THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 29

Case No. 17,060 — Case No. 17,746

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WALKER—WILLIAMS

Case No. 17,060—Case No. 17,746

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FEDERAL CASES.

BOOK 29.

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

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

Case No. 17,060.

In re WALKER.

[1 Lowell, 222; [1] 1 N. B. R. 318 (Quarto, 60).]

District Court, D. Massachusetts. Feb., 1868.

BANKRUPTCY—IMPRISONED DEBTOR—RELEASE.

The bankrupt act [of 1867 (14 Stat. 517)], § 26, does not relieve from arrest one who is already in custody at the time his petition in bankruptcy is filed.

[Cited in Hussey v. Danforth, 77 Me. 20.]

This petition for a writ of habeas corpus set out that the petitioner [William A. Walker], was arrested on mesne process at the suit of a creditor, in January last, and became bankrupt on the first day of February, but was still held in custody by the sheriff, and prayed for his discharge under section 26 of the act.

LOWELL, District Judge. I have before decided the question raised in this case, but have reviewed the arguments on the subject in the hope that I might reach a different conclusion, but am constrained to adhere to the opinion that the bankrupt act does not relieve from arrest debtors who were in custody before the proceedings in bankruptcy were begun. By the terms of section 26 no bankrupt shall be liable to arrest "during the pendency of the proceedings in bankruptcy," which certainly appears to mean that arrests already consummated are not to be interfered with. If it had been the intent of congress to release debtors in custody, it is probable that provision would have been made concerning the effect of such release upon the debt. And it is not at all improbable that some difficulty may have been felt in dealing with this point, for the reason that the effect of an arrest is a matter of local law, and congress might doubt its competency to relieve from the arrest and yet preserve the debt, if the local law held it to be discharged thereby. I do not myself believe there is any real difficulty in the point, but it may have caused the doubt.

Looking next at the rule of the supreme court, No. 27, we find the distinction between arrests before and after bankruptcy to be carefully preserved. In the former case, the bankrupt is only entitled to be brought up on habeas corpus for the purpose of attending the register, &c.; while in the latter, he is to be discharged. This rule puts upon the statute the construction which I have said is the most obvious, and no doubt the true one; and I have reason to believe that the very point now under consideration was brought to the attention of the supreme court, and was in fact passed upon by them when they established the rule in its present form. I must therefore refuse to issue the writ. Petition dismissed.

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

Case No. 17,061.

In re WALKER.

[1 Lowell, 237; [1] 1 N. B. R. 386 (Quarto, 90); 1 Am. Law T. Rep. Bankr. 38.]

District Court, D. Massachusetts. March, 1868.

BANKRUPTCY—DOMICILE OF BANKRUPT.

Where a bankrupt born in Boston, became domiciled in California, but left that state with no intention of returning, and after staying without the limits of the United States several months, returned to Boston, and in less than two months thereafter filed his petition in bankruptcy, *held*, that the act of leaving California with no intention of returning, at once revived

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the domicile of origin, and his petition to be adjudged bankrupt was rightly filed in Massachusetts.

[Cited in Hazelton v. Valentine, Case No. 6,287; Re Thomas, Id. 13,891; Re Bergeron, Id. 1,342. Distinguished in Fogarty v. Gerrity, Id. 4,895. Cited in Allen v. Thompson, 10 Fed. 123.]

[In the matter of William S. Walker, a bankrupt.]

C. S. Lincoln, for petitioner.

A. W. Boardman, for bankrupt.

LOWELL, District Judge. A creditor petitions to vacate all proceedings in this cause for want of jurisdiction, averring that the bankrupt had not resided in this district for the greater part of the six months next preceding the filing of his petition, as alleged by him and required by law. The adjudication of bankruptcy by the register, being ex parte, is not conclusive of this point, and this mode of reviewing it has not been objected to.

The petition to vacate was by consent referred to the register, Mr. Rogers, who has heard the parties and reported his findings of law and fact, together with the evidence; and neither party has desired to be heard in argument. The law wisely provides that proceedings in bankruptcy should be taken in the place where the debtor resides or has his place of business; and to prevent sudden and fraudulent changes, that if he has had two such homes within six months, he must proceed in the district where he has been domiciled the longest. It is not always an easy matter to determine where a person does, in legal contemplation, reside. Mere casual absence for business or pleasure will not change the domicile, though it may change the place of business; and one whose domicile is here may institute proceedings here, though he may have been staying in another district during the whole of the six months. When a person has been trading and travelling in several parts of the world, as has this debtor, the question is often one of delicacy and difficulty. In the present case it is complicated by a serious conflict of evidence. No question arises concerning the place of business, because he had none within the United States during any part of the six months.

The bankrupt, who is unmarried, was born in Boston, and has lived here for the greater part of his life. There is a house here, that of some near relative, as I suppose, where he usually stays. During some years he traded in several of the western states, and the register finds the weight of evidence to be that he was domiciled in California a part of the time, including September, 1866. He left that state in November, 1866, and swears that he had no intention ever to return thither, and that he left no property, business, or connections there; he was next in Paris and France for about eleven months, and left that country for Boston in November, 1867, and arrived here on the eleventh of December; he was arrested early in January at the suit of this petitioner, and has been imprisoned ever since. On the twenty-ninth of January he filed his petition in bankruptcy. The register finds that he came to Boston intending to remain; he reports in favor of the jurisdiction, on the ground that the debtor resided in Boston for the longest period of the six months that he had any actual residence anywhere. I affirm the report, though not for the precise reason given by the register. If Walker was domiciled in California until the eleventh of December, he cannot, whatever the hardship of his case, become bankrupt in Massachusetts on the twenty-ninth day of January; a construction of the word "resided," which makes it mean only personal presence, is inconsistent with the statute and the reasons of it; but upon the evidence and the finding, he must be considered as domiciled here from November 19, 1866, the day on which he sailed from San Francisco, to this time. The general rule is, that a domicile once acquired remains until a removal has been effected to some other place with intent to remain there. But there is an important exception in favor of the native domicile, by which a mere removal from the new or acquired home, with intent to return to that of origin, revives the latter, eo instanti. Story, Confl. Laws, § 47; The Venus, 8 Cranch [12 U. S.] 253; The Indian Chief, 3 C. Rob. Adm. 12. Of course the abandonment of the acquired domicile must be absolute and final. Craigie v. Lewin, 3 Curt. Ed. 435; but if it be so, the domicile of origin revives. It is of no consequence that the return home is not immediate or by the shortest road. If the fact of a final abandonment of the new, and the intent to return to the old concur, the domicile is changed from the time that the new is actually left. See the case of Mr. Curtissos, cited 3 C. Rob. Adm. 21, note a, who staid four years in Holland, the enemy's country, on his return from Dutch colonies, but whose property was restored on the ground that his English domicile revived when he left the Dutch colony. Mr. Westlake states this exception with some hesitation, but finds it supported by authority. Westlake, Priv. Int. Law, p. 39, § 40. So, in this case, the return by the way of France, and the stay of eleven months there for a temporary purpose, does not prevent the operation of this principle. The weight of the evidence is that Walker never intended to return to San Francisco, but left that city intending to resume his home here, which indeed he says he had never given up; but upon this point I follow the register, who saw the witnesses. I must conclude that the debtor was a resident of Boston, in the sense of the bankrupt law, during the whole of the six months next preceding the filing of his petition.

Petition to vacate proceedings dismissed.

Case No. 17,062.

In re WALKER.

[1 N. B. R. 335 (Quarto, 67).] [1]

District Court, D. Massachusetts. 1868.

BANKRUPTCY—OATH OF ALLEGIANCE.

The oath of allegiance annexed to the debtor's petition may be taken before a register.

[In the matter of Andrew J. Walker, a bankrupt.]

LOWELL, District Judge. One of the creditors objects that all the proceedings have been irregular and void, because the oath of allegiance annexed to the debtor's petition was taken before Mr. Sherman, one of the registers in bankruptcy for this district. This objection affects not only this case but nearly all others in the district, because the clerk, finding no warrant in the law or rules for administering this preliminary oath, has carefully abstained from doing so, and the several registers have been relied on for this business. It is argued that by section 4 of the act [of 1867 (14 Stat. 519)], registers are empowered to administer oaths in proceedings before them, and that no case is before them until it has been referred to them, and that this expression of one power impliedly excludes all others of a similar kind. This argument has much weight, and if this were the whole law on the subject, might be controlling, but there are other sections applicable to this question. By section 11 every petitioner for the benefit of the act shall annex to his petition, a schedule, verified on oath before the court, or before a register in bankruptcy, or before one of the commissioners of the circuit court, of his debts, &c., and an inventory verified in like manner, of his estate, &c., provided that all citizens of the United States shall take and subscribe the oath now in question. It is not said in terms, that this oath may be taken in the same way as the others which are included in the same paragraph; but it would be no strained construction to hold that it is so intended. Again, by section 10 the supreme court have power by rule to regulate the duties of the several offices of the district courts, and generally for carrying the provisions of the act into effect, and they have established forms of petition, which by the rules we are required to follow, and in that form, this oath is to be taken before a judge, register, or commissioner. I cannot but conclude that the supreme court either considered that the law was to be construed to include registers, or that by virtue of their full powers to regulate the duties of officers and practice generally, they saw fit, as well they might, to give them that authority.

[1] [Reprinted by permission.]

Case No. 17,063.

In re WALKER.

[18 N. B. R. 56.] [1]

District Court, N. D. Mississippi. 1877.

VOLUNTARY BANKRUPTCY—ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—TITLE OF ASSIGNEE.

1. W. assigned his property for the benefit of all his creditors. A few days afterward judgments were entered and enrolled against him. The enrollment, by law of this state, gave liens on the property of W. He filed a petition in voluntary bankruptcy within sixty days from the date of the assignment. *Held*, that the assignment was not void at common law; was only void under the bankrupt law as against the assignee, and that the property was not W.'s, but that of the trustee, and no lien existed in favor of the judgment-creditors.

2. Neither of the following facts rendered the deed of assignment void, viz.: It was made to a trustee who was the clerk of W. It was made to a trustee of little or no property, but of excellent character, without requiring bond. It required a sale of the goods for cash, but permitted a sale on a credit of not exceeding thirty days, if the trustee deemed this best.

3. A subsequent proposition of W. to pay a certain amount to his creditors, coupled with a threat of bankruptcy, did not of itself vitiate the deed.

4. The trustee was subsequently chosen assignee in bankruptcy. *Held*, that upon the execution of the assignment to him by the register the title became vested in him from the date of the assignment, and this being so, all his acts as trustee, performed in accordance with the deed of assignment, intermediate its date and bankruptcy must be approved.

[In the matter of John C. Walker, a bankrupt.]

Manning, Watson & Moore and Fant & Fant, for creditors.

Walter & Walter, for assignee.

HILL, District Judge. The questions now for decision arise upon the petition of a number of judgment-creditors of said bankrupt, claiming liens upon the bankrupt estate, the answer of J. G. Chism, the assignee, and proof; from which the following facts appear: Walker had been for many years a merchant in Holly Springs; two judgments had been recovered against him, which created liens upon his property; other suits had been brought against him not ripened into judgments. Finding himself unable to meet his liabilities, and being thus pressed, on the twentieth day of February last, he executed to said Chism, who had for a number of years been his clerk and well acquainted with his business, a deed conveying to him all his property and assets, except his exempt property, directing that the trustee should proceed to sell the stock of goods at private sale for cash, or, if he thought best, on thirty days' time, and first pay off these judgment liens, and then make a pro rata division among all his creditors; at the expiration of five months the remnant

[1] [Reprinted by permission.]

then on hand to be sold at auction for cash. This deed was on the 4th of March acknowledged and recorded as required by law. Soon after this conveyance was made, Walker wrote to all his creditors, giving them a statement of his assets and liabilities, and proposing to compromise with them upon certain terms mentioned, and stating that he had made an assignment of all his property and assets for the benefit of all his creditors, and that if his creditors did not accept his proposition and give him a release, he would avail himself of the benefit of the bankrupt law [of 1867 (14 Stat. 517)]. Whether any of the creditors accepted this proposition does not appear, but the petitioners did not, but pressed their claims into judgments, and had them enrolled prior to the twentieth day of April, when Walker filed his petition in this court, upon which he has been declared a bankrupt, and at a meeting of the creditors for the purpose said Chism was appointed his assignee and a deed of assignment of the bankrupt's estate executed to him as required by law. Chism, since the assignment made to him by Walker, has been in possession of the assigned property, and has proceeded to sell the goods, collect the debts due, and to pay off the judgments against the bankrupt recovered before the assignment, as directed by it. In his answer, Chism proposes to surrender all his rights under the assignment and to treat the assets as belonging to the bankruptcy, and asks that his acts as trustee be approved, alleging that they were all consistent with the bankruptcy, and not antagonistic to it. Upon the other side, the petitioners pray that the deed of assignment to Chism by Walker be declared void, that their judgments be declared liens upon the property of the bankrupt and paid out of the proceeds of the sales thereof.

The principal question to be determined is as to the validity of the conveyance by Walker to Chism as against creditors, for if that conveyance was valid no lien attached before the bankruptcy, and none now exists. It is contended by petitioners' counsel that the deed is void upon its face, first, because it was made to Chism, the clerk of the grantor, and that he is shown by the proof to be a man of little or no means. Chism is admitted to be a good business man, of unimpeachable integrity and moral character. His being the former clerk of the bankrupt, and familiar with the business, is in my opinion a strong reason why he should have been selected; being a man of unquestioned integrity more than supplies the want of an estate. This is the class of men usually selected for important trusts by the most prudent business men—not being encumbered with business of their own, they can give their entire attention to the trusts committed to them. I have never known security exacted of a trustee by a voluntary grantor. I do not think such a trustee is the one condemned by the authority to which I am referred by the petitioners' counsel, and therefore must hold this objection not well taken.

The next objection is that it authorized a sale upon credit. Had the credit been a long one, or had it been left entirely to the discretion of the trustee, as in the cases referred to by petitioners' counsel, the objection would have been good, but it was limited to thirty days, which is among business men considered as a cash sale, the time given being a mere convenience, and no additional charge made for the delay, and is usually a matter of convenience among merchants in dealings between themselves as such, and seldom ever extended to any but those who are expected to pay on the day when due. I am satisfied this objection is not maintainable.

Another objection is, that it reserved the exempt property without specifying what it was. That the grantor had a right to reserve his exemptions is admitted, but it is said it left to him the right to determine what they were. This is a mistake. The deed only reserves them, the law designates them. I do not think this objection well taken.

These are all the objections made on the face of the deed itself, as evidence of fraud, but it is insisted that soon after the execution of the deed, Walker wrote to his creditors, proposing an unreasonable compromise, upon condition of a release from his debts, coupled with the threat that if his proposition was not accepted he would go into bankruptcy, and that such was his purpose in making the assignment. Had the deed contained a provision that only such creditors as should release their debts should be entitled to its benefits, the condition would have avoided the deed as to all who did not accept its conditions; but no such conditions are contained in the deed. Walker had a right to make a proposition to his creditors, and if he made a truthful statement in relation to his means and liabilities, and left them to judge of the propriety of its acceptance, the creditors cannot complain that, upon their declining to accept, he would avail himself of a right given by law, so that this objection is not maintainable.

The numerous authorities read by petitioners' counsel I do not think apply to the facts in this case, and am satisfied that, aside from the bankrupt law, there is nothing shown to invalidate this assignment, and there is nothing in the assignment contrary to the spirit and purpose of the bankrupt law, further than it attempts to substitute a different machinery from that provided by law for carrying out the purpose of the law, namely, an equal distribution of the assets among the creditors. Whether such a conveyance is valid or invalid, under the provisions of the bankrupt law, under recent decisions, is not well settled. The weight of authority is against its validity, but only for the reason stated, and at most only renders the conveyance voidable upon the application of the assignee; and being valid until otherwise declared by the proper court, no time elapsed in which the judgment of petitioners fixed themselves as liens upon the property of the defendant in the judgments, prior to the bankruptcy. To hold otherwise would make the action of the

assignee defeat the very purpose of the application. The effect of setting aside the conveyance, as against the assignee only, has no other effect than to avoid any attempted incumbrances or disposition of the property inconsistent with the assignment, between the time it was made and the bankruptcy. This court so decided in Mitchell v. Hayes [unreported] some years since, upon this reason alone, as well as I now remember; but since then I find myself sustained by Johnson v. Rogers [Case No. 7,408]; Everett v. Stone [Id. 4,577]; and Dodge v. Sheldon, 6 Hill. 9.

The above position is sustained by a very able opinion of Judge Johnson, in the circuit court of the United States for the Northern district of New York, in the case of In re Beisenthal [Case No. 1,236]. In this case it is held that where an assignment for the benefit of creditors is set aside, at the suit of the assignee in bankruptcy, judgment-creditors who have levied upon the property, after the assignment and before the commencement of the proceedings in bankruptcy, have no priority over the assignee; "that, while in general the title of the assignee relates back only to the commencement of the proceedings in bankruptcy, yet where transfers are void as to him, his title relates back to the time of such transfer." The same doctrine was held by Judge Wallace, in the case of Johnson v. Rogers [Id. 7,408]. The only adverse ruling with which I have met is the case of Macdonald v. Moore [Id. 8,763]. See, also, Mayer v. Hellman, 91 U. S. 496.

I am satisfied that the petitioners obtained no lien upon the property of the bankrupt by reason of the invalidity of the assignment as to them, and that, for the sole reason that the voluntary assignment deprived the creditors of the selection of the assignee and the aid of the court to collect and distribute the assets, the conveyance must be declared void as to the assignee in his character as such, and that upon the execution of the deed of assignment to him by the register the title became vested in him from the date of the assignment, and that such being the case all his acts as trustee which would have been valid, had he then been acting in his capacity as assignee, must be approved. The alleged transfers of notes to Mr. and Mrs. Thompson are shown to have been made months before the assignment to Chism, and before such conveyance was contemplated. Besides, they are shown to have been made for present considerations, and not to secure antecedent debts, so that they can have no avail in aid of the prayer of petitioners. The result is that a decree must be entered, denying the relief prayed for in the petition, but declaring the conveyance void only as against the title of Chism in his capacity as assignee in bankruptcy, and that his title to the property and assets conveyed in the deed relates back to the execution of the deed, and that all the acts of Chism after he received the property and assets transferred to him, not inconsistent with his title and duty as assignee in bankruptcy, be approved and ratified. The result of these proceedings being necessary for a proper administration of the estate, the costs will be paid by the assignee.

WALKER, In re. See Case No. 4,081.

Case No. 17,064.

WALKER et al. v. ADAIR et al.

[1 Bond, 158.] [1]

Circuit Court, S. D. Ohio. Dec. Term, 1857.

ATTACHMENT—PREFERENCES.

A failing debtor has an undoubted right to pay any debt which he justly owes, and to secure an indorser against liability, if done in good faith.

[Cited in National Park Bank v. Whitmore, 104 N. Y. 304, 10 N. E. 526.]

[This was an action by Walker & Brothers against Adair & Anderson. Heard on a motion to dismiss an attachment.]

Thompson & Nesmith, for plaintiffs.

Snow & Bradstreet, for defendants.

LEAVITT, District Judge. This is a motion to dismiss the writ of attachment issued in this case, upon which certain goods and merchandise have been seized as the property of the defendants and are now in the possession of the marshal. The allegations of fraud in the affidavit on which the writ issued, are that the defendants have disposed of and assigned their whole property with the intent to defraud their creditors; and also that they are about to remove their property beyond the jurisdiction of this court, with the intent to defraud their creditors. The motion to dismiss is based on a denial of the allegations of fraud, and on this motion a number of affidavits have been presented by the defendants and also counter affidavits by the plaintiffs.

The facts which it is essential to notice are, that for some time prior to the 15th of July last, the defendants had been in business in the city of Cincinnati as a mercantile firm under the name of Adair & Anderson; that on the said 15th of July, the partnership expired by its own limitation and Anderson retired from the firm. The business was continued at the same place under the name of Adair & Brothers, who purchased the interest of Anderson, giving him their note for $3,935, with Charles W. Hunter as indorser. Some time in September last, it appears, the firm of Adair & Brothers became embarrassed, and were apprehensive they could not sustain themselves. An inventory of their stock and assets was taken, from which it appears their goods, at Eastern cost, were valued at about $17,000, and their notes, accounts, etc., at about $21,000, making together $38,000. Their liabilities at the time were estimated at about $35,000. Apprehending they might be pressed by their creditors, and that a sacrifice of their stock would be the

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result—with the advice of counsel, on the 8th of October, they sold their entire stock of goods, with all their assets, to Hunter, taking his notes therefor, at the estimated value as above stated, payable in two, three, and four years. This arrangement was not carried out, and was soon after entirely abandoned, by the advice of counsel, as objectionable. Immediately after, notice was given that the creditors of the firm would be paid either in goods at Eastern cost, or in notes held by the firm. Many availed themselves of this offer, and prior to the 10th of November, the payments in that way amounted to about $9,000. With two or three exceptions, the creditors were satisfied with this arrangement, and made no objection to it. On the 10th of November the stock of goods had become much reduced by these payments. The firm were then indebted to Charles W. Hunter, on their note, for money borrowed of him to the amount of $1,153, and he was liable for the firm on the notes to Anderson, on which he was indorsed for $3,935. On that day, to secure the debts due to Hunter, and to indemnify him for his liability as indorser on the notes held by Anderson, he purchased of Adair & Brothers the entire stock of goods remaining, at seventy-five cents on the dollar of the Eastern cost. The goods so purchased amounted to $5,681.53, and pursuant to the agreement, Hunter surrendered to Adair & Brothers the note he held on them for $1,153, and assumed the payment of the notes held by Anderson. For the balance due from Hunter on this purchase, being $593, he gave his note to Adair & Brothers, which has been applied in payment of a debt due by them. Hunter immediately took possession of the goods, and continued in business in the same house occupied by Adair & Brothers. On the 21st of November, Adair & Brothers found it necessary, for the interests of those creditors whose claims had not been satisfied, to make an assignment of all their remaining property and effects, and Charles W. Hunter was named as the assignee. This assignment was for the equal benefit of all the unpaid creditors of Adair & Brothers. On the 24th of November the goods were placed in boxes and forwarded by railroad to Piqua, in the state of Ohio. They were intercepted at Dayton, in transitu to Piqua, and seized by the marshal, under the attachment issued in this suit.

The question arising on these facts is: Was there fraud in the sale of the goods to Hunter made on the 10th of November, or in the assignment by Adair & Brothers made on the 21st of November? It is not necessary to decide whether the sale to Hunter of the 8th of October was infected with either actual or presumptive fraud. The evidence, however, is conclusive that, though the arrangement may have been an injudicious one, no fraud was intended by the parties. The affidavit of a respectable legal gentleman proves that it was made at his suggestion and advice, as an arrangement that would be beneficial alike to Adair & Brothers and their creditors. But, right or wrong, it was abandoned by the parties, and nothing is claimed under it. And in my judgment, all the circumstances considered, there is nothing in this sale to justify an unfavorable presumption as to the subsequent transactions between these parties. In reference to the sale to Hunter, made on the 10th of November, I see nothing in the facts which condemn it as fraudulent, either in fact or in law. Hunter was a bona fide creditor of Adair & Brothers, to the amount of $1,153, for cash loaned to them, and was liable as indorser of their paper for $3,935. It was no fraud in Adair & Brothers to pay the debt due to Hunter and indemnify him for his losses as indorser. A failing debtor has an undoubted right to pay any debt which he justly owes, and to secure a friend against liability, if done in good faith. And I confess I am unable to perceive any indication of unfairness or fraud in this transaction. The evidence is conclusive that the price paid by Hunter for the goods—seventy-five per cent. on their Eastern cost—was their full value, and more than would have been procured for them if sold at auction or at an assignee's sale. As to the fairness and validity of the general assignment to Hunter, made on the 21st of November, there seems no reason to doubt. It was not contemplated when the sale of the 10th of that month was made to Hunter. It appears, however, that after the most earnest efforts for that purpose, the firm had been unable to make a satisfactory arrangement with all the creditors. They had settled with the most of them on terms which the creditors regarded as fair and honorable. They had offered to arrange the claim of the plaintiff on terms as favorable as they could in justice to their other unpaid creditors. The proposition had been declined, and they were threatened with an attachment. It was under the pressure of these circumstances that they made the assignment to Hunter. There is nothing in this assignment which has the taint of fraud. It was made with the advice and under the direction of counsel, having full knowledge of the parties and of the state of their business affairs, with no other purpose than to secure to the creditors of the firm an equal distribution of the proceeds of their remaining property and effects. It is not pretended that the assignment did not cover all the property of the firm, or that a preference was given to one or more creditors. And the proof is clear that there was no concealment or disguise in any of the transactions between the parties. Public notice was given in a widely circulating commercial daily paper of the city, two days after the date of the assignment, which negatives the idea that the transaction was intended to be secret. It is moreover in proof that Adair & Brothers freely conferred with and made known to their friends and creditors the unpleasant embarrassment of their business concerns, and the means they were taking to close their affairs. But it is insisted by the plaintiff's counsel that the assignee selected by them was an unsuitable per-

son for the position, and that his selection raises a presumption against the fairness and honesty of the transaction. Without noticing all the facts in evidence as to the suitableness of Charles W. Hunter, it may be stated that, although a young man, he had gained the confidence of those in whose employment he had been, as well as of many others who knew him for his strict integrity, and stood high in their estimation as a young man of good business capacity. Few young men could establish a better character than he has proved by a number of witnesses, the truthfulness of whose statements is beyond a doubt. He also had pecuniary means, to the amount of between $4,000 and $5,000; and his intimate knowledge of all the business concerns of the firm of Adair & Brothers, in connection with his good reputation, seemed to have rendered it exceedingly proper that he should be intrusted with the settlement of their business as assignee. It is also urged as an indication of fraud in the assignment, that an effort was made to send the goods assigned to Piqua, in this state. This, it is contended, was for the purpose of concealment, and with a view to place the property beyond the jurisdiction of this court. This, however, is satisfactorily explained by the proofs before the court. It had been the intention of the firm, before they contemplated an assignment, to remove the goods to that place for sale. The reason for this was, that they would thereby avoid the high rent they were paying in this city, and find an equally ready and advantageous market for the goods. Hunter concurred in this view, and when the property was placed under his control as assignee, very properly decided to carry it out. There was no concealment in preparing the goods for shipment or in sending them away. The intimation that it was the design of the parties by sending them to Piqua, to place them beyond the jurisdiction of this court, is answered by the fact that they would have been as fully within reach of the process of this court at Piqua as at Cincinnati.

It may not be amiss here to make a remark in reference to the facts stated in Marshal Sifford's affidavit, to the effect that when he went to the former place of business of the firm of Adair & Brothers for the purpose of executing the attachment, one of the firm referring to the goods being removed from Cincinnati, spoke of them as the property of the firm, and not of Hunter. This, it is insisted, authorizes the conclusion that there had been no bona fide sale or assignment to Hunter. I do not question the truthfulness of the marshal's statement, but I can not suppose the conversation to which he testifies sustains the inference attempted to be drawn from it. It is more reasonable to conclude that Mr. Adair, in his supposed admission that the property still belonged to the firm, had reference to the fact that though placed in the hands of an assignee, the firm still had an interest in its management and disposal, and that in some sense it still belonged to them. Any other inference is so utterly in conflict with the proof before the court, that I can not hesitate to adopt that which I have indicated. It is incredible that Adair could have intended to ignore facts which are proved by the most indubitable evidence. But I do not propose to go further in the investigation of the facts involved in this motion. I am satisfied the allegations of fraud are not sustained, and I may be allowed to say that, in my judgment, it is rare that the conduct of business men, in embarrassed or insolvent circumstances, is so free from exception as that of the Adairs would seem to be from the evidence before me. The evidence clearly shows that they were anxious to do all in their power to satisfy their creditors. All their movements were open and evince no intention to conceal anything from their creditors. These creditors, with one or two exceptions, were entirely satisfied with the course they have pursued; the affidavits of a number of them have been taken, and, without an exception, they state there was nothing in the proceedings of Adair & Brothers with which they were dissatisfied. And they not only testify that after years of business intercourse with the firm, they have always found them honest and honorable in their transactions, but that they still have unabated confidence in their fairness and integrity. The motion to dismiss the attachment is sustained, and the property attached is discharged.

WALKER (BANK OF THE METROPOLIS v.). See Cases Nos. 903 and 904.

WALKER (BANK OF WASHINGTON v.). See Cases Nos. 955 and 956.

WALKER v. BARTON. See Case No. 12,043.

Case No. 17,065.

WALKER v. BEAL et al.

[3 Cliff. 155.] [1]

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

JURISDICTION OF CIRCUIT COURT — FOREIGN ADMINISTRATORS — HUSBAND AND WIFE — SEPARATION AGREEMENT—TRUSTS—RELINQUISHMENT OF DOWER—SUBSEQUENT COHABITATION.

1. The circuit court in this district has jurisdiction to grant relief under a bill praying for an account of certain funds received by a testator from the complainant, under a promise to invest the same for the complainant, where the testator died in Rhode Island, and his last will and testament was proved there, but administration was also granted in this state, where the testator left real and personal estate to a large amount.

2. A husband and wife agreed to live separately. Certain property was transferred by the husband to trustees, to pay the income to the wife, upon condition that she should relinquish her claims of dower to purchasers of such portions of his other real estate as he should sell during coverture; and if she survived him, she should relinquish her right of

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

dower in all the remainder of his real estate. *Held*, such a trust may be upheld in a court of equity.

3. The agreement of separation in this case was not rendered invalid by the provision for its continuance, should the parties after the making of it elect to cohabit. Neither was it suspended while they lived together. It was evident from the conduct of the parties that they regarded the indenture as operative during their cohabitation.

4. The indenture in this case was not solely based on separation. Temporary reconciliation and cohabitation did not suspend its operation, because the parties had expressly covenanted that it should not.

5. Unless it be assumed that the husband cannot be the trustee of his wife, in any case, it cannot be maintained under the indenture in this case that the trust property was wholly discharged of the trust, by the payment of the rents, income, etc. to the complainant, or that these, when paid by her to her husband, became his property.

6. The husband in this case received from her the rents, income, etc. of the trust property, under an agreement to invest it for her and her children. Such an arrangement made the husband the trustee of the wife.

7. The complainant was not precluded from setting up her claim by the indenture of compromise, she being a mere formal party to the adjustment, and the purpose of the instrument being to effect an adjustment between the heirs-at-law and the residuary legatees, and there having been no concealment of this claim on the part of the complainant.

8. Acceptance by the complainant of the provision made for her in her husband's will is not inconsistent with her claim under the agreement of separation, because the declared intention of the testator was, that the amount secured to the complainant in the agreement of separation, coupled with the provision made for her in his will, should be in full for her separate maintenance, and in lieu of dower.

The complainant [Eliza Walker] was the widow of William J. Walker, of Newport, in the state of Rhode Island, and the respondents [Joseph S. Beal and others] were the executors of the last will and testament of the deceased, as duly constituted under the laws of this commonwealth. The introductory allegations of the bill of complaint were, that the complainant, in the month of September, 1845, was the lawful wife of the deceased, and that they both then were, and for many years previously had been, inhabitants of Charlestown, in this state; that at that time and for many months before that time he, the husband, had been guilty of such extreme cruelty towards the complainant, that she ultimately, on or about the 15th of September of that year, was compelled to leave his home, and no longer cohabit with him; that his acts and conduct toward her were such that by the laws of the state she was entitled by reason thereof to prosecute and maintain against him a suit for divorce from bed and board, and to be decreed in such suit a liberal and suitable allowance for alimony; that being about to institute proceedings for such divorce, he, in order to induce her to forbear to carry that intention into effect, and to avoid a decree against him for such alimony, proposed to execute an agreement with the complainant that they should live separate and apart from each other, and to provide for her support and maintenance by a conveyance of real and personal estate to trustees, with power, and whose duty it should be, to appropriate the income thereof for that purpose. Based upon those introductory averments, the bill of complaint proceeded to allege that the complainant accepted the proposition of her husband, then in full life, and that the indenture embodying the terms of the same, and which was annexed to the bill of complaint, was on the 24th of February, 1846, duly executed by all the parties, including the trustees; that property, real and personal, to the amount therein agreed, was transferred to the trustees therein named, in trust, that they should pay the income of the same to the complainant during her life, upon the conditions therein provided. By the terms of the indenture they covenanted to live separate and apart from each other during coverture, unless they should thereafter elect to live together, as the provision assumed they might do; and the complainant also agreed, that if her husband should sell any portion of his real estate during her lifetime, to relinquish to the purchaser her claim of dower in the same, and after his decease to release her dower or right of dower in all his remaining real estate, when thereto requested by his heirs, executors, or administrators. Subject to these conditions and some others, not material to be mentioned, the complainant accepted the provision, in full satisfaction of her support and maintenance, and of all alimony during coverture, and covenanted and promised that she would at all times thereafter live separate and apart from her husband during coverture, unless they should thereafter mutually agree to live together. But the express provision was, that if they "shall at any time or times hereafter cohabit and live together as heretofore, these presents shall not thereby be rendered invalid." On the contrary, the stipulation was, that the trusts therein contained should in that event be executed in like manner as if they should live separate and apart. Pursuant to that indenture they separated, and the complainant lived apart from her husband from the date of the instrument until the month of April, 1846, when at his request, as she alleged, she returned to live with him, and continued to live with him until the month of June, 1860, when she was compelled by his cruel and harsh treatment of herself and daughter to cease to live with him, and ever after during his life continued so to live separate and apart.

Due conveyance was made of the described real and personal property to the trustees, and they covenanted in the same instrument that they would collect the rents, interest, and income of the same, and cause to be paid out of the trust property, rents, interest, and income, all debts which the complainant might thereafter contract, and after deducting all necessary and proper charges and expenses, to pay

annually or oftener the residue of the rents, interest, and income to the complainant during her natural life, for her sole and separate use and benefit, and upon her own order and receipt in writing. The execution of the indenture was admitted, and it was not controverted that the persons named as trustees in the instrument accepted the trust, and continued to execute the same during the lifetime of the husband, until his death. They collected the rents, interest, and income as covenanted, and the proofs showed that in every instance, except the first, they gave the check for the net amount to the complainant. When they were about to make the first semiannual payment, the proof was, that the husband presented an order from the complainant for the amount, and it appeared that the money was paid to him, under that order, he stating that he had advised the complainant to allow him to invest the money for her use and benefit. The subsequent payments, however, throughout the entire period of the controversy, were without exception made to the complainant. The payments were made in checks, and the proofs show that the checks were always received by the complainant, and that she gave the proper receipt. The allegation of the bill of complaint was, that the complainant, at the suggestion of her husband, and upon his agreement to invest the several amounts so received by her from the trustees for her benefit and that of her children, delivered the checks to him, and that he semiannually received the same from her, as they came to hand, promising at all times to make the investment, as he had originally agreed. The proof of the several payments substantially as alleged was full and satisfactory, as they appeared in a schedule, signed by the complainant, and found among the papers of the deceased, which passed into the hands of his executors. Satisfactory proof, also, was exhibited of the agreement of the husband to make the investment, as alleged in the bill of complaint. The agreement was fully proved by the uncontradicted statements of two credible witnesses, whose testimony was corroborated by the exhibit in the case, which the answer of the respondents admitted was found among the papers which came into their hands as executors of the last will and testament of the deceased.

B. R. Curtis, S. Bartlett, and Francis Bartlett, for complainant.

By the articles the agreed amount of property was transferred to trustees in trust, to pay its income to Mrs. Walker during her life, upon condition that she should release her possibility of dower in any and all real estate her husband might sell during his lifetime; and, if she should survive him, that she should release her right of dower in his estate. The settlement, therefore, was made by him, and accepted by her, not merely in lieu of alimony which she could have had decreed to her out of his then large estate, and as being about the amount he had received in her right from her father's estate, but in place of her dower. And, therefore, it was expressly stipulated that if the parties should at any time or times thereafter cohabit together as heretofore, "these presents shall not be thereby rendered invalid; but the trusts herein contained shall be executed (subject to the conditions as to her release of dower) in like manner as if the parties should live separate." It is settled law that such a trust, either with or without the covenant of the trustees to indemnify the husband against the wife's debts, is founded on valuable consideration; is valid, and is not terminated by the subsequent cohabitation of the parties. Compton v. Collinson, 2 Brown, Ch. 377; Worrall v. Jacob, 3 Mer. 266; Jee v. Thurlow, 2 Barn. & C. 547; Wilson v. Mushett, 3 Barn. & Adol. 743; Webster v. Webster, 23 Eng. Law & Eq. 216; 17 Eng. Law & Eq. 278; Randle v. Gould, 8 El. & Bl. 457; Babcock v. Smith, 22 Pick. 61. The separation having continued some months after the execution of the articles, Mrs. Walker returned to her husband at his request, as he expressed it, "as a visitor or guest." While so living together the transactions took place out of which arose the trusts on which this bill is founded. It is clear that a husband may be a trustee for his wife. All that is necessary is that he should agree to become so, and although the agreement be made between him and her alone, the trust will attach upon him in the same manner and under the same circumstances that it would if he were a mere stranger. 2 Story, Eq. Jur. p. 624, § 1380; Neves v. Scott, 9 How. [50 U. S.] 212. Such agreement imposes the character of a trustee on the husband even when there is no valuable consideration, and it is made concerning property belonging to him. A fortiori when there is a valuable consideration, and it is made concerning her separate property. 2 Kent, Comm. 163, and cases cited; Woodward v. Woodward, 8 Law T. (N. S.) 749; Grant v. Grant, 9 Law J. (N. S.) 802, 12 Law T. (N. S.) 721. Applying these principles to the facts proved by the evidence in the record, it is clear that the husband took from his wife her income, which was her separate estate, under an express agreement to invest it for her use, and made himself her trustee for that purpose. The objection that the suit should have been brought in Rhode Island is untenable. The scope of the bill is to charge the estate of the defendant's testator with a trust, and to procure a decree in favor of the complainant as a creditor, for that sum of money which may be found due to her on an account of such trust. The contracts out of which the trust arose were all made in Massachusetts, between persons then domiciled there. The circuit courts of the United States, as courts of equity, have jurisdiction over executors and administrators, when the parties are citizens of different states. Green's Adm'r v. Creigh-

ton, 23 How. [64 U. S.] 90. And they administer the equity law recognized by the constitution, and not the merely local law of any state. Neves v. Scott, 13 How. [54 U. S.] 272, and cases there referred to; Harvey v. Richards [Case No. 6,184].

B. F. Thomas and H. C. Hutchins, for respondents.

There is, defendants submit, no real equity to support the plaintiff's claim. The indenture of trust was made, as plaintiff expressly alleges, to provide for the support and maintenance of the plaintiff, and the income was to be "devoted to that purpose." Mrs. Walker accepted the provision for her support and maintenance. Her claim now is for the income of the fund during the period of reconciliation, when the plaintiff was living with and wholly supported by her husband; when she got precisely that which it was the object of the indenture to secure. The plaintiff says she ought to have both support and income. The claim is made at a time, and under circumstances, which cannot fail to excite the deepest suspicion and distrust. Fry, Spec. Perf. 155; Colson v. Thompson, 2 Wheat. [15 U. S.] 336. It is first made twenty years after the oral promises are alleged to have been made. It is made, for the first time, after the death of Dr. Walker. Not till after the death of her husband, not till after her interest is secured under the will, not till after the compromise between the heirs-at-law and the residuary legatees, to which she was a party, is this claim set up. The making of the promise upon which the bill rests is not so clearly established that a court of equity will enforce it. The agreement contained in the indenture of separation must stand, if at all, as a voluntary agreement of husband and wife, to live separately and apart from each other during their coverture. It is expressly so declared in the written contract. The plaintiff and her husband resided in Massachusetts when the agreement for separation was made, the indenture executed, and the moneys delivered, for which the plaintiff seeks to recover. The validity of the contract and the effect of the payments must therefore be determined by the law of Massachusetts. This indenture of separation would not, we submit, have been upheld and enforced by the courts of Massachusetts. The question affecting the marriage relation, and its rights and duties, is peculiarly one of state policy, of the lex loci. Story, Confl. Laws, §§ 276, 280; De Couche v. Savetier, 3 Johns. Ch. 190; Blanchard v. Russell, 13 Mass. 1; Anstruther v. Adair, 2 Mylne & K. 513.

Though the invalidity of articles of voluntary separation between husband and wife has not been the subject of express decision in Massachusetts, the recent tendencies and premonitions of the cases are all in that direction. See, among others, Ames v. Chew, 5 Metc. [Mass.] 320, 323; Albee v. Wyman, 10 Gray, 222. The recognition of their validity has been deeply regretted, whenever and wherever made. Lord St. John v. Lady St. John, 11 Ves. 526, 536, 537; 2 Story, Eq. Jur. 1427, 1428; Evans v. Evans, 1 Hagg. Consist. 35; Jee v. Thurlow, 2 Barn. & C. 547; Durant v. Titley, 7 Price, 577. If the agreement was not void, it was annulled or suspended during the period of the reconciliation and the cohabitation of the parties thereto; because the agreement was based on separation, and, by the reconciliation, new obligations arose inconsistent with separation. Lord St. John v. Lady St. John, 11 Ves. 526; Shelf. Mar. & Div. 629; Hunter v. Bryant, 2 Wheat. [15 U. S.] 32; Westmeath v. Salisbury, 5 Bligh (N. S.) 339; Clancy, Husb. & Wife, 414; Fletcher v. Fletcher, 2 Cox, Ch. 99; Jee v. Thurlow, 2 Barn. & C. 550; Westmeath v. Westmeath, 1 Dow. & C. 519; Bright, Husb. & Wife, 349; Hindley v. Westmeath, 6 Barn. & C. 200; Wells v. Stout, 9 Cal. 479; Heyer v. Burger, Hoff. Ch. 1; Shelthar v. Gregory, 2 Wend. 422; Slatter v. Slatter, 1 Younge & C. Exch. 28, 35; Webster v. Webster, 17 Eng. Law & Eq. 278. The provision of the indenture of separation, that subsequent cohabitation should not render the agreement invalid, does not control the disposition of the income, while the plaintiff received her support and maintenance under her husband's roof and out of his money. The actual maintenance by the husband, the parties living together, was a satisfaction in equity of the agreement that the income of the trust fund should be devoted to that purpose. Hunter v. Bryant, 2 Wheat. [15 U. S.] 32. A court of equity will not require the husband to account for the income of the separate estate of his wife, which the husband, with the consent of his wife, has been accustomed to receive. 2 Story, Eq. Jur. § 1396; Hunter v. Bryant, 2 Wheat. [15 U. S.] 32; Squire v. Vean, 4 Brown, Ch. 326. The income of the trust fund, when paid to the complainant by the trustees, became wholly discharged of the trust. The trustees had fully performed their duty in relation to it; and the money thus paid to her as income, when paid by her to her husband, became, by the laws of Massachusetts then in force, the property of her husband. Allen v. Wilkins, 3 Allen, 321; Lord v. Parker, Id. 129; Edwards v. Stevens, Id. 315; Ingham v. White, 4 Allen, 412. The acceptance by the complainant of the provision made for her in the will of her husband is inconsistent with the claim she now makes.

CLIFFORD, Circuit Justice. The reasonable inference from the agreement is, that it was executed at the request of the husband, and that it was kept by him as a voucher to show that certain sums were to be deducted from the amounts received by him from the complainant, as the net rents, interest, and income of the trust property. Viewed in that light, the paper affords strong confirmation of the testimony of the daughter, and of the trustee, whose deposition is in the record. The prayer of the bill of complaint is for an account, and

it is very clear that it ought to be granted, unless the defences, or some one or more of them, as set up in the answer, can be sustained.

The respondents object, in the first place, that inasmuch as the testator had his domicile in the state of Rhode Island, at the time of his decease, the circuit court here has no jurisdiction to grant the relief prayed for in this case. Undoubtedly the fact is, that the testator died at Newport in that state, and it appears that his last will and testament was duly proved in the state of his domicile, but the answer admits that administration was also granted here, and that the testator left in this state, as well as the state of his domicile, real and personal estate to a large amount. Insolvency is not suggested even in argument, and the sufficiency of the assets here is abundantly proved. The settled law of this state is, that the assets received and inventoried by the executors here are liable, under such circumstances, to the just claims of the citizens of the state, to the full amount. Richards v. Dutch, 8 Mass. 506; Gen. St. 508, § 39; Dawes v. Head, 3 Pick. 128.

Citizens of other states also, where it appears that the estate is solvent, may by proper proceedings in the circuit court of the district enforce their claims against such assets, as it is well settled that those courts, as courts of equity, have jurisdiction over executors and administrators, in such a case, where the parties are citizens of different states. Grain's Adm'r v. Creighton, 23 How. [64 U. S.] 104; Harvey v. Richards [Case No. 6,184].

Coming to the construction of the indenture, the primary suggestion of the respondents is, that it is merely a voluntary agreement of husband and wife to live separately and apart from each other during coverture; but it is quite evident that the proposition cannot be sustained. Irrespective of the parol testimony, it appears by the terms of the indenture that the trust property was granted and transferred to the trustees, upon the condition that the complainant should accept the provision, as a full consideration for her covenant to relinquish all claims of dower to purchasers of any portion of his real estate, if sold during coverture, and to release her right of dower to his heirs, executors, or administrators after his decease. The terms of the instrument also required that she should accept the trust provision as a full satisfaction, not only for her support and maintenance, but also as a full satisfaction of all alimony whatsoever during her coverture. The legal effect of the covenant to live separate and apart is, that they would continue so to live, unless they should thereafter elect to live together; but they mutually covenanted with each other that if they should thereafter cohabit and live together, the indenture should not thereby be rendered invalid, but that the trusts should be executed, subject to the conditions as expressed, in like manner as if they should live separate and apart. The intention of the parties clearly was, that the effect and operation of the indenture should continue during coverture, without suspension or interruption, and without the possibility of its becoming invalid, except upon breach of condition. Suppose that be so, still it is insisted by the respondents that the indenture is void, as a mere voluntary agreement to live separate and apart, because, as they contend, the proof of consideration as alleged in the bill of complainant is insufficient and unsatisfactory. The statement of the answer upon that subject is, that the respondents are ignorant whether or not their testator entered into the indenture for the reasons alleged in the bill of complaint, and therefore they can neither admit nor deny those charges. The express allegation of the bill of complaint is, that the husband prior to the date of that instrument had been guilty of such extreme cruelty to his wife that she was entitled to a divorce from bed and board, and to a liberal allowance for alimony.

Cruel treatment is proved by the daughter, in unmistakable terms, if she is to be believed. When asked whether he was kind, or otherwise, to her mother, she answered that she did not remember the time when he did not treat her mother cruelly; and she proves that the complainant received personal violence from her father, and that he compelled the mother and daughter to leave his house, without any just cause. Unless the witness can be considered as impeached, or in some way discredited, the introductory allegations of the bill of complaint are fully proved. Careful attention has been given to the inquiry, and the court has not been able to perceive any just grounds to hold that the witness is not entitled to belief.

Satisfactory proof has been exhibited in the record derived from the testimony of another witness that the husband confessed that his wife had left him just before the date of the indenture, and that she had employed counsel to obtain a divorce and separate maintenance. Passages also in the indenture, and in the last will and testament of the deceased, afford confirmation of the statement of the witness; and the conclusion of the court is, that the witness is not discredited.

Courts of equity have for a great length of time refused to acknowledge the common-law rule that a married woman is incapable of taking real and personal estate, and holding the same to her own separate and exclusive use. Arrangements of the kind are usually made through trustees, appointed for the purpose, to whom the property real and personal is conveyed, for her sole and exclusive use, but it has long been settled that the intervention of trustees is not indispensable. Whenever real or personal property is given or devised or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the rule in equity is, that the intention of the parties shall be carried into effect, and that the wife's interest shall be protected against the marital rights and claims of the husband, and

also those of his creditors. 2 Story, Eq. Jur. 1380.

Here the property was transferred to trustees in trust, to pay the income to the cestui que trust, upon condition that she should relinquish her claims of dower to purchasers of such portions of his real estate as he should sell during coverture; and if she survived him, that she should release her right of dower in all the remainder of his real estate. Such a trust, it is insisted by the respondents, cannot be upheld in a court of equity, but the court is not able to concur in that proposition. The views of the respondents appear to be, that the indenture, even if considered as divested of the clause which provides that it shall not be rendered invalid, should the parties thereafter cohabit and live together, is nevertheless void, as contrary to public policy. Objections of that sort have frequently been urged, but they have as often been overruled as they have been presented for consideration. Regrets have been expressed by judges that the rule had not been settled otherwise; but as often as the question has been presented in the later cases, another decision has been added to the list confirming it, until it may be said that it is universally established. Compton v. Collinson, 2 Brown, Ch. 377; Worrall v. Jacob, 3 Mer. 266; Jee v. Thurlow, 2 Barn. & C. 547; Webster v. Webster, 23 Eng. Law & Eq. 216; Wilson v. Mushett, 3 Barn. & Adol. 743; Randle v. Gould, 8 El. & Bl. 457; Babcock v. Smith, 22 Pick. 61; Hunt v. Hunt, 5 Law T. (N. S.) 778.

Special objection is made to the provision of the indenture, that it shall not be invalid in case the parties should thereafter elect to cohabit and live together, as withdrawing all motive from the husband for a reconciliation and return of his wife. Doubt cannot be entertained as to the intention of the parties. Where the instrument contains no such clause, it might well be argued that it was not the intention of the parties that it should continue in force in case of subsequent cohabitation, but every such suggestion is shown to be groundless by the terms of this instrument. Equally groundless is the suggestion that it was suspended during the period the complainant lived in the house with her husband, whether she lived there as agent, or as the wife of her husband. She returned to live with her husband at his request, and it was while they were so living together that the payments of the rents, interest, and income of the trust property were made, and that the checks for the same were received by the husband, as alleged in the bill of complaint. Webster v. Webster, 4 De Gex, M. & G. 437.

The clear inference from the conduct of both parties is, that they alike regarded the indenture as valid and operative, and the conduct of the trustee speaks the same language. The error of the argument for the respondents consists in the assumption that the indenture was solely based on separation. Granting that theory, there would be great weight in the argument, but the court has endeavored to show that the indenture cannot properly receive that construction. Temporary reconciliation and subsequent cohabitation did not so annul or suspend the operation of the instrument, because the parties had expressly covenanted that it should not, and the trust properly remained, affected by that covenant. Randle v. Gould, 8 El. & Bl. 457. Such being the fact, it is quite clear that none of the authorities cited to the point, by the respondents, have any proper application to the case.

The next proposition of the respondents is, that the rents, interest, and income of the trust property, when paid to the complainant by the trustees, became wholly discharged of the trust, and that the money thus paid to her, as rent, interest, and income, when paid by her to the husband, became the property of the husband. When the payments were made to the complainant, the several sums, as the proposition concedes, were so paid on account of and for the net rents, interest, and income of the trust property.

The next point made is, that the rents, interest, and income became discharged of the trust when the husband was suffered by the wife to receive the checks and to collect the money. Unless it be assumed that the husband cannot be the trustee for his wife in any case, the proposition ought not to be sustained, as it would give effect to a positive fraud. Delivery of the checks was made to him, in every case, upon his unconditional assurance that he would invest the money for her benefit and that of her children, and in the belief induced by his own representations that he was more competent to transact business than the wife, to whom the funds belonged.

But the husband may be trustee for his wife of gifts to her from others, or of the rents, interest, and income of property given by himself to her in trust, and lawfully held by trustees, for her sole use and benefit. 2 Story, Eq. Jur. 1380; 3 Kent, Comm. 163.

Gifts from the husband to the wife may be supported as her separate property, if they be not prejudicial to creditors, even without the intervention of trustees. Nevers v. Scott, 9 How. [50 U. S.] 22; Randle v. Gould, 8 El. & Bl. 457; Woodward v. Woodward, 8 Law T. (N. S.) 749; Grant v. Grant, 12 Law T. (N. S.) 721; Riley v. Riley, 25 Conn. 154; Turner v. Nye, 7 Allen, 181; Wells v. Stout, 9 Cal. 479; Dillinger's Case, 35 Pa. St. 357.

All the checks came from the trustees as payments for the rents, interest, and income of the trust property, and the proof is entirely satisfactory that the husband received the avails, as belonging to the wife, under the indenture, and agreed to invest it for her benefit and that of her children. Such arrangement imposes on the husband the character of trustee, especially in a case where it is concerning her separate property, and where to hold otherwise would sanction misrepresentation and fraud. Consent of the complainant that her husband should receive the checks, and collect the money as his own property, was never

given, and he never received the money with any such understanding. Bell, Husb. & Wife, 525, 526, 531, 534.

Should the court overrule those defences, the next objection of the respondents is, that the complainant is precluded from setting up the claim, by the indenture of compromise. But the answer made by the complainant to the proposition is decisive. She was a mere formal party to the adjustment, and it concerned only the residue of the estate, after the payment of all debts, liabilities, and legacies. The purpose of the instrument was to effect an adjustment between the heirs-at-law and the residuary legatee, and as there was no concealment of this claim on the part of the complainant, the defence of estoppel is not maintained.

The only remaining objection is, that the acceptance by the complainant of the provision made for her in the will of the husband is inconsistent with the claim she now makes; but the court is not able to adopt that conclusion, or perceive that it finds any support in the provisions of the will. On the contrary, the declared intention of the testator was, that the amount secured to his wife in the indenture, coupled with the provision made for her in his will, should be in full for her separate maintenance, and in lieu of dower.

Our conclusion is, that none of the defences set up in the answer can be sustained, and that the complainant is entitled to a decree for the amount.

Case No. 17,066.

WALKER et al. v. BYRNES et al.

[14 Blatchf. 347.] [1]

Circuit Court, N. D. New York. Nov. 12, 1877.

ACTION FOR FRAUDULENT REPRESENTATIONS—SALE.

Where a declaration sets forth as the cause of action fraudulent representations made to induce, and which did induce, a sale of goods on credit, the averments of fraud will not be stricken out, on the motion of the defendant, so as to make the action only one of assumpsit for goods sold and delivered.

[This was an action by Joseph H. Walker and others against John H. Byrnes and others.]

Martin W. Cooke, for plaintiffs.

D. C. Feeley, for defendants.

WALLACE, District Judge. The defendants move to strike out, as redundant and irrelevant matter, various allegations in the declaration, which, in substance, set forth fraud and deceit in the purchase of goods by the defendants from the plaintiffs, on credit, the defendants insisting that the cause of action is for goods sold and delivered, that a recovery can be had in the action without proof of fraud or deceit, and, therefore, that the allegations in question have properly no place in the declaration. No question is made as to the form and sufficiency of the averments of fraud, but the sole ground taken is, that the allegations of facts which merely show the right to arrest the defendants, are not constitutive of a cause of action, and are not traversable by answer. Various decisions of the state courts are cited, which sustain the views of the defendants' counsel, but the weight of authority, in my view, is on the other side. It will not be profitable to review the cases at length. The following are among those which hold that the fraud is the gist of the action, and that no recovery can be had without proving it. Ross v. Mather, 51 N. Y. 108; Burnham v. Walkup, 54 N. Y. 656; Dudley v. Scranton, 57 N. Y. 424; Elwood v. Gardner, 45 N. Y. 349. An action for the price of goods sold is substantially different from an action for a fraudulent representation, and the circumstances that the fraudulent representation was made to induce, and did induce, a sale of goods on credit, does not change the cause of action from one in fraud to one in assumpsit. If the plaintiff chooses to ground his action upon the fraud, and thereby seek for a judgment which will authorize the imprisonment of the defendant, and which cannot be affected by a discharge of the defendant in bankruptcy, he must prove the representations and the scienter, or fail in the action. The averments of fraud in the declaration are vital to the cause of action, and the motion to strike them out is denied.

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

WALKER (CHASE v.). See Case No. 2,630.

Case No. 17,067.

WALKER v. CRANE.

[13 Blatchf. 1.] [1]

Circuit Court, D. Vermont. Oct., 1865.[2]

PROVOST MARSHAL—LIABILITY FOR ASSAULT AND BATTERY—AUTHORITY TO USE FORCE—EVIDENCE—DAMAGES.

1. C., a provost marshal appointed under the act of March 3d, 1863 (12 Stat. 732, § 5), was sued by W. for assault and battery, and false imprisonment. C. contended that he could not be held liable in a civil action for acts done by him in the discharge of the duties of his office of provost marshal. *Held*, that the action would lie.

2. C. had a right to order W. to leave the premises occupied officially by C. as provost marshal, and the right, if W. refused to go, to use so much force as was necessary to remove W. from such premises.

3. If C. had good reason to believe, and did believe, that W., by language addressed by him to C., was threatening C. for the purpose of interfering with C. in the execution of his official duties as provost marshal, C. was justified in arresting and detaining W.

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

[2] [Affirmed by supreme court. Unreported.]

4. The 4th section of said act of March 3d, 1863, would not, of itself, bar W.'s right of action.

5. W., if entitled to recover, was entitled to his actual damages; and, if C. was influenced by any motive other than the honest discharge of his official duty, the jury were at liberty to give to W. exemplary damages.

This was an action of trespass for an assault and battery and false imprisonment, originally brought returnable to the county court for the county of Chittenden and state of Vermont, by writ dated August 23d, 1864, which being returned and entered in said court at the September term thereof, in 1864, the defendant [Cyrus R. Crane] filed his petition for the removal of the cause to this court, under section 5 of the act of March 3d, 1863 (12 Stat. 756), and the cause was removed into this court, and at the October term, in 1865, of this court, came on for trial before SMALLEY, District Judge, and a jury, on the defendant's plea of not guilty.

On the trial, the plaintiff [Hiram Walker] gave evidence tending to show, that he was, on and before the 2d of August, 1864, a manufacturer in Burlington, Vermont, and had, at that time, a man in his employ named Dike, who was liable to military duty, and whose home was in the town of Starksborough, Vermont; that the town of Starksborough was then offering to pay to any person who would put into the United States service a substitute who should be credited to the quota of that town, the sum of $900 as a bounty; that Dike applied to the plaintiff to assist him in obtaining a substitute, to be credited to Starksborough, so as to relieve himself from liability to draft, and to avail himself, in so doing, of the bounty offered by that town, and proposed to pay the plaintiff for his services in obtaining such substitute; that the plaintiff declined to accept any compensation, but agreed to assist Dike in obtaining the substitute; that, soon afterwards, the plaintiff was called on, at Burlington, by one Norton, of Champlain, N. Y., with whom he had no previous acquaintance, but who had been informed that the plaintiff desired to procure a substitute; that Norton was then on his way to Rutland, with three Frenchmen from Canada, with whom he had contracted that they should enlist in the United States service, and had had some correspondence with the selectmen of Rutland, relative to furnishing three men upon the quota of that town; that the plaintiff and Norton concluded an agreement that one of the men should be enlisted as a substitute for Dike, and credited to the town of Starksborough, and that the plaintiff should pay Norton therefor the sum of $900 when the man should be enlisted and sworn in; that, on the next day after the making of this agreement, the plaintiff accompanied Norton and the men to Rutland, for the purpose of getting the substitute for Dike enlisted and credited; that, on their arrival, some considerable discussion and negotiation took place between Norton and the authorities of Rutland, in which the plaintiff took no part, relative to a bargain for furnishing the other two men upon the quota of Rutland; [that, while this was going on, the plaintiff was called on by one N. P. Simonds, who was then engaged in and about the defendant's office (the defendant being provost marshal), and passing freely in and out, and who said he was a United States recruiting agent, and offered to put the substitute in for the plaintiff for $100, and said he was the only man in Rutland who could put a substitute in through that office, and that he intended to make $100 per head off of the men; and that plaintiff declined this proposition, but subsequently, after watching the proceedings there for some time, offered Simonds $25 to get his man enlisted as a substitute for Dike, which offer Simonds accepted.] So much of the foregoing evidence as is included in brackets was objected to by the defendant and admitted by the court, to which the defendant excepted. The plaintiff further gave evidence tending to show, that, soon afterwards, the men brought by Norton were taken in for examination, and, two of them having passed and been accepted, Simonds spoke to the plaintiff and told him it was all right, and to go up-stairs to the provost marshal's office and pay off his man; that the plaintiff thereupon started with the man to ascend the stairs in the United States post office building, which stairs led from the public room in the post office to the rooms in the second story occupied by the provost marshal's office, and, when he got up some distance, was met by the defendant, whom he did not then know, who took hold of his arm and asked him where he was going; that the plaintiff replied, that he was going up-stairs with those men; that the defendant then said: "Go downstairs; you are a substitute broker!" and shoved him down three or four steps; that the plaintiff replied: "I am not a substitute broker; my name is Walker, from Burlington, and I came to put in a substitute for a man named Dike, from Starksborough;" that the defendant still insisted he was a substitute broker, and shoved him down stairs again twice, three or four steps each time, till he reached the bottom; that the plaintiff then said to him: "If you will come out of doors I will show you something;" that the defendant asked: "What will you show me?" that the plaintiff replied: "I will show you how a gentleman defends himself when he is assailed;" that the defendant thereupon called one Briggs, who stood near, and ordered him to take the plaintiff to jail; that the plaintiff enquired what he was taken to jail for, and the defendant said: "For violating the provisions of the enrolment act, and resisting the provost marshal in the discharge of his duty;" that Briggs took the plaintiff to the county jail in Rutland, and imprisoned him there in the common prison, then occupied by a number of criminals and vagrants, where he remained about ten minutes; that, while on the way to the jail, the plaintiff offered to the officer to furnish bail in any

amount for his appearance at any time, which the officer declined to receive; that, when the plaintiff had been in jail about ten minutes, the defendant sent a couple of soldiers for him, who brought him back to the post office building, and, by direction of the defendant, took him into the cellar of the building, where there were cells used for United States prisoners; that the defendant went below and had a long conversation with the plaintiff, charging him with being a bounty broker, and with having lied to the defendant, and making other remarks of a similar character, and demanding that he should make an apology; that, on the plaintiff's stating what his business was with the provost marshal, and that Simonds had requested him to go up-stairs, the defendant said that would make a difference, and sent for Simonds and enquired of him as to that fact, to which Simonds replied that he did not remember whether he had asked the plaintiff to go up-stairs or not; that the defendant finally discharged the plaintiff from custody, saying that he did so on account of the respect he entertained for the plaintiff's father; that the man agreed for by the plaintiff, as aforesaid, was afterwards, on the same day, enlisted as a substitute for Dike; and that the plaintiff was sent for by the defendant to come to his office and pay the man, which he did, and also that he paid Simonds $25 for his services. The plaintiff further testified, that he had never, in any instance, had anything whatever to do with procuring substitutes, or obtaining men for enlistment, except on this single occasion, and never had any interest or share in any such business, directly or indirectly; and that he did not know Norton until applied to by him, as above stated, and had nothing to do with him or his recruits except to obtain the substitute for Dike, as above stated, and no interest or share otherwise in the disposal of the men, or in the money received therefor.

The defendant introduced in evidence the following documents:

(1) His commission as provost marshal, dated April 24th, 1863: "War Department, Washington, April 24th, 1863. Sir: You are hereby informed that the president of the United States has appointed you provost marshal for the First district of the state of Vermont, with rank of captain of cavalry, in the service of the United States, to rank as such from the 24th day of April, 1863. Immediately on receipt hereof, please to communicate to this department, through the provost marshal general of the United States, your acceptance or non-acceptance of said appointment, and, with your letter of acceptance, return the oath herewith enclosed, properly filled up, subscribed and attested, and report your age, birthplace, and the state of which you are a permanent resident. You will immediately report, by letter, to the provost marshal general, and will proceed without delay to establish your headquarters at Rutland, Vermont, and enter upon your duties in accordance with such special instructions as you may receive from the provost marshal general. E. M. Stanton, Secretary of War. To Capt. Cyrus R. Crane, Provost Marshal First District Vermont."

(2) Special order of the war department, No. 221, detailing Gen. Thomas G. Pitcher as assistant to the provost marshal general for the state of Vermont, dated May 18th, 1863: "War Department, Adjutant General's Office, Washington, May 18th, 1863. Special Orders, No. 221. (Extract.) * * * Brigadier General Thomas G. Pitcher, U. S. volunteers, will proceed without delay to Montpelier, Vermont, and enter upon the duties of assistant to the provost marshal general of the United States, for the state of Vermont. * * * By order of the secretary of war. E. D. Townsend, Assistant Adjutant General."

(3) Revised regulations issued by the war department, May 1st, 1864, for the government of the bureau of the provost marshal general, particularly sections 1, 2, 19, 22, 24, 27 and 32: "Sec. 1. The officer detailed in each state or division to aid the war department in securing uniformity in the execution of the enrolment act, shall keep himself well informed as to the condition of the department throughout the state or division. He shall, under the provost marshal general of the United States, exercise supervision over the provost marshals and their subordinates, for the congressional districts of that state or division, and shall see, by personal inspection, or by his inspectors, that boards of enrolment, and persons acting under them, attend faithfully and diligently to their duties. Sec. 2. He shall communicate to them the orders and instructions of the provost marshal general, and see that they are promptly and efficiently executed, and shall, from time to time, give or transmit such instructions, in accordance with these regulations, as hereinafter prescribed, as may be required to facilitate and enforce obedience to them. Sec. 19. Immediately upon entering upon his duties, each provost marshal shall report, by letter, to the provost marshal general of the United States, and the acting assistant provost marshal general of his state. Sec. 22. (Section 7 of the act for enrolling and calling out the national forces, approved March 3d, 1863—that it shall be the duty of the provost marshals to obey all lawful orders and regulations of the provost marshal general, and such as may be prescribed by law, concerning the enrolment and calling into service of the national forces.) Sec. 24. It shall be the duty of the provost marshal in each district to call together, when required, the board of enrolment, to preside at its sessions, announce such of its decisions or directions as it may be necessary to make public, enforce its orders, see that a fair record is made of its proceedings, in a book kept for that purpose by the recorder, and to transmit to the provost marshal general the enrolment lists, as consolidated by the board, and such other communications as the board may deem it necessary to lay before the provost marshal general. Sec. 27. He shall arrest and forthwith deliver to the proper civil

authorities, to wit, the marshal of the United States within and for the district in which the arrest is made, with written charges in the case, all persons who shall have violated section 12 of the act amendatory of the enrolment act, or any part of the same. Sec. 32. To enable provost marshals to discharge their duties efficiently, they are authorized to call upon the nearest available military force, or on citizens, as a posse comitatus, or on United States marshals and deputy marshals; and these and all other persons are hereby enjoined to aid the provost marshal in the execution of his lawful duties, when called on so to do."

(4) Regulations from the war department, dated September 29th, 1863, particularly section III: "III. Persons deputized as aforesaid, to arrest deserters and procure recruits, presenting to your board a man acceptable as a recruit, according to the present ruling of acceptability, as applied by this bureau, shall receive premiums as follows, to wit: for an accepted recruit who may be shown to the board to have served at least nine months as a soldier, and been honorably discharged (for other cause than disability), a premium of $25; for an accepted recruit without the military qualifications above specified, a premium of $15. The premiums herein provided will be paid to the persons who shall have presented the accepted recruit, as soon as said recruit shall have been delivered at the general rendezvous at ——. The payment of the premium will be made by —— in the ——, whenever the person who furnished the recruit shall present to him a certificate from your board that the recruits named, and for whom he claims premiums, were accepted and regularly enlisted, and a certificate from the commanding officer at the general rendezvous at ——, that the said recruits have actually been received at his rendezvous. You are authorized and required, notwithstanding anything else herein contained, to decline all business, in the matter of recruits, with any person or persons who may at any time practice, or attempt to practice, fraud or imposition, either upon the government or the person presented as a recruit, or who shall extort, claim, or receive any other fee, perquisite, or compensation from the government, or the recruit, than the premium herein authorized and provided, and such persons shall forfeit their appointments, and all right to any premiums or payments, and be reported to the provost marshal general, to be dealt with summarily by a military commission. You are required to facilitate the procuration of recruits in the manner herein prescribed, by early examination of them, prompt preparation of certificates upon which the payments of premiums depend, and by everything else properly devolving on you, calculated to assist the persons presenting recruits in securing their premiums without unnecessary delay. You will immediately nominate, through the acting assistant provost marshal general of the state, one or more persons whom you deem best suited for recruiting agents for your district, that they may be deputized for that purpose."

(5) Circular No. 28, dated June 16th, 1863, from the office of the provost marshal general: "War Department, Provost Marshal General's Office, Washington, D. C. June 16th, 1863. (Circular No. 28.) The following opinion of Hon. William Whiting, solicitor of the war department, has been ordered to be published by the secretary of war: Opinion. It is made the duty of the provost marshals to obey all lawful orders and regulations of the provost marshal general, and such as may be prescribed by law, concerning the enrolment and calling into service of the national forces. Act March 3d, 1863, § 7. The 25th section of the same act provides, that, if any person shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such draft, or shall assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto, or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted men not to appear at the place of rendezvous, or wilfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the provost marshal, and shall be forthwith delivered to the civil authorities, and, upon conviction thereof, be punished by a fine not exceeding $500, or by imprisonment not exceeding two years, or by both of said punishments. To do any act which will prevent or impede the enrolment of the national forces (which enrolment is preliminary and essential to the draft), is to prevent or impede the draft itself. The enrolment is a 'service to be performed by the provost marshal in relation to the draft.' It is not the act of drawing ballots out of a ballot box itself, but it is 'in relation to it,' and is the first step that must by law be taken preparatory to draft. It is, therefore, clearly within the duty of the provost marshal to subject all persons who obstruct the enrolment, the meeting of the board, or any other proceeding which is preliminary and essential to the draft, to summary arrest, according to the provision of section 25. There are many ways of obstructing officers in the performance of their 'services or duty in making, or in relation to, the draft,' without employing physical force. The neglect or refusal to do an act required by law to be done, may itself be such an 'obstruction' as to subject the offender to arrest. Suppose a person be found standing in a passage through which the drafting officers were required to enter into a place designated by law as the place for draft, and suppose that his standing in that place would prevent access by these officers to the place of draft. If they request him to move away, and he neglects or refuses so to do, for the purpose of preventing the draft, the non-performance of the act of removal would be itself an 'obstruction of the draft, or of an officer in the performance of his

duty in relation to it.' Standing mute in civil courts, is, under certain circumstances, a punishable offense; and so, if a person, with intent to prevent the draft, refuses to give his true name when lawfully requested so to do by an officer whose legal duty is to ascertain and enrol it, it is an obstruction of that officer in the performance of one of his duties in relation to the draft. So, also, of the giving of false names with the same illegal intent, and the offender will, in either case, be subject to summary arrest by the provost marshal. William Whiting, Solicitor of the War Department. James B. Fry, Provost Marshal General." This paper was objected to by the plaintiff, and was received by the court subject to the objection.

(6) The call of the president for 500,000 men, dated July 18th, 1864: "War Department, Adjutant General's Office, Washington, July 19th, 1864. For Five Hundred Thousand Volunteers. By the President of the United States of America—A Proclamation. Whereas, by the act approved July 4th, 1864, entitled, 'An act further to regulate and provide for the enrolling and calling out the national forces, and for other purposes,' it is provided, that the president of the United States may, 'at his discretion, at any time hereafter, call for any number of men, as volunteers, for the respective terms of one, two, and three years, for military service,' and 'that, in case the quota, of (or) any part thereof, of any town, township, ward of a city, precinct, or election district, or of a county not so subdivided, shall not be filled within the space of fifty days after such call, then the president shall immediately order a draft for one year, to fill such quota, or any part thereof, which may be unfilled;' and whereas the new enrolment heretofore ordered is so far completed as that the aforementioned act of congress may now be put in operation, for recruiting and keeping up the strength of the armies in the field, for garrisons, and such military operations as may be required for the purpose of suppressing the rebellion, and restoring the authority of the United States government in the insurgent states: Now, therefore, I, Abraham Lincoln, president of the United States, do issue this my call for five hundred thousand volunteers for the military service, provided, nevertheless, that this call shall be reduced by all credits which may be established under section eight of the aforesaid act, on account of persons who have entered the naval service during the present rebellion, and by credits for men furnished to the military service in excess of calls heretofore made. Volunteers will be accepted under this call for one, two, or three years, as they may elect, and will be entitled to the bounty provided by the law for the period of service for which they enlist. And I hereby proclaim, order, and direct, that, immediately after the 5th day of September, 1864, being fifty days from the date of this call, a draft for troops to serve one year shall be had in every town, township, ward of a city, precinct, or election district, or county not so subdivided, to fill the quota which shall be assigned to it under this call, or any part thereof which may be unfilled by volunteers on the said 5th day of September, 1864. In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed. Done at the city of Washington, this eighteenth day of July, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth. (L. S.) Abraham Lincoln. By the President, William H. Seward, Secretary of State. By order of the secretary of war, E. D. Townsend, Assistant Adjutant General."

(8) Proclamation of the president suspending the privilege of the writ of habeas corpus, dated September 15th, 1863: "War Department, Provost Marshal General's Office, Washington, D. C., September 17th, 1863. The secretary of war orders that the following act of congress, and proclamation of the president based upon the same, be published for the information of all concerned, and that the special instructions hereinafter contained for persons in the military service of the United States, be strictly observed. 'An act relating to habeas corpus, and regulating judicial proceedings in certain cases, approved March 3d, 1863. Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that, during the present rebellion, the president of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof; and, whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the president; but, upon the certificate, under oath, of the officer having charge of any one so detained, that such person is detained by him as a prisoner under authority of the president, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ, so long as said suspension by the president shall remain in force, and said rebellion continue.' 'By the President of the United States.—A Proclamation. Whereas, the constitution of the United States has ordained that the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it; and whereas, a rebellion was existing on the third day of March, 1863, which rebellion is still existing; and whereas, by a statute, which was approved on that day, it was enacted by the senate and house of representatives of the United States in congress assembled, that, during the present insurrection,

the president of the United States, whenever, in his judgment, the public safety may require, is authorized to suspend the privilege of the writ of habeas corpus in any case, throughout the United States, or any part thereof; and whereas, in the judgment of the president, the public safety does require that the privilege of the said writ shall now be suspended throughout the United States, in the case when, by the authority of the president of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command, or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled, drafted, or mustered or enlisted in, or belonging to, the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services by authority of the president of the United States, or for resisting a draft, or for any other offence against the military or naval service: Now, therefore, I, Abraham Lincoln, president of the United States, do hereby proclaim and make known to all whom it may concern, that the privilege of the writ of habeas corpus is suspended throughout the United States, in the several cases before mentioned, and that this suspension will continue throughout the duration of the said rebellion, or until this proclamation shall, by a subsequent one to be issued by the president of the United States, be modified or revoked. And I do hereby require all magistrates, attorneys, and other civil officers within the United States, and all officers and others in the military and naval service of the United States, to take distinct notice of this suspension, and to give it full effect, and all citizens of the United States to conduct and govern themselves accordingly, and in conformity with the constitution of the United States and the laws of congress in such case made and provided. In testimony whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed, this 15th day of September, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States of America the eighty-eighth. (L. S.) Abraham Lincoln. By the president, William H. Seward, Secretary of State.' The attention of every officer in the military service of the United States is called to the above proclamation of the president, issued on the 15th day of September, 1863, by which the privilege of the writ of habeas corpus is suspended. If, therefore, a writ of habeas corpus should, in violation of the aforesaid proclamation, be sued out and served upon any officer in the military service of the United States, commanding him to produce before any court or judge any person in his custody by authority of the president of the United States, belonging to any one of the classes specified in the president's proclamation, it shall be the duty of such officer to make known by his certificate, under oath, to whomsoever may issue or serve such writ of habeas corpus, that the person named in said writ 'is detained by him as a prisoner under authority of the president of the United States.' Such return having been made, if any person serving, or attempting to serve, such writ, either by the command of any court or judge, or otherwise, and with or without process of law, shall attempt to arrest the officer making such return, and holding in custody such person, the said officer is hereby commanded to refuse submission and obedience to such arrest, and if there should be any attempt to take such person from the custody of such officer, or arrest such officer, he shall resist such attempt, calling to his aid any force that may be necessary to maintain the authority of the United States, and render such resistance effectual. James B. Fry, Provost Marshal General."

(9) Letter from the provost marshal general to the defendant, approving N. P. Simonds' appointment by the defendant as recruiting agent: "War Department, Provost Marshal General's Office, Washington, D. C., October 13th, 1863. Captain C. R. Crane, Provost Marshal, 1st District of Vermont, Rutland, Vt. Captain: I am directed by the provost marshal general to acknowledge receipt of your communication of the 1st inst., nominating N. P. Simonds and George Hopkins as recruiting agents, and to say, in reply, that their nomination is approved. I am, captain, very respectfully, your obedient servant, Henry Stone, Ass't Adj't General."

The defendant further gave evidence tending to show that General Pitcher had acted under his said appointment as assistant provost marshal general for Vermont, from the date thereof, and had received and communicated to the defendant officially, as instructions, papers 3, 4 and 5, above mentioned; that the defendant had received a verbal order from General Pitcher, to exclude from his office all bounty brokers and other persons not having proper business with the office, and to arrest them in case of threats or refusal to obey orders; that the defendant had acted as provost marshal, under his said appointment, from the date thereof, having his office at Rutland, in the building belonging to the United States, and occupied as a United States court house and post office, under a cession of the state of Vermont, under an act entitled "An act ceding to the United States exclusive jurisdiction over a site for a court house and post office in the towns of Rutland and Windsor," approved November 18th, 1856; that he occupied two rooms therein, one below for the examination of recruits, and one in the second story for the general business of the office, the communication between which was the staircase before mentioned, leading from the public room in the post office; that it was nec-

essary for him frequently to pass up and down between the two rooms; that there were usually a good many people there having business with his office; that such was the case on the day of the transaction in question; and that he was then engaged in correcting the enrolment and receiving recruits. The defendant testified further, that, after the men above referred to had been examined and passed, and had gone up stairs to be sworn in, he overtook the plaintiff on the stairs, going up; that he asked the plaintiff if he had any business at the office, and he replied that he had not; that the defendant then told him the office was very much crowded, and they were very busy, and he wanted him to go down stairs; that the plaintiff did not move to go, and the defendant said: "You are a substitute broker, and my orders are not to allow one in or about my office, and I want you to go down these stairs, and now;" that the plaintiff replied: "I am Hiram Walker, of Burlington;" to which the defendant replied: "I know who you are, and have known you before," and then shoved the plaintiff down stairs, two or three stairs at a time, the plaintiff stopping and clinging to the railing; that the plaintiff then said: "If you will come out here, Capt. Crane, I will settle this with you;" that defendant asked him what he would do, and he replied that he would defend himself; that the defendant then arrested him, and, to his inquiry what he was arrested for, replied, for threatening the defendant in the discharge of his official duties; and that the defendant called on Levi Briggs, a deputy sheriff, to take the plaintiff to jail, and, on the plaintiff's inquiry by what authority, the defendant said, by virtue of the enrolment act and his instructions to arrest those who threatened him in the performance of his duties. The defendant further testified, that he understood the above language of the plaintiff to convey a threat, and feared the plaintiff would assault him when he should afterwards be passing up and down in the course of his business. He further testified, and gave evidence tending to show, that the plaintiff had been pointed out to him as a bounty broker, and as the one who had come with the three men above named, and that, at the time of the assault, he supposed the plaintiff was a bounty broker. In this connection he offered to prove that there was a brother of the plaintiff who was a bounty broker, and that he supposed this to be the man. This offer was objected to by the plaintiff, and excluded by the court, to which the defendant excepted. The defendant, also, introduced the said Simonds as a witness, who testified, that the plaintiff did, in fact, attempt to negotiate with the authorities of Rutland for furnishing the other men brought by Norton, to be applied on the quota of that town, and professed to have an interest in the disposition of the men. Said Simonds, also, denied that he told the plaintiff that he was the only man who could put in a recruit through that office, or offered to put the man in for $100, and testified, that he told the plaintiff he could go and put the man in himself, and he would be well received, but that the plaintiff declined to do so, and offered him $25 to do the business. He further testified, that he was appointed a United States recruiting agent in 1863, receiving a premium under the regulations of the war department, of September 29th, 1863, which premium was taken away in July, 1864, but that his appointment was not revoked until September, 1864, and that he continued, up to that time, to act as recruiting agent, and acted in connection with the provost marshal's office, and was employed by the town of Rutland to assist in filling its quota. On cross-examination of Simonds, the plaintiff sought to prove by him, that he was himself, both before and after the 3d of August, 1864, largely engaged in business at that office, as a bounty and substitute broker, and engaged in procuring and furnishing recruits for towns and individuals, under contract, by which he received one sum for the recruit furnished, and paid the recruit a less sum; that he, in some instances, received from the towns the bounties voted by them for recruits, and then obtained the recruits as cheap as he could; that he made from $50 to $250 each, on the men he so furnished, by receiving as their bounties that amount more than he paid the recruits; that he had proposed to various persons, namely, to one William Walker, and one Artemas Powers, to go into partnership with them in the business of substitute and bounty brokers, at that office; that he had been in partnership with one Shute, of Boston, in the business of furnishing naval recruits at the defendant's office, for which he received $1,000 each, and paid Shute $900; that he was, also, in the habit of receiving from towns and individuals liable to furnish recruits and substitutes, and bringing suitable men there to be enlisted for that purpose, from $25 to $100 per man for his services in getting them accepted and enlisted, and had received these fees in many instances, and received $50 from Norton for his services in getting accepted the other men brought by him on this occasion, who were enlisted; that, during all this time, he had free access to, and intimate communication with, the defendant's office; that, in one or two instances, where parties bringing men had refused to pay him, their men had been rejected on the ground that enough of the bounty to be received was not to be paid to the recruit; and that it was known to the defendant that Simonds was so acting as a substitute and bounty broker, as aforesaid, and receiving premiums and compensations, as aforesaid, during the time he was so acting. To these inquiries, and to the offer to prove these facts, the defendant objected, but the inquiries were permitted by the

court, and the defendant excepted, and the answers and the testimony of the witness tended to prove the foregoing facts. But the witness denied, as did, also, the defendant, that the defendant received any share of the money so derived; and Simonds further stated, that the difference between himself and a bounty broker was, that his proceedings were approved by the department. The defendant, on his cross-examination, stated that he considered a bounty broker to be one who was engaged in obtaining and furnishing recruits at a profit, and who was not vouched for to him; if vouched for, he should not regard him as a bounty broker; and if vouched for by Simonds, it would be sufficient. Gen. Pitcher, upon his cross-examination, testified, that, after the call for 500,000 men above referred to was made, the recruiting agents received nothing from the government; that he (Gen. Pitcher) never authorized them, after that, to receive anything from individuals or from towns; that, after the order of July 19th, 1864, they were forbidden to receive any such payments; that he knew nothing of Simonds, except that he was a recruiting agent; and that anything he did after the 19th of July, 1864, by which he received pay of towns or others, was a matter entirely between him and them.

The plaintiff, in reply, introduced further evidence tending to corroborate his statement of the conversation that took place between him and the defendant on the stairway, at the time of the assault, and to contradict the statement of that conversation given by the defendant, and also denied, and gave evidence tending to disprove, the statement of Simonds, both as to the conversation between him and the plaintiff, and as to the plaintiff's taking any part in the disposition of the other men brought by Norton, and claiming to have any interest in, or connection with, them; and also denied, and gave evidence tending to disprove, the statement that he knew the defendant, or called him by name, at the time of the assault.

The defendant claimed as the law of the case, and requested the court to instruct the jury (1) that the defendant was protected by the provisions of section 4 of the act of congress, approved March 3d, 1863, entitled "An act relating to habeas corpus, and regulating judicial proceedings in certain cases" (12 Stat. 756), and that the court should direct a verdict for the defendant; (2) that, upon the evidence, and the law applicable to the case, the justification of the defendant was made out, and that the jury be instructed to return a verdict for the defendant; (3) that, if the jury should find that the defendant, in the making of the assault, and in the arrest and imprisonment, acted in good faith and without malice, and in the performance of the duties of his office, in obedience to superior orders, as then understood by him, and then publicly proclaimed, the jury should return a verdict for the defendant; (4) that if the jury should find as in point 3, the plaintiff could not recover on the first count of his declaration; (5) that, if the jury should find that the defendant had good reason to believe, from the conduct of the plaintiff, and from the information which had been communicated to the defendant, that the plaintiff was a bounty broker, and that the defendant did so believe, the defendant, under his orders, was not liable to the plaintiff, in this action, for treating him as a bounty broker and excluding him from the approaches to the defendant's office; (6) that it was not necessary to the defendant's justification of the assault upon the stairs, that he should have announced to the plaintiff who he was, or his authority for ejecting the plaintiff. The plaintiff's counsel having remarked to the jury, in the opening, that the case was one of great public importance, involving the vindication of the private rights and liberty of the citizens against arbitrary military power, in comparison with which the plaintiff's individual injury became insignificant, and that, in the assessment of damages, this consideration should be attended to, and contribute to enhance them, the defendant further requested the court to instruct the jury, that this consideration was not an element which they should regard as going to increase the damages.

George F. Edmunds, Edward J. Phelps, and Andrew Tracy, for plaintiff.

Dudley C. Denison, Dist. Atty., Daniel Roberts, and John Prout, for defendant.

THE COURT [SMALLEY, District Judge] charged the jury upon the points involved in the requests, as follows: That there were certain facts about which there was but little, if any, dispute; that the defendant was a provost marshal, and had an office in a building which belonged to the United States, and, at the time of the transaction out of which this controversy grew, was engaged in the performance of his official duties therein; that the plaintiff wanted to have a person enlisted as a substitute for one Dike, and that he went to Rutland, and started to go up into the defendant's office, aforesaid, for that purpose, and was pushed or forced down by the defendant; that, after he got to the bottom of the stairs, the plaintiff said to the defendant, while still in the building: "If you will come down here, I will show you how I will defend myself," or words to that effect; that the defendant then told one Briggs, who was standing near, and a deputy sheriff, to arrest the plaintiff and commit him to jail, and that said Briggs did so, where the plaintiff was confined a few minutes, when the defendant sent two soldiers for him, took him out of jail, and brought him back to the building from which he was first taken, when a conversation ensued between the defendant, the plaintiff, and one Simonds, which ended by the defendant's telling the plaintiff that he might go, and ordering him to be released; and that the defendant claimed that the civil law had been suspended in Ver-

mont, in cases like this, and that martial law had been substituted therefor, and, that if the defendant was wrong, he should be tried by court martial. THE COURT, after explaining the difference between civil law and martial law, told the jury, that this claim of the defendant was unfounded, that the civil law was still in force in Vermont, and that, although the defendant was an officer in the military service of the United States, and claimed to be acting in his official capacity, the plaintiff had a right to seek redress for wrongs or injuries such as he claimed to have sustained in this case from the defendant; that, if the jury found, from all the evidence, that, when the plaintiff and the defendant met on or at the top of the stairs, as described, the defendant told the plaintiff to go down, that he did not want him there, and the plaintiff refused or declined to go, the defendant had the legal right to use so much force as was necessary to put him down; that, if the defendant had good reason to believe, and actually did believe, that what was said and done by the plaintiff after he was pushed to the bottom of the stairs, was intended to be or was a threat or menace for the purpose of interfering with the defendant in the execution of his official duties as provost marshal, or in any way to deter him therefrom or molest him therein, the defendant was justified in ordering his, the plaintiff's, arrest and detention in the manner stated by the witnesses; and that the jury, in coming to a conclusion upon that question, should carefully consider all the circumstances, as they appeared from the testimony and the surroundings of the parties at the time, and, if they were satisfied that such language and conduct of the plaintiff did amount to such threat or menace as before described, they would return a verdict for the defendant. THE COURT further instructed the jury, that the 4th section of the act of congress, approved March 3d, 1863, would not, as claimed by the defendant's counsel, of itself protect the defendant, or bar the plaintiff from his right of action, provided the jury found the facts to be as claimed by the plaintiff, as before stated, and, for this trial, THE COURT charged, that that section was inoperative, and afforded no defence; that if, under these instructions, the jury should find a verdict for the plaintiff, they were bound to give him his actual damages, and, if they should think the case required it, they might give him exemplary damages; that, upon this point they should carefully examine all the evidence in the case, and the arguments of counsel thereon, and if, after full consideration, they found that the defendant, in causing the arrest and imprisonment of the plaintiff, was influenced by any motive other than the honest discharge of his official duty, they were at liberty to consider it in making up the verdict; that this question was peculiarly within their province; and that, if they found for the plaintiff, they would award him such damages as they thought justice required.

To the refusal of the court to charge as the defendant requested, and to the charge as made, the defendant excepted. The jury returned a verdict for the plaintiff for $1,000 damages.

The district attorney was directed by the attorney general of the United States to bring and prosecute a writ of error, in behalf of the defendant, from the judgment of the court, with the consent of the defendant. This was done, and the supreme court of the United States affirmed the judgment. [Unreported.]

Case No. 17,068.

WALKER et al. v. DERBY et al.

[5 Biss. 134.] [1]

Circuit Court, N. D. Illinois. July, 1870.[2]

EQUITY—PLEADING AS EVIDENCE—TERMINATION OF AGENCY—VENDOR AND VENDEE—RESCISSION OF SALE—INADEQUACY OF CONSIDERATION—EVIDENCE.

1. Where, in a bill to set aside a conveyance on the ground of fraud by the defendants, the complainant calls for the answers of the defendants under oath as to the actual date of the execution of a contract relied upon, and the defendants answer under oath that it was not executed until a day much later than its date, the prima facie evidence made by the instrument itself is overcome.

2. In such case the rule applies that the answer called for under oath is, if responsive to the bill, conclusive, unless disproved by two witnesses, or by one witness and strong corroborative evidence.

3. The agency of a real estate agent and his duty to his principal ceases upon the delivery of the title papers and payment for the property.

4. After the termination of the agency the agents have the same right as any other persons to deal in the property.

5. The vendor, in order to set aside the sale, must show that such interest was acquired during the continuance of the agency.

6. If they afterwards acquire an interest from the purchaser, they are under no obligations to disclose that fact to the vendor, and the fact that they do not disclose it to him is not a circumstance tending to show fraud or bad faith.

7. The fact that the notes and mortgage securing the unpaid portion of the purchase money were by agreement left with the agents in escrow, to await the delivery of a quit-claim deed from other parties which the vendor had agreed to furnish, does not change the relation of the parties, nor operate to continue the agency.

8. To set aside the conveyance for inadequacy of consideration the price must be so small as to strike the mind at first blush as grossly inadequate, and raise the conviction that the property was sacrificed.

9. It is not sufficient to show that certain parties might, under certain contingencies, give more on time, when one object of the vendor was to sell for cash.

10. The responsibility of the purchaser, and the negotiability in the market of the securities executed by him, may also be considered.

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

[2] [Affirmed by supreme court; no opinion filed.]

11. Where the principal was present and assisting in the negotiations the rigid rule in regard to the relations between principal and agent do not apply with full force.

12. This fact is especially important as to the question of adequacy of consideration.

13. Allegations in a bill against the purchaser prepared by counsel for such agents but never signed nor filed, are not important as evidence against them on behalf of the vendor.

14. Testimony of witnesses in regard to the value of property at an anterior date commented upon.

15. On the question of adequacy of consideration, its value at a subsequent date cannot be considered. The question is as to its actual market value at the time of the transaction.

This was a bill in equity by John J. Walker, executor, and others, legatees of A. F. Hopkins, late of Mobile, Alabama, deceased, against William M. Derby, S. H. Kerfoot, Isaac F. Pierson, and other grantees, to set aside a conveyance made by the complainant Walker to the defendant Derby in March, 1867, of 32 acres of land, near the southern limits of the city of Chicago. The land is described as follows: The east half of blocks one and six, all of blocks four and five, and lots one, two, twenty-three, and twenty-four of block twelve in Pryor & Hopkins' subdivision of the west half of the northwest quarter of section 3, township 38, range 14, and an undivided half of twenty acres of land in the northeast corner of section 4, same township and range.

The substantial allegations of the bill were, that the real estate in question belonged, at the time of the transaction to the complainants, as executor and legatees of A. F. Hopkins, deceased; that, about the first of March, 1867, said complainant, John J. Walker, employed the defendants Kerfoot and Pierson, then doing business as real estate agents under the firm name of S. H. Kerfoot & Co., in the city of Chicago, as agents to sell said real estate, which employment the said Kerfoot and Pierson accepted; but that said Kerfoot and Pierson, disregarding their duty in that regard, and taking undue advantage of the trust and confidence reposed in them, made a corrupt agreement with Derby whereby they sold said land to Derby at a grossly inadequate price, with a corrupt and secret understanding and agreement between said Kerfoot and Pierson and Derby, that they (Kerfoot and Pierson) were to have and take one half of the said lands, at the price for which they sold the same to the said Derby, and that said Walker, being misled by the confidence he had reposed in the said Kerfoot and Pierson as agents for said complainants in that behalf, consummated and completed the sale thus fraudulently made. Derby, Kerfoot and Pierson, and divers other persons, who had purchased portions of the land, were made defendants, and their answers called for under oath. In their answers Kerfoot, Pierson and Derby explicitly deny the charges of corruption and fraud made in the bill, and insist that Derby was the sole purchaser of the land in question, without any fraud or secret agreement as charged in the bill.

Hill & Dale, for complainants.

Monroe & McKinnon and C. Beckwith, for defendants.

BLODGETT, District Judge. The undisputed facts shown by the evidence are substantially these: That the testator, A. F. Hopkins, died in December, 1865, at Mobile, Alabama, and by his will appointed said John J. Walker and one W. G. Jones his executors. Both of said executors qualified; but Jones, on the 6th of February, 1867, resigned his executorship, leaving the said Walker sole acting executor. By the terms of the will the estate of the testator was to be divided between his wife and children, and the will empowers the executors "to sell and convey all the houses and lots of the testator in the city of Mobile, and all other lots, wherever situated, on such terms and at such times as the said executors shall deem most advantageous to the estate."

After granting this power, the testator proceeds to state: "I have the title to about 36¼ acres of land at, and adjoining the city of Chicago, in the state of Illinois; but my daughter, Maria Walker, has an undivided interest in them of two acres, and my son-in-law, John J. Walker, has an undivided interest of two and one-half acres in that part of my land belonging to J. W. Pryor and myself, and for which the said Walker holds my written contract."

Said testator, Hopkins, had owned said lands since 1853. They were unimproved and unproductive. About the 1st of March, 1867, the Hopkins estate was in pressing need of money to pay debts which could no longer be postponed or delayed; and Walker, as executor, was under the necessity of selling either some improved real estate in the city of Mobile, or this property in Chicago. The firm of Rees & Kerfoot had been, from 1855 to 1860, to some extent, the agents for the owners of said lands, and in 1865 some correspondence in regard to the value and salability of this property had passed between Walker, and S. H. Kerfoot & Co., who, on the dissolution of the firm of Rees & Kerfoot, succeeded to the agency of this property. Walker came to Chicago about the 1st March, 1867, for the purpose of selling said lands, and placed of the business in the hands of S. H. Kerfoot & Co., his chief acquaintance being with Mr. Kerfoot. Walker wished to sell for cash, and Kerfoot advised him that he could not do so without great sacrifice, and told him that it was a bad time to sell; and that he had better wait until spring opened, and until navigation and business again revived prices. Walker then suggested that if he could make a loan of $10,000 to meet his necessities, and secure the same on this property, he would delay selling; but Kerfoot informed him that it would be impossible to negotiate a loan on such security in this city, the land lying outside, and being unimproved.

They visited the land and concluded to put it in the market at $1,000 an acre, cash. Kerfoot stated that he knew of only one man who would be likely to make the purchase, and that was Derby the defendant. He introduced Derby to Walker, stating as his reason for making the proposition to Derby, that Derby had lately been dealing in lots in that vicinity, and had his eye on investments in the southern part of the city, and that Derby having lately sold his house and lot for $45,000, had the means to buy if he chose to do so. Walker and Derby had much negotiating together, which finally resulted in a written agreement between them, bearing date on the 6th day of March, 1867, by which Walker, as executor of Hopkins, agreed to sell the land in question to Derby for $25,600; $8,200 in cash and the balance in three equal annual payments, with interest at six per cent., Walker to give a clear and perfect title.

Walker had an abstract of title prepared, which was examined by H. S. Monroe, Esq., an able lawyer in this city, on behalf of Derby, who pronounced the title satisfactory.

About this time Derby manifested some reluctance to close the bargain and became critical and captious in regard to the title, and finally insisted on a quit-claim deed from the legatees in addition to Walker's deed as executor, this Walker promptly agreed to furnish, and it was agreed that the notes for the deferred payment should remain in Kerfoot's hands until said quit-claim deed was duly executed and delivered. On the 19th of March the transaction was consummated by the execution and delivery to Derby of a full covenant warranty deed from Walker as executor and trustee under the last will and testament of A. F. Hopkins, and the execution to Walker as executor by Derby of the notes to be given for the deferred payments; also, a trust deed on the premises sold to secure the payment of said notes. The deed and trust deed were duly delivered, and Derby paid to Walker the cash payment of $8,200, and the notes, as had been stipulated, were left in the hands of Kerfoot. The deed and trust deed bear date on the 16th of March, but were not delivered nor the money paid until the 19th, when the deeds were duly recorded. On the same day Kerfoot & Co. rendered to Walker their bill for services, commissions and disbursements about the sale and their agency in that behalf, the item of "commissions" being $711. On the 30th of May, 1867, Walker delivered a quit-claim deed to Derby, and became entitled to the delivery of Derby's notes. A new arrangement was, however, entered into between Walker and Derby, by which said notes were paid in full by Derby's paying $10,000 cash and conveying certain real estate in section thirteen, just west of the then city limits, whereupon said notes were delivered to Derby and the trust deeds duly released by the trustee. Some time in September, 1867, an agreement in writing, bearing date March 19, 1867, between the said Derby and the said Kerfoot and Pierson, was filed for record in the office of the Recorder of Cook county, whereby Derby, in consideration of $375 in cash, agreed, in substance, to sell and convey to Kerfoot and Pierson one-half of the real estate bought of Walker, on payment of half of the money Derby had paid down to Walker, and the securing of one-half of the deferred payments by trust deed on said one-half, payable at the same time Derby's payments to Walker matured; said agreement to be consummated on or before the 1st of September, 1867.

It is also shown by the proofs and not denied, that a difficulty arose between the parties, Kerfoot, Pierson and Derby, in regard to the completion of this contract, and that a bill in chancery for a specific performance thereof was prepared by the solicitors of Kerfoot and Pierson, but which was in fact never filed, the matter having been compromised without suit.

So far the facts are undisputed. The complainant contends further that the price for which the land was sold was grossly inadequate and much below the price at which it could have been sold, if due exertions had been made in good faith by Kerfoot & Co., as they were in duty bound to do. Much evidence has been adduced by both parties upon this point. Indeed, the bulk of the evidence taken is upon this question of inadequacy of price, and the neglect or refusal of Kerfoot & Co. to obtain or consider offers from other persons than Derby.

There is really no disagreement between counsel in regard to the principles of law which govern this case; the only difference being as to whether the facts proven by the record make up a proper case for the applications of those principles. The rule of law governing the relations between principal and agent in regard to transactions of this character, is too well known and too familiar to require the citation of authorities. Perhaps it has nowhere been more clearly and concisely stated than in the opinion of the learned Chief Justice Breese of this state, in the case of Kerfoot v. Hyman, 52 Ill. 512. He states the rule as follows: "It is well settled that an agent employed to sell land cannot himself become the purchaser, and he is held to the strictest fairness and integrity, and bound to act in the utmost good faith."

As I have before stated, the defendants, Kerfoot, Pierson and Derby, have each, as required in the bill, answered under oath, and all have broadly and unequivocally denied that there was any agreement between them, by which Kerfoot and Pierson were to have an interest of any kind in the land at the time the sale was made by Walker to Derby; and while they admit the agreement for the purchase of one-half of said land as set forth in the bill, they insist that the said agreement was in fact made some time after the said 19th of March, but before the 30th of May, 1867, when the quit-claim deed was made. It is insisted by the complainant that the portion of the answers setting up the time when this agree-

ment was made is not responsive to the bill. It is true, the answers of the said defendants to the fourth specific interrogatory of the bill only admit that defendants executed an agreement of the tenor effect and date set up in the bill, but it is equally true that the charging part of the bill alleges a corrupt agreement between the parties, Derby, Kerfoot and Pierson, during the negotiation and the sale, and a sale at an inadequate price by reason thereof; and it clearly was the duty of the defendants to answer all the charging parts of the bill. Certainly, the time when Kerfoot and Pierson acquired an interest in the said land was the most material part of the complainants' case, as made by the charges in the bill. The position of the complainant, that the part of an answer of the defendants which states when the agreement was in fact made, is not responsive to the allegations of the complainants, seems to be pressing the question of irresponsiveness to a degree of nicety not justified by the authorities which have been quoted. The complainants in this case had either to prove the allegation upon which they relied for setting aside the sale complained of, by resting upon the prima facie evidence which the written instrument between Kerfoot and Pierson and Derby furnished, as to the time when it was actually executed, or to put in testimony establishing that time as a matter of fact. They have chosen to call testimony, and the testimony they have thus elected to call is that of the defendants themselves. The law is well settled by the supreme court of the United States in regard to the effect of an answer in chancery under oath. In the case of Union Bank of Georgetown v. Geary, 5 Pet. [30 U. S.] 99, the rule was laid down, that the answer of the defendants, called for under oath, if responsive, is conclusive, unless disproved by two witnesses, or one witness and strong corroborative evidence. The same principle is also fully adopted by the same court in Carpenter v. Providence Washington Ins. Co., 4 How. [45 U. S.] 185; Parker v. Phetteplace, 1 Wall. [68 U. S.] 684; Tobey v. Leonards, 2 Wall. [69 U. S.] 423. In this case, the witnesses called by the complainants, namely, the defendants themselves, deny the allegations, pointedly and directly. They state explicitly, that no such agreement as is alleged was entered into by themselves at the time the sale was pending, and not until long after it was consummated, and unless such an agreement was made at the time charged, the complainants have failed to make out their case.

Having, then, failed to prove the case alleged in the bill by the evidence of the defendants themselves, it becomes incumbent upon the complainants to establish the facts alleged by two witnesses, or at least one witness and strong corroborative circumstances. The record fails to show us any witness who has testified in regard to the time when this contract was made, save the defendants, who are called upon to answer under oath, and have answered, stating that this time was long after the sale between Derby and Walker, and long after the time stated in the bill.

There is, then, left on the record, only the presumption arising from the date of the agreement, which is explained away by the answer of the defendants, and which explanation must be accepted as true, and some other circumstances of a somewhat suspicious character, which are relied upon by the complainants as establishing the facts upon which they claim to recover. These circumstances I shall allude to hereafter, but pass from them at present, to say, that I shall assume as an established fact, from the evidence, that the agreement between Kerfoot and Pierson and Derby, which bears date the 19th of March, and which is set up in the complainants' bill, as the fraudulent agreement on which they claim relief, was in fact, made some considerable time after that date, and was so dated for convenience, as stated in the answers.

The material question, then, is, when did the employment of Kerfoot & Co., as agents of Walker, to sell this land, cease? The evidence shows, that they rendered their bill and were paid by Walker for their services on the 19th of March. What was the duty which they had undertaken to perform? Obviously, according to the statements of the bill, to find a purchaser and effect a sale of the land in question. Had they not done this? They had brought Derby and Walker together. The terms of the sale had been agreed upon, the deed from Walker to Derby had been executed. Derby had made his cash payment of the purchase money to Walker, and had executed his notes and trust deed securing their payment. The trust deed had been delivered and recorded, and no act that I can think of remained to be performed by Kerfoot & Co., as real estate agents, in connection with the transaction. It is true they still held Derby's notes, which were not to be delivered to Walker until he delivered to Derby the quit-claim deed of himself and the other legatees of Hopkins; but were they, for this purpose, anything more then mere stake-holders?

It was no part of their duty or function as agents for Walker to hold his pledge that he would keep his promise and word with Derby in reference to this quit-claim deed. But much of the importance of this relation assumed by them in connection with the holding of their notes, depends, perhaps, upon the relation which the quit-claim deed bears to the title itself; and in order to fully appreciate this, it becomes necessary to review the testimony for a moment, bearing upon the capacity in which Walker was acting, and his own relations to the title to the land he was selling. It will be remembered that the will gave Walker, as executor, the most ample power to sell and convey the real estate of the testator. The bill alleges, and the testimony shows, that Walker and his wife, Maria, were each entitled to one quarter of the said Chicago land, but the evi-

dence of their title was not then on record in the recorder's office of Cook county, and Derby and his counsel, Monroe, both testify that they had no idea of the existence of such interest at the time of the purchase.

Walker's wife was a legatee under the will, and the presumption is, that when Walker spoke of his interest in the land, he was understood to refer to the interest of his wife, under the will, rather than to the secret interest manifested by the unrecorded deed between himself and Hopkins. Pryor's evidence shows that the two acres, and the two and a half acres, alluded to in the will of Hopkins, as belonging to Walker and wife, pertained to another tract of land. I consider this fact as clearly proven, that the allusion in the will to the interest of Walker and wife in the tract of land near Chicago, is to another parcel of land purchased by Pryor and Hopkins from John Wentworth, the title to which had been forfeited. Walker testifies that it had become necessary to raise $10,000 out of the property of the estate, to meet pressing liabilities, and he came to Chicago to sell the property, as a part of the estate. His previous correspondence with Kerfoot alluded to the property as the property of the estate. The abstract of title exhibited by him, showed the title in A. F. Hopkins, deceased, and no one else. There was no evidence of record, or in the abstract, that Walker or his wife had any interest or title in the property which Walker proposed to sell. I presume that in the negotiation with Kerfoot and Derby, Walker made the same explanation, in regard to the land alluded to in Hopkins's will, which Pryor has made in his deposition, showing and stating in that explanation, that the land mentioned in the will, as owned by Walker and wife, was not a part of the land that he was then selling. When Walker had agreed upon the terms of sale with Derby, he signed a memorandum agreement, on the 6th of March, as the executor of the estate of Hopkins. His deed to Derby, of the 16th of March, purports to convey the entire estate, under his power as executor of the will. He took the notes for the purchase money, as executor, and that, too, in such amounts that they could not be divided conveniently between himself and wife, in their own right, and the estate of Hopkins, but took them in gross amounts, without reference, apparently, to any interest which he and his wife now claim to have had in the property, at the time of sale. Moreover, Mr. Monroe, an able and experienced real estate lawyer, in this city, passed upon the title, as shown by the abstract, and found the title as shown by the abstract to be in A. F. Hopkins. Could parties dealing with Walker, have supposed he was dealing in any other capacity than as executor, and that the estate for which he was executor, owned the entire property he was selling, and that the only party to be benefited by the sale, was the estate of Hopkins? It is to be borne in mind that Walker was in no need of money for his own purposes; the only pretext for selling the property was to raise money for the estate. Walker says, that he spoke to Kerfoot about the interest he and his wife had in the land, and asked if a deed from them would not be necessary, to which Kerfoot replied, that the quit-claim deed would make that all right. This was evidently at the end of the transaction, after the quit-claim deed had been agreed upon, and was not thought of or mentioned by Walker, until the deed of Walker had been prepared, and, in fact, was probably executed. In the light of these facts, I can but believe that the quit-claim deed insisted upon by Derby was a mere matter of super-caution on his part, induced, probably, by the experience of himself or others in dealing with executors and trustees, and the numerous litigated cases that had been developed in Chicago in reference to that class of interests.

To my mind it is perfectly clear, under the evidence, that the parties all considered the title made by Walker as executor to be ample. Derby insisted upon the quit-claim deed as an act of ratification and estoppel against the legatees; and Walker, on his part, on its being suggested to him, promptly agreed to obtain it. The notes were left in Kerfoot's hands because Walker was willing to give a guarantee or pledge for the fulfillment of his promise in that regard, and because he had had some conversation in which suggestions had passed between himself and Derby, that Derby might soon be in a condition to cash the notes, or some part of them. Walker had, therefore, no occasion to take the notes away. If he expected to raise money on them, by hypothecation or otherwise, he could best do so in Chicago, where Derby was known. It was, therefore, convenient for him to leave these notes in the hands of Kerfoot as an earnest of his willingness to comply with the terms exacted by Derby.

Concluding, then, that this quit-claim deed was not deemed necessary by the parties to pass the title, I can but believe that Kerfoot and Pierson's agency terminated upon the execution and delivery of the deed from Walker as executor, and that the parties so treated and deemed it. When the agency was at an end they had the same right, as against Walker, to deal in this property as any other persons. The mere fact that they had been engaged as agents for Walker in negotiating the sale to Derby did not estop or preclude them, for all time, from making an advantageous purchase of the property. After the transaction between Walker and Derby was at an end, and their relations as agents ended, there was nothing more to be done by Kerfoot and Pierson in reference to the matter. They had found a purchaser. Walker had, by the money raised from the sale, relieved himself of the pressing neces-

sity which brought him to Chicago. He had given a deed ample, under the power invested in him as executor, to pass the entire property, and it seems to me that there was no longer anything for Kerfoot and Pierson to do in the transaction as agents for complainants in regard to the sale which they had undertaken to obtain for them. Therefore, their agency was at an end. They had fulfilled their agreement and had performed all the duty which the law would imply against them from the terms of their employment. They had been paid, which is usually accepted as the best evidence that the undertaking had terminated and the relations ended.

In disposing of this question as I have, I have, in my estimation, substantially disposed of the case, for, unless the complainants show that Kerfoot and Pierson acquired their interest in the property during the continuance of their agency, the whole fabric of the complainants' case falls; but, as much labor has been bestowed by the counsel, and much stress laid upon circumstances shown in the evidence, which they claim establish the allegations of the bill, in regard to the corrupt agreement charged against the principal defendant, I must, in justice to the counsel and to myself, take a few moments to review the testimony.

In this branch of the case the evidence as to the inadequacy of the price of the property is important mainly as a circumstance tending to show the bad faith of the agent in sacrificing his principal's property for his own purposes. I have, therefore, looked carefully over the evidence as to the point of inadequacy of price, and must say that I fail to find in the record any convincing proof of such inadequacy. It is true that some of the witnesses for the defendants placed a larger estimate upon the value of the property at the time it was sold to Derby than what it was actually sold for; but we must bear in mind that this property had no fixed market or regulated value. Its value, as stated by several of the witnesses, both for the complainants and defendants, was what is termed speculative or prospective, depending upon the growth and development of the city to which it lay contiguous, and also depending upon the fact whether that growth should be in the direction of this property. Here was a growing city. This property lay near the southern limits. It was a problem to be solved only by time, whether the city would expand, if at all, in the direction of this property, or whether its growth would be to the west or to the north, where there was an unlimited area. It was, therefore, a doubtful proposition whether this property would or would not advance in value. Was it not, looking at it from the standpoint of witnesses or purchasers at the time of this transaction, as much a matter of probability that it would decline in value as that it would advance? I cannot shut my eyes, nor do I think the court ought to do so, to the fact that the unimproved suburban property of the city of Chicago has, within a few years, declined to such an extent as to be almost valueless, or, at least, utterly unsalable, and then advanced within a short time so as to be in great demand at unprecedented prices.

The witnesses on the part of the complainants who testified as to the largest values are Andrews and Pryor; and in regard to these witnesses, I must be allowed to say, that I can but believe, from their testimony, that their judgment as to the value of this land in the early part of March, 1867, is largely colored by subsequent transactions, and the advance in the property, which no one at that time had any valid reason for anticipating. So, too, of several of the other witnesses on the part of the complainants, who fixed the value upon the property; and I might say, in this connection, that the value which they fixed is not so largely in excess of the price at which the property was sold as to strike the mind, at first blush, as grossly inadequate.

The rule laid down by the courts in determining this question of adequacy or inadequacy of price, is, that the price must be so small as to strike the mind, in the light of the testimony, at first blush, as grossly inadequate, and raise the conviction that the property was sacrificed in the market for a price less than its actual value. Let us review this testimony for a moment. Andrews says that he would have paid $1,000 an acre, and perhaps $1,200 an acre, for that portion of the land lying east of State street, and Pryor fixes the value of the land in the light of his subsequent inquiries in April, and some correspondence which he had in February, at $1,500 per acre. Pryor, however, between April and June, according to his own testimony, sold his own land, in the same subdivision, at less than $1,200 per acre; and Andrews, while he says that he would have purchased that portion which lies east of State street for $1,000 per acre, and perhaps would have gone higher, at the same time admits that his ability to purchase depended upon whether he should succeed in enlisting a relative of his in the venture. So that the testimony of these witnesses—and they are the only ones whose testimony is relied upon strenuously on the part of the complainants—fails to show that they, if they had had the money, would have paid much, if anything, over $1,000 for the portion of the land lying east of State street; and all the testimony concurs in establishing the fact, that the land lying west of State street, being an undivided interest, and being in a less desirable locality, would have brought a much lower price in the market. It will be borne in mind that this land sold for about $875 an acre in gross, including the streets.

Now, we must also bear in mind that Walker was here for the purpose of raising money to meet the liabilities of the Hopkins estate; that it was desirable for this purpose not only that he should sell the land for a good price, the

highest he could obtain in the market, but that he should also sell it to a purchaser whose paper would have a marketable value here or wherever he should have occasion to raise money; and I think, in view of the fact that Derby was shown to be a man of large wealth in this community, Walker would naturally have considered him a desirable purchaser, and justify himself for deducting $100 or $150 per acre from a speculative price.

In the light of all these circumstances, taking complainant's testimony alone, it seems to me that the proof does not show any such gross inadequacy of price as to raise the presumption of unfair dealing. But to meet this testimony on the part of the complainant, the defendants introduce the testimony of six witnesses, all of whom are well known to the court, and in whose safe, cautious business habits and judgments the court has much confidence. All of them testify, substantially, that this property was not worth in the market any more than Derby paid.

In connection with this testimony, I will also allude to the fact that Walker was himself present and negotiating this sale, and I doubt whether the rigid rule in regard to the relations between agents and principals should apply with its full force to a case where the principal is on the ground and has an opportunity to understand the situation for himself. It is true that this furnishes no reason why Kerfoot should enter into a corrupt and secret agreement with Derby by which they should acquire an interest in the property unknown to Walker, and while acting as his agent; but upon the adequacy or inadequacy of price as a circumstance tending to prove this secret agreement or establish this theory on the part of the complainant, it seems to me a pregnant fact, because, Walker being here, and having the means of making inquiries touching the value of this property, must be presumed to have acted as much upon his own judgment as upon that of Kerfoot, in regard to whether it was best for him to make the sale of this property at the price which Derby was willing to buy it for, or forego the sale and make provision for the necessities of the estate out of Mobile property. He was to be the judge. He did not rely upon Kerfoot and Pierson in regard to the expediency of selling at the price which Derby offered. He could have repudiated Derby's offer and refused to sell the property at the price offered. He was not obliged to accept the proposition unless his judgment so dictated.

In connection with the same class of testimony, I must also consider the fact that it is alleged in the bill, and there is some proof in the record to show, that Kerfoot did not communicate to Walker all the offers which had been made to him. It is alleged that Andrews had made an offer for the purchase of this property, and that Kerfoot did not communicate that to Walker. In reference to the testimony in regard to Andrews' offer, it will be borne in mind that Walker was anxious to sell for cash; that Andrews left the city upon a problematical and doubtful suggestion that he would purchase, or might purchase, if he could get a relative of his interested with him, thereby clearly conveying the idea to Kerfoot's mind that his purchase, or ability to purchase, was contingent upon what should transpire when he should be able to see the person from whom he expected to raise money; and I can but look upon the testimony of Andrews, in that regard, given at this late day, as to his intentions and purposes at that time, as being given more in the light of his judgment, in looking backwards from the present, rather than in looking forward from the time when the land was sold.

Andrews had made some investments in the locality of this property. He says that he was desirous of purchasing it, but the evidence shows that there was an area of many thousand acres of land adjoining and contiguous to the southern limits of this city, all in the market, all speculative property, all having only a prospective value, and the mere fact that twenty or thirty acres of this land was purchased by some one else in the absence of Andrews, when there were other tracts that he could have purchased for the same price, or even at a lower price, does not, of itself, seem to me to prove that Andrews would necessarily, if he had succeeded in interesting his relative and returned to Chicago, have purchased it at any higher price than Derby did, when he found himself brought in contact with Walker, or became possessed of the information that Walker was under the necessity of selling and was determined to sell at some price or other.

But it is alleged, also, as another circumstance tending to show this fraudulent combination on the part of these parties, that Kerfoot and Pierson's interest in the property was concealed from Walker. The force of this circumstance falls to the ground as testimony, when I have disposed of the main facts in the case, that this purchase was not made until the termination of Kerfoot and Pierson's agency in the transaction. If they had the right to make the purchase, they were then under no obligation to expose their transactions in a business matter to Walker or any other person. They had the right, if they saw fit to do so, to keep it concealed, although there is no evidence, to my mind, of any concealment other than what other business men would have made under similar circumstances.

It is again claimed that the bill that was prepared by Kerfoot and Pierson cuts an important figure as evidence, and that the statements in that bill are conclusive evidence as admissions of parties to show that this secret agreement existed between Derby and Kerfoot from the inception of the negotiations with Derby, and the complainant's counsel have seized upon the allegations in that bill, that "there was a verbal agreement which was subsequently, on the 19th of March, re-

duced to writing," as unanswerable evidence in support of this case. It was admitted on the trial, and also appears in evidence, that this bill was never filed; that differences arose between the parties, and the matter was placed in the hands of counsel by Pierson, and the bill drawn. It never was signed by Kerfoot or Pierson, and, in fact, Kerfoot was not in the United States at the time the bill was drawn. It was made in antagonism to Derby's interest, for the purpose of making out a case against him. And the bill is evidently, as against Pierson, nothing but the work of counsel, without ever having been revised or corrected, or especially adopted by the complainants therein, or either of them. I therefore attach no importance to this bill as a matter of evidence in this case.

It is true there are some circumstances in the case which might go far to raise suspicions in the minds of the complainants that the dealings with them had not been entirely frank.

The date of the agreement, and the fact that the information came to Walker from Pryor, and perhaps from other interested parties, shortly after the sale, that he had not been fairly dealt with, were calculated to raise a suspicion in the mind of Walker; but where is there upon the record any conclusive and tangible proof of which the mind of the court can take hold, as satisfactorily establishing the main allegations in this bill, as against the presumptions of innocence which the law raises in favor of parties thus charged, and their denial under oath of the charges against them. So far as the present price of this property and its rise in value or price after the sale are concerned, they are circumstances which can have and should have no weight with the court. It is a part of the history of this city, and the court cannot close its eyes to the fact that there were extraordinary rises in real estate in and about the city between the 1st of March, 1867, and October, 1868, and it is undoubtedly true that this property partook of that advance, so as to increase fivefold, if not more, in that interval. But the main question really is, Was this property sold for less than its market value at the time of the transaction between Walker and Derby, and was it so sold at the corrupt instance of Kerfoot and Pierson?

In view of all the proof in the record, I am compelled to say that there is not sufficient evidence to satisfy my mind that it was at that time worth any considerable sum more than the $875 which Walker realized per acre for it. It is true, some witnesses say that they might have paid $1,000 or $1,200 an acre; but is it to be presumed that if these witnesses had been brought in contact with Walker, and found that Walker was determined to sell, they would have paid him more than Derby did? If we are to disturb real estate transactions of this city, because of unprecedented and unparalleled advances in price immediately after the sale, there is hardly a title here that could withstand the test of a judicial investigation.

In view, then, of all these considerations, I shall find for the defendants and dismiss the bill.

This case was carried by appeal to the supreme court, and the decision of the court below affirmed by a divided court, at the December term, 1871, no opinion consequently being filed.

WALKER (FARRAR v.). See Case No. 4,679.

Case No. 17,069.

WALKER v. FORBES.

[3 App. Com'r Pat. 428.]

Circuit Court, District of Columbia. Jan. 3, 1861.

PATENTS FOR INVENTIONS—PRIORITY OF APPLICATIONS—LACHES—EXAMINATION OF WITNESS—WAIVER OF NOTICE.

[1. One who was present at the examination of witnesses by consent cannot complain that he was not notified of such examination.]

[2. In an interference case it appeared that one party made a model of the invention in dispute before the other made any model or drawing thereof, though the latter had previously described it verbally to three persons. *Held*, that the former first perfected the invention.]

[3. W. perfected his invention by May, 1859, and then made a drawing thereof, but did not apply for a patent till July, 1860, nearly a year after F. had applied for a patent for the same invention, and after a patent had been issued to F. No excuse was given by W. for the delay. *Held*, that W., though the first original inventor, had no rights in the invention as against F.]

In the matter of the interference between William H. Walker, applicant for a patent, and Elias Forbes, patentee, for improvements in the capstans to drain ploughs.

DUNLOP, Chief Judge. The invention in this case claimed by both parties is admitted to be the same, and the questions to be decided are, 1st, who was the first original inventor, and if Walker was, 2nd, whether by neglect to apply for a patent till a patent had been granted to Forbes, also an original inventor for the same invention, Walker has not lost his right now to claim a patent. But a preliminary objection to evidence is first to be settled. Mr. Alexander, of counsel for Walker, insists that the depositions of Jas. Cleeland and David Hull, taken before Mayor Creighton, on the 24th Sept., 1860, must be excluded, because no notice was given to Walker, by Forbes or the officer taking the depositions, and the officer did not certify and annex the notice when he returned the depositions to the patent office. This question was before me in the case of Gibbs v. Ellithorp [Case No. 5,383], decided by me, on appeal from the patent office in Sept., 1859. In that case to which I now refer I then said: "The force of Low's evidence relied on by the commissioner is felt

by Gibbs' counsel, and it is objected to, as not taken according to the rules of the office. No notice, it is said, was served on Gibbs, and no proof of service, certified by the officer taking the deposition, and returning it to the office. The object of notice is to bring the adverse party before the examining officer, and to give him the opportunity, if he pleases, to cross-examine the witnesses. But if the adverse party voluntarily comes, and is present at the examination, and cross-examines, notice and proof of it are of no account. The substance is obtained, and they are mere form, technicality, and nothing more. The 90th rule of the office applies to and covers such formal defects."

In the present case, Walker and his counsel were both present at the examination of the witnesses, and, besides, the depositions were taken by consent; and these facts are certified by Mr. Creighton, in his return. If there was any defect, it was cured by consent. "Consensus tollit errorem." I, therefore, think, these depositions are properly in the case. They prove that Forbes in March or April, 1859, showed them a model representing the invention in dispute. Forbes therefore, as early as March or April, 1859, had given physical form and shape to his "conception." It no longer rested in "idea" only. Walker, on the contrary, although he had conceived the same "idea," and had described it, perhaps imperfectly, in Oct. or Nov., 1858, by word of mouth, to Thomas Speelman, Thomas Townsley and J. Bromagen, does not appear even to have made a drawing earlier than six or seven months after Oct. or Nov., 1858, which would make his drawing posterior in date to Forbes' model, and would show that Forbes had first perfected the invention. Assuming however that Walker first conceived the "idea," and used reasonable diligence to perfect it, by the drawing in May, 1859, and thereby has a right to carry back his invention to Oct. or Nov., 1858, and thus to antedate Forbes, still it seems to me clear in law he must be postponed to Forbes. Forbes, upon this assumption, though a subsequent original inventor first perfected the invention, and applied for and obtained a patent, and as the most diligent of the two, cannot now be superseded by his more tardy and negligent competitor. Walker, according to his own pretensions, had perfected his improvement as early as Oct. or Nov., 1858, and certainly in May, 1859, when the drawing referred to and marked with Speelman's name was made. He did not apply for a patent till the 31st July, 1860, more than a year after his perfected invention, nearly a year after Forbes' application, and not until after Forbes had got his patent. He has given no sufficient nor any reason, for the delay, and for so long withholding from the public the fruits of his invention; and he seeks now to supplant Forbes, who, though he may be a subsequent original inventor, promptly brought the invention to the notice of the office, after he had succeeded in perfecting it. On this subject, of Walker's delay, and its effects, on his rights as against Forbes, I refer to the case of Kendall v. Winsor, 21 How. [62 U. S.] 328, 329, and the case therein cited.

For the reasons above stated, and also for those so clearly and forcibly set forth by the examiner in his report of the 20th Nov., 1860, it seems to me the office properly rejected the application of Walker, for a patent. I do therefore, this 3rd January, 1861, overrule the applicant's, Walker's, reasons of appeal, and do affirm the judgment of the commissioner of patents, of date the 20th Nov., 1860. I herewith return to the office all the papers, models, and drawings, with this my opinion and judgment, this 3rd January, 1861.

WALKER (FOURTH NAT. BANK v.). See Case No. 4,992.

Case No. 17,070.

WALKER v. GRAND TRUNK RY. CO.

[2 Hask. 96.] [1]

Circuit Court, D. Maine. Sept., 1876.[2]

MASTER AND SERVANT—NEGLIGENCE OF RAILROAD COMPANY—FELLOW SERVANTS—NEW TRIAL.

1. A railway company managing its trains by telegraph, failing to provide a suitable telegraph line, so equipped with telegraph stations and operatives as to properly and safely control the movement of its trains, is guilty of negligence, and responsible to one of its train servants for injuries sustained thereby.

2. After verdict for plaintiff, the court will not grant a new trial for defects in a declaration that might have been amended, when substantial justice has been done.

3. A railway company, guilty of negligence that caused an injury to a servant, cannot defeat his action for damages by showing that a fellow servant was also guilty of negligence in the premises.

Case [by Nathaniel Walker] to recover damages for personal injuries sustained while employed upon one of defendant's trains, by a collision caused by the defendant's negligence. The case was tried upon the general issue, and the plaintiff had a verdict in his favor, whereupon the defendant moved for a new trial because the verdict was against law and evidence.

George F. Holmes and Almon A. Strout, for plaintiff.

John Rand, for defendant.

Before CLIFFORD, Circuit Justice, and FOX, District Judge.

FOX, District Judge. In March, 1873, the defendant was the lessee of the railroad from Island Pond to Portland, and the plaintiff was in their employment on the train for the distribution of ties for the repairs of the road. This train was known as the "tie train," had its conductor and engineer, but its movements

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

[2] [Affirmed in 154 U. S. 653, 14 Sup. Ct. 1189.]

were directed and controlled by Chevalier, the train dispatcher at Island Pond, by means of the telegraph. On the 25th of March, this train with the plaintiff left Gorham for South Paris with orders to work between these places distributing ties, keeping clear of all regular trains, and arrived seasonably at Gilead before 9.50. The same day at 4.30 a. m., freight train No. 6 left Portland for Island Pond. Its movements should have conformed to the time tables of the company, but it fell behind and was thirty minutes late at Bryant's Pond. These two trains came into collision near West Bethel, about five and one-half miles from Gilead, and the plaintiff sustained serious personal injuries for which he has brought the present action. A verdict has been rendered for the plaintiff, which the defendant moves to set aside as against law and evidence.

To a correct understanding of the cause, some explanations of the distance between the various stations on the road from Gilead to Bryant's Pond, and the arrival and departure of the trains is important. Gilead is seventeen miles west from Bryant's Pond, with three stations intervening; viz., West Bethel, about six miles from Gilead, then Bethel, three and seven-eighths miles from West Bethel, next Locke's Mills, about three miles east from Bethel and four and one-half miles west of Bryant's Pond. There was telegraph communication with but one of the stations between Gilead and Bryant's Pond, Bethel. Chevalier, called by defendant, testified that he was the chief train dispatcher at Island Pond, and as such had charge of the trains, made the crossing of regular trains when late, regulated the movements of the trains by telegraph, and was provided at Island Pond with all the means requisite to transact the business; that, by the seventeenth rule of the road, "the stoppage of trains having the right of track must invariably be secured before the crossing train is dispatched, or the track considered to be clear;" that on the morning of March 25th the telegraph operator at Gilead, at 9.50, reported to him the tie train then at Gilead and waited orders; Chevalier replied to him, "Wait a minute;" then telegraphed to Bryant's Pond, who replied, "Aye, aye;" "I commenced to give an order for Bryant's Pond for No. 6 train and Bryant's Pond operator stopped me and reported No. 6 had started at 9.50; then I telegraphed to Bethel and continued doing so for twenty-five minutes; got no answer till 10.22; then I inquired where No. 6 was; Bethel replied, gone, reported No. 6 off at 10.15; had previously sent an order to tie train at Gilead at 10.15 to cross No. 6 at West Bethel, but told the operator at Gilead to hold orders a minute; told him to let the tie train go; he reported it away at 10.20. No. 6 left Bethel at 10.15, having right of way over tie train; I gave no notice to No. 6 that tie train was to cross them at West Bethel; collision was caused by my negligence in not securing No. 6 before I gave the order to the tie train; I violated above rule; with the business of the Grand Trunk a telegraph is necessary at West Bethel; the telegraph operator was the ticket agent and did all the work at Bethel; I understood he was absent twenty-five minutes in freight shed, out of his office at the time." The writ contains two counts; the second charges that by reason of the fault, negligence and carelessness of defendant in not providing careful and suitable superintendents, * * telegraph operators and other servants, * * and by reason of the fault, negligence, carelessness and mismanagement of said corporation and its superintendent, * * train dispatchers, telegraph operators and other servants, * * in wrongfully and carelessly neglecting telegraph to warn and instruct the servants of said company, having possession, charge and control of another train belonging to said defendant, &c., and by other negligent acts and omissions of said defendant the collision was occasioned, &c.

At the trial, the court instructed the jury, among sundry instructions not excepted to, that "the defendant, if it undertook to manage and conduct the business of running its trains by telegraph, was bound to have a proper and fit telegraph line for this purpose, with a reasonable number of telegraph stations and operators to properly conduct and control movements of the trains; and it is for the jury to decide whether this duty was performed by the defendant, or whether it was guilty of negligence and want of ordinary care in this respect, by not having the requisite number of telegraph stations and operators for conducting the business of the road. If it was guilty of such negligence and want of ordinary care, and that occasioned the injury which otherwise would not have occurred, the jury would be authorized to find a verdict for plaintiff." Although excepted to at the trial, the correctness of this ruling was conceded at the hearing on the motion for a new trial by the learned counsel for the corporation, and it is sustained by all the authorities, and was merely the application of the rule of law, that when injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of the business, the master is accountable. Snow v. Housatonic Railroad Co., 8 Allen, 441. It is now argued that such is not the ground of action as set forth in the writ, and therefore this instruction was improperly given, and for that cause a new trial should be had; that the claim as made in the writ was for negligence of the servants of the company, and not for injuries occasioned by its own negligence. The second count, of which an abstract is before recited, does most clearly charge that the injury was occasioned by the negligence of the corporation as well as by that of its telegraph operator and other servants; and while the specific negligence of the defendant is not as sharply defined in the writ as could have been desired, yet in that, it is set forth as a ground of complaint, and after verdict is sufficient. It does not any where appear that this objection was taken at the trial; and if it had been, and an amendment request-

ed, it should have been allowed under all the circumstances disclosed by the evidence. For a technical objection of this character, a new trial should not be granted when justice has been done, and the objection could have been removed by an amendment before the new trial was had. The instructions given being unobjectionable, a new trial can only be granted because the evidence was not sufficient upon this point to authorize the verdict. A careful review of the testimony satisfies the court that the finding of the jury in this respect was well warranted by the evidence.

The question for the jury to pass upon was, whether this company, conducting its running of trains to a great extent by telegraph, had provided the requisite number of telegraph stations and operators for its business. From Gilead to Bryant's Pond is seventeen miles, with three stations intervening, at only one of which, Bethel, there were any facilities for giving the movement of trains by telegraph; and at that place, the jury was warranted in finding that the various duties which the operator there had to perform, of ticket seller, freight agent, &c., as well as telegraph operator, were such that he could not properly discharge them all, and thus that the company were requiring of him more than he could attend to, so that it had failed to provide a suitable operator at that point, leaving the whole distance of seventeen miles unprotected in this behalf. Admitting that the company was negligent in this respect, it is claimed that the negligence of Chevalier, in not detaining the tie train at Gilead according to rule 17, but giving it the right of way, was one cause; that train No. 6 was also a cause of the injury; that there was double negligence, that of the defendant as well as of its servant, who was a fellow servant of plaintiff; and that the plaintiff cannot recover for the injury occasioned by the negligence of a fellow servant. The correctness of this latter proposition, or its applicability to this case, we do not propose to consider, as in our view, contributory negligence to defeat a right of action must be that of the party injured, which it is not claimed existed in the present case. Paulmier v. Erie R. Co., 34 N. J. Law 151. Motion overruled. Judgment on the verdict.

[A writ of error was sued out from the supreme court, where the judgment of this court was affirmed. 154 U. S. 653, 14 Sup. Ct. 1189.]

Case No. 17,071.

WALKER v. HAWXHURST.

[5 Blatchf. 494.] [1]

Circuit Court, S. D. New York. Sept. 18, 1867.

PATENTS — MARKING UNPATENTED ARTICLES PATENTED—ACTION FOR PENALTY—REVIEW ON APPEAL.

1. Under the 5th section of the act of August 29th, 1842 (5 Stat. 544), a person who marks as patented an unpatented article, is not liable to the penalty therein prescribed, unless he does so knowing that he has no right to do so, and with the intention of deceiving the public.

[Cited in Oliphant v. Salem Flouring Mills, Case No. 10,486; Winne v. Snow, 19 Fed. 509.]

2. In an action for the penalty, the question as to such intention is one for the jury.

[Cited in Oliphant v. Salem Flouring Mills, Case No. 10,486.]

3. The question of fraud or deceit, on a trial, as a matter of fact, involves an inquiry of much latitude, and an appellate court will allow considerable indulgence in revising questions as to the admission or rejection of evidence; and the error must not only be striking, but must necessarily have been calculated to mislead the jury, before the verdict will be interfered with.

[Cited in French v. Foley, 11 Fed. 807.]

This was an action, founded on the 5th section of the act of August 29, 1842 (5 Stat. 544), to recover a penalty for marking an unpatented article with a mark indicating that it was patented, for the purpose of deceiving the public. The defendant [Jotham W. Hawxhurst] had a verdict, and the plaintiff [Sylvanus Walker] now moved for a new trial.

Charles W. Prentiss, for plaintiff.
George W. Lord, for defendant.

NELSON, Circuit Justice. A new trial is urged principally on the ground of an objection to the charge of the court. The counsel for the plaintiff requested the court to charge, that if the jury believed that the defendant intended the public to understand, by the words and figures he caused to be put on the article, that he had got a patent for it, he was liable for the penalty. The court refused so to charge, but charged, that if the defendant used the marks, knowing he had no right to, and with the intention of deceiving the public, then he was liable, but, if he used them, supposing he had a right to, and with no intention to deceive the public, then he was not liable. I am of opinion that the court did not err in refusing to charge as requested by the counsel. The request leaves out altogether the element of fraud and deceit, which is clearly, and even in terms, made essential to bring a party within the penalties of the statute. According to the interpretation of the counsel, the simple act of marking the article, indicating that it was patented when it was not, would be sufficient, because, of necessity, the party must mean and intend that the public should understand what he has thus explicitly expressed. But this is not the statute. The marking must not only give the public to understand the fact of a patent, but the act must be done malo animo, with an intent to deceive; and this ingredient of the offence, which is essential to make it complete, must be left to, and be found by, the jury. The court, therefore, was right in submitting it to them.

The remaining questions in the case arise out of the admission and rejection of evidence. The question of fraud or deceit, as a matter of fact presented in a case, involves an inquiry

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

of much latitude and scope on the trial, and must generally be directed by the good sense of the judge, in respect to the bearing of the facts and circumstances relied on, and concerning which it is oftentimes difficult to apply any fixed rules. Very considerable indulgence is, therefore, allowed by the appellate court, in revising these questions. The error must not only be striking, but must necessarily have been calculated to mislead the minds of the jury, before the verdict will be interfered with. I have looked carefully into these questions of evidence, and am of opinion that no one of them, within the above observations, would justify me in granting this motion. The motion for a new trial is denied.

Case No. 17,072.

WALKER v. HUNTER.

[5 Cranch, C. C. 462.] [1]

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

REPLEVIN—NON PROS—VERDICT.

1. The court will not, in replevin, order a non pros at the motion of the defendant after the jury is sworn.

2. In replevin the plaintiff may recover according to the extent of his title proved.

3. Form of verdict when the plaintiff proves a title to a part only of the goods replevied.

Replevin; pleas, non cepit, and property in the defendant. The defendant [Alexander Hunter], as marshal of the District of Columbia, took the goods in execution as the property of Richard Ballard. The plaintiff [Dorcas Walker] claimed under a deed of trust to the plaintiff, dated June 19, 1834, to secure her about $900, due upon two promissory notes of the same date. By the terms of the deed, the property was to remain in the possession of Ballard, until the plaintiff should think proper to take possession of it to execute the trust.

After the jury was sworn, and the plaintiff had adduced her evidence, Mr. Morfit, for defendant, moved the court to order a non pros, because the plaintiff had shown title only to part of the goods replevied.

But THE COURT (THRUSTON, Circuit Judge, absent) refused.

Mr. Bradley, for plaintiff, contended that the plaintiff may recover as much of the property as he proves title to; and that the jury should in their verdict specify the property to which the plaintiff has made title, and the value thereof, and of the goods replevied, and assess the plaintiff's damages. Rogers v. Arnold, 12 Wend. 30; 2 Evans, Harr. 342, No. 152, and No. 153, for the form of the verdict.

The jury found the following verdict: "We do say that the property in the declaration mentioned was taken by the defendants; and we further say that, as to the goods and chattels in the declaration mentioned, except one cane-seat rocking chair, two sets of castors, one work-stand, one side table, two foot-stools, and tray and snuffers, the property in them was in the plaintiff, as she hath alleged, and the value of the said goods and chattels is $413.75, and we assess her damages by occasion of the premises to the sum of ten dollars; and we further say the property of the said cane-seat rocking chair, two sets of castors, one work-stand, one side table, two foot-stools, and tray and snuffers, was not in the said plaintiff as she hath alleged, and the value of the same is seventeen dollars and fifty cents."

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

WALKER (JENKINS v.). See Case No. 7,275.

Case No. 17,073.

WALKER v. JOHNSON.

[2 Cranch, C. C. 203.] [1]

Circuit Court, District of Columbia. June Term, 1820.

NOTES—ILLEGAL CONSIDERATION.

A note given for the assignment of the time of an apprentice, being for an illegal consideration, is void.

Assumpsit [by Joseph Walker against Joseph Johnson] on a promissory note, given in consideration of the assignment of the time of an apprentice.

Mr. Key, for defendant, contended that the assignment, being unlawful, was not a sufficient consideration to support the action upon the note.

Mr. Jones, contra, contended, that although the assignment was void, yet the defendant had enjoyed the services of the apprentice, and was bound in conscience to pay the note.

THE COURT (THRUSTON, Circuit Judge, contra) was of opinion that, the assignment being void, there was no consideration for the note.

See Act Md. 1793, c. 45, § 11, which authorizes an assignment of the time of an apprentice, for the benefit of the widow, upon the death of the master.

Case No. 17,074.

WALKER v. JOHNSON.

[2 McLean, 92.] [2]

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

EXECUTORS AND ADMINISTRATORS, ACTIONS AGAINST—PLEADING—PLEA AND REPLICATION.

1. Where a statute provides that an executor or administrator, if the estate be insolvent, may institute suit before a probate court, and, by giving notice, compel the creditors to exhibit their claims, to be adjudged and paid pro rata; and that no suit shall, afterwards, be brought against the executor or administrator, unless

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

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

the plaintiff alledge that such executor or administrator has been guilty of fraud, negligence or waste, such allegation, in a subsequent suit, must be contained in plaintiff's declaration.

2. The declaration must show a legal right.

3. Two affirmative facts in a plea and replication may be so contradictory, the one to the other, as to make an issue.

4. As, where the plea averred diligence in the prosecution of a suit, and the replication charged negligence.

5. In such case the replication would have been more formal if it had negatived the affirmation of diligence, in the plea, and concluded to the country.

6. The replication, in charging negligence, and concluding with a verification, is wholly irregular, and can not be sustained.

At law.

Fletcher & Butler, for plaintiff.
Mr. Morrison, for defendant.

McLEAN, Circuit Justice. This action was brought to recover the amount of a promissory note, given by Kinnard in his lifetime. The defendant pleaded that, the estate being insolvent, he instituted a proceeding before the probate court of the state, of the proper county, under the statute, and that the plaintiff [John R. Walker], having been notified, became a party to those proceedings, which are still pending; and the defendant avers that he has prosecuted the same with diligence, and, without fraud or waste, discharged his trust. To this plea the plaintiff replied, that the defendant had been guilty of negligence, in prosecuting the suit in the court of probate, and concluded with a verification. To this replication the defendant demurred specially. The 22d section of the act to organize probate courts, &c., provides: "If the personal and real estate shall be insufficient to pay the debts, the administrator may make application to the court of probate, exhibiting certain inventories, and the court is required to give notice to creditors to file their claims, which are to be duly adjudged and paid, so far as a proportionate distribution shall go. And, from the date of filing the complaint, no suit or action shall be brought or sustained against such executor or administrator, unless waste or negligence or fraud, in the discharge of the duties of his trust, as such, be alledged against such executor or administrator; and if any such suit or action be brought after the filing of such complaint, the plaintiff, complainant or claimant, alledging such fraud, negligence or waste, and such plaintiff, complainant or claimant, shall fail, upon the trial thereof, to establish such fraud, negligence or waste, against such executor or administrator, such plaintiff, complainant or claimant, shall pay the costs of such suit or action, although he may recover a verdict, decree or judgment, against such executor or administrator; for which costs, such executor or administrator shall have judgment." The court of probate, under this statute, has jurisdiction in the mode pointed out, when the parties are properly brought before it; and its decision is final, and must be so held, until reversed.

On general principles, the pendency of a suit before the court of probate, of which it has jurisdiction, is pleadable, in abatement, to a subsequent action for the same cause. And there does not appear to be any thing in the mode of exercising jurisdiction in this case, which should make it an exception to the general rule. The executor, finding the assets would be insufficient to pay the demands against the estate, instituted, before the probate court, the proceedings authorized under such circumstances. Notice was given, and the present plaintiff filed his claim, and became a party to the proceedings. These proceedings are still pending. And this is the substance of the plea, in abatement, to the present action, filed by the defendant, with the averment, that he has diligently, and without fraud or waste, discharged his duties, and prosecuted the suit in the probate court. To this plea the plaintiff replies, that he has been guilty of negligence in the prosecution of the above suit. Regularly, the plaintiff should have negatived the affirmation of diligence, in the defendant's plea, and have concluded to the country; or, if he considered the plea defective, he should have demurred to it. It is said that two affirmatives make an issue, when the second is so contrary to the first, that it can not, in any degree, be true. 1 Chit. Pl. 691; Co. Litt. 126a. It may be said, that negligence is opposed to diligence, and that the affirmatives, in these pleas, come within the rule. If this be admitted, it is still a most awkward and unsatisfactory mode of making up an issue. But, in any view, this replication can not be sustained, as it concludes with a verification, instead of an issue to the country. The demurrer to the replication brings before the court the sufficiency of the pleadings on both sides.

It is argued, that this proceeding is in the nature of an action against the administrator, suggesting a devastavit, and that it must be governed by the same rule. However much in form this may be like an action charging a devastavit, in effect it is, in some respects at least, altogether different. The administrator, by this proceeding, is not, necessarily, made personally responsible for the judgment. If, on the trial, it should be made to appear the defendant had been negligent in the prosecution of the suit in the probate court, that would not make him personally liable as on a devastavit; nor would the judgment probably be so entered against him, if he were convicted of waste or fraud. There is another statute which regulates the proceeding against an executor or administrator, on suggesting a devastavit, and under which a personal liability is established. A procedure under this statute would, undoubtedly, be authorized by the probate act.

The statute provides that, after the institution of the suit in the court of probate, "no suit or action shall be brought or sustained against such executor or administrator, unless waste or negligence or fraud, in the discharge of the duties of his trust, as such, be alledged against such executor or administrator." In the declaration, there is no such allegation; and the plea, which sets up the pendency of the suit in the probate court, and avers that such suit has been diligently prosecuted, &c., under the statute, contains matter which, if true, must abate the plaintiff's action. It shows a state of facts which, by the express provision of the statute, prohibits the plaintiff from sustaining his action.

The allegation of fraud, negligence or waste, is essential to the maintenance of the plaintiff's action; and this must be found in his declaration. His suit is brought during the pendency of the proceeding before the court of probate; and such suit, the statute declares, shall not be sustained, unless the allegation be made. Under this state of facts, the allegation is essential to the plaintiff's right to sue, and, consequently, it must be contained in the declaration. In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption; but if there be an exception in a subsequent clause, that is matter of defence. 1 Chit. Pl. 264; 1 Term R. 144; 6 Term R. 559; 1 East, 646; 2 Chit. 582. All the circumstances, necessary to constitute a legal right of action, must appear on the face of the declaration. 1 Chit. Pl. 276; Co. Litt. 17a, 303; Com. Dig. "Pleader," 6, 7. The statute does not originate the cause of action; but it protects the defendant from an action, unless he be charged with fraud, negligence or waste. Now, is this matter of defence to be set up by the defendant, or is it inseparably connected with the plaintiff's right to sue? An executor or administrator can only be made personally responsible, by a suit suggesting a devastavit; and this suggestion must always be made in the declaration. Now, in the present case, the defendant is not liable to be sued, unless negligence, fraud or waste, be charged. Suppose a statute provided that an executor or administrator should not be liable to be sued, until after the expiration of a year from the time his duties commenced, unless he should be charged with fraud, negligence or waste, must not such charge be made in the declaration, if the suit be brought before the expiration of the year? And is not the case supposed analogous to the one under consideration? As before remarked, the court of probate having jurisdiction of the case, no reason is perceived why, on general principles, the pendency of the suit there should not be pleadable in abatement, in a subsequent action for the same cause. But the statute authorizes a subsequent action, provided the plaintiff alledge fraud, negligence or waste, against the executor or administrator. In this view, the statute may be considered as enlarging the right of the plaintiff to sue, on certain conditions; and it would seem to be reasonable that he should show, in his declaration, the defendant is liable to be sued. The statute provides that if, on the trial, the plaintiff shall fail to prove the allegation of fraud, negligence or waste, he shall, notwithstanding, recover a judgment for the amount due, but not for costs; but, if he prove fraud, negligence or waste, he may have, also, a judgment for the costs.

Upon the whole, we think, under the statute, it would be the most convenient mode for the plaintiff to make the allegation in his declaration, where he brings the suit under the above circumstances, and that such an allegation would be analogous to the rules of correct pleading.

On this suggestion, the plaintiff's counsel asked leave to amend their declaration, and it was granted.

[For subsequent proceedings, see Case No. 17,075.]

Case No. 17,075.

WALKER v. JOHNSON.

[2 McLean, 255.][1]

Circuit Court, D. Indiana. Nov., 1840.

AMENDMENT OF DECLARATION — RULE TO PLEAD.

[An amended declaration was filed in vacation, 20 days before the first day of the term, but when defendant's counsel called at the clerk's office he found that it had been removed by plaintiff's counsel. It was returned to the office before the first day of the term. *Held* that, as the case involved legislative enactments which had never been construed, and the amendment presented a new state of the case, defendant would not be required to plead during the term.]

Amended declaration, filed in vacation, more than twenty days before the first day of the term, and notice given to defendant's counsel, but no rule taken on the rule docket, and when defendant's counsel, a few days before commencement of the term, called at the clerk's office to examine the declaration, it was not in the office, having been taken out by the plaintiff's counsel; it was returned to the office before the first day of the term, of which, however, the defendant's counsel had no notice. Plaintiff's counsel moved a rule to plead, to operate instanter, or during the term. Defendant's counsel resisted the motion, on the ground that the amended declaration was long and complicated, and presented a new cause of action, and that he had had no opportunity of examining it before the term.

Fletcher & Butler, for plaintiff.

Mr. Morrison, for defendant.

PER COURT. Inasmuch as the declaration had been taken from the office by the plaintiff's

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

counsel when the defendant's counsel applied for it, it must be considered as filed the first day of the term, so far as relates to the defendant's counsel having an opportunity to examine its contents; and as the case is of a peculiar nature, arising out of legislative enactments, which have never had a judicial construction, and the amendment presents, at least, a new state of the case, the defendant is not bound to plead during the present term. Rule denied, and the cause continued.

[For opinion on demurrer to replication, see Case No. 17,074.]

WALKER (JONES v.). See Cases Nos. 7,506 and 7,507.

Case No. 17,076.

WALKER v. KREMER.

[5 Reporter, 389; [1] 4 Wkly. Notes Cas. 544.]

Circuit Court, E. D. Pennsylvania. Jan. 5, 1878.

ILLEGAL CONTRACT—NEW PROMISE.

Where an illegal contract has been executed, a balance of account of moneys received thereunder can be recovered upon a new promise, the receipt of the moneys being a good consideration for such promise.

Bill in equity filed by the assignee of the State Insurance Company of Missouri, a foreign insolvent corporation, against its Pennsylvania general agents, setting forth an account stated by them, and praying that they should be decreed to pay the balance due thereon; or, if they denied the correctness of their account stated, make discovery and account. [A demurrer to the bill was heretofore overruled. Case No. 17,077.] The answer set up, inter alia, the fact that during the period when the collections were made the company had not complied with the Pennsylvania statutes requiring a foreign insurance company to pay a license fee, &c., to the state. The case was argued on this point only.

A. Sydney Biddle, for plaintiff.

The principle is, that where the illegal agreement is the total foundation of the suit the plaintiff cannot recover; but where the original contract has been executed, so that the plaintiff merely seeks to recover its results, if the defendant's relation to the property held by him is such as to afford a good consideration for a new promise, express or implied, the plaintiff may recover. Lestapies v. Ingraham, 5 Barr [5 Pa. St.] 81; Fox v. Cash, 1 Jones [11 Pa. St] 211; Evans v. Dravo, 12 Harris [24 Pa. St.] 62. The new promise need not be express. It is sufficient if the illegal contract has been executed, and the result, i. e. the funds produced by it, would be a sufficient consideration for a new promise if one had been proved. Besides, here we have an account stated.

J. L. Ferriere, contra.

The case is determined by Thorne v. Travellers' Ins. Co., 30 Smith [80 Pa. St.] 15. [The policy of the insurance acts is clearly stated there. The propositions of the plaintiff are incorrect deductions from a well-known principle. The leading case is Faikney v. Reynous, 4 Burrows, 2069; but there the bond on which suit was brought was given by the partner whose share of the illegal losses had been paid by the plaintiff. The consideration was not the contracting, but the paying, of the illegal debt.] [2] How can the plaintiff prove his case without showing that he has violated the statute? This is the true test.

(McKENNAN, Circuit Judge. May he not rely upon the account stated, without averring anything more than mutual dealings, which will give him a footing here? Does not the principle of the cases show that you are debarred from proving the original contract to be fraudulent?)

The Penn. cases cited are in conflict with Armstrong v. Toler, 11 Wheat. [24 U. S.] 267 [in which the opinion was delivered by Marshall, C. J. The law is there stated (page 271) to be, that "no action can be maintained on a contract the consideration of which is prohibited by law."] [2]

Before McKENNAN, Circuit Judge, and CADWALADER, District Judge.

McKENNAN, Circuit Judge. The case is a very doubtful one, and my opinion has wavered during the argument. The Pennsylvania cases cited by Mr. Biddle certainly seem to establish his proposition, but it may be doubted whether they are not in conflict with the decision of the supreme court of the United States in Armstrong v. Toler, supra. On the whole, I am inclined to direct the defendant to account.

CADWALADER, District Judge. I am inclined to agree with Mr. Ferriere's argument, and if he wishes to take the case further, would (as the amount is less than $5,000) certify to a difference of opinion. The principle is extremely important, and it may be questioned whether C. J. Gibson has not abandoned the rule in his statement of the corollaries to be drawn from it.

Afterwards (January 8, 1878) the court entered a decree for an account, CADWALADER, District Judge, saying, that on further consideration he concurred with McKENNAN, Circuit Judge, as to defendant's liability to account.

[1] [Reprinted from 5 Reporter, 389, by permission.]

[2] [From 4 Wkly. Notes Cas. 544.]

Case No. 17,077.

WALKER v. KREMER et al.

[4 Wkly. Notes Cas. 432.]

Circuit Court, E. D. Pennsylvania. Oct. 8, 1877.

EQUITY—RIGHT TO ACCOUNT.

In equity. Sur demurrer to bill. The bill filed by the complainant, assignee in bankruptcy of the State Insurance Company of Missouri, set forth that the defendants [Kremer & Elmes] had contracted to act as general insurance agents of the State Insurance Company in Pennsylvania. After the contract was ended, the defendants furnished a statement, showing a certain amount to be due the company, of which a considerable portion had been subsequently paid. The bill prayed for (1) an alternative decree for the balance as stated by the defendants, or for an account from them; (2) discovery in aid of the account if decreed. The defendants demurred to the bill.

Mr. Ferriere, for the demurrer, argued that the complainant's remedy was at law, since an account had been stated, and accepted by the company, payments having been made thereon. No discovery, therefore, was necessary.

A. Sydney Biddle, contra.

There is no averment in the bill that the company accepted the account stated. They received payments on it, and are willing to accept it as correct. This does not preclude them from their right to an account in equity, if the defendants dispute their own account rendered.

THE COURT (McKENNAN, Circuit Judge, and CADWALADER, District Judge) overruled the demurrer, and ordered an answer to be filed.

[See Case No. 17,076.]

WALKER (LOCKWOOD v.). See Case No. 8,451.

WALKER (McCORMICK v.). See Case No. 8,728.

Case No. 17,078.

WALKER v. MARKS et al.

[2 Sawy. 152.] [1]

Circuit Court, D. California. Feb. 11, 1872.[2]

MEXICAN LAND GRANTS—ALCALDE GRANTS—TIDE LANDS.

1. The alcaldes of San Francisco had no power to grant lands below low-water mark, covered by the navigable waters of the bay.

2. The term "tide lands," as used in the act of May 14, 1861, means lands covered and uncovered by the tides, and does not include lands lying below low-tide mark, and permanently covered by the navigable waters of the bay or ocean.

[Cited in Andrus v. Knott, 12 Or. 501, 8 Pac. 763.]

3. The act of May 14, 1861, does not confirm the grants made by T. M. Leavenworth; alcalde, of lands lying in the Bay of San Francisco, below low-water mark, and permanently covered by the navigable waters of the bay.

Action to recover lands. The premises in controversy are a portion of the bay of San Francisco, being permanently covered by the navigable waters of the bay at low tide. They lie in front of the city of San Francisco, and would be bounded by Montgomery, Chestnut, Sansome and Francisco streets, if those streets, as originally laid out, should be extended. They lie wholly outside of the water front of San Francisco, as established by the act of March 26, 1851, entitled "An act to provide for the disposition of certain property of the state of California." The plaintiff [James D. Walker] claims title under two grants made by Alcalde Leavenworth, in 1848, one to Miles L. Calender, the other to Wm. S. Clarke; and the "act to provide for the sale of the marsh and tidelands of this state," approved May 14, 1861, which, it is insisted by the plaintiff, confirms said alcalde grants. The defendants [John J. Marks and others] constitute the board of state harbor commissioners, elected under the provisions of an "act to provide for the improvement and protection of the wharves, docks and water front in the city and county of San Francisco," approved April 23, 1863; and an act amendatory thereof, and supplementary thereto, approved March 5, 1864. Said acts extend the water front by widening the streets fronting on the bay, so as to embrace a portion of said premises, and authorize the said board of state harbor commissioners to take possession of the water front, and that portion of the bay adjacent thereto, to the extent of six hundred feet beyond the said water front, as established by the act of March 26, 1851; to construct streets on the water front; also, wharves, docks, etc., and thereby improve the facilities for commerce, and generally to manage the same in behalf of the state, for the benefit of the public. The defendants took possession of the said premises under the authority contained in said act, and for the purposes therein described.

McAllisters & Hambleton, for plaintiff.

Thomas P. Ryan, for defendant.

SAWYER, Circuit Judge. The only question in this case is, whether the alcalde grants to Calender and Clarke were confirmed by the said act of May 14, 1861. It has long been settled by the supreme court of the state of California, that grants by former alcaldes of San Francisco, of portions of the navigable waters of the bay of San Francisco are void, for want of authority in the officer asuming to make them. This is no longer questioned; and it is not even claimed in this case, that the grants under which plaintiff claims, inde-

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

[2] [Affirmed in 17 Wall. (84 U. S.) 650.]

pendent of the statute referred to, were valid. But plaintiff relies upon the said statute, as confirming and validating these grants. The title of the act is, "An act to provide for the sale of the marsh and tide lands of this state;" and the first section is in the words following:

"Section 1. The sales of all marsh and tide lands belonging to this state, that have been made in accordance with the provisions of any of the acts of the legislature, providing for the sale of the swamp and overflowed lands belonging to this state, are hereby ratified and confirmed; and any of said marsh and tide lands that remain unsold, may be purchased under the provisions of the laws now in force, providing for the sale of swamp and overflowed lands of this state; and all moneys derived from the sale of such lands, shall be paid into the state swamp land fund, to be used for the reclamation of the swamp and overflowed lands; provided, no marsh or tide lands located within five miles of the city and county of San Francisco, or of the city of Oakland, or within one mile and one half of the state prison grounds, at Point San Quentin, shall be sold or purchased, by authority of this act; and, provided, further, that no sales of lands, either tide or marsh, excepting alcalde grants, which are hereby ratified and confirmed, within five miles of said cities, or within one mile and one half of the state prison grounds aforesaid, shall be confirmed by this act." Stat. 1861, 363.

It will be seen, both by reference to the title, and the body of the act, that the subject matter upon which this statute is to operate is, "marsh and tide lands belonging to this state," nothing else.

It is not pretended that the premises were "marsh lands," within the meaning of the act. They must, therefore, be "tide lands," or they are not embraced within the subject matter upon which the act is to operate. Are they "tide lands," within the meaning of the act? The construction to be given to these terms, has also been settled by the supreme court of this state in an action relating to these very lots, in which the defendants claimed title under this same act, as confirming said alcalde grants. The court, upon a very elaborate examination of the question, held that the term "tide lands," as used in the act embraces only those lands which lie between high and low-water mark, and constitute the shore of the bay; those lands which are covered and uncovered by the tide. People v. Davidson, 30 Cal. 380, 384, 387. This construction was, also, approved in Rondell v Fay, 32 Cal. 364, where the court say: "The descriptive phrase 'tide lands' occurs for the first time in the legislation of this state, in the act of May 13, 1861; and it is applied to lands covered and uncovered by the ordinary tides."

These cases have not since been questioned by the court, and the construction of the term "tide-lands," as used in this act, must be regarded as settled by the tribunal, whose decision is authoritative upon the point, and binding upon this court, it being the construction of a state statute by the highest tribunal of the state.

A large number of statutes passed by the various legislatures, from 1859 to 1869–'70—some having been passed at each session—have been called to the attention of the court in connection with extrinsic evidence relating to two or three of them, as to the character of the land embraced in the several descriptions, with a view of inducing this court to re-examine the question already determined by the supreme court of the state, in the light of what is claimed to be the legislative construction put upon the term "tide-lands." I have examined these several acts, and, if it were admissible to re-examine the question, and overrule the decisions of the state supreme court, in my judgment, the several acts, upon the whole, sustain the view already established, rather than overthrow it. Besides, nearly all of those acts are private acts, granting a right to build a wharf extending into the bay, for a limited period of time, or some other franchise, with the right to use the adjacent lands for purposes of the franchise, and are, of course, usually drafted by the parties interested, and the language used designating the various classes of lands is not very carefully scrutinized, since it is intended at all events to run to deep water. The grants, in all cases, except, perhaps, in one or two acts, passed during the last two sessions, apply to specific tracts of land, and consequently, refer to a different subject matter from that embraced in the general act of 1861, under consideration. They cannot in any just sense, therefore, be regarded as in pari materia.

If it is proper at all to examine the acts of subsequent and different legislative bodies, with a view of ascertaining the sense in which a former legislature first used certain words in a statute, the subsequent acts referred to passed under the circumstances indicated, are entitled to but very little weight in this investigation. However this may be, those subsequent acts afford the plaintiff little aid, for they are at least not inconsistent with the construction adopted by the state supreme court, and some of the principal ones, manifestly use the terms in the same sense adopted by that court.

For example, take the two acts in connection with which extrinsic testimony was given by plaintiff, to show the character of the land embraced within the description—the act of April 19, 1862, granting land to Henry Owens, upon which to construct a marine railway, and the act of May 2, 1862, authorizing J. J. North and associates to construct a marine railway. Section one of the first act grants to Owens certain lands by specific boundaries, also, designated generally, as "submerged or tidal lands." And section two provides that Owens "shall have the right to reclaim the tidal lands comprising the lots four hundred and forty-six, and four hundred and sixty-one." The testimony shows that within the specific boundaries described in the first section, and therein gen-

erally designated as "submerged or tidal lands," there are lands which lie below ordinary low-water mark, that is to say, permanently "submerged," or covered by the navigable waters of the bay, also, lands lying above ordinary low-water mark—lands covered and uncovered by the ordinary tides. But lots four hundred and forty-six and four hundred and sixty-one, specially mentioned in section two, and therein designated as "tidal lands," without the word submerged, are shown by the testimony to be entirely above low-water mark. Thus by applying the term "tidal lands," alone, without the word "submerged," to these two specific lots, the legislature itself defines the term "tidal lands," as used in that act, and applies it to the lands embracing the shores which are covered and uncovered by the ordinary tides, while the word "submerged," in the first section, would be left to embrace the lands lying below low-water mark, and permanently covered by the navigable waters of the bay. Stat. 1862, 308, 309.

So, in the case of the other act, authorizing North and his associates to construct a marine railway. The lands are generally designated as "submerged, tide and marsh-land," followed by a particular description by metes and bounds. The testimony shows that this description embraced both lands permanently "submerged" by the waters of the bay, and lands above ordinary low-water mark, covered and uncovered by the ordinary tides.

This grant, then, contains different classes of lands, and it also uses appropriate words to describe each class. "Submerged land" is a much more appropriate word to designate land permanently covered by water than "tide-lands."

The numerous other acts referred to in most, if not all instances, show, by their specific terms of description, aside from the general designation given to the lands, that the grants extended into deep water; but they all, with perhaps one exception, where the term "tide-lands" is used at all, use other general words of description more appropriate to describe land permanently covered with water, as well as give a particular description, stating the depth of water at low tide, to which the parties were authorized to go, such as "submerged," "overflowed," "submerged and overflowed," "covered with water," and the like, in connection with the words "tide-lands," or "tide and marsh-land." Thus when the legislature grants lands of various classes, some word is used appropriate to each class, as "submerged," "overflowed," or both, or "covered with water," for lands lying below ordinary low-water mark, and permanently covered by water; "tide-lands," or "mud-flats," for lands covered and uncovered by the ordinary tides; and "marsh-land," or "salt-marsh land," for lands bordering on the shore of the bay, above ordinary high-water mark, but covered by the spring tides upon which marine grasses grow.

By far the greater number of these acts, now called to the attention of this court, were passed at the various sessions of the legislature from 1859 to 1866, inclusive, before the decision of People v. Davidson, which decision was rendered at the October term of the supreme court, 1866, and were carefully examined by the court in that case. Many of the leading ones were referred to in the opinion, as examples of the terms used by the legislature in relation to the general subject, as will appear by reference to the case. 30 Cal. 386. The construction given to the term "tide-lands" in that case was adopted in full view of these statutes, and as I had occasion to know, having taken part in the decision, after a thorough examination of the various statutes, and a thorough discussion of the question by the justices of the supreme court.

There have been but two sessions of the legislature since, and the acts passed at those sessions relating to the lands of the state, use the same general terms for similar purposes as the preceding acts, and do not present anything in addition to militate against the construction adopted. If they did, it would scarcely be insisted that acts passed by a different legislature, eight or nine years after the passage of the act of 1861, could be properly invoked to show the intent with which words in the act of 1861 were used, especially after the meaning of those terms had been deliberately settled by the highest judicial tribunal in the state.

The said act of May 14, 1861, provides that "any of said marsh and tide lands that remain unsold, may be purchased under the provisions of the laws now in force providing for the sale of swamp and overflowed lands." And the act of May 13, 1861, "to provide for the reclamation and segregation of swamp and overflowed lands and salt marsh and tide lands, donated to the state of California by act of congress"—the first act in which the term "tide lands" was used—provides that, "the provisions of this act shall apply equally to all salt, marsh or tide lands in this state, as to swamp and overflowed." Stat. 1861, 361.

If the term "tide lands," as used in these acts, embraces any portion of the lands permanently covered by the navigable waters of the Bay of San Francisco, or of the ocean, they embrace the entire lands under the navigable waters of such bay and ocean, and all the lands permanently covered by the navigable tide waters of the state would be open to purchase and reclamation under these acts.

It would be absurd to suppose that the legislature intended to use the term "tide lands" in so comprehensive a sense, especially so, when the more limited sense is more distinctive, descriptive and appropriate, as well as more reasonable.

If any force is to be given to the title of the said act of May 13, 1861, it would seem that the term "tide lands" in that act, was used in a still more restricted sense; for the title only mentions "salt marsh and tide lands donated to the state of California by the act of congress."

Now, no lands which could in any sense be

termed "tide lands" were ever donated to the state by act of congress, except such as lie above ordinary high water mark and below extreme high water mark, such lands as are covered and uncovered only by the spring tides and upon which marine grasses grow. All below ordinary high water mark are held by the state, by virtue of her sovereignty, and not under donation by act of congress. The legislature certainly could not have intended to include in the term "tide lands," as used in this act, lands permanently covered by the navigable waters of the bay.

I find nothing, then, in the numerous acts called to the attention of the court, to justify me in departing from the construction adopted by the state supreme court. Besides, if the question was new, I should feel constrained, after a careful examination, to adopt the same construction.

The subject-matter of the act in question being "marsh and tide-lands" only, the exception in the act must also be of alcalde grants of marsh and tide-lands. It is of the essential nature of an exception that, "it must be of part of the thing previously described and not of some other thing." The provision is, "and provided further, that no sales of lands, either tide or marsh, excepting alcalde grants, which are hereby ratified and confirmed,"—that is to say, excepting alcalde grants of that class of lands before described, "tide or marsh." No other class of alcalde grants is confirmed. The alcalde grants in question not being of "tide or marsh-lands," as the terms are used in the act, they are not embraced within the exception, and, therefore, are not "hereby ratified and confirmed."

This point was also expressly determined in People v. Davidson. The court say: "The subject-matter of the act is 'marsh and tide-land.' The sales which the act confirms, and the sales which it authorizes thereafter, as well as the sales which it inhibits, are of lands falling within this general description; and as we know of no principle upon which we can extend the subject-matter beyond the limits expressly put upon it, both by the title and the provisions of the act, we consider that the grants intended to be confirmed were alcalde grants of marsh and tide-lands, to the exclusion of all others." 30 Cal. 384, 385.

Aside from the fact that the language of the act does not, in terms, embrace these grants, it is unreasonable to suppose, in view of the fact that a permanent water front had been established by the said act of March 26, 1851, inside of those premises, and that the authorities were bound to "keep clear and free from all obstruction whatsoever, the space beyond the said line to the distance of five hundred yards therefrom," that the legislature, without changing the said water front, intended to confirm grants of lots lying beyond it, in such a position that their reclamation would necessarily obstruct navigation and destroy the water front, as so located, to the injury of the adjacent property-owners and of the public. To accomplish such an object, the legislative intent ought to be very clearly and explicitly manifested. It is not so manifested in this act.

The alcalde grants in question, being originally void, and not being embraced within the provisions of the act of May 14, 1861, conferred no title on the plaintiff. Let judgment be entered for the defendants with costs.

[The above judgment was affirmed by the supreme court, where the cause was carried by writ of error. 17 Wall. (84 U. S.) 650.]

WALKER (MARTIN v.). See Case No. 9,170.

WALKER (MATTISON v.). See Case No. 9,297.

Case No. 17,079.

WALKER et al. v. MISSISSIPPI VAL. & W. RY. CO. et al.

[2 Cent. Law J. 481.] [1]

Circuit Court, E. D. Missouri. July, 1875.

RAILROAD LIENS — PRIORITY OVER MORTGAGES — VALIDITY OF ACT—CONSTRUCTION.

[1. The legislature may pass an act making liens given by the act prior to all mortgages placed on the property "subsequent to the passage of" the act.]

[2. The phrase, "subsequent to the passage of this act," in such an act, means subsequent to its approval by the governor.]

[3. And the lien given by the act takes precedence of a mortgage placed on the property within the 90 days after the passage of the act, which the statute provides shall elapse before acts of the legislature shall take effect.]

Action by James M. Walker and others against the Mississippi Valley & Western Railway Company and others. The complainants, as trustees under two mortgages given by the railroad company to secure its bonds, brought suit in equity to foreclose them, and, among others, made defendants certain parties who had performed work and labor, and furnished materials in the construction and improvement of the railroad, and who claimed liens upon the railroad property under the act of the general assembly of Missouri, approved March 21st, 1873, entitled "An act to protect contractors, sub-contractors, and laborers in their claims against railroad companies or corporations, contractors or sub-contractors." The first mortgage was executed March 12th, 1872. The second mortgage was executed May 28th, 1873. At the time of the execution of the first mortgage the M. V. & W. Ry. Company was only authorized to own and operate a railroad from West Quincy, Marion county, Missouri, to Keokuk, Iowa, and from Canton, Mo. (a point about equi-distant from West Quincy and Keokuk), westward to the Missouri river. In January, 1873, the Mississippi Valley & Western Railway Company and two other railway companies consolidated, pursuant to the laws of Missouri and Iowa. The consolidated company retained the name of the Mississippi

[1] [Reprinted by permission.]

Valley & Western Railway Company, and was authorized to own and operate a railroad, from St. Charles, Missouri, to Keokuk, Iowa, and from Canton, Missouri, westward to the Missouri river. The first mortgage, therefore, covered the railroad property from West Quincy to Keokuk, Iowa, and from Canton westward. The second mortgage, made by the consolidated company, covered the same property, and, in addition thereto, the property of the railroad from West Quincy to St. Charles, and was a first mortgage upon that part of the railroad and property between those points, and a second mortgage upon that part of the railroad between West Quincy and Keokuk and from Canton westward. The bill charged that the liens of the defendants, if any, were inferior and prior to the liens of the mortgages. The defendants filed separate answers, and after alleging that they had liens, and had taken all the steps required by the lien law to preserve and keep alive their liens, charged that their liens were prior and superior to the lien of the mortgage executed May 28th, 1873, and were, therefore, the first liens on all that part of the railroad and its property between West Quincy and St. Charles, Missouri.

Agreed statements of facts were filed between the complainants and the lien claimants, by which it was admitted that the lien claimants had complied with the statute in preserving and keeping alive their liens. It was also admitted by the agreed statements that the work and labor was done, and the materials furnished in the construction and improvement of the railroad after June 20th, 1873. The second section of the lien law provides that the lien given by the law shall be prior to all mortgages or incumbrances placed upon the railroad and its property, subsequent to the passage of this act. There is no section of the lien law which says expressly that the act shall take effect from and after its passage, or at any particular time. The General Statutes of Missouri (2 Wag. St. p. 894, c. 5, § 4) provide that "All acts of the general assembly shall take effect at the end of ninety days after the passage thereof, unless a different time is therein appointed."

Two questions were presented and argued: 1. The constitutionality of the law as applied to mortgages upon the property where work and labor was done and materials furnished and made since the passage of the law. 2. When did the lien law take effect? The complainants, representing the bondholders, contended that the lien law was unconstitutional so far as it gave priority over mortgages existing when the work and labor and furnishing of materials were begun. The complainants also contended that the lien law had no force and effect, as to priority or otherwise, until the expiration of ninety days from its approval, namely, until June 19th, 1873. The lien claimants contended, that the law was constitutional, and that the phrase "passage of this act," as used in the second section of the lien act, meant the approval of the governor, namely, March 21st, 1873, and that the lien, whenever acquired, was prior to all mortgages or incumbrances subsequent to that time.

Davis, Thoroughman & Warren and G. Edmunds, Jr., for complainants.

Theo. Bruer, Dryden & Dryden and James Hagerman, for lienholders.

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

DILLON, Circuit Judge, delivered the opinion of the court, orally.

THE COURT held:

1. That it was competent for the legislature, and within the legitimate scope of legislative power, to provide in the act, entitled "An act to protect contractors, sub-contractors and laborers in their claims against railroad companies or corporations, contractors or sub-contractors," approved March 21st, 1873 (Sess. Acts 1873, p. 58), that the lien given by the act should be prior to all mortgages or incumbrances placed upon the railroad property subsequent to the passage of the act. There is no constitutional objection to such a provision. Phil. Mech. Liens, pp. 46, 47, § 30; Stonewall Jackson Loan & Building Ass'n v. McGruder, 43 Ga. 9; Hildebrand's Appeal, 39 Pa. St. 133; Blauvelt v. Woodworth, 31 N. Y. 285; Hicks v. Murray, 43 Cal. 515; Davis v. Bilsland, 18 Wall. [85 U. S.] 659.

2. The lien given by the lien act is prior to all mortgages or incumbrances placed upon the railroad and its property subsequent to March 21, 1873, the date of the approval of the law. The phrase "subsequent to the passage of this act," and in the second section of the act, means subsequent to the approval by the governor. And a mortgage lien placed upon the railroad and its property between the date of the approval of the act, to-wit:—March 21st, 1873, and June 19th, 1873, the end of ninety days after the approval, is subordinate and inferior to the lien of the contractor, laborer or material-man acquired under the lien act. As to the meaning of the phrase "passage of an act," see In re Tebbetts [Case No. 13,817] opinion of Judge Story; Johnson v. Fay, 16 Gray, 144. And as to when an act is passed, Logan v. State, 3 Heisk. 442; Wartman v. City of Philadelphia, 33 Pa. St. 202; People v. Clark, 1 Cal. 406; Brainard v. Bushnell, 11 Conn. 17; In re Richardson [Case No. 11,777].

WALKER (MITCHELL v.). See Case No. 9,670.

Case No. 17,080.

WALKER v. MOORE.

[2 Dill. 256.] [1]

Circuit Court, E. D. Arkansas. 1873.

TAX DEEDS—SALE OF SEPARATE LOTS EN MASSE.

Under the statutes of Arkansas a tax deed which shows by its recitals that two or more

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

separate town lots were sold en masse, for a gross sum, is void on its face, and cannot be contradicted by evidence aliunde.

[Cited in brief in Knox v. Gaddis, 1 App. D. C. 338. Cited in Farnham v. Jones, 32 Minn. 13, 19 N. W. 86. Cited in brief in Hopkins v. Scott, 86 Mo. 142.]

Ejectment for lots 1, 2, and 3, in block 2, Little Rock. The defendants are the general owners of the property. The plaintiff claims under the tax deed hereinafter mentioned, made to him by the county clerk under authority conferred upon this officer by the laws of the state. Acts 1869, § 144. By the recitals of said tax deed to the plaintiff, it appeared that lot 4, in block 1, and lots 1, 2, and 3, in block 2, in Little Rock, were assessed for taxation upon the non-resident list for 1867, to Bliss & Schenck, and that the same were advertised for said taxes for sale on the 9th day of March, 1868. Before the day fixed for the sale, but after the advertisement, the deed recites, that the owners had paid the taxes and obtained an injunction against the collection of the penalty, but did not pay the costs of advertising. The tax deed recites that on said day fixed for the sale, the sheriff, as collector, "did proceed to sell at public auction the said lots of land in separate lots and parcels, for the non-payment of such costs of advertising, which amounted to the sum of $3.60, and at such sale Thomas H. Walker bid and offered to pay the said costs for the whole of said lots, and no person having bid or offered to pay such costs for a less quantity thereof, the same were then and there publicly struck off and sold to him for that sum." In consideration of said $3.60 the sheriff grants the said lots to the said Walker. The sheriff's certificate of sale shows that the costs charged for advertising lot 4 in block 1 were $1.80, made up of the following items: Advertising, 80 cents; clerk, 25 cents; levy and return, 75 cents; total, $1.80. And the like amount of $1.80 for lots 1, 2, and 3, in block 2. The tax deed and sheriff's certificate of sale were offered in evidence by the plaintiff to sustain title; the defendant objected to their introduction, because the deed was void on its face.

Gallagher & Newton, for plaintiff.
U. M. Rose, for defendant.

DILLON, Circuit Judge. The revenue statute of Arkansas requires the collector, on the day fixed for the sale of lands for delinquent taxes, to "proceed to offer for sale, separately, each tract of land and town lot contained in such list, on which the taxes and penalty have not been paid." Gould's Dig. 950, 118. "The person offering at such sale to pay the taxes charged on any tract or lot, for the least quantity thereof, shall be the purchaser of such quantity." Id. § 119. "Such tracts or lots as shall remain unsold for want of bidders shall be entered as sold to the state." Id. § 123.

Construing the recitals in the tax deed the most favorably for the plaintiff, they show that the several lots were offered in separate parcels, but sold en masse, for the gross sum of $3.60.

Under the statute each lot must be offered for sale separately, and if there be no bidders, the lot must be entered as sold to the state. There is no authority in the statute, after distinct lots have been separately exposed, and no bidders have been found, to group these lots, though belonging to the same owner, and sell them en masse. If this be done, the sale is void; and a deed showing, as in the deed to the plaintiff, that this course was pursued, is void on its face.

A deed void on its face for this reason cannot be validated by parol evidence contradicting the recitals in the deed.

We therefore hold that the tax deed offered by the plaintiff must be excluded. We also hold that the offer of the plaintiff to show by evidence, aliunde the deed, that there was a separate sale of lot 4 in block 1 is incompetent.

We also hold that the offer of the plaintiff to show by evidence, aliunde, that all of the requirements of the tax law of the state had been complied with, unless said requirements were violated by the sale of the lots together, must be rejected, for the reason that the deed recites a sale of said lots en masse, and is therefore void on its face, and hence it is immaterial whether the other requirements of the revenue law were complied with or not.

Judgment for defendant.

NOTE. Where the statute requires a sale in parcels, a tax deed showing a sale of several parcels, en masse, is void. Byam v. Cook, 21 Iowa, 393; Ferguson v. Heath, Id. 438; Harper v. Sexton, 22 Iowa, 442; Ackley v. Sexton, 24 Iowa, 320. See, also, Loomis v. Pingree, 43 Me. 299. As to assessment of several parcels as one tract, where so returned by the owner, Woodburn v. Wireman, 27 Pa. St. 18. As to recitals in tax deeds and their effect under the laws of Arkansas: Bonnell v. Roane, 20 Ark. 125; Hogins v. Brashears, 13 Ark. 242, 249; Bettison v. Budd, 21 Ark. 581; Patrick v. Davis, 15 Ark. 365; Twombly v. Kimbrough, 24 Ark. 464; McDermott v. Scully, 27 Ark. 226; Parker v. Overman, 18 How. [59 U. S.] 137.

WALKER (NEALE v.). See Case No. 10,072.

WALKER (NEW YORK WIRE-RAILING CO. v.). See Case No. 10,218.

Case No. 17,081.

WALKER v. OGDEN et al.

[1 Biss. 287.] [1]

Circuit Court, N. D. Illinois. July Term, 1859.

CORPORATIONS—FORFEITURE OF STOCK—HOW MADE—REDEMPTION—WHEN ALLOWED.

1. The provision in the articles of agreement of a private joint-stock company, that upon default by a stockholder of payment of assessments, all his shares, right and interest in the association and its property shall be forfeited, does not authorize the trustees by a naked dec-

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

laration to make a forfeiture against which a court of equity will not grant relief.

2. The fact that the complainant with the acquiescence of the trustees, gave security for the payment of his assessments already overdue, is of material assistance in entitling him to redeem.

3. Upon payment of the amount due, principal and interest, such a stockholder will be allowed to redeem, and the trustees will be ordered to make and deliver the proper certificates of stock.

[Cited in Hill v. Atoka Coal & Mining Co., 124 Mo. 153, 25 S. W. 931.]

4. It seems that where the articles of agreement do not provide an express mode in which stock is to be forfeited, a valid foreclosure cannot be made without the decree of a court of equity.

This was a bill in chancery, filed by Walker, to compel the defendants who, together with E. R. Le Bar, deceased, were the trustees of the Chicago Land Company, to issue to him a certificate for one hundred and sixty-six shares of stock in said company, which the defendants claimed had been forfeited to the other stockholders for non-payment of assessment. It appeared that the complainant with others were associated together in a voluntary joint stock enterprise for the purchase of lands in and about Chicago, in 1853, with the view to profits by anticipated enhancement in value. The entire stock was divided into eighteen thousand shares of one hundred dollars each. Walker subscribed for one thousand five hundred shares. The payment of twenty-five dollars entitled each subscriber to one full paid share of stock purporting to be of the value of one hundred dollars. Walker had made one payment, and was the owner of two hundred shares of stock. By the articles of agreement, it was provided that the trustees should have the power, and it should be their duty to make assessments upon the shareholders to meet such amounts as were necessary to make the successive payments falling due on the purchases of real estate made by them upon credit; and to give thirty days' notice of the time of payment of such assessments, directed to the post-office address of each shareholder; and if any shareholder should fail to pay the assessment so called for at the time specified, he should thereby forfeit all his shares, right and interest in the association and its property and effects of any sort and kind, except such shares as might have been previously issued to him; such forfeited shares to be distributed among the other stockholders who were not in default. The trustees, on the 19th of July, mailed a notice to Walker, which was signed by W. B. Ogden and M. D. Ogden, personally, and by E. R. Le Bar, the other trustee, by M. D. Ogden as his attorney in fact. The trust agreement authorized one trustee to appoint any associate trustee or trustees as his attorney. The power of attorney from Le Bar to Ogden was dated on the 18th of July, 1853, but was not executed until the 22d of July, and its execution was not acknowledged, but proven. No execution, however, was admitted in this case. In October, 1854, the trustees, in pursuance of the express instructions of the stockholders, consummated the forfeiture of Walker's stock by sending to him a formal written notice of such forfeiture, the receipt of which notice was acknowledged by him, by a letter in which he denied the legality of such forfeiture, and professed his readiness to pay the amount due, and his determination to hold the trustees responsible, and to contest the right to forfeit his shares, but he made no tender of the amount due on it until March, 1855, at the time of filing the bill. It appeared by the testimony of S. H. Fleetwood, that in October, 1853, Walker requested him to give further time on his assessment and to receive certain acceptances of Ward & Bro., of New York, for the amount due. Upon the delivery of which to him, Fleetwood issued to Walker the certificate for the one hundred and sixty-six shares of stock and received it back for Walker as collateral security for the payment of the acceptances. These acceptances were not paid when due and were renewed by Fleetwood, and were all finally dishonored, and the house of Ward & Bro. became bankrupt. There was evidence showing a knowledge on the part of the trustees of the receipt of these acceptances by Fleetwood, and of an implied acquiescence in it by them. But such ratification was denied by them in their answer, and it appeared that they had never received the acceptances from Fleetwood, but refused so to do, and took from him the certificate of stock issued to Walker for the one hundred and sixty-six shares, and caused it to be cancelled.

J. M. Cassin and R. J. Walker, for complainant.

E. C. Larned and I. N. Arnold, for defendants.

DRUMMOND, District Judge. My opinion is that the assessment was legal and proper, and that a sufficient notice was given to Walker. If there was an illegality or irregularity in the assessment, the burden of proof was on the complainant to establish it, and he has failed to do so. But irrespective of the presumption of law of its regularity, I think upon the evidence before me that its legality is sufficiently established in every substantial particular.

I am also of the opinion that the objection taken by the defendants to the action of Fleetwood in receiving the acceptances, is well taken. I think the trustees had no authority, under the articles, to take anything but money. The complainant being a party to the articles, was bound to take notice of the nature and extent of the authority thereby given. I assume, therefore, that the giving of the acceptances was illegal, and that the complainant did not pay his assessment as required by the

articles, and the question in the case is simply one of forfeiture.

I am of opinion that the complainant at law incurred a forfeiture of his stock, and the only question is, has the court of equity the right to relieve for such forfeiture and is a case for such relief made out by the complainant? It is to be observed that no rights of property have become vested by reason of the forfeiture in this case. The forfeited stock has never been distributed among the shareholders, or sold as is provided for by the articles. Had such action been taken a different case would have been presented.

The articles provide no express mode by which the forfeiture is to be established. If they did, and such mode had been pursued, and especially if any right had vested in consequence thereof in third parties, the defendants' argument would have had more force. But here is a mere naked declaration that the stock is forfeited, which is all that stands in the way of the relief sought by the bill.

Courts of equity do not favor forfeitures, and it cannot be denied that the effect of a forfeiture in this case would be to inflict a heavy loss and injury upon the complainant. He would thereby lose all his interest in the increased value of a large amount of property, in a portion of which he was concerned as one of the original purchasers. The question is: Can the mere declaration of the trustees have the effect to foreclose all of Walker's interest in this property? I think not. I am inclined to the opinion (although I do not put my decision of this case on that ground), that a judicial decree of foreclosure upon a bill filed by the trustee, was necessary in order to bar the rights of Walker to redeem his stock.

Having come to the conclusion then that a court of equity has the right to grant relief if a proper case is made, the remaining question is: has the complainant made out such a case? In this view of the case, the transaction with Fleetwood is important. There is no question that this was in perfect good faith on the part of all the parties. They acted under an honest mistake in regard to their powers. The paper furnished by Walker was deemed unquestionable at the time. He left the stock as collateral. He was, as is shown, amply able to have raised the money in other ways if this agreement had not been made with Fleetwood. The trustees certainly knew of and acquiesced in the act of Fleetwood in taking the acceptances. They gave no notice to Walker of any dissatisfaction on their part with the arrangement until long after the maturity of the acceptances.

Under such circumstances, the complainant having come in and tendered in money the whole amount due and ten per cent. interest, it would be hard and oppressive to deny him the right to redeem his stock, and I should not feel inclined to do so unless compelled by the authorities, and from such examination of the law as I have been enabled to make in the brief time I have had, I think relief may be granted.

The case of Sparks v. Liverpool Water Works, 13 Ves. 428, decided by Sir Wm. Grant, has been pressed with much force by the defendants' counsel. But I think that that case rests upon the public corporate objects of the concern. The case before me is different. It is that of a mere private land company in which the public have no interest.

This case has been likened by the counsel on the part of the complainant to that of a bill to redeem from a mortgage after forfeiture, and on the other side to a bill for a specific performance of a defaulted contract to convey, and in my opinion neither of these views are to be regarded as exactly correct. It is a case which rests upon principles peculiar to itself, and the right to relief is based upon the considerations which I have stated.

Upon payment of the whole amount due, principal and interest, the complainant should be allowed to redeem his stock, and certificates thereof should be executed and delivered to him by defendants, and decree will be entered accordingly.

NOTE. Corporations may be authorized to forfeit stock. Herkimer Manufacturing & Hydraulic Co. v. Small, 21 Wend. 273; Troy Turnpike & Railroad Co. v. M'Chesney, Id. 296. Unless the power to forfeit stock is given by the charter, a by-law subjecting it to forfeiture is merely nugatory. In re Long Island R. Co., 19 Wend. 37; Bordentown & S. A. Turnpike Co. v. Imlay, 1 South. [4 N. J. Law] 285; In re National Patent Steam Fuel Co., 5 Jur. (N. S.) 420, 28 Law J. Ch. 637. Directors cannot forfeit stock in any other way than the mode provided in the charter. Downing v. Potts, 3 Zab. [23 N. J. Law] 66. Forfeiture can only be enforced upon full compliance with the provisions of the act. Eastern Plank Road Co. v. Vaughan, 20 Barb. 155.

Case No. 17,082.

WALKER et al. v. PARKER et al.

[5 Cranch, C. C. 639.] [1]

Circuit Court, District of Columbia. March Term, 1840.

DEPOSITIONS—NOTICE OF TAKING—EXCEPTIONS—WAIVER—COMPETENCY OF WITNESSES—EXECUTORS—PARTIES.

1. In suits in equity, in the circuit court in the District of Columbia, depositions taken under the act of congress of 1789 [1 Stat. 73] cannot be read in evidence.

2. A letter directed to the agent of the opposite party at Chillicothe, and put into the post-office at Cincinnati on the 21st, informing him that the deposition of a certain witness would be taken at Cincinnati on the 28th of the same month, is not conclusive evidence of notice, if, in fact, the letter was not received until the 29th.

3. If, upon the return of depositions, the opposite party except "to the caption as well as to the substance of them," he may, at the hearing, even after the lapse of several years, specify his objections and insist upon them.

4. If, upon cross-examination of a witness, in taking his deposition, he appears to be interested, and therefore incompetent, the objection to his competency is not waived by pur-

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

suing the cross-examination upon the merits of the case.

5. Executors, who are parties in the cause, cannot be examined as witnesses, without an order of the court to examine them; and such an order will not be given, if they are interested in the event of the cause.

Bill in equity; set for hearing by the defendant, at March term, 1839. Certain depositions had been taken by the complainants [William M. Walker and others] under the 30th section of the judiciary act of September, 1789 (1 Stat. 73). Upon the opening of which in court,

Mr. Jones, for defendant [Daniel] Parker, made this memorandum upon the envelope, and filed the same with the depositions, to wit: "Note. Defendant Parker excepts to the caption as well as the substance of the depositions taken on the part of complainants, to wit: Longworth, Piatt, &c. &c."

Mr. Jones now objected to the depositions, because they were not taken absolutely under a commission from this court, but were taken de bene esse under the act of congress of 1789 (1 Stat. 73). The uniform practice of this court from its commencement, and of the court of chancery in Maryland long before that time, has been to take the evidence in causes in equity under a commission issued by the court; and never to examine witnesses vivâ voce in open court, unless to prove exhibits. A deposition de bene esse, under the act of congress, cannot be read at the hearing, if the witness can be had; and if he should be present, this court would not examine him vivâ voce; so that his testimony would be lost.

R. S. Coxe, contra. The judiciary act of 1789, § 30 (1 Stat. 73), expressly requires "that the mode of proof by oral testimony and examination of witnesses in open court, shall be the same in all the courts of the United States, as well in the trial of causes in equity, and of admiralty and maritime jurisdiction, as of actions at common law." And by the 25th rule of practice prescribed by the supreme court to the circuit courts of the United States, "testimony may be taken according to the acts of congress, or under a commission."

Mr. Jones, in reply. The 30th section of the judiciary act of 1789 (1 Stat. 73), has also this proviso: "That nothing herein shall be construed to prevent any court of the United States from granting a dedimus potestatem to take depositions according to common usage, when it may be necessary to prevent a failure, or delay of justice; which power they shall severally possess."

By the second section of the act of congress of the 8th of May, 1792 (1 Stat. 275), "for regulating processes," &c., it is enacted that the forms and modes of proceeding in suits "of equity," shall be "according to the principles, rules, and usages which belong to the courts of equity," "as distinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions, as the said courts respectively shall, in their discretion, deem expedient; or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same." And by the 25th section of the act of 29th of April, 1802 (2 Stat. 156), "to amend the judicial system of the United States," it is enacted, "that in all suits in equity, it shall be in the discretion of the court, upon the request of either party, to order the testimony of the witnesses therein to be taken by depositions, which depositions shall be taken in conformity to the regulations prescribed by law for the courts of the highest jurisdiction in equity, in cases of a similar nature, in that state in which the court of the United States may be holden."

By the judiciary act of 1789, § 17 (1 Stat. 73), all the courts of the United States have power "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the law of the United States."

THE COURT (nem. con.) was of opinion, that the depositions taken under the act of congress, cannot be read in evidence at the hearing; and observed that the uniform practice of this court, in cases of equity, has been to take the testimony by deposition under a commission. A deposition taken under the act of congress is only de bene esse, and cannot be used, if the witness is here; and if here, his testimony cannot, according to the practice of this court, be taken vivâ voce in open court.

Mr. Jones then objected to the depositions of ——, taken in Cincinnati on the 28th of November, 1827, under a commission to J. G. Burnet and William Burke; for want of notice to Mr. Scott, the defendant's counsel.

A written notice, signed by the commissioners, that the depositions of sundry persons would be taken by them at the mayor's office in Cincinnati, on the 28th of November, 1827, was put into the post-office in Cincinnati on the 21st, addressed to Mr. Scott at Chillicothe, but was not received by him until the 29th. The mail of the 21st, by its usual course reached Chillicothe on the evening of the 22d or 23d.

Mr. Key and Mr. Coxe, for the complainant, contended that this was notice; that it would be good notice to charge an indorsee, and a fortiori it is sufficient notice of taking a deposition.

Mr. Jones, in reply. That is a rule that applies to mercantile cases only, and depends upon commercial usages and principles, and the presumed assent of the party to receive notice in that way.

THE COURT (MORSELL, Circuit Judge, contra) was of opinion that it was not notice.

CRANCH, Chief Judge, said it could be

only presumptive evidence of notice, and that presumption is destroyed by the fact that the notice was not received until after the depositions were taken.

MORSELL, Circuit Judge, thought that the party had done all that was reasonable, all that he was bound to do; and Mr. Scott ought to have been there to receive the letter in time.

THRUSTON, Circuit Judge, said it was not a case to which the law-merchant applies, and therefore common-law notice was necessary.

Mr. Key and Mr. Coxe, for the complainant, objected to Mr. Jones now, after the lapse of several years, taking particular exceptions to the depositions, not specified at the time the depositions were returned and opened.

THE COURT, however, overruled the objection, and suffered Mr. Jones now to specify and insist upon his particular objections to the depositions. See Gres. Eq. Ev. (Phila. Ed. 1837) 155; Raym. Ch. Dig. 79.

Mr. Jones then objected to the depositions of Benjamin M. Piatt and Nicholas Longworth, that they were parties in the cause, and there was no order of the court to take their depositions; and that they were also parties in interest. That Longworth's deposition was never finished, on account of his ill health.

Mr. Key, contra. Longworth's deposition is complete; it does not appear that any interrogatories are not answered, or that either of the parties wished to put others.

As to the objection of interest, they are merely executors without any personal interest, and are mere nominal parties. The contest is between two contending assignees of John H. Piatt.

The defendant has waived the objection of interest by requiring these witnesses to be cross-examined upon the merits after the interest, if any, was disclosed, and no objection then made to their competency. The objection should have been taken at the time of the examination. U. S. v. One Case of Hair Pencils [Case No. 15,924]; Gres. Eq. Ev. 207.

Mr. Jones, in reply. There is a difference between an examination in open court, and before commissioners. If it be in open court, the moment the interest is discovered upon cross-examination, the court decides that the witness is incompetent, and his testimony is at once excluded. But upon an examination before commissioners, non constat that the court will reject the witness; the objection may be overruled, so that if the party should be precluded from further cross-examination before the commissioners, he would lose the benefit of cross-examining the witness. The cross-examination, therefore, ought to proceed de bene esse, to avail the party, in case his objection should be overruled; and to be rejected if the objection should prevail. A party can be examined as a witness, only under an order of the court, and then only upon collateral matters.

THE COURT (MORSELL, Circuit Judge, contra) was of opinion, that the defendants, the executors of John H. Piatt, were not competent witnesses, without an order of the court to examine them; and that they were interested, and therefore the court would not order their depositions to be taken. That the cross-examination of Piatt was not a waiver of the objection on account of his interest, although the cross-examination was continued after his interest was disclosed; the objection to the competency of the witness having been expressly saved by the agreement for the cross-examination.

By consent, the order for setting the cause for hearing was set aside, and new commissions issued for taking the testimony of the witnesses.

Case No. 17,083.

WALKER v. RAWSON et al.

[4 Ban. & A. 128.] [1]

Circuit Court, D. Massachusetts. Feb., 1879.

PATENTS — MODE OF CUTTING SOLES FOR BOOTS AND SHOES.

1. The complainant's patent construed, to contain merely a direction to workmen to use a known tool in a skilful mode, well known in other arts, and in the same art, as applied to a somewhat different tool, to effect an old result, and, therefore, that it does not set out a patentable invention.

2. Letters patent No. 49,572, granted to Joseph H. Walker, August 22d, 1865, for an improved mode of cutting soles for boots and shoes, *held*, not to describe a patentable invention.

[This is a bill in equity by Joseph H. Walker against Daniel G. Rawson and others to restrain an infringement of certain letters patent granted to complainant.]

Browne & Holmes, for complainant.

A. K. P. Joy, for defendants.

LOWELL, District Judge. This suit in equity is brought for the infringement of the plaintiff's patent, No. 49,572, granted August 22d, 1865, for an improved mode of cutting soles for boots and shoes from whole sides of leather. The specification describes the old method to have been to cut the side of leather into strips, or "races," as they are technically called, wide enough to form the length of the required soles, and then to cut each strip by itself into soles by a die, which was reversed after each cutting. His mode, as described, is, to place the die upon the side of leather and cut one sole, then to reverse the die and draw it into such a position as to touch, or nearly touch, the former pattern at the toe, ball and heel, and cut the second; and so on, until the whole width of the side has been cut into soles;

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

and then to begin a new series of cuttings, as close as possible to the first, and arranged in the same order; and so on until the whole side is cut. Both modes are illustrated by drawings.

There is great economy in this mode of cutting, as compared with what the patentee calls the old mode. A strip of the exact width necessary for the length of a sole will not allow the patterns to fit into each other, because they then overlap, and every other one would pass beyond the strip or race; and if the race were wide enough to allow this, there would be loss at the ends of the soles. This loss is not made by the new method, because the second series is made to fit into the first and take up the spare pieces.

The complainant is a manufacturer of boots and shoes, of large experience, who has some eighteen or twenty patents, all upon inventions of his own. He gives much interesting evidence concerning the growth of the art of manufacturing those articles on a large scale, and insists that he is the first person who used dies for cutting soles in any other way than upon a race of leather cut out in the form of a parallelogram, and of a width exactly equal to the length of a sole. Upon this point there is a vast mass of conflicting evidence. Dies began to be used at least twenty years before the date of the patent.

In his specification, the complainant describes a mode by which the operator may find out where to place his die for cutting the first sole of the second series, and this is the subject of the second claim in his patent. When the commissioner of patents rejected his application, he sent on affidavits to prove that this mode of beginning the second series was a discovery, and not an easy one to make. I do not understand that he now relies on the second claim at all, or that it is infringed. In my opinion the drawings show, on their face, that there is no practical difficulty in the matter, and I think the complainant's evidence proves as much.

It does seem to be proved that before 1863 the machines working by power were all adapted to cutting soles from races, and that the plaintiff first brought the method of cutting from a whole side into general notice, and that many intelligent manufacturers took licenses under this patent; which certainly tends to show that the process was supposed to be new. To be sure he had a machine which was patented; and the defendants insist that the licenses were for the machine, and that the mode of cutting was thrown in. The plaintiff declares the very reverse to be true.

The claim in question here is the first: "Cutting up sides of leather into soles for boots and shoes, in the manner described, and as shown in Sheet 1 of the drawings." This claim is not limited to cutting by power, but applies to all cutting with dies. If the claim is construed to include, in the mode of cutting, the particular method of finding where to put the die for the beginning of the second series of soles, it is not infringed. If it means that a whole side of leather must be employed, it could readily be evaded. I understand the construction given by the counsel for the complainant to be for cutting at least two series of soles, so that the saving of material at the sides and the ends will both be taken advantage of. As a series may consist of two, the patent is for cutting four soles or more, touching at the sides and ends, as described.

The great discovery, as I understand the plaintiff to view it, was, that races may be dispensed with. I do not see any difficulty in practising the invention on a race or strip of leather, if the die is laid with its longer axis lengthwise of the race. Whether this would be economical or not would depend on the comparative dimensions of the sole and the race. The invention, therefore, seems to be to reject the mode of cutting by races of the precise width necessary for the length of a sole, and used by always laying the die across the race.

No doubt any new machinery, adapted to cutting whole sides or pieces of a shape different from the old races, would be patentable. But, in my opinion, the plaintiff cannot, without relying on particular means or machinery, monopolize a general mode of presenting old material to an old tool, in such a mode as to make it hold out as long as possible, by adapting the presentation of his material to the shape of his tool, or the positions of his tool to the shape of his material.

In Brown v. Piper, 91 U. S. 37, it is said by the court that judicial notice may be taken of facts of common knowledge in the arts. This has been called a new departure of the court; but it seems a useful and reasonable one, if reasonably used. In Snow v. Taylor [Case No. 13,148], I said, speaking for Mr. Justice Clifford and myself, "It is a matter of common knowledge, and is mentioned by some of the witnesses, that in various branches of manufacture, material has been cut in such a way as to bring the wide part of one article of the manufacture against the narrow part of the next, so as to save material." We held, in that case, that a patent could not be sustained for "the method of cutting two or more series of collars side by side, from a strip of paper or other suitable material, in such a manner that the wide parts of the collar of one series shall come opposite to the narrow parts of the adjoining series."

In the present case it is proved that in the old mode of cutting by hand, the shoemaker would save material by marking out his soles so that they should fit each other, very much as the dies are put against each other by the plaintiff. It seems that, owing to the hardness of the leather, a shoe knife will not cut an outer sole so accurately that it will go into the shoe without trimming, and the plaintiff says that the knife cuts only "sole-blanks," and not soles. This does not appear to be true of inner soles. If it were, the mode of operation is the same, and a relative economy of the same sort is gained. A die is a pattern and a knife

combined, and its operation is more perfect upon outer soles than that of the knife; but, so far as the placing of the pattern is concerned, there is no difference in the operations.

Whatever may be the fair effect of most of the very conflicting evidence of precise anticipation with dies, this, I think, is established: That almost every manufacturer sometimes had pieces of leather which he worked up into soles, especially inner soles, with dies, which could not conveniently be "raced"; and I do not think it needs much testimony to prove that he would use his dies, on such pieces, in such a way as to make the greatest number of soles out of it.

Upon the whole, I am of opinion that no patentable invention is set out in this specification and claim. It contains merely a direction to workmen to use a known tool in a skilful mode, well-known in other arts, and in this art, as applied to a somewhat different tool, to effect an old result. I am not aware that a patent has ever been sustained for such an invention.

When a certain process of "canning" had been applied to beans and peas, it was held that its application to green corn could not be patented, although much study and experiment had been expended to discover that the old process would apply to the new article. Sewall v. Jones, 91 U. S. 171. Where a certain mode of fastening had been applied to pickaxes, it was held not patentable for anchors. Brunton v. Hawkes, 4 Barn. & Ald. 541. A "fish" for the timbers of bridges, anticipated a like fish for rails of a railway, though its mode of operation was somewhat different. Harwood v. Great Northern Ry. Co., 11 H. L. 654. A process for finishing cotton and linen threads could not be patented when applied to threads of wool and hair, though experiment was necessary to discover its applicability to them. Brook v. Aston, 8 El. & Bl. 478. So of many other cases where the adaptation was new and useful, but no new means were devised, and no new result was reached, or only one which had been attained before in analogous arts. Bill dismissed with costs.

WALKER (REESIDE v.). See Case No. 11,656.

Case No. 17,084.

WALKER et al. v. REID et al.

[2 Cin. Law Bul. 133.]

Circuit Court, S. D. Ohio. June 11, 1877.

TRADE-MARKS — SECRETARY'S CERTIFICATE — VALIDITY AND INFRINGEMENT.

[1. The certificate of the commissioner of patents of the registration of a trade-mark is not required to include a certified copy of the declaration filed with the trade-mark; for the law does not provide for the recording of such declaration, as distinguished from the statement which is required to be recorded; and a statement in the certificate that the declaration was filed, together with the substance of the declaration, is sufficient.]

[2. There can be no valid trade-mark in the words "Stoga Kip," as applied to boots, for they indicate neither ownership nor origin, but merely designate quality.]

[3. Quære: Whether one who has obtained a patent for an improvement in the manufacture of boots, which he terms in his application a "Saddle Seam Boot," can thereafter obtain a trade-mark in these words, whereby his monopoly may be prolonged beyond the term of the patent.]

[4. The owner of a trade-mark for goods which he manufactures under a patent is not entitled to enjoin the use thereof by a dealer purchasing his goods from a manufacturer who has a license under the patent.]

[This was a suit in equity by Joseph H. Walker and others against W. P. Reid and others to enjoin the alleged infringement of a trade-mark.]

Lincoln, Smith & Stephens, for complainants.

Perry & Jenney and Mr. Hartwell, for defendants.

BY THE COURT. This suit is brought by the complainants to enjoin the defendants from the use of certain trade-marks described in the bill, the first of which is composed of the words "Walker Boot," and an open star, which, it is alleged, was legally registered and recorded in the patent office on the 23d day of May, 1871. The second is composed of the words "Saddle Seam Boot," and which, it is alleged, was legally registered and recorded on the 23d day of July, 1872. In addition to the registered trade-marks, the bill alleges that complainants have for four years past, for the purpose of designating the boots manufactured and sold by them, and to distinguish them from those manufactured and sold by others, used upon the cases or packages containing their boots certain marks, consisting of the words "Stoga Kip." The letters "J. H. W." (being the initials of John H. Walker) inclosed in a broken ellipse, the words "Trade-Mark," "Saddle Seam Boot," "Walker Boot," and the open star. Complainants allege further that during the period of four years they were, and now are, entitled to the exclusive use of said trade-marks, and until the infringement by the defendants they have been exclusively used by them; that large quantities of boots so marked in cases have been sold by them; that their boots have acquired a valuable reputation, and are known in the trade by such trade-marks; that such trade-marks, and the exclusive right to use the same, are of great value to complainants; that the defendants, without complainants' license, have offered for sale and sold large quantities of boots bearing the same marks, or substantially the same, in boxes bearing the same marks, or substantially the same, as those of complainants, and thereby induced the public to believe that the boots so sold were the boots manufactured by complainants, greatly to the damage of the complainants. The bill

concludes with the usual prayer for injunction.

Attached to the bill are the certificates by the commissioner of patents of the registration of the two trade-marks alleged to have been registered. Upon the hearing it was objected to these certificates that they did not show a compliance with the law regulating trade-marks, and therefore, as registered trade-marks, they are invalid. In support of this proposition, reference was made to Smith v. Reynolds [Case No. 13,097]. Under that authority, if the certificates in this case were the same as that given by the reporter, they would not be sufficient, but I think that certificates are different. In that case the certificate was, "That I, Lee, Smith & Co. did, on the 30th of December, 1870, deposit in the patent office for registration a certain trade-mark for paints, of which a copy is hereto annexed; that they filed herewith the annexed statements, and having paid into the treasury of the United States the sum of twenty-five dollars, and otherwise complied with the act of congress in such case made and provided, the said trade-mark has been duly registered, &c." In that case the only thing certified to have been filed was the "annexed statement." The commissioner in these certifies that "Joseph H. Walker did, on the 1st day of May, 1871, deposit in the said office for registration a certain trade-mark, a copy of which is hereto annexed, &c.; that he deposited therewith a statement, a copy of which is also hereto annexed, and the declaration under the oath of himself, the said Joseph H. Walker, to the effect, &c." Then follows a minute detail of all the declarations contained, which shows that it was in full compliance with the law. In this the two certificates are different. The statement required by the statute is a separate and distinct thing from the declaration, and, when the statute speaks of certified copies of the statement, it certainly does not thereby include the declaration. The statement is to contain the name of the person who applies for the trade-mark, the kind of goods to which it is to be applied, and a description of the trade-mark, and this is to be recorded; but there is no provision for recording the declaration, and consequently no provision for certified copies thereof. But the certificates in this case show that such declarations were filed, and this, I think, for the purposes of the present hearing, must be taken as true. In addition to the registered trade-marks, I take it that this bill alleges that they have combined these two trade-marks with the words "Stoga Kip," the letters "J. H. W.," in a broken ellipse, the words "trade-mark," and used them all upon the boxes containing the boots of their manufacture, as a general trade-mark, to designate them as of their manufacture.

It is not contended that the defendants have used the first trade-mark as registered; the proof shows, however, that they have used the second literally as registered. The proof further shows that the defendants used upon the boxes in which their boots were sold the words "Stoga Kip," the letters "J. H. W.," in the broken ellipse, the words "Walker Saddle Seam," in stencil, and the words "Walker Saddle Seam," branded letters of the same size and form, and stencil and brand of the same general appearance of those used by complainants. That defendants had a right to use the words "Stoga Kip," separate from any other word, cannot be doubted, for the words neither indicate ownership nor origin, but quality, and the complainants themselves could acquire no exclusive right in such words separately, or as a trade-mark; but when used in connection with their own name, or their initials, to designate goods of their manufacture, it might become a part of their trade-mark. Had the defendants stopped with the use of the word "Stoga Kip," they could not have been enjoined, but they have used the letters "J. H. W.," in the broken ellipse, in connection with it precisely as used by complainants; this they certainly had no right to do, in connection with goods of their own manufacture, or with others than those of complainants. The more important matter, however, is the use of the words "Walker Saddle Seam," and it has given me no inconsiderable amount of trouble.

It appears from the evidence in the case that Joseph H. Walker, on the 1st of November, 1870, obtained a patent for an improvement in the manufacture of boots. What he claimed as his improvement was "a boot having a saddle or brace piece applied with a boot to the side seams, and extending up on said seams above in the top line of the counter, as and for the purposes set forth," and which improved boot he termed in his application the "Saddle Seam Boot." In the drawing referred to it is called "Joseph H. Walker's Saddle Seamed Boot." Whether this title is copied from the original drawing, or "Joseph H. Walker" added by the commissioner as a designation of the person whose invention it was, does not appear. The evidence further shows that Joseph H. Walker on the 23d of July, A. D. 1872, registered the trade-mark "Saddle Seam Boot," which he says in his statement was to be used upon boots made as described in his letters patent of November 1, 1870, and the circulars and advertisements relating to said style of boots. The evidence further shows that this patent was assigned by Joseph H. Walker to the Walker Saddle Seam Association, but whether the assignment was made before or after the registration of the trade-mark does not appear. It does appear, however, that, after the association became the owner of the patent, it granted license to others to manufacture boots under the patent, and that during the year 1872 large quantities of boots were manufactured under the same by said licensees. It also appears that since 1872 a large number of persons have been licensed to manufacture boots under said patent, and that more than

two-thirds of all the boots now manufactured are manufactured by others than complainants, who are also licensees, and are manufacturing by virtue of their license.

Upon this statement of facts the question arises: Can a man, after he has obtained a patent for an improvement of this character, and which he terms in his application a "Saddle Seam Boot," obtain the right to a trade-mark in and to the same name? By the patent the government has given him the exclusive right for seventeen years to make and sell the improved boot which he calls the "Saddle Seamed Boot"; can he procure an additional right by which he shall have the exclusive use for thirty years of that name, by which he can prohibit, long after his patent has expired, the use of a name which, by his patent, he has given to the public? The view that I have taken of the case renders it unnecessary to determine that abstract question; but I doubt very much the validity of any such trade-mark. It is admitted in argument by the learned counsel for complainants that they have not the exclusive right to the words "Saddle Seam Boot"; that other licensees have an equal right with them to their use; and so those to whom they sell have the same right to their use until the article shall be consumed. But it claimed that as against these defendants the right exists, because they were not licenses. If it were entirely clear that these parties were using the words to designate and dispose of goods of their own manufacture, it would bring us back to the question of the validity of this trade-mark; but that is not the case as presented by the testimony. Upon this point the testimony is somewhat conflicting. The affidavits of the defendants show that they did not use these words upon boots of their own manufacture; that they were used only upon goods which they purchased from licensees, or those purchased from the purchasers of such licensees. If this be so, there can be no injunction as to the use of these words, but concede it to be doubtful whether they have used them in the sale of their manufactures; still, the injunction would be refused, for it is a well-recognized principle that whenever the title or right which is sought to be protected is not entirely clear, or the infringement doubtful, an injunction will be refused. Had the defendants used only the words "Saddle Seam Boot," I have no doubt that they would have been protected as against everybody, but the evidence in the case shows that the defendants, in connection with these words, have used the word "Walker." I admit that, if this boot had become generally known throughout the entire trade as "Walker's Saddle Seam Boot," the defendants would have had a right to use it in connection with work manufactured under the patent; it would come within the doctrine of Singleton v. Bolton, 3 Doug. 293; Canham v. Jones, 2 Ves. & B. 218; and Singer Manuf'g. Co. v. Wilson, 3 Cent. Law J. 706. In the latter case the court held that the defendants had a right to call their machine the Singer machine, provided they did not convey the idea that it was manufactured by the Singer Co. There is a diversity of statements by the witnesses upon this point, some testifying that the word "Walker," prefixed to the words "Saddle Seamed Boot," signifies that the boot was made under the Walker patent, and others that it signifies to the trade the boot made by complainants under the patent. The weight of the evidence would seem that the word was understood to designate the boots manufactured by the complainants, but this might of itself not be sufficient to maintain injunction. But we have in addition to this the fact that defendants were customers of the complainants up to 1875, when, from some cause, they refused to sell them any more goods, and that in 1876 the defendants procured the stencil and the brands, the letters "J. H. W.," with the broken ellipse precisely as complainants; in the brand the word "Walker" was of the same letters in size and appearance as complainants, but in lieu of boot and star they had saddle seam. In addition we have the testimony of three witnesses that the principal defendants admitted to them that they had infringed complainants' trademarks, and assigned as a reason therefor that the complainants would not sell them their boots, and they did it to satisfy their customers and not lose their trade. The defendant denies that he made such admissions; says he had conversations in regard to the matter, but did not use the language; but the testimony of three must outweigh that of one. I think from the evidence in the case the complainants are entitled to an injunction restraining defendants from the use of the letters "J. H. W." and the broken ellipse, and from the use of the word "Walker" as used by them, but they are not entitled to an injunction restraining them from the use of the words "Saddle Seam." Whether the defendants would have the right to use the word "Walker" in connection with the words "Saddle Seam," simply to show that the boot was manufactured under Walker's patent, need not now be decided. Let an injunction issue in conformity with this opinion.

Case No. 17,085.

WALKER v. SEIGEL et al.

[12 N. B. R. 394; [1] 2 Cent. Law J. 508.]

District Court, E. D. Missouri. Feb. 11, 1875.

JURISDICTION IN BANKRUPTCY — ENJOINING SUITS IN STATE COURTS—EQUITABLE ASSIGNMENT.

1. Creditors of a bankrupt holding an order obtained before bankruptcy, on a general fund, acceptance thereof having been refused, though holding an equitable assignment of the fund pro tanto, will be restrained from prosecuting their suit, after bankruptcy, against the managers of the fund, in the state court.

[Cited in Re Smith, Case No. 12,990.]

[Cited in Grammel v. Carmer, 55 Mich. 213, 21 N. W. 424.]

[1] [Reprinted from 12 N. B. R. 394, by permission.]

2. The bankrupt himself, before bankruptcy, or his assignee after bankruptcy, is a necessary party to a suit in equity on such an order, and the bankruptcy court has exclusive jurisdiction for the determination of all questions pertaining to the bankrupt's estate.

[Cited in German Sav. Inst. v. Adae, 8 Fed. 108.]

[This was a bill by William R. Walker, assignee in bankruptcy of Morris H. Fitzgibbon, to restrain the defendants, Seigel & Bobb, from prosecuting a suit in a state court.]

TREAT, District Judge. The bill prays for an injunction to prevent the prosecution of a suit by Seigel & Bobb, in the Buchanan circuit court, and against the other defendants. The managers of a state lunatic asylum, in their capacity as such state officers, had in their possession a large sum of money applicable to the payment of debts due [Maurice H.] Fitzgibbon, the bankrupt. The latter, before bankruptcy, gave an order on said managers to pay ten thousand dollars to Seigel & Bobb, to whom Fitzgibbon was indebted for work and materials furnished. The order was duly presented and acceptance and payment refused. The managers had full notice thereby of the existence of said order.

An examination of the authorities shows that at the present time the general rules governing such cases are: First. That a draft or check does not operare as an assignment of the funds unless accepted,—so that the holder can sue the drawee in his own name. There is no privity between the holder and drawee, and this obtains whether the funds are general against which the draft is made, or the fund is specific. Second. An order drawn for the whole of a particular fund, is an equitable assignment of the fund, and after notice to the drawee binds the funds in his hands. In such a case it seems that a suit in assumpsit may be maintained in the name of the assignor to the use of the assignee. Third. An order drawn on a general or particular fund for a part only, does not amount to an assignment of that part, or give a lien as against the drawee, unless he accepts. That rule, as thus broadly stated, seems to apply only to cases at law. Such an order, so soon as notice is given to the drawee, works an assignment in equity. In a few states, from the peculiar character of their practice, a direct action could be had by the assignee in his own name, or in the name of the drawer, to the use of the holder. The general doctrine, however, is as stated in Gibson v. Cooke, 37 Mass. [20 Pick.] 15, and Christmas v. Russell, 14 Wall. [81 U. S.] 69. The holder is driven to his suit in equity, where the interests of all concerned in the fund can be disposed of at the same time. The rule in Mandeville v. Welch, 5 Wheat. [18 U. S.] 277, has never been departed from in United States courts; but that rule, and the reasons on which it rests, pertain solely to actions at law.

In equity, partial assignments of the fund are recognized, because the drawee is subjected to only one suit. True, in some states a suit in the name of the assignor for the use of one or more assignees has been upheld, on the theory that the assignor may recover from the drawee all funds of the assignor in the latter's hands, and while the equitable interest of the assignee or assignees will be thus protected, the drawee will be subjected to only one suit. But it is apprehended that such rulings are wholly inconsistent with the doctrine that, in United States courts, pure equity proceedings cannot be, and are not, modified by state modes of practice. If the rights of a party are cognizable alone in equity, he must proceed accordingly.

In law courts, as actions of assumpsit proceed on an express or implied promise or undertaking by the defendant in favor of the plaintiff, that privity must exist. In the absence of such promise or undertaking, where notice of the order is given, many state courts have held that suits in the name of the assignor to the use of the assignee, may be maintained at law, whether the order was for the whole or part of a fund in the hands of a drawee. This court sitting under a different system as to equity causes, must compel persons who have no assignments or liens, except in equity, to pursue their remedies solely in equity.

But it is contended that as Seigel & Bobb had an assignment in equity of this fund pro tanto, they had a right to sue therefor in their own names in the state court, where by force of the state statutes they could proceed accordingly, there being no distinctions in form as to legal and equitable proceedings. If their right so to do were irrespective of any supervision or jurisdiction of a United States court, the proposition might be correct. In this case, as presented, it appears that Fitzgibbon was adjudicated bankrupt; that thereafter Seigel & Bobb proved a demand against the bankrupt's estate for thirteen thousand dollars, ten thousand dollars of which was secured (as above set out) and the other three thousand dollars unsecured. Thereupon, without leave had from this court sitting in bankruptcy, and without making the assignee in bankruptcy a party, they instituted in a state court, according to the mixed state practice, an action as assignees in equity for the sum of ten thousand dollars against the other defendants (the drawees), said sum being part of the fund in the hands of the latter.

If the foregoing rules are correct, then the bankrupt in person, who was the assignor, or his assignee, would in equity be a necessary party, and the managers would have a right to cause the other claimants of the fund, if any, to interplead. But it is urged that after the order drawn and notice to the drawees, Fitzgibbon was in equity only a trustee for the payees, and therefore his interest did not pass to his assignee in bankruptcy. It is certainly correct that property held merely in trust by the bankrupt does not pass to his assignee; but it is also true that if he has an interest, or if his trust is coupled with an interest, then

his assignee in bankruptcy is vested with said interest. Here, however, we have by the bankrupt act [of 1867 (14 Stat. 517)] exclusive jurisdiction for the determination of all such questions when they arise, vested in the court which has charge of the bankrupt's estate. If a person holding a mortgage, or deed of trust, or collaterals of any kind, to secure an alleged debt, can, regardless of the court in bankruptcy, proceed to dispose of the same, without question, and without the knowledge or consent of said court, or without having the validity of his debt, or of the security, passed upon by said court, then there will be no practical force given to the many important provisions of the act of congress, designed to vest in the United States court exclusive jurisdiction of all such questions. This court rules, therefore, that the plaintiff is entitled to the injunction prayed for, and that the prayer of the managers for the other claimants of the fund in their hands to be cited in to interplead ought to be granted. They are entitled to be thus protected. The orders will be accordingly.

[See Case No. 11,559.]

Case No. 17,085a.

WALKER v. SMITH.

[2 Hayw. & H. 230.] [1]

Circuit Court, District of Columbia. March Term, 1857.[2]

PUBLIC LANDS—CONFLICTING CLAIMS—LAND OFFICE DECISIONS.

Where the defendant has paid a large and valuable consideration, without any notice of the complainant's claim, has made his proofs, and has had the decision of the general land office in his favor, he has obtained an advantage of which a court of equity will not deprive him under the circumstances.

In equity. This bill was brought [by John M. Walker] to obtain an injunction to prevent the issuing of certain script to Jonathan B. H. Smith, the defendant, by the land office, and to have cancelled the assignment under which Smith had been adjudged by the officers of the government entitled to the script.

Lawrence & Davidge, for complainant.
Jas. M. Carlisle, for defendant.

The counsel for defendant, Smith, made the following points:

1st. The defendant's title is admitted by the bill modo et forma, it is set up in the answer: The execution of the instrument, the payment of a full and valuable consideration; the absence of notice in fact; the inquiry at the general land office; the apparent title of Scott at that office, and the fact that the complainant's title-paper was in the private iron safe of Pruit, after the defendant's purchase, are proven by Webb, the complainant's witness.

2d. The complainant's assignment, prior in time, if admitted to be founded upon a sufficient consideration, and valid as between the parties to it must be postponed to that of the defendant, who is portior in jure by reason of his superior diligence, and because the complainant, by his laches, has enabled the common assignor to perpetrate a fraud upon the defendant, if the assignment to the latter be allowed to be defeated by the complainant's "pocket conveyance."

3d. The complainant's assignment is not proven; the power of attorney does not prove it as against the defendant. Neither time, place, nor consideration is specified in the recital; nor is there any proof aliundi upon either of these particulars. The complainant, therefore, has not made out such a case as to induce a court of equity to interfere as against a bona fide purchaser for full and valuable consideration without notice, actual or constructive.

4th. The bill itself shows that the defendant, by his superior diligence, is in a present capacity to receive the fruits of his assignment, and in substance, as a holder of a legal title in aid of his equity, since the authority charged with the execution of the law has determined that the defendant is "the present proprietor of the warrant, and entitled to receive the script, and shall receive it unless this court interferes."

The principle that the subsequent in date of two otherwise equal equities, shall not be disturbed if it be aided by the legal title (or in other words if the holder of it will prevail if "let alone") applies to this case. Judson v. Corcoran, 17 How [58 U. S.] 615, and the cases there cited and approved, and the same case in this court [Append. Fed. Cas.], so far as not covered by the opinion of the supreme court are relied on in support of the law involved in the foregoing propositions.

The points made by Mr. Laurence, the counsel for the complainant, were as follows:

1st. The sale to complainant was prior in time to defendant. It is proved by an instrument under seal, dated March 30, 1837, the due execution thereof by Wm. S. Scott, under whom both parties claim title, is admitted by the defendant in his answer and his counsel in argument. This instrument, even if a mere recital of sale, as stated in defendant's answer, would still be sufficient evidence of complainant's title. It recites the absolute sale to complainant of the warrants mentioned, and declares its object to be to secure to him the unsatisfied ten per cent., and any equivalent which may be granted therefor. It further invests complainant with all the powers over the property possessed by Scott. There is no prescribed form for the assignment of these warrants; any paper showing on its face the intention of the grantor to transfer his title to the grantee is sufficient.

2d. As to the consideration of complainant's assignment. (1) If the legal title passed by the sale and the above instrument (and that it did is demonstrable) the question of consideration is immaterial, the legal title will be pro-

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

[2] [Affirmed in 21 How. (62 U. S.) 579.]

tected. (2) Even when an equitable title passes, if the intention to transfer be clear, and the transfer be complete, neither a court of law nor equity will inquire into the consideration. McNulty v. Cooper, 3 Gill & J. 214, 219. (3) But if the consideration be inquired into that there was a valuable consideration is fully established by an instrument under seal, the execution thereof is admitted, and which recites a sale and the delivery in pursuance of such sale of the script which had issued. Again the answer denies consideration on information, not even belief. A replication was filed, and no proof was offered by the defendant to sustain his allegation. Complainant's proof is that there was a valuable consideration. It must be admitted that the ex parte affidavit of Scott, upon which alone the denial of the answer is based (putting out of view his motive to conceal his fraud), is not evidence. But even if it were, he is contradicted by the testimony of Webb, the agent who negotiated the sale claimed by defendant. It may be remarked that defendant claims as heir at law and executor, and does not profess to have any personal knowledge of the facts before August 31, 1852.

3d. As to the instrument under which the complainant claims. This, it is said, is a mere letter of attorney, and not an assignment or evidence thereof. To distinguish it as such is utterly to disregard its contents; but if it be a mere power it is coupled with an interest and is irrevocable. Hunt v. Rousmanier, 8 Wheat. [21 U. S.] 174, 1 Pet. [26 U. S.] 1. And being given for a valuable consideration (the purchase of the warrant mentioned in it), it would operate as an equitable transfer. Bromley v. Holland, 7 Ves. 28; Bergen v. Bennett, 1 Caines, Cas. 18; Raymond v. Squire, 11 Johns. 47; People v. Tioga, 19 Wend. 73. The paper however is manifestly evidence of absolute sale and assignment.

4th. It is argued that although complainant be prior in time-pose the defendant is potior in jure. The general rule is stated by the supreme court in Judson v. Corcoran, 17 How. [58 U. S.] 615; to be "that the purchaser of a chose in action, or of an equitable title must abide by the case of the person from whom he buys." The defendant seeks to bring himself within exceptions to this rule. It is plain the burden of proof is upon him; if he fails to show his case to be an exceptional one, the general rule must prevail. He relies upon two propositions: (1) That complainant's assignment had not been filed by him in the general land office, when defendant's father purchased Jan. 18, 1838. (2) That there has been an adjudication, the effect of which was to invest defendant with the legal title, and that consequently if the equities are equal, the legal title which defendant has drawn to his equity will prevail.

As to the first proposition: It is not pretended that there existed any law, regulation or usage requiring the filing of complainant's assignment in the general land office. If requisite, it must be on some general principle of equity applicable to this case. The whole equity set up by defendant, by virtue of which he claims to be within an exception to the general rule, is that in 1838; his ancestor before concluding his purchase, made inquiry at the general land office of a subordinate clerk, and was told by him that there was no prior assignment on file. But in answer to this it is submitted that by the express terms of the act of March 3, 1834 (4 Stat. 770), the appropriation of land thereby made was "in full satisfaction" of all further claim against the federal government. The claim which remained after the surrender of the warrants was against the state of Virginia, and it cannot be doubted that as against her there was a claim. Comegys v. Vasse, 1 Pet. [26 U. S.] 193 and especially 216. Now it is not asserted that complainant's assignment was not filed at Richmond, the proper place, or that any examination was there made. If, as is indubitably true, all claim was extinguished as against the federal government, upon the surrender of the warrants and receipt of the receiver's tenths of the script, why file here the assignment to complete? especially why file it at the general land office—the only place where search is alleged to have been made? If it was conceived that congress might possibly, in its liberality, make provision in a case where no claim, legal or moral or equitable existed, of what would that provision consist—land or money? and what department of the government would be charged to administer that provision?

To maintain complainant's proposition, it must be shown that there was proper diligence on defendant's part and gross neglect on complainant's. The diligence alleged seems to have consisted in looking for the assignment, where no one could reasonably expect to find it, the gross neglect in not filing it where no one could be reasonably expected to look for it. It will be observed that notice was not necessary to perfect the assignment. 1 Story, Eq. Jur. 421c; 2 White & T. Lead. Cas. Eq. 238, &c.; nor is there a case where a trustee, having paid to a subsequent assignee, without notice of the claim of a prior assignee, and in ignorance of it, seeks to be protected, and where different considerations might be applicable. Again equity requires notice only to the debtor or trustee holding a fund. Judson v. Corcoran, 17 How. [58 U. S.] 615. It does not require notice to a party standing in no fiduciary relation to the assignor. Here the government of the United States was not a debtor nor a trustee in any the largest sense; nor was there any fund or any right to call for a fund after the "full satisfaction" had been made. Far different was Judson v. Corcoran. There Judson took his assignment, of a mere equitable title, in January, 1845, and did not set it up until May, 1851, when Corcoran had been adjudged by the board, the owner of the fund. The claim against Mexico had always been recognized by this government, and was the subject of negotiations before 1839, when it

was submitted to the mixed commission. With these negotiations, the state department was exclusively charged, and it was the only channel through which redress could be obtained, and hence the propriety of filing in that department. Judson failed to file until three years after the treaty of Gaudalupe Hidalgo, and two years after the passage of the act of congress to carry out its provisions. There was from the origin of the claim, what was equivalent to a fund, and there was also the right to call for it. Until the treaty the state department was the exclusive representative or trustee of the claim, the claimant having no recourse against nor means of communicating with the Mexican government, save through that department. After the treaty and act of congress there was an actual fund in esse. There was then from the inception of the claim an ascertained legal depository with which to file, until the passage of the act of congress—the state department—afterward the board. There was also a valid, subsisting, unsatisfied claim throughout. There was no "full satisfaction" as here. As to the legal character of the claim in the case of Judson v. Corcoran, see Comegys v. Vasse, 1 Pet. [26 U. S.] 193, 216. See, also, De Bode v. Reg. (in Dom. Proc.) 16 Law & Eq. 14, in which, at page 23, the lord chancellor (St. Leonards) uses the following language: "It is admitted law, that if a subject of a country is spoliated by a foreign government, he is entitled to obtain redress from the foreign government, through the means of his own government. But if from weakness, timidity or any other cause on the part of his own government, no redress is obtained from the foreigner, when he has a claim against his own country."

In the present case there was a settlement under the act of 1835, if there can be one full satisfaction. But complainant's assignment was filed in the general land office in June or July, 1838, certainly in the autumn of that year when Webb saw it. The act, making provision for the unsatisfied ten per cent. was passed August 31, 1852 (10 Stat. 148), fourteen years then before the federal government was in any sense debtor or trustee; and before any fund existed in its hands, or there was any shadow of right to call for a fund, the assignment was filed. To deprive complainant of his superior title, in consequence of his prior purchase, there must be gross and unwarrantable neglect. The time of giving notice depends upon the special circumstances of each case. There is no fixed rule, but undoubtedly if the thing to be transferred be a mere possibility or expectancy, a larger time will be allowed. Even in the case of the transfer of real estate, the acts of Maryland have allowed six months for recording the deed and protecting the purchaser (within that time) against any subsequent purchaser, though bona fide and without notice. The true question is not whether the defendant may sustain damage in consequence of complainants not filing in the general land office (for that may manifestly occur where there would be no exception to the general rule), but whether under all the circumstances—there having been full settlement and satisfaction with the federal government, there being no fund nor right to call for or even to expect one, &c., &c., gross and unwarrantable laches can be imputed to complainant.

As to the second proposition: that defendant has drawn to his equity the legal title. Here, too, it is incumbent on him to bring himself within an exception to the general rule. To do this he must show: 1st. That he has an equal equity. 2nd. That he has the legal title. The first of these propositions has already been sustained. As to the second, has defendant the legal title, and when and how did he obtain it? The only legal title he depends upon is under the letter of the commissioner, dated August 3, 1854. If complainant has the legal title before that time, or if defendant did not obtain it by virtue of the letter, the case is not brought within the exception.

On behalf of the complainant it is submitted: 1st. That Virginia military land warrants are the subject of ownership at law, the title to them is as much a legal title as that of the proprietor of state stock, negotiable paper, &c., or of a bond in which he is the obligee. 2d. That they are assignable, the legal and not the mere equitable title passing to the assignee. 2 Rev. Code 1819, pp. 371, 372, etc.; Rev. Code 1849. The whole legislation of congress recognizes the quality of assignability, and shows that congress has never designed to interfere with the legal character of these warrants so established by Virginia, but merely to provide the means to satisfy them. The cases of such recognition might readily be enumerated. It will be observed that by the 4th section of the act of May 30, 1830, c. 215 (4 Stat. 422), it is provided that the script to be issued under it should be receivable in payment of lands offered at public sale and remaining unsold at any of the land offices in Ohio, Indiana and Illinois. And afterwards by the act of congress of March 2, 1833, c. 94 (4 Stat. 665), such script was made receivable in payment for any of the public lands liable to sale. The 2d section of the act of 1830 provided that the script to be issued upon warrants granted after its passage should be issued to the party originally entitled. But these provisions did not alter the assignable quality of the warrants. See act July 7, 1838, c. 166; 5 Stat. 262. They merely extended the area out of which the warrants were to be satisfied, and imposed in certain cases a restriction as to the mode of using the script. Warrants still continued assignable. An assignee could still, when he held warrants, though issued after the passage of the act of 1830, vacate them and obtain patents. Even the restriction as to the mode of issuing the script was afterwards repealed. The act in question, August 31, 1832, required the script to be issued to the "present proprietors." It also, like the many preceding acts, recognized the assignability of warrants, and it further recognized it for all purposes whatso-

ever. All restrictions as to the script, and directing it to be issued to the present proprietors of the warrants. The simple question involved is: who at its passage was the proprietor of the warrants connected with this controversy? The heirs of Lee held a legal title, not an equitable one, which passed by the sale made by Scott to the complainant. No law regulation or usage required the filing of the assignment to complete the transfer. That has not been contended. Congress could, in 1852, make its grant to whom it thought fit. It chose to make it to the proprietors at that time of the warrants. It is urged, however, that the legal title was surrendered when the warrants were filed at the general land office under the act of 1835 [4 Stat. 749]. But: 1st the surrender was the "full satisfaction" only as to the United States. The warrants still had valuability as regarded Virginia. The act of 1852 [10 Stat. 256] expressly recognized ownership after the surrender. Its terms are "present proprietors of any warrants thus surrendered." If the legal title was surrendered by the election to take under the act of 1835, so would have been an equitable title. But this defendant does not contend for, and wisely, as he would thereby defeat his so-called equity. The result of the argument is, and would clearly be, that the provision of congress in 1852 would find the first assignment the complainant's. That even if the warrants were not legally assignable, even if complainant never held any legal title (if that can be supposed), the defendant never obtained that legal title under the commissioner's letter as he maintains he did: 1st. Because even the secretary of the interior, much less a subordinate, the commissioner, an officer unknown to the law, had no jurisdiction inter partis, and could not in any manner effect their rights. Comegys v. Vasse. 2d. If jurisdiction existed, the secretary, the only officer known to the law, has not acted under the act of 1852; the secretary of the interior is to issue script. The action of the commissioner, until submitted to the secretary, and approved by him, is no more than the action of any other subordinate. All the script has to be signed by him, the secretary. 3d. The letter of the commissioner clearly shows he did not intend to effect the rights of either party, and that his action was not final. The language of the letter is that a reasonable time will be given to test the matter before court, "before further action will be taken." Even his action was inchoate and incomplete. No order was given to prepare the script. It is not sufficient that the possession of the legal title by the defendant, upon which Corcoran & Judson turned in the supreme court, can be seriously maintained.

In reply to the complainant's points, the following propositions are relied on:

1st. The argument as to "legal title" in the complainant can only apply to the warrant. The warrant is only an authority to locate and survey. The "legal title" to this warrant never was in any person but the heirs of Lee, unless the recent decision of the commissioner, that Smith (the defendant) is the "present proprietor" put it in him. Whatever title any other person could have had in it, was necessarily an equitable title merely.

2d. The so-called legal title, which existed in 1837-8, was surrendered with the warrant to the United States, by the election, to take under the act of 1852.

3d. The statutes cited by Mr. Lawrence, if they show that the assignee could not be recognized at the land office (because the script could only issue to the warrantee, his heir or devise), by the same showing, demonstrate that the claim of an assignee was purely equitable. Congress could not deprive that property of the incident of being alienable. The policy of this and other laws in pari materia was to protect the warrantee, and to make every assignment depend upon its equity; not to prevent equitable assignments, which would have been inconsistent with the enjoyment of the property. Therefore equitable assignees were referred to the land office, when the warrants were deposited, and from which all benefit of ownership must issue. And so the complainant himself understood, but he delayed to give notice there until after the defendant, by his laches, had been rendered to purchase on the faith of Scott's apparent right to dispose of the subject matter in the name of Lee's heirs.

This cause coming on to be heard on the bill, exhibits answer, general replications and depositions; and the same being seen and read by THE COURT. And the parties by their solicitors being heard, and the matter being fully understood, it was ordered by THE COURT, on mature deliberation, that the complainant's bill be dismissed with costs, &c.

On appeal to the supreme court of the United States, the decree was affirmed. See 21 How. [62 U. S.] 579.

Case No. 17,086.

WALKER et al. v. SMITH.

[1 Wash. C. C. 152; [1] 4 Dall. 389.]

Circuit Court, D. Pennsylvania. Oct. Term, 1804.

PRINCIPAL AND AGENT — GRATUITOUS SERVICES — VINDICTIVE DAMAGES — PROVINCE OF COURT AND JURY.

1. No man can compel another to render him acts of friendship, or service, of any kind whatsoever, gratuitously, or with a view to compensation. But if the person applied to consents to render the service, and undertakes the business, he is bound to act in conformity to the terms on which the request was made.

[Cited in brief in Chamberlain v. Parker, 45 N. Y. 571.]

2. In commercial agencies, this rule should be strictly enforced.

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

3. The relinquishment of commission on an agency, does not release from the effects of negligence.

4. An agent who does not comply with his instructions, is liable for the loss occasioned thereby, although the services were gratuitously rendered.

[Cited in brief in Crump v. U. S. Mining Co., 7 Grat. (Va.) 366.]

5. In suits for vindictive damages, the jury have the right to decide on the amount, without the control of the court; but where they are extravagant, the court will interfere. But in other cases, where a rule can be discovered, the jury are bound to follow it; and where a sum of money has been lost to the plaintiff by the negligence of the defendant, the amount of damages which a jury can give, is the sum the plaintiff has been thus deprived of, and no more.

[Cited in Jolly v. Blanchard, Case No. 7,438.]

[Distinguished in Pegram v. Stortz, 31 W. Va. 246, 6 S. E. 499. Cited in brief in Seely v. Alden, 61 Pa. St. 304; Woodbury v. District of Columbia, 5 Mackey, 129.]

The plaintiffs, merchants in London, having been applied to by a Mr. Brown of Philadelphia, for a parcel of goods, and doubting his solidity, were introduced by the mutual friend of the plaintiff and defendant, to the defendant [Robert Smith]; and on this introduction, they sent the goods to him, and in a letter, stating their apprehensions of Brown, requested him to receive the goods, but not to deliver them to Brown, without payment for the amount being received, or such security given, as the defendant should approve; and in case neither was done, he, the defendant, was to dispose of them for account of plaintiffs. The defendant received the goods, and delivered them to Brown, without receiving payment or security. Brown afterwards failed; and by a compromise; part of the debt was received, and remitted to the plaintiffs; and this action was brought to recover the balance. In the account forwarded by the defendant, to the plaintiffs, after the failure of Brown, and the compromise, no commissions are charged.

Ingersoll, for defendant, contended, that a discretion was given the defendant to take security or not; that he acted for the best, without a view to any compensation whatever; and having himself trusted Brown, he had done for plaintiffs, as he would have done for himself. He therefore argued, that the plaintiffs were not entitled to recover at all. But if they were, he insisted, that it was in the discretion of the jury to find such damage, less than the loss sustained by the plaintiffs, as they might think right; taking into consideration all the favourable circumstances which attended the defendant's case. He cited [Purviance v. Angus] 1 Dall. [1 U. S.] 180; 2 Wils. 328; 2 Bac. Abr. 266; Bull. 156; 1 Esp. 179.

[For the plaintiffs, J. Sergeant and Dallas contended:

[1st. That although the defendant was not obliged to accept the consignment, yet, if he did accept it, he was answerable, like every other agent, or factor, for a breach of the positive orders of his principal. 1 Beaw. Lex. Merc. 44, 46; Moll. 493, 497; 4 Com. Dig. 227, 228; 2 Ch. Cas. 57; 4 Rob. 218; 1 Marsh. Ins. 206, 207, 209, 210.

[2d. That although the jury has a great and useful latitude in cases of tort, and mixed cases of negligence and tort, where no precise standard of damages was established, the legal discretion of a jury, could indulge in no capricious, or conjectural, estimate, in cases of contract, express, or implied, where a mere calculation of figures furnishes a certain and uniform standard of right. 2 Wm. Bl. 942; 4 Term R. 654, 655; 5 Term R. 255; Barnes, Notes Cas. 455, 448; 1 Strange, 425.

[3d. That, on these principles, the defendant was liable for the debt, as if he were a purchaser of the goods; and every purchaser is chargeable with interest, after the usual term of credit is expired [Henry v. Risk] 1 Dall. [1 U. S.] 265; Doug. 361; 2 Bos. & P. 337; U. S. v. Willing [Case No. 16,727].[2]

WASHINGTON, Circuit Justice (charging jury). This is a short and perfectly clear case. The facts are few, and agreed between the parties. It is my duty to state to you the law, and to apply it to the case. The principles of law, as applied to the duties and obligations of agents, have been correctly stated by the plaintiffs' counsel. No man can compel another to render him acts of friendship, or services of any kind, whether gratuitously, or with a view to a remuneration. But, if the person applied to, consents to render the service, and undertakes the business, he is bound to act in conformity to the terms on which the request was made. This rule is universal in its application, whatever may be the situations or professions of the parties; but, in commercial agencies, it is of great consequence, that it should be rigidly enforced. The defendant, by receiving the goods, and undertaking to act concerning them, bound himself to hold them, until paid for, or secured by Brown; and on his failure to do either, to dispose of them for account of the plaintiffs. But what has he done? He delivered them to Brown, without receiving payment or security; he did the very thing he was cautioned not to do. The discretion which the defendant had, was confined to the kind of security to be taken, and did not leave him at liberty to take security; or deliver the goods without any, as he might think proper. Had he taken security, which afterwards became insufficient, he would have been excused; provided he acted with that caution and prudence, which he would have observed in his own case. The defendant, by the very nature of the transaction, was entitled to a commission, as certainly as if the plaintiffs had promised it; and his relinquishing this compensation, after the loss had taken place,

[2] [From 4 Dall. 389.]

cannot alter the case. Indeed, he would have been liable, if it had been undertaken gratuitously. There was no ambiguity in the plaintiff's letter upon the subject; and therefore, the defendant is without excuse, and has taken upon himself to answer for the loss. He has made himself a guarantee of the debt.

The next question is, as to the damages? I admit the principle, that in cases sounding in damages, the amount of those damages depends upon the sound discretion of the jury. In cases, where merely vindictive damages are sued for, the jury act without control on this subject; because there is no legal rule by which they can be measured; and unless they are so extravagant as to induce a suspicion of improper conduct, the court will not interfere. But in these cases, where a rule can be discovered; the jury are bound to adopt it. That rule is, that the plaintiff should recover so much, as will repair the injury sustained by the misconduct of the defendant; and applying this rule to the present case, what other measure of damages can be thought of, but the sum lost to the plaintiff by the violation of his orders? The sum demanded, is of no great consequence, perhaps, to either of the parties, on the score of its amount. But the question itself is important to the commercial interests of this country; in its intercourse with foreign nations. A precedent is to be set to determine in a case like this, whether an agent is liable for a breach of orders, and to what amount.

The jury found for the plaintiff; but a sum much inferior to the loss he had sustained.

[The jury, however, gave a verdict for only 468 dollars 44 cents, which was the amount of the plaintiff's demand (after crediting the remittance), estimating the sterling money at par, allowing the defendant a commission, and deducting the interest. The jury added, that the plaintiffs should pay the costs.

[The finding of the jury, that the plaintiffs should pay the costs, was, at once, abandoned by the defendant's counsel, on general principles; but Ingersoll stated, that the first judicial law provided, that the plaintiff should not be allowed costs if he recovered a sum less than 500 dollars (6 Laws U. S. 16, § 3 [1 Stat. 83]); and that although the action was instituted, when the sum required, in that respect, was only 400 dollars, yet he referred to a decision of Judge Chase's, in the circuit court of Delaware, which pronounced, that the act repealing the latter provision revived the former, and was to be applied to all suits present, or future. Dallas referred, however, to the acts of congress, 5 Laws U. S. 237, § 11; 6 Laws U. S. 16, § 4 [1 Stat. 83]. And THE COURT declared that the plaintiffs were clearly entitled to costs.

[The plaintiffs' counsel then moved for a new trial, because the verdict was against law, evidence, and the charge of the court; but, after argument, the motion was overruled, and it was observed by Washington, Circuit Justice, that although he was not satisfied with the verdict, nor should he have assented to it as a juror, yet the question of damages, or of interest in the nature of damages, belonged so peculiarly to the jury, that he could not allow himself to invade their province; while he felt a determination to prevent, on their part, any invasion of the judicial province of the court.] [3]

[See Case No. 17,087.]

[NOTE. This case as reported in 4 Dall. (4 U. S.) 389, contains the following statement of facts: "The plaintiffs were merchants of London; and in March, 1796, shipped and consigned to the defendant certain goods, invoiced at £270 14s. 8d. sterling, accompanied with a letter, stating that 'these goods were shipped by order of Mr. J. B. and for his account; and he was to remit us the amount on his arrival at Philadelphia; but since they were shipped, some circumstances have occurred, which have created some doubts, in our minds, respecting his solidity; and by the advice of our friends, we have adopted this method to secure ourselves through your friendly assistance, which we request on this occasion. As we do not want to deprive B. of the benefits to be derived from the sale of these goods, we wish you to hold them at his disposal, but not to deliver them to him, without being paid for the amount, or having such security given you therefor, as is satisfactory to yourself. Should he not be able to effect either of these, in a reasonable time we would wish you to dispose of them for our account, and remit us the amount in good bills.' The defendant duly received the goods, but delivered them over to B. without receiving payment, or exacting security; and shortly afterwards B. failed. The defendant, however, representing other creditors of B., as well as the plaintiffs, made a composition, by which he received for the proportion of the plaintiffs £151. 16s. sterling, and remitted that sum to them, without charging commissions, in a letter dated the 11th of December, 1800. The plaintiffs refused to ratify the composition, and brought the present suit to recover the invoice value of the goods, with interest according to the usage of trade."]

Case No. 17,087.

WALKER v. SMITH.

[1 Wash. C. C. 202.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1804.

NEW TRIAL—ACTION FOR DAMAGES—PROVINCE OF COURT AND JURY.

1. Motion for a new trial.—In an action to recover damages, although the jury, by their verdict, gave the plaintiff less than the court thought him entitled to, a new trial was refused.

2. The court will always set aside a verdict, when it is against law: it will always respect the right of the jury to decide upon facts.

[Cited in Lancaster v. Providence & S. S. S. Co., 26 Fed. 234.]

3. If the court had jurisdiction of the cause, when the action was commenced, the repeal of

[3] [From 4 Dall. 391.]

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

the law, which gave the jurisdiction, will not take away the plaintiff's right to costs.

Rule for a new trial; the jury having found, contrary to the charge of the court, which laid down, as the rule for estimating the damages, the loss which the plaintiff had sustained, by the misconduct of the defendant, in violating his orders. [See Case No. 17,086.] The jury have given only the principal sum due, without interest; have allowed the defendant his commissions, though he claimed none; and have rated the exchange at par, when it was higher. Besides which, they have said, that the plaintiff shall not have costs.

WASHINGTON, Circuit Justice. We cannot say, that we are satisfied with the verdict; since we are of opinion, that the jury ought to have given interest on the principal sum, in the name of damages. But, ought the court, on this account, to set aside the verdict? If, indeed, the verdict were against the charge, we would not hesitate to do it; and would continue to do so, as often as such a verdict should be given. For, whilst we will always respect, and secure to the jury, the privileges to which they are entitled, which is, to decide upon the facts; we will take care, that the rights of the court, to decide the law, shall never be impaired by the jury. But, the court certainly never meant to direct the jury to find interest, in this case; although, we think they would have been justified, in giving it in the name of damages. But, if the jury saw any mitigating circumstances in the case, to induce them to refuse interest in such a case; it would be going too far, to set aside their verdict on that account. As to the allowance of commissions, though they were not claimed, yet it was admitted at the trial, by the plaintiff's counsel, that the defendant was entitled to them; and so we think. As to the rate of exchange, no evidence was offered to the jury upon that subject; but the difference is very trifling. As to the costs; the court had jurisdiction of the cause at the time the suit was brought; and, though the verdict is given after the repeal, and for less than 500 dollars; yet, costs must follow of course. Rule discharged, and judgment to be entered, with costs.

WALKER (STILLWELL v.). See Case No. 13,451.

Case No. 17,088.

WALKER v. STOCKDALE.

[11 Int. Rev. Rec. 63.]

Circuit Court, D. Louisiana. Feb. 5, 1870.

INTERNAL REVENUE—SEIZURE AND SALE—INJUNCTION BY STATE COURT.

Plaintiff [A. W. Walker] owns a distillery on the corner of Marmel and St. Peter streets, in New Orleans. Defendant [S. A. Stockdale], who is an internal revenue collector of the United States, seized upon the distillery and implements and advertised them for sale for the payment of the government tax. An injunction was issued on the 26th of October, 1869, from the Sixth district court, restraining defendant from selling the property. On the 4th of November following, Stockdale applied to the United States circuit court for a writ of certiorari directing the judge of the Sixth district court to send up the record, which was done.

On February 5th, DURELL, District Judge, rendered a decision in the case, ordering that the suit be dismissed; that the rule of the 10th of December, 1869, be made absolute; the injunction issued by the Sixth district court of New Orleans on the 26th of October, 1869, be set aside and quashed, and that A. W. Walker as principal, and Louis A. Ducros as security on the injunction bond, be condemned, in solido, to pay the defendant five per cent. damages on the sum of $5,651.52, and ten per cent. interest thereon from the 26th of October, 1869, till paid, and costs.

WALKER (TEAL v.). See Case No. 13,812.

Case No. 17,089.

WALKER v. TOWNER.

[4 Dill. 165;[1] 16 N. B. R. 285; 5 Cent. Law J. 206.]

Circuit Court, W. D. Missouri. 1877.

BANKRUPT ACT—REV. ST. § 5057—LIMITATION OF ACTIONS.

1. A suit by an assignee in bankruptcy to collect debts or claims due to the estate, must be brought within two years from the time when the cause of action accrued to the assignee.

[Cited in Payson v. Coffin, Case No. 10,859; Doty v. Johnson, 6 Fed. 482; Rice v. U. S., 122 U. S. 616, 7 Sup. Ct. 1381.]

[Cited in Ross v. Wilcox, 134 Mass. 22; Rock v. Dennett, 155 Mass. 500, 30 N. E. 172.]

2. Where an assignee filed his petition or declaration in a suit to recover such a debt within two years from the time when his right of action accrued, but gave directions to the clerk not to issue the summons, and such summons was accordingly not issued or served until more than two years from the time the cause of action accrued, *held*, that the action was barred.

This is an action brought to recover $3,500, as the balance due by defendant upon a subscription by him to the capital stock of the North Missouri Insurance Company, of which the plaintiff is the assignee in bankruptcy. The petition in this case was filed March 20, 1876; but the summons was not issued (by direction of the plaintiff's attorney, as stated in the plea of the statute of limitations below mentioned) until November 1, 1876, and was not served until November 2, 1876. The petition alleges that the company was adjudicated

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

a bankrupt November 8, 1873; that the plaintiff was appointed assignee on March 21, 1874, and that on July 3, 1874, the district court, on a petition presented by the assignee, found "that it is necessary, for the purpose of paying the indebtedness of the said company, to collect the whole of its assets, including the unpaid stock," and thereupon "ordered that the said assignee proceed forthwith to collect from the stockholders of said company the full amount due and unpaid on the shares of stock by them respectively held in said company." The defendant answered. The second and third special defences set up the statute of limitations prescribed in the bankrupt act. It is alleged in said defences that the deed of assignment from the register in bankruptcy to the plaintiff, as assignee, was dated March 23, 1874; that the order of the bankruptcy court assessing all stockholders, etc., was made July 3, 1874; that plaintiff's petition in this action was filed herein March 20, 1876; the writ issued November 1, 1876, and service had on defendant November 2, 1876. It is also alleged that service of process was countermanded by plaintiff for an indefinite time, and that plaintiff, of his own accord, and without the fault of defendant, forbore to issue process or to prosecute said suit until said issue of process, November 1, 1876. To this plea of the statute of limitations the plaintiff demurred, and it was on this demurrer that the case was submitted to the court.

N. Myers, for plaintiff.
Albert Blair, for defendant.

DILLON, Circuit Judge. The plaintiff's petition to recover in this case was filed within two years from the date of the order of the district court to the assignee to collect the unpaid stock, but, by direction of the plaintiff's counsel to the clerk, the writ of summons was not issued until more than two years from the date of that order had elapsed. The effect of this is conceded to be the same as if the petition had not been filed until November 1, 1876, which is more than two years from the time when the assessment or order to collect by the bankruptcy court was made. If, under the second section of the bankrupt act as found in the Revised Statutes (section 5057), any suit for the collection of assets by an assignee in bankruptcy is barred by the two-years limitation therein prescribed, then the present action is barred, if the facts set forth in the plea are true. This is an important question, and it has been thoroughly argued by counsel. Since this case was submitted, the same question came before Mr. Justice Miller, in the Kansas circuit, at the June term, 1877, in the case of Payson v. Coffin [Case No. 10,859]. The learned justice, after argument and consideration, there held that the two-years limitation in the bankrupt act applies to suits by assignees to collect the debts and assets of the estate, as well as to suits relating to specific property. The opinion was orally pronounced, but this conclusion was regarded as the almost necessary result of the language of section 2 of the bankrupt act of 1867 [14 Stat. 518], particularly the words "but no suit at law or in equity shall in any case be maintainable by or against such assignee, * * * unless the same be brought within two years from the time the cause of action accrued for or against such assignee," which was not intended to be changed, in substance, by the Revised Statutes (sections 4979, 5057); and this conclusion was considered to be strongly supported by the views of the supreme court in Lathrop v. Drake, 91 U. S. 516; Claflin v. Houseman, 93 U. S. 130; and Bailey v. Glover, 21 Wall. [88 U. S.] 342; and by the obvious policy of the bankrupt act in requiring speedy settlement of estates in bankruptcy. In Bailey v. Glover, supra, Mr. Justice Miller, arguendo, observed: "To prevent this (protracted litigation and delays in closing the estate) as much as possible, congress has said to the assignee, 'You shall commence no suit two years after the cause of action has accrued to you, nor shall you be harassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be settled up, and your functions discharged, and we close the door to all litigation not commenced before it has elapsed.'"

The decision in Payson v. Coffin, supra, has authoritative force in this circuit, and it is needless to enforce the arguments by which it may be sustained as a sound exposition of the limitation provisions of the bankrupt act. It is true that views have been expressed by judges which might lead to a different conclusion, as in Sedgwick v. Casey [Case No. 12,610]; Smith v. Crawford [Id. 13,030]; Re Krogman [Id. 7,936]; Bachman v. Packard [Id. 709]; Stevens v. Hauser, 39 N. Y. 302; Union Canal Co. v. Woodside, 11 Pa. St. 176; Re Conant [Case No. 3,086]. But the weight of judicial opinion is with the judgment of Mr. Justice Miller, in Payson v. Coffin. Mitchell v. Great Works Milling Co. [Id. 9,662]; Pritchard v. Chandler [Id. 11,436]; McLean v. Lafayette Bank [Id. 8,885]; Norton v. De la Villebeuve [Id. 10,350]; Miltenberger v. Phillips [Id. 9,621]; Comegys v. McCord, 11 Ala. 932; Harris v. Collins, 13 Ala. 388; Paulding v. Lee, 20 Ala. 753; Pike v. Lowell, 32 Me. 245; Archer v. Duval, 1 Fla. 219; Lathrop v. Drake, 91 U. S. 566; Claflin v. Houseman, 93 U. S. 130; Bailey v. Glover, 21 Wall. [88 U. S.] 342. Whether any cause of action accrued prior to the order of July 3, 1874, it is not necessary to determine. Judgment will be entered overruling the demurrer to the plea of the statute of limitations. Judgment accordingly.

WALKER (TRACY v.). See Case No. 14,129.

WALKER (UNITED STATES v.). See Case No. 16,632.

Case No. 17,090.

WALKER et al. v. WANTON et al.

[1 Cranch, C. C. 397.] [1]

Circuit Court, District of Columbia. April Term, 1807.

DISCOVERY—ACTION AT LAW.

If a debtor, in embarrassed circumstances, agrees to deliver to some of his creditors sufficient goods, at certain prices, to discharge their claims, and a part are selected, and inventoried, and removed from the shelves and set apart, and other creditors come in, and, with consent of the debtor, take possession of the whole, and of the inventory, and prevent the other creditors from finishing their selection, these creditors may, by a bill in equity for discovery, oblige the others to give up the inventory, to enable the former to support their action at law for the goods selected.

The bill states that the defendant Wanton, being indebted to the plaintiffs, agreed to assign to the plaintiff Walker, in trust for himself and the other plaintiffs, so much of his merchandise, as the plaintiff Walker should judge sufficient to satisfy the several claims of the plaintiffs. That it was understood, at the time, that the goods were to be charged to the plaintiffs at the invoice price, with costs and charges thereon. That in pursuance of that agreement, the plaintiff Walker went to the store of Wanton, with the assistance of whose clerk, he proceeded to select and inventory the merchandise, for the purpose of satisfying the said agreement. That he was several days engaged in the selection, in the course of which he took down from the shelves a considerable portion of merchandise, which was set apart as the property of the plaintiffs under the agreement, and was inventoried and charged as such by the clerk of Wanton. That some of the goods thus selected and inventoried, were carried to the warehouse of Rickets & Newton, and the residue into the back warehouse of Wanton, and the whole goods selected were thus removed, for the benefit of the plaintiffs, from the places where they were kept for sale. That, at the time of the agreement, Wanton was somewhat embarrassed in his affairs. That when it was known, by the defendants Janney and others, creditors of Wanton, that the plaintiff was engaged in selecting the merchandise in pursuance of the said agreement, they complained to Wanton of the injustice of the preference given to the plaintiffs, although they knew that the goods which the plaintiffs were receiving, were the very goods which they had before sold to Wanton, and urged him to withhold from the plaintiffs the goods which had been deposited in the back warehouse for their use, as well as the residue which the complainants were entitled to under the agreement; and that the defendants Janney and others interposed before the selection was completed, and when the plaintiff Walker was proceeding to finish the selection, he was opposed by Wanton, who alleged the interference of the other creditors, and abandoned his store and back warehouse to the defendants Janney and others, who refused to suffer the plaintiff Walker to proceed to finish his selection, or to take away the goods already selected. That the goods set apart and inventoried for the plaintiffs, were all priced and charged in the inventory, but the prices not extended, and the aggregate amount of the goods selected was not extended. That when the defendants took possession of the store, warehouse, and goods, they got possession of the books and papers of Wanton, and of the inventory of the goods selected, but the plaintiffs expected the defendants would have furnished the plaintiffs with a copy of it, in order that the plaintiffs might be able to describe their said goods, and support their title at law to the same, which, although demanded, they have refused, and have kept it among themselves, and appropriated to their own use, the goods selected by the plaintiffs, and refuse to pay the debts due by Wanton to the plaintiffs. The plaintiffs complain that they are remediless at law, and cannot obtain from the defendants a discovery of the inventory, and of sundry other matters and things necessary to the establishment of their claim to the residue of the merchandise left in the store of Wanton, without the interposition of this court as a court of equity. The bill then calls upon all the defendants for a discovery and production of the inventory. The defendants have answered, but none of them have produced the inventory, nor discovered minutely the contents, although it is admitted to be in the hands of the defendant, Green, who offers to produce it, if he shall be so ordered by the court. To the answer of Green, there is an exception taken on that ground, which has now come on to be heard. Before the court can decide the answer insufficient in that respect, they must be satisfied that the plaintiffs have a right in equity to require that defendant to produce it.

Mr. Swann, for plaintiffs, cited 2 Bl. Comm. 447, 448.

C. Lee, for defendants, cited Finch v. Finch, 2 Ves. Sr. 494; 2 Pow. Cont. 221; Like v. Beresford, 3 Brown, Ch. Cas. 366; Wrottesley v. Bendish, 3 P. Wms. 237; Hall v. Atkinson, 2 Vern. 463; 1 Wooddeson, 205; Fowl. Prac. 55; Mitf. Eq. Pl. 157, 162.

CRANCH, Chief Judge, thought the plaintiffs not entitled to the discovery against the other creditors, because the equity of the defendants is equal to that of the plaintiffs, who ought to be left to law to enforce their preference, if they have any.

FITZHUGH and DUCKETT, Circuit Judges, contra. Being of opinion that the plaintiffs had acquired a legal title to the goods, and were therefore entitled to a discovery of the evidence.

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

The answer of Green was adjudged insufficient, and he was ordered to produce the inventory.

WALKER (WASHINGTON v.). See Case No. 17,235.

WALKINSHAW (TOBIN v.). See Cases Nos. 14,068–14,070.

WALKINSHAW (UNITED STATES v.). See Case No. 16,633.

Case No. 17,091.

The WALKYRIEN.

[3 Ben. 394.] [1]

District Court, E. D. New York. Sept., 1869.[2]

MARITIME LIENS—SUPPLIES.

1. Where supplies were furnished, in the port of New York, to a vessel which hailed from a British port, carried the British flag, and was intending to proceed to a foreign port to be sold as a British vessel, the supplies being furnished on the order of the owner, but on the credit of the vessel, and being charged to her; *Held*, that her owner could not be permitted to claim that she was a domestic vessel, even though it had been proved that her owner resided in New York.

[Cited in The Brantford City, 29 Fed. 386.]

2. The vessel was liable for the supplies.

[Cited in The George T. Kemp, Case No. 5,341; The Alice Tainter, Id. 195; The Rapid Transit, 11 Fed. 330; The Scotia, 35 Fed. 909.]

In admiralty.

Emerson, Goodrich & Wheeler, for libellants.

Beebe, Donohue & Cooke, for claimant.

BENEDICT, District Judge. This is an action to enforce an alleged lien against the bark Walkyrien, for the amount of certain repairs and supplies furnished that vessel, in the port of New York, in the year 1865. The vessel, as it appears, was then in the port of New York, and bound on a voyage to sea. Her rigging requiring to be overhauled, to enable her to sail, the libellant was employed by J. C. Jewett, the owner, to do the necessary work. The work was done upon the credit of the vessel, was charged to the vessel, and the amount is not disputed. Afterwards the vessel left the port, and did not return until shortly before the commencement of this action, when she was promptly proceeded against, to enforce the lien for the amount of the bill. The only question at issue between the parties is, as to whether, by the maritime law, any lien was created upon this vessel.

It appears in evidence, that the vessel in question, at the time the work was done, hailed from a British port, carried the British colors, and was intending to proceed to a foreign port, there to be sold as a British vessel. Claiming thus the advantages which might be supposed to follow a British vessel, it is not permitted to her owner to assert, in this action, that she was a domestic vessel, or that she was in her home port, when the supplies were furnished, even had it been proved, as it has not, that her owner resided in New York. 2 Mar. Law Cas. (1865) 225.

The case comes clearly within the previous cases of The James Guy, decided by this court, and affirmed by the circuit court, and within the late decision of the supreme court of the United States in the case of The Belfast, 7 Wall. [74 U. S.] 643, where it is declared that material men who furnish supplies to a vessel in a foreign port, or in a port other than her "home port," have a maritime lien, because such supplies are presumed to be furnished upon the credit of the vessel. Such a presumption must be held to arise in a case like this, where the supplies were furnished to a vessel hailing from a British port, carrying the British flag, and bound for a foreign port, for the purpose of sale there as a British vessel. The decree must, accordingly, be for the libellant, with a reference to ascertain the amount.

[The case was taken to the circuit court on appeal, where the decree of this court was affirmed. Case No. 17,092.]

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

[2] [Affirmed in Case No. 17,092.]

Case No. 17,092.

The WALKYRIEN.

[11 Blatchf. 241.] [1]

Circuit Court, E. D. New York. July 2, 1873.[2]

MARITIME LIENS — SUPPLIES — PRESUMPTIONS — STALE CLAIMS—BONA FIDE PURCHASER.

1. Supplies were furnished, in the port of New York, to a foreign vessel. On a libel in rem against her, for their value, it was contended that the presumption of credit to the vessel was rebutted by the fact that her foreign owner resided in New York. It appeared that the person who furnished the supplies did not know that such owner resided in New York: *Held*, that, in the absence of such knowledge, there was no rebuttal of such presumption.

[Cited in The George T. Kemp, Case No. 5,341; The Rapid Transit, 11 Fed. 330; The J. L. Pendergast, 29 Fed. 128; The Brantford City, Id. 386; The Scotia, 35 Fed. 909.]

2. The libel alleged that the supplies were ordered by the "master and owner" of the vessel. They were shown to have been ordered on the request of the master: *Held*, that this was sufficient.

3. A few days after the supplies were furnished, the vessel sailed from New York on a foreign voyage. The libel was filed directly after she returned therefrom to New York. In the mean time, she had been sold to a bona fide purchaser for value, who was ignorant of the lien claimed: *Held*, that there was no laches in enforcing the lien, and that the sale of the vessel did not destroy the lien.

[Cited in The Alice Tainter, Case No. 195; The Tonawanda, 27 Fed. 576.]

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

[2] [Affirming Case No. 17,091.]

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

In admiralty.

William W. Goodrich, for libellant.
Charles Donohue, for claimants.

HUNT, Circuit Justice. The bark Walkyrien, to which the supplies were furnished, was a foreign vessel. She carried British colors, hailed from a British port, was registered in the name of a British subject, and had on her stern the words, "The Falcon, of Cape of Good Hope."

1. The appellants, admitting the law to be, that, where supplies are furnished to a foreign vessel, credit is presumptively given to the vessel, insist that this case is not within the rule, because the foreign owner was in fact a resident of New York City, where a part of the supplies were furnished. The general rule, as stated, is laid down in numerous cases. The Grapeshot, 9 Wall. [76 U. S.] 129, 136; The Guy, Id. 758; The Lulu, 10 Wall. [77 U. S.] 192; The Patapsco, 13 Wall. [80 U. S.] 329. If there be such a qualification of the rule as the appellants claim, it must be in connection with the knowledge of the person furnishing the supplies, that the owner's residence was in New York. Unless that fact is established, it is difficult to see how his presumed intention to credit the vessel, and not the owner, can be affected. No such proof is given in the case before us, but the libellant testifies that he had no such knowledge.

2. The libel alleges, that the supplies were ordered by the "master and owner." The proof is, that they were ordered by Mr. Jewett, on the request of the captain. He is spoken of by the libellant as the agent, and proof is given that he was then the owner. The allegation of the libel, that the order was from the master and owner, is sufficiently established by proof that the order came from either of them, or from another agent. The point of the allegation is, that the supplies were ordered by one having authority to bind the vessel. This may be done upon the order of the agent or owner. As a variation between the pleadings and proofs, it is unimportant. As a fact, it is unimportant, except upon the question of crediting the vessel or the owner, and this point has been already disposed of.

3. The appellants insist, that the lien on the vessel is lost by laches or negligence in enforcing it. The supplies were furnished in December, 1865, and, within a few days after their completion, the bark sailed on a foreign voyage, from which she did not return until February, 1867. The libel was filed directly after her return. There is evidence that the bark was sold to purchasers for value, who were ignorant of the present lien. The arrangement for her sale was made before she left New York, and the money was advanced to Jewett, but she was actually sold in a foreign port. The repairs were made and the supplies furnished in order that the vessel might sail. That was their object and purpose. "Ships were made to plough the sea, and not to rot against the wall." Supplies are furnished for the same purpose, and it would entirely defeat this purpose, if the creditor were bound to enforce his lien for them before the vessel should leave port, under the penalty of its forfeiture. The lien was enforced on the first return of the vessel to the port of New York. I am not cited to any authority that this is laches, nor am I cited to any authority that the sale to a bona fide purchaser in a foreign country destroys the lien. I do not think good authority can be found for either of these propositions.

The decree [Case No. 17,091] should be affirmed, with costs.

Case No. 17,093.

WALL v. The ROYAL SAXON.

[2 Am. Law Reg. 324; 5 Pa. Law J. Rep. 290.]

District Court, E. D. Pennsylvania. Feb. 4, 1848.

ADMIRALTY JURISDICTION — LIEN FOR WAGES — VESSEL IN CUSTODY OF STATE COURT—SALE.

A vessel may be libelled and sold in a court of admiralty, under a paramount lien, such as for seamen's wages, notwithstanding that she has been previously seized by process of foreign attachment issuing out of a state court, and still remains in the custody of the sheriff; and a perfect title will pass to the marshal's vendee.

[Cited in Ashbrook v. The Golden Gate, Case No. 574; Marsh v. The Minnie, Id. 9,117. Questioned in The N. W. Thomas, Id. 10,386. Quoted in The Isabella, Id. 7,100. Cited in The E. A. Barnard, 2 Fed. 722.]

[Disapproved in Keating v. Spink, 3 Ohio. St. 121.]

Libel in admiralty in a cause of wages. Petition for an interlocutory order of sale.

KANE, District Judge. The British barque, Royal Saxon, being under attachment in the admiralty, for mariners' wages and supplies; the master, with the approval of the consul of his nation, has applied to the court for an interlocutory order of sale. The facts, as reported by the commissioner, show that such an order is called for by the interests of all parties, and that according to the ordinary course of the admiralty, it should be granted without delay.

The application is resisted by third persons, suitors in one of the courts of Pennsylvania, at whose instance the vessel was attached under mesne process against certain non-resident defendants, before she was arrested by the marshal. They have presented two questions for the consideration of this court: (1) Whether, pending such attachment from the state court, the vessel was liable to arrest, and is now liable to interlocutory order in the admiralty; (2) whether, admitting such liability to exist, this court

ought under the circumstances to enforce it. I shall consider the questions together; for they resolve themselves into one.

The authority of the courts of admiralty to make seizure and sale of vessels, while under attachment from the courts of common law, has not hitherto been questioned in England or this country. On the contrary, it has been exercised in England, without prohibition or dispute; and in the courts of the United States, it has been asserted, and acted on, as often as occasion has offered. The cases of The Flora, 1 Hagg. Adm. 298; The Spartan [Case No. 4,085], and of Certain Logs of Mahogany [Id. 2,559], are illustrations of this.

The case in Haggard is interesting, as it shows at least the tacit recognition of this admiralty power by the common law courts. An execution had been levied on the ship from the king's bench, before the attachment from the admiralty. A sale was had under an admiralty decree, and the proceeds were brought in and distributed, so far as the claimants in that court had right. The question then arose, to whom should the surplus proceeds be paid over. The sheriff applied to the king's bench for a rule on the marshal to pay them over to him; but was refused, on the ground that the marshal had acted under competent authority, and that he would not be bound to obey if ruled. The judgment creditor and the defendant in execution thereupon applied severally to the admiralty, each claiming the surplus. A decretal order pro forma was made in favor of the defendant; and thereupon the whole matter was carried up by appeal to the court of delegates, comprising judges of the king's bench, common pleas and exchequer, as well as those of the civil law courts. It was admitted in argument before the delegates, that the sheriff's possession was suspended by the admiralty process;—but on the ground, as it would seem, that, though suspended, it was not abandoned, and that the sheriff's rights still continued as against the owner, the court directed that the surplus proceeds remaining in the admiralty, after satisfying the claims in that court, should be paid to the sheriff: and the decision thus given was satisfactory to Lord Eldon, who, as chancellor, refused a commission of review. In this whole case there does not appear, either on the arguments of counsel or the judgments rendered by the several courts, the suggestion of a doubt as to the regularity of the proceedings of attachment and sale in the admiralty, though both followed the sheriff's levy.

The case of the Spartan presented the question under circumstances almost identical with the case before me. The vessel had been attached in the state court of Maine by sundry creditors, before the libel in the admiralty, which was for wages, as in our case. The master, by his answer, admitted the wages to be due; but the right of the libellants to proceed was resisted by the sheriff, on behalf of the attaching creditors. The court maintained the regularity of the proceeding in admiralty. "The property," said Judge Ware, whose accuracy of learning makes him a safe guide, "the property has been attached by sundry creditors of the charterers, and the cases are now pending in the state courts. It is argued, that as different creditors are each pursuing their own right against this property in different courts, it is a proper rule, to prevent collision of judicial authority, to give precedence to those who first lay their hands on the fund. This priority might be decisive, if both creditors stood in the same relation to this specific property. But the reason no longer holds, when the claim of one of the parties is in its nature a privileged claim. The very essence of a privilege is to give the creditor a preference over the general creditors of the debtor; and if such be the claim of the seamen, the attachment only created a lien on the property, subject to such prior incumbrance. It can only extend to the whole right to the owner; and that was, to hold the property after discharging the lien."

The same law is asserted by Judge Story, in the case Certain Logs of Mahogany [supra]. It was that of a replevin from a state court, issued and served before the marshal's attachment in rem. "A suit in a state court," said Judge Story, "by replevin, or by an attachment under process, of the property, can never be admitted to supersede the right of a court of admiralty to proceed by a suit in rem to enforce a right against that property, to whomsoever it may belong. The admiralty suit does not attempt to enter into any conflict with the state court, as to the just operation of its process; but it merely asserts a paramount right against all persons whatever, whether claiming above or under that process. No doubt can exist, that a ship may be seized under admiralty process for a forfeiture, notwithstanding a prior replevin or attachment of the ship then pending. The same thing is true as to the lien on a ship for seamen's wages, or on a bottomry bond."

These cases leave me without any doubt as to what the law is, or what are the grounds on which it rests. The proceeding in the courts of the state applies itself to alleged interests in the vessel, not to the vessel itself. The plaintiff in replevin recovers his property, whatever it may be; but no more: his title is not disencumbered by the execution which follows on his judgment. The attachment creditor, if he succeeds in his suit, obtains recourse against the thing attached, just so far as his defendant had interest in it, and no farther. The rights of third parties remain in both cases unaffected. The bona fide owner of the property may sue out his process, and recover the possession against the sheriff's vendee, as if no replevin or attachment had issued. The bottomry creditor, residing, it may be, in a foreign

country, is no party to either proceeding, and loses none of his rights; his contract was with the thing, not the owner, and it is, therefore, not embarrassed, and cannot be, by any question or contest of ownership. So, too, the seamen: whoever owns the vessel, or how often soever the ownership may be changed; wherever she may go, whatever may befal her; so long as a plank remains of her hull, the seamen are her first creditors, and she is privileged to them for their wages. It is the interest of the individual defendant, his residuary interest after all these are satisfied, upon which alone the common law process operates.

Nor would the case be different if the sheriff's sale had been made under an interlocutory order. I am not aware that a court of common law can adjudicate upon rights that are not before it, or that the sheriff can sell what never passed into his custody. What rights were, or could be, involved in the proceeding by foreign attachment?—those of the defendant in the writ; surely none else: the command of the writ was to "attach the goods and effects of the defendant" only. And what was it that passed into the sheriff's keeping? The act of assembly of Pennsylvania tells us that it was "the goods and effects of the defendant, susceptible of seizure and manual occupation," and nothing more. See Act 1836, § 50. How, then, could the sheriff take or sell the title of a third person?

Should a foreigner present himself to-morrow, or a year hence, in the state court, and show there that from the first, and at all times, he had been and was the only owner of the Royal Saxon, and that the defendant, as whose property she was attached, never had a scintilla of interest in her, would that court refuse to him its judgment in replevin? "I was no party," he would say, "to the proceeding under which my ship was sold; I had no notice of it; neither my title, nor any liability of mine, or of my property, was asserted to be in issue; the whole controversy was between strangers." And if the sheriff's vendee, in reply, were to assert his title under the judicial sale, would he not be told at once, in the language of the supreme court of Pennsylvania, in Freeman v. Caldwell, 10 Watts, 9: "In judicial sales there is no warranty, whether the sale be of land or of a chattel pure. What interest in it does the sheriff propose to sell? Not a title to it; but the defendant's property in it, whatever it may be."

Not so in the admiralty. Here, the subject matter of the controversy is the res itself. It passes into the custody of the court. All the world are parties; and the decree concludes all outstanding interests, because all are represented. Here, they are marshaled in their order of title or privilege; and if there be conflicting claims either upon the distributable fund, or upon the residue, the court adjudicates between them, or refers the question to that forum, either at home, or in foreign countries, which is most competent to examine it. It is an international court: its seal is recognized every where; and its decrees are executed wherever, throughout the world, there is a court of admiralty to appeal to. Its forms of proceeding are known among all maritime nations, and the title which passes under them is absolute, without conditions, discharged of all liabilities and liens. See the Thomas [Case No. 14,206].

There is, therefore, as it seems to me, no difficulty in allowing an arrest by the admiralty, notwithstanding the vessel, or some interest in it, has passed before into the custody of the sheriff. His process, whether mesne or final, has affected only the rights which were litigant in the common law court; and those rights, whatever they were, are necessarily subordinate to those which give the admiralty its jurisdiction. He retains all his rights, notwithstanding the marshal's intervention. If he holds an execution, he may go on with his sale; and his vendee will succeed to whatever title belonged to the defendant. The proceedings against the vessel, the thing, the subject of the property or title, may still go on in the admiralty: the sheriff's vendee of the ship may intervene there, as the defendant might have done in this court; he may make defence to the proceeding there, as the successor to the defendant's rights; and may be substituted ultimately before the judge of admiralty, as a claimant of the surplus fund. Or, if the sheriff have not sold before the proceedings in admiralty are consummated, the sheriff may perhaps arrest the surplus proceedings in the admiralty, as was done in the case cited from 1 Hagg. Adm.

On the other hand; to deny to the admiralty the right of proceeding, because proceedings are pending elsewhere that affect the title of the ship, or rights under the title, would be effectively to take from this court its characteristic and most wholesome office. The acts of congress, following in this the maritime policy of the rest of the world, give summary redress in cases of subtraction of wages. Within three weeks, at furthest, from the exhibition of a libel in the admiralty, the seaman has his decree; and in one week more, decree or no decree, he has probably sailed on another voyage. To turn him over to a state court, to await there the protracted determination of a common law suit, to which he is not a party, and of which he knows nothing, would be little else than to deny him justice altogether. It was well said by Lord Stowell, in a suit in personam for wages, against an asserted owner, when called upon by the defendant not to decide the question of ownership, inasmuch as that question was already under adjudication in the high court of chancery. "Shall I put him off to the distant day when these conflicting interests may, after the diligence which the judge of that court himself uses, or compels parties to use, finally be arranged? The obstacles may outlive the

suitor." The St. Johan, 1 Hagg. Adm. 341.

Besides, may it not be questioned whether the state courts could regard the seaman's claim? Suppose the foreign attachment dissolved by the entry of bail, what becomes of the seaman's lien? the bail, whether for the defendant's appearance, or for the satisfaction of the judgment, is liable to the plaintiff only, and for only his asserted demand in the suit. The bail could not be charged for seaman's wages or other maritime liabilities of the thing attached: "non hæc in fædera." Or, suppose the attachment not to be dissolved, but the cause to be prosecuted to final judgment, and a sale made under the execution: what will that execution affect? It was against the defendant, not the ship; and a sale under it can pass no more and no better title than the defendant had. The proceeds of the sale take the place of his residuary interest in the thing sold, and are not liable for the liens which were paramount to his title. How then can the seaman assert his privilege against the proceeds of an execution in a common law suit?

View the subject as we may; while we admit the inconvenience or at least the delicacy, which attends the exercise of a divided jurisdiction, there can be no doubt as to the relative inconvenience of asserting, or of waiving such a jurisdiction as the admiralty has over a case like this. But how can I waive it, were I so inclined? The powers of the court are the property of the suitor; and the judge is nothing but the trustee, whom the constitution and the law have constituted to exercise them when the occasion requires.

I may add in conclusion, that the question which this case presents is by no means similar to those which were before the court in the cases cited by the counsel for the attaching creditors, (Mr. Meredith.) Prince v. Bartlett, in 8 Cranch [12 U. S.] 431; Hogan v. Lucas, in 10 Pet. [35 U. S.] 400; and Beaston v. Farmers' Bank, in 12 Pet. [37 U. S.] 102, were all of them cases in which the subject of execution was the same in both courts whose process was in question, and where the same law would determine the distribution of the proceeds, and with equal security to the rights of all parties. A similar remark may be made upon the case of the Robert Fulton [Case No. 11,890], which at first view might seem to conflict with some of the conclusions to which I have arrived. It was the case of a libel for materials against a domestic ship in the admiralty, while a similar libel, also for materials, was pending against the same ship in a state court. Both courts derived their jurisdiction from the same local law; and the circuit court of the United States yielded up jurisdiction to the state court as the tribunal first taking possession of the thing. The ground of the decision is thus expressed by Judge Thompson: "The proceedings were in rem; and the sentence must act upon the thing itself, and could not be executed unless possession of the thing was taken. It is the necessary result, he adds, of proceedings in rem, that the thing must be in the possession of the court;" and he justly concludes that this possession must of course be exclusive. Thus stating the case before Judge Thompson, I need not spend time in distinguishing it from that now before this court.[1]

No one can be more anxiously sensitive than I am to the duty of avoiding a contest of jurisdiction between a court of the United States and a state court; and certainly there is no one, who can regard with more deferential respect the court under whose process the sheriff is understood to be acting, or who can be more fully assured of the safety of every interest which may be confided to its judicial administration. But I see no possibility of collision here; and I am not aware that justice can possibly be done to the parties who are now before me in this court, unless the jurisdiction of this court is maintained.

Inasmuch, therefore, as it appears to the court, that the British barque Royal Saxon, now under arrest and in the custody of the marshal of the United States, is in a perishing condition, and that there are no means of effecting her discharge; it is upon the petition of the master of the said vessel, sanctioned and approved by the consular representative of her Britannic majesty, ordered: That the said vessel, her tackle, apparel, and furniture, be sold by the marshal of the United States for the Eastern district of Pennsylvania, to the highest and best bidder; the said marshal giving at least seven days' notice, by hand-bills publicly posted and by advertisement in daily newspapers, and in the Legal Intelligencer, a weekly paper, of the time and place of such sale; and that he bring the proceeds thereof into the registry of this court, to abide further order and decree.

In pursuance of this decree, the barque Royal Saxon was sold on the 22d of February, 1848, to Robert Taylor. The parties to the foreign attachment in the state court, had, however, in the meantime, proceeded in their suits and obtained an order of sale of the vessel therein as a perishable commodity, under the act of 13th June, 1836: and she was accordingly sold on the 21st of February, 1846, to a firm of the name of Ward & Co. The latter thereupon brought an action of replevin against Taylor, the marshal's

[1] It would be a mistake of definition to include foreign attachments and replevins in the same category with admiralty proceedings in rem. The court of admiralty proceeds in rem, because its suitor has the jus in re, whether it be a privilegium or other modification of ownership: its writ, in such case, is irrespective of the person: the thing is defendant. The common law suitor, on the other hand, has only the jus ad rem, a right of recourse against the thing, not of property in it; and according to the civil law, from which these terms are derived, his proceeding is in personam, even when it begins by arresting the defendant's goods, and is followed by a sale of them. See Bonjean, Tr. Act, § 274, &c. The missio in possessionem bonorum, which resembled the English writs of attachment more than any other process of the civil law, was never counted among proceedings in rem: it was applicable to personal and mixed actions only.

vendee, under which the Royal Saxon was taken from his possession by the sheriff and delivered to them.

This replevin of Ward & Co. came on subsequently to be tried at nisi prius before Judge Woodward, of the supreme court of Pennsylvania. [See Case No. 13,803.]

Case No. 17,094.

In re WALLACE.

[Deady, 433; 2 N. B. R. 134 (Quarto, 52); 3 Am. Law Rev. 174; 1 Chi. Leg. News, 30.] [1]

District Court, D. Oregon. July 25, 1868.

BANKRUPTCY—EFFECT OF ADJUDICATION—NOTICE—JURISDICTION OF DISTRICT COURTS—SUMMARY PROCEEDINGS.

1. An adjudication declaring a person a bankrupt, is in the nature of a judgment in rem, and therefore notice to and binding upon all the world.

[Cited in brief in Brown v. Wygant, 6 Mackey, 448.]

2. Under the bankrupt act of 1867 [14 Stat. 517] § 1, the several district courts have equity jurisdiction and power over all "acts, matters and things to be done under and by virtue of the bankruptcy," and are authorized by summary proceedings to administer all the relief which a court of equity could administer under the like circumstances upon regular proceedings.

[Cited in Re Mallory, Case No. 8,991; Re Brinkman, Id. 1,884.]

3. Notice of an application for an injunction in bankruptcy need not be given, unless specially directed; and the provision in the act of March 2, 1793 (1 Stat. 334), prohibiting writs of injunction from being granted, except upon notice to the adverse party, applies only to suits in equity in the supreme and circuit courts.

[Cited in Re Muller, Case No. 9,912; Re Ulrich, Id. 14,327.]

4. In exercising the equity power which pertains to a district court, as a court of bankruptcy, it is not deemed necessary or proper that resort should be had to the plenary proceedings common to suits in equity; but a petition stating the facts and praying the particular relief sought, is sufficient.

[Cited in Re Dole, Case No. 3,965; Re Oregon Iron Works, Id. 10,562.]

This was a petition by certain of the creditors of a voluntary bankrupt [John B. Wallace] for an injunction to restrain other creditors from selling the property of the bankrupt on execution.

W. W. Page, for petitioners.

Erasmus D. Shattuck, for respondents.

DEADY, District Judge. This petition was filed on June 13, 1868. It sets forth that the petitioners, the Bank of British Columbia and others, are creditors of the bankrupt, and that on May 30, 1868, Wallace filed his petition in bankruptcy in this court, and that on June 8, he was, by the register, duly adjudged to be a bankrupt; that about May 20, 1868, the respondents, C. M. Lockwood and others, commenced actions against the bankrupt, in the state courts for the county of Multnomah, to recover certain debts alleged to be due them, and caused the property of the bankrupt to be attached to satisfy any judgment they might obtain therein, and that between June 1 and 8, these respondents obtained judgments in the actions aforesaid, by default; that afterwards said respondents sued out executions upon said judgments and placed them in the hands of the respondents, Stitzel and Hudson, sheriff and constable respectively of said county; and that said sheriff and constable are about to sell the property of the bankrupt upon such execution. Two days after the filing of the petition for injunction, an order was made allowing an injunction until the further order of the court.

The respondent Lockwood now comes and demurs to the petition, and for cause of demurrer alleges (1) that the facts stated are not sufficient to entitle the petitioners to the relief prayed for; and (2) that this court has not jurisdiction of the matters involved in this suit as set forth in the petition.

In support of the first ground of demurrer, counsel for Lockwood insists that the petition should show that the respondents had notice of the adjudication in bankruptcy. The adjudication in this court, by which Wallace was declared a bankrupt, determined his legal status in that respect, and so far is binding upon all the world. These respondents had therefore constructive notice of the decree in bankruptcy, and that is a sufficient answer to this objection. The decree is in the nature of a proceeding in rem before a court having jurisdiction of the subject matter, and is notice and evidence to third persons, not actually parties thereto, that Wallace had committed an act of bankruptcy for which he had been duly decreed a bankrupt. Morse v. Godfrey [Case No. 9,856]; Shawhan v. Wherritt, 7 How. [48 U. S.] 643.

The second ground of demurrer raises the question: Has the district court equity power in proceedings in bankruptcy? Section 1 of the act of 1867 [14 Stat. 517] constitutes "the several district courts of the United States," courts of bankruptcy, with "jurisdiction in their respective districts in all matters and proceedings in bankruptcy." This court being thus declared a court of bankruptcy, with jurisdiction over all matters and proceedings in bankruptcy, it would seem to follow, as a matter of course, that such equity power inherently belongs to it, as may be found necessary and proper to maintain and exercise the jurisdiction thus granted. And the act, as if anticipating the question: What is a matter or proceeding in bankruptcy? goes farther, and in the same section declares, that "the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy: to the collection of all the assets of the bankrupt; to the ascertain-

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission. 2 N. B. R. 134 (Quarto, 52), and 3 Am. Law Rev. 174, contain condensed reports. 1 Chi. Leg. News, 30, contains only a partial report.]

ment of the liens and other specific claims thereon; to the adjustment of the various priorities and the conflicting interests of all parties; and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." And also, that "said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein, in equity."

The judgments now sought to be enforced by the respondents against the property of the bankrupt, were all given after the filing of the petition in bankruptcy. The decree pronouncing Wallace a bankrupt, took effect by relation, from the date of such filing, and divested him of all property not excepted from the operation of the act and saved to him by section 14. The attachments of the respondents, being levied within four months of the commencement of proceedings in bankruptcy, will be dissolved by the assignment to the assignees, and for the purpose of this petition, must now be considered as of no effect. This being the state of the case, it is apparent that the respondents by their executions, are endeavoring to subject the estate of the bankrupt—now and since May 30 under the exclusive jurisdiction of this court for distribution among all the creditors—to the exclusive payment of their particular demands.

This property no longer belongs to the bankrupt, and is not liable to be taken on executions against his property. The policy and aim of the bankrupt law is to compel an equal distribution of the estate of the bankrupt among all his creditors. Shawhan v. Wherritt, 7 How. [48 U. S.] 644. Can this court prevent this interference with the estate of the bankrupt, on the part of these respondents, by injunction? After a careful examination of the act of 1867, and the decisions given under that of 1841 [5 Stat. 440], I think it can. Indeed, I have no doubt of it. The proceedings in bankruptcy are in the nature of equity proceedings. The property seized by the respondents is the assets of the bankrupt, and the jurisdiction of this court is specially extended to the collection and distribution of such assets. This power, with others granted by the first section of the act, is in its nature an equity power, and may be exercised by proceedings in the nature of equity proceedings. In addition the act constitutes this court a "court of bankruptcy," with power to do any act necessary and proper for the due administration and settlement of the bankrupt's estate. Proceedings by petition for the exercise of equity power were common in the district courts under the act of 1841. In re Foster [Case No. 4,960]; In re Eames [Id. 4,237]; Parker v. Muggridge [Id. 10,743]; Mitchell v. Great Works Milling & Manuf'g Co. [Id. 9,662]; In re Babcock [Id. 696]; In re Bellows [Id. 1278]. This power was expressly affirmed by the supreme court in Ex parte Christy, 7 How. [48 U. S.] 312.

In Re Foster, supra, Mr. Justice Story says: "And here I lay it down as a general principle, that the district court is possessed of the full jurisdiction of a court of equity, over the whole subject matters which may arise in bankruptcy, and is authorized by summary proceedings to administer all the relief which a court of equity could administer under the like circumstances, upon a regular bill and proceedings instituted by competent parties. In this respect, the act of congress, for wise purposes, has conferred a more wide and liberal jurisdiction upon the courts of the United States, than the lord chancellor sitting in bankruptcy, was authorized to exercise. In short, whatever he might properly do, sitting in bankruptcy, or sitting in the court of chancery, under his general equity jurisdiction, the courts of the United States are by the act of 1841, competent to do." It is the duty of this court, by means of the jurisdiction given to it, to preserve and distribute the estate of the bankrupt among his creditors, as the act prescribes. The respondents, by means of these executions, are attempting to prevent this distribution of the estate. An injunction is a proper remedy or means to prevent this wrong and fraud upon the law from being accomplished. A petition to the court is a proper means of invoking this power. The demurrer to the petition is overruled at the cost of the respondent.

As a matter for future practice, it is proper to add, that in exercising the equity power which pertains to this court as a court of bankruptcy, it is not deemed necessary or proper, that resort should be had to the formal and plenary proceedings common to suits in equity in the circuit court. A petition stating the facts and praying for the order, relief or proceeding sought for, is deemed sufficient. For the same reason a motion by Lockwood to dissolve this injunction, would have been sufficient without resorting to the formality of a demurrer. Nor need notice be given of an application for an injunction, unless specially directed. The restriction in the act of 1793 (1 Stat. 334) against issuing injunctions without notice, applies only to suits in equity in the circuit and supreme courts. It does not affect the allowance of injunctions under the equity power conferred upon the district courts by the bankrupt act, in relation to matters pending therein, and within its exclusive cognizance.

Case No. 17,095.

In re WALLACE et al.

[12 N. B. R. 191.] [1]

District Court, D. Massachusetts. 1875.

BANKRUPTCY—PARTNERSHIPS.

Where there have been distinct firms of A & B and A & C, the three persons cannot be joined in one proceeding in bankruptcy, though the latter firm may have undertaken to pay the debts of the former.

[Cited in Re Jewett, Case No. 7,306.]

Wallace & Newton petitioned to be adjudged bankrupts as partners, and that Bryant might be included in the decree, alleging that he had been a partner with Wallace, and that upon his retiring from the business, the petitioners, Wallace & Newton, had undertaken to pay the debts of the former firm of Wallace & Bryant. Bryant filed a written consent, and adjudication was made against the three. At the first meeting the creditors of Wallace & Newton voted for one assignee, and the creditors of Wallace & Bryant for another, and the register certified to the court the question which vote was to control.

LOWELL, District Judge. At the hearing of the certified question, I felt bound to take exception to the power of the court to make a joint adjudication, and upon this I have heard counsel. The statute enacts or implies that two or more persons who are partners in trade, may be made bankrupt in one proceeding; and persons remain partners for this purpose until all their joint affairs have been fully wound up. It follows that if three or four or any number of persons have been partners, and owe joint debts, they may proceed jointly, although there may have been several lesser firms made up of some of the same persons: thus, the bankruptcy of A, B, C, & D, by a joint proceeding. will require the court to settle the affairs of the distinct firms of A & B, or B & C, and so on.

But I know of no law which authorizes persons to join, or to be joined, in a petition in bankruptcy, who could not sue, or be sued together, in any form of action at law or in equity. Bankruptcy is an equitable proceeding, but no single bill in equity would lie to settle the affairs of distinct firms, composed in part of different persons.

It has been said that I intimated an opinion in favor of such a joinder in Mitchell's Case [Case No. 9,656]. This is a mistake. What I said was, that A & B, who were partners, could file a joint petition without joining C, who had been a partner with them both, under a distinct and different firm. I suggested, too, that if C became bankrupt, I could probably consolidate the two proceedings, since all three persons had once been partners, and the affairs of that firm were not entirely settled. It was formerly the law of England that a joint commission could not issue against part of the members of a firm; it must include all the partners, or else there must be separate proceedings against each. Ex parte Henderson, 4 Ves. 163; Ex parte Layton, 6 Ves. 434. This was decided by analogy to suits upon a joint and several undertaking. A statute was afterwards passed, permitting any number of partners to be joined. See 6 Geo. IV. c. 6, § 16. How this would be under our statute, I have not had occasion to consider. But I can find no authority by statute or decision, here or elsewhere, for taking a joint proceeding against persons who have never all been partners together.

The petition of Wallace & Newton was regular, and the adjudication against them is good, if Bryant is dismissed, which I understand is desired by the parties, if the entire decree cannot stand. All proceedings against Henry J. Bryant dismissed.

[1] [Reprinted by permission.]

Case No. 17,096.

WALLACE v. AGRY et al.

[4 Mason, 336.] [1]

Circuit Court, D. Maine. May Term, 1827.

SHIPPING—AUTHORITY OF MASTER TO DRAW BILLS OF EXCHANGE — NONACCEPTANCE AND NOTICE — PROTEST — PRESENTMENT — MODE OF TRANSMISSION.

1. Where a bill of exchange is drawn by the master of a ship, by authority of the owners, in his own name, for cargo supplied for the owners, the latter are liable, and are entitled to the same defence against the bill, in case of dishonour, that they would be, as drawers.

2. Where the declaration contains due averments of the presentment of a bill for acceptance, and due dishonour and notice to the drawer, proof of these averments is sufficient to maintain the suit, although there are subsequent averments in the declaration of presentment for payment, non-payment and notice thereof, which are not proved.

[Cited in Musson v. Lake, 4 How. (45 U. S.) 282.]

3. The right of action is complete by the non-acceptance, protest, and notice.

4. Taking of a bill of exchange is, at most, only prima facie evidence of a satisfaction and extinguishment of an antecedent debt. Quære, how far even this is to be relied on, as a general presumption in foreign states.

[Cited in The Betsy and Rhoda, Case No. 1,366; Risher v. The Frolic, Id. 11,856; Underwriters' Wrecking Co. v. The Katie, Id. 14,342.]

5. A copy of the protest for non-acceptance need not accompany the notice of dishonour. It is sufficient to produce it at the time.

[Cited in Browning v. Andrews, Case No. 2,040.]

[Cited in Atwater v. Streets, 1 Doug. (Mich.) 457.]

6. A bill of exchange, payable at 60 days after sight, was drawn in Havana upon London. *Held*, that it need not be sent from Cuba direct to London; but might be sent indirectly in any manner justified by the course of trade; and be sent for sale to the United States.

7. No absolute rule can be laid down, as to the time within which such a bill must be

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

presented for acceptance. The only rule is, that it must be presented within a reasonable time; and what is a reasonable time depends upon the circumstances of each particular case.

[Cited in Durnell v. Sowden, 5 Utah, 216, 14 Pac. 334; Angaletos v. Meridian Nat. Bank, 4 Ind. App. 578, 31 N. E. 368.]

Assumpsit. The principal circumstances were as follows: The defendants [Thomas Agry and others], who are citizens of Maine, were owners of the brig Diana, of which William Heddean was master. She arrived at Havana in the Island of Cuba, and was consigned to the plaintiff [William B. Wallace], a citizen of Connecticut, but a resident merchant at Havana, by the master, to procure freight on a freighting voyage. Six hundred boxes of sugar were procured on freight, on a voyage from Havana to Bremen, upon an understanding, that 150 boxes more should be taken on board on account of the owners. The master had no authority to take any sugars on board on the owners' account; but it was agreed between him and the plaintiff, that he should receive these on board on their account, and remit the proceeds to Samuel Williams at London, and should draw a bill for the amount on Williams, payable at sixty days sight; that the sugars should be insured in Boston on the owners' account, and that a Mr. Whitney, the agent and correspondent of the plaintiff, should be employed to effect the insurance. Williams was known to both parties to be the correspondent of the owners in London; but no funds were supposed by either party to be in his hands, out of which to pay the bill, except those arising from the proceeds remitted from Bremen. In fact, however, he had other funds of the defendants'. The master accordingly, on the 18th of June, 1825, at Havana, drew a bill, in his own name, on Williams, payable to the plaintiff or his order, for £848. 6s. 11d. (the amount of the sugars advanced by the plaintiff), at sixty days' sight to be charged to the owners' account. Information was duly communicated of his proceedings to the defendants, who ratified the same. The brig proceeded on her voyage, and arrived safely at Bremen, and while sailing up the British channel the master communicated the information of the bill's being drawn, and the intended remittance to Williams, who acknowledged the receipt of the letter. The remittance of £848. 6s. 11d. was duly made for the payment of the bill, and received by him on the 19th of August. Williams failed on the 24th of October following, and was duly declared a bankrupt. The bill was sent to Boston, by the plaintiff, to his agent, Mr. Whitney, indorsed payable to him, together with a bill of lading of the sugars, and instructions to procure insurance, and reached Whitney on the 7th of July, 1825. He was informed, at the same time, that the plaintiff would draw on him for the amount of the bill at sixty days; and he was understood to be at liberty to sell the bill in the market to reimburse himself, or to remit it to London on his own account. He made insurance, and communicated the facts to the defendants in course of mail. Whitney paid the bill drawn on him for the amount by the plaintiff, and charged it in account, the bill having been transmitted to him merely as agent. He attempted to sell the bill, but thinking the price of exchange too low, he retained it until the 29th of September, when he remitted it to London, with directions to Williams, in whose hands he had funds, to place it to his credit. The bill arrived in London on the 31st day of October, and was duly protested for non-acceptance; and the protest and information of all the facts were sent by letter to Whitney, by the next regular ship from Liverpool, which sailed on the 2d of November. The letter reached Whitney on the 28th of December, who immediately gave information of the protest for non-acceptance to the defendants by mail, but did not transmit the protest or a copy to them. Previous to this period, on the 5th of December, a rumour being current in Boston of the failure of Williams, Whitney wrote to the defendants, and stated his expectations, that the bill might be returned protested, and wished them to make some arrangements to take it up on its return; and by letters, on the 8th of December, confirmed the news of the failure. On the 12th of December the defendants replied to the letter of the 8th, and made no objection to their liability to pay, and wished early information of the return of the bill. On the 12th of January, 1826, the defendants, in a reply to the letter of the 28th of December, expressed dissatisfaction at the long detainer of the bill in Boston, and objected to payment on that account. Whitney remonstrated against their conduct in his reply; and on the 24th of January the defendants wrote a letter to Whitney, taking notice of his remarks, and expressing their fears of their inability to pay, and not urging their original objection.

There was conflicting testimony in the case, as to an understanding between the master and the plaintiff at Havana, for delay in transmitting the bill, so that it might not reach London until after the funds should be remitted there; and also as to the bill's being sent to Boston for sale; the plaintiff contending, that there was an express agreement to this effect, and the defendants denying it. There was no direct evidence, that the period of the delay of the bill in Boston was known to the defendants before the letter of the 28th of December enclosing information of the protest for non-acceptance.

The declaration contained two special counts on the bill of exchange, as drawn by the order and on account of the defendants, by the master as their agent, and averred the presentment for acceptance, and protest for non-acceptance, and due notice thereof to the defendants, and also a presentment for payment, and protest for non-payment, and due notice thereof. No presentment for payment, or protest for non-payment, was proved

in the case. There were also counts for money laid out and expended, and for money had and received. The plea was the general issue.

Mr. Longfellow, for defendants, at the trial, contended:

1. That the plaintiff was not entitled to recover; because the averment in the declaration of a presentment for payment, and protest for non-payment was not proved; and though unnecessary to have been averred, yet the plaintiff must prove his case as laid.

2. That the plaintiff was guilty of laches in not transmitting the bill to London at an earlier period, and had thereby made it his own. He was bound to have sent it direct from Havana to England, and had no right to send it to Boston for sale, or indeed for any other purpose, if there was any conveyance between Havana and England. But at all events the holding of the bill from the 6th of July to the 29th day of September, was an unreasonable time to keep it at the risk of the owners, and discharged them. They have the same rights as if they had been the drawers of the bill in their own names. If the bill had been presented to Williams, at any time before the 24th of August, it would have been paid: If presented before the 19th of August, it might have been protested for non-acceptance, but it would have been paid at maturity. And the plaintiff ought, notwithstanding the protest for non-acceptance, to have presented it for payment. The delay was, therefore, a loss of the proceeds, and gross laches. On this point he cited Muilman v. D'Eguino, 2 H. Bl. 565, 469; and urged, that the circumstances showed, that the plaintiff, in effect, guarantied Williams's solvency.

3. That the notice to the defendants of the non-acceptance was bad, because it was not transmitted by the earliest mail from London to Liverpool (but this point was afterwards abandoned); and because neither the protest for non-acceptance, nor a copy of it, was sent to the defendants with the notice, by the letter of the 28th of December; and for this he cited Blakely v. Grant, 6 Mass. 388.

4. No recovery could be had on the money counts for the advance, because the taking of a negotiable security extinguishes the original contract. This is clearly the law of Massachusetts and Maine, whatever may be the law elsewhere. He relied on 5 Mass. 299; 6 Mass. 143; 2 Greenl. 121.

Mr. Ames, for plaintiff, argued:

1. That the plaintiff was entitled to recover. The right of action accrued by the non-acceptance and protest; and there was no necessity to aver or prove a presentment for payment, or protest for non-payment. The averment, therefore, was immaterial, and might be rejected as surplusage. On this point he cited Chit. Bills, 122, 244, 245, 314, 561; 3 East, 481; 3 Johns. 206.

2. That there was no laches in transmitting the bill. The plaintiff was only bound to use due and reasonable diligence. He had a right to send it to Boston, or elsewhere, for sale, and was not bound to transmit it direct to England. So is the course of trade. The plaintiff had a right to wait until he received information, that the proceeds were in Williams's hands. This could not have been known until the 1st of October. The evidence shows, that the average time in transmitting bills from Havana to London, is 50 days, and from the United States less. Besides, here was an agreement for delay.

3. The notice was in time, and no protest for non-acceptance is by law necessary to be sent to the party charged with the notice. On this point he cited Chit. Bills, 232, 236, 248; 1 Maule & S. 289; 2 Esp. 511; 10 Mass. 1; 7 East, 779; 18 Johns. 240.

4. That the bill was not received as absolute, but as conditional payment. The English is the true law on this point.

STORY, Circuit Justice, in summing up the facts to the jury, said:

Some of the questions of law, in this case, are of considerable importance, and require from the court an explicit opinion. The first objection to the plaintiff's right of recovery is, that no presentment for payment, or protest for non-payment, or due notice thereof to the defendants, is proved according to the allegations of the declaration. I agree, that, under the circumstances of this case, the defendants stand in the same situation as if they were the drawers of the bill. They have adopted the acts of the master, and ratified the draft on Williams; and the plaintiff is therefore at liberty to consider them as subject to the same responsibility as if the bill were drawn by them, and no more. See Van Reimsdyk v. Kane [Case No. 16,872]; Id., 9 Cranch [13 U. S.] 155. But if they were drawers of the bill there would be no necessity of proving the averments in the declaration of presentment for payment and protest, and notice for non-payment. The declaration contains a prior averment of a presentment and protest for non-acceptance, and due notice thereof to the defendants. The cause of action of the plaintiff was complete by such non-acceptance and notice, and it was wholly unnecessary afterwards to make any presentment for payment. The other averments, therefore, of presentment for payment, &c. are wholly immaterial, and may be rejected as surplusage. They constitute no part of the averments entitling the plaintiff to recover. The case is not like that of a material averment, more special than the law requires; there the whole must be proved as laid. But, here, the averments are distinct, of matters foreign to the right of the recovery, and may be rejected without prejudicing the plaintiff's right. "Utile per inutile non vitiatur." Such, upon principle, I take the law to be; and the authorities conform to it. Chit. Bills, 300; 1 Starkie, 7; Mason v. Franklin, 3 Johns. 202.

Then it is said, that there can be no recovery upon the money counts in this case, because the taking of the bill of exchange was a satisfaction, and consequently an extinguishment of the original contract for advances to purchase the sugars. And in corroboration of this position it is argued, that, by the law of Massachusetts and Maine, the taking of a negotiable security for a debt amounts to an absolute, and not merely to a conditional payment. The rule is certainly so in these states, with this limitation, that the taking of such security is only prima facie evidence of being an absolute payment, but the fact is open to explanation, and is not conclusive where the other circumstances qualify or repel the presumption. Thacher v. Dinsmore, 5 Mass. 299; Maneely v. M'Gee, 6 Mass. 143; Goodenow v. Tyler, 7 Mass. 36; Johnson v. Johnson, 11 Mass. 359; Chapman v. Durant, 10 Mass. 47; Varner v. Nobleborough, 2 Greenl. 121; Greenwood v. Curtis, 4 Mass. 93. Even with this limitation, however, the rule differs from that of the common law, which is adopted in many of the commercial states in the union. By the common law, a negotiable promissory note, given by a debtor to his creditor for a subsisting debt, is not a discharge of the debt. It is not, in a legal sense, a security of a higher nature. Roades v. Barnes, 1 Burrows, 9. But if it be negotiated and outstanding in the hands of a third person, at the time of a suit brought for the original debt, it may be pleaded in bar of the action. See Kearslake v. Morgan, 5 Term R. 513; Rex v. Dawson, Wight. 32. A note or draft of a third person may indeed, by express agreement of the parties, be taken as payment, and thereby operate as a discharge of the debt; but unless there be such an agreement, or the creditor has been guilty of laches, if the note or draft be dishonored, the creditor may resort to his original debt. Puckford v. Maxwell, 6 Term R. 52; Owenson v. Morse, 7 Term R. 64. And this doctrine of the common law I take to be extensively adopted in our own commercial states. Tobey v. Barber, 5 Johns. 68; Schemerhorn v. Loines, 7 Johns. 311; Putnam v. Lewis, 8 Johns. 389; Johnson v. Weed, 9 Johns. 310; Pintard v. Tackington, 10 Johns. 104; Holmes v. De Camp, 1 Johns. 34; Burdick v. Green, 15 Johns. 247; Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253. But if the doctrine of the Massachusetts and Maine courts were admitted to govern in this case, the circumstances are such as would repel any presumption, that the bill was received as absolute payment, so as to discharge the owners from personal responsibility in case of its dishonor. On the contrary, the bill seems to have been relied on as collateral security, and intended to discharge the debt only upon payment out of the funds which were to be remitted from Bremen. If those funds were not remitted by the master, or the bill were not paid at maturity, it can scarcely be believed, that the plaintiff meant to rely exclusively on the credit of the drawer of the bill. The case, however, does not call for any decision on this point; because it is not to be governed by the law of Massachusetts or Maine.

It is a transaction originating in, and consummated at Cuba, and is to be governed by the law of Spain, and not by the law of America, applicable to this subject. What is the law of Spain, I have no accurate means of knowing; and it is the duty of the party, who sets up the defence, to establish it in evidence by competent proofs. If he fails so to do, the court can take no legal notice of the point. There is, however, much reason to believe, that the civil law, which is the law of Spain, does not make a bill of exchange an extinguishment of a prior debt, unless the parties expressly so stipulated. See Poth. Obl. pt. 3, c. 2, art. 4; 1 Domat, bk. 4, tit. 3, p. 491, § 1.

Another objection is, that the protest of non-acceptance did not accompany the notice to the defendants, and it is strenuously contended, that by our law the notice, without such accompanying protest, or a copy, is a mere nullity. The case of Blakely v. Grant, 6 Mass. 386, contains a remark, which certainly countenances the suggestion; but it was wholly gratuitous in that case, not being called for by any argument urged at the bar, or by any facts in controversy. It is indeed somewhat questionable, whether the remark itself attracted the close observation of the court. I can only say, that, as at present advised, I think that the dictum is not law; and I have no reason to suppose, that it has been actually conformed to in practice. See Stanton v. Blossom, 14 Mass. 116. The English rule, as to foreign bills, is directly the other way. It is the clear result of decisions in England, purporting to be founded on the general law merchant, that the notice is sufficient, though a copy of the protest is not sent. Chit. Bills (5th Ed.) 282; Robins v. Gibson, 3 Camp. 334, 1 Maule & S. 288; Cromwell v. Hynson, 2 Esp. 511; Chaters v. Bell, 4 Esp. 48. But this bill, being drawn in a foreign country, is, strictly speaking, to be governed on this point by the law of that country, as to notice and protest. And in the absence of any other proof the court might well presume, that the law of Spain does not differ from that acted upon in England. If it did, the learned counsel for the defendants would doubtless have established it by some competent evidence. See Poth. Traite de Change, pt. 1, c. 5, arts. 149, 150.

But the principal objection is, that there has been gross negligence in the remittance of the bill, and that this, at all events, would discharge the drawer, and by consequence the present defendants. There is a difference between the case of a bill of exchange, drawn payable at so many days after date, and one drawn payable at so many days after sight. In the former case, the bill must be presented by the period of its maturity; in the latter, it is sufficient if it be presented in a reasonable time. What that reasonable time is, depends

upon the circumstances of each particular case, and no definite rule has as yet been laid down, or indeed can be laid down to govern all cases. The question is a question of fact for the jury, and not of law for the abstract decision of the court. Such, as I take it, is the doctrine of the authorities. There is one other limitation, or rather illustration, of the principle, which is very material. It is this, that the holder is not at liberty to lock up the bill for any length of time in his own possession; but he may put it into circulation, and though it may remain a considerable time in circulation, if there be no unreasonable delay in any of the successive holders, the delay of presentment for acceptance is not fatal to the party in case of a dishonor. Muilman v. D'Eguino, 2 H. Bl. 565; Goupy v. Harden, 7 Taunt. 159; Fry v. Hill, Id. 397; Field v. Nickerson, 13 Mass. 131; Kyd, Bills, 117; Bayley, Bills & N. (2d Ed.) 60; Chit. Bills, (5th Ed.) 208. In the present case the bill was not put into circulation, but was locked up in the hands of the agent of the plaintiff at Boston, from the 6th of July to the 29th of September. It has been said, that the plaintiff was bound to send it direct from Havana to England by some regular conveyance, and had no right to remit it to Boston for sale. I am of a different opinion. The party, who receives a negotiable bill, payable after sight, has a right to sell it in the market, where he resides, or to send it to any other place for sale. He is not bound personally to make a remittance of it, or to send it directly to the country on which it is drawn. He is at full liberty to put it in circulation, or to send it to any other place for sale or remittance; and the only limitation upon this right is, that he shall have it presented within a reasonable time, be the conveyance direct or indirect. To be sure, the usage of trade is to be consulted on this as on other occasions. The holder of such a bill is not at liberty to send it to very remote places, wholly out of the course of trade, if there be unreasonable delay thereby in the presentment for acceptance, and thus to fix the drawer with an indefinite responsibility. But on the other hand, the transmission in a direct trade is not necessary. No one can doubt, that, by the course of trade, many bills of exchange, drawn in the Havana on England, are sent to the United States for remittance or sale. The very testimony in this case establishes this fact. It would be a most inconvenient rule to hold, that such a negotiation of bills was at the sole peril of the holder. I know of no rule of law reaching to such extent. In my judgment, the remittance of the bill to Boston for sale was not a discharge of the defendants.

Then as to the delay. The jury must, independent of the asserted agreement, look to all the circumstances. If the bill had been presented before the 19th of August, when the funds reached Williams, it would have been protested for non-acceptance. That it was in the contemplation of all the parties, that the bill should or might be retarded, so as not to reach the drawee before the fund, is most manifest from all the circumstances of the case. The whole arrangement proceeded upon this as an implied basis; for otherwise, in case the bill were sold, it would be returned by the holder, with heavy damages against the prior parties, since his right of action would be complete by the dishonour, and he would not be obliged to wait for the funds. Now the bill itself would not have been paid, if it had been presented later than the 21st of August, for it would not have arrived at maturity, if presented at a later period, before Williams's failure, which was on the 24th of October. In reality, then, there were but two days for the presentment of the bill, in which acceptance and payment would have followed each other. The loss, therefore, which has been sustained, cannot have arisen from any want of due presentment, unless there was an unreasonable delay in not remitting the bill before the 21st of August. The evidence establishes the usual average time of remitting bills from Havana to London, by common conveyances, to be about fifty days; and calculating this to be the earliest period for remittance, where there is no delay, the bill, if sent on its passage on the 20th of June would not have reached London sooner than the 10th of August; and supposing the remittance to Boston justifiable, not until the 25th of August. In this view there can scarcely arise the least doubt, that there was no delay in not remitting the bill until after the funds reached London. The plaintiff, having sent the bill to Boston for sale, had a right to some time to look out for a purchaser; and in the uncertainty of the time when the funds might be expected to reach London, he ought to be allowed, for the benefit of all concerned, a liberal indulgence as to his calculations of time. The only real difficulty is, whether the subsequent delay to the 29th of September was not an unreasonable time, not because it actually occasioned the loss, but because it was a giving credit to the drawee, and thereby putting the bill at the risk of the plaintiff, as to the solvency of the drawee. In coming to a conclusion upon this point, the jury will weigh the whole evidence, and take into consideration the course of trade, and the understanding of the parties in this particular case. If there has been any act of the defendants, or their agent, adopting the delay, or recognizing their responsibility with full knowledge of the delay, that would be decisive of itself. But in the absence of such evidence, it will still be for them to say, whether the delay be, upon all the circumstances, unreasonable.

Hitherto I have considered the case as if it were governed by the rules of the common law; but as I have before observed, the case arose in Cuba, and in this, as in other respects, it must be governed by the Spanish law. It has been treated, however, as a question not varied by any thing peculiar to the

law of Spain, and therefore the court has given its opinion accordingly. It is most probable, that the Spanish law is quite as indulgent, if not more so than ours, to the rights of the holder. See Poth. Traite du Contract de Change, pt. 1, art. 143, c. 5, § 2; Locré's Esprit du Code de Commerce, tom. 2, p. 242; Code de Commerce, lib. 1, tit. 8, § 11, art. 160, &c.

If there was any special agreement in the case, beyond what the other facts would naturally imply, it will, of course, be conclusive upon the point now under consideration. The testimony is in conflict, and it will be for the jury to decide upon the credit to which it is entitled. (Here the judge summed the facts, as to the agreement, at large; and left them to the jury.)

The jury disagreed on the question of facts, and by consent were discharged.

[Subsequently the cause was again tried by the jury, with additional evidence. The verdict was rendered in favor of the plaintiff. See Case No. 17,097.]

Case No. 17,097.

WALLACE v. AGRY et al.

[5 Mason, 118.] [1]

Circuit Court, D. Maine. Oct. Term, 1828.

BILLS OF EXCHANGE—TIME OF PRESENTMENT—USAGE.

Assuming that a foreign bill of exchange, payable after sight, ought to be presented within a reasonable time, that time must be judged of with reference to the usage among merchants as to delays in the negotiation and transmission of such bills.

This cause was again tried by the jury at this term. In addition to the testimony formerly in the case [Case No. 17,096], there was evidence, that in Boston and elsewhere in America, the usage and understanding among merchants was, that upon foreign bills of exchange payable after sight, the holder was under no obligation to present them for acceptance at any particular time. He was at liberty to consult his own discretion. In short, that no time was known or recognized among merchants within which the presentment should be made; but the holder might keep the bill any length of time he pleased. There was also evidence of a like nature, and tending to the same result, as to the usage and understanding among merchants at the Havana. There was also evidence, that foreign bills drawn at the Havana on London, and elsewhere, were often sent to different ports of the United States, for negotiation and sale; and no particular time was understood to be fixed, within which they should be negotiated, and no particular modes of conveyance, direct or otherwise, by which they should be sent to London. In many instances, they were sent to Spain and France first, when drawn on London; and in many instances, to the United States. No law or usage existed requiring them to be sent direct to London. In respect to foreign bills it did not appear from the evidence, that the Spanish law differed in any material respect from the general commercial law of England or America.

Mitchell & Greenleaf, for plaintiff.

Daveis & Longfellow, for defendants.

STORY, Circuit Justice, in summing up the case said, that the court adhered to the doctrine given to the jury at the former trial. As far as the new evidence went, it corroborated, in point of usage, that which the court supposed to be the Spanish law. That, at all events, if the doctrine were correct, that foreign bills, like the present, were required to be presented within a reasonable time, on which the court would not give any absolute opinion, still the evidence in the case of the usage of merchants, if not good evidence of the law, was evidence as to their understanding of what was reasonable time, and in that view proper for the consideration of the jury; that, with reference to such usage, he would put it to the jury to say whether the present bill was not, in point of fact, put into negotiation, or transmitted for presentment, within a reasonable time. If the jury thought it was, then, so far as this point was essential to the plaintiff's cause, he was entitled to their verdict.

The judge then adverted to the other points made in the cause, affirming the former doctrine held by the court.

The jury found a verdict for the plaintiff.

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

WALLACE (BROWNSON v.). See Case No. 2,042.

Case No. 17,098.

WALLACE v. CLARK.

[3 Woodb. & M. 359.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1847.

PLEAS TO THE JURISDICTION—DILATORY PLEAS—RULES OF COURT.

1. A plea to the jurisdiction on the ground that a demand has been colorably assigned in order to evade a discharge under the insolvent law, is not to be treated as dilatory and captious, like some pleas in abatement.

2. For good reasons and on proper terms, the rules made by this court may be varied or dispensed with, so as to allow a longer time to file such pleas.

3. It may be otherwise with rules made for this tribunal by the supreme court, or any made by statutes for any court.

This was an action of assumpsit on a promissory note, the plaintiff [William Wallace] being called a citizen of New Hampshire, and the defendant [William E. Clark] a citizen of Massachusetts, and this court, therefore, hav-

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

ing on the face of the record, jurisdiction of the case. No pleas had been filed on the 5th of November, the term having commenced on the 15th of October. On the former day, the defendant moved for time till the next term to file a special plea in abatement to jurisdiction of the court, and other special pleas in bar. The ground of these pleas was a supposed collusive transfer of the note to the plaintiff, from a person belonging to Massachusetts, and still the owner of the note, with a view to bring an action in the name of a person resident in another state, and thus obtain an undue advantage over other citizens of Massachusetts, by attaching and holding the property exempt from distribution, under the insolvent system of this state. Property had been attached by the writ in this case, and the defendant had since gone into insolvency.

Mr. Bigelow, for defendant.
Mr. Fabyan, for plaintiff.

WOODBURY, Circuit Justice. The exception wished to be raised being to our jurisdiction, is one resting on substance, and not mere form. In substance it is, therefore, not strictly dilatory, or in abatement, though such in form, nor is it to be discountenanced like mere dilatory pleas, as it tends to prevent a party from further prosecuting his action by a colorable assignment to a third person, and to the injury of others like himself, when all are citizens of this state, and entitled only to an equal distribution of the debtor's estate. But the plea has not been filed, within the time fixed by our rules, which is two days from the commencement of the term, for pleas in form in abatement.

The eighth law rule made by and for this circuit court is, "All pleas in abatement and to jurisdiction shall be filed in court within two days after the entry of the action, and not afterwards." By rule 15th, special pleas are to be filed in seven days from the entry.

It is argued by the counsel for the plaintiff, that this court possesses no power to dispense with these rules on any terms, or for any cause. In support of this are cited Hines v. Dean, 8 Pet. [33 U. S.] 269; Thompson v. Hatch, 3 Pick. 515; and 5 Pick. 188. But I see nothing in these cases which settles the law in that way. In Thompson v. Hatch, 3 Pick. 512, it was held only that one judge could not dispense with rules made under a statute by the whole court, nor could the whole court dispense with a rule or order prescribed unconditionally by a statute itself. See, also, 14 Mass. 134. So, in Bank of U. S. v. White, 8 Pet. [33 U. S.] 269, the question arose under rules prescribed by the supreme court of the United States to the circuit courts in equity. But even there, it seems to be implied that the circuit courts might enlarge the time prescribed for an answer. And the 89th of these rules expressly authorizes the several circuit courts to alter or add to that kind of rules made by the supreme court, if not prescribing what is inconsistent with them.

The rule now under consideration is, however, one made by this court itself, for its own common law practice. It comes, therefore, under the principle of none of these adjudged cases, but raises the question simply, whether any court making rules for its own convenience and the benefit of suitors, cannot dispense with them in any case for good cause shown, and on proper terms. This is not abrogating them entirely, nor suspending them without a sufficient reason, and without full indemnity to the opposite side, and consequently such a course, instead of destroying or proving the inability of rules, tends to establish their general excellence, and confirms them as the general guide, and allows no departure from them without ample cause. If courts could not, in cases of accident or necessity, with a view to reach the truth, give relief or indulgence on making the other party indemnity for the delay, our rules would be worse than any principles of the law in common cases, which are often relieved against in equity, and sometimes at law in the event of accident and mistake. On the contrary, such rules are mere engines to promote convenience in business, and when, from any peculiarity, they require to be suspended or waived in order to promote justice, the power which made them can and ought to suspend them. This is done daily in all courts, as to their own rules, made by themselves, in enlarging time to plead, and curing other difficulties. So it is done in all legislatures, as to their own rules. The mistake on this subject probably arises from not discriminating critically between rules adopted by a statute, like the articles or rules of the war department, or certain rules and general orders for courts in some particulars, about pleading and practice, as by statute of 3 Wm. IV., and to be reported to court, and which cannot be waived, and those made or adopted merely by the same court, which is asked for good reasons to dispense with them, and which may be waived by them on proper reasons and terms. See cases in 14 Law J. 141, and 9 Jur. 122. And again, in not discriminating between rules or general orders made by the court administering them, and those made by law by one tribunal or commission to guide others, and which others have no more authority to amend or waive, them, than they have to amend or waive a statute.

At this time in England most of the general rules for all courts are made under the statute passed in 1834, and by judges from each of the courts, and are intended to be uniform and binding on the whole. 1 Spence, Eq. Jur. 253. These, therefore, cannot be departed from by any one of the courts alone. There is, also, a class of rules, temporary, rather than permanent, and there is a class of the latter made by the court administering them, without any special statute, but for its own convenience, like these under considera-

tion. These are at times modified merely by a long practice in opposition to them. 9 Jur. 543. They can, also, be dispensed with, or the time enlarged under them on some "evident necessity," or in "cases of urgency," to use the language of 1 Tidd, Prac. 456. But this is usually granted only on terms, if desired by the other party. Id. Certainly this waiver or suspension is not proper without special reasons, and on due security to the other side against loss by it or its consequences.

The defendant here, then, unless the fact is admitted, must first swear that he expects to be able to show collusion in the assignment, and such other facts as would constitute a valid defence, either to the cause of action, or to maintaining the latter further in this court. He must next file good security to pay, at all events, the costs incurred during the delay requested, because in a question of jurisdiction, if the latter is not found to exist, no costs can be awarded. Burnham v. Rangeley [Case No. 2,177]. Finally, he must charge no costs in any event for the present term. On these conditions the motion is granted.

WALLACE (DAVIS v.). See Case No. 3,657.

Case No. 17,099.

WALLACE v. DEWEY.

[3 McLean, 548.] [1]

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

DEED BY TOWN TRUSTEES — EVIDENCE OF AUTHORITY—ACKNOWLEDGMENT.

1. Where a deed purports to have been executed by the trustees of a town, there must be evidence that the persons who signed it were trustees, and that they had power to make the conveyance.

2. An acknowledgment of a deed before a clerk of the court, in Kentucky, is not good without evidence that the person taking the acknowledgment was clerk.

[This was an action of ejectment by D. C. Wallace against Charles Dewey.]

O. H. Smith, for plaintiff.

Morrison & Bright, for defendant.

McLEAN, Circuit Justice. This is an action of ejectment. The plaintiff offered a deed in evidence from the trustees of the town of Clarksville, to John Harrison, dated 3d September, 1794, recorded the 27th September, 1818. And also a deed from Harrison to the plaintiff, for the premises, dated 4th January, 1817, and recorded 4th March, 1818. The deeds were both objected to.

The first deed is inadmissible, as it does not appear that the persons who signed it were trustees of Clarksville, at the time, and had power to make the conveyance. And the second deed must be rejected, as it purports to have been acknowledged before the clerk of the court of Jefferson county, and there is no evidence of his being clerk. Nor is there any evidence of the genuineness of the deed. Judgment of non-suit.

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

Case No. 17,100.

WALLACE et al. v. HOLMES et al.

[9 Blatchf. 65; 5 Fish. Pat. Cas. 37; 1 O. G. 117.] [1]

Circuit Court, D. Connecticut. Sept. 19, 1871.

PARTIES IN EQUITY—WAIVER—GUARDIANS—POWER TO SELL PERSONALTY—MASSACHUSETTS STATUTE — PATENTS — INFRINGEMENT — LAMPS.

1. Where, in a suit in equity, the want of parties is not set up or suggested in the answer, it cannot avail, on final hearing, unless the case is one in which the court cannot proceed to a decree between the parties before it, without prejudice to the rights of those who are proper to be made parties, but who are not brought into court.

2. In the absence of a restraining statute, a guardian of the person and estate of an infant, appointed by a court of probate, has, as incidental to his office and duties, the power to sell personal property of his ward.

3. The statute of Massachusetts (Gen. St. Mass. c. 109, § 22) providing that the courts therein named may authorize or require a guardian to sell personal property held by him as guardian, and invest the proceeds in real estate, or otherwise, does not take away the power of the guardian to sell such personal property without an order of the court, and to confer title thereto on the purchaser.

4. Where a structure consisting of several parts is patented as a combination, one who manufactures and sells some of the parts, they being useless without the residue, with the understanding and intent that such residue shall be supplied by another, and the whole go into use in its complete form, is liable as an infringer of the patent.

[Applied in Renwick v. Pond, Case No. 11,702. Distinguished in Saxe v. Hammond, Id. 12,411. Approved in Turrell v. Spaeth, Id. 14,267. Followed in Rumford Chemical Works v. Hecker, Id. 12,133. Distinguished in Buerk v. Imhaeuser, Id. 2,108; Morgan Envelope Co. v. Albany Perforated Wrapping-Paper Co., 152 U. S. 425, 14 Sup. Ct. 630; Maynard v. Pawling, 3 Fed. 713. Cited in New York Bung & Bushing Co. v. Hoffman, 9 Fed. 201. Followed in Travers v. Beyer, 26 Fed. 450. Cited in Harper v. Shoppell, Id. 521; Alabastine Co. v. Payne, 27 Fed. 560; Harper v. Shoppell, 28 Fed. 615; Syracuse Chilled-Plow Co. v. Robinson, 35 Fed. 503; Schneider v. Missouri Glass Co., 36 Fed. 584. Distinguished in Winne v. Bedell, 40 Fed. 465. Cited in Hobbie v. Jennison, Id. 890; Boyd v. Cherry, 50 Fed. 282. Distinguished in Robbins v. Columbus Watch Co., Id. 555. Cited in brief in Heaton Peninsular Button-Fastener Co. v. Dick, 55 Fed. 26.]

5. Letters patent were granted to Michael H. Collins, September 19th, 1865, for an "improvement in lamps." The claim was to "the improved lamp, as not only constructed with its

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel H. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 65, and the statement is from 5 Fish. Pat. Cas. 37.]

cone or deflector, F, and its chimney-rest, D, and chimney, arranged with respect to each other as described, but as having the said deflector provided with peripheral springs, or the same, or the slits, h, h, and the rest, D, made concavo-convex, and provided with an annular groove or lip at the bottom, for supporting the chimney, the whole being substantially as described or represented." The specification described the main purpose of the invention to be, not only to keep the lower part of the glass chimney of the lamp cool, so that it might readily be removed by the hand, but also to support the chimney without the use of a spring catch, or other devices, such as are ordinarily used. The distinguishing feature of the invention claimed was the burner, with its chimney-rest, a deflector having peripheral springs, to sustain the chimney without the aid of a catch or screw, and with air-passages operating, when in use, to keep the lower part of the chimney cool, and tending, by that means, and by the greater elevation of the flame, to prevent the lower portion of the burner and top of the reservoir from becoming unduly heated. The burner alone, or the burner attached to the reservoir, was useless, without a chimney; and a chimney was useless without a burner. The defendants made and sold burners substantially like the patented invention, but, although they used such burners with chimneys placed therein, to exhibit the burners to customers, they did not make or sell the chimneys. *Held*, that the claim of the patent was a claim to the burner in combination with the chimney.

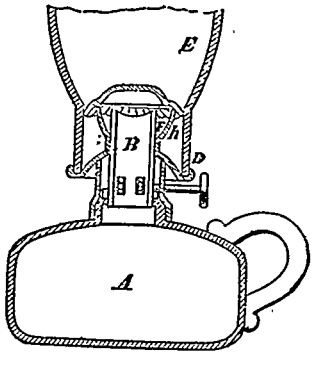
6. The defendants must be regarded as active parties in the whole infringement, by making and selling the burner to be used with the chimney.

[Cited in Rumford Chemical Works v. Vice, Case No. 12,136; Bowker v. Dows, Id. 1,734. Approved in Schneider v. Pountney, 21 Fed. 403. Cited in Lane v. Park, 49 Fed. 458.]

[2] [Final hearing on pleadings and proofs.

[Suit brought upon letters patent [No. 49,984], for an "improvement in lamps," granted to Michael H. Collins, September 19, 1865, and assigned to complainants.

[The facts of the case and the claims of the patent are set forth in the opinion, and will be understood by reference to the accompanying drawing, in which A represents



the lamp, B the wick-tube, E the chimney, D the chimney-rest, and F the cone or deflector, provided around its upper edge with peripheral springs, or having the edge cut into radial slits, h, the function of which is to press against the glass of the chimney and hold it in place.] [2]

[3] [This was a suit in equity brought by Wallace & Sons and Phelps, Dodge & Co. against Holmes, Booth & Haydens for the alleged infringement of certain letters patent for an improvement in lamps, granted to Michael H. Collins, September 19, 1865. No defect in complainants' title appears to have been set up in the answer to the bill; but at the hearing defendants averred a lack of sole title in complainants, and made this one of the chief points of defense. From the record in the case it appears that on the 24th of September, 1867, Collins and his wife, the former as guardian for his minor daughter, conveyed the patent in suit to one Warren for a nominal consideration, the deed of assignment reciting an alleged previous assignment of the same to the wife and child, and that on the same day, and for the same consideration, Warren conveyed all his right, title, and interest in the patent to Collins. It further appears that on the 24th of December, 1867, doubt being entertained as to the legal efficacy of these conveyances, Collins, in his own behalf and as the guardian of his daughter, assigned the patent and the invention secured thereby to the complainants; and on the following day still another instrument was executed by Collins and his wife jointly, which recited a doubt as to whether any interest had ever passed to the wife, and assigning to the same parties all the interest that she ever may have acquired. It was urged, upon this state of facts, that the transactions to which Warren was a party were tainted with fraud as aiming to transfer a valuable property from the ward to the person holding the relation of guardian for a manifestly inadequate compensation, and therefore were illegal; and that the subsequent assignment of December 24 was not free from the same suspicion of fraudulent intent. Reference was also made to the General Statutes of the Commonwealth of Massachusetts, in which state Collins and his daughter lived, which enacts as follows: "The probate courts in the several counties, and the supreme judicial court, on the application of a guardian, or any other person interested in the estate of a ward, after notice to all other persons interested therein, may authorize or require the guardian to sell and transfer any stock in the public funds or in any corporation, or any other personal estate or effects held by him as guardian, and invest the proceeds thereof and all other moneys in his hands in real estate, or in any other manner that shall be most for the interest of all concerned. Said courts may make such further order and give such directions as the case may require for managing, investing, and disposing of the estate and effects in the hands of a

[2] [From 5 Fish. Pat. Cas. 37.]

[2] [From 5 Fish. Pat. Cas. 37.]

[3] [From 1 O. G. 117.]

guardian." Gen. St. Mass., c. 109, § 22. It was urged that this statute was intended primarily for the protection of the estates of wards by requiring judicial sanction for every transfer of property, personal as well as real, made in their behalf; and therefore, as it did not appear that Collins had obtained any order from the court authorizing the sale of his ward's interest in the patent in question, it could not be held that the interest once held by her had become vested in complainants by the instruments above recited. For these reasons it was contended that complainants did not hold the entire title in the patent; that Michael H. Collins, as guardian, should have been joined as party plaintiff in the bill, and that by means of this not being done the suit could not be maintained.

[The other ground relied upon by the defense at the time of trial was non-infringement of the patent. The invention as patented is sufficiently described in the opinion rendered by the court. The claim of the patent is in these words: "I claim the improved lamp as not only constructed with its cone or deflector, F, and its chimney-rest D, and chimney, arranged with respect to each other as described, but as having the said deflector provided with peripheral springs, or the same and the slits, h, h, and the rest, D, made concavo-convex and provided with an annular groove or lip at the bottom for supporting the chimney, the whole being substantially as described or represented." The bill charged infringement by the manufacture and the sale of the invention described in the specifications; and the proofs showed that the defendants had largely engaged in making and selling burners in all material respects like that described in the patent, unless the spiral wire wound into the edge of the deflector—the form of spring used by defendants to press against the interior of the chimney—was to be regarded as a substantially different device from the elastic radial arms described by Collins: but it did not appear that they had ever made or sold any chimneys to accompany such burners. It was contended on the one side that in this there was no infringement, since the claim was to be construed as covering a combination of instrumentalities into which the chimney entered as an essential element; the rule of law being invoked that a combination claim is not infringed unless all the elements of the combination are used. On the other hand, it was urged by the complainants that, although in the claim reference was made to the chimney, yet as this device was not set forth in the specification as essential to the patentability of the combination of the chimney-rest and the deflector, and as Collins' object was to combine the deflector with a rest in such manner as to support the chimney both vertically and laterally without the aid of any other device, and at the same time to keep the lower part of the chimney cool, the claim should be construed as covering, in fact, only the combination with the elevated deflector provided with peripheral springs of the concavo-convex chimney-rest pierced with holes for the passage of air. The enunciation of invention contained in the specifications of the patent bears upon this point, and is in these words: "The main purposes of my invention, or the principal part thereof, are, not only to keep the glass chimney of the lamp—or, in other words, the lower part of such chimney—in a cool condition, so that a person taking hold of such part with his hand can readily remove the chimney from the rest of the lamp, but to support the chimney without the use of a spring-catch and other devices that are ordinarily used." But, further, it was contended that if the chimney by reason of being included in the claim was an essential part of the combination as patented, still it must be held that there was virtually an infringement by the defendants, even in the burners made by them and sold unaccompanied with chimneys. It was urged that the cases in which it had been held that the manufacture and sale of a combination containing only a part of the elements of a given patented combination did not constitute an infringement, were cases where the combination manufactured, although a part only of the patented combination, was useful in itself, independent of the parts omitted, and was actually designed for such use only, and not to be associated with the other parts of the patented combination; but it was contended that where, as in the case at bar, the combination manufactured and sold, containing less than all the elements of the patented combination, is made and sold with the express purpose of having the other elements of the patented combination added, and was useless without such addition, the case is entirely different—that in such case the one who makes and sells the minor combination knowingly and willfully commits a part of an act the whole of which constitutes infringement; and that he is, therefore, guilty of the charge of infringement, because he has participated in the infringement. Infringement of a patented combination, it was insisted, does not consist alone of putting the parts together; it commences when the unauthorized party begins to make the parts with the intention of completing them and putting them together, and at any stage of progress he is liable as an infringer. If the different parts are made by different persons, they jointly infringe the patent, and are liable both jointly and severally, and this whether the work is done in the same shop or in places remote from each other.] [3]

William B. Wooster, John S. Beach, and George Gifford, for plaintiffs.

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

[3] [From 1 O. G. 117.]

WOODRUFF, Circuit Judge. The complainants sue, as the assignees and owners of letters patent granted September 19th, 1865, to Michael H. Collins, for an improvement in lamps for an alleged infringement by the defendants, praying an injunction and an account of the gains and profits made by the defendants by the unlawful manufacture and sale of the invention so patented. The answer puts the complainants to proof of the patent, and of their title as assignees, denies that the defendants have infringed the patent, and alleges that, if the patent recited in the bill of complaint shall be construed to cover anything contained in lamps heretofore and now manufactured and sold by the defendants, then, and in that case, such letters patent are, to that extent, void, for want of novelty.

Upon the trial, the defendants rested their defence solely upon two grounds—want of sole title in the plaintiffs, and the non-infringement of the patent by the defendants. The court is, therefore, relieved from any examination of the testimony and documents which were apparently intended to show that Collins was not the first inventor, or any other proofs, except such as bears directly upon the two points above mentioned.

1. As to the complainants' title. They first show that, on the 23d of September, 1867, Michael H. Collins was, by the probate court of the county of Suffolk and state of Massachusetts, appointed guardian of the person and estate of his minor child, Florence E. Collins, upon his own petition and her nomination, and upon the giving of bonds in the form required by the statutes of that state. They next produce an instrument dated September 24th, 1867, which recites the granting of the foregoing and other patents to him, the said Michael H. Collins, that the said Florence E. Collins and Frances M. Collins have become the owners of the said invention for the territory of the United States, that Frances M. has assigned her interest to Sylvester W. Warren, that the said Michael has been appointed guardian of the said Florence E., whereby he is empowered to dispose of all the real and personal estate, goods, chattels, &c., of the said Florence E., and that it appears to the said Michael to be for the interest of his ward that her interest in the patents should be sold. It thereupon, in consideration of $50, sells, assigns, &c., to Warren, all the right, title, and interest the said Florence has in the patent right and in the invention, by virtue of an assignment to her and Frances M., dated February 12th, 1867. The instrument is executed, under seal, by the said Michael, as guardian of the said Florence. Next, an assignment by Frances M., dated, also, September 24th, 1867 (reciting, also, the assignment of February 12th, 1867, by Michael H. Collins to her and Florence E.), whereby, in consideration of $50, Frances M. assigns to Warren. Next, an assignment under the same date, by the said Sylvester W. Warren to the said Michael H. Collins, in consideration of $50, assigning to the latter the same patent, for the territory of the United States. Next, an assignment, dated December 24th, 1867, which recites the granting of the patent, the assignment thereof to Florence E. (a minor daughter) and Frances M. Collins, and that said rights had been attempted to be reconveyed to the said Michael, but that some doubt exists as to the precise effect of said conveyances, and therefore, in consideration of $30,000 paid to him, the said Michael, in his own behalf, and as guardian to the said Florence E., by the complainants in this suit, he, the said Michael, in his own right, and as guardian of the said Florence E., assigns to the complainants the said letters patent and the invention secured thereby, and all rights of re-issue, extension, &c. Finally, an assignment under date of December 25th, 1867, reciting a doubt whether, Frances M., being the wife of Michael, received or now holds any interest in the patent, by the conveyance to her by her husband, and therefore the said Michael and Frances M., husband and wife, assign all the interest which she may have in the patent or invention, to the complainants herein.

The defendants insist, that Michael H. Collins, as guardian of Florence E., had, under the laws of Massachusetts, no authority to sell her interest in the patent, without the order or license of one of the courts of that state, having jurisdiction for that purpose; and that the complainants, therefore, own only one-half of the patent (as tenants in common with her), and cannot maintain this suit without her presence as a party. The want of parties, not having been set up or suggested in the defendants' answer herein, cannot avail, unless the case is one in which the court cannot proceed to a decree between the parties before the court, without prejudice to the rights of those who are proper to be made parties, but who are not brought into court. Whether the suggestion of want of parties, first made on the trial, has any sufficient foundation in fact, depends upon the construction and effect of the statutes of Massachusetts. It was claimed to be apparent on the face of the assignments, that Michael H. Collins had practised a fraud upon his infant daughter, through the form of a sale of her interest for a consideration of $50, with intent that that interest should be immediately conveyed to him by the apparent purchaser, and so it was plain that he made use of his guardianship for the mere purpose of obtaining title to his ward's property, that he might sell the entire patent for the large consideration of $30,000 paid to him by the complainants. Whatever reason the assignments of the 24th of September, 1867, furnish for such a suspicion, the actual transfer to the complainants is free from any such appearance of fraud. That instrument recites the doubt of the effect of the previous sale, and, in appropriate form, acknowledges the receipt of the full considera-

tion in his own behalf, and as such guardian, and sufficiently charges him, in his capacity of guardian, with accountability for the actual proceeds of sale. If, therefore, he had authority to sell, the complainants, being plainly bona fide purchasers, acquired good title to the whole patent. This question of authority must be determined by considering the effect of a statute of Massachusetts. Independent of the particular statute in question, it is not doubtful, that a guardian of the person and estate of an infant, appointed by the court of probate, has, as incidental to his office and duties, the power to sell personal property of his ward. His duty to pay debts, and to provide for the support, maintenance, and education of the ward, and, generally, to manage the estate, and his trust, indicated and expressed in the bond he is required to give, conditioned to manage, dispose of, and apply the same, and to account for all property and the proceeds thereof, all imply the power of the guardian in this respect. In this management, he is under a rigid responsibility, not only for the property but for its management and disposal for the best interest of the ward. If, therefore, he assumed to sell, for investment in other property, and, especially, if he ventured to change the nature of the property by investing in real estate, he would incur the hazard of an accounting in that respect, it may be many years afterwards, in which, in case of depreciation, the discretion exercised by him might be assailed and impeached, and he be subjected to loss on the one hand, and, on the other, the estate might be depreciated, notwithstanding the good faith of the guardian. And yet, at times, the interest of the ward may often be greatly promoted by change of investments, for the making of which the guardian would be unwilling to assume the responsibility.

The statute referred to enacts, that "the probate courts in the several counties, or the supreme judicial court, on the application of a guardian, or any person interested in the estate of a ward, after notice to all other persons interested therein, may authorize or require the guardian to sell and transfer any stock in the public funds, or in any corporation, or any other personal estate or effects held by him as guardian, and invest the proceeds thereof, and all other moneys in his hands, in real estate, or in any other manner that shall be most for the interest of all concerned. Said courts respectively may make such further order, and give such directions, as the case may require, for managing, investing, and disposing of the estate and effects in the hands of the guardian." Gen. St. Mass. c. 109, § 22. It is argued, that this statute has taken away the power of the guardian to sell any personal estate of his ward without an order of court, and that a sale and transfer by the guardian, without such order, is void, and confers no title on the purchaser. I do not think that this was the design of the statute, or that such is its effect. It unquestionably gives jurisdiction to the courts named summarily to control the guardian in this respect. So, also, it gives them power to control him generally in the management of the estate. But, the construction claimed would imply that he can, since the statute, do nothing lawfully except under a special judicial order obtained for the purpose. This jurisdiction is useful, in a high degree. It looks chiefly to the investment, and change of investment, of the estate. It enables the guardian to obtain advice and protection. He may often think a change of the property, and even an investment in real estate, best for the interest of his ward, and yet be unwilling to make it at the hazard of the result, and of the judgment which may be passed thereon at the end of, perhaps, very many years. He can, therefore, apply to the court, and obtain recorded judicial approval, which will be his conclusive protection in the future. So, also, when any party interested in the estate is dissatisfied with the management of the estate, or deems a change in the investments desirable, he can apply, and, if it seem best, the courts may require change of investments, or make other order touching the management or disposal of the property. This summary jurisdiction is conservative, it may be availed of by all parties, it protects the guardian in circumstances of doubt, and enables him to make investments not within the general line of his duty as guardian, and to make changes of investment without liability therefor on an accounting which may be required long afterwards, when, perhaps, unforeseen events make the acts seem negligent or improper; but it was not intended, and it does not operate, to deprive the guardian of power to sell personal property. In doing so, he acts subject to responsibility for good faith, proper prudence, and the proper use of the proceeds; and, in such case, the purchaser obtains title to the property sold.

This view of the complainants' title renders it unnecessary to say what, in this suit, would be the effect of a holding that they were not sole owners of the patent. The objection that Florence E. is not a party to the suit, not having been made either by plea or answer, would not necessarily defeat the suit. Even then, the complainants have title, though not as sole owners. At law, in an action for a tort, such non-joinder could only be urged by plea in abatement, or in diminution of damages; and, in equity, if the court were of opinion that complete justice could be done between the parties before the court, without prejudice to the absent party, it might perhaps proceed, treating the defendants as having waived the objection, or, at most, in such a state of the case, direct the absentee to be made a party, if that was deemed necessary. The conclusion, however, that the complainants have title, disposes of the objection.

2. The ground upon which alone the defendants claimed, on the trial, that they had not infringed the patent, is this—that the pat-

ent is for a combination of several parts, together constituting the improved lamp described in the patent; and that the defendants have only made and sold some of the parts of that combination, and cannot, therefore, be charged as infringers. The patent is, in terms, for "a new and useful improvement in lamps." The specification describes "the main purpose of the invention, or the principal part thereof," to be, not only to keep the lower part of the glass chimney of the lamp cool, so that it may readily be removed by the hand, but, also, to support the chimney without the use of a spring catch, or other devices, such as are ordinarily used. It thereupon proceeds to describe what is ordinarily called the burner of the lamp, namely, that portion which holds the wick tube, and which is to be screwed into the cap of the reservoir or body of the lamp, containing the oil or fluid used for combustion, consisting of an "air induction annular plate" at the bottom, convex, and provided with holes, to admit the air, and turned slightly up at the outer edge, to receive and sustain the chimney. The wick tube rises above it, and near, but just above the top, is surrounded by an "umbelliferous cone, or deflector," which extends outward to the sides of the chimney, and, the outer edge being cut or slit radially, the divided edge forms springs, which press against the interior of the chimney, and sustain it firmly in its upright position. The parts of the deflector between the slits being inclined downward, and being elastic, are adapted to receive the chimney, though there be irregularities and differences in the interior dimensions of chimneys which may be used. Other details are given pertaining to the construction, mode of operation, and uses of the parts, which it is not necessary to mention. It must suffice to say, that what is called the burner embraces all the metallic portion of the lamp containing, surrounding, or placed above the wick, and to be screwed into the cap of the reservoir. The specification also describes the glass chimney to be used, thus: "The lower part of the chimney, or that portion which extends from the deflector to the chimney rest, is constructed tubular and cylindrical. Above this part, the chimney bulges out, and finally is contracted to its top, in manner as shown in the drawings;" and, in the operation of the lamp, stress is laid upon the effect of perforations in the chimney rest, in its convex sides, through which the air, passing in currents, is alleged to impinge against the inner surface of the cylindrical portion of the chimney between the deflector and the chimney rest, and keep that part of the chimney cool, so that it may readily be seized between the thumb and finger, when it is desired to remove it.

The claim is as follows: "I claim the improved lamp, as not only constructed with its cone or deflector, F, and its chimney rest, D, and chimney, arranged with respect to each other as described, but as having the said deflector provided with peripheral springs, or the same, or the slits, h, h, and the rest, D, made concavo-convex, and provided with an annular groove or lip at the bottom, for supporting the chimney, the whole being substantially as described or represented." The proof shows, that the defendants from the fall of 1867, have been engaged in the manufacture and sale of lamp burners, called the "Comet Burners," which were not claimed on the trial to differ in any material particular from the patented invention, the principal apparent difference being in the substitution of a spiral elastic wire wound into the edges of the deflector, to press against the interior of the chimney and maintain its upright position, instead of the slit edge of the deflector itself, formed into springs, performing the same office. This however, was not claimed to be a substantial difference, but was treated by both parties, for the purposes of the case, as (which, I think, it unquestionably is) an equivalent device, operating in the same manner and producing the same effect. But, although it is proved that the defendants used their burners, so manufactured, in their store, with chimneys placed thereon, to exhibit their burners to customers, in order to make sales, and to demonstrate their superiority over other burners, there is no proof that the defendants ever manufactured or sold a chimney; and, hence, they insist, that, having made and sold only some of the parts included in the patented combination, they are not liable in this suit. It is quite obvious, that the distinguishing feature of the invention of Collins is the burner, with its chimney rest, a deflector having peripheral springs, to sustain the chimney without the aid of a catch or screw, and with air passages operating, when in use, to keep the lower part of the chimney cool, and, obviously, tending, by this means, and by the greater elevation of the flame, to prevent the lower portion of the burner, and top of the reservoir, from becoming unduly heated. It is, also, clear, and was proved, that the burner alone, or the burner attached to the reservoir, is utterly useless. A chimney must be applied, in order to its operation. So, also, a chimney without a burner is wholly useless.

It was claimed, in behalf of the complainants, that the chimney is no material part of the invention, as patented, and, therefore, that the defendants have made and sold all that is material in the patent. I incline, however, strongly to the opinion, that the patentee, in his specification and claim, instead of claiming the burner as new, and securing the exclusive right in respect to that, has claimed it in combination with a chimney, and must stand by his patent under that construction. In that view of the construction of the patent, the case stands thus: The complainants having a patent for an improved burner in combination with a chimney, the defendants have manufactured and sold extensively the burner, leaving the purchasers to supply the

chimney, without which such burner is useless. They have done this for the express purpose of assisting, and making profit by assisting, in a gross infringement of the complainants' patent. They have exhibited their burner furnished with a chimney, using it in their sales room, to recommend it to customers, and prove its superiority, and, therefore, as a means of inducing the unlawful use of the complainants' invention. And now it is urged, that, having made and sold burners only, they are not infringers, even though they have distributed them throughout the country in competition with the complainants', and have, to their utmost ability, occupied the market, with the certain knowledge that such burners are to be used, as they can only be used, by the addition of a chimney. Manifestly, there is no merit in this defence, and it must be regretted if the law be not such as will protect the complainants against this palpable interference. If the complainants were to succeed in finding those who manufactured chimneys for the express purpose of selling them to be used on these burners, the latter could clearly urge the same, if not a better, defence, to a prosecution; and so the complainants would be driven to the task of searching out the individual purchasers for use who actually place the chimney on the burner and use it—a consequence which, considering the small value of each separate lamp, and the trouble and expense of prosecution, would make the complainants helpless and remediless.

The rule of law invoked by the defendants is this—that, where a patent is for a combination merely, it is not infringed by one who uses one or more of the parts, but not all, to produce the same results, either by themselves, or by the aid of other devices. This rule is well settled, and is not questioned on this trial. The rule is fully stated by Chief Justice Taney, in Prouty v. Ruggles, 16 Pet. [41 U. S.] 336, 341, and in other cases cited by the counsel. Byam v. Farr [Case No. 2,264]; Foster v. Moore [Id. 4,978]; Vance v. Campbell, 1 Black [66 U. S.] 427; Eames v. Godfrey, 1 Wall. [68 U. S.] 78, 79. But I am not satisfied that this rule will protect these defendants. If, in actual concert with a third party, with a view to the actual production of the patented improvement in lamps, and the sale and use thereof, they consented to manufacture the burner, and such other party to make the chimney, and, in such concert, they actually make and sell the burner, and he the chimney, each utterly useless without the other, and each intended to be used, and actually sold to be used, with the other, it cannot be doubtful, that they must be deemed to be joint infringers of the complainants' patent. It cannot be, that, where a useful machine is patented as a combination of parts, two or more can engage in its construction and sale, and protect themselves by showing, that, though united in an effort to produce the same machine, and sell it, and bring it into extensive use, each makes and sells one part only, which is useless without the others, and still another person, in precise conformity with the purpose in view, puts them together for use. If it were so, such patents would, indeed, be of little value. In such case, all are tort-feasors, engaged in a common purpose to infringe the patent, and actually, by their concerted action, producing that result. In a suit brought against such party or parties, a question might be raised, whether all the actors in the wrong should be made parties defendant; but I apprehend, that, even at law, and, certainly when non-joinder was not pleaded, the want of all the parties would be no defence. Each is liable for all the damages. Here, the actual concert with others is a certain inference from the nature of the case, and the distinct efforts of the defendants to bring the burner in question into use, which can only be done by adding the chimney. The defendants have not, perhaps, made an actual pre-arrangement with any particular person to supply the chimney to be added to the burner; but, every sale they make is a proposal to the purchaser to do this, and his purchase is a consent with the defendants that he will do it, or cause it to be done. The defendants are, therefore, active parties to the whole infringement, consenting and acting to that end, manufacturing and selling for that purpose. If the want of joinder of other parties could avail them for any purpose (which is not to be conceded), they must set it up as a defence, and point out the parties who are acting in express or implied concert with them. Nor is it any excuse, that parties desiring to use the burner have all the glass manufacturers in the world from whom to procure the chimneys. The question may be novel, but, in my judgment, upon these proofs, the defendants have no protection in the rule upon which alone they rely as a defence against the charge of infringement. Independent of this question, the proofs show an actual use by the defendants of the entire subject of the patent; but, as the conclusion reached charges them as manufacturers and vendors, it is not material to enquire whether that use is within the scope of the bill of complaint, or would, by itself alone, entitle the complainants to charge them as infringers, in this suit. The complainants must have a decree for an injunction and account, as prayed in the bill of complaint.

WALLACE (JORDAN v.). See Case No. 7,523.

Case No. 17,101.

WALLACE v. LAWRENCE.

[1 Wash. C. C. 503.] [1]

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

SHERIFF'S DEED—RECORDING—EJECTMENT.

The title under a sheriff's deed, although the deed was not recorded until after ejectment brought, is good; because, although such deeds do not convey a title until recorded, yet the title relates back to the time when the deed was made.

[Cited in Farlin v. Sook, 30 Kan. 403, 1 Pac. 124.]

The lessor of the plaintiff claimed under a deed from the sheriff, who sold the land in question to him, as the highest bidder, under a levari facias. The deed was executed before the ejectment was brought, but was recorded some time after.

Mr. Lewis, for defendant, stated, that these deeds were not considered as conveying a title, till they are recorded.

Mr. Binney, for plaintiff.

BY THE COURT. If this doctrine be as stated, still the title is good, by relation to the time when the deed was made.

Verdict for plaintiff.

WALLACE (MASON v.). See Cases Nos. 9,255 and 9,256.

Case No. 17,102.

WALLACE v. MUNFORD et al.

[Betts' Scr. Bk. 515.]

District Court, S. D. New York. April 18, 1855.

SEAMEN'S WAGES—TRANSHIPMENT OF CARGO AND SALE OF VESSEL.

[1. A ship contracted to carry guano from the Chincha Islands to Baltimore for $12 per ton. She proved unseaworthy, and at Pernambuco she was condemned, and sold on the recommendation of surveyors. The cargo was transhipped by order of the shipowner's agents, and carried to Baltimore at $13.88 per ton, that being the lowest rate obtainable. *Held* that, on these facts, the seamen were entitled to wages, as the original freight contracted for was earned by delivery of the cargo at its destination.]

[2. Seamen are entitled to wages when freight is or might be earned on the voyage, and their right thereto is not taken away when freight is not earned through the fault of the shipowner or his agent.]

[This was a libel by John Wallace against B. A. Munford and others to recover wages.]

INGERSOLL, District Judge. On the 21st of August, in the year 1850, the libellant, at the port of San Francisco, in California, shipped on board the ship Palestine, owned by the respondents, for a voyage to Callao; thence to one or more ports in Peru, for a cargo; and thence to a port of discharge in the United States. The wages to be paid the libellant were $75 per month to a port in Peru, and the going rate of wages afterwards. The ship arrived at Callao, in ballast, on the 30th of October in the same year. She afterwards sailed for the Chincha Islands, and there took in a cargo of guano on freight, to be carried to Baltimore. Having taken the cargo on board, she returned to Callao, and on the 31st of December in the same year sailed for Baltimore. Upon the sailing of the ship from Callao to Baltimore, the libellant was employed as second mate, and from that time, while he remained on board the ship, he acted as such. On the voyage it was found that the ship leaked badly, in consequence of which, on the 18th of March, 1851, she put into Pernambuco. On the 19th of March a survey was had of the ship, and it was certified by the surveyors that she was in an unsafe condition to proceed on her voyage, and it was certified by them that the ship be discharged of her cargo as expeditiously as possible. After the ship was discharged of her cargo on the 15th of April, another survey of her was had under the direction of the consul. On that survey it was certified by the surveyors that what was required to put the ship in repair would amount to a sum far beyond her value. They therefore recommended, as the best course to be pursued, that the ship be sold at public auction for the benefit of whom it might concern. In pursuance of that recommendation of the surveyors, the ship, on the 5th of May, was sold at public auction to the highest bidder. On the 15th of May the libellant was discharged by the captain. The guano was, by the agents of the respondents, transhipped in another vessel, and in such other vessel was safely carried from Pernambuco to Baltimore, its port of destination, and there safely delivered. to the consignees. The agreement between the owners of the Palestine and the shippers of the guano was to carry the guano from the Chincha Islands to the port of Baltimore, and there deliver the same for freight and the price, of twelve dollars a ton. The owners of the Palestine paid for the transportation of the guano from Pernambuco to Baltimore in the vessel in which it was transhipped, at and after the rate of $13.88 a ton, which said last mentioned sum was the lowest price for which such transportation could be obtained.

The libellant claims that wages are due him for the services which he rendered on board the ship, and the libel is filed to enforce the payment of such wages. It is insisted on the part of the respondents, that there are no wages due; that no freight has been earned; "that freight is the mother of wages," and when there is no freight earned there are no wages to be paid. It has often been doubted whether the maxim that "freight is the mother of wages" is founded on considerations of equity and sound policy. The par-

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

liament of Great Britain, considering that there was neither equity nor sound policy in the maxim, have lately, by statute, abolished it; so that now, on board of British ships, the more sound rule, that "the laborer is worthy of his hire," is adopted in its place. Congress has not as yet legislated on this subject, and the maxim which has been repudiated by the parliament of Great Britain, is still recognized in our courts as a rule of law. But this general rule is subject to several important exceptions. By the exceptions established, it follows that although this maxim is admitted by our courts as a general rule of law; yet in its application to particular cases, it is by no means true, that in all cases where there is no freight earned there can be no wages paid. When the ship is unseaworthy at the time of her sailing, and in consequence thereof the ship and cargo are lost, by which loss no freight is earned, yet, notwithstanding this, the seamen are entitled to their wages. In such a case freight is not "the mother of wages." As a general rule, to earn freight the cargo must be delivered at its port of destination. But where there has been a condemnation of the ship and cargo for an illegal trading, in which the mariners are not implicated, and in consequence of which the cargo is not delivered according to the contract, and no freight is due, there is no forfeiture of wages. They are payable. The Malta, 2 Hagg. Adm. 158. The true doctrine on this subject is, that seamen are entitled to wages for the full period of their employment in the ship's service for any particular voyage in which freight is or might be earned by the owners; and if, by the fault of the ship owner or his agent, freight is not earned, the seamen are entitled to their wages, the same as if it had been earned. Pitman v. Hooper [Case No. 11,186]. But in this case it is not necessary to determine under what circumstances the seamen are entitled to their wages when there is no freight earned; for, upon the facts as they have been exhibited on the trial, I am of the opinion that freight has been earned, and consequently that the libellant is entitled to his full wages.

The respondents, in the month of December, in the year 1850, received at the Chincha Islands, from certain shippers, a quantity of guano to be transported to Baltimore, and there safely delivered. They agreed so to transport it and deliver it, and for such transportation and delivery the shippers agreed to pay them freight at the rate of $12 a ton. At the Chincha Islands the respondents received the guano on board the ship Palestine, owned by them. In that ship they transported it a part of the way to its port of destination and delivery, as far as Pernambuco. The ship put into the latter port in consequence of a leak, and for the purpose of repairs. When she arrived at Pernambuco no freight had been earned. No freight could be earned until the guano had, according to the contract entered into between the respondents and the shippers, been safely transported to Baltimore. The obligation of that contract rested upon them. Nothing had happened to excuse them from its performance; and if it was not performed it was through their fault, and the libellant is not to be prejudiced in his claim, by any fault of the respondents. Upon a survey of the ship at Pernambuco, it was found that she needed extensive repairs to enable her to prosecute the voyage, and to enable the respondents, by means of that ship, to perform the contract which they had entered into. The duty to transport and deliver still remained, and the payment of freight depended upon the performance of that duty. To enable the respondents to perform that duty, there were several courses which the captain had a right to pursue. He had a right, if he had funds belonging to the respondents, to expend them in the necessary repairs of the ship; and, if he had no such funds, he had a right, for that purpose, to borrow money upon the personal responsibility of the respondents. If that could not be done, he had a right to raise the amount necessary upon a bottomry bond; and he had a right, in case of necessity, to add thereto a respondencia obligation, binding the cargo. He had also the further right to tranship the cargo in another vessel. One of these courses it was his duty to adopt, to enable the respondents to execute their contract to transport to and deliver at Baltimore, and thereby to enable them to demand freight.

The surveyors, believing that the expense of repairing the ship and putting her in proper order would exceed the value of the ship, recommended that she be not repaired, but that she be sold for the benefit of whom it might concern. She was accordingly sold, and the respondents employed another vessel to transport the guano at the rate of over $13 a ton. It was for the benefit of the respondents that that course was adopted. In such other vessel, so procured by the respondents, the guano was safely transported to Baltimore, and there safely delivered. By such transportation and delivery the respondents were at Baltimore entitled to receive the freight money, which was to be paid to them by virtue of the contract entered into by them at the Chincha Islands. Freight therefore was carried by the services of the seamen on board the Palestine. Without their services at the pumps during the time the ship was leaking badly, and the other services which they performed on the voyage from Callao to Pernambuco, the ship and cargo would have been lost. The respondents would have lost their ship, and they would also have lost their right to demand freight. By such efforts the ship was carried in safety to Pernambuco, and the respondents have saved their freight. The wages of the seamen should therefore be paid; and the libellant, being one of such seamen, is entitled to receive his wages according to the terms of the contract entered into by him. To deprive seamen of their wages under such

circumstances would be against sound policy and equity; no case has been cited to authorize any such harsh rule.

It is further contended on the part of the respondent, that if there was ever a claim for wages on the part of the libellant, that claim has been satisfied and discharged by the payment to him of a certain sum, which on the 15th day of May, 1854, he received at Pernambuco; that that payment was an accord and satisfaction of any claim which the libellant may have had; and that the writing which he executed was a discharge of the same. The Palestine, in pursuance of the recommendation of the surveyors, was sold at Pernambuco. The libellant received from the counsel a certain portion of the net proceeds of the ship, and executed a writing which shows the object of the payment and the purposes for which it was made, as expressed in the writing. The money received by the libellant from the consul was "in full of my proportion of the net proceeds of the ship Palestine, condemned and sold at Pernambuco for wages due as 2d mate of said vessel." The libellant, for his wages, had a claim against the ship and against the respondents. The money received by him was not in full of all claim of wages against the respondents; it has no such operation. It operated only to discharge his lien against the ship and the proceeds thereof. By discharging his lien on the ship and its proceeds, the libelant did not discharge his claim against the respondents. A lien may be discharged without discharging the claim upon which the lien is founded; and a valid claim against a party is not affected by the discharge of a lien given by law to him for the security of such valid claim. The money therefor received by the libelant from the consul at Pernambuco, and the writing then executed by him, did not discharge any claim which the libellant had against the respondents, and was not an accord and satisfaction of the same. The effect of the writing was only to discharge his lien upon the ship and its proceeds, and the payment made to him was only effective to discharge such lien, and reduce the claim which the libellants had against the respondents.

The decree therefore must be in favor of the libellant; and it is referred to a commissioner to ascertain and report the amount due him; and in fixing the amount, the commissioner will allow wages to the libellant from Aug. 21 to Oct. 30, 1850, at the rate of $75 per month, from the said Oct. 30 to Dec. 31, at the rate of $30 a month, and from the last mentioned date to May 15, 1851, the time when he was discharged by the captain, at the rate of $35 a month. The commissioner will also allow the libellant for the time necessary for his return home after he was so discharged, and for his necessary expenses in returning, two months' additional pay, to wit, $70. An allowance of this character is made by the court even when there can be no allowance for the extra wages, as given by the act of congress upon the voluntary sale of a ship in a foreign port. The Dawn [Case No. 3,666].

From the aggregate of these several sums, the commissioner will deduct the payments which have been made to the libellant, and report the balance in his favor at six per cent.

WALLACE (ROOT v.). See Case No. 12,039.

Case No. 17,103.

WALLACE v. TAYLOR et al.

[1 Cranch, C. C. 393.] [1]

Circuit Court, District of Columbia. April Term, 1807.

EQUITY PLEADING—AMENDMENTS.

A material amendment of a bill, after answer, must be on payment of all costs, including the solicitor's fee.

Chancery attachment. Motion to amend the bill, after answer of Marine Insurance Company denying funds in their hands.

Mr. Taylor, for plaintiff. The amendment is to state specially a loss of F. S. Taylor's vessel or goods, so as to get a specific answer as to the particular circumstances of the insurance and loss. The amendment was granted on payment of all costs, including solicitor's fee, and the cause sent to the rules. The same order in Wilson v. Same and Hartshorne & Taylor v. Same.

WALLACE (VAUGHAN v.). See Case No. 16,902.

WALLACE (WATERMAN v.). See Case No. 17,261.

Case No. 17,104.

WALLAMET FALLS C. & L. CO. v. KITTREDGE.

[10 Chi. Leg. News, 122; 5 Reporter, 425.] [2]

Circuit Court, D. Oregon. Dec. 17, 1877.

DISSOLUTION OF CORPORATION—WINDING UP BUSINESS.

1. Section 19 of the corporation act of Oregon (Laws, p. 538) empowers the majority of the stockholders to authorize the dissolution of the corporation, "and the settling of its business and disposition of its property and dividing of its capital stock, in any manner it may see proper." *Held*, that the authority to the directors to dissolve the corporation, carried with it the incidental power to collect and distribute its assets and wind up its affairs.

2. A vote of the directors declaring the corporation dissolved, only operates to prevent it from engaging in new business, but the corporation continues to exist, notwithstanding the declaration of dissolution, for the purpose of collecting and distributing its assets and winding up its affairs.

[This was an action by the Wallamet Falls Canal & Lock Company against Jonathan Kit-

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

[2] [5 Reporter contains only a partial report.]

tredge to recover damages. Heard on demurrer to defendant's plea. See Case No. 17,105.]

William Strong, for plaintiff.
Charles B. Upton, for defendant.

DEADY, District Judge. The plaintiff alleges that the defendant is indebted to it upon a bond given by himself and others to secure the performance of a contract to build its locks and canal at the Falls of the Wallamet, in 1871. The defendant in his amended answer pleaded in abatement of the action that since the commencement thereof the plaintiff at a meeting of its stockholders duly "authorized the dissolution of said corporation without authorizing or providing for settling its business; the said corporation thereby ceased to exist." Upon demurrer to this defense it was held that a vote of the stockholders did not dissolve the corporation, but that the act of the dissolution must proceed from the directors; and the defendant had leave to amend. See [Case No. 17,105].

The amended plea alleges that the plaintiff by the act of its directors done in pursuance of a majority vote of its stockholders became and was duly dissolved and thereby ceased to exist without said vote "authorizing or providing for settling its business." The plaintiff demurs to the plea because the facts stated do not constitute a defense to the action. Section 19 of the corporation act of this state (Laws, p. 528) provides that any corporation organized under that act, "may at any meeting of the stockholders, * * * by a vote of the majority of the stock of such corporation * * * authorize the dissolution of such corporation and the settlement of its business, and disposing of its property and dividing of its capital stock in any manner it may see proper."

The plea does not conclude that by reason of the facts stated therein this debt became and is extinguished, but upon the argument of the demurrer it was maintained by counsel for the defendant that such was the legal effect of the transaction.

The argument for the plea is that the stockholders may vote to authorize the dissolution of a corporation without at the same time authorizing a settlement of its business, a disposition of its property or division of its capital stock; and, that in such case, if the corporation is dissolved by the directors in pursuance of such authority its debts are extinguished and its property escheats to the state or reverts to the grantors. At common law, upon the death or dissolution of a corporation its real property reverted to the donors, and its personal property escheated to the king, while the debts due to and from it were thereby extinguished and all actions pending for or against it at the time, abated. Ang. & A. Corp. §§ 179, 195.

This doctrine had its origin when corporations were either municipal or ecclesiastical and being dissolved for non-use or abuse of their powers, their real property, which was usually acquired as a donation to public or pious uses, was held to revert, upon the cessation of the use to the donors and their personal property to escheat to the king for want of owners. In these cases there were no stockholders or natural persons who were entitled, equitably or otherwise, to the assets of the deceased corporations, and as in the case of an individual dying without heirs, the personalty went to the king; but to prevent the realty from escheating to the king, it was held to revert to the donor upon the theory that the grant being made to the corporation for a public or pious use was made only for its life: Ang. & A. Corp. § 195. But this rule, so far as the modern business and commercial corporation is concerned, has become practically obsolete. Its unjust operation upon the rights of creditors and stockholders has been generally prevented by statute. And in equity the assets of such a corporation which represent not the donations of the prince or its pious founder, but the contributions of its stockholders are held, independent of statute to constitute a trust fund into whosesoever hands they may come for the benefit of creditors and stockholders: Curran v. Arkansas, 15 How. [56 U. S.] 311; Bacon v. Robertson, 18 How. [59 U. S.] 480; 2 Kent, Comm. 307, n. a; Ang. & A. Corp. § 779a.

Admitting, however, that in the absence of any statute provision to the contrary, the common law rule—that the civil death of a corporation extinguishes all debts due to or from it—still applies to actions at law, yet it being manifest that corporations like the plaintiff are not within the reason of the rule, and that the same has been generally superseded by legislation, the provisions of section 19, supra, ought to be so construed, if possible, as to keep the case out of the rut of what Chancellor Kent (supra) calls the now "obsolete and odious" rule of the common law and accomplish the manifest purpose of the legislature,—that is, to allow a corporation to terminate its existence and collect and distribute its assets in its own name, whenever and in any manner the stockholders may deem best.

Now this plea of the defendants does not allege that the act, resolution or proceeding of the directors dissolving this corporation did not provide for the collection of its assets, including this debt. But if it is assumed that unless the vote of the stockholders expressly authorized such collection as well as the dissolution, the directors could not provide for the former, although they might declare the dissolution. Upon this view of the matter, which seems to be based upon the idea that the dissolution, settlement of business, disposition of property and division of capital provided for in the statute, are distinct and independent subjects, the more reasonable conclusion seems to be that the stockholders cannot authorize a dissolution of the corporation unless they also expressly

authorize the settlement of its business, etc.

But I think the most reasonable and practical construction of the section is that the power to authorize the settlement, disposition and division mentioned is a mere amplification or unfolding of the power to authorize the dissolution, which has been inserted therein out of abundance of caution; and that the stockholders may authorize the directors to dissolve the corporation, and that by a necessary implication such authority gives them power to provide for the winding up of its affairs. The authority to dissolve the corporation implies the power to provide for the necessary consequences of such dissolution—the collection and distribution of its assets among its creditors and stockholders according to their respective rights. But the stockholders may, if they see proper, go farther and prescribe the mode of doing this, subject of course to the legal rights of such creditors and stockholders.

The rights of creditors are to be considered in this matter as well as those of the corporation or stockholders. A corporation may be largely in debt, and its stockholders may be liable to it for a like amount upon their subscriptions to the capital stock. The statute ought not to be construed so as to permit the stockholders to secure the dissolution of the corporation without the settlement of its business, and thereby extinguish this indebtedness, to the manifest wrong and injury of the creditors and their own unjust gain.

It is very doubtful whether a corporation can be dissolved outright under this section —at least, unless the scheme or declaration of dissolution provides completely and effectually for the full and just settlement of its affairs. The object of the section is to enable the stockholders of a corporation to bring its business to a close before the expiration of the time for which it was incorporated, without incurring the penalty or inconvenience of forfeiture for non-user. In the absence of any specific directions to the contrary, the dissolution takes effect at once only so far as to deprive the corporation of the power of engaging in new business; but for the purpose of completing unfinished business and winding up its affairs, it continues to exist as long as may be necessary, or until it expires by lapse of time, or is declared dissolved by the judgment of a competent court.

In conclusion, I think this plea bad: (1) Because it does not appear therefrom but that the directors upon providing for the dissolution of the corporation, also specifically provided for the prosecution of this action and the disposition of any judgment that might be obtained in it; and (2) because, even if it appeared that no special provision was made concerning this claim the corporation continues to exist, notwithstanding the declaration of dissolution for the purpose of collecting and distributing its assets and winding up its affairs. The demurrer is sustained.

Case No. 17,105.

WALLAMET FALLS C. & L. CO. v. KITTRIDGE.

[5 Sawy. 44; 5 Reporter, 104; 10 Chi. Leg. News, 113; 24 Int. Rev. Rec. 142; 1 San Fran. Law J. 259.] [1]

Circuit Court, D. Oregon. Dec. 10 and 17, 1877.

DISSOLUTION OF CORPORATION — SUSPENSION OF BUSINESS—DISSOLUTION—WINDING UP.

1. The corporation act of Oregon, § 16 (Laws Or. p. 528), declares that if any corporation shall neglect and cease to carry on its business for any period of six months, its corporate powers shall cease. *Held*, that such neglect did not terminate the existence of the corporation as by lapse of time, but that it was a cause of forfeiture of the corporate privileges of which no one but the state could complain or take advantage.

[Cited in Re Brooklyn El. R. Co., 125 N. Y. 441, 26 N. E. 475.]

2. The corporation act aforesaid (section 19) provides that a majority of the stockholders may authorize the dissolution of a corporation. *Held*, that a vote of the stockholders, authorizing a dissolution, did not of itself dissolve the corporation, nor compel the directors to do so, and that the act of dissolution must proceed from the directors, who alone can exercise the corporate powers.

[Distinguished in Wells v. Oregon Ry. & Nav. Co., 15 Fed. 565. Cited in Powell v. Oregonian Ry. Co., 38 Fed. 189.]

[Cited in Strong v. McCagg, 55 Wis. 629, 13 N. W. 898.]

3. Section 19 of the corporation act of Oregon (Laws Or. p. 538) empowers the majority of the stockholders to authorize the dissolution of the corporation "and the settling of its business and disposition of its property and dividing of its capital stock in any manner it may see proper." *Held*: (1) That the authority to the directors to dissolve the corporation carried with it the incidental power to collect and distribute its assets and wind up its affairs; and (2) that a vote of the directors declaring the corporation dissolved only operates to prevent it from engaging in new business, but the corporation continues to exist, notwithstanding the declaration of dissolution, for the purpose of collecting and distributing its assets and winding up its affairs.

Action [by the Wallamet Falls Canal & Lock Company against Jonathan Kittridge] upon a bond to secure the performance of a contract.

William Strong, for plaintiff.

Charles B. Upton, for defendant.

DEADY, District Judge. The plaintiff is a corporation formed under the laws of Oregon, to construct a canal and locks at the Wallamet Falls, near Oregon City. The defendant is a citizen of California and a party with F. L. A. Pioche, John Morris, E. N. Robinson, and A. H. Jordan, to a bond given on March

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 5 Reporter, 104, and 24 Int. Rev. Rec. 142, contain only partial reports.]

20, 1871, conditioned for the performance of a contract of the same date, between the plaintiff and said Morris, Robinson and Jordan, for the construction of said work by the latter. The contractors having failed, as it is alleged, to complete the canal and locks according to the contract, this action was brought on September 7, 1874, against the defendant to recover the penalty of said bond, —thirty thousand dollars. Among other defenses, the amended answer, filed May 17, 1876, contains the following: 1. That since the commencement of this action, the plaintiff, at a meeting of its stockholders, called for that purpose, "authorized dissolution of said corporation without authorizing or providing for settling its business, and said corporation has thereby ceased to exist." 2. That on May 1, 1876, the plaintiff ceased to carry on the business for which it was formed, and has not since transacted or carried on any of such business, and has ceased to exist.

The plaintiff demurs to these pleas as not constituting a defense to the action. The first of them is founded upon section 19 of the corporation act (Laws Or. p. 528), which provides that a corporation, at a meeting of its stockholders, called for such purpose, may, by a vote of the majority of its stock, among other things, authorize the dissolution of such corporation and the settling of its business and the disposing of its property and dividing its capital stock in any manner it may see proper. The second plea is founded on section 16 of said act (Laws Or., supra), which provides that if any corporation organized thereunder, "shall for any period of six months after the commencement of its business, neglect and cease to carry on the same, its corporate powers shall also cease."

It is admitted by counsel for the defendant that a forfeiture of the plaintiff's corporate powers cannot be set up to defeat this action. But it is claimed that the non-existence of a corporation may always be pleaded to an action professed to be brought by it; as that it was never duly created or had ceased to exist by lapse of time; and that under the provision cited from section 16, supra, whenever a corporation neglects to use its powers for any one period of six months it ceases to exist, the same as if its corporate life had then expired by lapse of time. But in my judgment the language—"its corporate powers shall cease," is the substantial equivalent of the phrase "its corporate powers shall be forfeited." In either case the statute does not execute itself. An inquiry must be made to ascertain whether the corporation has kept the conditions subsequent upon which its creation was authorized and permitted. If there has been a failure to keep any such condition no one can allege it or take advantage of it but the state which created or authorized the corporation. In this respect a corporation is like an estate in fee. If a condition subsequent is annexed to such an estate, no one but the grantor or his successors can take advantage of its non-performance. Schulenberg v. Harriman, 21 Wall. [88 U. S.] 63. Upon the question of whether the words—"its corporate powers shall cease," import a forfeiture of the corporate existence rather than an actual termination of the same, as by lapse of time, the case of Frost's Lessee v. Frostburg Coal Co., 24 How. [65 U. S.] 283, is in point. There the law provided that in case four fifths of the capital stock of a corporation became concentrated in the hands of less than five persons "the corporate powers and privileges shall cease and determine," and it appearing that the stock of the corporation defendant was so owned, the court held that it was a cause of forfeiture of which a private party could not take advantage; saying, "That is a question for the sovereign power, which may waive it or enforce it at its pleasure." In Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. 1, it was held that a violation of a provision in a charter of a corporation, to the effect that on a breach of a certain condition such corporation should not be entitled to any privilege under the act of incorporation, and that all its interest thereunder should be forfeited and cease, did not ipso facto work a dissolution of the corporation. See, also, to the same effect, People v. President, etc., of Manhattan Co., 9 Wend. 382; Bradt v. Benedict [17 N. Y.] 93; Mickles v. Rochester City Bank, 11 Paige, 118. That this provision in section 16, supra, concerning the non-user of corporate powers, is a condition subsequent and not a limitation upon the existence of the corporation, is further shown by the Code of Civil Procedure, which provides (section 353, subd. 3) that an action may be maintained in the name of the state "for the purpose of avoiding the charter or annulling the existence of such corporation, * * * whenever it has forfeited its privileges or franchises, by failure to exercise its powers." Here, the state has provided a direct judicial proceeding to annul the existence of a corporation which has failed to exercise its powers for such a period and under such circumstances as causes a forfeiture of its privileges —the very case described in section 16, supra. Indeed, this declaration of the statute is simply intended to define and make certain what kind and duration of neglect or non-user of the corporate powers shall be a sufficient cause of their forfeiture. Without the statute the question in each case was involved in the uncertainty of determining whether, under all the circumstances, the neglect was willful and material. Ang. & A. Corp. p. 776. But now the statute furnishes a certain and prescribed rule. A neglect to exercise the powers of the corporation for six months works a forfeiture without reference to the cause or consequence of such neglect. But this action can only be brought in the name of the state and upon leave granted by the judge of the court. Neither the forfeiture nor the fact of non-user can be set up by a private person for any purpose. It must first be judicially

ascertained and declared on the complaint of the state. Ang. & A. Corp. § 777. The demurrer to this defense is sustained.

The first of these defenses is also bad. A majority of the stock at a stockholders' meeting may authorize the dissolution of the corporation; but I do not think they can or thereby do dissolve it or compel the directors to do so. The power of dissolution, like the other powers of the corporation, are vested in the directors and exercised by them. Laws Or. p. 526, § 9. True, the exercise of this power by the directors must first be authorized by the stockholders, but a dissolution does not result from such authorization, or necessarily follow it. It may be made with a view of meeting future contingencies, and in any event it must depend upon the subsequent action of the directors, who may, for any reason sufficient to themselves, decline or forbear to use the authority conferred upon them by the stockholders. If B. authorizes A. to execute a deed it is not thereby executed. The authority and the execution of it are distinct. Both the vote of the stockholders and the action of the directors are necessary to produce a dissolution of the corporation; but the immediate act of dissolution must proceed from the directors. The inconvenience, if any, of a disagreement between the stockholders and directors upon the necessity or expediency of a dissolution, can be remedied at the annual election of directors, when the majority of the stockholders may choose a board who will conform to their wishes in the matter.

December 17, 1877. The defendant having amended his said first plea, upon a demurrer thereto the same was held insufficient.

DEADY, District Judge. The amended plea alleges that the plaintiff, by the act of its directors done in pursuance of a majority vote of its stockholders, became and was duly dissolved and thereby ceased to exist without said vote "authorizing or providing for settling its business." The plea does not conclude that by reason of the facts stated therein this debt became and is extinguished, but upon the argument of the demurrer it was maintained by counsel for the defendant that such was the legal effect of the transaction. The argument for the plea is, that the stockholders may vote to authorize the dissolution of a corporation without at the same time authorizing a settlement of its business, a disposition of its property or division of its capital stock; and, that in such case, if the corporation is dissolved by the directors in pursuance of such authority, its debts are extinguished and its property escheats to the state or reverts to the grantors. At common law, upon the death or dissolution of a corporation its real property reverted to the donors and its personal property escheated to the king, while the debts due to and from it were thereby extinguished and all actions pending for or against it at the time, abated. Ang. & A. Corp. §§ 179, 195. This doctrine had its origin when corporations were either municipal or ecclesiastical, and being dissolved for non-use or abuse of their powers, their real property, which was usually acquired as a donation to public or pious uses, was held to revert, upon the cessation of the use, to the donors and their personal property to escheat to the king for want of owners. In these cases there were no stockholders or natural persons who were entitled, equitably or otherwise, to the assets of the deceased corporations, and, as in the case of an individual dying without heirs, the personalty went to the king; but to prevent the realty from escheating to the king, it was held to revert to the donor upon the theory that the grant being made to the corporation for a public or private use, was made only for its life. Ang. & A. Corp. § 195. But this rule so far as the modern business and commercial corporation is concerned, has become practically obsolete. Its unjust operation upon the rights of creditors and stockholders has been generally prevented by statute. And in equity the assets of such a corporation which represent not the donations of the prince or its pious founder, but the contributions of its stockholders are held, independent of statute, to constitute a trust fund into whosesoever hands they may come for the benefit of creditors and stockholders. Curran v. Arkansas, 15 How. [56 U. S.] 311; Bacon v. Robertson, 18 How. [59 U. S.] 480; 2 Kent, Comm. 307a; Ang. & A. Corp. § 779a.

Admitting, however, that in the absence of any statute provision to the contrary, the common law rule, that the civil death of a corporation extinguishes all debts due to or from it, still applies to actions at law, yet it being manifest that corporations like the plaintiff are not within the reason of the rule and that the same has been generally superseded by legislation, the provisions of section 19, supra, ought to be so construed, if possible, as to keep the case out of the rut of what Chancellor Kent, calls the now "obsolete and odious" rule of the common law and accomplish the manifest purpose of the legislature, that is, to allow a corporation to terminate its existence and collect and distribute its assets in its own name, whenever and in any manner the stockholders may deem best. Now this plea of the defendants does not allege that the act, resolution or proceeding of the directors dissolving this corporation did not provide for the collection of its assets, including this debt. But it is assumed that unless the vote of the stockholders expressly authorized such collection as well as the dissolution, the directors could not provide for the former, although they might declare the dissolution. Upon this view of the matter, which seems to be based upon the idea that the dissolution, settlement of business, disposition of property and division of capital provided for in the statute, are distinct and independent subjects the more

reasonable conclusion seems to be that the stockholders cannot authorize a dissolution of the corporation unless they also expressly authorize the settlement of its business, etc. But I think the most reasonable and practical construction of the section is, that the power to authorize the settlement, disposition and division mentioned is a mere amplification or unfolding of the power to authorize the dissolution, which has been inserted therein out of abundance of caution, and that the stockholders may authorize the directors to dissolve the corporation, and that by a necessary implication such authority gives them power to provide for the winding up of its affairs. The authority to dissolve the corporation implies the power to provide for the necessary consequences of such dissolution, the collection and distribution of its assets among its creditors and stockholders according to their respective rights. But the stockholders may, if they see proper, go farther and prescribe the mode of doing this, subject of course to the legal rights of such creditors and stockholders. The rights of creditors are to be considered in this matter as well as those of the corporation or stockholders. A corporation may be largely in debt, and its stockholders may be liable to it for a like amount upon their subscriptions to the capital stock. The statute ought not to be construed so as to permit the stockholders to secure the dissolution of the corporation without the settlement of its business, and thereby extinguish this indebtedness, to the manifest wrong and injury of the creditors and their own unjust gain.

It is very doubtful whether a corporation can be dissolved outright under this section, at least unless the scheme or declaration of dissolution provides completely and effectually for the full and just settlement of its affairs. The object of the section is to enable the stockholders of a corporation to bring its business to a close before the expiration of the time for which it was incorporated, without incurring the penalty or inconvenience of forfeiture for non-user. In the absence of any specific directions to the contrary, the dissolution takes effect at once only so far as to deprive the corporation of the power of engaging in new business; but for the purpose of completing unfinished business and winding up its affairs, it continues to exist as long as may be necessary, or until it expires by lapse of time, or is declared dissolved by the judgment of a competent court.

In conclusion, I think this plea bad: (1) Because it does not appear therefrom but that the directors upon providing for the dissolution of the corporation, also specifically provided for the prosecution of this action, and the disposition of any judgment that might be obtained in it; and (2) because, even if it appeared that no special provision was made concerning this claim, the corporation continues to exist, notwithstanding the declaration of dissolution for the purpose of collecting and distributing its assets and winding up its affairs. The demurrer is sustained.

[Subsequently the plaintiff demurred to an amended plea, which demurrer was sustained. See Case No. 17,104.]

Case No. 17,106.

WALLAMET R. T. CO. v. OREGON S. N. CO.

[9 Chi. Leg. News, 73.]

District Court, D. Oregon. 1876.

COLLISION IN FOG—SPEED—SIGNALS—DAMAGES—RULES—EFFECT OF PARDON ON WITNESS.

1. The damages caused by a collision when both boats are in fault must be divided between them.

2. A boat should be run in a fog at moderate speed, and with caution.

3. A boat which has missed its landing in a fog, and is turning around to return to it in the fair way of other boats navigating the river, ought to blow three whistles, as provided in rule 10 of pilot rules.

4. What is a fog signal?

5. A pardon does not restore the credit of a person convicted of an infamous crime, and therefore such a person is not a witness entitled to full credit.

In admiralty.

William H. Effinger and Richard Williams, for libellant.

Wm. Strong and Frederick Strong, for respondent.

DEADY, District Judge. During the autumn of 1874, the libellant and the respondent were engaged in running competitive lines of steamboats on the waters of the Wallamet and Columbia rivers, between Portland and Astoria. On the morning of October 29, 1874, the Josie McNear, belonging to the respondent, and the Wallamet Chief, belonging to the libellant, started from Portland for Astoria. The Chief is a light-built, stern-wheel boat, about 150 feet in length, while the McNear is a heavy, disconnected, double engine, side-wheel boat, about 109 feet in length, with a solid bow and very strongly built. The usual time of starting from Portland was 6 a. m., but on this occasion the McNear started about ten minutes, and the Chief about 35 minutes behind time. The latter was delayed on account of not reaching her wharf the night before, on her trip from Astoria, until 12 o'clock. The cause of the delay of the McNear was trifling and immaterial. The wharfs from which the boats started were some distance apart, that of the Chief being farthest up the river. In going to Astoria, she would pass immediately in front of the McNear's wharf. The morning was foggy, so that at times it was necessary to run with a compass; but most of the time the banks of the river could be sufficiently distinguished to make the use of the compass unnecessary. As a rule, the fog was thicker immediately upon the sur-

face of the water than above it until the time of the collision, when it began to rise. Both vessels were in the habit of calling at St. John, a place on the right bank of the Wallamet, about five or six miles below Portland. On this occasion the McNear had a passenger for St. John, and reached the place a few minutes after 7 o'clock, but passed the wharf without being aware of it. The sight of the barrel factory above the wharf apprised the master of his mistake, when he stopped his engines, and let his boat run out her way, and then blew a blast upon his whistle to signify his intention to land, and turned up stream, backing upon one wheel, and going ahead upon the other. As the McNear headed up stream, she was about 100 feet from the St. John shore, and about 200 yards below the St. John wharf.

The Chief followed the McNear down the river without seeing or hearing her, until about a mile above St. John, when her master heard the landing whistle of the latter, and very naturally supposed that the McNear was about to land at Springville, a place on the left bank of the river, and about ¼ of a mile below St. John. The Chief had neither freight nor passengers to discharge at St. John, but as usual bore in for the wharf as she passed, so that she might land readily and take on whatever might be there for her, if anything. On this morning, she came to the wharf at a speed of 6 or 7 miles an hour, and about 150 feet out in the stream. There was nothing on the wharf for her, and she did not attempt to land. Just here, the master of the Chief "sighted" the McNear about 200 yards ahead, but made the mistake of supposing that she was going from him. With that, he gave one blast of his whistle to signify his intention to pass to the right, and started ahead under full steam—about 12 or 14 miles an hour. When within about 200 feet of the McNear the master of the Chief discovered his mistake, and observed that the former was meeting him instead of going from him. He immediately gave the signal to reverse the engine and commenced backing.

The master of the McNear heard the whistle of the Chief to pass to the right, but made no reply to it, and testifies that he took it for a fog whistle. After turning up stream the McNear continued in motion and headed for the wharf. In this position, assuming that she was going down stream, as the master of the Chief supposed, she would appear to be going away from the bank and widening the space between herself and the east shore, over which the Chief intended to pass. When the boats were within about fifty feet of one another, the McNear blew two whistles to signify her intention to pass to the right, to which the Chief made no response. At the same time she commenced backing. But it was then too late to prevent the collision, and the only thing to be done by either party was to lessen the force of it by backing the engines. Both boats were still moving forward when they came in contact. The bow of the McNear struck the port bow of the Chief about six feet back of the stem, and cut her down to the water line for a distance of about twenty feet. At the time both boats were pointing towards the east shore, the McNear more so than the Chief. The force of the blow turned the bow of the McNear down stream, so that she was almost at right angles with the bank. She immediately backed off into the stream and then proceeded to the wharf, where it was found she was not materially injured. The Chief's bow was also turned toward the shore by the blow. She was immediately run on to the bank, but her master thinking that her bulkheads would keep her afloat, started back for Portland. But a short distance above St. John it was found she was sinking, and she was beached. Afterwards she was raised, taken to Portland and repaired.

Upon this state of facts I think both vessels are to blame, and the result of the collision must be borne between them. The remote cause of the trouble doubtless lay in the fact that the boats belonged to rival lines, and were then running in opposition to one another.

When the master of the Chief "sighted" the McNear there was considerable fog on the river, so much so that he mistook her stern for her bow at a distance of 200 yards —not a very great mistake probably—but enough to show that there was a necessity for careful and slow running on account of the fog. The master of the Chief was entitled to pass on the right, whether the McNear was going up or down stream, and therefore he gave the proper signal—one blast of his whistle. See Rev. St. § 4233, Rule 18; and rules 1 and 11 of pilot rules of Jan. 1, 1872. But I do not think he was justified under the circumstances in attempting to pass her at the rate of speed he did. He was in a fog and should have proceeded at a moderate rate of speed, as provided by rule 21 of section 4233 supra—at least until he was near enough the McNear to be certain of her movements and direction. It seems to me that he was also lacking in diligence and attention when he ran 400 feet after he started to pass the McNear, and to within 200 feet of her before he discovered his mistake in supposing that she was going away from him, when the fact was she was approaching him with her bow inclined to the shore and across the line of his direction.

It is probable that he was so elated with the idea of overtaking and passing a rival who had left him behind that morning, under the impression that by reason of the Astoria accident, he would be unable to make this trip, that he forgot or disregarded the fact that he was running in a fog in the proximity of another boat, and that his first duty was to navigate the Chief safely and avoid the chances of a collision with the McNear. If the McNear had been going down stream and moving out from the bank,

as he supposed, the Chief might have passed her with safety. But in this supposition, however plausible, the master of the Chief was in error. Had there been no fog, and had he kept a diligent lookout, he could not have made the mistake of supposing that the McNear was going from him when she was approaching him, with no object between them, until she came within 200 feet of him. But because the utmost diligence will not prevent mistakes, as to the character, distance and motion of objects in a fog, the law very properly requires that a vessel under such circumstances shall be run at a moderate rate of speed and with caution. When the master of the Chief, having "sighted" the McNear 200 yards below him on the right side of the river, crowded on all steam and undertook to pass her without having a reply to his signal, and did not observe until he came within 200 feet of her, that the McNear, instead of going away from him was meeting him, "head and head," he was guilty of misconduct and negligence that directly contributed to this collision.

The conduct of the master of the McNear was also seriously a fault. He was aware of the delay of the Chief in reaching her wharf night before, and he had every reason to know, that if she was on the route that morning at all, she was somewhere behind him. In his testimony he undertakes to give impression he had upon the subject in the following contradictory statement. Speaking of the single whistle of the Chief which she gave when her master "sighted" the McNear, he says: "It was the first intimation I had that the Chief was coming our way behind me. I knew that she was disabled the night before—that is, I knew she got up late, and had paid but little attention to her supposing she was ahead of me, as we were a little late."

He also knew that there was no boat belonging to any regular line on that river, that would be expected to be found ascending it at that place, anywhere near that time of day, and that therefore his landing whistle as he was descending the river below St. John would naturally give the impression to boats behind him that he was descending the river and about to land at Springville. Having missed his landing at St. John, as he might under the circumstances without serious fault, and gone some distance below and whistled to land, when he commenced turning up stream, in the fair way of descending steamers, there being at the time a fog on the river, which he testifies prevented him from seeing the Chief at a greater distance than 250 feet, he should have signified his condition by three distinct blasts of his whistle, as provided in rule 10 of the pilot rules aforesaid. But, at all events, when he heard the single whistle of the Chief to pass to the right, he should have answered it, and put his wheel to port, and then the boats might have passed without collision.

But the respondent maintains that the master of the McNear did answer the Chief's signal to pass to the right, and such is his testimony. He also swears that at the same time he stopped both engines and gave the signal to pass to the left—two whistles—and that the Chief answered with two whistles. The master of the Chief swears that the McNear did not answer his signal to pass to the right, and that he did not answer hers to pass to the left, as the collision was then unavoidable. Upon this point the decided weight of the evidence in the case is in favor of the statement of the master of the Chief. Besides, if this point rested upon the evidence of the two masters alone, it would have to be decided according to that of the master of the Chief. It being proven that the master of the McNear has been convicted of an infamous crime, he is not a witness entitled to full credit. It is admitted that the fact of his conviction affects his credibility, but it is claimed that his subsequent pardon by the president—February 27, 1869—restores it. No authority has been cited for this novel proposition; and it is wholly contrary to the nature and reason of the matter. If the pardon established his innocence with the same degree of certainty that the conviction did his guilt, then it would follow that his credibility was thereby restored. But nothing short of this can give it such effect. But as a matter of fact, a pardon by the president is no proof of the innocence of the party receiving it, although it may have been granted upon the belief or impression that the party was not or might not be guilty. It is, or certainly was at the date of this pardon, an ex parte proceeding, taken upon the ex parte statements, representations and solicitations of sympathizing friends and interested and uninformed parties, and cannot be said to prove anything except its own existence and the fact that the party was entitled to have, or had the influence requisite to procure the application of the executive clemency to his case. A pardon does not profess to be a reversal of the judgment of conviction, but only a relief from the punishment imposed by it. In every other respect the judgment stands as if no pardon had been granted. These remarks are made, of course, with reference to pardons in general; but there is nothing upon the face of this one, or in the circumstances of the case, calculated to take it out of the general rule.

The master of the McNear also swears that he took the signal of the Chief to pass to the right for a "fog whistle," and in support of this conclusion he testifies that a fog signal is a "short blast" of the steam whistle. But this is a manifest error, and betrays a want of knowledge upon the subject, which may have materially contributed to this collision. The signal to pass to the right, whether boats are meeting "head to head" or running in the same direction, is "a short, distinct blast" (see rules 1 and 11 of the pilot rules aforesaid); while a fog signal is made by sound-

ing the whistle at intervals of not more than a minute (see rule 15 of section 4233 aforesaid). Now, to sound a whistle is something the opposite of and different from "a short, distinct blast" of it, and necessarily in this connection implies duration—a drawing out—like blowing a horn.

Upon the evidence it satisfactorily appears that the master of the McNear was guilty of misconduct in not sounding three whistles when he stopped in the stream below St. John and turned completely around—in not answering the signal of the Chief to pass to the right, and at once putting his wheel to port, or in misunderstanding such signal, if he took it for a fog signal and therefore did not answer it, and that he thereby directly contributed to produce this collision.

The damages in this case, except the claim for general depreciation, are not seriously contested. The cost of repairs was $925. The net earnings of the boat appear to have been $500 per month, and the pay roll of her crew for the same time $1,000. For demurrage the claim is for one-third of a month, for loss of net profits $166, and for expenses of crew $333. But I think the testimony warrants the inference that the steward and his help and the purser were not retained during the detention, or were elsewhere employed, and for this item only $200 is allowed; making the aggregate for repairs and demurrage the sum of $1,291. For general depreciation the claim is $6,000. I think there can be no doubt upon the evidence but that some damage ought to be allowed under this head, although it is difficult to fix any precise sum. In my judgment it ought not to be less than $3,000, and I allow that sum. See Wallamet R. T. Co. v. Oregon S. N. Co., No. 382 [unreported]. This added to the foregoing sum, makes $4,291, the one-half of which—$2,145—with interest for one year and eight months—$286—the libellant is entitled to recover off the respondent. These estimates being made in coin, and the respondent being entitled to satify the decree herein in U. S. currency, a decree will be entered for the libellant for the foregoing sum—$2,431—with ten per centum thereon, making $2,674 in all, without cost.

WALLAR v. STEWART. See Case No. 17,109.

Case No. 17,107.

WALLER v. ADAMS.

[1 Hayw. & H. 218.] [1]

Circuit Court, District of Columbia. May 2, 1845.

DEBT ON BOND—PARTIES—ASSIGNMENT.

1. In an action of debt on a bond, the suit must be brought in the name of the assignor or obligee, and it is immaterial to the obligor who the party is that is interested, whether the assignee on record or any other person.

2. The obligee in the bond, in whose name the suit must be brought is merely a trustee or stakeholder for the person entitled.

3. Neither the title to the penalty mentioned in the bond, nor the conflicting claims of the assignee, Webb, and Williams can be tried in this suit.

Action of debt on a prison bounds bond [brought by Abraham B. Waller, to the use of John F. Webb, for the use of Tounley Munroe and Tounley Munroe, Jr., against James Adams].

R. Wallach, for plaintiff.

J. Hellen, for defendant.

This is an action of debt on a prison bounds bond of Carey Seldon, in which James Adams, the defendant, was surety in the penalty of $350. The bond was to "Waller for the use of Webb," and recited a judgment and capias ad satisfaciendum in favor of "Waller for the use of Webb." The defendant put in three pleas: 1st. That the said Carey Seldon did not depart from the prison bounds until released in due form of law, &c. 2d. That John F. Webb, to whom A. B. Waller had assigned the judgment for valuable consideration, bargained and sold, assigned and transferred all his interest in the said judgment to one, William H. Williams, before the ca. sa. was issued upon it, and that notice of the assignment to Williams was given to Seldon. That Webb afterwards and without authority from Williams and in violation of his rights, and for the purpose of defrauding Williams of his interest in the judgment and with intent to prevent, defeat and defraud him from receiving the amount due to him by Seldon on the judgment fraudulently and illegally caused a ca. sa. to be issued thereon, and the said Seldon to be illegally imprisoned thereon, and by fraud and oppression procured, exacted, extorted and obtained the said prison bond while Seldon was illegally imprisoned by color of the said process. 3d. That Webb before the taking of the prison bounds bond had for valuable consideration assigned the judgment to Williams before the issuing of the ca. sa. by virtue, whereof, Williams became the sole owner of the judgment and only creditor of the said Seldon for the amount thereof. That Webb, after the said assignment to Williams, and after he had ceased to be the creditor of Seldon, and without the knowledge or consent of Williams, illegally caused the said ca. sa. to be issued, and therefore caused the said Seldon to be illegally confined in prison and thereby wrongfully and oppressively and in violation of the provisions of the statute (the insolvent law), coerced, extorted, exacted and illegally obtained the said prison bounds bond to be executed by the said Seldon and this defendant, that the said Webb not being a creditor of Seldon at the time of the issuing of the ca. sa. and at the date of the prison bounds bond as required by the said statute

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

and that all the said proceedings having been illegally executed and carried on by the said Webb as aforesaid, without any authority or direction of the said Williams who was the only creditor of the said Seldon. That the said bond, therefore, is null and void and wholly inoperative and was not authorized by the said statutes to be required and taken by the said marshal. To the first plea there was a general replication and issue. To the second and third pleas there was a general demurrer. The defendant filed a joinder in the demurrer. The case was submitted to the court on the following briefs and notes of counsel:

The plaintiff submitted the following:

The pleas allege that the assignee of record (John F. Webb) having previously sold his interest in the debt to one, Williams, had no right to issue a ca. sa., and, therefore, the prison bounds bond was a fraud upon the defendant and void. Both the ca. sa. and bond recite assignment from Waller to Webb, and the pleas set up a new issue between assignee of plaintiff on the record, and a third party not of record, trying title to the chose in action. The action being debt on bond must be brought in the name of the assignor and it is immaterial to the defendant whether the assignee on record or any other person be beneficially interested. See Raymond v. Johnson, 11 Johns. 488, and 10 Johns. 397. It is sufficient for defendant that the suit is brought in the name of the original obligee, and he cannot allege either that the assignee on record has no beneficial interest or that another party is entitled. The obligee in the bond and in whose name the suit must be brought is merely a trustee or stakeholder for the person entitled and it is immaterial to defendant whether the assignee on record or other person be entitled to the money. The conflicting claims of Webb, assignee on record and Williams, and consequently the title to the chose in action cannot be tried in this suit. The bond is not assignable so as to give assignee a right to sue in his own name. Query.—Whether defendant is not estopped by his deed?

Counsel for the defendant submitted the following:

The defendant has filed two special pleas which allege that the bond was fraudulently and illegally obtained and that the bond is void. The second plea avers that Webb, prior to the opening of the ca. sa. against Seldon, had sold and assigned the judgment to one, William H. Williams, and that Williams notified Seldon of the assignment and that Webb after the sale and assignment of the judgment against the consent of Williams, and without his authority and with the fraudulent intent of defeating the payment of the judgment to Williams issued or caused to be issued a ca. sa. against Seldon, and had him imprisoned in the county jail and that while Seldon was in duress, the prison bounds bond was extorted from Seldon and Adams and that the bond was obtained by fraud and is void. The demurrer admits all the facts set forth in the plea to be true. The facts there show a case of fraud and duress. Can then the defendant avoid himself of the fraud as a defence in this action? The demurrer admits the averments of the plea that the bond was extorted from Seldon and Adams, and that such will bar the action has been decided by the supreme court in the case of U. S. v. Tingy, 5 Pet. [30 U. S.] 129. That illegality or fraud may be pleaded as a defence to an action on a bond will appear from the case of Collins v. Blantern, Law Lib., No. 128, vol. 43, p. 282; Smith's Selections of Leading Cases with English and American notes, where the cases are mostly specified. The only way in which a bond or deed can be avoided is by a plea averring fraud. Bruce v. Lee, 4 Johns. 410; Van Valkenburgh v. Rouk, 12 Johns. 337. "Acts which of themselves (as well judicial as others) are just and lawful, if infected with fraud are in judgment of law void." Roberts, Fraud, 522. A judgment may be void for fraud and the act of 1787, c. 9, § 6, provides for such a case. Suppose then, that a ca. sa. should issue on such a judgment and a prison bounds bond should be taken from the defendant would not the bond be affected by the original fraud? Would not the court in which the process was had to consummate the fraud have a right to set aside such a bond? It certainly has a right to set aside any execution for fraud, and where the body is imprisoned by means of fraud with a ca. sa., the damage is done and the court not being in session to afford relief, the party is in duress and the bond being the fruit of the fraud is inflicted with it and the bond is on that account void. In such a case, the imprisonment would be unlawful. Where an execution has been wrongfully used for an unlawful purpose, all contracts that are extorted by means thereof are null and void, 5 Wheeler, Com. Law, p. 1, as to the duress. In this case the plea avers that it was used for a fraudulent purpose by Webb, and after he ceased to have any interest in the judgment, and this the demurrer admits. An execution is said to be "the formal method prescribed by law, whereby, the party entitled to the benefit of a judgment may obtain that benefit." Bing. Ex'ns, Law Lib. 13 Vol., p. 102. Webb then had sold and assigned this judgment before the ca. sa. was issued, and he was not entitled to the benefit of the judgment and the plea avers that he assigned it to defraud Williams of the judgment. He had no interest in the judgment and had no right to use the process of the court to defraud Williams of the fruits of it. Had Seldon after notice of the sale and assignment paid the judgment to Webb, it would have been a fraud upon Williams, and he would still be liable. Suppose then, that they had contrived that such payment should have been affected by execution against his body or property, it would still be a fraud upon Williams and equally void. Will not the same result fol-

low, when the fraud has been perpetrated by Webb alone by means of a ca. sa.? He had no claim upon Seldon and the very object of the bond was to make Seldon liable to Webb for what he had no interest in. Now it is well settled that when a chose in action has been assigned by the owner he shall not be permitted fraudulently to interpose and defeat the right of the assignee. Mandeville v. Welsh, 5 Wheat. [18 U. S.] 277. Courts will not give effect to a dismissal of a suit affected by fraud or a release. "It would be strange (says Judge Story) if parties could be allowed under its forms to defeat the whole purposes of the law." The demurrer admits the assignment, and if Webb could not release the judgment neither could he use the process of the courts to recover of Seldon the money. The fraud would be equally as great; the bond then was the fruit of his fraudulent purpose and he cannot claim it as valid. The ca. sa. here was issued in fraud and was used for an unlawful purpose and is different from the case where the execution was lawfully issued and the party is lawfully imprisoned. In such a case there is neither fraud nor duress. In the case at bar there is both and the plea charges it, and the demurrer admits the facts as pleaded.

The third plea avers that under the insolvent acts there was no authority to take this bond. By the common law the sheriff had no right to take such a bond and it would have been void. The sheriff had no right by the common law to take even a bail bond, and where the statute authorizes him to take a bail bond he must take it as directed by the act, or it will be void and its illegality may be pleaded by the obligor. Hurlstone on Bonds, 9 Law Lib. 63. The insolvent laws which authorize a prison bounds bond to be taken should be construed with equal strictness. By the act of March 3, 1803 [2 Stat. 237], any debtor actually confined in jail at the suit of a creditor may petition for the benefit of the act. The 15th section, provides, that the creditor or his agent shall give security for the prison fees. The 7th section provides, that any creditor may file allegations against the debtor. The act then requires an actual creditor and the creditor alone to be a party to such proceedings. Was, then, Webb a creditor within the meaning of the law? The facts set forth in this plea show that Webb had been paid by Williams and had assigned to him the judgment, and that Williams notified Seldon of the purchase from Webb. He ceased, then, to be a creditor. Seldon was not Webb's debtor under these circumstances, if Seldon had applied to be released by the benefit of the act, could Webb have pled allegations and stopped his discharge? Could he act as a creditor after he had assigned his interest to Williams? Could he then use the process of the court as a creditor and use a bond which he had obtained by fraud from Seldon when he had no interest in the judgment? The plea avers that Webb assigned the ca. sa. without the authority or consent of Williams, and that it was oppressively exacted and illegally done to defraud Williams and that Webb had no right to imprison Seldon. The imprisonment then is admitted to have been illegal and the bond was extorted from Seldon for his discharge from that illegal imprisonment. The insolvent acts contemplate a case of imprisonment for debt at the suit of a creditor. Here Webb was not a creditor, and he had no right to exact a bond of Seldon. The bond then was oppressively extorted of Seldon under color of right and of the insolvent laws, and is void on that account. It is submitted then that Webb cannot recover on this bond, and that the pleas show a valid defence.

Verdict and judgment for the plaintiff.

WALLER (BIGLER v.). See Case No. 1,404.

Case No. 17,108.

WALLER v. DYER et al.

[5 Cranch, C. C. 571.] [1]

Circuit Court, District of Columbia. Nov. 26, 1839.

MECHANICS' LIENS—TIME OF FILING CLAIM.

No debt for materials furnished for building a house in Washington, Alexandria, or Georgetown, D. C., will under the act of congress of 2d March, 1833 [4 Stat. 659], remain a lien upon the house for more than two years from the commencement of the building, unless an action for the recovery of the debt be instituted, or the claim filed within three months after furnishing the materials, &c.

Bill in equity to compel the execution of a trust. The question submitted to the court, upon a case stated was, whether the complainant, who furnished materials for a dwelling house, built by Nathan Smith, who had conveyed it in trust to Dyer and Blagden, to secure certain debts of Smith, had, on the 29th of October, 1835, any lien upon the building for which the materials were furnished? The case agreed was, that Smith began to build the house before the 25th of October, 1833. That the materials were furnished by the complainant, Waller, before the 1st of August, 1834, and were used in building the house. That on that day, [Abraham B.] Waller came to a settlement of the account of materials furnished, and Smith gave his note to Waller at 90 days, for the amount, ($651.54.) That on the 11th of November, 1834, Waller brought suit upon the note, and at March term, 1836, recovered judgment, but did not file his claim in the clerk's office, nor institute his action for the debt within three months after furnishing the materials. On the 20th of October, 1835, the creditors of Smith, excepting the complainant, and Shepherd and Mudd, who supposed they then had a lien upon the building for

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

the materials which they had furnished, entered into a written agreement with Smith to give him time until the 1st of November, 1837, upon his giving security by a deed of trust upon all his real estate in the city of Washington. On the 29th of October, 1835, the complainant and Shepherd and Mudd executed the following writing: "Whereas the creditors of Nathan Smith have generally united in an agreement to extend the time of their demands, upon his executing a certain deed of trust, particularly mentioned in the said agreement; and whereas we, the undersigned creditors, have liens upon part of the property of the said Nathan Smith, and are, therefore, not upon the same footing with the other creditors, but are desirous to make the same extension of credit that they have: Now we do agree to forbear any coercion of our several demands upon him for the term of two years from the first day of November next, provided that the said Nathan Smith shall and do first execute his deed of trust according to the terms of the agreement hereinbefore referred to; and provided also, that his other creditors shall agree to the like extension, so that we shall not lose any priority of lien, whether under the lien law, or otherwise, which we now may have." On the 31st of October, 1835, Smith executed the deed of trust to the defendants Dyer and Blagden, reciting the names of his creditors, and the amount due to each, and among the rest, "to Abraham B. Waller, in the sum of $651.54. And whereas also the said Shepherd and Mudd and Abraham B. Waller have executed and delivered to the said Nathan Smith, an instrument of writing, dated on the 29th day of October, 1835, making the same extension of credit given in the first-named instrument of writing, dated on the 20th day of October, 1835, and on the same conditions, but reserving any priority of lien, whether under the act of congress aforesaid, or otherwise, which they, the said Shepherd and Mudd and Abraham B. Waller, might have on the said 29th day of October, 1835, and whereas also," &c. "Provided, however, that nothing herein contained shall be construed to impair the legal priorities of lien hereinbefore mentioned as belonging to the Patriotic Bank, and to Shepherd and Mudd, or which belongs to Abraham B. Waller."

The act of congress of the 2d of March, 1833 (4 Stat. 659), entitled "An act to secure to mechanics and others, payment for labor done, and materials furnished in the erection of buildings in the District of Columbia," after giving a lien, &c., provides: "That no such debt for work and materials, shall remain a lien on the said house or other buildings, longer than two years from the commencement of the building thereof, unless an action for the recovery of the same be instituted, or the claim filed, within three months after performing the work, or furnishing the materials, in the office of the clerk of the court for the county in which the building shall be situated."

It was agreed by the counsel for the parties respectively, that if the court should be of opinion that the complainant had such a lien on the 29th of October, 1835, then a decree should be rendered against the trustees for the amount of the note. If otherwise, then the decree should be for an equal dividend with the other creditors.

Mr. Bradley, for plaintiff.

R. J. Brent and Mr. Hellen, for defendants.

THE COURT was of opinion that the complainant had no lien on the 29th of October, 1835, as the two years expired on the 25th.

Case No. 17,109.

WALLER v. STEWART.

[4 Cranch, C. C. 532.] [1]

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

PRACTICE—INSPECTION OF BOOKS—COMPETENCY OF WITNESS.

1. It is not too late, after the jury is sworn, to call for the books which the court has ordered to be produced at the trial. If the party calling for the books inspect them, he makes them evidence for the other party.

[Cited in Edison Electric Light Co. v. United States Electric Lighting Co., 45 Fed. 59.]

2. If the witness is protected from liability by the act of limitations, he is a competent witness without a release from the party to whom he was liable.

Assumpsit for $116.30, for lumber sold and delivered. The defendant [Stewart's executrix] had obtained an order of the court upon the plaintiff, to produce, upon the trial, his original book of entries. After the jury was sworn the defendant called for the book. The plaintiff's counsel, Mr. Bradley, refused to produce it, although he had it ready, saying that the call was too late after the jury was sworn, and cited Geyger v. Geyger, 2 Dall. [2 U. S. 332] 332.

Mr. Morfit, contra, cited the judiciary act of 1789, § 15 (1 Stat. 73); Blight v. Ashley [Case No. 1,541]; and Kenney v. Vanhorne, 1 Johns. 394.

THE COURT (nem. con.) was of opinion that the motion for non pros. for not producing the book, was not too late. The book was then produced.

Mr. Bradley then gave notice to the defendant's counsel that if they inspected the books he should claim the right to use them as evidence for the plaintiff, and cited Jordan v. Wilkins [Case No. 7,526].

THE COURT (CRANCH, Chief Judge, and MORSELL, Circuit Judge, hesitating, and thinking there were contrary decisions on the point) decided that if the defendant's counsel inspected the book he made it evidence for the plaintiff.

Mr. Morfit then refused to inspect it.

Mr. Peter Kurtz was then offered as a witness for the plaintiff, and was about to testify

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

that he was employed by Stewart, and got the lumber on his credit.

Mr. Brent, for defendant, objected that the witness was interested; but, it appearing that he was protected by the statute of limitations, he was permitted to testify without a release from the plaintiff.

NOTE. Upon the question whether the calling for and inspecting the books of the opposite party authorizes him to read them in evidence, if the party calling for them refuse to use them, see the following cases in this court: Banks v. Miller [Case No. 963] June, 1809; Lindsay v. Riggs [Id. 8,366] Dec., 1811; Clementson v. Williams [Id. 2,885] June, 1812; and Coote v. Bank of U. S. [Id. 3,203] Dec., 1826.

WALLER (UNITED STATES v.). See Case No. 16,634.

Case No. 17,110.

WALLIS v. CHESNEY.

[4 Am. Law Reg. 307.]

District Court, D. Maryland. 1856.

ADMIRALTY JURISDICTION—AFFREIGHTMENT—CARRIAGE BY CANAL.

1. The admiralty has not jurisdiction of a libel for freight on merchandise carried in a canal-boat, about two hundred and fifty miles by canal, and only about forty miles on tide-water.

[Cited in American Transp. Co. v. Moore, 5 Mich. 390.]

2. To give jurisdiction on a contract of affreightment, the principal or chief part of the service must be under the contract to be performed on tide-water.

Libel for freight on coal. Plea to the jurisdiction of the court.

GILES, District Judge. The facts of this case are as follows: The coal was brought in a canal-boat from Pittston, Luzerne county, Pennsylvania, on the canal to Port Deposit; and from that point the canal-boat was towed by a steamboat to Baltimore. It was brought on the canal about two hundred and fifty miles, and on tide-water about forty miles. Is the contract to carry this coal a maritime contract, over which this court has jurisdiction? I think not. The contract is entire, and four-fifths of the distance this coal was carried was on a canal, clearly beyond the jurisdiction of this court. Now, the supreme court, in the case of The Lexington, on page 392 of 6 How. [47 U. S.] say, "But if the substantial part of the service under the contract is to be performed beyond tide-waters, or if the contract relates exclusively to the interior navigation and trade of a state, jurisdiction is disclaimed." I understand the court to mean, by the word "substantial," the principal or chief part of the service. I will briefly notice the cases in this court, to which I have been referred by the proctor for the libellant. In the case of The Telegraph [Case No. 13,821], which was a collision which took place on the Chesapeake and Delaware Canal, the circuit court reversed the decree of the district court, for the want of jurisdiction. The case of Ware v. Baltimore Steam-Towing Co. [unreported], in which a decree was given for libellants, was a case for freight on goods brought from Philadelphia to Baltimore. The goods were carried down the Delaware to the Chesapeake and Delaware Canal, and through that canal, and on the Chesapeake Bay and Patapsco river, to Baltimore; more than three-fourths of the distance was on tide-water, and the goods were carried on a vessel built and used for transportation on tide-water. The Case of York River Steamboat Co. [Case No. 18,144] grew out of a collision which took place on the Chesapeake Bay, near the mouth of the Patapsco river. The steamer ran against and injured a canal-boat at that point. Now, in cases of tort, the locality determines the jurisdiction; and as the collision happened on tide-waters, this court clearly had jurisdiction of the case. I will sign a decree, dismissing the libel filed in this case, for want of jurisdiction.

Case No. 17,111.

WALLIS v. THORNTON.

[2 Brock. 422.] [1]

Circuit Court, D. Virginia. May Term, 1831.

JUDICIAL SALES—SALE BY MARSHAL ON CREDIT—TAKING BONDS—RIGHTS OF CREDITOR—TRUSTS—EQUITY SUPERVISION.

1. Where a decree directs an officer of the court to sell property, "and bring the proceeds of sale into court," and the sale is on a credit of one, two, and three years, and bonds are given for the payment of the instalments, these bonds are the immediate proceeds of sale. As a matter of convenience, they may be permitted to remain in the hands of the officer, but as matter of strict right, the creditor may require that they shall be brought into court.

2. Where bonds are made payable to the marshal of a court, he has a right to collect them. In such case, the marshal must be considered as a trustee for the creditor. Quære, whether the direction to take bond implies, that it shall be taken to the marshal, rather than to the creditor? Where bonds are taken, not to the marshal and his successors, but to J. P., marshal, &c., his executors, administrators, and assigns, could his successor, in the event of the marshal being changed before the money is paid, act on these bonds without an assignment?

3. If bonds are made payable on or before the day mentioned in the condition, but the decree under which the sale is conducted, does not authorize the insertion of these words, it seems that the trustees have no right to receive the money before the day; if they had, the cestui que trust might be injured, without having an opportunity of providing for his safety. But, admitting that the trustees have a right to receive the money before it is due, they have no right to discount legal interest and receive only a part of the debt.

4. Courts of equity extend their control, not only over the acts of trustees, but over the acts of those who have any agency in enabling the trustees to violate their trust.

[Cited in brief in Keyser v. Hitz, 2 Mackey, 517.]

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

5. Where trustees sell on a credit, and receive the money before it is due, discounting legal interest, it does not operate, in equity, a discharge of the lien, but a court of chancery will consider the lien as still subsisting, and the purchaser as responsible to the creditor.

6. If, in the regular execution of a trust, money is paid to a trustee, his co-trustee is not liable for it, merely because he joined in the receipt; but if the trustee who received the money, had no right to receive it, his co-trustee who joins in the receipt, is considered as co-operating in a breach of trust, and will be involved in its consequences.

The plaintiff, George W. Wallis, filed his bill against the defendants, stating, that in a suit brought by the same plaintiff against the representatives of Samuel Adams, deceased, this court, in December, 1825, decreed, that unless the defendants, on or before the 15th day of January, 1826, paid $8017.26, with interest, to the plaintiff, the marshal should proceed to sell on a credit of twelve months, or such farther time as the plaintiff's counsel should direct, a tract of land, lying in Henrico, with directions to take bonds with approved security, and a deed of trust on the land. The marshal was directed to sell on a credit of one, two, and three years. Anthony R. Thornton, the deputy-marshal, on the 20th of May, 1826, sold the land to John Minor Botts for $2020, payable in three equal annual payments, to wit: in May, 1827, 1828, and 1829. The land was regularly conveyed under an order of court. The deed of trust was executed to the said Anthony R. Thornton and William Carter, trustees, to secure the payment of the purchase-money, as it should fall due, to John Pegram, the marshal. The plaintiff's counsel agreed to the substitution of other property, the deed for which was executed December 1st, 1826. The first instalment, which fell due in May, 1827, not being paid, the property was sold on the 26th of November, 1827, on the following terms: The amount of the first instalment to be paid immediately, the second in May, 1828, and the residue in May, 1829. Richard Anderson became the purchaser for $1848, to be paid and secured as before stated. On the 23d of January, 1828, Richard Anderson paid, not only the instalment, which was then due, but also those which were payable at a future time, the trustees discounting legal interest. The trustees, thereupon, executed their joint deed, and signed the following memorandum: "The payment for the within described lot of land, was made to us by Richard Anderson, in the following manner, on the 23d of January, 1828. Cash payment, due on the day of sale, November 26th, 1827, $757.46. Bond due on the 20th of May, 1828, $706.98; four months interest off, $14.14; $692.84; bond due May 20th, 1829, $383.56; sixteen months' interest off, $30.68; $352.88; $1803.18. Signed, Anthony R. Thornton and William Carter, Trustees." On the 26th of January, 1828, the said Anthony R. Thornton, accounted with the plaintiff's attorney, for $694.13, but has not accounted for the residue. The plaintiff was shortly afterwards informed by Henry L. Carter, administrator of Anthony R. Thornton, of the payment by the purchaser, Richard Anderson, to his intestate, on the 23d of January, 1828. Neither the plaintiff, nor his attorney, or the marshal, ever consented to such payment. The plaintiff, in his bill, insists that by joining in the receipt, William Carter enabled Anthony R. Thornton to commit a breach of trust, and is responsible, whether any portion of the purchase-money paid by Anderson was received by him or not; that Richard Anderson paid in his own wrong, and is also responsible. The marshal, the administrator of Anthony R. Thornton and William Carter, the surviving trustee, and Richard Anderson, the purchaser, are made parties defendants. Henry L. Carter, administrator of Anthony R. Thornton, deceased, admits in his answer, that the whole money was paid to Anthony R. Thornton, who claimed the whole commission. There was no money in his hands at his death, except what stood to his credit in the bank of Virginia, $334.28. He died on the 6th of February, 1828.

Richard Anderson, the purchaser, insists on the right of the trustees to receive the money: That the credit was solely for the benefit of the purchaser, who might waive it. The only question respects the discount. Such would be the power of executors, and such is that of the trustees, who would receive the bonds and collect the money when due. Holding the bonds with the power to receive the money when due, necessarily implies a right to receive it at any time, and to surrender the bonds. This is still stronger than the common case, because the original decree directed the sale to be made by the marshal, and the money to be brought into court. Anthony R. Thornton and William Carter, made the sale, as deputies of the marshal (who had no personal agency in it), and took the deed of trust to themselves as trustees, to secure the payment of bonds, payable on or before a certain day. The sale at which this respondent purchased, was made for the payment of these bonds. The bonds which would have been required of him, had he not paid the money, would, probably, have been in the same form as to the trustees. In either case, the payment would have been legal, especially as the original decree directed the money to be brought into court. If, however, he should be held liable to the creditor, it must only be in the event of the insolvency of the trustees. He required a conveyance from both, and an acquittance from both, before payment. They stand equally bound to him, as the sureties against the claim of the creditor. He was not privy to the application of the money, to the use of either. William Carter says, in his answer: That he had no knowledge of the deed of trust, except that Anthony R. Thornton held it up, saying, "Here is a deed of trust, and I will make you a trustee," to which respondent assented. That this defendant did not attend the sale. That he admits the payment of the money to Anthony R. Thornton, and affirms that the respondent did not even

receive a commission. That he signed and acknowledged the receipt, without reading or inquiring about it, supposing that his signature was essential to the execution of the trust. That he was indebted to Anthony R. Thornton for his office, and it was understood, that he was to act under his instructions, and to pay over to him the money received. That he had the utmost confidence in Anthony R. Thornton, and believes that, had he lived, the affair would have been adjusted. That the money was received on the 23d of January; Anthony R. Thornton was taken sick on the 27th of January, and died on the 6th of February. William Carter contended, that as the bonds were payable to Pegram as marshal, his deputy had a right to collect them; his right being coextensive with that of his principal. Throughout the business, Anthony R. Thornton frequently acted as deputy marshal. The decree of December, 1825, directed the marshal to sell, and under that decree, Anthony R. Thornton sold. So on the execution of the second deed from John M. Botts, Anthony R. Thornton acted both as marshal and trustee. The deed required, that on default of payment, the trustees should sell on the request of the marshal. The property was sold, he believes, without directions from Pegram. Thornton having, as deputy, the whole authority of principal, ordered the sale, and sold as trustee. That this defendant does not know whether the bonds were made payable to the marshal, or the trustees. If to the trustees, Thornton had a right to receive the money; if to the marshal, the recourse of the plaintiff is against Anderson. The first deed of trust bears date, June 6th, 1826. It is made in trust, to sell on default of payment, at the request of Pegram, the marshal, in trust to pay the said Pegram, the sum or sums then due and unpaid, and the surplus, if any, the trustees are directed to retain in their hands, to be applied to the payment of bonds to become due. If, in the opinion of the trustees, a division of the property would be injurious, they are empowered to sell the whole for as much ready money as is due, and for the residue, on credits to meet the sums to become due; the property to remain bound in the hands of the purchaser, and the surplus of the purchase-money, if any, to be paid to John M. Botts. The second deed is dated December, 1826, substituting other property on precisely the same trusts. The third deed bears date, 26th of November, 1827, from Anthony R. Thornton and William Carter, the trustees, conveying the whole property to Richard Anderson, in consideration of the whole purchase-money, the receipt of which is acknowledged.

MARSHALL, Circuit Justice. This suit is brought by a creditor, claiming from the defendants a sum of money which this court has decreed to him, and which he has not received. In December, 1825, a decree was entered in his favour, against the original debtor, ordering a sale of lands which were subject to the debt, on a credit of one year, or on such farther credit as the plaintiff's attorney might direct, taking a bond or a deed of trust from the purchaser, to secure the payment of the purchase-money. The marshal, John Pegram, acting by Anthony R. Thornton, his deputy, made the sale and took the bonds to himself as marshal, and a deed of trust to Anthony R. Thornton and William Carter, who were his deputies, specifying the times of payment, and stipulating that, in case of default, the trustees or the survivor, or his heirs, should, at the request of the said John Pegram, his executors, administrators, or assigns, sell, according to the terms of the deed. Default having been made in paying the first instalment, a sale was made by the trustees, and Richard Anderson became the purchaser. He paid the whole purchase-money, including the two instalments not then due, discounting from the amount, the legal interest on that part of the debt which was not due. The money was received by Anthony R. Thornton, who died soon afterwards insolvent. His liability for the money not being questioned, a decree was entered against his representative at a former term, reserving to the plaintiff the right to proceed against the other defendants, as to whom the cause was continued. That decree having been unproductive, the plaintiff now asks a decree against the other defendants. Three persons are now before the court, the creditor, the purchaser, and the surviving trustee, on one of whom the loss sustained, in consequence of the default of Thornton, must fall.

The creditor has proceeded in a regular course of law, to obtain his money; has given no authority to any individual which the law does not give, and has committed not a single act of indiscretion or irregularity, that has been shown to the court. The extension of credit on which the sale was made, under his first decree, which has produced no loss, and the selection of trustees to whom the trust property should be conveyed, if he did select them, constitute his whole agency, except as a plaintiff prosecuting his suit in court. His selection of, or assent to, the trustees, gave them no power not expressed in the deed, and their actions can affect him no farther than they have acted by his authority. If, then, the creditor has lost his debt, he must have lost it by the mere operation of law, or by a correct exercise by the trustees, of the authority vested by him in them. If he has lost it by the operation of law, it must be because the money was paid according to the decree of the court. The decree orders the marshal to sell on a credit, "and to bring the proceeds of sale into court, to be disposed of by future order." Now, what are the proceeds of this sale? The decree directs that he shall "take bond with approved security, and deed of trust of the premises to secure payment of the purchase-money." These bonds are the

immediate proceeds of sale, and the decree directs that they shall be brought into court to be subject to its future order. This implies no right in the officer to make any disposition of them, either to the debtor himself, or to any other person. If the term "proceeds" be construed to apply to future, as well as immediate proceeds, to the money secured by the bonds, as well as the bonds themselves, this does not dispense with the necessity of bringing the bonds into court, or confer a right on the officer to exercise over them any of the rights of ownership. As a matter of convenience, they may be permitted to remain in the hands of the officer; but as a matter of strict right, the creditor might, I presume, have required that they should be brought into court.

It seems to be agreed, that the bonds being taken to the marshal, he had a right to collect them, which right might consequently be exercised by his deputies. I have felt some doubt on the propriety of making the bonds payable to the marshal. It is directed by no law. The decree does not specify the obligee, and I am not certain that the direction to take bond, implies that it shall be taken to the officer, rather than to the creditor. But passing over this difficulty, and supposing that, for the sake of convenience, there has been a general acquiescence under this practice, the marshal must be considered as a trustee for the creditor. He acquires no property in the bonds; no right of ownership over them; no power to dispose of them at his own will: he is a mere trustee. If empowered to collect them, he must collect them according to the trust. I do not mean to inquire, whether he exercises this trust by virtue of his office, or under an implied authority from the creditor. I am aware of the delicacy and consequences of this as a general question, and do not purpose to touch it; but will observe that these bonds are not taken to the marshal and his successors, but to John Pegram, marshal, &c., and to his executors, administrators, or assigns. Had the marshal been changed before the money was paid, could his successor, without an assignment, have acted on these bonds? However this may be, whether his trust was personal or official, it is a trust, and ought to be faithfully executed.

It is argued, that the bonds are payable on or before the day mentioned in the condition, and that a consequent right existed in the obligor to pay, and in the obligee to receive the money, immediately. The decree does not authorize the insertion of these words. The sale is to be made on credit, and bonds are to be taken for the payment of the purchase-money. It is the common formula, because an individual who is to receive money for himself, never objects to payment before the day. In trusts, it may be different. Payment before the day is never expected; and if it may be made without the knowledge of the cestui que trust, his situation may be changed, often to his very great injury, without enabling him to provide for his safety. But, admitting that the general direction to take bonds implies that they may be taken in the common form, and that this gives the debtor a right to pay before the day, it gives him a right to pay the whole debt, and the obligor a right to receive the whole debt, not a part of it. It gives no right to the one to purchase, nor to the other to sell the bonds for less than the sum mentioned in the condition. Such a transaction is not the exercise of any power conferred by the decree. If, then, this could be considered an an official act, it is an abuse of office; it is a wrongful act, and can confer no rights in equity on those who are parties to it. If the receipt of this money could be considered as an official act, the sureties of Thornton, if he gave any, would be responsible for it. I do not mean now to indicate any opinion on this question, if it be one, because I think General Pegram, whether officially or personally, was a trustee for the creditor, was known to all the parties as a trustee, and could not, by his own act, violate the trust for his own purposes. Consequently, that power could not be imparted to his deputies.

The creditor, then, has not lost his debt by the operation of law, and the responsibility of the parties before the court to him, is not changed by the circumstance that the trustees were also deputies of the marshal. They acted as trustees, the debtor contracted with them as trustees, purchased from them as trustees, and paid the money to them as trustees. The casual circumstance, that they were also the deputies of the marshal, can no more avail him, than them. I proceed, then, to consider the transaction as one between a debtor and trustees, respecting a trust debt.

I do not think the case at all varied by the fact, that the deed of trust and bonds upon the second sale, were not executed. It is fairly to be presumed, that those instruments, had they been executed if, indeed, a new deed of trust was required, would have conformed, precisely, to the deed of trust and bonds for which they were to be substituted.

The sale is made for the payment of a debt due to George W. Wallis. The terms are, partly for cash, and partly for credit. Bonds are directed to be taken for the payment of so much purchase-money as becomes due in future, secured by a deed of trust. The purchaser agrees with the trustees to pay the whole sum immediately, discounting legal interest, on which they convey the trust property, and give him a receipt in full for the purchase-money. Is this a fair, a legal, and an equitable execution of the trust?

Trustees must act conscientiously for the cestui que trust, and not for themselves. They have no right to divert the trust fund to their own use, and no man can relieve

himself of his liabilities by assisting in such conversion. Had the whole purchase-money been paid, without discount, to the person authorized to receive it, the case would have been involved in much difficulty. It might have been supposed that the terms of the bond, authorized the purchaser to pay before the day, and compelled the obligee to receive the money. Even, then, any co-operation between the parties for the sole benefit of the trustee, would not receive the countenance of a court of equity. But this payment is not made to the obligee; it is made to the trustee, whose right to receive it, depends on the deed of trust. We must refer to the deed, then, for his power and his duty. The deed does not authorize the trustees to sell under any circumstances, unless required to sell by Pegram. If required by him, they can only sell to raise so much of the purchase-money, as is then actually due, that is, so much as the obligee could recover by a suit at law. In one state of things only, can they sell the whole property, and that state of things, it is to be presumed, did actually occur. They did sell the whole property, but this right to sell, was not accompanied with the right to receive the purchase-money, which was to fall due in future. The language of the deed, after directing that the sale shall be for cash, so far as is necessary to pay the money actually due, is, "and as to the residue of the purchase-money, upon such credit as will meet the residue of the sum or sums to become due, the property to remain bound in the hands of the purchaser or purchasers, and to be sold, if he or they shall make default in the payment of any of the moneys that may thereafter be due and payable." The trust then requires, absolutely, that the property, if the whole be sold, shall remain bound in the hands of the purchaser for the money thereafter to become due. The trustees have a right to receive, only to the extent of the sale for cash; the property is to remain bound for the residue. They are empowered to receive that residue, only in the event of another sale for cash, which is not to be made until another instalment falls due, nor then, unless required by Pegram.

The terms of the trust, then, give no authority to the trustees to receive any part of the purchase-money, except that which arises from sales for cash; nor have they a right to make those sales unless required by the obligee. They are sedulously watched, and are not allowed to receive money, or to discharge the lien on the property, except at fixed times, when the fact of their receiving it must be known both to the obligee and to the creditor, and the attention of both must be drawn to it. They are not allowed to receive the money at a time when neither the obligee nor the creditor have any reason to suspect the fact, or any opportunity of providing for their safety. If the money was paid to trustees not authorized to receive, the liability, both of the purchaser, and of the trustees, to the creditor, cannot be controverted. But if the authority of the trustees to receive, could be identified with that of the obligee; if the money, by the terms of the trust deed, as by the terms of the bond, had been made payable on or before the time specified in the deed, let me inquire, whether a court of equity ought to consider this as a valid payment.

It will not be contended, that a trustee can rightfully receive money which is well secured, in order to apply it to his own purposes. He can have no right to vary and increase the risk of his cestui que trust, in order to benefit himself. Such acts are breaches of trust, and, even if within the letter of his power, are deemed void. In this case, the risk is varied and increased, without the knowledge or consent of the cestui que trust. A sum of money, which was amply secured, is collected by the trustee for his own use, and is held by him on his own personal security only. It is not collected for the cestui que trust, but for himself. Had he purposed to act for the cestui que trust, he would have consulted the interested party, or his counsel. But he acted notoriously for himself. This is undeniably a breach of trust. Courts of equity, in the exercise of that vigilance which they employ for the protection of trusts, extend their control, not only over the acts of trustees, but over the acts of those also, who participate in the transaction; who aid and assist in the violation of the trust; who enable the trustee to violate it. All are made responsible for the act. In Balfour v. Welland, 16 Ves. 156, the master of the rolls said: "Where the act is a breach of duty in the trustee, it is very fit that those who deal with him, should be affected by an act tending to defeat the trust of which they had notice.

It is a general rule, that where the trustee does not act in pursuance of his trust, but in violation of it, even if he is within the letter of his power, those who co-operate with him, in enabling him to defeat the trust, are responsible for it.[2] This case contains intrinsic evidence, that all the parties acted with full knowledge of the character of the transaction. The purchaser must have known, that Thornton intended the money for his own purposes. Receiving it on a discount of interest, was equivalent to borrowing it on interest. He could not have done this without intending to employ it.

The advance of money on a discount of legal interest, if to a person authorized to receive it, is, of itself, a perfectly fair, legal, and moral transaction. But, in regard to the power of these parties, it stands on the same ground with the discount of a larger sum. It is the

[2] Crane v. Drake, 2 Vern. 616; Scott v. Tyler, 2 Brown, Ch. 477; Andrew v. Wrigley, 4 Brown, Ch. 125–130; Hill v. Simpson, 7 Ves. 152; Lowther v. Lord Lowther, 13 Ves. 95; McLeod v. Drummond, 17 Ves. 169.

purchase of a bond by a debtor from a trustee, for less than the sum mentioned in the condition, attended by this additional circumstance, that the trust property is to be exonerated from the lien which insured the debt, and the only security substituted for it, is the personal responsibility of the trustees. Under such circumstances, a court of chancery must consider the lien as subsisting in equity, and the purchaser as responsible to the creditor.

In argument, the counsel for the purchaser has likened this case to a payment made to an executor before it became due. Had the money been payable to the trustees instead of the obligee, General Pegram, the cases would not, I think, stand on the same principles. An executor derives his power from the will, represents the testator in regard to the whole personal estate, and has an extensive discretion in its management. A trustee is strictly limited by the terms of the deed creating the trust, and has no power which it does not expressly give. But even in the case of an executor, the person who aids him in a breach of trust, does not act with impunity. The purchaser and co-trustee, have both aided in this breach of trust; the purchaser, by advancing the purchase-money; the co-trustee, by that act which induced him to advance it. It is not to be believed, that Anderson would have advanced the money to Thornton, had not Carter joined in the conveyance and receipt.

The counsel for Carter insists, that he is not responsible, as the whole money was paid to his co-trustee. Had it been received in the fair and regular execution of the trust, the person who received it would have been solely responsible. All the cases which bear upon the point, have been adduced; the subject has been profoundly examined at the bar, and they prove clearly that in a fair transaction, one trustee is not liable for money received by his co-trustee, merely because he joined in the receipt.

But although Carter's act implies nothing disreputable in intention, his entire confidence in his co-trustee has betrayed him into an indiscretion, which, in a court of equity, is considered as co-operating in a breach of trust, and involving him in its consequences. The effect of his joining in the conveyance and receipt, was the payment of the money. He believed it safe in the hands of Thornton, but the substitution of Thornton's responsibility for the security which the decree provided, was a breach which a court of equity cannot countenance. It is a wrongful act, and he must bear the loss resulting from it. I have never doubted the ultimate responsibility of both the purchaser and the co-trustee to the creditor. The only doubt which I have felt, regards the relation in which they stand to each other. Reflection has confirmed my first impression, that Carter, by signing the conveyance and receipt, has induced Anderson to pay the purchase-money, and has become surety for Thornton to him. I am therefore of opinion, that Carter is liable, in the first instance, to the creditor, and that Anderson is liable, eventually, on the insufficiency of Carter to pay the debt.

Decree: The decree heretofore rendered against the administrator of Anthony R. Thornton, who was primarily chargeable with the plaintiff's demand, having proved unavailing, and the court being of opinion, that the payment by the defendant, Richard Anderson, of the deferred instalments of the purchase-money, discounting interest, and the execution of the deed to him by the trustees, were unauthorized transactions; and that these deferred payments still remain due, and are chargeable on the trust property, but that the defendant, William Carter, by uniting with the other trustee, Anthony R. Thornton, in giving a receipt for the money, and executing the deed, is bound to indemnify the said Anderson, for the payment made by him, and should, therefore, be first made liable to the plaintiff for the amount of the said deferred instalments, after deducting therefrom, so much of the trustees' commission on the sales, as remains unpaid;—the court therefore ordered and decreed, that William Carter should deposit in bank, to the credit of this cause, the deferred instalments, so far as they remained unsatisfied, with legal interest, from the dates at which they fell due respectively, and the plaintiff's costs. And the cause was retained in court, in order that the plaintiff might have a decree against the defendant, Anderson, and enforce his lien upon the trust property, if it should be necessary to the recovery of the money hereby decreed, or any part thereof.

WALLS (DAY v.). See Case No. 3,692.

WALLS, Jr., The JOHN. See Case No. 7,432.

WALMSLEY (SINGER v.). See Case No. 12,900.

Case No. 17,112.

In re WALSH.

[McA. Pat. Cas. 530.]

Circuit Court, District of Columbia. March, 1857.

PATENTABLE INVENTION — EXTENT OF CHANGE — GAS BURNERS.

[1. When a change from previous devices, and its consequences, taken together and viewed as a sum, are considerable, there must be sufficiency of invention to support a patent.]

[2. A gas burner in which, in order to retard and equalize the flow, the gas is made to pass successively through two upright cylinders, with holes projecting downward from beneath the cap, so as to create a retarding counter current, *held* to show patentable novelty over a burner in which the gas passed through only one cylinder, and escaped into the body of the burner through horizontal holes around its upper circumferences; it appearing by the proofs that there was a great gain in steadiness of light, combined with a large saving in the amount of gas used.]

[This was an appeal by John C. Walsh from a decision of the commissioner of patents refusing to grant him a patent for an improved gas burner.]

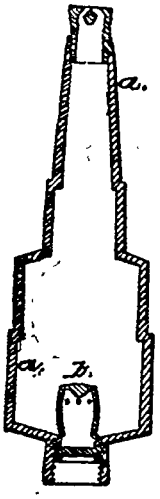
A. B. Stoughton, for appellant.

MORSELL, Circuit Judge. The claim, as set forth in the specification, is made in the following terms: "Having thus fully described the nature of my invention, I would state that I am aware many devices have been used for retarding the flow of gas through a burner, such as deflectors or circuitous passages. I lay no claim to these things. But what I do claim as my improvement, and desire to secure by letters-patent, is the arrangement within the burner of two or more hollow pillars d and g, extending up in the chambers of the burner with holes k, made obliquely, into the upper end of said pillars, as represented, for producing counter-currents of gas as it flows through the burner, to break its force and regulate the supply of gas to the tip of the burner, for purposes mentioned in the aforegoing specifications."

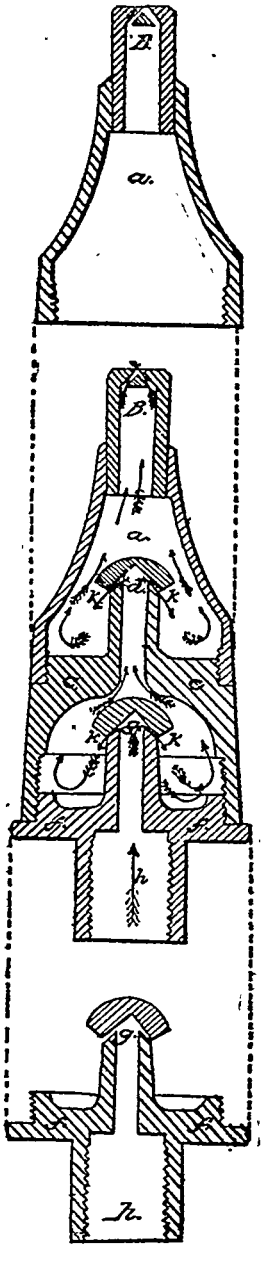
In order that the particular nature and object of his invention may be fully understood when compared with others, to which references have been given by the commissioner in this case, I will proceed to state the same in his own language. He says: "The object of my improvement is to break the momentum of the current of the gas as it passes through the burner, while the ordinary pressure is on the gasometer, so that no more gas will escape from the burner than will be fully consumed, and at the same time give a steady, unflickering light by the means employed of supplying the burner with a steady, constant, easy flow of gas. The means accomplishing this is effected by so constructing the parts of the body of the burner that counter-currents of the gas will be produced as it passes through the body of the burner to the tip, and thereby break the momentum of the main current, for purposes before mentioned, and is effected by providing the body of the burner with two or more chambers, and the said chambers with hollow pillars projecting up in and near the top of the said chambers; and holes are made obliquely in the top of said pillars, which holes project down for conducting the gas to the bottom of the chamber as it escapes from the pillar; and as the gas rises in each chamber, after leaving the pillar, it meets descending currents coming into the burner from the pillar, and its force is thereby impeded or broken in each chamber as it approaches the tip of the burner by the counter-current of the gas. By the time the gas rises at the tip of the burner the current is so much broken in its force and impeded in its flow that it will all be fully consumed as it escapes from the burner, and at the same time give a steady, unflickering light."

The commissioner, in his decision dated 22d January, 1857, says: "Mr. Walsh's claim is for arranging two or more hollow pillars within the burner, with holes made obliquely in their upper ends, for the purpose of producing counter-currents of gas, to break its force and regulate the supply to the tip of the burner. In rejecting the claim, several references were given to what may be justly considered equivalent devices; one of them, Samuel R. Brick's burner, was rejected and withdrawn in 1852, on the 2d of November, after an interference with A. H. Wood, whose burner was patented November 9th, 1852, No. 9396. Wood's claims appear to me sufficiently broad to foreclose J.

[Drawings of Patents Nos. 17,530, granted to J. C. Walsh, June 9, 1857, and 9,396, granted to A. H. Wood, November 9, 1852, for gas burners, published from the records of the United States patent office.]



Wood's Burner.



Walsh's Burner.

C. Walsh's. The mere duplication of parts not being sufficient to make a patentable improvement, the conclusion is that the patent should be refused."

The appeal is from this decision, and the reasons, in substance, are, that the commissioner erred when he stated that A. H. Wood's claim appears to be sufficiently broad to foreclose J. C. Walsh's, when the record shows that Wood neither describes nor claims nor represents what Walsh claims; that the commissioner erred in deciding that Walsh's invention was but mere duplication of Wood's, the decision being that the mere duplication of parts is not sufficient to make a patentable improvement; and also that he erred in deciding (substantially) that Walsh's burner did not differ from those referred to for its rejection, and did not produce any new or beneficial effect beyond those to which reference was made, when evidence to the contrary existed on the files of the office.

The claim of Wood, referred to by the commissioner, was filed the 2d of April, 1852; patent issued on the 9th of November, 1852, and is in these words: "What I claim as my invention, and desire to have secured to me by letters-patent, is the use in a gas-burner of a distributor, constructed substantially as above described, for the purpose of producing a steady jet or flame, and for preventing the blowing and waste of gas in the burner." In stating his device or arrangement, he says: "My improvements consist in introducing into an ordinary gas-burner a hollow core or chamber fastened to the inside of the burner in any proper manner, and pierced near its top with fine holes; a a in the drawings represents a fish-tail or tulip burner constructed in the ordinary manner, the jet of gas issuing from two holes in the end. In the larger end of this burner is inserted a hollow core or distributor bb, pierced near its top with fine holes, the bottom of the same having only one aperture for the gas to pass through. When the gas is admitted from the supply pipe, instead of rushing directly into the burner and passing through the apertures in the end of the same, it has to pass first through the apertures in the bottom end of the distributor b b, and thence is distributed through the holes of the same into the main burner a a."

I have been particular in giving the description of this reference, because it appears to be the one mainly relied on by the commissioner.

A time and place having been appointed for the hearing of this appeal, and due notice given thereof, the commissioner has laid before me the original papers and evidence in the case, together with the grounds of his decision in writing; at which time and place the appellant, by his attorney, appeared and filed his argument in writing, and the said case was submitted.

If in this case the devices used are mechanical equivalents, and the differences or changes from those given in the references be merely colorable, unquestionably the applicant would not be entitled to a patent. Upon this ground the commissioner seems to rest his decision. But it is contended that in supposing this to be the case as to the applicant's burner the commissioner erred, because there are substantial differences between the construction of the improved burner and that of Wood's and the others to which the reference has been given; that the construction and arrangement of the parts which mainly operate to produce a more perfect counter-current and checks consists of having a dome or deflector with the drill holes in an oblique, upward direction under the cap or dome, so that the current of gas shall be thrown downward; that in Wood's there is no dome or deflector; that the holes to admit the gas into the body of the burner are horizontal. Again, that a material difference may be perceived between the two in the currents and counter-currents that pass through the two burners by blowing with the mouth through the different ends of the two burners; that it will be found on making the experiment that whilst with Walsh's burner a free passage of air from the tip to the inlet end is made, yet from the inlet to the tip it is apparently entirely checked, though not so in fact. The argument is that the openings being the same in both cases, there is evidently a strong counter-current in the direction in which the gas flows through the burner, that does not exist if the current is reversed. These facts, as stated, are believed from observation to be true. It is admitted that this effect exists to a degree in Wood's burner, but not to the extent that it does in Walsh's burner. These differences might not be deemed sufficient if the result produced had been slight or inconsiderable; but various affidavits sent up with the original papers, and which it may be supposed passed under the examination of the commissioner, satisfactorily show that by actual experiments made according to the most approved and best modes of comparison, to test the same, of Walsh's burner with the best burners in the city of Cincinnati (and Wood's may be supposed to have been among them), Walsh's burner was invariably found to be very much superior and better than any of them; that it saved in the consumption of gas from twenty-five to thirty per centum; that when lighted up there was no flickering or variation in flame, and no instance noticed of any of them to blow. If this be true, and there is no reason to believe it is not, there is certainly in this invention a very great saving of expense and of economy in the consumption of gas more than by any other. There are affidavits which show expressly that the comparison was made between the burner of Walsh and Wood, and a similar result found in favor of Walsh; but as these affidavits, from what I can observe, did not pass under the inspection of the commissioner, they were not considered as evidence before me in this case.

What, then, are the rules of patent law applicable to this case? The law, as laid down in Webster, is "that whenever the change and its consequences, taken together and viewed as a sum, are considerable, there must be a sufficiency of invention to support a patent. Thus, when the change, however minute, leads to consequences and results of the greatest practical utility, as in the cases of Dudley's, Hall's, and Daniels' patents, the above condition is satisfied; but if the consequence, as in the case of Fussell, be inconsiderable, the change also being inconsiderable, and such as would most readily suggest itself to any one, the condition is not fulfilled, and the invention is not sufficient to support a patent." Webster's Subject-Matter of Letters-Patent, p. 29.

The conclusion, therefore, to which I feel myself obliged to come is that there is error in the decision of the commissioner in rejecting the application of the appellant for a patent for his invention as set forth, and that the said patent ought to have been granted. The decision ought, therefore, to be reversed and annulled.

[Patent No. 17,530 was granted to J. C. Walsh, June 9, 1857, and has not, so far as ascertained, been involved in any other cases.]

Case No. 17,112a.

In re WALSH.

[10 Reporter, 549.] [1]

Circuit Court, S. D. New York. Oct. 11, 1880.

SUPERVISOR OF ELECTIONS — REMOVAL — INSTRUCTIONS—RETAINING NATURALIZATION PAPERS.

1. The circuit court will not remove a chief supervisor of elections, for issuing of instructions which are the same as those previously issued, and shown to have been approved by the district attorney and circuit judge.

2. Instructions to the supervisors to take from a person who asks to be registered as a voter his certificate of naturalization are unauthorized by the statute.

On petition. The petitioner alleged that his certificate of naturalization had been taken from him, on his attempt to register as a voter, under instructions to that effect issued by the chief supervisor; and an order was issued to the chief supervisor, John I. Davenport, to show cause why he should not be removed.

E. Ellery Anderson and George W. Wingate, for petitioner.

Elihu Root and E. W. Stoughton, for respondent.

BLATCHFORD, Circuit Judge. We are prepared to dispose of this matter now. The two judges concur entirely in their views upon the subject, although the decision must be considered as being made by the circuit judge sitting alone, with the advice and concurrence of Judge CHOATE. We do not think a case is made out for removing Mr. Davenport under this petition. The instructions so far as the substance and materiality of them are concerned—everything that precedes the second further direction—appear to have been the same that were issued previously and passed upon and approved so far as it went (ex parte, if you please) by the district attorney and Judge WOODRUFF. Under such circumstances this court would not be authorized to say that the reissuing of these instructions was evidence of want of fidelity or of want of capacity on the part of the chief supervisor. Certainly these circumstances repel all question, in our judgment, of any bad faith, while at the same time they may not be conclusive upon this court sitting judicially upon the question involved. Now, as to the instructions, they have been argued to us and we have been asked to express an opinion in regard to them. The decision not to remove Mr. Davenport perhaps disposes of the prayer of this petition, but we deem it proper, in view of the questions involved and of the argument of counsel on both sides, to give our views upon the instructions as the views of the court. We consider these inquiries that are to be made of the person presenting an 1868 certificate as proper. We do not understand there is anything in these instructions which in any manner is intended to interfere with the proper prerogative and business of the inspectors. They are to decide whether the man is to be registered or not. If these questions or any other questions are asked of the party, and he refuses to answer one way or the other, upon that the state statute interposes, and the consequence is that he cannot be registered. If he says that he will not answer them because they tend to criminate him, that makes no difference; he does not answer, no matter what the reason is. These instructions were made with reference to the laws referring to the registration and elections of the state of New York, and we consider them pari passu with the questions which are authorized or required to be put to the person offering to vote upon naturalization papers. They not only are required to put certain questions, but such other questions as affect the right of a man to vote; and that is also the purport of the oath. Now, it says here that this supervisor may challenge the man's right to register who persists in registering on an 1868 paper. Well, we think sufficient is shown to warrant an inquiry into these 1868 papers. We do not go behind the affidavit of Mr. Davenport. We have not the facts before us upon which he acted, and must take his affidavit upon that subject. Now, he is to challenge the right to register. The right of challenge is expressly given by the statute of the United States, and the statute of the state gives the right of challenge to any voter, and not only gives a voter the right to challenge but requires that every supervisor

[1] [Reprinted by permission.]

shall be a voter. Now, the supervisor is to require the statutory oath to be put to the applicant. The inspector is to put the statutory oath. Under the state law he is required to do that. When these oaths are put, of course the man is to be examined. How is he to be examined? Why, the state law provides that the inspector shall put the questions. Well, this instruction says: "Upon such challenge, after the party is sworn, you will make of him the following inquiries," and then on the top of the second page it says: "Whenever upon your examination of any person applying for registration it shall appear that such person," etc. It does not follow at all from that that the questions are to be put directly by the supervisor to the applicant. The presumption is that they are to be put in the usual lawful way through the inspector. That is the presumption and the meaning of it. The inspector may not put these questions. He may have his attention called by the supervisor to the advisability of putting the questions and he may refuse to put them, but nevertheless they are proper questions for the supervisor to ask to have put. The inspector may not put them, or the voter may refuse to answer them or may answer them, but these questions, it seems to us, are questions which are proper to be put—every one of them. Why, the theory of the law for registration in the state of New York is that the right of a naturalized person to vote, even though he presents a certificate of naturalization, is to be inquired into, and there is nothing in the decision of the court that touches this question or conflicts or interferes with it. Then comes the instructions: "That whenever upon your examination of any person applying for registration it shall appear that such person has in his possession a certificate of naturalization improperly issued or granted, or improperly obtained, you will see that such person is not allowed to register," etc. Well, that is not an instruction of prohibition. If the inspector puts the man's name down as a registered man this instruction does not mean that the supervisor is to seize the paper and tear it out of his hands; it merely intends that he is to use proper means to see that the inspector does not register him. But as a matter of course the inspector may still register him. It is a formal expression, perhaps not as accurate as might be, but at the same time a form that may very well be used, and we do not understand that it conflicts in any manner with the freedom of action of the inspector.

Then the next instruction is, "and will take from him his certificate and attach thereto a statement of the facts, as given by the applicant, together with his name and address, and return the same with your book to the assembly district aid, to be forwarded to the chief supervisor." That portion of this direction we regard as unwarranted and not to be supported. We regard it as tending to a breach of the peace, and as totally unauthorized under the circumstances in which it is directed. If a man is arrested for illegal registration by a marshal, or for attempting to register illegally, or by the supervisor for violation of the statute, and in connection with that arrest the criminating and inculpating certificate is taken, together with the person, to the magistrate, that may be a proper proceeding, but a very different proceeding; and we do not think this language, "will take from him his certificate," is capable of the modified construction sought to be given to it by one of the counsel—that he is merely to receive the certificate if the man gives it up. It is capable of a different construction; and more than that, in the petition in this case it is stated that in several cases the certificate had been taken from the party, and on demand to have it given back the supervisor had refused to return it. Well, of course receiving it after it has been submitted to the inspector and the inspector has passed it to the supervisor and the man asks it back, withholding it then amounts to the same thing as if he had taken it forcibly from him, and we do not think that that portion of the instruction is to be upheld or can be warranted. In regard to the point first raised by Mr. Wingate in his last observations to the court about the evidence to be taken of naturalization, either of the original certificate or some substituted evidence, it would seem that perhaps this instruction goes a little beyond the intent of the state statute. The state statute seems to be that he is to produce the original certificate, and if that is lost then the applicant himself may take the oath. This instruction seems to proceed upon the principle that the best attainable evidence must be produced, either the original certificate or a duplicate. It says: "If for any substantial reason, such as that the records of the court where the applicant was naturalized have been burned or otherwise destroyed, so that he cannot obtain a duplicate, then the evidence of any one who knows the fact of the naturalization of the applicant or who has seen his certificate may be received." That is put forth as the opinion of the chief supervisor of elections. It may or may not be acted upon by the inspectors. It would seem, so far as the court now perceives, to be a departure somewhat from what is required by the state statute. We have not had an opportunity to examine it with care, and it has not been commented upon by the other side. But the departure is not a very grave or serious one, and the matter is to be regulated unquestionably by the inspectors. This is an instruction to the supervisors. If the supervisor sees fit to say to an inspector, under these instructions, that the law is so and so, why, unquestionably the inspector knows better, for he has got better guidance under the state law and will continue to act as he pleases. It does not

seem to amount to much one way or the other. At all events, it is not sufficient ground for removal nor for more serious comment. Motion denied.

Case No. 17,113.

WALSH v. The CARL HAASTED.

[3 N. J. Law J. 18.]

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

LIBEL IN REM—AGENCY OF MATE.

1. The owners of a freighting vessel are not liable for the loss of floating stages which were towed by the vessel under an agreement by the mate that he would take care of them.

2. Such an agreement is beyond the scope of the employment of the mate, and even of the master. If the owners are not liable, the vessel itself is not liable.

In admiralty.

Muirheid & McGee, for libelant.

E. A. Ransom, for claimant.

NIXON, District Judge. This is a libel in rem, and it seeks to hold the libeled bark liable for the loss of a floating stage, which it attempted to tow over the North river from the 42d street pier, New York, to Bergen Point, New Jersey. It appears from the admissions of the parties and the testimony in the case that the Carl Haasted, a Norwegian vessel, in approaching New York in November, 1877, collided with the steam-tug Cornell, and received injuries to her cut-water and stem, which the owners of the tug, acknowledging their fault and liability, agreed to repair. When the bark reached the 42d street pier these owners sent on board three of their workmen for the purpose of carrying out their agreement.

In making the repairs it was necessary to use two floating stages, which the men brought with them. On the evening of the first or second day, and before the completion of the work, the workmen were informed by one of the officers of the bark, the mate, that the vessel was to be towed early the next morning over the river to Bergen Point to load for her return voyage to Europe. Some conversations took place between the mate and the workmen in regard to the floating stages. The mate says that the carpenters asked him as a favor to take them over to the New Jersey shore, and he promised to do so. They testify that it was understood that if the vessel was removed from the dock before they returned in the morning, the mate should take care of the stages for them.

They got aboard the next morning just as the bark was casting off her lines from the wharf. The floating stages had been removed from the bow, where they had been left the day before, and had been fastened to the stern of the vessel by some of the hands on board. Their course was down the river, the bark being towed by a tug-boat, against a strong wind and tide; and whilst they were in the middle of the river, the chain and hawser which fastened the two stages together parted, and the rear one, which was not attached to the bark, went adrift. No request was made to the persons controlling either the bark or the tug-boat to stop, but the carpenters hailed a passing boat, requesting them to pick up the stage, and send it to the libelant, Walsh. It never was taken up or returned to him, and he claims that the bark to which the stage was fastened is liable for the loss.

The first question claiming attention is whether a case is presented in the libel and shown in the proofs, which entitles the libelant to an action in rem. This must be answered in the negative, unless the owners of the bark are personally responsible, because in cases of this sort the liability of the vessel and the responsibility of the owners are convertible terms. The Bold Buccleugh, 2 Eng. Law & Eq. 537, approved by the supreme court in Freeman v. Buckingham, 18 How. [59 U. S.] 189; The John Farron [Case No. 7,340].

The libeled bark is a freighting vessel, and it was the duty of the master to employ her as such. By the maritime law, he can bind the owners by his acts and contracts only when performed and made within the scope of his authority. If the undertaking in this case had been by the master, it is more than questionable whether the owners of the bark were bound to answer for any negligence on his part in its performance. The towing of floating barges was not within the range of the master's employment or the vessel's business, and all persons entering into contracts with the master, having in view any ultimate responsibility of the owners, must see to it that the subject-matter of the service was within his authority. Much less can the owners be held by the agreement of the mate to take care of or to look after the safety of the stages. There is no sense in which he can be regarded, under the circumstances, as the agent of the owners or as capable of making them responsible for his undertakings.

This view of the case renders unimportant some of the other questions discussed by the advocates of the respective parties,—such, for instance, as whether the master's presence on board might not be construed into an acquiescence by him in the mate's agreement to tow the stages, and whether, as the service was voluntary and without hire, it was not necessary to show gross negligence before any one could be held liable for the loss. These might become relevant in a suit against the master or mate; but the owners of the boat, not being personally responsible, a libel in rem is not maintainable and the action must be dismissed.

Case No. 17,114.

WALSH v. The CHINA.

[Cited in The Alabama, Case No. 122. Nowhere reported; opinion not now accessible.]

WALSH (HANCOCK v.). See Case No. 6,012.

Case No. 17,115.

WALSH v. The H. M. WRIGHT.

[Newb. 494.] [1]

District Court, E. D. Louisiana. Dec., 1854.[2]

CARRIERS OF PASSENGERS—THEFT OF BAGGAGE—NEGLIGENCE—STEAMBOATS—WHAT IS NECESSARY BAGGAGE—ADMIRALTY JURISDICTION.

1. When, on board of a passenger steamer, time and opportunity were given for a thief, without detection, to enter a stateroom of the ladies' cabin, which was properly fastened, and steal a valise, it was *held*, that it exhibited a want of that care and watchfulness on the part of those managing the steamboat, which should always be observed in the police regulations of such a boat.

[Cited in The John Brooks, Case No. 7,335.]

2. Those engaged in running passenger steamers are required to use such a degree of vigilance as will effectually protect from all intrusion, during the night time, at least, that portion of the boat which is appropriated for the security and convenience of helpless females.

3. Common carriers of passengers are liable for the safe transportation of passengers' baggage.

4. Articles which it is usual for persons to carry with them, from necessity, or convenience, or amusement, fall within the term baggage; as also money not exceeding a reasonable amount.

5. A gold watch and gold spectacles were, in this case, necessary to the traveler's personal convenience.

6. When the baggage of a passenger had been stolen from her room, on board a passenger steamer, the admiralty court has jurisdiction over an action brought to recover its value.

[Cited in The General Buell v. Long, 18 Ohio St. 533.]

[This was a libel by A. M. Walsh against the steamboat H. M. Wright to recover the value of certain property stolen from her while a passenger on the steamboat.]

Mr. Cornelius, for libelant.

Durant & Hornor, for respondent.

McCALEB, District Judge. The libelant in this case claims from the steamboat H. M. Wright the sum of $143, as the value of a gold watch, a pair of gold spectacles, a sum of money amounting to $11, some other small articles, and the valise in which they were deposited. These articles, it is alleged, were stolen from the stateroom of the boat, which was occupied by the libelant while the boat was on her voyage from New Orleans to Bayou Sara; and the evidence adduced in the cause leaves no doubt on the mind of the court that such was the fact. It is shown that the libelant is a lady of the highest respectability, residing in Woodville, Mississippi; that the stateroom in which the valise containing the articles stolen, was deposited, was occupied only by herself and a young lady, also of the highest respectability. It is shown that the valise was carefully deposited under her berth by the libelant when she retired to rest on the night when the robbery was perpetrated. The respondent has attempted to raise a presumption that the articles were stolen by a servant belonging to another lady of the party with which the libelant was traveling; but this attempt has been unsuccessful. The conclusion I have formed from the evidence is, that the stateroom was entered and the articles taken by some one having no immediate employment about the ladies' cabin, and having no right to be there. Whether the intruder was a person connected with the boat, or a stranger, it is unnecessary to inquire. The fact that he had time and opportunity to enter a stateroom of the ladies' cabin, which, it is shown, was properly fastened, exhibits a want of that care and watchfulness which should always be observed in the police regulations of every boat engaged in the transportation of passengers. It is certainly not exacting too much of those in charge of these common carriers to require of them that degree of vigilance which would effectually protect from all intrusion, during the night time, at least, that portion of the boat which is appropriated for the security and convenience of helpless females.

It is well established that steamboat proprietors, who are common carriers of passengers, for hire, are liable for the baggage of passengers; and it is equally well established that they are not subject to damages for the loss of anything that is not strictly baggage. This leads us to the inquiry, what is baggage strictly so called? The supreme court of Pennsylvania have considered that it is not obvious in what manner the court can restrict the quantity or value of the articles that may be deemed proper or useful for the ordinary purposes of traveling, because, in the nature of things, it is susceptible of no precise or definite rule; and when there is an attempt to abuse the privilege, a court must rely upon the intelligence and integrity of the jury to apply the proper corrective. The defendants in the particular case in which this decision was made, requested the court to charge the jury that they (the defendants) having had no notice that the trunks lost contained jewelry, or other articles of greater value than ordinary wearing apparel, they were not liable for such articles of jewelry; but the court refused, and the jury found for the plaintiff, and the judgment was affirmed upon appeal. "An agreement," says Angell, in his work on Carriers, "to carry ordinary baggage may well be implied from the usual course of business; but the implication cannot be at all extended beyond such things as a traveler usually has with him, as a part of his baggage. All articles which it is usual for persons traveling to carry with them, whether from necessity or for convenience, or amusement, fall within the term baggage. So, likewise, does money, not exceeding a reasonable amount; and a watch has been held to be a part of a traveler's baggage, and his trunk a proper place in which to carry it." Ang. Carr. §

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

[2] [Affirmed by circuit court. Case unreported.]

115. See, also, 9 Wend. 85; 19 Wend. 534; and 6 Ohio, 358.

The proctor for the respondent has contended that the articles lost should have been deposited with the clerk for safe keeping. On the contrary, they were just such articles as a lady of the age and circumstances of the libelant would naturally prefer to keep about her person. They were necessary to her personal convenience, and it is not shown that she failed in taking the proper precaution for their security.

It has also been contended that this is not a case of admiralty jurisdiction. This position cannot be maintained. A contract for the transportation of passengers for hire, is a contract over which the admiralty has exercised jurisdiction from a very early period. It is distinctly mentioned among the subjects of that jurisdiction by the learned Godolphin of the court of admiralty in England, in the reign of Charles I. It has repeatedly, within a few years past, been a subject of jurisdiction in the United States district court for the Southern district of New York, and has been clearly recognized as such, both in the district and circuit courts. It was also recognized as such in a recent case by Mr. Justice Campbell, in affirming a decree of this court. The value of the articles claimed by the libelant has been proven, and she is entitled to a judgment for the sum of $143, with costs.

This decree was affirmed on appeal by the circuit court. [Case unreported.]

Case No. 17,116.

WALSH v. UNITED STATES.

[3 Woodb. & M. 341.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1847.

SMUGGLING—EVIDENCE—POSSESSION OF SMUGGLED GOODS—RECOVERY OF PENALTY.

1. Where a person had in his store and sold cigars, which he seemed to admit were known to him to have been smuggled, it is competent for the jury, unless he offer rebutting evidence, to infer from such admissions both that they had been landed without license from the collector, and that he knew it, and was keeping or storing them with such knowledge. This constitutes one offence under the act of congress of 1799 [1 Stat. 627], though it is another but distinct offence to land foreign merchandise without license, or to assist in doing it.

2. The remedy for the penalty incurred in such cases may be by information or debt.

[Cited in Stockwell v. U. S., Case No. 13,466; s. c., on appeal, 13 Wall. (80 U. S.) 543; U. S. v. Maxwell, Case No. 15,750; Ex parte Wilson, 114 U. S. 425, 5 Sup. Ct. 939.]

3. If the information is filed by the district attorney, on behalf of the United States, though expressed to be for the benefit of the collector and all concerned, it will be sustained.

This was a writ of error, brought to reverse a judgment rendered in the district court for Massachusetts in September, 1846. The original proceeding in which judgment was rendered was an information against [Richard] Walsh, for that he did "aid in removing, storing or otherwise securing" a certain quantity of cigars, which had been landed without special license, from a vessel at Boston, within this district, on the 9th of May, 1845, importing them from abroad, and which landing without license was known to said Walsh. [Case unreported.]

The objections insisted on at the trial, as well as now, are the following: 1. That an information does lie at all in a case of this kind. 2. That this information is informal and void. 3. That the rulings of the judge as to the evidence, which were excepted to and come up in the case by a regular bill of exceptions, were erroneous, because the judge instructed the jury that the acts of the defendant in removing or assisting to remove the articles, if it was within his knowledge that they had been landed improperly, need not be in connection with the landing itself.

Mr. Sohier, for plaintiff in error.

Mr. Rantoul, Dist. Atty., for the United States.

WOODBURY, Circuit Justice. The original information was here founded on a supposed violation of the 50th section of the act of congress, of March 2, 1799 (1 Stat. 665). That section punishes with a penalty of $400, and disability for seven years to hold any office of trust or profit under the United States, the unlading or delivery of any goods from a foreign port, "at any time without a permit from the collector or naval officer, if any, for such unlading or delivery." And it punishes in a like manner, "if any goods, &c., shall be unladen or delivered from any such ship or vessel, contrary to the direction aforesaid," any "person who shall knowingly be concerned or aiding therein, or in removing, storing or otherwise securing the said goods," &c.

The plaintiff in error was charged with the commission of the last named offence, of aiding to remove or store a certain quantity of cigars, which had been landed without any special permit, and this fact known to him at the time. The evidence offered to prove this, was his possession of cigars in his store, and selling some of them, which he appeared to concede had been smuggled. His counsel contended that this was not sufficient, unless he was shown to have aided or done something wrong in connection with the landing of them. But the district judge thought otherwise, and his construction of these provisions in the act of congress, we think, was correct. The act had two objects in view in these provisions: One was to punish the actual landing without a permit, and the other was to punish the securing or storing of the articles afterwards, so as to prevent the seizure of them for smuggling, and so as to help to make

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

the former violation of the law successful. But the offences may be distinct transactions, though the ultimate design in both punishments is to secure the faithful payment of duties or revenue to the government, and by making any assistance in evading that payment penal, whether it be by landing the property illegally, or storing it afterwards, with a knowledge of that previous illegality. All which the last clause requires to show penal guilt under it, would be secreting, or housing, or removing the articles to a safe place, knowing they have been irregularly landed. That of itself, properly considered, is an offence. It per se tends to countenance and assist the defrauding of the revenue. To be sure the landing of the goods without a permit is also an offence, but it is a separate and distinct one. So probably would be the removal of the goods with a view to aid in such landing, and in connection with it, it might be a branch or part of the other offence, viz., the illegal landing. It might make him a particeps criminis in the landing itself. But it is not the second offence described in the act of congress, as that consists, not in removing or storing to aid the improper landing, or in connection with it, but merely in "storing or receiving the goods," with a knowledge that an improper landing had already and beforehand taken place. This being of itself an unfaithfulness to duty, tending to defraud the revenue, ought to be and is a matter to be discountenanced by a severe penalty. If this plaintiff, in truth, had not, also, assisted in the landing, or if the cigars in this case were of domestic manufacture, and never really imported from abroad, he should have shown these facts in his defence, and not have allowed the case, unexplained, to go to the jury under admissions and statements, from which the inference was a just one, that the cigars which he was selling, and which had been stored on his premises, were smuggled, and this fact well known to himself, no less than to the purchasers of them from him.

We have thus gone over the merits of the case, as appearing at the trial, and on the bill of exceptions, and find them to be in favor of the government, and of the correctness of the instructions given to the jury. It remains to consider the two other objections, which apply more to the technical propriety of the form of proceeding adopted here, than to any defence on the merits.

It is contended first, as to this point, that the act of congress which we have been considering, virtually designates some civil action, like that of debt, for the recovery of the penalties incurred under it, and does not authorize an information. In the 89th section it is provided, "that all penalties accruing by any breach of this act, shall be sued for and recovered with costs of suit, in the name of the United States of America, in any court competent to try the same.' 1 Stat. 695. The expression "sued for and recovered," it is argued, applies to civil prosecutions, and not those of a criminal character, like informations. 4 Bl. Comm. c. 23. And where one remedy is expressly given by the statute creating an offence, it is contended that no other exists of a common law character, because there is no offence in doing the act by the common law, and because "Expressio unius est exclusio alterius." Cro. Jac. 643; Rex v. Wright, 1 Burrows, 543; Wiley v. Yale, 1 Metc. [Mass.] 553; Rex v. Robinson, 2 Burrows, 803. All this, except the first position, may be sound law, and thus may be the case of State v. Mitchell, 1 Bay, 267, holding that where a constitution requires all public prosecutions to be in the name and by the authority of the state, a remedy by information, rather than an indictment by a grand jury, should be excluded, and especially, in case of a crime, be excluded with great propriety. But the first position is not correct, that "sued for" is an expression always applied to civil remedies. In the supplemental act of congress as to an embargo in 1809 (chapter 24, § 12 [2 Stat. 506]), further remedies were given expressly to recover penalties, as the original act of 1808, c. 8, § 6 [4 Bior. & D. Laws, 132; 2 Stat. 453], had conferred only the like remedies that existed in the collection law of 1799 now under consideration. This supplemental act provides that any penalty may be "sued for" and recovered by debt, or indictment, or information, any law, usage, &c., to the contrary. Now, if the argument from this be, that an information being given by this last act, it follows that it did not before exist, there would appear to be like ground for arguing that the remedy by debt being given by this last act, hence that remedy did not exist before.

Again, if "sued for" being an expression used in the first act, an inference is thence drawn that a civil remedy like debt, rather than a criminal one like an information, was intended, this argument is rebutted by the use of the same term "sued for" in the supplemental act, and there applied as well to information and indictment, as to debt. It may be that "a suit" usually means a civil remedy. U. S. v. Allen [Case No. 14,431]. But "sued for" is broader, and may mean prosecuted for in any legal form. An action of debt is doubtless good. Levy v. Burley [Id. 8,300]. And in the collection of a fine or penalty, given to an individual, though to be divided between himself and the United States, debt is the most usual remedy adopted. See case of Parsons v. Hunter [Id. 10,778]. An information, however, lies there sometimes. Ward v. Tyler (in South Carolina) 1 Nott & McC. 22. And it is the most common form of proceeding for penalties in connection with revenue in England. It is at times called "the king's action of debt." Levy v. Burley [supra]; U. S. v. Lyman [Case No. 15,647]. And though debt, also, will lie there (Cross v. U. S. [Id. 3,434]; U. S. v. Webber [Id. 16,656]; U. S. v. Mayo [Id. 15,755]; U. S. v. Lyman [supra]), and though debt may have been the most usual remedy adopted for the

recovery of a penalty under the collection law of 1799, yet several cases exist in the books where the remedy was by information (U. S. v. The Virgin [Case No. 16,625]; U. S. v. Hunter [Id. 15,428]; U. S. v. Brant [Id. 14,637]). The principles applicable to this subject seem to favor this last remedy.

The breach of the law here is not a crime, in one sense, so as to require an indictment, or any punishment, either by fine or imprisonment in the discretion of the court, nor does it look like a debt by means of money had, goods sold or services performed, so as peculiarly to require a civil remedy. But it is rather one of those mixed transactions, one of those statutory liabilities created for public reasons, and to be sued for on public account in part, and in the name of the United States, rather than of any individual, and hence an information would seem to be the most appropriate, as that is instituted officially by the public attorney, and not like an indictment found by a grand jury, and not like an action of debt, brought by any attorney whom the prosecutor pleases to employ.

A further objection is urged, that this information is in behalf of the United States and Marcus Morton, the collector of the port of Boston, whereas it ought, by the statute, to have been in the name of the United States alone. But this is in some degree a misapprehension concerning the facts. This information is in the name of the United States, and probably must be. 1 McCord, 35, 52. Yet it is in behalf, not only of the United States, but Marcus Morton, and any other person interested. That is the fair and legal intendment of the recital, distributing the words as the sense requires. See Jewett v. Cunard [Case No. 7,310]. And there is no impropriety in saying that the information, though in the name of the United States, was in behalf of all concerned in the question. Perhaps it must state this. Com. v. Messenger, 4 Mass. 462. The common actions qui tam for penalties, are usually in the name of a complainant or informer, but still brought in behalf of others, as well as himself, and are so stated to be in the proceedings, when others are to receive a portion of the penalty. But a suit may be sustained in the name of all entitled to portions of the penalty. Bradley v. Baldwin, 5 Conn. 288. The form of expression adopted here, probably arose from what is provided in the 89th section, where collectors are enjoined to cause suits to be instituted for penalties under the act, without delay, and to receive the money collected, and distribute the same to those entitled. 1 Stat. 695. This furnishes another reason, undoubtedly, why the information is in the usual form, recited to be in part on the behalf of the collector. If there was a real error in this description, courts are liberal in allowing amendments even in informations. 4 Durn. & E. [Term R.] 457; 4 Burrows, 2527; 3 Anstr. 714; 5 Mees. & W. 372; The Emily & The Caroline, 9 Wheat. [22 U. S.] 381; and The Merino [Id. 391]. In this respect, and for good reasons, informations are unlike indictments, because they are drawn up by the attorney for the United States, who is in chancery to amend them to conform to the truth, as in any civil action, and are not found by grand juries dispersed over the whole county, and not easily got together to make amendments, if they could. Chirac v. Chirac, 1 Wheat. [14 U. S.] 261. So, even after a writ of error, amendments in new form are often allowed in the original proceedings. See U. S. v. Jarvis [Case No. 15,469]. But in our view the information can be maintained as it is, and therefore the judgment must be affirmed.

WALSH (UNITED STATES v.). See Cases Nos. 16,635 and 16,636.

WALSH (VAN EPPS v.). See Case No. 16,850.

Case No. 17,117.

WALSH v. WALSH.

[3 Cranch, C. C. 651.] [1]

Circuit Court, District of Columbia. Nov. Term, 1829.

EVIDENCE IN ORPHANS' COURT — DEPOSITIONS — PRACTICE.

1. The orphans' court is not bound to receive, as evidence, the testimony taken under a commission, not issued by consent of the parties, and not directed to commissioners mutually named by the parties; but directed to any notary-public, justice of the peace, or mayor, in England, Ireland, or elsewhere; and not issued in conformity with any established practice or rule of the orphans' court.

2. The orphans' court may adopt the practice of the court of chancery, as to the manner of issuing commissions, or it may establish rules of practice for itself in this respect.

Appeal from an order of the orphans' court, which rejected certain depositions which had been taken under a commission issued by that court, without the consent of the parties, and directed to any "notary-public, justice of the peace, or mayor, in England, Ireland, or elsewhere." See Act Va. Nov. 29, 1792, p. 279, § 13.

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, absent).

By Testamentary Law, c. 15, § 12, "the orphans' court shall have full power, authority, and jurisdiction to examine, hear, and decree upon all accounts, claims, and demands, between persons entitled to any distributable part of an intestate estate," "and administrators." This is such a claim and demand, and the jurisdiction is expressly given; and that court must, ex necessitate, ascertain the fact, that the party claiming is entitled to a distributable part of the estate. To do this, it must have the power of obtaining the testimony of witnesses not residing within its territorial jurisdiction. This may be done by

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

commission, in analogy to the practice in courts of chancery, to which tribunal the orphans' court is referred, (in the same section of the act,) for the extent of its power, and the means to enforce its decrees. The orphans' court may adopt the practice of courts of chancery, as to the manner of issuing its commission; or it may establish rules of practice for itself in this respect. If it has no rule upon the subject, a commission issued according to the practice in chancery would be unexceptionable; but it is not bound to receive testimony not taken according to its own rules, nor according to the rules of any other court.

The commission which was issued in this cause was not issued by consent of the respondent, and was not directed to commissioners mutually named by the parties; but is directed to any notary-public, justice of the peace, or mayor, in England, Ireland, or elsewhere. It is not issued in conformity with any established practice or rule of the orphans' court, or of any other court in this district; and the orphans' court was not bound to receive, as evidence, the testimony taken under it. The order of that court, therefore, "that this cause stand over, in order that a new commission may be awarded, and depositions taken, if desired by the complainant; otherwise, that the same be dismissed at the proper costs of the complainant," is hereby affirmed with costs; and the cause is remanded to the orphans' court for further proceedings.[2]

WALSH, The W. J. See Case No. 17,922.

Case No. 17,118.

In re WALSHE.

[2 Woods, 225.][1]

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

BANKRUPTCY — VALIDITY OF COMPOSITION — PURCHASE OF CLAIMS BY RELATIVE— PRACTICE—REFERENCES.

1. A purchase by the brother of a bankrupt and the transfer to him of a large part of the claims against the bankrupt, and the satisfaction at a large discount of other claims by the bankrupt himself for the purpose of assuring the acceptance of a composition proposed by the bankrupt, constitute no reason why the composition should not be confirmed by the court, when it was made to appear that excluding the brother and the claims held by him more than two-thirds in number, and a majority in value of the creditors had assented thereto, and that the evidence of these transactions of the bankrupt and his brother was open and accessible to the assenting creditors.

2. A court of bankruptcy has all the powers of a court of chancery, and proceeds summarily untrammeled by the ordinary rules of procedure. A court of chancery may refer a matter for inquiry as to the facts at any stage of the cause, even on final hearing; therefore:

3. After a motion to confirm a compromise had been brought on for final hearing before the bankrupt court, the judge had the power to refer the matter back to the register to report all the facts of the case touching the proposed compromise.

4. The presence and vote of a creditor who is not lawfully to be accounted such, in favor of a composition, should not nullify the proceedings unless the absence of his vote would change the result.

This was a petition of review brought to reverse an order of the district court sitting in bankruptcy.

John H. Kennard, W. W. Howe, and S. S. Prentiss, for petitioners.

Thomas J. Semmes and Robert Mott, contra.

BRADLEY, Circuit Justice. On the 10th day of January, 1876, Blaney T. Walshe, of the city of New Orleans, filed his voluntary petition in bankruptcy; and on the 13th of January, he filed a petition for a compromise with his creditors under the 17th section of the act of 1874 [18 Stat. 178], offering ten cents on the dollar.

A meeting of the creditors having been called, a resolution accepting the offer was passed, as required by said act, being concurred in by all the creditors present and voting. At this meeting, the bankrupt was examined in presence of the creditors by the attorneys of Arnold, Constable & Co. and Brokaw Bros., who afterwards opposed the composition. He identified a circular sent by him to his creditors in December, 1874, offering 25 cents on the dollar, and various other propositions, none of which were accepted in the form proposed. He stated that all of his creditors except Arnold, Constable & Co., Brokaw Bros. and Libby, sold their claims for 25 cents on the dollar to Frederick H. Smith, of Newark, New Jersey, agent for his brother George Walshe, within two or three months of the issuance of the circular. His brother furnished Smith with $5,000 in cash to make these purchases; the balance, $2,500, was raised by the petitioner himself in New Orleans. He then explained in detail how his property had gone on diminishing in value by which he was now unable to offer more than ten cents on the dollar.

Arnold, Constable & Co. and Brokaw Bros. thereupon filed a formal opposition to the composition proposed, objecting, amongst other things, to George Walshe being admitted as a creditor on the claims purchased by him, because (as they alleged) he purchased the same for the purpose of influencing

[2] In the Deputy Commissary's Guide, p. 213, is the form of a commission for taking testimony, used by the prerogative court for probate of wills, in Maryland. It is issued in the name of the lord proprietary to four persons, by name, authorizing them, or any three or two of them, to examine witnesses for plaintiff and defendant, on their corporal oaths, to be administered by the commissioners on the Holy Evangels of Almighty God, &c. To which commission was annexed the form of the oath to be taken by the commissioners.

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

the proceedings, and because he had received $2,500 thereon, which was an unlawful preference. At the second meeting of creditors on the 14th of February, the register certified that two-thirds in number and a majority in value of all the creditors, and the bankrupt himself had affirmed the resolution for composition, by signing their names to a paper to that effect, which was appended to the report. The register in his report of the proceedings enters into a particular explanation of the various debts. He also bestows attention to the schedule of assets, and concludes by reporting that it was for the interest of all concerned that the composition should be approved and recorded. The paper of ratification annexed to the report shows that twenty-five parties (persons and firms) holding debts over $50 signed the ratification, including George Walshe as one (who had purchased debts to the amount of over $19,000 at 25 cents on the dollar, on which he had been paid $2,500); and that the amount of the debts was $23,780.88, including that of George Walshe, put down at $17,498.89. But leaving out him and his debt, the ratification would have in its favor twenty-four creditors in number, and $6,282 in amount.

In either case, therefore, whether George Walshe were included or not included, the composition received the ratification of much more than two-thirds in number, and one-half in value of all the bankrupt's creditors.

But the opponents allege that there was a fraudulent conspiracy between the bankrupt and his friends, particularly his brother, the said George Walshe, and his friend Frederick H. Smith, of New Jersey, to bring about this composition, and much evidence was taken to show that after laborious but unsuccessful efforts to get the opponents to acquiesce in the composition, Smith had advised the bankrupt to get some friend to buy up the other debts at twenty-five cents on the dollar, and to use them when thus bought up to coerce the opponents, and to bring about the desired composition; and that the bankrupt had taken this advice, and had induced his brother to advance $5,000 for this purpose, he himself raising $2,500 more, and with these means purchasing up a large part of his debts, retiring those which had been purchased with his own money, and procuring the others to be assigned to his brother. There was evidence, however, to show that George Walshe would not have the business transacted in any other way than by an assignment to him of his share of the purchased claims. Be this as it may, it seems that after throwing all these claims out, and not even allowing George Walshe to come in as a creditor at all, considerably more than the requisite majority of creditors in number and amount ratified the composition. And then, the evidence of all these transactions was open and accessible to the ratifying creditors, if they had chosen to examine it. If they were satisfied that the composition was for their interest, and for the interest of all concerned, there does not appear to be any very cogent reason why the purchase of the bankrupt's debts by his brother should interfere with it. No pains appears to have been taken by him to conceal what he was doing. On the contrary he was very frank in stating the whole of the transaction.

But to avoid every cavil, the court took the pains (and this is assigned for error) to refer it back to the register to ascertain and report all the facts of the case, and especially whether the creditors who had ratified the composition understood the matter of the purchase of the bankrupt's debts, and the part taken in it by him, his brother and Smith. A full and detailed report was made by the register, and the court made a final decree confirming the composition. [Case unreported.] This decree is brought here for review, and various errors are assigned.

It is objected that the court had no power to refer the matter back to the register, after the case had been brought on for final hearing. But this is clearly a mistake. The court of bankruptcy has all the powers of a court of equity, and proceeds summarily, untrammeled by the ordinary rules of procedure. And a court of chancery may refer a matter for inquiry as to the particular facts at any stage of the cause. It may even direct a feigned issue at the final hearing.

Again, it is objected that George Walshe was not a lawful creditor, and should not have been accounted as such in the vote of ratification. We have seen that his vote made no difference. The result would have been the same if he and his claim had been stricken out. I do not think that the presence and vote of a creditor, who is not lawfully to be accounted such, should nullify the proceedings, unless the absence of his vote would change the result. If a compromise could be nullified by the presence of an unlawful creditor, few compromises would be safe.

These views render it unnecessary to discuss some other questions which were mooted in the case. For example, it is contended that the deposit in bank, to the credit of the bankrupt, of the $5,000 received from his brother, made the money his own. In law, and as between him and the bank, this might have been so. But if he was really the agent or trustee of his brother, that relation would not be destroyed by depositing the money in his own name, or even by using it in the purchase of other property. This point, however, has become immaterial in the cause.

The decree of the district court is affirmed.

WALTER v. The CORA NELLIE. See Case No. 3,217.

Case No. 17,119.

WALTER v. The KAMCHATKER.

[2 Betts, D. C. MS. 69.]

District Court, S. D. New York. Nov. 5, 1841.

LIBEL FOR SEAMEN'S WAGES—CONTRACT — PERFORMANCE—DISCHARGE FOR INSUBORDINATION.

[1. Libellant contracted with the owners of a steamship to work on board, at putting in her machinery, at the rate of $15 per month, and if, on her completion, he should engage to go on her voyage as a fireman, he should have $30 per month, during the time he worked in port as well as on the voyage. Disagreements arose, and libellant either left the ship, or was discharged, before her completion. After she was ready for sea, he made no tender of his services for the voyage. *Held* that, in the absence of such tender, he could not claim to have been attached to the vessel so as to be entitled to a seaman's wages, and his remedy, if any, was by action at law.]

[2. Even if the agreement should be regarded as perfected, the refusal of libellant to accept orders from any engineers or superintendents but the engineer in chief was sufficient to justify his discharge from the ship.]

[This was a libel by James Walter against the steamship Kamchatker (George Schuyler, claimant) to recover wages.] The libellant entered into a contract with the proprietors of the steamship Kamchatker to work on board her, in putting in and completing her machinery, at the rate of $15 per month, or $^{50}/_{100}$ per day, with the condition that after her completion, if he should engage to go in her on her voyage to Russia as fireman, and should sign the regular shipping agreement for such voyage, then he should be entitled to the pay of $30 per month, during the time he worked upon the vessel in port as well as during the voyage. Libellant avers his readiness and willingness to perform the whole contract, and that he was in discharge of it in port, by working on board in port until he was wrongfully discharged from the vessel by the claimants or their agents, and he demands $30 per month for the time he was employed in the service of the vessel, and his damages for breach of the contract. The answer alleges that the libellant, whilst employed on board at labor, became refractory, and abusive to the officer, and refused to obey the proper orders given him in respect to necessary work on board, and that he left the ship voluntarily, without finishing the work on which he was employed, and long before the ship was ready for sea.

Mr. Benedict, for libelant.
Mr. Bowdoin, for claimant.

BY THE COURT. The libellant's right to recover in this action rests exclusively on the services performed by him as a laborer on board the Kamchatker whilst lying at the wharf on the New Jersey side of the river. There is no pretence that he has tendered his services since the completion of the ship's machinery to go to sea, or to sign shipping articles. He assumes, first, that the contract throughout was of a maritime character; and, secondly, that he has been wrongfully prevented by the claimant or his agent from performing it in full, and that, therefore, he is to be compensated by full wages for the time he labored on board, and by damages for the loss of the voyage.

When a contract is an entirety, looking to services at sea as the chief consideration, admiralty courts regard services in port preparatory to the voyage as coming within the contract, and entitled to the same remedy. Jones v. Davis [Case No. 7,460]. And, when rendered on board the ship, no objection would be allowed that it was not necessarily connected with the duties of a sailor. Accordingly, had the libellant established a hiring for the voyage, he would be entitled to claim, as part of the wages of such voyage, a compensation for his time and labor employed on board in fitting out the ship, as well if he was engaged on her machinery as if employed about her spars, rigging, or sails. But the agreement shown by the proofs was of a different character. The libellant had not yet bound himself to the ship. There was a provisionary or probatory contract antecedent to the inception of the agreement for the voyage; and, if it be urged that the claimants were bound to accept the engagement of the libellant, it certainly must be conceded that he was under no compulsion to proffer and complete it. He was at full liberty to withdraw from the service at any time before executing the agreement binding him to the voyage. The arrangement, then, throughout, must be regarded as of such separable character. The libellant was not to be enlisted or bound to the vessel until the final contract should be signed or adopted on his part. He could leave his employment there the same as if on shore. The obligation of the parties must necessarily be interpreted as reciprocal in its operation. And the plain sense and equity of the arrangement concur in affixing to it the meaning that for work done in part as a laborer the libellant should be paid merely as a laborer having no fixed connection with the vessel, and that after such work was finished, if he chose to undertake the voyage, then the pay should be doubled, and made equal to his wages at sea $30 per month. As the libellant did not execute the contract, or offer to do it, after the ship was made ready for sea, he cannot now claim to have been attached to her so as to secure a seaman's privileges to himself. Whatever remedy he may be entitled to for services performed, or for a wrongful violation of that part of his agreement, must be enforced in a court of law.

In the second place, if this court was authorized to regard the agreement as perfected, and the services rendered by the libellant as performed in part execution of it, I think, upon the proofs, that his conduct on board was so far disorderly and insubordinate as to justify his discharge from the vessel. It cannot be maintained that in a service so extended as to particulars, and about a ship of the

extraordinary dimensions of this frigate, the libellant would refuse obedience to the orders of all the superintendents and engineers other than given directly by the chief engineer. The absurdity of a claim of that character is too gross to require any formal refutation. When, then, he took ground that he would not remain or obey orders given him by any one except the chief engineer, that officer might most rightfully refuse to continue him in his employment, and he would on such discharge forfeit every claim to the contingent and prospective advance of wages. That advance was not to be absolute, but rested on a condition which the libellant must show he has satisfied before he can demand anything more than the compensation stipulated for the mere labor in port. In my opinion, therefore, this action cannot be maintained, and the libel must be dismissed, with costs.

Case No. 17,120.

WALTER et al. v. The MONTGOMERY.

[3 Hunt, Mer. Mag. 153.]

District Court, S. D. Florida. March 7, 1840.

SALVAGE — COMPENSATION — FLORIDA COAST — ADMIRALTY JURISDICTION — SURVEY AND CONDEMNATION.

[1. Salvage services rendered by professional wreckers, who constantly maintain outfits suitable for the purpose, in places (such as the Florida coast) where the interests of commerce require it, are to be more liberally rewarded than like services would be if rendered in other places, and by persons and vessels pursuing other avocations.]

[2. One-fourth, being $10,178, allowed to professional wreckers for getting a ship and cargo of cotton off the Florida reef, by transferring cargo to their vessels; the ship being considerably damaged and in some danger, the services lasting about 10 hours, and being without danger or risk to the salvors.]

[3. Admiralty courts have jurisdiction to order a survey and decree a condemnation and sale of the ship; but, before doing so, the judge should be satisfied that the application is made in perfect good faith towards all parties interested, and that the vessel is so damaged that no prudent man would think of repairing her.]

In admiralty.

MARVIN, District Judge. This is a suit, instituted by John Walter, on his own behalf, and on the behalf of fifty-five others associated with him, against the ship Montgomery and cargo, claiming salvage for services rendered them upon the high seas. The material facts of the case are briefly these: The ship Montgomery, of Portsmouth, Grace, master, bound on a voyage from Mobile to Havre, in France, on the 30th of January last, ran ashore upon that part of the Florida reef known as Carysford's reef. The master carried out his anchors, set his sails aback, and used all the means in his power to get his ship off the reef without discharging any of his cargo. While he was making these efforts, the present libellants, who are licensed wreckers on the coast, offered him their assistance, which he declined, under the impression that he would succeed without assistance in the extricating his ship from her dangerous situation. He continued his exertions during that day, the ensuing night, and a part of the following day, but to no purpose. The ship still remained hard and fast upon the rocks. The master, having now become satisfied that his ship could not be gotten off without lightening, accepted the assistance of the wreckers. They lightened the ship by transshipping aboard their vessels two hundred bales of cotton; and, in about ten hours, succeeded in getting the ship afloat, and safely moored inside of the reef. They then got her under way, and navigating her through an intricate and winding channel into the Gulf, brought her to this port. Her situation on the reef was somewhat dangerous. She had run across the outer reef, and progressed some distance through a narrow channel, surrounded by rocks and shoals. Yet these did not so far protect her from the waves as to prevent her thumping and grinding heavily upon the bottom. She suffered considerable injury. Her keel was badly split; upper deck started; several beams were broken, and she was otherwise much strained and injured.

The first question to be considered in this case is, what is a reasonable salvage, under the circumstances, to be decreed the libellants for their services? Our law has fixed no standard by which to measure compensation to salvors. It is left to the discretion of the judge; not, indeed, to an arbitrary and capricious, but to a sound and reasonable discretion, to be exercised upon a careful consideration of all the circumstances; and upon consulting, as far as they are applicable, the decrees and opinions of other judges in analogous cases. Before, therefore, I enter upon the particular consideration of this question, it will be expedient to review briefly some of the leading cases of salvage, decided in England and this country, with a view to learn, not only the proportions decreed in each case, but also the motives which induced their adoption. Such a review will aid us in arriving at a just decision of the present case.

It was the ancient practice of the English and American courts of admiralty to decree the one moiety to the salvors, in all cases of derelict. But this practice has long since been discarded, and derelict and other cases of salvage are now considered as governed by the same general principles. In a case of derelict, where the services of the salvors were highly meritorious, Sir William Scott decreed them two-fifths of the value of the property saved, the whole being valued at £12,000. The Aquila, 1 C. Rob. Adm. 42. In another case, where the ship had struck upon a rock on the coast of England, beaten in bottom, lost her rudder, and was abandoned by her master and crew, and was gotten off by the salvors, and a quantity of bullion saved from her, when she

sank, and was again weighed up by them, and taken into port, the judge decreed the salvors sixty per cent. upon the amount saved, including the bullion; the whole being £3,400. 5 C. Rob. Adm. 322. In the case of The William Beckford, the ship and cargo were saved from imminent peril, although but little time and labor were expended. They were valued at £17,604. The judge decreed £1,000 to the principal salvors; £50 to the owners of three boats and smacks; and 10 guineas apiece to two boys. 3 C. Rob. Adm. 355. In another case of much merit, the one-tenth of £72,000 was decreed to the salvors. 1 Dod. 414. The salvors, in the case of The Salacia, were highly commended for their good conduct by Sir Christopher Robinson, but their compensation was by no means proportioned to the value of their services. The case was this: The British ship Salacia, while on a voyage from Hull to Lima, put into West Point Bay, in Great Falkland Islands, on the 11th of May, 1826, for a supply of water, where she was driven on shore four times. On the 20th of May, she struck upon the rocks, and was thrown upon her beam ends; and in this situation was found on the 12th of June, by the American ship Washington. Captain Percival, of the Washington, after making a survey of the Salacia, with his crew, and the crew of the Dart, (who had previously been wrecked on the Falkland Islands,) undertook the release of the Salacia, which, after unlading half of the cargo, was effected on the 21st of June; and, on the following day, she was moored in the bay. By the 28th her cargo was reshipped, and on the 7th of July she was ready for sea, and proceeded on her voyage to Valparaiso, where proceedings for salvage were instituted, and a reference was made to arbitrators, who awarded £600, being the one-fourth of the value of the ship as the salvage of the ship; and it was then agreed between the parties that the question of the salvage upon the cargo should be decided by the high court of admiralty in England. The cargo was valued at £38,000. The judge allowed £1,000 to the owners of the Washington and other persons interested, for the loss of the sealing voyage, occasioned by the detention in assisting the Salacia, and £1,500 as a remuneration to the salvors for their services. 2 Hagg. Adm. 262.

Among the cases decided in the courts of our own country, that of The Blaireau [Case No. 9,230] is a leading one. This ship, during the night, was run down at sea, and before morning, had three feet of water in her hold. She was deserted by all her crew except one, who, at first from compulsion, but afterwards from choice, remained on board and endeavored to save her. In this situation she was found by the ship Firm, and with great labor and fatigue, navigated nearly three thousand miles into port. The sales of the Blaireau and cargo amounted to $60,270. The supreme court decreed $21,400 salvage. 2 Cranch [6 U. S.] 240. The case of The Cora was decided by Justice Washington, in the circuit court of Pennsylvania [Case No. 1,621]. It resembles the case of The Blaireau in all of its material circumstances. The brig was found deserted at sea, by the master of the brig Ceres, who put on board of her his mate and two mariners. They got her under way, and after encountering a violent gale, succeeded in bringing her safely into Delaware Bay. The gross amount of the sales of the brig and cargo was $47,300. The court decreed the one-third of this amount as a reasonable salvage. The case of Hobart v. Drogan [10 Pet. (35 U. S.) 108] was decided in the supreme court in 1836. The case was this: The brig Hope, with a valuable cargo, was lying in Mobile Bay, when a hurricane came on. The brig parted her anchors, and was driven on a shoal, outside of the Point, among the east breakers, and forced on her beam ends. Her masts and bowsprit were cut away. The master and crew deserted her to save their lives. Two days after she was stranded, the libellants, who were all pilots of the outer bar, after making various fruitless efforts, succeeded in getting the brig off and towing her up to Mobile. On a libel for salvage, the district court decreed the libellants the one-third of $15,299.58, the appraised value of the brig and cargo. The owners appealed, and the supreme court thought the salvage was reasonable, and affirmed the decision.

The attempt was made at the bar to compare the case now before the court to the cases I have cited; and it was claimed, that as high a rate of salvage should be decreed in this case, as in any of those. But it appears to me, that there are but few material points of comparison. In nearly all of the cases cited, the vessels saved have been abandoned by their respective masters and crews. They were saved at the expense of much labor and fatigue; and, in some of the cases, of personal danger also. In the present case, the master and crew remained by the ship. There was no danger in saving the ship and cargo, nor great labor or fatigue. The claim, therefore, to as high a rate of salvage in this case, as in those, if sustained at all, must be sustained upon other grounds than those of analogy. There have been numerous cases decided in this court, by my predecessor, that possess a striking resemblance to the present. One of the first, is that of The Nauna [unreported], decided in 1828. This barque, during the night, ran ashore upon Carysford's reef. In the morning three wrecking vessels, lying near by, offered their assistance, which was accepted. The wreckers lightened her, by transhipping aboard their vessels 456 bales of cotton, when she swung off the reef. They were employed in this service about twenty hours. The barque and cargo were valued at $60,000. The judge decreed $10,000 salvage. The case of The Hector [unreported] was decided in 1833. This ship got ashore on Couch reef. The weather was calm, and continued so for several days after the ship was gotten off. Four wrecking vessels

and their crews were employed to relieve the ship. After loading two of their vessels from her cargo, they succeeded in heaving her off the reef. The master insisted, at the trial, that his ship was in no immediate danger; that he accepted the assistance of the wreckers as a matter of prudence and precaution, and not because he supposed their services were absolutely necessary to the safety of the ship and cargo; that, as the weather continued favorable, he might have removed the cargo, and got at and thrown overboard his ballast; and in this way lightened, and hove his ship off, without the assistance of the wreckers. The judge did not regard the ship, under the circumstances, as in great danger; yet he thought the prompt and active exertions of the wreckers entitled them to a fair and reasonable compensation; and that $10,000 was not an unreasonable recompense, the ship and cargo being valued at $70,000. The Austerlitz [unreported] was decided in 1837. This ship got ashore in the night, in calm weather, and remained on the reef three days, before the master would take assistance. During this time, he carried out his anchors, and used all his exertions to get his ship off, but without success. He then employed the wreckers to lighten and get the ship off. They transhipped aboard their vessels 400 bales of cotton, and she came off. The weather continued calm for several days after the ship was relieved. The cargo consisted of 1567 bales of cotton, valued at $61,740. The judge decreed to the salvors 300 bales, valued at $11,800. The case of The Ella Hand [Case No. 4,369] was decided the same year. It was like the case of The Austerlitz in all its material circumstances. The ship ran ashore on the Tortugas. The weather was calm, and continued so for several days after the vessel was relieved. The wreckers lightened her, by loading two of their vessels, and hove her off. The ship and cargo were valued at $33,200. The master contended, at the trial, that he might have saved his ship, and the greater part of his cargo, by throwing overboard a portion of it, of little value. The judge agreed, that the master might have saved the ship and the greater portion of his cargo by a jettison of a part of it; but he said, "that experience had taught him, that masters generally delay this operation until it is too late to be available to them." He decreed the wreckers $7,000 salvage.

These and many other cases, which might be cited, decided by Judge Webb, very much resemble the present one. In all, the weather was favorable, and the vessels and cargoes were in no imminent peril; yet in each they would have been in great peril upon a slight change of weather; and, in all, the services were performed without risk, and by the same class of persons. It will be readily seen, that the amount of salvage decreed in the several cases cited, from the English and American Reports, and from the rolls of this court, far exceeds a compensation pro opere et labore, and any peril encountered by the salvors. Indeed, in many of these cases there is an apparent prodigality in rewarding the salvors, that can be justified only by some potent consideration. Why should salvors be so largely rewarded for their services? If life or property is saved from imminent destruction on land, no reward except simply for the work and labor done and not often that, is paid or demanded. Let similar services be performed at sea, and a most liberal and sometimes even extravagant reward is given. Why is this difference? Why is the marine salvor so generously rewarded? It is because an enlightened public policy deems the interests of commerce and navigation best promoted by decreeing a liberal recompense to salvors; not for the sole purpose of satisfying them for their work and labor, and the dangers they may have encountered, but also for the purpose of inciting others to similar exertions. Judge Peters says: "The general principle is not confined to mere quantum meruit, as to the persons saving; but is expanded so as to comprehend a reward for risk of life and property, labor and danger in the undertaking, as well as a premium, operating as an inducement to similar exertions." La Belle Creole [Case No. 17,165]. Justice Story says: "An enlarged policy, looking to the safety and interests of the commercial world, decrees a liberal recompense to salvors, with a view to stimulate ambition, by holding out what may be deemed an honorable reward." Rowe v. The Brig [Case No. 12,093]. Chief Justice Marshall, delivering the opinion of the court in the case of The Blaireau [Case No. 9,230], says: "The allowance for such services is intended as an inducement to render them; which it is for the public interest, and for the general interest of humanity, to hold forth to those who navigate the ocean." Sir William Scott, speaking of the principles which should govern in rewarding salvage services, says: "I do not think that the exact service performed is the only proper test for the quantum of reward in these cases. The general interest and security of navigation is a point to which the court will likewise look in fixing the reward. It is for the general interest of commerce, that a considerable reward should be held up; and, as ships are made to pay largely for lighthouses, even where no immediate use is derived from them, from the general convenience that there should be permanent buildings of that sort, provided for all occasions, although this or that ship may derive no benefit from them, on this or that particular occasion. So, on the same principle, it is expedient for the security of navigation that persons of this description, ready on the water and fearless of danger, should be encouraged to go out for the assistance of vessels in distress; and, therefore, when they are paid at all, they should be paid liberally." The Sarah, 1 C. Rob. Adm. 313, in nota.

I think it will also be seen, that the compensation to the wreckers on this coast has usually been much higher than has been decreed to other salvors, under similar circumstances, in other American or in the English courts. Why

is this difference? Why should the Florida wrecker receive a larger compensation than other salvors for similar services? The answer is obvious. There is a great difference in the circumstances and relations of the different salvors themselves. Salvors are, generally, passing voyagers or other persons, who accidentally fall in with the property in peril, and extricate it from danger, without doing injury to their other interests. They incur little or no expense in saving the property, and the salvage they receive is a clear and lucky gain. A nominally small compensation to such persons, under such circumstances, may be really a high reward, and amply sufficient, not only to pay them for all their labor, risk, and exposure, but also to induce others to perform similar services. Not so with the Florida wrecker. He does not accidentally fall in with the property in peril; but he looks out for and goes in search of it. He is no passing voyager; but is stationed for months and years near the place of danger. His exclusive business is to give assistance to vessels in distress, and to save the shipwrecked mariner and the property under his charge. His remuneration for such services is his sole means of living. He incurs heavy expenses, too, in procuring, fitting, manning, and sailing his vessel. These are often, on an average of several years, nearly equal to the salvages received. The interests of commerce and humanity require, that his steady and active devotion to his regular employment be encouraged and rewarded. Upon this subject, I cannot better express myself than in the language of Judge Webb, who presided in this court for nearly twelve years, and who united to a sound judgment much experience of the usefulness of a distinct class of wreckers on this coast. In the case of The Concord [unreported] he said: "These persons are generally men who have devoted themselves exclusively to this particular business, and have expended large sums in preparing good vessels and outfits for the purpose; and it is upon that occupation alone that they depend for a subsistence; and encouragement to such men is an additional consideration, which will ever operate with the court in meting out their reward. The advantages which commerce derives from their services have been too frequently witnessed here to be overlooked by the judge who presides, or to permit him to withhold the inducement necessary to insure a continuance of their employment." In the case of Ashby v. 474 Bales of Cotton [unreported], the property had been saved by transient persons, and the attempt was made to liken it to that of Barker v. 984 Bales of Cotton [unreported]; but the judge said: "The principal difference between this case and that of Barker, (who was a licensed wrecker,) grows out of the fact that he had devoted himself exclusively to the wrecking business. At a large expense in procuring, furnishing, and manning a vessel, he had prepared himself for it; and it was his only means of obtaining a subsistence. To be at all times able to furnish aid to property situated as this was, it was necessary that he should be for months together unemployed, except in looking out for vessels in distress; and during which time he was subjected to hardships, privations, and expenses, which can only be appreciated by those acquainted with the difficulties to be encountered by the wreckers on the Florida coast. But in this case the situation of the parties is different. They look to other pursuits for a livelihood; and it has only been under the expectation of greater gain that they have been temporarily diverted from those pursuits. It would not be justice, therefore, to measure the compensation by the same standard."

These remarks go far to show, that the rates of salvage allowed in this court are high in appearance only; for, although in the greater number of cases decided here, the services have not been attended with much personal danger to the salvors; nor have they been performed with great labor and fatigue; nor has the property in all instances been in imminent and certain peril; yet the absence of these circumstances, which are generally held to enhance the merit of the salvors, is more than made up, in the case of the regular wrecker, by the expenses he incurs, the privations and hardships he endures, and by the security which his ready presence and active exertions at the scene of danger afford to life and property. Be this as it may, I think it clear, that while the present necessity exists for the employment of a distinct class of men and vessels, in saving life and property exposed to the dangers of shipwreck, sound policy requires that they should be encouraged and supported by decreeing them a liberal compensation for the services they render. If the recompense they receive were not, in some degree, proportioned to the expenses they incur, and the hardships they endure, the dictates of common prudence would prompt them to abandon so precarious, hard, and ungrateful a vocation. If the necessity for the employment of a regular class of wreckers shall hereafter diminish in consequence of an increase of other means and facilities of saving shipwrecked persons and property, then the proportions of salvage, hitherto decreed to them, must be diminished also. Until then, unless I shall be sooner instructed differently by a superior tribunal, I shall continue to vindicate the policy, which seeks to lessen the perils of navigation, by insuring the present steady employment of wreckers on this coast. But their compensation must not be too high, or else it will defeat its own object; and owners, instead of being benefited by their services, will be driven to an abandonment of their property to pay the salvage and expenses. It must be restricted within proper and reasonable limits; and while, on the one hand, it should be sufficiently liberal to afford adequate encouragement to the wrecker, on the other, it should not be so large as to overburden the property charged with it.

Having thus briefly reviewed some of the

leading cases of salvage, and noted the principles that governed their decision, I proceed now to consider the question, what is a reasonable salvage in the present case? The facts of the case have already been detailed. They show that the Montgomery and cargo were exposed to considerable danger. The master might possibly have extricated them, but he could have done so only by a jettison of a large portion of his cargo. Had he by such means gotten his ship afloat, and she had again gone ashore, in her damaged condition, she would probably have been totally lost. My experience of the loss of many vessels on this reef in similar situations induces the belief that the exertions of the actors, if not the very means of saving this ship and cargo, greatly contributed thereto. A prominent feature in the merit of the salvors is the promptness with which their services were rendered. This is a quality highly commended in this court upon grounds of policy. A single anchor opportunely carried out, the assistance of a single wrecking vessel for half an hour, will often save a large amount of property from total loss. "Bis dat, qui cito dat." On the other hand, tardiness in rendering such apparently slight, but really valuable services, is severely reprehended. The shares of the masters of the principal wrecking vessels, in the case of The Howard [Case No. 6,752a], although they had clearly saved the barque and cargo from total loss, were nevertheless forfeited, because they did not give that prompt and early assistance they might have done.

Viewing the case in all its relations, and comparing it with many other similar cases decided in this court, my opinion is, that the one-fourth of the value of the ship and cargo is a reasonable salvage. This proportion will give to the salvors the sum of $10,178, the ship and cargo having been appraised at $40,712. It is to be divided among the several vessels and their crews concerned, as their interests are set forth in the libel. Their great number will reduce the share of each man to about sixty dollars. The salvage upon the cargo must be paid in kind, and the salvage upon the ship in money. The decree will direct the officers of the court to set off and deliver to the libelants, as salvage upon the cargo, 275 bales of cotton of average weight and quality; and that time be given until the 20th of April, for the payment by the master, owners, or underwriters, of $875, as the salvage on the ship.

Another branch of this case still remains to be disposed of. The master has filed a petition, praying the appointment of surveyors, and, if proper, a condemnation and sale of the ship. Surveyors have been appointed, and they have reported that her necessary repairs in this port will cost $7,035; that her present value here is $3,500, and that she will be worth, when repaired, $10,000. They advise that she be condemned and sold, rather than repaired here. But they say that she may be safely navigated to a northern port, after receiving slight repairs, and there repaired at an expense of $5,276. I have no doubt of the jurisdiction of admiralty courts to order surveys, and to decree a condemnation and sale of vessels, whether such proceeding be an incident of some other suit or not. It is a highly useful jurisdiction too; and, if it were more frequently invoked, it would prevent many improper and fraudulent condemnations in distant ports. But the power to order a condemnation and sale of a vessel, on the ground of unseaworthiness, should be cautiously exercised. It is a power susceptible of great abuse. Before making such decree, the judge should be satisfied that it is applied for in perfect good faith towards all parties interested, and that the vessel is so damaged as that no prudent man would think of repairing her. Vide case of The William Henry [unreported], decided in this court, 1839. To apply this rule to the present case: I am satisfied that the application is made in good faith towards all persons interested. The master does not seek the condemnation and sale in a manner that creates suspicions of any sinister motive. He simply submits the question, and prays the advice of the court. I am satisfied, too, that no prudent man would think of repairing her in this port; but I am not satisfied that she may not be navigated to some other port and repaired to an advantage. I cannot, therefore, order the ship condemned, as irreparably unseaworthy, and sold. The clerk will make out the decree in form, according to the directions given, and submit it to the court for final approval.

Case No. 17,121.

WALTER v. PERINE.

[Cited in Beach v. Woodhull, Case No. 1,154. Nowhere reported; opinion not now accessible.]

Case No. 17,122.

WALTER et al. v. ROSS et al.

[2 Wash. C. C. 283.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

SALE — STOPPAGE IN TRANSITU — INDORSEMENT OF BILL OF LADING — FACTORS — AUTHORITY TO BIND PRINCIPAL.

1. A summary of the law relative to stoppage in transitu.

[Cited in Ruhl v. Corner, 63 Md. 185.]

2. The endorsement and delivery of a bill of lading, or the delivery of the bill without endorsement, if the cargo is, by the terms of it, to be delivered to a particular person, amounts to a transfer of the property, subject to the right of the vendor, if the consideration be not

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

paid, to reclaim the property before it shall get into the actual possession of the vendee.

[Cited in Wiener v. The Rafael Arroya, Case No. 17,621; The Thames, 14 Wall. (81 U. S.) 106.]

3. If a factor sell, bona fide, the goods of his principal for a valuable consideration, by assigning over the bill of lading, the sale is valid against the principal. But such a sale is not valid, unless the bill of lading for the goods has been received by the factor.

[Cited in brief in Davenport Nat. Bank v. Homeyer, 45 Mo. 147. Cited in First Nat. Bank v. Northern R. R., 58 N. H. 204. Cited in brief in Schmertz v. Dwyer, 53 Pa. St. 338.]

4. The principal may follow the money in the hands of the purchaser, and if not paid to the factor, he may recover it.

5. Goods sold, bona fide, while at sea, by assignment of the bill of lading, the right of the principal to stop in transitu ceases.

6. A factor has no property or interest in the goods beyond his commissions, and cannot control the right of the principal over them.

At law.

WASHINGTON, Circuit Justice. This is an action of trover and conversion, in which a verdict has been found for the plaintiffs, subject to the opinion of the court upon the following case. Shoemaker & Traverse, merchants, of Philadelphia, became considerably indebted to the plaintiffs, of Boston, in the year 1806, in a course of commercial dealings which had taken place between them. With a view to discharge this debt, they made various shipments of goods, sometimes to the plaintiffs, and sometimes to other houses, with orders to pay over the proceeds to them; and it was to be remarked, that every consignment to the plaintiffs was accompanied by a bill of lading and invoice. On the 1st of November, 1806, Shoemaker & Traverse wrote to the plaintiffs, and promised to make them a remittance by the middle of that week, but without expressing in what way, whether by bills, money, or goods; but on the 8th of the same month they explain their meaning, and upon receipt of a large sum of money expected from St. Thomas's, promised to remit a draft on one of the Boston banks. On the 19th, they mention their expectation of receiving a considerable sum in specie, and certain cargoes of West India articles, and promise a remittance as soon as they arrive, in which expectation they were probably disappointed, as nothing more was heard of this remittance, and in fact, the correspondence between the parties seemed to have terminated until the 27th of December, when Shoemaker & Traverse announced their failure, and determination to call their creditors together. Before this latter period, Shoemaker & Traverse had purchased and shipped on board the Goram, a general ship, then lying in the port of Philadelphia, sundry parcels of flour, and amongst them, one hundred and fifty barrels, purchased from the defendants, which, however, were never paid for. For this parcel, the captain of the Goram signed three bills of lading, by which, taken in connexion with the invoice, he engaged to deliver the flour to the plaintiffs or their assigns, and they expressed that the same was shipped on account, and at the risk of the shippers. These bills bear date the 3d of December, 1806, one of which was retained by the captain, and the other two by Shoemaker & Traverse. Shoemaker & Traverse, about the 5th of December, finding that they would be compelled to stop, and understanding from their clerk, that this flour had been purchased from the defendants, and not paid for, they directed him to return them the flour, and to do whatever might be necessary to give them possession of it. The clerk, in obedience to these orders, delivered to the defendants the two bills of lading which had been retained, and returned to them the bills of parcels. The captain refusing, however, to give up the flour, the defendants sued out a writ of replevin, and in this way obtained possession of it. It appears, by the evidence of Mr. Shoemaker, that Shoemaker & Traverse had received no orders from the plaintiffs to make this shipment; that, though shipped at their own risk, and upon their own account, it was, nevertheless, their intention, that the nett proceeds should be applied towards the discharge of their debt to the plaintiffs. No bill of lading, invoice, or letter of advice, respecting this shipment, was at any time forwarded by Shoemaker & Traverse to the plaintiffs. But the captain, upon his arrival at Boston, delivered to the plaintiffs the bill of lading, of which he was possessed. The question is, are the plaintiffs entitled to recover?

A number of cases have been read and relied upon, to prove, on the one side, that Shoemaker & Traverse had a right to stop this flour before it got into the possession of the plaintiffs; and on the other side, that no such right existed. It is not easy to understand how the doctrine, in most of those cases, respecting the right of stoppage in transitu, can be made to bear upon this case. For, in the first place, this is not the case of a sale by the shipper to the consignee; and if it were, being made to a creditor, whose debt exceeded the value of the flour, it cannot be said that the consideration had not, or might not be paid. A contract of sale, accompanied by delivery, amounting to a complete transfer of personal property, the question would naturally arise, how far the shipment of a cargo by the vendor to the vendee, constituted such a delivery, as would deprive the former of his equitable right to reclaim the property, until the consideration is paid or secured. This point first occurred in equity, and was decided in the case of Wiseman v. Vandeputt, 2 Vern. 203, and afterwards in Snee v. Prescot, 1 Atk. 245, where the right of the vendor to stop the goods in transitu, in case of the insolvency of the vendee, before the goods had come into his actual pos-

session, was established. The same question soon arose in the courts of law, who adopting the equitable principle laid down in the above cases, gave similar decisions in favour of the vendor. They considered the endorsement and delivery of the bill of lading, or the bill without an endorsement, if the cargo is, by the terms of it, to be delivered to a particular person, as amounting to a transfer of the property to the vendee, subject, nevertheless, to the right of the vendor, if the consideration be not paid, to reclaim the property before it should get into the actual possession of the vendee, until which time the contract, to use the words of Justice Ashurst, in Lickbarrow v. Mason [2 Term R. 63], was considered as ambulatory. All the cases to be met with in the books, are either those of goods shipped by order of the consignee, and upon his account, and at his risk, or without orders, and for account and at the risk of the shipper. The first class of cases is founded upon contracts of sale, such as Fearon v. Bowers, 1 H. Bl. 364, note; Stokes v. La Riviere, cited in 3 Term R. 466; Hunter v. Beal, Id.; Burghall v. Howard, cited in 1 H. Bl. 365; Hodgson v. Loy, 7 Term R. 440; Ellis v. Hunt, 3 Term R. 464; Hunt v. Ward, cited in Id. 467; Mills v. Ball, 2 Bos. & P. 457; Holst v. Pownal, 1 Esp. 242; Northey v. Field, 2 Esp. 613; Slubey v. Heyward, 2 H. Bl. 504; Lickbarrow v. Mason, 2 Term R. 63; Salomons v. Nissen, Id. 674; Fowler v. M'Taggart, cited in 7 Term R. 442; Feise v. Wray, 3 East, 93.

With respect to goods shipped without orders, and upon account and at the risk of the shipper, they are all cases of principal and agent or factor; and the law, in respect to these cases, depends upon circumstances peculiar to each. If the factor sell the goods to a bona fide purchaser, for a valuable consideration, by assigning over the bill of lading, there is no distinction, in principle, between such a case and those just mentioned; for if the bill of lading and the endorsement, where one is necessary, direct the goods to be delivered, generally, third persons are not to know but that the property is in the consignee as vendee; and if a purchase be fairly made, it is nothing less than a sale by the consignor, through the intervention of an agent. But whether even this could be done, before the goods had got into the actual possession of the factor, was made a question in the case of Wright v. Campbell, 4 Burrows, 2046, in which the whole doctrine upon the subject was laid down by Lord Mansfield. The points decided by him were, that no matter how general the endorsement of a bill of lading is, yet, as between the principal and factor, the former retains a lien until delivery, and even until the property is actually sold and turned into money; and that the property may even be followed into the hands of an assignee of the bill of lading, who had notice of the circumstances. But if the goods are, bona fide, sold whilst at sea, by assignment of the bill of lading, the right of the principal to stop in transitu is defeated, because, in such case, the property had been sold by the authority of the real owner. Appleby v. Pollock, cited in Abb. Shipp. 240, of which we can find no full report, was either a case of goods consigned by order, and of course sold, or a consignment to a factor, who, bona fide, assigned away the bill of lading. The case of Dick v. Lumsden, Peake, 189, is that of a consignment to a factor, who fairly assigned the bill of lading for a valuable consideration. In Snee v. Prescot, 1 Atk. 245, Ragueneau, the Italian factor, was considered as entitled to stop the goods in transitu, in respect of the interest which he had in them; having paid out of his own pocket a part of their price, although the goods were in fact taken in part for goods belonging to Tollet, his principal.

If the factor has not sold the goods in the manner just mentioned, it is impossible that any question can ever arise, as between him and his principal, respecting the right of the latter to reclaim the property at any time before they are bona fide sold. The factor has no property or interest in the goods beyond his commissions, and of course cannot controvert the right of his principal. If, indeed, he be a creditor of the shipper, he has a contingent interest in virtue of his right of lien, which the possession would give; but for the perfection of this right, he must acquire and retain an actual possession of the property; a constructive possession will not do. Kinloch v. Craig, 3 Term R. 119, 783. In the cases just mentioned of goods shipped without orders and at the risk and upon the account of the shipper, it will be observed that the consignee, who is strictly a factor, claims the property for the use of the shipper, and, consequently, the latter, as has been stated, may at any time countermand the consignment. But it may happen that the consignee is entitled to the property for the use of a third person; and in that case, though he acts as agent for the shipper, he stands in the character of a trustee for such third person; and if the consideration has been paid, by the cestui que trust, the consignor can no more reclaim the property, than he could if the same had been consigned directly to the person for whose use the property was intended. The consideration may be said to be paid, if the goods are shipped in satisfaction of a pre-existing debt.

How do these principles apply to the present case? What is the evidence of the plaintiff's title? The bill of lading authorized the delivery of the flour in question to the plaintiffs, or to their assigns. But, for whose use? Judging from the import of the bill of lading, taken in connexion with the invoice, the answer is obvious:—for the use of the shippers upon whose account, and at whose risk, the shipment was made. What is this, then, but the naked case of a consignment by a merchant to his factor, to sell, and to apply the proceeds as the shipper should direct? Suppose the flour had not been stopped, but had

arrived safe at Boston—where would have been the evidence of the plaintiffs' right to demand a delivery of it to them? They had no bill of lading, no invoice, not even a letter of advice, to produce as the evidence of their right; and the bills of lading, being negotiable, from the terms of them, might have been passed by the plaintiffs into the hands of a third person. The possession of the bill of lading by the person to whom the cargo is deliverable, whether as original consignee or as endorsee, vests in him a legal right to the property. Caldwell v. Ball, 1 Term R. 205. But no such transfer arises from the bill retained by the master, because such is not the intended operation of it. Abbot says (Shipp. p. 143) that "three bills of lading are taken by the shipper, one of which he retains, and the other two he sends to his agent, or some other person, one by the vessel, and the other by some other conveyance." But he adds, "the master should also take care to have another part, for his own use:" by which it would seem, that his part transfers no right to any one. It is for his own use, and is evidence of his right to collect the freight. Can it be possible, that the master should have it in his power to vest a legal right in the consignee, or to withhold it, by giving or refusing him possession of a paper intended, solely, to serve the purposes of the master himself? Certainly not. The court wishes not to be understood as meaning to say, that a bill of lading, endorsed to a particular person, or which, in the body of it, directs the delivery to him, is essentially necessary to invest him with a right to demand the cargo. The possession of a bill of lading to order, not endorsed; a promise by the shipper to endorse it, or to send a bill of lading; or perhaps even a letter of advice, stating the shipment to be to a particular person, may, as between these parties, and where the consideration is paid, give to the consignee an equitable title, sufficient to repel the right of the consignor to countermand, and even to defeat the legal right of the holder of the bill of lading, with notice of the circumstances. The master would, in such case, certainly act at his peril, in delivering the cargo to such equitable claimant; but if his title, as such, can be made out, it is probable he would incur no risk. Had Shoemaker & Traverse been bound, by any prior agreement with the plaintiffs, to make this shipment on account of their debt; or even if the bill of lading had been forwarded by them to the plaintiffs, with a letter of advice stating the purpose of the consignment; or possibly (as to which, however, no positive opinion is intended to be given) if such a letter, without the bill of lading, had been forwarded; a very different case would have been presented to the view of the court, from that under consideration. If the flour had got into the actual possession of the plaintiffs, they might have retained it, in virtue of their lien, for the balance of their account. But here is no contract—no transfer of property, by means of a bill of lading, or even a letter of advice—no specific appropriation of the proceeds, and no possession by the consignee. No contract, because, though the letters of the 8th and 19th of November speak of remittances generally, yet so far from making an appropriation, or containing a promise to appropriate this particular cargo to the payment of the debt due from Shoemaker & Traverse to the plaintiffs, they obviously refer to a remittance, in drafts, in specie, or in West India goods, which Shoemaker & Traverse expected to receive.

If there be any case in the books, which decides the right to be in the intended consignee, under such circumstances, we have not met with it; and yet it is believed that not one case has escaped our researches. Haille v. Smith, 1 Bos. & P. 565, was the case of a consignment to a factor or trustee, in pursuance of a special agreement that the goods should be sold, and the nett proceeds applied to the indemnification of a third person, for advances to be made, and which were actually made. The legal title was vested in the consignee, subject to a trust in favour of a third person, who had paid a valuable consideration for the property shipped; of course, the right to stop in transitu could not occur. In the case of Hibbert v. Carter, 1 Term R. 745, the bill of lading was endorsed and delivered by a debtor to his creditor; which the court considered as, prima facie, a transfer of the property itself, and as a payment pro tanto. But when it afterwards appeared upon a second trial, that the real intention was only to charge the nett proceeds, the court determined, that the property in the goods did not pass by the endorsement, and that consequently the consignor had an insurable interest. In the case of Kinloch v. Craig, 3 Term R. 119, 783, a bill of lading and an invoice were transmitted, and the object of the consignment was declared to be, to enable the consignee to discharge certain acceptances, made on account of the consignor; but the bill of lading not having been endorsed, no right passed to the holder of it, as owner, and he was considered as standing merely in the condition of a factor. The case of Smith v. Bowles, 2 Esp. 578, and Atkin v. Barwick, 1 Strange, 165, amount to nothing more than this: that if a debtor send specie or goods to his agent, to be delivered over to his creditor, though without the knowledge of the creditor, the agent is not only bound, by accepting the consignment, to perform the trust, but the possession of the agent or trustee, so far vests in him the absolute property clothed with the trust, that it is not afterwards countermandable by the debtor. In these cases, there was a specific appropriation made by the debtor—an express declaration of the trust, to the perfection of which nothing was wanted but the assent of the cestui que trust; but which, according to the case of Brand v. Lisley, Yel. 164, amounted to a

transfer of the right until dissent; and further, there was an actual possession of the property in the trustee.

It has been before stated, that in the case before the court, there was no possession in the plaintiffs, or in any other person for their use; for surely it cannot be contended, that the mere possession of the master of a general ship, was the possession of the plaintiffs. It has also been stated, that in this case there was no appropriation of this flour —no written, and not even a verbal declaration of a trust in favour of the plaintiffs. The fact is certainly so. The private intentions of Shoemaker & Traverse were to apply the nett proceeds of this shipment to the payment of their debt, but it was at all times in their power to change such intention; and, certainly, to permit the rights of third persons to be affected by a subsequent declaration of those intentions, could be supported by no principle of law or equity. Suppose this consignment had been made to some third person, but intended to be for the purpose of satisfying the plaintiffs' demand; could the right of Shoemaker & Traverse to countermand the consignment have been questioned? and in what would the supposed case differ from the real one, except in this, that if, in the latter, the flour had got into the actual possession of the plaintiffs, they might have retained it by force of their lien? Had Shoemaker & Traverse thought it more for their advantage to sell this cargo at Philadelphia or elsewhere, than at Boston; or chose to make an equal distribution of it amongst all their creditors; or to prefer the defendants to the plaintiffs; neither the bill of lading in the possession of the master, nor their former mental determinations, could oppose the exercise of their right to do so; and upon paying the master his freight, and indemnifying him against the consequences of his engagement to deliver the cargo to the plaintiffs, it was not competent to the master to refuse to return the cargo.

The proposition stated by Lord Mansfield, in the case of Alderson v. Temple, 4 Burrows, 2235, is much too general to be safely applied in any case. It would seem, as if he had a view to goods which had been ordered and paid for, which would be the common case of vendor and vendee. He speaks of a cargo consigned, which must mean a consignment in the usual way, or accompanied at least by some written evidence of the intended appropriation. If this was his meaning, the dictum (for it amounts to no more) goes no farther than what is laid down in the case of Atkin v. Barwick, upon which he appears to have founded it. The principal case was that of a note endorsed and sent by a debtor to his creditor, and received by him; and the dispute was between the creditor and the assignees of the debtor. The case of Summeril v. Elder, 1 Bin. 106, was that of goods purchased by a factor with funds in his hands, which were put on board, as the property of his principal, and specifically appropriated, as such, by a letter addressed to his principal, as well as by a bill of lading. They were, in fact, the property of the person whose funds had been employed in the purchase of them, independent of the bill of lading; as to the effect of which, as stated by the court in that case, we give no opinion. Justice Le Blanc, in the case of Coxe v. Harden, 4 East, 220, says, that where goods are sent by A to B, according to order, and are shipped on his account and risk, the goods become the property of B, without any bill of lading, subject only to the right of stoppage in transitu. In the case of Stevenson v. Pemberton, 1 Dall. [1 U. S.] 3, the cargo was shipped by a debtor to a creditor, with orders to sell, and apply the proceeds to the payment of his and other debts. The right of the consignee was established against another creditor of the consignor—but why? Because the goods had not only got into the actual possession of the consignee, but the purpose for which the consignment was made was specified. The case of Wood v. Roach, 2 Dall. [2 U. S.] 180, decides nothing very important to this point, as the question was left very much to the jury. But in that case, it is stated, that the bill of lading was delivered to the consignee; and one question left to the jury was, whether the consignment was for the use of the consignee or consignor; which might depend very much upon evidence that does not appear in the case. The evidence, as to this, was probably against the consignee, as the verdict was in favour of the plaintiff.

Upon the whole, it is the opinion of the court, that judgment ought to be in favour of the defendants. It is not an unpleasant consideration, that the legal ground upon which this decision is believed to be made, is consonant with the justice and equity of the case; for although it was perfectly honest in Shoemaker & Traverse to pay the debt which was due to the plaintiffs, it ought not to have been paid with property, to which, in conscience, they were not entitled.

WALTERS (CALDWELL v.). See Case No. 2,305.

Case No. 17,123.

WALTERS v. The RADIUS.

[Betts, Scr. Bk. 235.]

District Court, S. D. New York. Oct. 25, 1851.

SHIPPING — FASTENING VESSELS IN SLIP — LARGE VESSEL CRUSHING SMALL ONE.

[A large vessel which places herself outside a small one, in a slip, has no right to remain there, or to refuse to let the small one out, when the weather becomes such as to cause danger of crushing the latter, there being plenty of room for a safe berth further along the pier. Nor can the large vessel excuse herself on the ground that, in order to slack her lines to let

the small one out, it would be necessary to run a line across the slip temporarily, which is forbidden by ordinance; for the spirit of the ordinance would not be violated in such an emergency.]

[This was a libel by Joseph Walters against the brig Radius to recover for the loss of the schooner Splendid.]

JUDSON, District Judge. The two vessels in controversy are the schooner Splendid, Augustus Chevalier, master, and the brig Radius, Solomon D. McGraff, master. The damage, which is the subject-matter of the libel, was the total loss of the schooner, on the 22d day of December, 1849, under the following circumstances: Pier 39 East river is 344 feet long; the short pier on the south side, 192 feet long, and the breadth of the slip between them is 211 feet. On the morning of the 22d December, 1849, the brig Radius and two other vessels lay at the inner end of the slip, and the schooner Splendid in the same slip, within almost 50 feet of the foot of the pier. The schooner measured 23 tons, and the brig 200 tons and over. The length of the schooner was 34 feet, and the length of the brig 125 feet. Both vessels were made fast to the spiles in the usual way; and at 9 o'clock in the morning the Radius let go her fastenings, and, with a view of going out by the aid of a steam tow, she hauled down the slip to the position of the schooner, and made fast directly opposite the schooner, covering the same between herself and the pier, with the lines of the brig running to the spiles fore and aft the schooner. The master of the schooner then inquired how long the brig expected to lay in that position, when Capt. McGraff replied, "But a short time only,—waiting for a steamer to take him in tow." Thus far all is right, and for that purpose the brig had a perfect right to place herself conveniently for the approach of the steamer. Towards noon the steamer came, but the tide did not serve, and the weather began to be lowery; and at 12 o'clock Capt. McGraff concluded not to leave the slip until Monday morning, the 24th, and then he left the Radius in the care of a ship keeper, and went, as he says, to countermand his order to the steamer until Monday, leaving the Radius made fast, as at first, without giving the schooner any notice that his position was to remain unchanged until Monday. Here the case assumes an important aspect; and from this time the acts of the parties become decisive of the controversy. The master of the schooner being absent, the charge of her remained with his mate. In the afternoon of Saturday, while the storm was increasing, Captain McGraff returned to the vessel, when the mate of the schooner requested him to slack his bow line and permit the schooner to pass out. This request is sworn to by the schooner's mate; and Capt. McGraff also swears to the same fact, as an admission of its truth, but he adds, that he could not let the schooner out with safety to the brig. The case may be narrowed down to this single point; for, up to this period, no damage had occurred to the schooner. We are now to inquire into the cause of the damage; where the blame is to rest, and how far the justification set up by the respondent can avail him for having destroyed the schooner. Nothing short of justification can answer the issue. To use the impressive language of one of the witnesses, the schooner was smashed by the brig, and she went down. If the brig had not taken her new position, if she had occupied it only for a temporary purpose, if she had let the schooner out as requested, then the loss would not have occurred. There is no ground or pretence that the schooner was in the wrong, or that she could escape from the fastenings fore and aft, placed there by the brig, without the consent of the brig. The brig is the active instrument of the destruction of the schooner, and it is not too much to say that the respondent must show a legal justification.

The burden of proof now rests with the brig. Here we have the justification:

1. The respondent claims that the brig could not have been hauled out or in at all, because of the gale. The proof on this point entirely fails; and there is neither question nor doubt but what the brig might, with safety to herself, at all times between twelve and four o'clock, have been moved from her new position, to as safe a position for herself, ahead of the schooner. There was room enough in the slip; and, as the storm and danger approached, the master was legally bound to do so, and in the omission of that obvious duty he was guilty of gross negligence.

2. The mate in charge of the schooner, about 4 o'clock, made a request that the captain of the brig would slack his bow line, and let the schooner out. Capt. McGraff admits this request to have been made to him when he was on board the brig, about 4 o'clock; that he refused to do so; and assigns as the cause of his refusal that this maneuver would endanger the brig. This act of the master of the brig places him in a still greater wrong. The brig had a stern line made fast to the pier aft the schooner, which held her, while her bow line was slack, but not enough so to let the schooner haul ahead. All that was required to relieve and save the schooner was to give that line slack enough to let the schooner pass over it, and then both lines of the brig might have been taut, and the brig would have been more safe than before. I see neither excuse nor apology for this neglect of plain and positive duty. But the respondent claims this could not be done, for a special reason. To accomplish that, he must have run a line from the bow of the brig, across the slip to the opposite pier, and made fast there, which could not be done, for the additional reason that a city ordinance prohibited such an act, under a penalty of ten dollars. Rev. Ord. p. 342, § 4. "No person shall place any cable, rope, chain or line across the entrance of any slip, under the penalty of ten dollars." It is urged here,

that this ordinance is positive in its character, and the master would have subjected himself to the penalty had this been done, even to relieve and save the schooner. This construction of the ordinance is too technical for the case in question. In construing all laws, we are to consider the object, the mischief, and the remedy. This ordinance was designed to prevent obstructions to the free passage of vessels into slips. There was, at the time, no approaching vessel to be obstructed; and, moreover, the schooner was in imminent danger of destruction, and that imperious necessity would have been justified by the spirit of the ordinance. The case cited by counsel does not sustain the construction urged.

3. We have the respondent's own view of the case, in the defence assumed. It is simply this: The master of the brig had a lawful right to leave his original position in the slip, and make fast on the outside of the small schooner, as he did in this case, and possessing that right, and having exercised it lawfully, the law justifies his remaining there, under all circumstances; that the maritime law will not oblige him to move his brig, at the expense of a single dollar, or even to the hazard of that sum. To sustain this position, witnesses were called in to show that large vessels were frequently made fast outside of small craft, and that it was lawful and customary to do so. Whatever moral duty and obligation might indicate, still there was no legal obligation which would compel its performance. The court has been called upon to apply these principles to this case, and sanction their application, by a decree against the libel. The court is not aware of any such rulings in the admiralty practice. The claim is much too broad. Rather would we say that the law of navigation carries with it a more reasonable and equitable spirit. Rather would we say that a master of a ship should understand that, in case of imminent danger to another ship, it is his duty to do all in his power to avoid the injury, especially when his own acts constitute the only danger in the case. The respondent has not only neglected plain duty, but has illegally and wrongfully been the means of the destruction of the schooner Splendid, without fault of the other party. The decree will be for the libellant, with reference to ascertain the damages.

Case No. 17,124.

The WALTER W. PHARO.

[1 Lowell, 437.] [1]

District Court, D. Massachusetts. March, 1870.

COLLISION—MEASURE OF DAMAGES—COSTS—OFFERS OF SETTLEMENT—PLEADING.

1. The owner of a yacht kept for his own use may recover, in a collision cause, as damages for the loss of her use while repairing, the price at which he could readily have let her for pleasure parties.

[Cited in The Lagonda, 44 Fed. 368.]

2. When each party to a collision cause had made an offer of a settlement, costs were decreed to the libellant though he recovered much less than he had demanded, which was more than he was offered.

3. It seems, that if a tender or offer of payment is relied on to bar costs in a collision cause, it should be set up in the pleadings, and should be a continuing offer.

[Cited in The Rossend Castle, 30 Fed. 464.]

In admiralty.

C. A. Welch, for libellant.

J. W. Hudson, for claimants.

LOWELL, District Judge. The only question of law in this case is whether damages should be assessed for the loss of the use of this little yacht while she was undergoing repairs? The general rule in such cases is that if the owner has probably lost a profitable employment for his vessel he should be paid for it. I have applied this in various ways, as where the detention was only for a certain number of days beyond what it necessarily would have been in discharging cargo, and the repairs might have been going on during the discharge, I allowed for the days beyond those needed for discharging. If a coasting vessel were repaired during the season in which she is usually laid up nothing would be due, and so on. Here the yacht was not kept for profit and was never let to hire. Still I am of opinion with the libellant that he may have compensation for the loss of her use at the market rate of such craft, because it is no concern of the respondents what use the libellant chooses to put his vessel to. He had a right to change his mind at any moment. It is different from the case of a vessel kept for hire whom no one wishes to hire. Damages must be assessed by market value when that is possible. The evidence tends to show that such boats would let for about eight dollars a day, and I suppose I may assume that this would be only on week days and when the weather is good. How many such days there were during the twenty days of the repairs I cannot tell. I allow eighty dollars for this damage. The only other item that was seriously challenged is the owner's charge for services in overseeing or looking after the work. Considering the plain and simple character of the repairs, and their small cost, I should have doubted about giving any thing here, and I understood this charge to be withdrawn at the argument.

The question of costs was raised, and it seems that the libellant demanded the full amount of the bills of repairs, although he now concedes that the new mainsail and some work in the cabin are not properly chargeable to the claimants. On the other hand, the latter offered two hundred dollars, which is less than they now concede to be due. The libellant's explanation, which is not met by any evidence on the other side, is that he told the captain or the agent

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

of the schooner that his offer was made as a compromise, that the bill contained items which he could not charge to the collision, but that it omitted others, and he thought it about what he ought to receive. In that state of the case, I cannot see that the claimants were misled or induced to defend the suit by any fault of the other party.

One word in regard to the offer of two hundred dollars. It is not our practice to insist on a formal tender when an offer is made by a person of abundant means and is rejected on its merits; but it is the practice of all courts, and is founded in justice, to insist that the defendant shall make his offer a continuing one, so that the other party may avail of it at any time. It once happened in a salvage case that I awarded less than the owners of the vessel had offered, and they then came in and asked leave to show this fact in bar of costs; but I decided that they could not lie by and take their chance of how the award would go, without pleading their offer and stating their readiness to abide by it, and then object to the payment of costs. I mention this because that decision has not been reported, and it seems to be thought that in admiralty any offer will always avail the parties. In this case the respondents mentioned the offer in their answer, but in the same answer denied their liability. The point is not important now because the damages exceed $200. Decree for libellant for the $337.70 and costs.

Case No. 17,125.

The WALTHAM.

[9 Adm. Rec. 75.]

District Court, S. D. Florida. Dec. 11, 1865.

SALVAGE.

[This was a libel for salvage by William H. Bethel and others against the cargo and materials of the bark Waltham.]

Homer G. Plautz, for libellants.
W. C. Maloney, for respondent.

BOYNTON, District Judge. This cause having been fully heard, and the court being duly advised in the premises, and the saved property having been appraised by appraisers appointed by the court at the sum of $204,888.82, except a portion of the materials and stores of said vessel which has been sold on the application of the master and claimant for the sum, as appears by the marshal's account sales, of $477.98, and no objection having been made against said appraisement or sale, it is now ordered, adjudged, and decreed that the said sale be confirmed, and that after deducting the costs, charges, and expenses hereafter to be taxed in this proceeding (the matter of distribution being reserved for further decision), the libellants and petitioners have and recover for their services in the premises 9 per cent. of the amount of said sale and appraisement, and that upon payment into the registry of the court of the said costs, charges, expenses and salvage, the said saved property be restored and delivered to the claimant, for the benefit of the true owner or owners thereof.

And on the 27th day of said month a further decree was entered:

In this case it is ordered, adjudged, and decreed, that on one small lot of brass, and one small lot of damaged hides, brought down since the decree, and sold, as appears by the marshal's account sales, the brass for $8.94, and the hides for $34.10, the salvors receive 70 per cent. of the proceeds of sale; and that on one lot of copper brought down since the first appraisement, and appraised at the sum of $279.50, the salvors receive 25 per cent. of the appraised value.

Case No. 17,126.

In re WALTHER et al.

[14 N. B. R. 273.] [1]

District Court, E. D. Michigan. Feb. 25, 1876.

DEPOSITIONS—ALTERATIONS—VERIFICATION.

A deposition which has been altered to correct an error must be resworn to before it can be filed. A deponent cannot confer upon another the power to alter a sworn paper.

The register certified that on the 16th day of December, 1875, a deposition, entitled "In the matter of Alphonse Walther, a Bankrupt," was offered to prove a debt alleged to be owing by Alphonse Walther, one of the above-named bankrupts, to William Resor & Co., of Cincinnati, Ohio. There being no such cause pending before him as that in which the deposition offered was entitled, he declined to accept it as satisfactory. Shortly after the same paper was again offered, the entitling having been altered by inserting the name of Pius Walther and making a corresponding correction in the body of the deposition. There being no evidence that the deposition had been resworn to since its alteration, he declined again to accept it. On the 20th day of January last it was again presented, accompanied by the statement that it had been returned to the attorneys of the claimant, Messrs. Noyes and Lloyd, of Cincinnati, who declined to have it resworn to, conceding that they had made the alteration in the proof, claiming authority from their client to do so, that it was immaterial in its character, and insisting that the question should be certified into court for determination.

Opinion of HOVEY K. CLARKE, Register in Bankruptcy:

That an affidavit to be used in a cause pend-

[1] [Reprinted by permission.]

ing in any court must be correctly entitled in the court, I have supposed was a well-settled and indisputable principle of practice. The reason is conspicuously stated in Whipple v. Williams, 1 Mich. 115: "Affidavits must be correctly entitled in the cause in which they are to be used; otherwise an indictment for perjury would not lie upon them if false." The occasion of the error in the case cited was, that when the suit was commenced there were two plaintiffs. The cause had been severed, and the court says that "since the severance there is no such cause in this court as that in which the affidavits are entitled." If it were possible to suppose that proofs of debt in bankruptcy did not come within this general principle applicable to affidavits, general order 34, adopted by the supreme court, at the December term, 1871, settles the question. It provides that "depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause." If the reason assigned by the court in Whipple v. Williams, that unless an affidavit is correctly entitled, an indictment for perjury would not lie upon it if false (and there are many other cases to the same effect), then, of course, the title of the affidavit is as material as any part of it. When the oath was administered to the paper offered to me as proof of the debt due Wm. Resor & Co., it was not such a paper as, if false, could support a prosecution for perjury. It was not perjury to swear to it. If perjury could be assigned upon it, if false, in the form as last presented to me, it is because of the alterations which have been made in it by Messrs. Noyes & Lloyd.

I am specially requested to call the attention of the court to the fact that these alterations are claimed to have been made by authority, which, in other words, claims that, without the administering of an oath, Resor, the deponent, could authorize his attorney to convert a paper signed by him, and then lacking the essential qualities of a judicial deposition, into a sworn paper having all such qualities. This is, in fact, enabling the attorney to swear what an alleged deponent is averred to say is true, and its effect is claimed to be, to charge the alleged deponent with the pains and penalties of perjury if the averments be false. I am not aware that such a claim has ever been made anywhere before, and if admissible anywhere, it would not be in proofs of debt in bankruptcy, because the statute (section 5078) requires that all such proofs must be made by the claimant in person, unless he is absent from the United States, or prevented by good cause from testifying.

All of which is respectfully certified.

Approved. H. H. EMMONS, United States Circuit Judge, Sitting in the Absence of the District Judge.

Case No. 17,127.

Ex parte WALTON.

[1 Cranch, C. C. 186.] [1]

Circuit Court, District of Columbia. Nov. Term, 1804.

NATURALIZATION.

Five years continued residence was necessary under the naturalization law of 1802 [2 Stat. 153].

Application to be naturalized. Affidavit that "he has resided within the United States upwards of six years, that during that period he was absent a short time upon business, but left his family in the United States. That he hath resided for more than one year last past in Alexandria, in the District of Columbia, and that during all the aforesaid time he has behaved as a man of a good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. That the said Walton removed to the United States, as this deponent understood, and doth verily believe, with the intention of making the said States his place of permanent residence, and that he hath not relinquished that intention."

The application was objected to, and rejected by THE COURT, because the residence did not appear to be a continued residence, and the term of absence was indefinite, and THE COURT had also seen another affidavit, by the same deponent, stating that Walton last returned to the United States on the 20th day of May, 1804, which was inconsistent with the present affidavit.

Case No. 17,128.

In re WALTON et al.

[Deady, 442.] [2]

District Court, D. Oregon. Aug. 8, 1868.

BANKRUPTCY—PROOF OF CLAIMS—PRACTICE—OBJECTIONS.

1. Where a creditor obtains a confession of judgment from an insolvent debtor, and it appears probable that such confession was taken with knowledge of the debtor's insolvency, the proof of such creditor's claim will be postponed until after the choice of an assignee.

[Cited in Re Leland, Case No. 8,230.]

2. Objection to proof of a claim must be made by written allegations, specifying with reasonable certainty the grounds of such objection.

In bankruptcy.

J. M. Whalley and M. W. Fechheimer, for petitioning creditors.

Erasmus D. Shattuck, for A. & L. and H. F.

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

[2] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

DEADY, District Judge. On July 2, 1868, a petition was filed in this court, in bankruptcy, against J. J. and M. Walton, merchants in Eugene. On July 11, they were without opposition, duly declared bankrupts. On August 3, Henry Failing and Allen & Lewis by C. H. Lewis, appeared before the register and offered to prove claims against the estate of the bankrupts—that of A. & L.'s being $3,982.64, and H. F.'s, $2,002.33. Objection being made by the petitioning creditors to the proof of these claims until an assignee had been chosen, the register, under section 4 of the act [of 1867 (14 Stat. 519)], has adjourned the matter into court for decision. Accompanying the register's statement of the matter, is a copy of the schedules and warrant, and the depositions of C. H. Lewis and Henry Failing, respectively, in proof of the claims above mentioned. From these, it appears, that A. & L. and H. F., are wholesale merchants in Portland, and that the Waltons being indebted to them on account, for goods, etc., sold and delivered, they severally induced the bankrupts to confess judgments in their favor for the above mentioned sums. That said judgments were confessed, without action, on Saturday, June 27, 1868, and that on the Monday following, A. & L. and H. F., acting through the same attorney, sued out executions and levied upon the property of the bankrupts, including the stock of goods on hand, supposed to be worth about $4,000. At the date of the judgments the bankrupts were insolvent—their indebtedness being largely in excess of the value of their assets. So far as the bankrupts are concerned, the confessing of these judgments was an act of bankruptcy. It must be inferred from a comparison between their indebtedness and assets, as shown by their schedules, that they were then insolvent. Section 39 of the act makes a confession of judgment by an insolvent or bankrupt or given in contemplation of bankruptcy or insolvency an act of bankruptcy. To be in a state of insolvency or to contemplate insolvency, is simply for the debtor to be or contemplate being unable to pay his debts as they become payable. A person may be insolvent without having committed an act of bankruptcy—an act for which he may be declared a bankrupt by proceedings in invitum. Buckingham v. McLean, 13 How. [54 U. S.] 167; In re Black [Case No. 1,457].

After the decree in bankruptcy in this case had passed, A. & L. and H. F., through their attorney, directed the sheriff, holding the executions against the bankrupts, to turn over the personal property levied on to the messenger, and return the executions to the clerk's office, which was done. By the law of this state, these judgments were a lien upon the real property of the bankrupts, in the schedule mentioned, in favor of the judgment creditors and they also acquired a lien upon the personal property, by virtue of the levy of the execution thereon. By means of these proceedings these creditors received a preference over the other creditors of the bankrupts. Until the contrary is shown, it must be presumed that this preference was intended to be given by the bankrupts, for the reason that it was the natural and probable consequence of their act—the confessing of judgment to A. & L. and H. F., while in a state of insolvency. If the creditors had no reason to believe that the bankrupts were insolvent or contemplated insolvency, when they took these judgments and obtained this preference, then their judgments are good, but under section 20 of the act they can only be admitted to prove the balance of their debts after deducting the value of their liens. This involves an arrangement with the assignee, and presupposes the choosing of the assignee before they are allowed to prove their debts. But if, on the other hand, these creditors had reason to believe that the bankrupts were insolvent or contemplated bankruptcy or insolvency, when they took these judgments and obtained this preference, then they are not entitled to vote for an assignee. "No person who has received any preference contrary to the provisions of this act, shall vote for or be eligible as assignee." Bankrupt Act, § 19. And under section 23, they would not be allowed to prove their debts until they surrendered to the assignee all property, etc., or advantage received by them under such preference.

The last clause of section 39 authorizes the assignee to recover back—obtain by judicial proceedings—any property transferred by a bankrupt contrary to the act, if the person receiving the property had "reasonable cause to believe that a fraud on the act was intended or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy." Taking this section alone, and a creditor who has received a preference contrary to the act, cannot be allowed to prove his debt at all—in other words he is precluded from recovering any part of the assets of the bankrupt. But I am inclined to the opinion, that section 23 must be considered with section 39, and that a creditor who has received a preference contrary to this act, may surrender such preference, voluntarily to the assignee, and be allowed to prove his debt and share in the estate. See In re Walton [Case No. 17,129]. But if such creditor does not voluntarily surrender the property or benefits obtained by such preference, and the assignee is driven to "recover back" the same by judicial proceedings, then I think he is debarred from proving his debt or sharing in the estate. Under section 23, if the judge entertains doubts of the validity of the claim, or the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may

postpone the proof of the claim until the assignee is chosen.

I have no doubt as to the validity of these claims, that is, I am satisfied that they are genuine—not fictitious—and justly due by the bankrupts to the creditors. But the right of the creditors to prove them is not so plain a question. If the creditors received this preference not contrary to the provisions of the act, then these proceedings as to them were valid, and as we have seen they cannot prove their debt, but only such part of it as the assignee may ascertain is due, after deducting the value of the property held under the lien of their judgments. As this arrangement cannot be made until after the choice of an assignee, in the nature of things these creditors must be precluded from voting for an assignee. But if they are now allowed to prove their debts, then under section 13, they would be qualified to vote for assignee. But if this preference was received contrary to the provisions of the act, then under the most favorable view of the law for these creditors, they could not be allowed to participate in the election of the assignee, and therefore should not be allowed to prove their debts until an assignee was chosen, and had an opportunity to investigate the matter and resist the application, if justice to the other creditors requires it. I do not now propose to decide absolutely the question whether these creditors had reason to believe these bankrupts were insolvent when they took these judgments. A judgment by confession is an effectual means of transferring property from a debtor to a creditor, and I do not think it can be considered as an act done in the ordinary course of the debtor's business. It is therefore prima facie fraudulent—that is, contrary to the provisions of the act, both as to the debtor and the creditor receiving it. The burden of proof is upon the creditor to overcome this presumption. In accordance with these conclusions I will direct the following order to be certified to the register:

Order: Upon reading and consideration of the statement and accompanying papers reported to me by the register, touching the claims of Allen & Lewis and Henry Failing, against the estate of the bankrupts—it is ordered, that the proof of such claims be postponed until an assignee of the estate has been chosen or appointed; and that if the proof of such claims is thereafter objected to, it must be done by a written allegation, specifying with reasonable certainty and brevity, the grounds of such objection; and thereupon the register, after notice to the assignee, must proceed to take the evidence for and against such objection, and report the same to the court, with his findings of facts and law thereon.

[For a motion to expunge the claim of E. P. Coleman from the list of claims against the estate of the bankrupts, see Case No. 17,129. See, also, Id. 17,130.]

Case No. 17,129.

In re WALTON et al.

[Deady, 510.] [1]

District Court, D. Oregon. Dec. 26, 1868.

BANKRUPTCY—PROOF OF CLAIMS—INDIVIDUAL AND PARTNERSHIP DEBTS—SUFFICIENCY OF PROOFS.

1. Proof of a debt against a partnership should not be joined with proof of a debt against an individual partner.

2. Proof of a debt should show with reasonable certainty whether it was contracted by a partnership or the individual partners.

3. A claim not duly proved must be rejected; and a claim is not duly proved unless it appears from the statement of the deponent thereto, that a debt exists which the creditor has a present right to have paid out of the estate of the bankrupt.

[In bankruptcy. For a prior proceeding in this suit, see Case No. 17,128.]

M. W. Fechheimer, for the motion.

DEADY, District Judge. Motion by the assignee to expunge the claim of E. P. Coleman from the list of claims proved against the estate of said bankrupts. The proof of the claims in question was made by the creditor in person, July 28, 1868. It substantially states: That at and before the filing of the petition herein, J. J. and C. W. Walton, were and still are indebted to the deponent in the sum of $159—balance due on a promissory note, given to deponent about March 1, 1868, for money loaned said bankrupts; also, that at and before the filing of said petition, C. W. Walton was and still is indebted to deponent in the sum of $178, on account for wines and liquors sold said C. W. Walton in 1867 and 1868. Then follows the proper allegation as to whether the deponent had received satisfaction or security for such sums or any part thereof. In conclusion the proof states, as required by the act [of 1867 (14 Stat. 527)],—section 22,—that said claims or either of them were not procured for the purpose of influencing the proceedings under the bankrupt act, and that no bargain, etc., has been made, etc., by deponent "to sell, transfer, or dispose of said claim or any part thereof against said bankrupt," etc. The grounds of the motion are substantially these: (1) That proof is informal; (2) it does not appear from the proof whether the claim for borrowed money is intended to be proved against the individual estate of the bankrupts or against the estate of the partnership, consisting of J. J. and C. W. Walton, and known as J. J. Walton & Son; and (3) it does not appear from the proof whether the claim for wines and liquors is intended to be proved against the partnership estate or the individual estate of C. W. Walton.

The first objection to the proof is well taken.

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

Here are two distinct debts against different estates included in one proof or deposition. When parties are adjudged bankrupts, the result is or may be that several distinct estates are to be administered in that proceeding. First, there are the estate and debts of the company or partnership, and then the separate estate and debts of each individual included in the partnership. Proof of a debt against either of these estates ought not to include or be joined with the proof of a debt against either of the others. The act (section 36) provides that all the creditors of the company and the separate creditors of each partner, shall be allowed to prove their respective debts, and that a separate account shall be kept of the partnership property "and of the separate estate of each member thereof." The reasonable inference from these and similar provisions contained in section 36 is, that these partnership and individual estates are to be administered separately, and therefore the proof of a debt or debts against either should not be joined with the like proof against another. Besides, there is nothing elsewhere in the act or in the general orders or forms that countenances the contrary practice.

By the second and third objections the question is raised whether the proof is sufficiently certain or not. The claim for money loaned is not proved against the partnership of J. J. Walton and son, but against the individuals who constitute that partnership. The consideration of the debt is stated to be money loaned J. J. and C. W. Walton. The probable inference is that it was loaned to them as individuals, and that their individual estates are liable for it, but not the partnership estate—at least until the partnership debts are first satisfied. But another inference may be drawn from the statement in the proof, and from other circumstances it is highly probable that the creditor intended to prove this debt against the partnership estate. In this respect the proof is uncertain. If intended to establish a debt against the partnership estate, it should state that the firm or company, describing it by its firm name and the individuals who composed it—was indebted to the creditor, and how and for what amount. As to the claim for wines and liquors, it seems to me to be stated with sufficient certainty in this particular. It is stated that C. W. Walton is indebted to the creditor for articles sold him. This is plainly the proof of a debt against the separate estate of C. W. Walton only. But the proof does not state that the deponent had not bargained to sell either of the claims stated, but only "said claim against said bankrupt." This allegation, whatever was intended by the deponent, only includes one claim, and that the one against a single person. The only claim stated which answers to this description is the one against C. W. Walton. The other claim is stated to be against the bankrupts—both father and son. Then as to the claim for money loaned to J. J. and C. W. Walton there is in the proof, no allegation that deponent had not bargained to sell or dispose of it. By the act (section 22), the court is required "to reject all claims not duly proved." A claim may be said to be duly proved when the statements of the deponent, if true, establish prima facie the existence of the debt, and the present right of the creditor to payment of the same out of the estate of the bankrupt. But a claim is not duly proven when any allegation which the act requires to be made in the proof concerning it is omitted—as that the creditor has not bargained to sell or dispose of it; or where the proof is not made in conformity with the forms prescribed and the rules and practice of the court. The motion is allowed; let the proof be expunged.

[For a subsequent proceeding see Case No. 17,130.]

Case No. 17,130.

In re WALTON et al.

[Deady, 598;[1] 4 N. B. R. 466 (Quarto, 154); 2 Am. Law T. 121; 1 Am. Law T. Rep. Bankr. 162.]

District Court, D. Oregon. July 12, 1869.[2]

BANKRUPTCY—PROVABLE DEBTS—UNLAWFUL PREFERENCES—INTENT.

1. Where a creditor takes a preference from an insolvent debtor, with reason to believe that such debtor was then insolvent, and intended to evade the provisions of the bankrupt act [of 1867 (14 Stat. 517)] by preventing his property from being distributed thereunder among his creditors, such creditor is barred from proving his debt, and may be compelled to restore property so taken, to the assignee.

[Cited in Re Scott, Case No. 12,518; Re Leland, Id. 8,230.]

2. The bankrupt act does not trust the legal rights of one portion of the creditors of an insolvent to the judgment or good intentions of another portion, and therefore it makes no difference with what ultimate intention a creditor takes a preference contrary to the act, he thereby forfeits his right to prove his debt.

[Cited in Re Scott, Case No. 12,518.]

[In bankruptcy. For prior proceedings, see Cases Nos. 17,128 and 17,129.]

Objections by the assignee, Joseph Bachman, to the proof of debts by Allen & Lewis and Henry Failing. The objections being similar and depending upon the same facts they were heard together.

Mr. Register HILL, to whom the matter was referred, found the following conclusions of fact and law:

1. On the 27 of June, 1868, J. J. & C. W. Walton, being then partners under the name of J. J. Walton & Son, were indebted to these creditors as follows: To Allen & Lewis, $3,982.64; to Failing, $2,002.33; which indebtedness was for goods sold to said J. J. Walton & Son. 2. That at the same date, said J. J. Walton &

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

[2] [Affirmed by the circuit court. Case unreported.]

Son were largely indebted to divers other persons, most of them residing at Portland, Oregon, for goods sold them. 3. That at that time said J. J. Walton & Son were insolvent. 4. That on said 27 day of June, these creditors, Allen & Lewis and Failing, by their agent and attorney, E. D. Shattuck, at Eugene City, Oregon (the place of business of said Walton & Son), procured the said firm of J. J. Walton & Son to confess judgments in their favor for the amounts due them respectively, in the circuit court of the state of Oregon for the county of Lane. 5. That on the 29 day of June, 1869, those creditors Allen & Lewis and Failing, caused executions to be issued upon the judgments so confessed, and directed the sheriff to seize the property of said J. J. Walton & Son upon those executions, and to act under the directions of J. B. Underwood as to further proceedings, and at the same time sent instructions by mail from Portland to Underwood at Eugene City, to the effect that it was not their intention to get any preference in the final distribution of the moneys to be made by the sale of the property, but that it was their intention to avoid the expense of a division of the moneys under the bankrupt law; and further instructing him to have the sheriff turn over the property to any agent whom the creditors might agree upon to sell the same and distribute the money, or to the marshal in case proceedings should be instituted under the bankrupt law, and the marshal as messenger should be directed by the court of bankruptcy to seize the property. 6. That at the time of taking of said judgment by confession, and at the time of causing said executions to be issued, and at the time the property was seized upon said executions, these creditors, Allen & Lewis and Failing, knew that J. J. Walton & Son were insolvent; that is, could not pay all their debts in full, and their debts could not be paid in full upon sale of all their property under execution. 7. That on the 2d day of July, 1868, proceedings were instituted by order of the creditors of said Walton & Son, to have them adjudged bankrupts, and that on the 28th day of July, 1868, they were adjudged bankrupts by this court upon the proceedings so instituted. 8. That these creditors, Allen & Lewis and Failing, made no resistance to the marshal seizing the property levied upon under their said execution; and that with their offer to prove their debts they also offer to surrender any advantage or preference which they may have obtained by their said proceedings against said J. J. Walton & Son. And, upon these findings of fact, I find as a conclusion of law, that these creditors, Allen & Lewis and Failing, should not be allowed to prove their debts, but that their claims should be rejected, and they be adjudged to pay the costs of this proceeding.

In support of his conclusions, the register filed the following opinion, which, being adopted by the court, is here inserted:

On the 27th day of June, 1868, Walton & Son, merchants, doing business in copartnership at Eugene City, Oregon, being indebted to Allen & Lewis, merchants of Portland, in the sum of $3,982.33, and to Henry Failing, merchant of Portland, in the sum of $2,002.64, confessed judgments in favor of these creditors respectively, for the amounts of their respective demands. At that time Walton & Son were largely indebted to others, amounting in all to over $10,000, and were insolvent. These judgments were confessed after some pressure from the creditors, Allen & Lewis and Failing. That Walton & Son were at that time insolvent is not questioned; and I cannot but conclude that these creditors knew of such insolvency. They offer to prove their claims against the estate; and the depositions they offer for such proof go beyond the forms prescribed by the supreme court, and contain a large amount of matter in regard to taking the judgments, which I suppose is intended to exculpate these creditors from any charge of violating the bankrupt law in taking the confessions of judgments; and among other things, these creditors say in their depositions for proof of debt, that they supposed, when they took the confessions, that if the property of Walton & Son (which consisted of a small stock of goods for retail business) could be disposed of at its full value and if the debts due Walton & Son could all be collected, Walton & Son would be able to pay their debts in full. To the same effect is the testimony of Mr. Failing and Mr. Lewis, when on the stand as witnesses. Neither of them pretends to have supposed that Walton & Son were, or would be, able to pay in full, except upon all the contingencies stated above. They were unable to pay on demand, and their property was insufficient to pay in full upon forced sale. This these creditors knew; and this is insolvency. In re Randall [Case No. 11,551] decided by the judge of this court; Hastings v. Knox, 1 Am. Law Times, 73; In re Black [Case No. 1,457].

But these creditors endeavor to rebut the presumption of fraud which the law attaches to this transaction, by stating their own intentions at the time—that they intended only to preserve the assets of Walton & Son from being wasted through the dissipation of young Walton, and would have made a distribution of the proceeds of the property pro rata among all the creditors. I think this evidence incompetent. It would be an alarming proposition to lay down as a rule for the guidance of courts of justice, that a man may, in express violation of the statute, seize and appropriate wholly to himself that of which the larger portion belongs to others, and then, when overtaken by the law, escape its penalties by saying he never intended any fraud; he did not intend to use the advantage which he had thus gained, to another's injury. Some persons might—as I suppose these creditors may have intended to do—make a just and equitable division of what they had obtained; but these would be the exceptions, and the rule would be that the rapacious and unconscientious creditors of every insolvent debtor would seize

all his assets regardless of the rights of other creditors; and then, if prevented by the law from depriving the other creditors of any part of the estate, would pass out at this convenient and wide door of escape, carrying with them all the rights of innocent men, notwithstanding the penalties denounced against their acts by the statute. The law does not leave the rights of one man to the generosity of another.

These creditors further seek to show that they had conversations with other creditors almost immediately after taking the confessed judgments, and before issuing execution, in which their entire good faith, and their intention to make a just distribution, were expressed to such other creditors. This evidence is objected to on the part of the assignee. It is not pretended on the part of A. & L. and F. that there was any agreement between all the creditors, that the estate of Walton & Son should be wound up in the way suggested; and unless these conversations amounted to a mutual agreement of that kind, by which all parties interested in the estate might be estopped to object to it afterwards, I cannot see how the conversations affect the case. They are therefore excluded.

The creditors, A. & L. and F., on the 29th day of June, two days after the judgments were confessed, caused executions to be issued thereon, and the property of Walton & Son to be seized. On the same day they sent written instructions to J. B. Underwood, an attorney, at Eugene City, by mail from Portland, directing him to have the sheriff hold the property under the executions, subject to an arrangement they wished to make to have it disposed of for the benefit of all the creditors, and to have the property turned over to such agent as the creditors might agree upon, to avoid the expense of having it distributed under the bankrupt law; and, further, to have it delivered up to the messenger, if proceedings were instituted in the court of bankruptcy. This was after these creditors were informed that the other Portland creditors had sent an agent and attorney to Eugene City to see about their claims against Walton & Son. Indeed, the prime object in taking these confessions of judgment and all the proceedings under them, seems, upon the construction most favorable to these creditors, to have been to avoid a distribution of the assets of Walton & Son under the bankrupt law. This appears from the testimony of Mr. Shattuck, the agent and the attorney who procured the judgments, as well as from the instructions to Underwood. Such a transaction, "assignment, transfer, conveyance," etc., "or warrant to confess judgment," made to defeat or hinder the operation of the bankrupt law, and within six months before the filing of a petition by a creditor for adjudication of bankruptcy against the debtor, is a fraud upon the law, and an act of bankruptcy (section 39); and if made to a person who knows or has reasonable cause to believe the debtor is insolvent, or that a fraud upon the act is intended, it brings upon such person the penalties and disabilities of a participant in the fraud (section 39); namely, the liability to an action for the property so transferred, assigned or conveyed, or its value, and the exclusion from any participation in the dividends that may be declared to the creditors of the estate. The direction to Underwood to have the sheriff deliver the property of Walton & Son to the messenger, in case proceedings in bankruptcy should be instituted, was only a direction to do without resistance that which he could have been compelled to do if he had refused; and can have no influence in the case, unless it be to disclose the reason for the preceding instructions; the desire to escape the imputation of fraud which the law puts upon their acts. Walton & Son were adjudged bankrupts on the 28th day of July, 1868, upon the petition of one of their creditors, these judgments and executions being the acts upon which the adjudication was founded. These creditors, A. & L. and F., propose now to prove the debts upon which the judgments were taken, and offer to surrender any advantage they may have acquired by the judgments or executions, and take their distributive shares in the estate, as if such preference had never been taken. This presents the question: Can a creditor who, within six months before a petition for adjudication of bankruptcy is filed by another creditor, has taken a preference knowing the debtor to be insolvent, surrender his preference and take his place with other creditors, and receive the dividends as if such preference had not been taken?

The bankrupt act (section 39), as it stood at the time of these transactions, provides that any insolvent person who shall give any fraudulent preference by "transfer or conveyance of any money, property or other thing, or shall give any warrant to confess judgment, or procure or suffer his property to be taken on legal process, shall, upon the petition of one or more of his creditors, whose provable claims amount in the aggregate to $250 or more, be adjudged a bankrupt, providing such petition be brought within six months after the act of bankruptcy is committed; and if such person shall be adjudged a bankrupt the assignee may recover back the money or property so paid, assigned," etc.; "provided, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy." Who is meant by "such creditor" in the last clause above quoted? The plain and obvious meaning, construing this section alone, is the creditor receiving such preference: "such creditor" is "the person receiving such payment, conveyance," etc. But it is claimed that section 23 allows a creditor who has taken a preference in fraud of the act—constructive fraud—to prove his debt upon surrender-

ing all advantages of the preference; and that these two sections must be construed together. And it is said that this construction is the only one which can reconcile the provisions of section 23 with those of 39, above cited. But I do not think that is correct. To construe them thus would not reconcile them, but would wholly annul the last clause in section 39. A construction which renders any part of a statute inoperative should not be adopted if any other can reasonably be given. McCartee v. Orphan Asylum, 9 Cow. 437. In this case the statute may be so construed as to avoid the apparent conflict between sections 23 and 39, and give effect to each; a construction, indeed, which gives the language used in the two sections its natural and ordinary import. Section 23 provides that any person receiving a preference "after the passage of this act," having knowledge or reasonable cause to believe that the debtor is insolvent, shall not share in dividends without surrendering his preference to the assignee for the benefit of all the creditors. Section 39 is the first section making provision for involuntary bankruptcy—adjudication upon creditor's petition—and denies the right to share dividends or prove claims to any creditor who has taken such preference "within six months" next preceding the commencement of the proceedings in bankruptcy by a creditor. I think section 39 operates as a limitation of the provision in section 23, and limits its application to cases where the preference is received in fraud of the act, more than six months prior to the filing of a petition for adjudication of bankruptcy by a creditor. If the preference is received more than six months before the petition is filed, or the adjudication of bankruptcy is made upon the debtor's own petition, the creditor may surrender his preference and prove his debt, notwithstanding the preference was constructively fraudulent; but if the preference was taken within six months, and the adjudication is upon the petition of one or more creditors, the preferred creditor cannot prove his debt nor share in dividends. This construction should not be rejected merely because it may in some cases—as I believe it may in the present case—work a hardship upon creditors who intend only to use such diligence as will secure their own and other creditors' distributive shares in the estate. Considerations of this character ought not to induce a court to put a subtle and forced construction upon statutes, contrary to their plain and obvious import. Waller v. Harris, 20 Wend. 555; McCluskey v. Cromwell, 11 N. Y. 593.

The conclusion, therefore, at which I have arrived, is that these creditors, A. & L. and F., can not be allowed to prove their debts against the estate of the bankrupts. This conclusion rests not alone upon what seems to me to be the true construction of the bankrupt law; the same construction was placed upon these two sections by the district court for the Wisconsin district in Re Princeton [Case No. 11,433], in which the court, after a somewhat extended examination of the question and of the reasons for this provision in regard to involuntary bankruptcy, says: "It can not be permitted to a creditor who, with reasonable knowledge, has participated in such fraud on the act as to found a proceeding against his debtor, to relinquish his intended preference and claim to prove his debt under the 23d or any other section of the bankrupt act."

Another objection to the proof of these claims, urged by the counsel for the assignee, is that the confessed judgments, being void by section 35 of the bankrupt act, can not be the basis of claims against the estate; and that, though void as to the bankrupt act, these judgments were valid under the state laws, and therefore the original debts, being merged in the judgments, can not be the basis of claims against the estate. If this were the only objection, I should have to admit the claims to proof. This reasoning seems to me to be artificial and unsound. It is a maxim of the law that "a void act is no act;" and if these judgments are void as to the bankrupt law, they have no effect to merge the claims upon which they are founded, as to the bankrupt law. But I think these judgments, if void under section 35, are void for all purposes. The language is that such preferences are "void"—not "void as to the bankrupt act." There are the strongest reasons why this provision should have been made, and why the broadest language possible should have been used in the law. The only way in which the law can be made to operate equally upon all creditors whose debts were originally—in their nature—provable in bankruptcy; the only way to make the system a "uniform system of bankruptcy," was to make these preferences void to all intents and purposes. And such was the decision under the bankrupt law of 1841 [5 Stat. 440], upon language identical with the wording of the 35th section of the law of 1867. McLean v. Lafayette Bank [Case No. 8,885]. There are some other questions raised in the written arguments submitted to me, but I deem it unnecessary to consider them at this time.

M. W. Fechheimer, for assignee.
Erasmus D. Shattuck, for creditors.

DEADY, District Judge. I concur in the conclusions of fact and law as found by the register and in his opinion in support thereof. When the question was first raised as to the right of Allen & Lewis and Henry Failing to prove their debts, I inclined to the opinion that a creditor who had taken a preference contrary to the act, might in any case be allowed to prove his debt upon the surrender of the property, benefit or advantage obtained by him under such preference, as provided in section 23. But after long and careful deliberation, I am forced to come to a different conclusion. I am now satisfied that to allow these creditors to surrender their unlawful

preference, and come in and prove their debts under section 23, would be to violate both the letter and spirit of the act. It may be admitted that section 23 is of general application, in both voluntary and involuntary cases, except as otherwise provided in section 39. But the special provision in the latter section, declaring that a creditor shall not be allowed to prove his debt in a particular case, so far, excludes the operation of the general words of the former. Now this special provision of section 39 covers this case at every point, and therefore takes it out of section 23.

Walton and Son, being insolvent, confessed a judgment, and procured and suffered their property to be taken on legal process, with intent to give a preference to A. & L. and H. F. This being the case, the section declares, that if the person receiving such preference "had reasonable cause to believe that a fraud on the act was intended or that the debtor was insolvent," that the assignee may recover back the money or property paid or transferred contrary to the act, and that "such creditor"—that is, the creditor receiving such preference, with reasonable cause to believe, etc.—"shall not be allowed to prove his debt in bankruptcy." These creditors, by their agent, had not only reason to believe, but knew, that at the time of giving this preference, Walton and Son were insolvent, and that in so doing they intended a fraud upon the act—that is, intended to evade its provisions by preventing their property from being distributed among their general creditors under it. To these acts or conduct, section 39 attaches certain consequences: First—The preferred creditors may be compelled by the assignee to restore the money or property received under the preference. Second—Such creditors are prohibited from proving their debts in bankruptcy. The first of these provisions is remedial, and furnishes the means whereby the wrong committed in giving and receiving a preference may be corrected. But the second is preventive, and intended to deter creditors from receiving preferences for fear of losing or forfeiting their debts thereby. Of the two it is the more important and more likely to prevent violations or evasions of the act in this respect. The liability to these consequences or penalties arises upon the same facts—the creditors taking a preference contrary to the act—but the right to enforce the one does not depend upon the enforcement of the other. They are distinct and cumulative. The assignee may recover back the money or property without objecting to the proof of debt, or the proof of debt may be excluded where there has been no such recovery.

What use these creditors may have ultimately intended to make of their preference is immaterial. Let it be admitted that they intended so far as they know, to share the proceeds of their executions with their fellow creditors, pro rata. The law does not trust the legal rights of one portion of the creditors to the judgment or good intentions of the others. While, as a matter of fact, it may have been safe to do so in this case, in a majority of others it might or would not. Besides a mere intention or even proposition on their part to admit the rest of the creditors to a share of the property was not a contract with such creditors which the latter could enforce. Such intention or proposition could have been changed or withdrawn by A. and L. and H. F., at any time before it was realized or accepted, with impunity. In legal effect, the transaction as claimed by these creditors, was nothing more or less than obtaining a preference contrary to the act, with intention to make such arrangement with the general creditors as the parties taking the preference might think proper under the circumstances. This would be to make themselves judges in their own case. An order will be made rejecting these claims, and directing the register to refuse to allow them to be proved, and that A. and L. and H. F. be adjudged to pay the costs and expenses of this proceeding.

[This cause was subsequently affirmed by the circuit court. Case unreported.]

Case No. 17,131.

In re WALTON et al.

[1 N. B. R. 557 (Quarto, 154).] [1]

District Court, E. D. Missouri. 1873.

BANKRUPTCY — ASSIGNEE'S LIABILITY FOR RENT.

Where the assignee held a store for the purpose of keeping and storing the goods of the bankrupt until they could be sold, *held*, that the rent for such premises must be paid by the assignee, and charged as part of his expenses.

[Cited in Re Dunham, Case No. 4,145; Re Hufnagel, Id. 6,837.]

[Cited in Abbott v. Stearns, 139 Mass. 169, 29 N. E. 379.]

The property of the bankrupts [Fred B. Walton and others] consisted of the stock and fixtures of a drug store in a building rented from J. E. Barrow, trustee, &c. This stock had been conveyed by the bankrupts, and their conveyance had been declared fraudulent, and the grantee enjoined from interfering with the property in any way. As it was thought best for the interest of all concerned not to remove, but to sell the property on the premises, the possession of the store was retained until after the sale, when it was delivered to the landlord. The landlord presented his petition to the register, asking that the rent of the premises from the date of the provisional injunction until the surrender of the possession, be paid by the assignee as part of his expenses. The petitioning creditors, through the assignee, opposed the petition, claiming that the rent up to the time of the appointment of the assignee should go into the accounts of the marshal as messenger; and of that opinion was the register.

TREAT, District Judge. In this case it appears that this store has been used as a place

[1] [Reprinted by permission.]

for the keeping and storing of the goods of the bankrupt until they could be sold by the assignee under the proceedings in bankruptcy; and now objection is made to payment of the rent for the time the premises were thus occupied.

The proceedings in bankruptcy give no authority to the assignee, or the creditors he represents, to use one man's property, without his consent, for the benefit of the estate of the bankrupt. The landlord does not claim to hold the assignee as assignee of the term, but merely asks compensation for the use and occupation of the premises, while they have been actually used for the benefit of the estate, and he is as much entitled to be paid as any warehouseman with whom the assignee or messenger had stored the goods. There is no necessity for dividing up the account, charging part to the expenses of the messenger, and part to those of the assignee. This rent should be paid by the assignee, and be charged as part of his expenses.

Case No. 17,132.

WALTON et al. v. COULSON.

[1 McLean, 120.] [1]

Circuit Court, D. Tennessee. Sept. Term, 1831.[2]

EVIDENCE—PROOF OF ANCIENT DOCUMENTS—SPECIFIC PERFORMANCE — MUTUALITY OF CONTRACT — LIMITATIONS — TRUSTS — EQUITY — DECREES AGAINST INFANTS.

1. An instrument of writing more than forty years old, is not required to be proved with the same strictness as one of modern date, unless there are facts and circumstances proved, which create doubts as to its genuineness. But if these facts and circumstances are explained and refuted by the evidence, then the instrument must be considered as coming under the rule which does not require strict proof of its execution.

2. The relation of vendor and vendee must exist, or the court cannot decree a specific execution of the contract.

[Cited in Fogg v. Price, 145 Mass. 516, 14 N. E. 743.]

3. Where the obligor has an election, the election may be shown by circumstances.

4. Mutuality is essential to the validity of a contract.

[Cited in Tufts v. Tufts, Case No. 14,233.]

5. The statute of limitations does not operate in cases of trust.

6. The rule that chancery will not decree where doubt exists, refers to the intention of the parties from the face of the contract, and not where some doubt may exist as to a certain fact in the cause, however important it may be.

7. Where the relation of trustee and cestui que trust exists on the death of the trustee nothing but the mere legal estate goes to his heirs.

8. A claim to land is not barred by lapse of time, where the right has been asserted at various times and on different occasions, and possession has been taken of a part of the land.

[Cited in Tufts v. Tufts, Case No. 14,233.]

9. A court of chancery will not decree against infants without full proof, though their guardian ad litem confess the ground of action.

[Cited in brief in Le Bourgeoise v. McNamara, 82 Mo. 190; Ralston v. Lahee, 8 Iowa, 26.]

[This was a bill in equity by Isaac Walton, James Walton, and the heirs of Payne against John Coulson.]

Mr. Fogg, for complainants.

Mr. Washington, for defendant.

McLEAN, Circuit Justice. This controversy arises out of a bond purporting to have been given by Isaac Coulson, the ancestor of the defendant, to Josiah Payne in which he bound himself, his heirs and assigns, to pay to the said Josiah Payne, one hundred pounds, Virginia currency, in payment for a certain horse, twelve months after the date, with lawful interest; otherwise, in lieu thereof, he bound himself to make over all his right and interest of a certain warrant and entry of land of six hundred and forty acres, lying on the north side of Cumberland river, on said river, &c. The bond was dated the 2d January, 1787. As the money was not paid, a bill was filed by the heirs of Payne and Walton, the latter of whom claim to have purchased the land from the heirs of Payne, and they pray that the defendant may be enjoined from prosecuting a judgment in ejectment which he has obtained for the possession of the land, and that he be decreed to convey the legal title to the complainants.

The first point for consideration is, the execution of the bond. It is earnestly contended that the execution of the bond has not been proved, and in the answer as well as in the argument it is insisted that the bond was forged, and that since its supposed execution, it has been so altered as to destroy its validity. There were two subscribing witnesses to the bond, James Donaldson and William Bush. The subscribing witnesses have been long dead, and several witnesses have been examined to prove the hand-writing of Bush, some of whom were his near kinsmen, who had seen him write, and were acquainted with his handwriting. And, although much evidence has been given by the defendant of a circumstantial character, tending to create some doubts as to the identity of the witness Bush, and, that being a resident of Kentucky, he was not in Tennessee at the time the bond purports to have been executed, yet we think, under the circumstances, the execution of the bond is as satisfactorily proved, as could be expected or should be required after so great a lapse of time. Phil. Ev. 404; Governor v. Cowper, 1 Esp. 275; Fry v. Wood, 1 Selw. N. P. 492; Manby v. Curtis, 1 Price, 232; Bertie v. Beaumont, 2 Price, 308; Bullen v. Michel, Id. 399; 4 Dowl. 297. Strict proof of the execution of an instrument is dispensed with after a great lapse of time, where a person has claimed under such instrument, and there are no circum-

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

[2] [Affirmed in 9 Pet. (34 U. S.) 62.]

stances which go to create doubts of its genuineness. But in this case, it is contended, there are circumstances which forbid the application of this principle to the bond in controversy. In addition to the proof of the handwriting of Bush, the complainants to sustain the genuineness of the bond have proved by parol the original transaction on which the bond was given, and in which, the terms of the contract as set forth on the face of the bond are proved. The bond appears on its face to have been altered by substituting the state of Virginia, for the state of North Carolina, which has been scratched out; and the signature of the obligor seems also to have been scratched out and re-written. And these alterations, it is contended destroy the validity of the bond. There is no proof that these alterations were made by the obligee, and it is not perceived that he could have had any motive to make them. They do not, in any sense, increase the obligation of the obligor, or tend to advance the interest of the obligee. If the alterations had increased the sum to be paid, or the quantity of acres to be conveyed, or had shortened the time within which the obligation was to be discharged a motive might have been assigned for the alteration, and the part altered being material would have vitiated the bond.

The bond remained in possession of the obligor until his decease, and then came into the possession of his heirs. It appears, however, from the evidence, at one time to have been out of the possession of the complainants, and in the hands of one or more individuals whose interest was hostile to the bond. In the absence of all positive proof on the subject as to the alterations, and being thrown upon the most reasonable presumptions which arise from the facts established, it would seem to be most probable, if the bond has been altered, the alterations as made could not have been made by the obligee or his representatives. They cannot be presumed to have made them, unless we suppose them to have acted not only without any motives of interest, but against all such motives. To presume that these alterations were made by persons whose interests were hostile to the bond, and who had it in possession, would be far less violent. One of the witnesses who saw the bond after the decease of the obligee, states that it was fair upon its face. And we think, the alterations not affecting the obligation of the instrument, and being in some degree accounted for, do not vitiate it; and there is no reason to believe they were made by the complainants or any one claiming under the bond.

The proof of the terms of the contract independent of the bond, is objected to as parol proof going to vary or affect a written instrument. This evidence was not offered to establish the contract, but to rebut the circumstances relied on to destroy its validity. It goes to meet the objection that no such contract was ever made, and that the whole face of the bond is a mere fabrication. It shows the consideration named in the bond was paid, and this, connected with other circumstances, tends to establish the fairness of the transaction, and raises a probability that the bond was duly executed. At least it rebuts the circumstances relied on as raising a presumption against it, and places it upon the ordinary ground of legal proof. Where the subscribing witnesses to an instrument are dead or their residence is unknown, proof of their hand writing is admissible; and also proof of the hand writing of the obligor. Proof of the hand writing of a witness is not, in reason, as satisfactory proof of the genuineness of an instrument as proof of the signature of the obligor; but by a long established rule of law the former is the higher and better proof, and must be produced. Where any circumstances of suspicion appear upon the face of an instrument, or arise from the evidence, and they remain unexplained, proof of the hand writing of all the witnesses and also some proof of the signature of the obligor might be necessary. But in ordinary cases proof of the signature of one of the subscribing witnesses, the other being dead or absent would be deemed sufficient.

But there is another circumstance in the case, which is strongly in favor of the instrument. This is the lapse of time. On this point it has been contended that lapse of time in favor of a deed only arises where possession accompanies the deed. Ancient deeds are admitted without proof, where the possession is in conformity to the deed. But the presumption is not limited to such cases. It may arise where possession of the deed has been had, by the person claiming under it, and he has done acts, which asserted his claim although he may not have entered into the possession of the land. In the case of Barr v. Gratz, 4 Wheat. [17 U. S.] 231, the supreme court decided "that where a deed is more than thirty years old and is proved to have been in the possession of the lessors of the plaintiff in ejectment, and actually asserted by them as the ground of their title in a chancery suit, it is in the language of the books sufficiently accounted for, and it is admissible in evidence without regular proof of its execution by the subscribing witness." In this case the bond is more than forty years old, and if the obligee did not take possession of the land under the bond, but under a contract made with Coulson, still he claimed the land by virtue of the bond, and exhibited it to Walton and others as the ground of his claim.

Upon a deliberate consideration of the facts and circumstances of the case which bear upon this point, we think the execution of the bond is proved. This may not be clear of all doubt, but the decided preponderance of the evidence is in favor of the instrument, and therefore it is received as genuine. The principle, that where doubt exists, a court of chancery will not decree, does not refer to a particular fact in a cause, but to the terms of the contract. Where these are doubtful, chancery cannot aid.

It will only carry into effect the intention of the parties, and this intention must appear from the contract. In ascertaining the facts of a cause, such as the execution of an instrument, the payment of money &c. the testimony may be weighed and the decision given accordingly.

The next point to be considered is, whether this is such a contract as can be decreed to be specifically executed. Coulson bound himself to pay to Payne one hundred pounds, in Virginia currency, for a bay horse, within twelve months, with lawful interest; otherwise, in lieu thereof, he agreed to make over his title to the land in dispute. The defendant's counsel insist that this is a case of an election by the obligor, and that the contract cannot be specifically enforced, until it be proved that the election has been made. And it is also urged that the conveyance of the land, should be considered in the light of a penalty and was only inserted, as a security for the payment of the money. In giving a construction to instruments, the intention of the parties should be chiefly regarded. The law has fixed certain rules on this subject, which are so generally known, that all persons who are capable of making a contract are presumed to know them.

Chancery will not enforce the payment of a penalty, but will relieve against it. The land in this case was clearly not intended to operate as a penalty or as a security for the payment of the hundred pounds. The intention of the parties is so clearly expressed in the bond, that there is no room for doubt. The obligor bound himself to pay the money or the land at his option, and the obligee agreed to receive either in discharge of the obligation. But at what time may this election be exercised? By the defendant's counsel it is contended that at any time before the expiration of the year, or at the time the bond became payable, it was in the power of Coulson to discharge the bond by the conveyance of the land; but after the expiration of twelve months, Payne was not bound to receive the land, and he could only recover the money. Therefore it is urged there was no sale of the land, and the relation of vendor and vendee does not exist. And that it is only where such a relation exists, a court of chancery can decree a conveyance. On the other side it is urged with equal earnestness, that by the terms of the contract Coulson was bound to convey the land, if he did not pay the money within twelve months. And consequently that an action at law at no time could have been maintained for the money. That the money not being paid within the time stipulated, the bond became absolute for the conveyance of the land, and that the land only could be recovered or damages for a failure to convey it. By this construction the obligor would have a reasonable time after the expiration of the twelve months, to make the conveyance, under the rule which allows such time, there being no time fixed by the contract for the conveyance. The obligor agreed to pay the money in twelve months, or in lieu of the money, to transfer the land. This seems to be a clear case of election by the obligor; and a conveyance of the land or the payment of the money would discharge the contract within the time specified. In this respect, there seems to be no difference between the money and the land. If the words of the bond had been that the money was to be paid in twelve months, and in default of such payment, the land was to be conveyed, in satisfaction of the bond, the argument of the complainant's counsel would be conclusive. But the land was to be conveyed in lieu of the money, and not in default of its payment. 2 Story, Eq. Jur. 359; 19 Ves. 662. To have sustained an action at law on the bond, no election having been made, it would have been necessary to aver in the declaration, that neither the money had been paid, nor the land conveyed in discharge of the obligation. If an election had been made, an averment to that effect would have been necessary.

It is alleged in the bill, that the defendant elected to pay the hundred pounds, by a conveyance of the land, and that Payne agreed to receive it. The fact of this election may be established by positive testimony, or by circumstances. No positive proof on this point has been adduced, and the complainants rely on circumstances to show the fact. One of the witnesses states that when Coulson returned to Virginia, he expected to obtain from his father's estate, money, to discharge this debt; but he found that the executor had wasted the estate, and he was, consequently, unable to raise the money. That he remained in Virginia, and was, sometime afterwards, married. It is admitted if the election had been once made, it could not be changed, except by the consent of both parties. The consideration paid for the land by Coulson was the horse he purchased of Payne, and for which it is not pretended payment has been actually made in any other manner. Coulson being disappointed in receiving money from his father's estate, as a matter of course would look to the land for the means of payment. This would relieve him from the obligation, and would, in effect, be giving to Payne the proceeds of his own property. It does not appear that Coulson had been subjected to any expense by the purchase of the horse. He had kept him for some months, but the service of the horse was at least worth his keeping. This same horse was disposed of for the land by the act of Payne, as the agent of Coulson. Coulson, therefore, by relinquishing the land for the debt, was in as good a situation as he was before the contract. It seems the horse did not suit him, and he might consider himself fortunate in being able to dispose of him on terms which would relieve him from the debt. This seems to be the natural course of things on the part of Coulson; and from the circumstance of his never taking any step to pay the money or any part of it during his life, and in fact not having the means of paying it; and in addition from the fact that he neither made nor attempted to make any disposition of the land, affords a

strong ground of presumption that it was well understood, as stated by one or more of the witnesses, that if the money was not paid within twelve months the land was to be conveyed. And this presumption is greatly strengthened by the acts of Payne. In his first visit to Virginia, in 1793, which was shortly after the death of Coulson, he endeavored to procure a conveyance of the land, and with the consent of the widow made application to the court for that purpose. And at a subsequent period he complained that he should not be able to procure a title until the heirs of Coulson became of age. He claimed the land and disposed of a part of it before 1798; and actually took possession, and, from that day to this, this right has been asserted by Payne and his heirs, or those who claim under them. It would seem therefore, from the acts of the parties, and the circumstances of the case, that a strong presumption arises that an election to convey the land in discharge of the bond was made. Every equitable consideration favors this presumption. It gives to Payne or his representatives what belongs to them, and takes from Coulson or his heirs nothing that they can call their own. We are satisfied that an election to convey the land was made, and that the relation of vendor and vendee exists in the case.

But it is objected that there is a want of mutuality in this contract for the land, and consequently a specific execution of it cannot be decreed. The doctrine on this head is admitted, but its application is not perceived. In this case the consideration has been paid, and if it be admitted that by the laches of Coulson, if living, he could not compel Payne to receive a conveyance of the land in discharge of the bond, is that any reason why chancery should refuse a specific execution of the contract when claimed by the vendee? This would enable a vendor to defeat any contract, by taking advantage of his own negligence. And this plea might be urged in, perhaps, a majority of the cases where a specific execution is asked. No matter how much the land may be deteriorated in value—though half of it be sunk by an earthquake—after default has been made by the vendor, and in consequence of which it would be an insuperable objection to a specific execution, if made by the vendee, still he may waive this objection and demand a conveyance. If mutuality exist at the inception of the contract, or at the time the contingency happens on which the condition to convey becomes absolute, no subsequent changes can destroy the contract or prevent the vendee from demanding a specific execution of it, if he has performed the condition of it on his part. Sugd. Vend. 194; Attorney General v. Day, 1 Ves. Sr. 218; 10 Ves. 315, 316; 1 Schoales & L. 19, note a.

The statute of limitation, it is insisted, bars the complainant's right. This statute may be pleaded in equity as well as at law. But the question here is, whether the statute can operate in favor of heirs where the specific execution of a contract for the conveyance of land made with the ancestor is the object of the bill. The words of the act of limitation of 1715 are, that "creditors of any deceased person shall make their claim within seven years after the death of the debtor, otherwise such creditor shall be for ever barred." It is contended that Payne could not be viewed in the light of a creditor of the estate of Coulson, in setting up his claim to the land in controversy; that the relation of vendor and vendee exists, and consequently the statute cannot bar the execution of a trust, and could not have been designed to operate in such a case. The first case cited is from Cooke [Tenn.], 330 [Smith v. Hickman's Heirs]. That was a case where Smith filed his bill against Hickman's heirs, stating that the ancestor of the defendant, in 1789, executed an obligation to the defendant, to convey one hundred acres of land, within a reasonable time; that the ancestor died intestate, leaving the defendants his heirs at law; that the obligation has not been complied with, and that the defendants refuse, although a large estate both real and personal has descended to them. In one part of their opinion the court say, "that it has been insisted, that the complainant is not a creditor, on account of the demand not being of a pecuniary nature; but, as it is the duty of this court to examine this point, they feel satisfied that as to that, he is within the act. All persons are considered creditors that have demands originating from contracts or agreements." And the court held that the complainant was barred by the statute. It would seem from the language of the court that they intended to apply the statute to all cases of trusts, as well as to claims for debt or damages, for a breach of contract. But the case before them, was not one where any interest to any particular tract of land vested in the obligee. The obligor agreed to convey six hundred and forty acres of land, "within a reasonable time," but no specific tract was named; consequently the obligee could set up no equitable right to any particular tract of land. No trust was created, and although the bill prayed a specific execution of the contract, no lien existed, and the demand was in effect for damages, if the defendant had no land to convey. That case is not analogous to the one under consideration. And although the language of the court is broad enough to cover cases of trusts, still no case of trust was before them, and consequently they cannot be considered as adjudicating on such a case. The case of Lewis' Ex'rs v. Hickman's Heirs was also cited in the argument. 2 Tenn. [2 Overt.] 317. This was a case where Hickman, for a valuable consideration, executed a bond to John Hughes for £500, with condition, for the conveyance of a tract of two hundred and seventy-four acres of land on Cumberland river, in Davidson county, so soon as Hickman should obtain a patent. A deed was executed by the administrator of Hickman, for this land, but the statute not having been complied with, in making the

deed, it was inoperative. And the object of the bill was, to set up the original bond against the heir. Whether the bill prayed a conveyance of the land, or only the value of it, does not appear in the report. The heirs pleaded the statute, and it was admitted in the discussion that it was a good bar, according to the law as settled in the above case of Smith v. Hickman's Heirs [Cooke (Tenn.) 330]. In a later case (Den v. Mayfield. 5 Hayw. 121) the court say: "As to the act of limitation of 1715 and of 1789, where is the obligee in such a case as the present barred as against the heir? He has no demand against the executor when he selects the land; and cannot therefore be barred as to him. His demand is only against the heir, and that too in equity upon a trust to be performed by the heir; who until performance holds the land for the obligee. And he is only barred as in the case of equities, by the lapse of twenty years unaccounted for." The record which contains the decree in this case has been referred to and examined, and nothing is discovered in it, which controverts the statement of the case in the report. The bill was dismissed because that more than seven years had elapsed from the death of Mayfield before the deed was executed by his personal representative under the statute, when her powers had ceased, and because more than twenty years had elapsed from the execution of said deed to the filing of the bill.

From these decisions it does not appear that the supreme court of Tennessee have decided that the statute operates as a bar to a specific execution of a contract, by an heir, on whom the legal estate has been cast, by the decease of his ancestor. Such a decision would be so novel in its character and injurious in its consequences, that we should require a clear adjudication fixing such a construction of the statute, before we could consider it as the law of this state. Where the relation of trustee and cestui que trust exists, on the death of the trustee nothing but the legal estate descends to the heir. The equity is with the vendee. He has paid the consideration and may be in possession of the premises. Would it not then be a most extraordinary rule, that would bar the equitable claimant from obtaining the legal right. A right divested of all equity. Such a right is not within the mischiefs against which a statute of limitations is designed to guard. After the lapse of seven years the heir is protected against any claim which may be made upon him, as the representative of his ancestors, though he may have inherited from him both real and personal estate. This is the extent, to which the decisions in the above cases have gone. The claims attempted to be enforced, arose from a failure to convey land, but no specific tract of land which the ancestor held in trust for the vendee. In the case against Mayfield the bar rested on the twenty years which had elapsed, and not on the statute of 1715.

That the right asserted by the complainants has been lost by lapse of time, has also been assumed in the defence. But the facts in the case do not sustain this position. Although many years have elapsed from the date of the bond, yet it has not lain dormant. The right under it has been asserted by the complainants and by their ancestor, on various occasions, and especially by entering into the possession of the land.

At the former hearing of this cause, the court intimated that a decree could not be made in favor of the complainants, Waltons, as they had shown no valid contract with the heirs of Payne for the land. That this objection was deemed insuperable so far as the infant heirs of Payne were interested. The bill prays that the title may be decreed to Waltons, on their paying the consideration money, which they had agreed to pay to the heirs of Payne. What this contract was, and how much has been paid upon it, does not satisfactorily appear. But it does appear that the pretended sale by the heirs, was made to Waltons by a person who had no right to dispose of the interest of the heirs, or who was under no legal responsibility to account for the money. The part of it which may have been paid, has probably gone beyond the reach of the infant heirs. And can a case be found where the property of infants has been disposed of under such circumstances, and the proceeding sanctioned afterwards by a court of chancery? But it is said this point is not in issue between the litigant parties. This is true, but the action of the court is prayed upon it, and are we not bound to look into the facts, and see that injustice be not done to those who are incapable of guarding their own interests? So far as the heirs of Payne are of full age, and have assented to the transfer of their rights, to the complainants Waltons, no difficulty exists; but, in regard to the infant heirs, they never having assented to a sale in a legal form, the court can sanction no pretended sale from them. But it is insisted that these infant heirs have recognized the right of the complainants, Waltons, as set forth in the bill. How have they recognized it? By guardians pro forma, to prosecute the suit, and who may be irresponsible and indifferent to their pecuniary interests. Had these infants been made defendants, which would have been the more proper course, had the jurisdiction of the court admitted, the court would hardly have decreed the specific execution of the contract set out in the bill without evidence, although in their answers the guardians might have admitted the facts. The contract of sale to the Waltons is not clear of suspicion, and the proof is deficient if the right of the mother to sell the estate were admitted. A court of chancery will always guard the rights of infants. It will not permit their rights to be sacrificed, by its sanction, though the consent of the guardian be given. Before it divests an estate from infants, and vests it in others, the court must be satisfied that the principles of

justice and the rules of equity authorize the proceeding.

A decree may be entered to invest the complainants Waltons with the legal title to the interest of the heirs of Payne who are of full age, and to invest the legal title in the infant heirs, subject to any equity which may arise under the contract with Waltons.

This case was appealed to the supreme court, and the above decree was affirmed. 9 Pet. [34 U. S.] 62.

Case No. 17,133.

WALTON v. CROWLEY.

[3 Blatchf. 440; Cox, Manual Trade-Mark Cas. 78; Cox, Am. Trade-Mark Cas. 166.] [1]

Circuit Court, S. D. New York. March 19, 1856.

TRADE-MARKS — RIGHT TO USE ON PURCHASED GOODS—ASSIGNMENT—INFRINGEMENT —EVIDENCE.

1. On the facts in this case it was *held*, that the plaintiff was entitled to maintain a suit in equity in his own name for an injunction and relief, for the infringement of a trade-mark.

[Cited in Hostetter v. Vowinkle, Case No. 6,714.]

2. The owner of goods, which he exposes to sale in market in his own right, is entitled to the exclusive use of any trade-mark devised and applied by him to the goods, to distinguish them as being of a particular manufacture or quality, although he is not himself the manufacturer, and although the name of the real manufacturer is used as part of the trade-mark; and the assignee of the whole right in such trade-mark, and of the property in the goods to which it is attached, is entitled to the enjoyment of the exclusive right thereto, and may maintain an action, in his own name, for any wrongful use by others of such trade-mark, to the like extent as the originator thereof.

[Cited in Hostetter v. Vowinkle, Case No. 6,714. Cited in brief in McLean v. Fleming, 96 U. S. 253.]

[Cited in brief in Caswell v. Davis, 58 N. Y. 226. Cited in Fischer v. Blank (Sup.) 19 N. Y. Supp. 66; Glen & H. Manuf'g Co. v. Hall, 61 N. Y. 235; Godillot v. Harris, 81 N. Y. 267.]

3. In this case it was *held*, that the mere affidavit of the defendant, without a formal answer, denying that the trade-mark claimed was the original device of the plaintiff's assignor, or was first adopted by him, was not sufficient to bar the equity of the plaintiff, arising out of the facts charged in the bill, and his long undisturbed possession and use of the trade-mark, corroborated, as his right was, by after acts and declaration of the defendant.

4. The privilege of a party to the exclusive enjoyment of a trade-mark, does not rest upon a right of property therein, but on its prior use and application in the manner in which it has been imitated and employed by the defendant.

5. A tradesman, to bring his privilege of using a particular trade-mark under the protection of equity, is not bound to prove that it has been copied in every particular by another. It is enough for him to show that the representations employed bear such resemblance to his as to be calculated to mislead the public generally who are the purchasers of the article, and to make it pass with them for the one sold by him.

[Cited in Filkins v. Blackman, Case No. 4,786; Amoskeag Manuf'g Co. v. Trainer, 101 U. S. 67; Humphrey's Specific Homeopathic Medicine Co. v. Wenz, 14 Fed. 254; Atlantic Milling Co. v. Robinson, 20 Fed. 219; Liggett & Myer Tobacco Co. v. Hynes, Id. 885; Morgan v. Rogers, 19 Fed. 597.]

[Cited in Gilman v. Hunnewell, 122 Mass. 152. Cited in brief in Holmes, Booth & Haydens v. Holmes, Booth & Atwood Manuf'g Co., 37 Conn. 284; Palmer v. Harris, 60 Pa. St. 157.]

In equity. This was an application for a provisional injunction, founded upon a bill and an affidavit of the plaintiff [Henry Walton]. It was opposed upon an affidavit of the defendant [Robert Crowley], without any answer. The bill set forth, that one James Smith, in England, had, under the name of James Smith & Son, been for 20 years a manufacturer of needles for sewing; that, more than 20 years ago, Smith agreed with the plaintiff's father, James Walton, who resided in Philadelphia, that he should be the sole purchaser of all the needles made by Smith which should come to the United States; that this agreement was carried out by Smith, and all the needles made by Smith which came to the United States were sent to the plaintiff's father, packed under his direction, and were sold by him in papers having on them printed labels, devices and trade-marks, which were devised and first used by him, the words "Jas. Walton" being also on each paper, in small writing letters; that the labels covering the first quality of needles were printed on a red ground; that such red ground formed a part of the trade-mark; that, on account of the merit of the needles, and the care and expense in devising and applying the labels, devices and trade-marks, the needles had acquired a standard value in the United States; that the annual sales of the plaintiff's father, under his exclusive contract, averaged from 20 to 25 millions of needles each year; that, on the 1st of July, 1851, the plaintiff became, by assignment from his father, proprietor of the whole of his business, good-will and trade in vending the needles made by Smith, and of all the right to use such devices, labels and trade-marks, and was, by the assent of Smith, substituted in place of his father, in the exclusive right of purchasing such needles for sale in the United States; that the plaintiff had since continued annually to sell, in the United States, from 20 to 25 millions of such needles, in papers covered by such labels, devices and trade-marks, in pursuance of such assignment; that he had recently discovered that the defendant had counterfeited such labels, and had been selling, in the United States, needles with such counterfeited labels, of inferior quality, and at a less price than the price at which the plaintiff could afford to sell such needles with genuine labels; that such counterfeited labels were such close imitations as readily to deceive the public, and especially hundreds of uneducated women and workmen who buy

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission. Cox, Manual Trade-Mark Cas. 78, contains only a partial report.]

needles by retail; that none of the needles sold by the defendant under the counterfeited labels were ever made by Smith, nor in England; that the defendant got up the labels knowing that the plaintiff was the exclusive importer of Smith's needles, and that no one else was entitled to import them into the United States with such labels; and that the defendant, when selling such needles, described them, in bills rendered, as "Smith's needles."

A schedule to the bill contained three of the plaintiff's labels, with needles enclosed, as made up for selling. No. 1 had a label on the front and another label on the back. The label on the front was printed in white letters, on a red ground, occupying 9 lines, and was as follows: "Jas. Smith & Son. (A crown.) Genuine Drill'd Ey'd Sharps. (7) Warranted. Jas. Walton," (in writing characters). The label on the back was printed in black letters, on a red ground, occupying 13 lines, and was as follows: "Manufactured and warranted by Jas. Smith & Son, Astwood, near Redditch. Beware of the imitation labels. The genuine are signed Jas. Walton," (in writing characters). No. 2 of the plaintiff's labels was, both as to its front and its back, like No. 1, except that instead of "(7)" it had "(9)," and the red ground of the front of No. 2 was lighter than the red ground of the front of No. 1, and the red ground of the back of No. 2 was a different shade of red from either the front or the back of No. 1, or the front of No. 2. No. 3 of the plaintiff's labels was a front label, like the front of No. 1, except that, instead of "(7)," it had "(5)," and was a larger sized label than the front of No. 1, and the red ground was a different shade of red from the front of No. 1. A schedule to the bill contained specimens of the labels used by the defendant. They were three in number. No. 1 had its front printed in white letters on a red ground, and its back printed in black letters on a red ground. The front of No. 1 occupied 9 lines, and was as follows: "Jas. Smith & Son. (A crown.) Genuine Drill'd Ey'd Sharps. (7) Warranted. R. Crowley," (in writing characters). The color of the red ground of the front of No. 1 of the defendant's labels, was the same shade of red as the red ground of the front of No. 1 of the plaintiff's labels. The back of No. 1 of the defendant's labels occupied 13 lines, and was as follows: "Manufactured for Jas. Smith & Son, and warranted by (R. Crowley). Beware of the imitation labels. The genuine are signed R. Crowley," (in writing characters). The color of the red ground of the back of No. 1 of the defendant's labels, was the same shade of red as the red ground of the back of No. 1 of the plaintiff's labels. The front of No. 2 of the defendant's labels was like the front of No. 1 of the defendant's labels, except that, instead of "(7)," it had "(8)." The back of it was like the back of No. 1 of the defendant's labels. The front of No. 3 of the defendant's labels was like the front of No. 1 of the defendant's labels, except that, instead of "(7)." it had "(5 to 10)." In the labels of the plaintiff and of the defendant, the figures were in a circle and were printed in white. The labels of the defendant and of the plaintiff were all of them pasted on a black piece of paper, in which the needles were contained.

The affidavit of the plaintiff set forth that, on the 12th of January, 1856, the defendant called on the plaintiff, in Philadelphia, after this suit was commenced, and said he had called to see if he could make an arrangement to stay proceedings in the suit, that he had made the labels, not for himself, but for J. H. Smith & Son, of Baltimore, that he received from them an order to make the labels, and made them according to their instructions, that they were insolvent, and that, in consequence, the needles and labels still remained in the defendant's hands; that he proposed that the plaintiff should appoint some one to go to New York, and take possession of the counterfeits on hand, and take off the labels, and return the needles to the defendant; that the defendant proposed to pay all the expenses that might be incurred by such proceedings, and to pay all counsel fees and court charges in the suit, provided the plaintiff would stay proceedings in it, and said that, if the plaintiff would not agree to that proposition, he, the defendant, had plenty of money to spend in law, and had much experience in law matters; that the plaintiff told the defendant that his excuses and propositions were lame, that he had not asked the plaintiff's permission to use the labels, and that the plaintiff would seek the protection of the law against all infringements of his rights; that he had made search concerning said J. H. Smith & Son, and had reason to believe, that no such firm now existed, or had for many years existed, in or near Baltimore; and that the defendant's statement relative to the existence of that firm and the order for the labels was wholly fictitious. The affidavit of the defendant set forth that, for more than 20 years, he had been a manufacturer of and dealer in sewing needles in the United States, and had acquired an extended reputation, and his name, as manufacturer and warrantor, on the labels covering such needles, was much relied upon; that, on the 10th of August, 1854, he received an order from James Smith and James H. Smith, doing business in Baltimore, under the style of James Smith & Son, for 732,000 needles, in papers of 25 needles in each, to be labelled with the name of said James Smith & Son, and the name of the defendant to be put thereon as manufacturer and warrantor, the labels to be on a red ground, with the device of a crown thereon, making a label similar to labels of that description in general use by the trade, and which were then and there spoken of or referred to, and of which those annexed to the bill and those annexed to the defendant's affidavit were specimens and ex-

amples; that the labels and devices in the schedule annexed to the defendant's affidavit, or most of them, had been in use by the trade, in the United States, for a long period and quite as long as the use thereof by the plaintiff; that the red ground and a crown thereon had been commonly used in England by the trade for upwards of 30 years, and prior to the use thereof by James Smith, or James Smith & Son, of England, or the plaintiff; that it was a common label; that the defendant had never heard of any person's claiming an exclusive right to its use except the plaintiff, nor of his claim until the commencement of this suit; that the words on the labels, "genuine drill'd ey'd sharps," were words of universal use in the trade, and were so used to distinguish the quality and character of the needles enclosed, as was also the figure on the labels, which merely indicated the size of the needles; that the plaintiff was not the only manufacturer of "genuine" needles, or of "drill'd ey'd" needles, or of "sharps," but that the same were made and so styled by every needle manufacturer, those words being well understood as merely descriptive of the style and character of the needle; that, in pursuance of the order of said James Smith & Son, the defendant got up for them, by way of sample, a few thousands of the labels referred to in the bill, but that, they having failed about that time, their order was never fulfilled, and no more of the labels were ever got up: that only a portion of those that were got up were delivered to said James Smith & Son, and that, the balance being left on the defendant's hands, he was authorized by said James Smith & Son to sell them for his own benefit, and had disposed of some portion of them; that it was untrue that the plaintiff's label, annexed to the bill, was devised and first used by the plaintiff's father, or by James Smith, or James Smith & Son, of England, but that, at the time the plaintiff's father commenced to use it, it was a common label; that it was untrue that the label got up by the defendant was got up in fraud of the plaintiff, or with a view of obtaining sales which would otherwise be made by the plaintiff, or with a view of deceiving the purchasers of needles; that it was untrue that the defendant's labels were intended to be an imitation of the plaintiff's, but that the difference was easily perceptible, in the sale thereof; that it was never pretended by the defendant that his needles were the plaintiff's needles; that the plaintiff's needles and the defendant's needles had always had on them the back label; that such back label was originally used about 50 years ago by R. Hemming & Sons, whose back label was exhibited in a schedule annexed to the defendant's affidavit; that the plaintiff's back label was an imitation thereof; and that the use of a crown, upon labels covering needles, was first adopted by the defendant's father, and used by him 40 or 50 years ago. A schedule annexed to the defendant's affidavit contained various specimens of front labels of various manfacturers of needles, all of which were printed in white letters on a red ground, and were 48 in number. Of these 48, 47 had upon them a crown, 41 had upon them the words, "drill'd ey'd sharps," and 32 had upon them the words, "genuine drill'd ey'd sharps, warranted." Of these 32, 22 had figures in circles, printed in white, 4 having so printed "5 to 10," 7 having so printed "5-10," and 11 having so printed single figures. The words in said 48 specimens of labels were arranged in lines under each other, in the same manner as in the plaintiff's and the defendant's labels. The back label before referred to of R. Hemming & Sons, was printed in black letters on a green ground, and was half the length of the plaintiff's back label. It occupied 5 lines, and read thus: "Manufactured and warranted by R. Hemming & Sons, Forge-Needle-Mills, Redditch."

Charles Edwards, for plaintiff.
Daniel D. Lord, for defendant.

BETTS, District Judge. On ordinary observation, the labels used by the two parties in this case would not be apt to be distinguished the one from the other—the size, shape, vignette, coloring and marking being so nearly identical as to make them easily pass for the same, and the only difference discernible, on considerable scrutiny, being in the name of the warrantor, stamped upon them in letters so small as not readily to attract notice.

It is this apparent similitude or counterfeiting which is the grievance complained of. A tradesman, to bring his privilege of using a particular mark under the protection of equity, is not bound to prove that it has been copied in every particular by another. It is enough for him to show that the representations employed bear such resemblance to his as to be calculated to mislead the public generally who are purchasers of the article, and to make it pass with them for the one sold by him. If the indicia or signs used tend to that result, the party aggrieved will be allowed an injunction staying the aggression until the merits of the case can be ascertained and determined. 2 Story, Eq. Jur. § 951; 2 Kent, Comm. (7th Ed.) 453, notes.

I cannot regard the denial by the defendant's affidavit alone, of the equity of the bill, as sufficient to defeat the motion for an injunction, resting, as it does, upon the positive oath of the plaintiff, and his long and unquestioned use of his design and mark. The affidavit has not the weight and effect of an answer. The allegations of the bill are, moreover, corroborated by facts set up in an additional affidavit, and not denied by the defendant, that he offered to destroy the labels prepared by him, and pay the expenses incurred by the plaintiff in this action, if the suit could be stayed, and by the further statement, not denied or explained

by the defendant, that no such persons or firm as those named in the defendant's affidavit, as having ordered the labels prepared by him, could be discovered, or heard of, in Baltimore, on inquiry there for them. These are matters of signal importance, and demanded a clear explanation by the defendant in his affidavit, addressed to the equitable consideration of the court.

The case is, in its general features, plainly within the scope of those cases over which courts of equity exercise the jurisdiction now applied for. The principles of the rules upon which injunctions are granted to suppress this description of wrong, and the extent to which the relief is carried, are largely discussed and distinctly settled in the summary of the adjudications, in late publications. 2 Kent, Comm. (7th Ed.) 473, and notes; 2 Eden, Inj. (by Waterman) 271, notes; 2 Story, Eq. Jur. § 951.

It is objected that the bill is defective in substance because James Smith & Son are not made parties, and that an injunction will be denied upon a bill which would be pronounced virtually insufficient on demurrer. Bills of this description are not maintainable upon the ground that the plaintiff has a right of property in the trade-mark. The relief is given because the mark is a sign or representation, importing, and so understood and acted upon by the public, that the article to which it is attached is the manufacture or production which is generally known in market under that denomination. Coffeen v. Brunton [Case No. 2,946]. The owner of the goods which bear the indicia is considered to be prejudiced in his interests if others can be permitted to come into the market with the same representation, and thus delude purchasers by vending inferior articles, or diminish the owner's business by acquiring sales to themselves under color of his reputation. The party, then, whose interests are directly affected by the wrong, is entitled to proceed in his own name to procure its suppression; and the person for whom goods are manufactured has the same legal right to affix and maintain a special trade-mark, as the manufacturer himself. Amoskeag Manuf'g Co. v. Spear, 2 Sandf. 599; Taylor v. Carpenter, 2 Sandf. Ch. 614.

The plaintiff was not the inventor of this label or trade-mark, nor the one who originally adopted it, but he is the assignee of it, and of the good-will of the trade. He stands, thus, in the same relation to the defendant as his assignor would, and whatever privilege the law accorded to James Walton, in the possession and use of the trade-mark, passed to and can be enjoyed by the plaintiff under the assignment.

I think that the plaintiff is entitled, upon his bill and the proofs before me, to an injunction in the cause, until the further order of the court. Order accordingly.

WALTON (KNOX v.). See Case No. 7,915.

Case No. 17,134.

WALTON v. McNEIL.

[3 Mass. 25.]

Circuit Court, D. Massachusetts. June, 1794.

JURISDICTION OF FEDERAL COURTS—SUITS BETWEEN ALIENS.

This was a declaration upon promises made at Quebec, viz. at Boston. The defendant pleaded to the jurisdiction; that the parties were both inhabitants of Quebec; and that the cause of action, if any, accrued in Canada, and not within the United States; and that cognizance thereof belonged to the courts of Great Britain, and not to any of the courts of the United States. To this plea there was a demurrer and joinder. The judgment was that the plea in bar is good, and that the court will take no further cognizance of this suit, and that the defendant recover his costs.

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

[NOTE.—See, also, Fields v. Taylor, Case No. 4,777. In Mason v. The Blaireau, Id. 9,230, Chief Justice Marshall held that the federal courts have jurisdiction of actions between aliens where no objection is raised; and in Montalet v. Murray, 4 Cranch (8 U. S.) 46, that, when both parties to an action are aliens, the courts of the United States have no jurisdiction. In the absence of treaty stipulations, which should be faithfully observed (The Elwine Kreplin, Case No. 4,426, reversing Id. 4,427; Ex parte Newman, 14 Wall. [81 U. S.] 152), Mr. Justice Bradley, speaking for the supreme court, said in The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860: "Circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts, or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages or because of ill treatment are often in this category; and the consent of their consul or minister is frequently required before the court will proceed to entertain jurisdiction,—not on the ground that it has not jurisdiction, but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul. * * * In other cases, also, where the subjects of a particular nation invoke the aid of our tribunals to adjudicate between them and their fellow-subjects as to matters of contract or tort solely affecting themselves, and determinable by their own laws, such tribunals will exercise their discretion whether to take cognizance of such matters or not." It was also held that, where controversies are communis juris,—that is, where they arise under the common law of nations,—special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. 114 U. S. 355, 5 Sup. Ct. 860. In Hinckley v. Byrne, Case No. 6,510, it was held that, where both plaintiff and defendant are aliens, the judicial power of the United States does not extend to the case, on account of the parties thereto; citing Massman v. Higginson, 4 Dall. (4 U. S.) 12; Piquignot v. Pennsylvania Ry. Co., 16 How. (57 U. S.) 104. This decision seems to have been based upon the decision in Jackson v. Twentyman, 2 Pet. (27 U.

S.) 136, "that, by the constitution, the judicial power was not extended to private suits in which an alien is a party, unless a citizen be the adverse party." See Const. U. S. art. 3, § 2; 1 Stat. 78, § 11; Rev. St. 629.]

WALTON (MOORE v.). See Case No. 9,779.

Case No. 17,135.

WALTON et al. v. The NEPTUNE.

[1 Pet. Adm. 142.] [1]

District Court, D. Pennsylvania. 1800.

SEAMEN'S WAGES—DEATH ABROAD—SICKNESS RESULTING FROM SEAMAN'S FAULT.

1. The seamen shipped for the whole voyage of the Neptune, and died before her return to Philadelphia. Their administrators claimed wages until the return of the ship, which were allowed by the court.

[Cited in note to Scott v. Greenwich, Case No. 12,531.]

2. In the shipping articles used in the United States, though wages are designated by the month, yet the contract is entire for the voyage.

3. Freight is always the rule of wages.

4. Hiring a seaman in place of the one dead has no influence on the general principle.

5. Capture interrupt, or wreck destroy, the voyage.

6. What is meant by full wages.

7. If sickness arose from the fault or vice of the mariner, no wages would be allowed.

[Cited in Writer v. The Richmond, Case No. 18,101; The Ben Flint, Id. 1,299; The City of Alexandria, 17 Fed. 395.]

8. Full wages allowed at common law although the disability be by accident.

[9. Cited in U. S. v. New Bedford Bridge, Case No. 15,867, to the point that the laws of Oleron are yet in force, except as to some of their harsh punishments for crimes and offenses, which are out of use.]

[10. By act of congress, the ship is bound to furnish medicines or pay the physician's bill; but the sailor, when the ship is properly furnished, must pay for surgical or medical advice and assistance. If left or put on shore, his reasonable board wages must be paid by the ship.]

[Cited in Harden v. Gordin, Case No. 6,047; Freeman v. Baker, Id. 5,084; Holmes v. Hutchinson, Id. 6,639; The Forest, Id. 4,936; Richardson v. The Juillette, Id. 11,784; The Ben Flint, Id. 1,299.]

PETERS, District Judge. The mariners shipped at Philadelphia, the twenty-first day of December, one thousand seven hundred and ninety-nine, at the current monthly wages, to perform a voyage to the Havanna, and back to Philadelphia. They died, through accidental illness, of a prevailing fever at the Havanna, while in the service of the ship. The libellants [Walton, administrator of Strum, and Armstrong, administrator of Pagel] claim wages as due to the decedents, for the whole voyage, allowing funeral expenses and physicians' bills. The ship arrived at Philadelphia, and earned her freight. The owner alleges, they should only be paid, pro tanto, to the time of their respective deaths.

The laws of Oleron contain the principles of all the maritime laws of the European western nations concerned in commerce; with some particular exceptions in particular cases. They are yet in force, and acknowledged in their great and leading principles, by all the trading nations; though some of their harsh and severe punishments and pecuniary mulcts, for crimes and offences, are out of use. Whenever any of their regulations are modified or contradicted, they are so modified or opposed by special ordinances, binding only in the particular state making them. Thus in France, by the thirteenth and fourteenth articles of the twenty-ninth section of the Ordinances of Louis the Fourteenth, it is declared, that "the heirs of a seaman hired by the month, and dying in the voyage, shall be paid his wages, until the day of his decease. The half of the wages of a seaman, hired by the voyage, shall be due to his heirs, if he dies outward bound; and the whole, if he dies in the way home. And if he sailed by the profit, or freight, his heirs shall enjoy his full share, if the voyage be begun before his death." Yet even in this modification, the leading principle is preserved, of payment of full wages, or freight; in the two latter cases, because the sailor was not in fault, but by an inevitable casualty, was prevented from fulfilling his contract. There is a similar distinction in the ordinances of Charles the Fifth, as to a sailor dying in the outward passage, when his heirs shall have half; and if on the home passage, they shall have his full wages. But in Spain, where their seamen are treated with peculiar strictness, there is a local custom, that "in ships of war on India voyages, if a man die the first day of the voyage his heirs are to be paid as much as if he had completed it." Herein preserving the general principle on which I have dilated in the case of Hart v. The Littlejohn [Case No. 6,153]. In that case, and in this, I consider the contract to be for the voyage, though monthly wages are stipulated; to take from the mariner the risk of long, and to give to the owner the advantage of short, passages. The terms of the shipping articles prove this, and the forfeitures, incurred by desertion, go to the whole due the sailor, for the preceding part of the voyage, and not solely to the month in which the forfeitures attach.

I have always made freight the rule. In a former case in this court, wherein an attempt was made to cut the seamen out of their wages, for the whole of an East India voyage, by making them payable only on the ship's return to Philadelphia, I decreed wages as far as freight was earned, the vessel having been captured on the home passage. I did not then recollect a stronger case than that before me. 2 Vern. 727. The seventh article of the laws of Oleron is clear, in my view, to the present question. It makes no distinction between the out and home passage. In this

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

article, after declaring what shall be done with a mariner falling sick, and left on shore after the departure of the ship, it is ordained —"But if he recover he ought to have his full wages; deducting only such charges as the master has been at for him, (to wit, better diet than the ship afforded, or more provisions than he required on ship board), and if he dies, his wife or next of kin, shall have it," i. e. his full wages. The 59th article of the laws of Wisbuy, the 45th of the laws of the Hanse Towns, and the 56th of those of Philip the Second, which he compiled for the Low Countries, were all founded on this law of Oleron, and agree with it exactly, both if he recover his health or die in the voyage.—See note on the 7th article, Laws Oleron. In one of these laws, the expression is general "he shall be paid his wages, if he recover," which, if explained by the laws of Oleron, certainly means "his full wages." But in the other law, it is more clearly expressed, "he shall be paid his wages as much as if he had served out the whole voyage." And in the event of death, I have no doubt that the words "his heirs shall have what was due to him" mean, according to the laws of Oleron, on which this is founded, "his full wages," or according to the preceding part of this same article "his wages as much as if he had served out the whole voyage."

Thus, by these wise and politic regulations, making attention to mariners the interest, as it was the duty of masters of ships. They or their owners sustain a loss by the death, but profit (in his services, and saving of the hire of another in his room) by the continuance of health, or recovery of the mariner from sickness. Hereby also giving encouragement to those who enter into this hazardous and laborious employment. Some provision being, in this way, made for them if they survive, when lingering under convalescence, or ruined by disability, occasioned by sickness or accident; or for their families, in the event of their death. This benevolent principle has always been attended to by enlightened nations. It is established in the most respectable codes of jurisprudence, among the general and leading points of justice, in contracts for personal services of every description. Common law authorities can be produced in support of it: it is grounded in the wisdom of ages. We find it recognised in the Digest of Justinian (law 38, p. 58): "He who has hired his services is to receive his reward for the whole time, if it has not been his fault that the service has not been performed." The laws of the Rhodians are inserted in this Digest.[2] These are the most ancient sea laws extant. They were adopted for the most part by the Romans; and we see their principal features in the laws of Oleron. One of these laws (article 46, Rhodian Laws) directs "that if the ropes break and the boat goes adrift, with mariners in it, and they perish at sea, the master shall pay their heirs one full year's wages." This article has been held to be a mulct on the master for having bad ropes; but we see no such assertion, in the text of the article. It proves, at any rate, the early attention paid to the families of deceased mariners, by commercial nations.

The provisions of the general maritime laws, and the principles of the Roman, or civil law,

[2] This fact I had taken from respectable authorities, and presumed it correct; although I knew it had been doubted by some, and contradicted by others. Among those who do not consider the parts of those laws now extant as genuine, is Bynkershoek, whose opinion has always great influence. A late writer (Azuni), who has treated with ability and extensive knowledge on maritime law, but is not free from prejudices on particular points, has taken much pains to prove, that the whole of the Rhodian laws were not inserted in the Digest of Justinian, though one of these laws relative to jetison, is to be found therein. He cites and comments on a number of authors for and against the authenticity of the fragments generally received as parts of the Rhodian laws; and concludes against their being genuine. He asserts, that these supposed Rhodian laws, are productions of more recent date, and fabricated by more modern Greeks. He brands them with the character of "trash"; yet, however accurate his opinions may be in other respects, I see not that they merit an appellation so vituperative. They contain many of the valuable principles of maritime law, though (as light things float long) some of the least important may have been borne down to us on the tide of time. It will be seen, on examining the authorities, many whereof are cited by Azuni (see 1 Mar. Laws [New York Ed. 1806] p. 265, et seq. and notes), that these fragments were discovered in Pithou's library, and first printed in Germany, by Simon Scardius. The Greek was the original language, in which these ancient laws were written. But Azuni discovers some modern Grecisms in Scardius' copy. The evidence, appearing on the face of them, of this language is, so far as it goes, rather a proof of authenticity; even if some corruptions from the purity of the original may have crept into, relatively, modern copies. Many ancient manuscripts and authentic classical works have been discovered in monasteries, where they have lain neglected for ages. Poggio, in the 15th century, recovered in Germany (where these fragments were found) as well as in Italy, some of the most valuable of the Roman classics, buried in rubbish and dust, in cloisters and other obscure places, where only one of his industry and talents would have sought for or found them. Pithou's library was a depositary more respectable; and Marquardus Freer and Leunclavius were the editors of the laws found there, and considered them authentic. They were persons of the first grade of literary character. The Pandects were discovered at Amalfi, or Pisa, (for this is not clearly ascertained) in places no more important to their credit, than the library of Pithou was to the Rhodian laws, said to be there deposited. Nor are those who attest the facts, as to the Amalfi or Pisan copy, or copies of the Pandects, more credible than Freer, or Leunclavius. The Pisans enobled M. Azuni for attributing to their predecessors the Consolato del Mare, and the discovery of the Pandects. It appears, however, be the fact of the authenticity of the Rhodian laws as it may (according to the allegation, after due examination, of the able American translator of Azuni's work, to whose labours and information I am much indebted) that the English compiler of the "Sea Laws," a book generally of good authority, is egregiously mistaken, when he asserts that, these fragments of the Rhodian laws are to be found in the Italian copy

I am bound to respect, when relevant to points before me, in my decisions on the admiralty side of this court. We have no act or ordinance of our own nation, comprehending the case in question. Having entered into the society of nations, we must therefore be regulated by the general laws which govern in maritime cases. I do not see that hiring a mariner in the place of the sick, disabled, or deceased seaman, (which is an obligation on the master, or he risks his insurance, or the safety of the ship) alters the principle of the case. It has an effect on the profit of the merchant, always subject to chances; and the death or sickness of mariners, is among his other risks. But it is beside the question of law. This profit is as much diminished by hiring in the room of sick or disabled mariners, (and their number is of no import as to the principle) as of those dead. The Spaniards oblige a sick or disabled mariner, to pay for one hired in his stead. But this is reprobated by the writers of other nations, as a severity peculiar to Spain. The argument, applicable only to a mariner recovered from

of the Pandects or Digest; and this copy has been most generally considered the only genuine remains of that important collection. It is nevertheless not incredible, that there were other copies of the compilations made by Justinian and his coadjutors, than those found at Amalfi or Pisa. This controversy has divided the learned for a long period; and must be left with those who delight in such investigations. Those who desire to gratify their curiosity, may consult 'Schomberg's Chronological View of the Roman Law,' where the subject of the Justinian Pandects, Code and Novels, and that of the Basilican Code, is concisely treated, and the authorities cited. It does not appear less probable that the Rhodian laws either entire, or digested, and published under one of the Greek emperors in their original language, were in existence in 876, in the time of the Emperor Basilicus, than that the Pandects should be found at Amalfi in 1135 or 1137. The Greek copy may have been preserved in Germany, and there discovered, as many such ancient manuscripts have been, in that district of the empire.

Having conceived and declared that, "the laws of the Rhodians are inserted in the Digest," I considered myself bound to give some account of the subject. But I have no desire to enter into an unnecessary critical investigation, or controversy, on a topic in which I may have been mistaken, and misled. I have fallen into an error, if such it really is, in common with many others. After all, this assertion is, beyond dispute substantially true. It is agreed on all hands, and conceded by Azuni himself, that the Rhodians gave the principles of maritime law to the Romans, who adopted them into their Code. Their leading character is allowed to be engrafted in the Roman, as well as subsequent sea laws. See Azuni on this subject. Whether the laws, in the very words in which they were originally promulgated, or only a summary of, or commentary on, them, "are inserted in the Pandects or Digest," is immaterial; if their general principles and distinguishing features are handed down to us. We have indisputable maritime laws, competent to guide and govern us, if what we have heretofore deemed the Rhodian laws should be rejected as apocryphal. The principles of the venerable Rhodian Code are indubitably transfused into systems yet extant, and in high estimation. These principles have survived the ravages of barbarism, and the vicissitudes of fortune, which have reduced to imbecility and obscurity, the once powerful and celebrated people, with whom they originated. Time, which has exterminated every monument of their wealth and splendor, has perpetuated these more durable memorials of their policy, wisdom and justice; by disseminating them through distant regions, and extending their inestimable advantages to remote generations and races of men.

[The following explanatory note relative to the Rhodian laws has been added by Judge Peters as a correction to the above note. It is reprinted from 2 Pet. Adm. 478:]

Not having considered it so important to establish (if I were capable of so doing) the authenticity of the Rhodian fragments, as to show that the principles of the Rhodian laws were inserted in the Digest of the Justinian, all the facts relative to these fragments were not sufficiently attended to. Nor were the compilations of Justinian then examined farther than occasional references required. It is alleged in the note that the fragments were first printed in Germany. It appears they were first printed at Basle in Swisserland, by Scardius, in 1561; and afterwards, in 1596 at Frankfort, in Germany, by Leunclavius and Marquardus Freer. They were Germans, and the latter was the pupil of the celebrated Cujas or Cujaccius, as was also Pierre Pithou or Pithoeus. In this note it is suggested, that the fragments were found in Germany. This does not appear clearly in any of the books I have had opportunities of consulting. The Pithous, Pierre and Francis, were brothers, and sons of an eminent civilian. They were Frenchmen; and the former most celebrated. He was a Protestant, and had a miraculous escape from the infamous massacre of St. Bartholomew. Both were consulted on great juridical and diplomatic questions, being eminently famed for their talents and accurate knowledge of the Roman laws; many valuable portions whereof (collected and preserved in their libraries) were by them "brought forth from the obscurity in which they had been buried for ages." Pierre was styled the Varro of France: his library was in Paris, and accounted the most valuable collection in his time. The Rhodian fragments were discovered in the library of Francis Pithou; which was also greatly valued, when public libraries were rare. In these fragments, as published by Scardius, Azuni discovers Latin words written with Greek letters. Such should have been styled "Latinisms." However the fact of authenticity may be, it appears the most probable, that the text of the Rhodian laws was not inserted in the Pandects: though it is asserted by respectable jurists (cited by Schomberg, Illustrations 199,) that the Romans, and after them the Greek emperors, "regulated all matters of trade and navigation by the Rhodian laws, which were, on that account, admitted into the Pandects." To admit them verbatim seems to have been inconsistent with the plan of these collections, which was to condense and abridge, and not exactly to copy the Roman or other laws, the principles whereof were adopted. This became the custom of jurists, not only of the period in which the Digest was formed, but of succeeding ages. It has not yet ceased, though it is condemned by writers of eminence, as a practice which has tended to supersede the use of the original laws; and thereby occasion their loss and final destruction. The Basilica or Procheiron of the Emperor Basil or Basilius is only an epitome of Justinian's Code, which has always been considered of the highest authority; and to form the most essential part of what is called "Corpus Juris Romano-Civilis," —a title applied, in its strict sense, solely to the Institutes, Code and Novels of Justinian. The use of the Basilica, encouraged by the Greek emperors, may have superseded that of the Roman Code; and occasioned its laying so long in obscurity.

sickness or disability, and left in a distant country, leaves the case where it finds it. These mariners are said to be entitled to their wages, only from the peculiarity of their situation, i. e. to enable them to get home; yet they do not receive them till they arrive at home: whither they most commonly work their passages; and if they do not, but receive wages, these are deducted from their demands. If the mariner had arrived in the ship, though from sickness or disability he had done no duty, his claim to his full wages, would be equally legal. The subject must be viewed on a more extensive scale, than as it affects the interests of individuals. I conceive it to be for the great and general interests of commerce, and much for its reputation, that, at some particular sacrifice of gain, encouragement and support should be afforded by those who profit by their services, or hire them with that object, where mariners are unfortunate and faultless. Occasions too frequently happen in which they merit, and incur, severe forfeitures and punishments.

Although the sum in demand in this case is small, the subject often presents itself; and I wish to put the point at rest here, until an occasion for an appeal offers. I must be guided by what I conceive fixed principles, which ought not to be shaken because temporary inconveniencies casually occur. I wish it to be understood, that, in the application of the general principles here I do not lose sight of the limitation mentioned in the case of The Littlejohn [supra]. All general rules are subject to exceptions. Capture or wreck interrupt or destroy the voyage. The sick mariner, or the heirs of one dead, can only receive wages out of the freight earned; and so far as it is earned. And in the case of a ship seized for debt, or forfeited through the owner's default, wages will be received though no freight be earned. By full wages I therefore mean, as much as he would have been entitled to, had he been on board and met the fate of the ship. In the case I have now to determine, the freight was earned for the voyage. So it was in the case of The Littlejohn, with the deduction of salvage—to which, if it had occurred here, I should have ordered the libellants to contribute. They must now allow all sums, lawfully chargeable against the decedents. Let it be also understood, that the sailor must not be in fault. If his sickness, disability or death is owing to vicious or unjustifiable conduct, he, or his heirs must bear the loss, propter delictum.

I have looked into several common law authorities on this subject. By the common law, no contract for wages was apportionable. Brooke, Abr. tit. "Apportionments; Labourers' Contracts." See the case of Chandler v. Greaves, H. Bl. 606. It appears expressly on enquiry, by order of the court of C. P. in 1796, into the usage of the British admiralty, a disabled mariner "was always entitled to his wages during the whole voyage." And in this case, full wages were recovered at common law. The mariner's disability was occasioned by an accident, happening on board the ship, and he does not appear to have met it in doing actual duty. There is no difference as to wages, between the case of a sailor disabled on actual duty, or that of one taken sick, or, owing to no misconduct, accidentally disabled while in service. In the former case, he is to be cured at the expense of the ship; in the latter, at his own charge. The ship, by act of congress is bound to furnish medicines or pay the physician's bill: [3] but the sailor, when the ship is so furnished, must pay for chirugical or medical advice and assistance. If left or put on shore (in lieu of the ship's provisions, ship-boy, or nurse ordered by the law of Oleron) his reasonable board wages must be paid by the ship. The case in 6 Term R. 320 (Cutter v. Powell), was determined on the special agreement, and not on the general maritime law. A sum in gross, four times larger than the rate of current wages, was to be paid on terms which death prevented the mariner from performing. "Modus et conventio vincunt legem." It appears in this case, that there was no fixed usage among the London merchants, in 1795, on this subject. The high wages given to our mariners, are general, and not confined to a particular case; they are contracted for under the shipping articles, and not by special agreement. They are caused by our neutral situation, which occasions great demands for seamen. The merchant's profit, or chance of it, is in proportion. High wages, are however, not confined to the maritime class of our citizens. But the principle is not affected by such fluctuating circumstances. It is certain that I rely much on principles practised upon, in instances of sick and disabled mariners. I cannot distinguish these from those which should govern in the case of a mariner deceased. The law of Oleron couples them together, and is with me decisive. The ordinance of France has fixed a rule for that nation. This rule would give the libellants the full wages, if the decedents had died on the home passage. There are some grounds in point of fact, to warrant this application of their case to this rule, if it were necessary. The outward pas-

[3] Always bound to submit, with the respect I owe, to the laws, yet having frequently seen the inefficacy, and in several instances the danger, of medicines administered ignorantly, or carelessly, I have not been perfectly satisfied that the seamen should pay the bill for medical advice, which to complete the intent of the provision should be charges on the ship. But finding the weight of authority that way, I have yielded. It is certain that medicines administered without due knowledge of the disease, are as often fatal as the malady, if not more so. Congress intended a benefit to the mariner, but he had better pay for medical advice, than risk the consequences of indiscreet use of the medicine chest. In numerous instances, physicians' bills, especially in the West Indies, have balanced the claim for wages. By the terms in the alternative, in the act of congress, that if the ship has no medicine chest, the owners shall pay the physician's bill, it seems, that if the ship is furnished with the chest, the sailor must pay for advice; but the ship must supply medicine.

sage was ended when the ship arrived at the Havanna. The wages for the voyage must be paid, subject to all legal deductions.

I do therefore adjudge, order and decree, that the libellants, respectively, have and recover the sums following, that is to say, Elijah Walton, administrator of Matthias Strum, shall have and recover the sum of one hundred and thirty dollars, and Andrew Armstrong, administrator of Johannes Pagel, shall have and recover the sum of sixty-four dollars and eighty-three cents, being the balance of wages due to the said Matthias Strum and Johannes Pagel, for the whole voyage. And I finally adjudge, order and decree, that the said ship Neptune, together with her tackle, apparel and furniture, or so much thereof as may be necessary, be condemned, and that the same be sold by the marshal of this district for the payment to the libellants aforesaid of the sums of money herein before decreed to them respectively, together with the costs and charges, legally accruing, in the premises.

WALTON (WEAVER v.). See Case No. 5,488.

WALWORTH (ASHCROFT v.). See Case No. 580.

Case No. 17,136.

WALWORTH v. COOK COUNTY.

[5 Biss. 133.] [1]

Circuit Court, N. D. Illinois. June, 1870.

APPLICATION FOR INJUNCTION—PRACTICE.

On filing a bill for an injunction, it is not competent for the complainant to fix a time for hearing the motion for an injunction so far ahead as to embarrass the defendant. The court will, on application, anticipate the rule day.

In equity. Rule to show cause why injunction should not issue, returnable on the 25th. Counsel for complainant [James J. Walworth] contend that such is not a rule to show cause on or before the day set; that the rule day ought not to be anticipated.

Before DRUMMOND, Circuit Judge, and BLODGETT, District Judge.

BLODGETT, District Judge. Mr. Dent came in on Saturday and stated that notice had been served of an application for injunction under a bill filed in court; that the application would be made on the 25th of this month. He stated that the application was against the board of supervisors of this county, to prevent their entering into a certain contract; that the board was then in session, and likely to take action in the matter. In view of the fact that that board is a public body in charge of the county interests, it might be important for the public that they should know whether they had the right to make the contract. I thought he should have an early hearing, and so intimated to Mr. Dent that the public business should not be delayed by the mere option or motion of the party filing a bill against it, for perhaps the party filing the bill and giving the notice might set an unreasonable day. A man might file a bill and give notice that he would apply for an injunction in six months, and thus get the advantage of an injunction, and yet not get it. I therefore thought that Mr. Dent had a right, under the circumstances, to call the matter up at an earlier day and require you to make your application.

DRUMMOND, Circuit Judge. I think it is not competent for a party to fix a time so far ahead as to embarrass a party defendant by the notice of an application for injunction, but it is the right of the party to whom notice has been given to come in and have the matter disposed of in a reasonable time.

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

WALWORTH MANUF'G CO. (GILBERT, ETC., MANUF'G CO. v.). See Case No. 5,418.

Case No. 17,137.

WALZ et al. v. BROOKVILLE NAT. BANK.

[11 Chi. Leg. News, 392; 8 Reporter, 580.] [1]

Circuit Court, D. Indiana. Aug., 1879.

PRACTICE — DECREE AT SAME TERM OF DEFAULT ENTERED.

It is not competent for the court to enter a final decree in case of default and decree pro confesso during the term when the default was taken; but it seems that where the default or decree pro confesso is taken in open court, under any special order made by the court and after the intervention of a rule day, an absolute decree may be taken at the same term of court.

In equity.

DRUMMOND, Circuit Judge. This is a bill of review filed by Mary M. Walz, the widow of Frank A. Walz, deceased, and his children and heirs at law, under the following facts: Frank A. Walz, in his lifetime, in January, 1874, borrowed a considerable sum of money of the defendant, for which he gave his promissory notes, with a mortgage executed by himself and his wife, Mary M. Walz, now his widow and administratrix, on certain property to secure the said indebtedness. Some of the notes not being paid according to their tenor and effect, the defendant filed a bill to foreclose the mortgage in this court in July, 1875. A subpœna was issued on the 12th of that month, and was then served upon all persons named as defendants in the bill, except Mary M. Walz, a minor, who seems to have been a different person from the wife of the mortgagor. A guardian ad litem was appointed for those of the defendants who were minors, and the guardian filed an answer for them denying the allegations in the bill.

[1] [8 Reporter, 580, contains only a partial report.]

It is not clearly stated in the bill of review, but the inference is that Mary M. Walz, the present widow and administratrix of the estate of Frank A. Walz, was served with process in the foreclosure proceeding, and the fact is that she did not appear in the case, and a default was taken against her, and a decree that the bill as to her be taken pro confesso. The bill of foreclosure was then referred to a master, who made a report of the facts, and also of the amount due upon the notes and mortgage, and the report was approved by the court, and on the 24th day of September, 1875, there was a decree of the court finding the amount due under the mortgage, and requiring that Mary M. Walz should, within ten days, pay the sum with interest, and that in default thereof, the property should be sold. It would seem that Frank A. Walz had died before the bill in the foreclosure case was filed. It is alleged now in the bill of review that the decree entered in the foreclosure proceeding was erroneous, and should be set aside because there was a default taken, and an order entered, as of course in the order book of this court, that the foreclosure bill should be taken pro confesso against Mary M. Walz, the administratrix and widow, who had a claim in her own right to the property mortgaged; and that at the same term that the decree pro confesso was entered, there was a final decree rendered and an order of sale made contrary, as alleged, to the 18th and 19th rules of the practice of courts of equity. The bill of review also claims that the mortgage was invalid, in whole or in part, because it was not given to the bank in good faith, by way of security for a debt or debts which had been previously contracted, and that it was not real estate conveyed for what was necessary for the accommodation of the bank in the way of transacting its business. It is also alleged in the bill of review that the mortgage was given in whole or in part for an usurious consideration; and further, that a sale was decreed to be made of the property in fee simple; whereas in point of fact, it was not owned by the mortgagor in fee simple, but that there were other interests in the property. And it is further alleged that counsel were employed in the case, and that they neglected their duty, and did not appear, and that was the reason a default was taken against the parties.

The main controversy in the case seems to be whether it was competent for the court to render a final decree, and order a sale in the foreclosure case, where default had been taken against one of the defendants at the same term in which the decree was rendered; and it is claimed that the case of O'Hara v. MacConnell, 93 U. S. 150, is an authority to show that could not be done, and so that there is error upon the face of the decree of foreclosure, for which a bill of review will lie. The case referred to seems by the language of the judge who delivered the opinion to hold that it was not competent for the court to enter a final decree in case of default during the term when the default was taken. It is true that it was not absolutely necessary to so hold in that case, although it is given as one of the reasons why the case was reversed, the remaining two reasons stated by the court being sufficient for that purpose. The principle, as stated by the reporter in the headnote is, that it is not competent to render a final decree for want of appearance at the first term after service of subpœna, unless another rule-day has intervened, which seems to be somewhat different from that stated by the judge who delivered the opinion of the court. In this case two rule-days had intervened before final decree, after the subpœna was served, and one after default was taken.

The practice has been in this circuit for many years to take final decrees at the same term as that during which a default has been entered against the party. We have always supposed that the cases in which a final decree could not be taken during the term in which the default was entered, applied to the entry of defaults in what is called the "order-book," during vacation. The 4th rule in equity declares that "all motions, rules, orders, and other proceedings made and directed at chambers, or on rule-days at the clerk's office —whether special or of course—shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed." It has been always supposed that this is something different from the regular record or journal of the proceedings kept by the court in term time. It says that this order-book "shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors," a direction that would hardly seem to have been necessary when applied to the regular record or journal kept of proceedings in court while sitting. So when the 18th rule declares that it was the duty of the defendant to file his plea, demurrer or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance, and that "in default thereof the plaintiff may, at his election, enter an order as of course, in the order-book, that the bill be taken pro confesso," it has been supposed that this referred to an order under the rules, and under the direction of the plaintiff, entered in the order-book, during vacation or at chambers, and not to an order entered by the court when it was in regular session. And so the practice has been where there was a default taken in open court during its session, and entered by the court, to consider that it was not an order made by the plaintiff in the order-book, as mentioned in the 18th rule; and so in the 19th rule, when it was declared that the court may proceed at the next ensuing term after the bill is taken pro confesso to render an absolute decree, it has been supposed that it referred to the order taken in vacation, and entered in the order-book, as stated in the 18th rule; and it will be recollected that these rules were made in 1842,

at a time when in most of the districts the court sat for a few days, or at most a few weeks during a term, and they hardly seem applicable to courts which, when the decree in question was entered, sat for months, and when, if the 18th rule applied to all decrees pro confesso, it might well be that a final decree could be taken in an equity case upon answer and proof sooner than where there had been a decree pro confesso. But the supreme court seems to have given emphasis to the opinion in the case of O'Hara by amending the 18th and 19th rules at its last term, by which amendment it was declared that after the expiration of 30 days from the time when the order pro confesso was entered, a final decree might be taken. If it appeared in this case upon the bill of review that the default or decree pro confesso, had been taken in open court under any special order made by the court, and after the intervention of a rule-day an absolute decree had been taken, I should feel inclined to sustain the decree in this case, but it would seem from the allegation of the bill, as though the decree pro confesso, or the default, was not taken during the sitting of the court. The allegation of the bill of review is, that said bill was filed and default taken, and the order entered as of course in the order-book, that the bill should be taken pro confesso, which rather seems to imply that a decree pro confesso was entered in vacation under the 18th rule.

In view of the difficulty connected with this question, and of the decision of the supreme court of the United States in the O'Hara Case, and of the amendments made to the 18th and 19th rules at the last term of the court, I feel constrained to overrule the demurrer which has been filed to the bill in this case. If it shall turn out that the decree pro confesso was entered during the sitting of the court, under an order to that effect made by the court in session, it can be stated in the answer, and then the question can be fairly presented to the court for its consideration, whether there could be an absolute and final decree taken at the same term during which a decree pro confesso or default was entered.

WAMPOLE (DALLAM v.). See Case No. 3,543.

Case No. 17,138.

The WANATA.

[4 Ben. 310.] [1]

District Court, S. D. New York. Oct., 1870.[2]

COLLISION OFF BARNEGAT—PILOT BOAT AT ANCHOR—LIGHTS—ANCHOR WATCH.

1. A pilot boat, at anchor, is not required to show a white light at her masthead, and a flare-up light every fifteen minutes, as required by the 8th article of the rules for preventing collisions (13 Stat. 58), but must show the white light in a globular lantern, provided for by the 7th article.

2. A pilot boat was at anchor off Barnegat, showing a proper light, but having no watch on deck. She was run into by a schooner which was running in, under shortened sail, to anchor, the wind being so violent that the schooner was unable to keep her own side lights burning. *Held*, that the schooner was in fault in not keeping a vigilant lookout, and that the absence of an anchor watch on the pilot boat, under the circumstances, was not a fault contributing to the collision.

[Cited in The Lady Franklin, Case No. 7,984.]

In admiralty.

Beebe, Donohue & Cooke, for libellants.

J. H. Choate, for claimants.

BLATCHFORD, District Judge. This is a libel filed against the schooner Wanata, to recover for the damages caused to the libellants by the sinking and total loss of the pilot boat Josiah Johnson, and of certain clothing and other property on board of her, through a collision which occurred between the two vessels, about 9 o'clock p. m., on the 6th of March, 1869. The amount of damages claimed is $23,000. The libellant Johnson was the owner of the pilot boat, and the other libellants were the owners of such clothing and other property. The Wanata was on a voyage from New York to Charleston. The pilot boat was at anchor, off the coast of New Jersey, in the Atlantic Ocean, about half a mile from the shore, in four fathoms of water, about from 15 to 20 miles north of Barnegat light. The wind was very strong from the north-west. The pilot boat was struck on her starboard side by the stem of the Wanata, and sank in a very few minutes. She had on board thirteen persons, all told, six of whom were pilots. Of these thirteen, eleven have been produced as witnesses for the libellants. The pilot boat had come to anchor because she had split her foresail. The libellants insist that the collision happened through the fault of those on board of the Wanata, in not keeping a proper lookout, and in sailing at too great a rate of speed. The claimants insist that the collision was caused by the negligence of those on board of the pilot boat, in anchoring in an improper place, in not exhibiting a proper light, and in not keeping a proper watch on her deck.

The claimants fail to show that the pilot boat was anchored in an improper place. As to the light on the pilot boat, I am satisfied, on the evidence, that she exhibited such a light as is prescribed by article 7 of the statutory regulations (Act April 29, 1864; 13 Stat. 58) for a vessel at anchor. It is insisted that she ought to have exhibited, not the white light in a globular lantern, provided by article 7, but a white light at the masthead, and a flare-up light every fifteen minutes, as prescribed for sailing pilot vessels by article 8. It is in-

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

[2] [Affirmed by circuit court. Case unreported. Decree of circuit court affirmed by supreme court in 95 U. S. 600.]

sisted that article 8, in speaking of "sailing pilot vessels," means pilot vessels propelled by sails in contradistinction to pilot vessels propelled by steam, and that, as the pilot boat in this case was a vessel propelled by sails, she was bound to exhibit the lights prescribed by article 8, at all times, both while at anchor and while actually sailing, and that the provisions of article 7, as to the light to be exhibited by vessels at anchor, do not apply to her. It may be conceded, that the expression "sailing pilot vessels," in article 8, only includes pilot vessels propelled by sails, and yet it by no means follows that that article applies to such vessels while at anchor. In the first place, article 7 prescribes a light for all vessels at anchor. Article 8 does not speak of vessels at anchor; and the wording of all the articles in the statute shows clearly that article 8 was only intended to prescribe lights for sailing pilot vessels while under way. Whenever, in the statute, a light is prescribed as one to be borne and exhibited uninterruptedly in a fixed place by a vessel under way, it is spoken of as a light to be carried; and the word "carry" is not applied to a light that is to be shown by a vessel at anchor, or to a light that is to be shown otherwise than uninterruptedly by a vessel under way. When a light is spoken of, in the statute, as one to be shown by a vessel at anchor, or one to be shown otherwise than uninterruptedly by a vessel under way, the word used is "exhibit." In article 3, for seagoing steamships under way, in article 4, for steamships when towing other ships, and in article 5, for sailing ships under way or being towed, the word used is "carry." The vessels are supposed to be in motion and are to "carry" the lights prescribed, and such lights are to be visible uninterruptedly, and not to be exhibited at intervals only. But, when we come to article 6, which provides for "exceptional lights for small sailing vessels," when under way, and the side lights cannot be fixed so as to be carried where they will be visible uninterruptedly, they are required to be "exhibited" on the approach of or to other vessels. So, in article 7, the prescription in regard to vessels at anchor is, that they shall "exhibit" the prescribed light. In article 9, the provision is, that open fishing boats, and other boats, when under way, shall not be required to "carry" the colored side lights, but that, if they do not, the proper colored light shall be "exhibited" in the proper place, on the approach of or to other vessels, and that such boats, when at anchor or stationary at their nets, shall "exhibit" a bright white light. In consonance with this use, in articles 3, 4, 5, 6, 7, and 9, of the words referred to, we find, that, in article 8, the provision is, that "sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light every fifteen minutes." The word "carry," as there used, intends a light borne by the sailing pilot vessel while under way, and visible uninterruptedly; and the word "exhibit" intends a light on such vessel while under way, not visible uninterruptedly, but exhibited at prescribed intervals. There would seem to be a good reason for prescribing for a sailing pilot vessel, when under way, different lights from those prescribed for other sailing vessels when under way, but no good reason can be conceived for prescribing for a sailing pilot vessel when at anchor different lights from those prescribed for other sailing vessels when at anchor, especially in view of the fact, that article 7 prescribes one and the same light for all vessels at anchor, whether steamships or sailing ships. It is undoubtedly often convenient, and even necessary, for a vessel which desires to take a pilot from a pilot boat which is under way at sea, to approach so near to the pilot boat as to require the exercise of caution to prevent a collision between the two. Such approach may be made at night, and, for the pilot boat to carry and exhibit the lights prescribed by article 8, so as to distinguish her from other sailing vessels, would seem to be reasonable and useful, not only to indicate her character, but to guard against collision with her. But a pilot boat at anchor is presumptively not in the course of present service, not seeking employment for her pilots, and not to be approached by a vessel seeking a pilot. Hence, there is no necessity that she should, when at anchor, show a different light from that shown by every other vessel at anchor.

As to the question, whether, in fact, the pilot boat in this case exhibited, at and before the time of the collision, such a light as is prescribed by article 7, the clear weight of the evidence is that she did. In addition to all the other evidence, the witness Miller who had been on deck on the pilot boat continuously for an hour and ten minutes before the collision, and had gone below for his coat a moment before the collision, testified, that the light was burning brightly in the main peak halyard when he so went below, and that it had been so burning during the hour and ten minutes. Moreover, the light was seen before the collision, by those on board of the schooner, but at too late a moment to avoid the collision. It was in a proper place, 15 or 16 feet above the deck, and about 15 feet abaft the mainmast, the sails being all furled. Placed as it was, and with the pilot boat heading to the wind, it ought to have been seen by the approaching schooner. All the discrepancy, in the testimony, as to the position in which some of the witnesses saw the light after the collision, is owing to the fact that some of them looked at it from the higher position of the deck or bulwarks of the schooner, the pilot boat being lower in the water, and to the further fact, that its position was lowered by the canting aft of the mainmast, owing to the injury it received by the blow from the schooner.

It is clear, on the proofs, that the schooner

had no proper lookout, and that the collision was due to her negligence in that respect. A lookout stationed forward upon her, engaged diligently in searching for lights and vessels ahead, with his attention not distracted by other duties, would, undoubtedly, have seen the pilot boat's light in season to have enabled the schooner, by a change of helm, to avoid her, anchored as she was. Especially was this duty of keeping a vigilant watch, of the character indicated, incumbent upon the schooner on such a night, and in her existing predicament. The wind was so violent that she was unable to keep her own side lights burning, and she was running in, under shortened sail, to anchor under Barnegat. Still, her speed was considerable, and, having no lights to indicate to those on other vessels her approach, it was especially incumbent on her to watch closely for such other vessels.

In view of the fact that the pilot boat was at anchor, and exhibited a proper light, and that the schooner had no lights to indicate her approach, it cannot be regarded as a fault on the part of the pilot boat, contributing to the collision, that no one of her company was on deck or on watch at and just before the collision.

There having been no fault on the part of the pilot boat, and the collision being caused by the fault of the schooner, there must be a decree for the libellants, with costs, with a reference to a commissioner to ascertain and report the damages sustained by the libellants.

[Affirmed by the circuit court, on appeal. Case unreported. Decree of circuit court affirmed by supreme court. 95 U. S. 600.]

WANATA, The (AVERY v.). See Case No. 677.

Case No. 17,139.

The WANDERER.

[1 Spr. 515;[1] 23 Law Rep. 139; 17 Leg. Int. 260.]

District Court, D. Massachusetts. June, 1860.

SLAVE TRADE—FORFEITURE OF VESSEL—INTENT—HOW PROVED—ACTS OF MASTER—IGNORANCE OF OWNER.

1. Under the second section of the act of 1818, c. 91 [3 Stat. 451], for the suppression of the slave-trade, it is not necessary, in order to subject the vessel to forfeiture, that the fitment should be complete.

2. Nor is it necessary that it should be peculiarly adapted to the slave-trade, if the illegal intent be otherwise shown.

3. But if the intent is to be inferred only from the character of the fitment, the latter must be such as to prove the illegal design.

4. Where any person, as master, fits out a vessel, with intent to employ her in the slave-trade, she is liable to forfeiture, although the owner has never authorized any such illegal enterprise, and is ignorant of the master's intention.

This was a libel of information, by the district attorney, in behalf of the United States, claiming a forfeiture under the second section of the act of 20th April, 1818, c. 91. That section is as follows: "That no citizen or citizens of the United States, or any other person or persons, shall, after the passing of this act, as aforesaid, for himself, themselves, or any other person or persons whatsoever, either as master, factor, or owner, build, fit, equip, load, or otherwise prepare any ship or vessel, in any port or place within the jurisdiction of the United States, nor cause any such ship or vessel to sail from any port or place whatsoever within the jurisdiction of the same, for the purpose of procuring any negro, mulatto, or person of color, from any foreign kingdom, place, or country, to be transported to any port or place whatsoever, to be held, sold, or otherwise disposed of as slaves or to be held to service or labor; and if any ship or vessel shall be so built, fitted out, equipped, laden, or otherwise prepared, for the purpose aforesaid, every such ship or vessel, her tackle, apparel, furniture, and lading shall be forfeited."

J. A. Andrew and A. G. Browne, Jr., for claimants, made the following points: 1st. That the second section of the act of 1818 was not violated, so as to involve the forfeiture of the schooner, unless she was fitted or prepared for sea by Martin, "as master," acting in the work of fitment and preparation, as the agent of the owner, and that, as essential to his action, thus "as master," he must have been authorized by the owner, to fit and prepare the vessel for sea. 2d. That there is no evidence or pretence, that he was authorized by the owner to fit or prepare her for sea at all, much less to fit or prepare her for the slave-trade. 3d. That the evidence shows that, if Martin exercised any of the authority pertaining to a master at all, he did so by mere usurpation; and that his partial fitment and preparation for sea was surreptitious, tortious, and fraudulent, as to the owner. 4th. That such acts as were performed by Martin, and are relied upon by the government, as evidence that he was master of the schooner (although they are usually performed by that officer, and are competent in evidence), do not necessarily prove the fact; and that notwithstanding these acts, and the circumstances attending them, the truth being, and being made to appear, that Martin was a wrong-doer, they, as pieces of evidence, are to be regarded as successfully rebutted. In other words, that a man who is not master, does not become so by pretending that he is master, and acting the falsehood, as well as speaking it. 5th. That even although Martin had become "master" de facto, so as to bind the owner in respect to his ordinary contracts with seamen and material-men (they acting inno-

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

cently and bonâ fide), yet he could not forfeit the ship from the owner, unless he should be master de jure,—master as between the owner and himself; for otherwise he cannot be deemed, in the words of the statute, to have been "acting for" the owner in what he did. In other words, that one "as master" cannot forfeit a vessel, unless as "acting for the owner;" and that Martin was in no sense acting for [G. B.] Lamar, but was acting against him. 6th. That there was no such characteristic fitment or preparation for sea, as to show that a slave voyage was intended. 7th. That the declarations made by Martin, as to his own unlawful intention, cannot affect the vessel, because only the owner, or a real and lawful master or factor, could so impress his own mind and intent upon the vessel, as to affect its character, to the detriment of the owner. 8th. That the only fitment or preparation for sea, which was made at all, was the hasty, secret, and imperfect preparation, which Martin made, to enable him to steal the vessel; and that such a fitment, made by a felon, in fraud both of the owner and of the government, to enable him to steal the vessel, is not the fitment intended by the statute, nor are the words or acts of such a felon, said or done in the pursuance of his felonious intention, capable of affecting either the owner or the res. 9th. That even if Martin could affect the vessel by his own intention, there was no clear intention in his mind beyond the appropriation of the vessel to his own use; that he had no money, nor credit, nor other means of obtaining a slave cargo; that he had no accommodations for a cargo of slaves, nor such an outfit as is characteristic of a slaver; that he was merely a general pirate, intending to get what he could, and actually getting what he could, by artifice, and intimidation, and fraud, from vessels which he boarded, and from merchants, at ports where he stopped, and pursuing an aimless career over the seas, subject to such variations as his own caprice, or the accidents of fortune, might suggest.

And they cited The Emily and The Caroline, 9 Wheat. [22 U. S.] 381; The Plattsburgh, 10 Wheat. [23 U. S.] 133; U. S. v. Gooding, 12 Wheat. [25 U. S.] 460.

C. L. Woodbury, Dist. Atty., for the United States, cited U. S. v. Gooding, 12 Wheat. [25 U. S.] 460; St. Jago de Cuba, 9 Wheat. [22 U. S.] 409; The Porpoise [Case No. 11,284]; The Catharine [Id. 14,755]; U. S. v. Morris, 14 Pet. [39 U. S.] 464; U. S. v. Quincy, 6 Pet. [31 U. S.] 445.

SPRAGUE, District Judge. This controversy resolves itself into two questions: 1st. Was this vessel fitted out or prepared with intent to employ her in the slave-trade? And if so, 2d. Was this done by any person, "as master, factor, or owner?"

On the night of the 18th of October last, the Wanderer went to sea, from the port of Savannah, under the command of one Martin, with a full crew of officers and men, all shipped for that purpose at Savannah. Some of the crew had been on board of her, fitting her for sea, for several days before she sailed, during which time water had been taken in, stores purchased and put on board, to the amount of nearly $2000. Her sails were taken from the shore and bent, and other preparations made. These acts were all done by Martin, as master, and constituted a fitting or preparing of this vessel for sea. Was it done with intent that she should be employed in the slave-trade? The conduct of Martin, and the manner in which this vessel went to sea, demonstrate that he was intent upon some unlawful enterprise. Most of the stores were hurriedly taken on board, in the evening of the 18th of October, and during the darkness of the same night, he hoisted sail, and went down the river, taking with him two seamen, who had just before come alongside in a boat, which had been employed by one Black, to convey him to the vessel; and these two men were compelled, against their will, to go the voyage. The vessel escaped from the port, without any clearance from the custom-house, without charts or books of navigation, and so suddenly that none of the crew were allowed time to take their clothing from the shore, and many of them were coerced by threats, and a display of deadly weapons. Upon what illegal enterprise was Martin intent? Here it has been made a question whether his own declarations of his purpose are admissible in evidence. As the fitment was all made by him, and the vessel went to sea under his command, there can be no doubt, that what was said at the time of doing these acts, as explanatory of, or giving them character, are admissible as part of the res gestæ. To Hussey, the shipping-master, who was employed by him to engage the crew, ostensibly for a voyage to Matanzas, he declared that "he had been in the slave-trade, and was going into it again." And before the vessel left the river, while near its mouth, Martin prepared shipping articles,—describing the voyage to be to Saint Helen's Sound, a place on the coast of Africa,—which all the crew signed. This they were induced to do by a free use of intoxicating liquors, and a display of pistols. And, before leaving the river, Martin repeatedly declared that he was going for a cargo of "blackbirds," that is, negroes. Upon getting to sea, instead of going to Matanzas, he shaped his course for the Western Islands, and arrived at Flores in thirteen days, with no deviations, except for the purpose of speaking other vessels, in order to obtain charts and supplies. At Flores he took on board a quantity of provisions, and then escaped furtively, without paying for them, and soon after arrived off Funchal, in the Island of Madeira; but seeing a man-of-war in port, he put to sea, directing his course for the coast of Africa. A few days after this, falling in with a French bark, he went on board of her with a boat's crew, and in his absence, the mate, with the concurrence of the crew, took the command, changed her course, brought her to Boston, and delivered

her up to the officers of the revenue. These facts clearly show that the Wanderer was fitted for sea by Martin, with intent to employ her in the slave-trade. In the cases cited by the counsel, it was held, that the fitment need not be complete, but that any preparations for the unlawful purpose are sufficient. The Emily and The Caroline, 9 Wheat. [22 U. S.] 381; The Plattsburgh, 10 Wheat. [23 U. S.] 133; U. S. v. Gooding, 12 Wheat. [25 U. S.] 460. But it is insisted, that here the fitment was not only incomplete, but that no part of it was exclusively or peculiarily adapted to the slave-trade. But such adaptation is not necessary, where the intent is otherwise proved. Where the character of the fitment is the only evidence of the illegal purpose, it must be such as to prove such purpose. And if the preparations be only such as are made for innocent voyages, no criminal intent can be inferred from it; but if the criminal intent be proved aliunde, then any fitting for sea, coupled with such intent, satisfies the language and spirit of the statute.

As to the second question. Was this fitting out for the slave-trade made by Martin as master? When the Wanderer sailed, and for several months before, she was owned by Charles A. L. Lamar, of Savannah, who had purchased her under a decree of condemnation for having been a slaver. Eight or ten days before she went to sea, Martin, by consent of Lamar, took actual possession and control of her, and acting as master, shipped a crew, purchased stores upon the credit of the vessel, and otherwise prepared her for sea, with intent, on his part, to engage in the slave-trade. But it is insisted, that this was not done by him as master, within the meaning of the statute, unless he was actually authorized so to fit the vessel for that trade; that if Lamar only intended and authorized a fitment by Martin, as master, for a lawful voyage, it would not be sufficient, and that there must be a criminal intent on the part of the owner. To this doctrine I can by no means accede. The words of the statute are—"if any person . . . as master . . . shall fit . . . or prepare a vessel with intent," &c. The acts and intention of Martin bring the case within the words of the statute, and they are clearly within the mischief which it was intended to suppress. If all the illegal acts and purposes must be authorized by the owner, then they are his acts and intention by his authorized agent, and the words "master or factor" are without meaning, and might be wholly omitted, without impairing the force or effect of the statute. The construction contended for, will not only violate the language, but defeat the purpose of the act. For an owner might send his vessel on a lawful voyage to New Orleans, for example, and there his master fit her out for the slave-trade; nay, even in the home port, the owner has only to keep behind the curtain, while the master is fitting his vessel for the criminal enterprise, and make, at the proper time, such declarations and manifestations as may repel the presumption of complicity, and the vessel will be liable to no forfeiture. But it is urged, that it is unjust to deprive the owner of his property, when he has been guilty of no criminal purpose. No doubt it may sometimes bear hard upon innocent owners. But this hardship is imposed by the general policy of our laws, when vessels are employed for criminal purposes. For example, smuggling goods to the value of $400 may subject a ship to forfeiture, however innocent the owners. And seizures for such cause are frequent. Even the Cunard steamers have been arrested more than once, in this port, because a few hundred dollars' worth of goods had been smuggled on shore, without a suspicion that the owners, or even the officers, were in any degree implicated in the illegal act. The legislature, to insure not only good faith, but the utmost vigilance on the part of the owners, says to them emphatically, you must, on peril of losing your vessel, see to it that she shall not be made use of as an instrument for violating the law. And if this is deemed necessary, merely for the protection of the revenue, for a much stronger reason should it be enforced against vessels to prevent their being used as instruments to carry on a trade, which not only in the eye of morality, but also in the eye of the law, is the most atrocious that man can be engaged in. We must recollect, that a traffic so denounced and so criminal, will assume every disguise, false pretence and deception, which fraud and ingenuity can devise, and calls for the most stringent measures for its prevention; one of which is to enlist the owner of the vessel to prevent her being so employed in violation of law, by holding him responsible for such use to the extent of his ownership.

For these reasons, I do not think it necessary to go into the question which has been so much contested, whether Lamar had knowledge of Martin's criminal intent. It is said by the claimant that Martin had contracted to purchase three-fourths of the Wanderer for the sum of $20,000, and that he was permitted to go into possession, and control her, in the confident expectation that he would speedily become the major owner. But this explanation goes only to the guilt or innocence of Lamar, and leaves the fact of the actual control, and the acts and purposes of Martin, as master, untouched. In this case, Martin was in possession, with the consent of the owner, and I am not called upon to decide what would have been the result, if he had been a mere trespasser from the beginning. When that case shall arise, and an owner shall leave his vessel so exposed, that a wrong-doer can seize, fit, and convert her to such unlawful purpose, it will be for the court to consider, whether both the language and the spirit of the law do not require her condemnation. But that question is not now before me. This vessel, her tackle, apparel, furniture, and lading, must be decreed forfeit.

NOTE [from 23 Law Rep. 139]. There were two other cases in the district court connected

with the Wanderer. One was a libel in rem, brought by Weston, the mate, and the crew, for their wages; the other was a libel in rem by the same parties for salvage; they having brought her into the port of Boston, as stated in the above opinion. The claim for wages was objected to, because, first, the crew knowingly and willingly sailed on the illegal voyage; and, second, because the owner of the Wanderer did not give the master such authority as would give the seamen he employed a lien on the vessel for their wages. Both objections were overruled, and the claim for wages was allowed, except as to the mate, who was held not to have been ignorant of the purposes of the voyage. The libel for salvage was dismissed, because, to entertain it, the libellants should have saved the vessel from something. They could have saved her only from forfeiture for being engaged in the slave-trade; and, as the vessel was decreed forfeited, they had no reason to be compensated for any salvage service. W. H. Judson was counsel for libellants; Messrs. Andrew and Browne, for the claimant.

Case No. 17,140.

The WANDO.

[1 Lowell, 18;[1] 2 Int. Rev. Rec. 117; 27 Law Rep. 391.]

District Court, D. Massachusetts. Sept., 1865.

PRIZE—VIOLATION OF BLOCKADE—CAPTURED COIN—PROPERTY OF NEUTRAL MASTER.

1. Coin taken in a vessel which was captured in the act of breaking blockade, is liable to condemnation, though belonging to a neutral, and not intended to be used in trade.

2. Nor will such coin be exempted from this rule by being the property of the neutral master; at least, if his conduct as master and as a witness is open to just animadversion.

3. An amount of money sufficient for the master's necessary expenses, while detained here, will be allowed him out of such coin.

In admiralty.

R. H. Dana, Jr., Dist. Atty., for the United States and captors.

C. G. Thomas, for claimant.

LOWELL, District Judge. The Wando, or Let Her Rip, was captured near Wilmington, in North Carolina, having run out of that port, with a full cargo of cotton, in the course of an unfinished voyage from Nassau to Wilmington and back to Nassau. Her papers were all destroyed before the capture, and her national character does not distinctly appear by the evidence. The only claim is by the master, who is a British subject, for restitution of about five thousand dollars in American gold coin, which is alleged to be his private property. The master's own statements, made in his several affidavits, are not consistent with each other; but I am inclined to believe that the story told in his deposition, before he had taken counsel, or was likely to see the bearing of the facts upon the law of the case, is true, namely, that the money was, in part, the earnings of this voyage, and in part savings out of former earnings. This is the most favorable view, at all events, which the evidence will allow me to take of his case. And the question is, how shall the court deal with this coin upon this state of facts?

It is conceded in the argument for the claimant that trade with Wilmington was illegal, and that any property engaged in that trade, or any thing which formed a necessary part or instrument of the mercantile adventure, must be condemned. But the allegation is, that this money was the mere personal and private property of the master, not used nor intended to be used in trade; and it is said that neutral property, so situated, is not liable to forfeiture.

In respect to the coin, which was a part of the wages for this unfinished illegal voyage, I think it must be considered not to come within the exception contended for. It is clear that the master could not claim his wages here, nor his freight; and if his outward freight had been paid at Wilmington, and were found on board in specie, it must have been condemned. And so, of these wages. They were so involved in the illegal transaction that they must, upon the admitted principle, follow the fate of the ship, cargo, and freight. A somewhat analogous point is decided in The Frederick, 5 C. Rob. Adm. 8.

But the exception contended for cannot be maintained. The right of a belligerent, who has established a lawful and effective blockade, is to prevent all intercourse with the blockaded port, and not merely the intercourse of traders. His object is to shut out all aid and comfort, and even all information, every thing which can by possibility be turned to the advantage of the enemy or to his own injury. The visit of a neutral immigrant vessel, or yacht, or mail carrier, or ship of war, or merchant vessel, are all equally illegal, unless with the consent of the blockading power, and may be restrained by him with such a degree of force, be it more or less, as may be necessary under the circumstances. And the violation of this right subjects private property in general to forfeiture. In the case of a neutral public ship indeed, the right of capture may not exist, but this is because for wrongs done by public officers of a friendly government, redress is sought directly of the government itself, which is presumed not to have authorized such acts. Governments do not proceed against each other in rem excepting when they are at war, or when redress has been refused them. But this is a question of remedy and of international comity, and does not at all depend upon the fact that the public ship is not a trading vessel.

It is equally true that the persons of neutrals are subject only to such restraint as may be necessary to prevent the illegal act, or to compel the presence in the prize courts of important witnesses. But this exemption applies alike to traders and to non-traders, and so throws no light on the present question. And

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

I think the principle is that private property which may aid the enemy is presumed to be hostile, and this for several reasons: one is, because of the very great difficulty attending the proof of intent in matters of this kind, and the great opportunity for fraud and deception; and again, because the intent of the owner may not control the action of the enemy. Thus, if contraband of war be taken into the blockaded or besieged port, who shall say that it will not be at once confiscated and turned to warlike use by the besieged? So of a vessel in ballast; and so of coin.

In this case, moreover, the evidence of intent is entirely insufficient. It is not easy to believe that the master would not have used the money in trade if he had found a good opportunity to do so: as indeed he did use a part of his money to buy cotton, which was on board, and for which he makes no claim.

And it makes no difference that the money was actually on its way out from Wilmington when captured. It is equally liable to forfeiture for having been carried in, the voyage not being finished. And the mere bringing out of property through the blockade would, no doubt, subject it to a like forfeiture. See The Rapid, 8 Cranch [12 U. S.] 155.

I am not to be understood as deciding that the mere personal effects or the pocket-money, intended for the subsistence or expenses of the owner, whether he be an enemy or a neutral, is to be seized. Such is not the law nor the usage. In this case the marshal gave the claimant, with the consent of the captors, about two hundred dollars out of the sum taken, for his expenses. And, as he was detained here for a considerable time, I shall allow him two hundred dollars more. The rule I am intending to lay down is, that money as well as other property, in amount sufficiently large to be considered by the court, especially if capable of being used in trade if occasion occur, and taken breaking blockade, is to be deemed hostile, without regard to the neutrality of its owner, or to his actual intent to employ it in trade. It is for him to bring himself within any of the admitted exceptions, such as a license, &c.

Although the case was not put on that ground, I am aware that courts of prize exercise great lenity towards masters and seamen; and that the private adventure of the master has been restored in many cases in which the vessel and cargo have been condemned. But without examining the limits which ought to divide the discretion of the courts from the indulgence of the captors,—limits which I am inclined to think have been sometimes overstepped by the former,—it is enough to say that in this case the conduct of the master, by the false statements which he made to the marshal about this matter, by his prevarication in his affidavits, but especially by the spoliation of the ship's papers, are such, that he cannot fairly expect the exercise of the peculiar consideration in question. Decree of condemnation.

Case No. 17,141.

In re WANGERIEN.

[11 Int. Rev. Rec. 181.]

District Court, N. D. Ohio. 1870.

INTERNAL REVENUE—WHOLESALE DEALERS.

In the section of the act of April 10, 1869 [16 Stat. 41], defining what constitutes a wholesale dealer, the words "five gallons" refer to "wine" gallons, and not to "proof" gallons.

On motion to set aside a verdict rendered against A. Wangerien & Son, of Cleveland, Ohio, in the United States court.

Geo. Willey, U. S. Dist. Atty., for court.

J. E. Ingersoll and John W. Heisley, for defendants.

SHERMAN, District Judge. The defendants, authorized retail dealers in liquor, were indicted for carrying on the business of wholesale dealers in liquor under section 44 of the act of July 20, 1868 [15 Stat. 130], which imposes for such offence a fine of not less than $1,000 or more than $5,000, and imprisonment not less than six months nor more than two years. "A retail dealer," by this law, "pays a special tax of $25, and is defined to be one who sells foreign or domestic spirits, wine, ale, beer, or other malt liquors, and whose annual sales, including all sales of other merchandise, do not exceed $25,000." "A wholesale dealer in liquor pays a special tax of $100, whose annual sales do not exceed $25,000; and if exceeding $25,000, pays in addition $10 for every $1,000 of sales of such spirits, wines, or liquors, in excess of $25,000; and on other sales shall pay as wholesale dealers; and such excess shall be assessed and paid in the same manner as required of wholesale dealers. Every person who sells distilled spirits, wines, or malt liquors, whose annual sales shall exceed $25,000, shall be regarded as a wholesale liquor dealer." By this law, therefore, one selling $25,000 of liquors paid a tax of $25, while one selling one dollar in excess of that sum was compelled to pay a tax of $100. This bore hard, evidently, upon the wholesale dealer, and for this and other reasons the above definitions were changed by the act of April 10, 1869.

By this act it was provided that "every person who sells foreign or domestic spirits, wines, or malt liquors in quantities of not less than five gallons at the same time, shall be regarded as a wholesale liquor dealer," and pay a tax of $100. A retail dealer is one who sells less than five gallons of the same liquor, and pays $25 tax. Within the above definition of a wholesale liquor dealer it was necessary to bring the defendants, to insure a conviction. Upon the trial, the government showed a sale of five wine gallons of whiskey by defendant, at the same time, to one person, and rested. The defendants then offered evidence tending to show that said five gallons were below proof, and that, therefore, they had sold less

than five proof gallons, and consequently had not carried on the business of a wholesale liquor dealer. The court allowed this evidence to go to the jury, but charged that, if five wine gallons were sold, the offence was proved. The jury found the defendants guilty. Thereupon they moved for a new trial for alleged error in the charge; and the simple question presented by the motion is this: Do the words "five gallons," in the act of 1869, mean wine or proof gallons?

The definition of wholesale liquor dealers and of retail liquor dealers, and the distinction between them, from the first revenue law in 1862 [12 Sat. 432] down to the act of March 2, 1867 [14 Stat. 471], were substantially the same as those of the act of 1869; except that the dividing line was three instead of five gallons. Congress, having the constitutional power to fix the standard of weight and measures, has, in all these as in all later acts, declared a proof gallon to be a wine or gauge gallon of that alcoholic liquor containing one-half of its volume of alcohol. This was done to establish a basis on measure of taxation, and to compel an honest payment of that tax by distillers, —first and second sections of the act of 1868. These reasons have no application to, or connection with, rectifiers, compounders, or dealers, for though the packages handled by these persons must, under heavy penalties, be inspected, gauged, marked, and branded, it is for the purpose of preventing fraud by distillers, and of tracing fraud where it exists back to the manufacturer of the spirits.

Now, under these former acts prior to March, 1867, it was universally held by the revenue department and by the courts that the "three gallons" meant wine gallons, and this was the true construction beyond all doubt. No other construction was claimed or acted upon by any person. By the first section of the act of March 3, 1865 [13 Stat. 469], the fifty-sixth section of the act of June 30, 1864 [13 Stat. 243],—a section almost precisely like the second section of the act of 1868, by virtue of which it is claimed that the court erred in its charge,—was amended by adding these words: "And in all sales of spirits hereafter made, where not otherwise specially agreed, a gallon shall be taken to be a gallon of first proof, according to the standard set forth and declared for the inspection and gauging of spirits throughout the United States." There is nothing in this amendment certainly which changed the existing definition of wholesale and retail dealers or changed the dividing line between them from three wine gallons to three proof gallons, since, among other reasons, that would allow parties, by a private agreement, to change an act of congress. The object of the amendment was probably this: Every revenue law has levied the tax on spirits upon the basis of a proof gallon; that is, every wine gallon of spirits less than proof paid a tax of the same amount as a wine gallon first or full proof. Under the law of 1862 the tax was small—twenty cents per gallon. Under the law of 1864 the tax was raised to two dollars per gallon. Evidently the object of this amendment was to allow the tax-payer, who paid the same tax of two dollars on a wine gallon of spirits forty per cent. below proof as on a wine gallon of spirits of fifty per cent. or full proof, to sell the same, "if not otherwise specially agreed," as a proof gallon and for the same price if he could find a purchaser, and so to enable the tax-payer and seller to pay two dollars on a wine gallon below proof; the amendment declared that such a wine gallon should, in all sales, be taken to be a full proof gallon. That this fact, in any suit between the seller or purchaser, should not be disputed or called in question, "unless otherwise specially agreed" upon between the parties. The same amendment was preserved in the act of the 13th of July, 1866, § 33 [14 Stat. 157], together with the same definition of wholesalers and retailers as given in the act of 1862. Still no one ever claimed or supposed that this amendment changed the dividing line between wholesalers and retailers from "three wine gallons" to "three proof" gallons. Indeed, this opinion sprung up after, and because the second section of the act of 1868 in adopting the same amendment left out the words "except where not otherwise specially agreed," and it sprung up also because the scope, meaning, and bearing of this amendment in the law of 1865 and 1866 were forgotten or not examined. Everyone believed that in the phrase selling "three gallons of distilled spirits fermented liquors, and wines of every kind," under these acts of 1865 and 1866 the words "three gallons" meant wine and not proof gallons. It meant this for the simple reason that neither in commerce nor in our revenue laws was the term "proof gallon" ever applied to wines of any kind or fermented liquor.

The definition of wholesalers and retailers, given in the law of 1869, considered by itself, declares beyond question that the dividing line between them is "five wine gallons," and not "proof gallons," and this seems to be admitted by counsel, who nevertheless claim that these words, when construed with the second section of the act of 1868, mean proof gallons. Indeed, any other construction of the words than wine gallons would be simply to set a trap for the ignorant, unwary, and innocent dealer. For it requires the possession of a hydrometer, which not one dealer in a thousand has; of a perfect thermometer, also, to measure the proof gallon, or, in other words, to arrive at and measure with certainty the exact quantity below or above five gallons allowed to be sold by the special tax certificate of the retailer or wholesaler; and if by any defect in these delicate instruments, or by any unskilfulness of the manipulator, a mistake is made, fine and imprisonment might follow. Should the retailer sell ten gallons marking by his instrument 24½ proof, he is safely with-

in supposed legal limit of less than five proof gallons. But should a more accurate or perfect instrument make the proof twenty-five per cent, he would be liable to a fine of five thousand dollars and imprisonment for two years; and possibly, in this age of whiskey frauds, would be convicted and suffer the penalties prescribed. Such a law, or a construction of any law leading to such consequences, would be cruel and outrageous. On the other hand, congress knew that every family, every liquor dealer, had a wine measure of some capacity, a gallon, quart, or pint, using which no violation of the law could be committed, except purposely.

If the construction I have indicated by the law of 1869 is at variance with the law of 1868, we must still give it effect as the latest declaration of the legislative will. An examination of this law shows that it does not sustain the construction put upon the law of 1869 by defendant's counsel. Let us examine various sections of this law and see if they indicate that the definition in the law of 1869 imports proof gallons. Section 1: "There shall be levied on every proof-gallon a tax of fifty cents, which shall be collected on the whole number of wine or gauge gallons when below proof, and increased in proportion to the strength above proof." Section 19: "The distiller shall make true and exact entry of the number of gallons distilled, the number of gallons placed in warehouses and the proof thereof," and also "the number of gallons sold or removed and the proof thereof." Section 23: "All spirits are to be drawn from the receiving cistern into casks of not less capacity than twenty gallons wine measure." Section 27: "Between sun-set and sun-rise no cask containing more than ten gallons to be removed from any place where made or stored." Section 47: "Every package containing not less than ten gallons drawn from any other package must have the proof marked thereon." This would be superfluous if the "ten gallons" imported proof-gallons. Section —: "Certain persons are forbidden under a penalty of $1,000 from purchasing distilled spirits in quantities greater than twenty gallons, except from an authorized rectifier, compounder, distiller, or wholesale dealer in spirits." Each of the persons so purchasing and so selling must, by other sections of the act, enter the quantities bought and sold and the proof thereof in a book kept for that purpose. These two words, "quantities," in different sections, plainly mean wine gallons. The retailer is not among the excepted persons, and yet should be, if he has the right to sell over twenty gallons at a proof low enough to make less than five proof gallons. These quotations and numerous others, which might be quoted, plainly show that when quantities, or the contents of casks or packages, are spoken of in the law, wine gallons are the ones referred to; that proof gallons are spoken of only in relation to the rate of taxation; and even in the latter case, by the first section, the tax is collected upon the wine or gauge gallon.

Again, one great object of the law of 1868 was the prevention of fraud in the collection of duties. Every section is carefully drawn to effect this purpose. It fixes the size of packages for tobacco, snuff, cigars, and whiskey. It covers them with brands, stamps, marks, and notices, so that any person witnessing a sale of any of these articles can know at a glance whether a violation of the law has occurred. This object would be defeated as to many provisions relating to distilled spirits, if wholesale dealers may sell, as defendants claim, a cask of two and one-half gallons, so that the spirits are 100 per cent. proof; and the retailer a cask of ten gallons of spirits, so that they are 26 per cent. below proof.

I have already observed that the words "five gallons" in the definition given by the law of 1869 mean, looking only to the definition, wine gallons. I have already shown that the construction of former laws and the practice under them, and the general scope and interest of the law of 1868, not only are not opposed to this meaning, but sustain it. I will now examine the second section of the law of 1868, which section, as claimed by defendant's counsel, makes the "five gallons" in the definition mean proof gallons. The first section, after levying a tax of fifty cents on each proof gallon, directs that "it shall be collected on the whole number of gauge or wine gallons when below proof, and shall be increased, in proportion, for any greater strength than the strength of proof spirit as defined by this act." The second section, after declaring that "proof spirit shall be that alcoholic liquor that contains one-half of its volume of alcoholic specific gravity of 79.39 at sixty degrees Fahrenheit," adds, our old acquaintance, the amendment of the act of 1865, in these words: "And in all sales of spirits hereafter made, a gallon shall be taken to be a gallon of proof spirits according to the foregoing standard set forth and declared for the inspection and gauging of spirits throughout the United States." Had the phrase, "unless otherwise specially agreed," contained in the former amendment, been retained in this, no one would have imagined that the five gallons in the definition meant five proof gallons, that it compelled us to read "five gallons" when applied to spirits, as five proof gallons, and when applied to wine and beer, as five wine gallons. But that phrase was mere surplusage, since every person could legally contract for any degree of proof—as he may, for wheat weighing, less or more than sixty pounds to the bushel, the standard fixed by law—whether the phrase "unless otherwise specially agreed" were retained or rejected. The amendment imports, in law, the same meaning, and establishes the same rule in sales without as it does with the phrase. Not having changed the meaning of the "three

gallons" in the law of 1865, it cannot, then, change the meaning of "five gallons" in the law of 1869.

Let us analyze the provision, "in all sales of spirits, a gallon shall be taken to be." A gallon of what? Why, a gallon of spirits. What kind of a gallon? Why, certainly a wine gallon. The sentence then will read thus: "In all sales of spirits, a wine gallon of spirits shall be taken to be a gallon of proof spirits." The clear, obvious import and meaning of this, is, that where a transaction has no other element than the mere sale of five wine gallons of whiskey, as in this case at the bar, they shall be considered and taken to be five proof gallons; and that, too, whether they are above or below proof; that throughout the United States a wine or gauge gallon of spirits sold shall be taken and adjudged to be a proof gallon sold; that in a contract for the sale and delivery of one hundred gallons of whiskey merely, the contract is fulfilled by the delivery of one hundred wine gallons above or below proof, upon which a tax is laid by the first section. This provision, so construed, is in accordance with the custom of the trade in reference to small quantities. No purchaser of a few gallons of whiskey ever inquires about the proof. This section, then, for the benefit of the distiller obliged to pay the same tax upon a gallon below proof as upon a proof gallon, sanctions the custom of the trade, and extends the same to any quantities, however large. It declares in effect that in any suits growing out of such sales where this question is involved, the courts shall allow neither buyer nor seller to dispute this fact, this conclusive presumption of law.

It follows, therefore, not only that this section does not change or modify in any way the definition given by the law of 1869, but is clearly opposed to the construction claimed by defendants' counsel. It shows, clearly, too, taken in connection with the first and other sections quoted above, that the law of 1868 made the wine gallon the measure of capacity and quantity, and, with a single modification, of taxation also. It is apparent from all this that the only error committed by the court was, after the sale of five wine gallons had been proven, in allowing evidence to go to the jury tending to show that they were not proof gallons, the law itself declaring that in such case they should be taken to be proof gallons. The motion is overruled.

WANGERIEN (UNITED STATES v.). See Case No. 16,637.

WANN (UNITED STATES v.). See Case No. 16,638.

WANTON (WALKER v.). See Case No. 17,090.

WAPE v. HEMENWAY. See Case No. 18,042.

WAPLES (LOUISIANA PAPER CO. v.). See Case No. 8,540.

Case No. 17,142.

WARBURG v. MAXWELL.

[3 Blatchf. 382.] [1]

Circuit Court, S. D. New York. Nov. 30, 1855.

CUSTOMS DUTIES—PROTEST—PENALTY—EVIDENCE.

Where a protest, by a consignee of goods, claimed that they were invoiced at their fair market value, and also protested against the payment of a penalty for undervaluation, and described the goods thus—"these goods consigned to me by the manufacturer thereof, maintaining that they are not liable to a penalty under the laws, for the reasons stated"—*held*, that the consignee could not, under such protest, prove that the goods were owned and imported by the manufacturer, and so not liable to the penalty.

This was an action against [Hugh Maxwell] the collector of the port of New York, to recover back an excess of duties and a penalty. The jury found a verdict for the plaintiff [Edward Warburg], subject to the opinion of the court on a case.

John S. McCulloh, for plaintiff.
J. Prescott Hall, for defendant.

BETTS, District Judge. This action is brought to recover back an excess of duty of $52.25, and also an additional duty of $328, exacted on an importation of twenty-nine cases of silk from Havre to this port, in August, 1851. The invoice price was raised by appraisal 15 per cent., and an additional duty of 20 per cent. was imposed.

The protest claims, that the goods were invoiced at their fair market value at the time and place of shipment, and also protests against the payment of the penalty imposed on "these goods consigned to me by the manufacturer thereof, maintaining that they are not liable to a penalty under the laws, for the reasons stated." This protest is vitally defective in not stating that the goods were owned and imported by the manufacturer. It affords no distinct notice to the collector that the manufacturer continued to be the owner after his consignment. The invoice and entry import the contrary. The manufacturer merely certifies to the invoice, that it represents the true market value of the goods at the place of shipment; and the plaintiff, on the entry, takes, in his own name, the owner's oath, in full. He also takes the "consignee, importer or agent's oath" on the entry, adding thereto, "E. Roth is part owner." And it is not asserted by either of these oaths, or by the protest, that Roth was the manufacturer of the goods.

In our opinion, the plaintiff cannot, under this protest, be allowed to prove that Roth was the manufacturer; nor can he avoid the payment of the penal duties, on the allegation or proof that the goods were owned and im-

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

ported by the manufacturer, without having notified the collector of that fact, in the written protest. Judgment for defendant.

Case No. 17,143.

WARBURTON et al. v. AKEN et al.

[1 McLean, 460.] [1]

Circuit Court, D. Illinois. June Term, 1839.

JUDGMENT—CONCLUSIVENESS—CONTINUANCE—ABSENT WITNESS.

1. A judgment of a court, having jurisdiction of the subject matter, is conclusive between the parties until reversed or set aside on the ground of fraud.

[Cited in The Acorn, Case No. 29.]

2. Where a party moves for a continuance on account of absent witnesses, and states what he expects to prove by such witnesses, if the facts stated would not be admissible in evidence, the motion must be overruled.

3. As between parties who enter into a fraudulent combination against an individual, no relief will be given, either in a court of law or chancery.

[Cited in Tufts v. Tufts, Case No. 14,233; Overshiner v. Wisehart, 59 Fed. 138.]

[Cited in Fargo v. Ladd, 6 Wis. 118.]

[This was a suit by Warburton and King against Aken and Little. Heard on a motion for continuance.]

Mr. Logan for plaintiffs.

Mr. Johnston, for defendants.

McLEAN, Circuit Justice. This action was brought on a judgment obtained in the state of Missouri, against the defendants, as the garnishees of Kemball, against whom an attachment had been issued. A motion for a continuance was made by defendants to take the deposition of a witness by whom they expected to prove that when the attachment was issued, at the request of plaintiffs, the defendants, who live at a considerable distance from St. Louis, remained in the city until the attachment could be issued and served on them as garnishees, although they were not indebted to the defendant in attachment, which was well known to the plaintiffs and admitted by them. But that they wished the service to be made on the defendants as garnishees, as it might induce the defendant in attachment to pay the debt. And they promised to give the defendants notice, if their attendance should be necessary at a subsequent term, and assured them that under no circumstances should any injury result to them. With this understanding the service on the defendants as garnishees was submitted to, and that they heard nothing further from the plaintiffs until a judgment was entered against them. And the object of the testimony which they wish to take is, to set aside the above judgment.

If the deposition which the defendants desire to take, could not be read, if taken, the motion for a continuance, must be overruled. The court before whom the judgment in Missouri was obtained, had jurisdiction of the subject matter; and the judgment, however erroneous, is conclusive on the parties, unless the same shall be reversed or set aside on the ground of fraud. And unless to show fraud, if indeed that could be shown collaterally, the evidence on which the judgment was obtained cannot be gone into. This court cannot re-try the case which has been heard and adjudged by the court in Missouri. The defendants complain that they were entrapped by the assurances of the plaintiffs, that they would give them notice, and that under no circumstances should they suffer injury. From the statement in the affidavit it would appear, that the defendants entered into a combination with the plaintiffs to give jurisdiction to the court in Missouri, by consenting to be summoned as garnishees; although they did not owe the defendant in attachment a dollar, which was known and admitted by the plaintiffs. In so far as this proceeding could affect the interests of the defendant in attachment, it was a fraud upon him. Such a fraud as neither a court of law nor chancery would relieve against, as between the parties practising it.

If the defendants can avail themselves of any fraudulent acts of the plaintiffs, on the proceedings before the Missouri court, relief may be sought in a court of chancery. And it would seem that an application to chancery would be more appropriate for relief, than the defence which is attempted to be set up in this action. I am satisfied that if the facts which the defendants state could be proved by the absent witness, they could not be received as evidence in the present state of the pleadings in this case, and the motion for a continuance must, therefore, fail.

1 Anstr. 8; 2 Saund. Pl. & Ev. 29, 30; 2 Mer. 392, 7; 7 Taunt. 97; 3 Ves. & B. 42; Doug. 196; Cowp. 727; 1 H. Bl. 75; Starkie, 247, 250, were cited by the counsel.

Motion for a continuance overruled and judgment.

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

Case No. 17,144.

In re WARD et al.

[2 Flip. 462; [1] 25 Int. Rev. Rec. 289; 8 Reporter, 136.]

District Court, W. D. Tennessee. June, 1879.

PARTNERSHIP — CONTRACT — LENDER TO RECEIVE INTEREST IN PROPORTION TO PROFITS — PRESUMPTIONS OF LAW.

Beyond dispute a participation in the profits of a business is prima facie strong evidence of a partnership in it, but a loan to a person engaged in trade on condition that the lender shall receive a rate of interest in proportion to profits, or a share of the profits, does not of itself constitute the lender a partner, nor does a contract to remunerate a servant or agent of a person

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

engaged in trade by a share of the profits, of itself, render such servant or agent liable as a partner.

[Cited in Re Ward, 12 Fed. 326.]

In bankruptcy. On petition to charge Mrs. Margaret Holst as a partner in the firm of J. C. Ward & Co. and to adjudicate her a bankrupt. She claims that the facts only show that she lent her money on a contract to receive one-fourth of the profits as interest on the loan. The creditors insist that she was a partner in fact, and certainly so as to creditors.

Vance & Anderson, for creditors.
Estes & Ellett, for defendant.

HAMMOND, J. Partnership is a contract of two or more persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. 3 Kent, Comm. 24. There is no difficulty in the ordinary course of business with the case of an actual partner, who appears in his character of an ostensible partner. The question as to the persons on whom the responsibility of partner ought to attach in respect to third persons arises in the case of dormant partners who participate in the profits of the trade and conceal their names. They are equally liable, when discovered, as if their names had appeared in the firm, and although they were unknown to be partners at the time of the creation of the debt. 3 Kent, Comm. 31. A partnership inter sese—that is, in relation to the persons engaged as between each other—can commence only by the voluntary contract of the parties, expressed in their agreement, or implied from their dealings with each other and the outside world. 43 Mo. 391. But parties as to third persons, and sometimes even as between themselves, may become partners by the legal effect of their agreement, or of their acts and dealings, although they may not be aware of such legal effect, and may not believe themselves partners and may deny it. 31 Vt. 395.

It is urged by the creditors in this case that the simple fact that Mrs. Holst participated in the profits makes her, by operation of law a sharer in the losses and liable for debts, and that every one who has a share in the profits ought to bear his share of the losses. 1 Smith, Lead. Cas. 381.

An agreement between persons to share in certain proportions of the profits of a business does not necessarily make them partners as to each other under circumstances which certainly do render them liable as such to third persons. The Crusader [Case No. 3,456]. The rule of law formerly prevailing, that participation in the net profits of a business made the participant liable absolutely to third persons as a partner, has certainly been greatly modified in England and in this country. 83 Pa. St. 290. We have been favored by learned counsel with arguments on both sides, based upon a reference to the authorities on this question. And our supreme court say that "it must be confessed that some of the discriminations, where profits are used as compensation for definite services, are very nice." 22 Wall. [89 U. S.] 119. And I may add in the language of Lord Eldon, that the distinctions are so thin that they have proved perplexing and unsatisfactory. 17 Ves. 403. Distinctions based on the difference between net and gross profits, whether the parties have a lien or only may look to the fund, whether entitled to an account, whether they share as principal owners or not, whether liable on the doctrine of agency, etc., have all been, I find, quite as useless to all other judges who have, in the conflict of cases, searched for the principle, as they are to us here now. 3 Kent, Comm. 25, note 1, and also same note on page 22 (bottom), 12th Ed. It will be thus seen that the conflict of cases is so great that, in the absence of controlling authority, a court may support either view with the most respectable judicial opinion.

I find that the perplexity grows out of an attempt to gauge and measure by tests each case so as to determine by a rule, whether as a matter of law, the partnership exists irrespective of the fact itself; and the solution to be to treat the case as presenting to the court and the jury the question as one of fact, and this rule of the common law as one of evidence, more or less decisive according to the circumstances of each case and not of itself conclusive.

I adopt Judge Deady's explanation of the rulings of the supreme court in Berthold v. Goldsmith, 24 How. [65 U. S.] 537, in his opinion in Re Francis [Case No. 5,031], in a case very much like this, and agree with him that, the old rule of the common law that a participation in the profits is ipso facto conclusive of a partnership, is not the established rule of the supreme court of the United States. I doubt if it is or ever was the established rule in England. The conflict was as great there as here. It was modified, if not abrogated, by the house of lords in the great case of Hickman v. Cox, 91 E. C. L. 523, in the year 1860, which established the rule that the participation of profits does not necessarily in all cases and under all circumstances establish a partnership, but is treated as evidence, more or less cogent, according to circumstances, of a partnership.

The English parliament, about 1866, passed an act to cure the conflict and establish the above rule, and so did the legislature of Pennsylvania about 1870. These acts declare what I believe to be the better principle supported by the best considered cases, namely: That a loan to a person engaged in trade providing that the lender shall receive a rate of interest in proportion to profits, or a share of the profits, shall not of itself constitute the lender a partner; nor shall a contract to remunerate a servant or agent of a person engaged in trade

by a share of the profits of itself render such servant or agent liable as a partner. This is also the rule in Tennessee. 5 Sneed, 726; 12 Heisk. 615; 1 Baxt. 108. Read, as to strength of presumption, 37 Conn. 266. But, notwithstanding these exceptions, we think the general rule remains beyond dispute, that participation in the profits of a business is prima facie strong evidence of a partnership in it.

There was a verdict for the creditors, and motion for a new trial overruled.

[See 12 Fed. 325.]

Case No. 17,145.

In re WARD.

[9 N. B. R. 349.] [1]

District Court, E. D. Michigan. 1874.

BANKRUPTCY—ATTACHMENTS—ALLOWANCE OF COSTS—EXPENSES OF CREDITORS.

1. Under the statutes of Michigan, an attaching creditor acquires a lien upon the property attached, for both his debt and his costs; but those statutes make no provision for the retention of any lien for either, in case his attachment is dissolved, neither in favor of the plaintiff in the attachment, nor the officer who makes the levy, and no such provision is found in the bankrupt law.

2. In all cases where it appears that attachment proceedings were not instituted with a view of obtaining a preference, but were merely auxiliary to bankruptcy proceedings, and so for the benefit of all the creditors, the costs and expenses of such attachment proceedings will be allowed.

[Cited in Re Hatje, Case No. 6,215.]

3. The omission of the attachment creditors to commence proceedings in bankruptcy is not sufficient to rebut the positive averment in the petition that the attachment proceedings were not taken to defeat the operation of the bankrupt act [of 1867 (14 Stat. 517)].

4. Expenses of creditors in attending first meeting of creditors must be disallowed; likewise the charges of a deputy sheriff for attempting to arrest the debtor, because there was nothing in the evidence to show its necessity, or that it resulted in any benefit to the estate.

On the petition of James McDonnell, Charles P. Burrell and Henry Gallagher, comprising the firm of McDonnell, Burrell & Co., attaching creditors, for the allowance of the costs and expenses of their attachment proceedings. The grounds of the application are: (1) That the attachment proceedings were not for the purpose or in the prosecution of an attempt to defeat the provisions or operation of the bankrupt act; but, on the contrary, were for the purpose of securing the assets of the bankrupt [George S. Ward] for the benefit of all the creditors under the provision of the act. (2) That the same operated beneficially to the estate, and secured to the creditors the only property realized to the estate. (3) That a valid lien for said costs and expenses was acquired by the said attaching creditors, upon the property attached, by the laws of Michigan. (4) That the property attached was promptly surrendered by the sheriff to the messenger and to the assignee, by direction of petitioners, with the understanding that petitioners' claim, for said costs and disbursements, should be referred to the court for allowance, if just. (5) That more than four-fifths of all the creditors in amount have consented to and requested the allowance of the claim. (6) That said claim is a just and proper charge against the estate.

On filing the petition an order was made requiring the assignee to show cause why the same should not be allowed. On the return day of the order the assignee appeared, but put in no answer to the petition. The facts alleged in the petition, therefore, stand undisputed, and, the same being duly verified, must be taken as true. Subsequently, however, the matter having been held under advisement by the court, the assignee handed to the judge the following objections, in writing, to the granting of the petition: (1) That the said attaching creditors are not the petitioning creditors upon whose petition the said George S. Ward was adjudicated a bankrupt, and that the facts stated in their petition do not show any reason or excuse for not commencing proceedings in bankruptcy themselves. (2) That the claim is large and in many respects extraordinary. The two attachments sued out—one in this state and one in New York—amounted to nothing, because the first was dissolved by the adjudication, and the other was a nullity, because sued out after the petition for adjudication was filed. (3) That one C. A. Holmes, an under-sheriff of Saginaw county, has presented to the assignee a claim for one hundred and forty dollars, growing out of the attachment proceedings in this state, in addition to petitioners' claim. (4) Denies that he has admitted the equity of, or has consented to, the allowance of petitioners' claim. (5) Objects to the allowance of the item in petitioners' claim for forty dollars for expenses of "Burrell to Detroit in appointment of assignee." (6) That the law does not contemplate the allowance of such an account or claim. (7) That the decisions of the United States courts and of this court are against it. (8) Denies that any lien accrued to petitioners for said costs and expenses enforceable in this court.

In support of the petition the following are cited: In re Houseberger [Case No. 6,734]; Gardner v. Cook [Id. 5,226]; 2 Comp. Laws Mich. §§ 6402, 6405, 6406, 6435.

And in support of the assignee's objections, the following: Section 28 of the bankrupt act; Zeiber v. Hill [Case No. 18,206]; In re Archenbrown [Id. 503]; Gardner v. Cook [supra].

D. B. & H. M. Duffield, for petitioners.

F. G. Russell, assignee, in person, opposed

LONGYEAR, District Judge. I shall not take up the grounds of the petition nor the as-

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signee's objections in the order in which they are stated, but they will all be disposed of in the course of the opinion.

First. As to the question of lien by an attachment creditor, for his costs and disbursements. Under the statutes of Michigan an attaching creditor acquires a lien upon the property attached, for both his debt and his costs. Those statutes, however, create no different or more extended lien in regard to the costs than in regard to the debt, and make no provision for the retention of any lien for either, in case the attachment is dissolved, neither in favor of the plaintiff in the attachment nor of the officer who makes the levy. And no such provision is found in the bankrupt law. Therefore, the lien for the debt and for the costs, being precisely the same in all respects in regard to the means by which it is acquired and the tenure by which it is held, when such lien ceases by reason of the dissolution of the attachment, as to the one, it must necessarily cease as to the other. That it ceases as to the debt, in case of dissolution, by operation of the bankruptcy act, there is, and can be, no question; from which it follows that the lien also ceases, as to the costs. This disposes of petitioners' third ground of claim. The rights of the officer making the attachment are at most no greater than those of the attaching creditor. In fact, I find nothing in the statutes of Michigan conferring upon him in such cases any specific lien in any event. But without discussing or deciding that question here it is sufficient to say, that in case of dissolution of any attachment by operation of the bankrupt law, the officer making the attachment has no lien whatever for his costs and disbursements. In such case he must look to the plaintiff in attachment alone for the same, and in no case can he withhold the property from the messenger or assignee of this court on account of the same; nor has he the legal right, in any event, to look to the assignee or to the assets in this court for the same. There may be peculiar circumstances under which the court might direct such officer to be paid his costs and disbursements out of the assets, but no such question is presented here. This disposes of the assignee's third objection.

Second. But it does not necessarily follow that because there is no lien the court may not allow petitioners' claim. In all cases where it appears that attachment proceedings were not instituted with a view of obtaining a preference, but, on the contrary, were merely auxiliary to bankruptcy proceedings in view, and so for the benefit of all the creditors, the costs and expenses of such attachment proceedings will be allowed for the same reasons and in the like cases as the costs and expenses of petitioning creditors are allowed. Perhaps, on account of distance from the bankruptcy court, proceedings by attachment may be the only means by which the property of a fraudulent debtor may be secured and retained or brought within the reach of that court. In such cases, and when the attachment proceedings are prosecuted for that purpose, a claim by the attaching creditors to be reimbursed out of the property thus secured is highly meritorious, and will always be allowed. Although not stated in so specific terms as could be desired, yet taken together, such I understand to be the basis of the present claim; and upon that basis, and that alone, the claim must be allowed, if at all.

It is objected that the petitioners herein were not the petitioning creditors for adjudication of bankruptcy. It is true that fact is prima facie against them; but it is to be observed that only nine days elapsed between the commencement of their chase after the property under the attachments and the filing of the petition for adjudication; that the chase continued during nearly, if not quite all, that time, and extended to a distant point in another state; and that the last of the property secured was in fact not secured until after the petition for adjudication was filed; and that the petitioning creditors themselves acknowledge the justice of the claim and have joined with other creditors—in all representing more than four-fifths in amount of all the creditors—in a written request to the court to allow the claim.

Under all the circumstances I think the omission of petitioners to commence proceedings in bankruptcy until such proceedings had been commenced by another creditor, was not unreasonable; at all events it is not sufficient to rebut the positive averment sworn to in the petition, and not denied, that the attachment proceedings were not taken to defeat the operation of the bankrupt act.

The claim is also highly meritorious on another ground. It is evident that the attachment proceedings resulted in securing to the creditors all the assets that have come to the estate, and that without those proceedings it is highly probable that nothing whatever would have been secured. Without going into an analysis of the decisions to which the attention of the court has been called, it is sufficient to say that I have examined them and find nothing necessarily in conflict with the views herein expressed.

Two of the items of the claim, viz.: "July 31, Burrell to Detroit in appointment of assignee, forty dollars," and "June 24, C. A. Holmes, under-sheriff, in effort to arrest Ward, fifty dollars," must be disallowed. The first, because expenses of creditors in attending meetings of creditors to vote for assignee, or otherwise, are not allowed; and the other, because there is no showing of its necessity, or that it resulted in any benefit to the estate.

Deducting these items, the balance of the claim is five hundred and ten dollars and fifty-eight cents, at which amount it must be allowed. Ordered accordingly.

Case No. 17,146.

WARD et al. v. AMORY et al.

[1 Curt. 419.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1853.

CONSTRUCTION OF WILL—EXPRESS LIMITATIONS—POWERS—ESTATE OF TRUSTEES—RULE IN SHELLEY'S CASE—HUSBAND AND WIFE—EQUITABLE SETTLEMENT.

1. An express limitation in a bequest or devise, should not be held to be controlled by implications drawn from other provisions in the will, if the latter, by any fair intendment, can be reconciled with the former.

[Cited in Stuart v. Walker, 72 Me. 154.]

2. A power of disposal by will, does not enlarge an interest in the donee of the power, beyond what is expressly limited.

[Cited in Burleigh v. Clough, 52 N. H. 277.]

3. The quantity of estate taken by trustees depends on the purposes of the trust.

4. A devise of a fee to trustees and their heirs, with authority to sell, is consistent with an executory bequest of the fee to others, after a life estate.

5. The rule in Shelley's Case is not applicable to a devise of an equitable estate for life to the ancestor, and a legal estate, after the termination of the life estate, to the heirs.

6. On a bill by husband and wife, to recover property of the wife, the court directs a settlement on the wife, unless satisfied, upon a separate examination of the wife, that it is voluntarily waived.

This was a bill in equity to enforce the trusts of the will of Mrs. Sarah W. Sullivan. The bill was filed by [Olivia B. Ward and others] three married daughters, and one unmarried daughter, of the testatrix, (the former suing by their next friends, their husbands being also complainants,) the two surviving sons of the testatrix, (one son, John T. S. Sullivan, named in the will, having died in the lifetime of the testatrix,) and Anne Stewart Newton, a granddaughter of the testatrix, who, being a minor, also sues by her next friend, against James S. Amory and Stephen H. Perkins, the trustees named in the will. The questions raised, and the clauses in the will giving rise to them, are stated in the opinion of the court.

CURTIS, Circuit Justice. The complainants allege, that by the will of Mrs. Sullivan, they have severally become equitably entitled to certain real and personal estate, now held in trust by the respondents, and they pray to have those trusts executed, and the legal title to the property conveyed to them. The trustees claim no beneficial interest in the property for themselves, but they deny the titles, which the complainants assert in their bill. The principal question is, whether by the will, the complainants acquired the titles on which they now rely.

The clauses in the will, having a material bearing on this question, are as follows: "And I do now, therefore, hereby devise and bequeathe as well the said estate of my late husband, now in trust, as aforesaid, as all other property, real, personal and mixed, to which I have any title in my own right, however derived to me, and of which I may die seised or possessed, or may rightfully claim, to James S. Amory, of said Boston, and Stephen H. Perkins, of Brookline, in the county of Norfolk, and commonwealth aforesaid, merchants, to them and to their heirs and assigns, and to the survivor of them, and to the heirs and assigns of such survivor, and to such successor or successors as the judge of probate may appoint, hereby requesting said judge of probate to make appointments as vacancies may occur, so that the trust herein provided for may be duly executed. This bequest and devise to said James S. Amory and Stephen H. Perkins, is in trust nevertheless to them, their successors and assigns, for the following purposes, viz.: First. To pay my just debts. Second. After providing for all costs and charges of executing this trust, my will is that the residue of the estate be divided into eight equal shares, and that the income or interest of one share be paid to my son James S. Sullivan, and to each of my two sons, John T. S. Sullivan and Meredith Sullivan, and to my four daughters, Sarah W. Oakey, Olivia B. Ward, Marianne A. Schley, and Hepsebah S. Sullivan, each the income of one share, and to Anne Stewart Newton, my grandchild, likewise the interest or income of one share during the respective lives of all my said sons and daughters, and of my said granddaughter. And as to the share of the estate, to the income of which, as above provided, my children are to be entitled respectively, my will further is, that in case any one or more of them die before me, their heirs at law shall respectively be entitled to have and receive the portion or portions of income that would have come to such sons or daughters, or to my granddaughter, had they survived me, and to the portion of the principal that would come to them in like manner. And such of my said sons and daughters as survive me and my granddaughter, (the coverture of the daughters, and granddaughter, if they are married, notwithstanding,) shall have power to dispose of their interest in the estate by will as they see fit. And if one or more of them die intestate, their share of the estate shall go to their heirs at law respectively. Provided always, that none but Anne Stewart Newton's maternal relations shall be recognized as heirs at law, or be considered as capable of taking under this will. And as to the shares in the estate which are to go to my daughters and granddaughter, as above provided, my will is, that they be considered their separate property, and free from all liability under any contracts of their husbands respectively, or their creditors, that is, the creditors of their husbands (their coverture notwithstanding.) Third. I do hereby authorize and empower James S. Amory and Stephen H. Perkins, before named, their as-

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

sociates, and any future trustee, or their successors as aforesaid, to make and execute any deed or deeds of the real estate held by them under this trust and to convey the same for any consideration which they may think proper, and in as full and ample a manner as I could do myself. And I do authorize and empower them to alien, sell, convey, and change and reinvest any personal estate of which they shall become possessed as trustees under this instrument, at their discretion; each one being responsible for his own acts only, and not for the acts of any other trustee, and I desire that no bonds be required at the probate office, of my trustees above named. Fourth. Having entire confidence in said James S. Amory and Stephen H. Perkins, I do hereby make them joint executors of this will, as well as trustees, and I request them to accept the trust, inasmuch as I shall feel that I shall have done the last service in my power for my family, if they will take upon themselves this trust and the execution thereof. In witness, &c., this 28th of September, 1848."

The complainants allege that the fee-simple in the realty, and the whole equitable interest in the personalty, passed to them; and this upon two grounds: First: because such appears to have been the intention of the testatrix, as gathered from the whole of her will. Second: because, so far as respects the realty, the rule in Shelley's Case gives the fee-simple to them, as the first takers of an estate of freehold, to whose heirs the remainder is limited.

The first of these grounds raises a question of construction; the second depends on he applicability to this case of a well-known rule of law, which operates, if at all, wholly irrespective of the intent of the testatrix. Upon the first of these inquiries, it is clear, that, by the second clause of the will, the testatrix has expressly given to her grandchild, and to each of her children, a life estate; but it has been ingeniously and learnedly argued that the words, "during the respective lives of all my said sons and daughters, and of my granddaughter," are controlled by subsequent provisions of the will, showing an intent to devise and bequeathe to them the fee-simple of the realty and the principal of the personalty. It is necessary to distinguish the realty from the personalty, because different rules are applicable to each. Where the interest or income of a fund is bequeathed through a trustee, or directly to the legatee, without any words limiting the donation of the trust, or the enjoyment by the legatee, the principal is regarded as bequeathed to him. Philipps v. Chamberlaine, 4 Ves. 51; Haig v. Swiney, 1 Sim. & S. 487; Hawkins v. Hawkins, 7 Sim. 178; Clarke v. Gould, Id. 197; Earl v. Grim, 1 Johns. Ch. 494. But if it appears from the context, that only the produce of the fund was intended for the legatee, the principal does not pass; and one mode in which this may appear is the insertion of words limiting the duration of the trust, through which alone the legatee is to take. Cooke v. Bowler, 2 Keen, 54; Scott v. Earl of Scarborough, 1 Beav. 154; Clowes v. Clowes, 9 Sim. 403; 2 Rop. Leg. 1477, and cases there cited. In this will, there are not only the express words confining the interest of the legatees in their income to their lives, but there is no provision for extending the duration of the trust, through which they are to take, beyond their lives; no duty being imposed on the trustee to receive the income, or pay it to any one, after the decease of the legatees. Standing alone, therefore, there would seem to be no doubt that this clause in the will would not bequeathe the capital or principal to the legatees, but only the income during their lives. Indeed, this has not been questioned by the complainants' counsel; but he correctly argues that we must look at the whole will, and he insists that other parts of it are sufficient to control this clause, and to show that the testatrix really intended to give the whole fund.

There is one general observation, which I think entitled to weight; in construing a will, so inartificially drawn as this is, it is unsafe to set aside the express terms employed by the testatrix in the very clause in which the bequest is made, because it is found not easily reconciled, or perhaps not completely reconcilable with language used in other parts of the instrument. It may reasonably be assumed, that when the testatrix made the provision that her children should take the income through trustees during their lives, she was aware of the effect of the terms she employed, and intended what she there expressed; while in making other provisions subsidiary to this bequest, she might be inattentive to the effect of her language upon the bequest already made, and which may be supposed in some degree to have passed out of her view; and, therefore, when an intent has been once clearly expressed in a will, and the instrument then goes on to deal with other subjects, this clear intent should prevail, unless it is plainly modified or controlled by what is subsequently said. In this case, it is argued that the power of disposal by will, shows clearly the testatrix meant to bequeathe, not the income merely, for life, but the whole fund. The power is in these words: "And such of my said sons and daughters as survive me, and my granddaughter, (the coverture of the daughters and granddaughter, if they are married, notwithstanding,) shall have power to dispose of their interest in the estate by will as they see fit; and if one or more of them die intestate, their share of the estate shall go to their heirs at law respectively." That a power of disposal by will does not, of itself, enlarge a limited interest, is well settled. A bequest to A for life, and after his death to such person as he may appoint, by will, to receive the same, gives only a life estate to A, and no one can claim through him, save by an execution of the power. Croft v. Slee, 4 Ves. 60; Nannock v. Horton, 7 Ves. 391; Bradley v. Westcott, 13 Ves. 445.

But it is insisted that the testatrix speaks of what is to be devised by the children, as their interest in the estate, and what is to be inherited as their share of the estate; and that this necessarily implies that the interest of each child was not to be limited to his or her life. This argument must be admitted to have much weight, but when examined by all the lights gained from the whole of the will, it is not decisive. The testatrix had previously directed that her estate should be divided "into eight equal shares, and that the income or interest of one share should be paid to each of her children and her grandchild, during their respective lives." She is now providing further, that each may dispose, by will, of that share which had been set apart for his or her use, and, failing to make a will, that it should go to his or her heirs at law. Apparently she considered each of these shares as so bequeathed that it might be spoken of as the share of the child to whose use it was devoted during life, at whose disposal, by will, it was left, and to whose heirs it was to go in case of intestacy. And she uses the words, "their interest in the estate," as synonymous with "the shares in the estate set apart for their use." In the very next clause this is apparent; for she there uses the phrase, "and as to the shares in the estate, which are to go to my daughters and granddaughter, as above provided," &c. Now, the manner in which those shares were to go to them, "as above provided," was for life; so that the testatrix here uses the words, "the shares in the estate which are to go to my daughters," simply as indicating the shares set apart for their respective use. A few sentences above, she said, "and as to the share of the estate to the income of which, as above provided, my children are to be entitled respectively," &c. Here she has inserted the full and accurate description of the subject. In the other clauses, she describes more loosely and inaccurately; but it is apparent she all along refers to the same subject. It is true, that if a power of disposal by will, annexed to an express estate for life, with a remainder, in case of intestacy, to the heirs of the first legatee, would amount to a gift of the whole fund, this will must so operate; for all these things the testatrix undoubtedly intended. But it has been already stated that the power does not enlarge the interest, and it is clear the heirs at law may take personalty as purchasers, if the testatrix so intended. That she did so intend in this case, appears not merely from the express limitation for life, and the gift to the heirs in remainder, but from another clause, which necessarily depends altogether upon the heirs taking as purchasers by way of remainder. That clause is: "Provided always, that none but Anne Stewart Newton's maternal relations shall be recognized as heirs at law, or be considered as capable of taking under this will." I do not attach very great importance to the concluding words, though they indicate that the testatrix understood the heirs were to take under her will, and not by descent or the statute of distributions; but it is plain that the whole clause must be stricken out of the will, as inoperative, if the heirs do take by descent or from the ancestor, for, in that case, all who are by law entitled, must so take. To strike this clause out of the will, would be a far graver thing than to put on the words, "their interest in the estate," an interpretation which, though not consistent with their natural meaning, does no violence to what may be fairly considered the sense in which they were used. What is said above applies also to the language of the codicil, upon which some reliance was placed, and it needs no further comment. My opinion is, that the children and grandchild took only an equitable interest in the income of their respective shares during life.

As to the realty, the intent of the testatrix was the same as in respect to the personalty, and there is no rule of law to prevent the execution of that intent unless the rule in Shelley's Case is applicable. To decide this question, it is necessary first to determine what estates are devised by this will. It is a settled rule, that trustees take and hold under a will just that quantity of interest necessary to enable them to discharge the duties of their trust. Neilson v. Lagow, 12 How. [53 U. S.] 98; Webster v. Cooper, 14 How. [55 U. S.] 499. To these trustees and their heirs, the real property is devised in trust: 1. To pay debts. 2. To divide the whole property, real and personal, into shares. 3. To pay the income of each share, after deducting the expenses, &c., to a child or grandchild for life. 4. By a clear implication, though it is not expressed, to hold to the use of the appointees by will of such child; and, in default of any appointment, to the use of its heirs at law.

From this view of the purposes of the trust, there can be no doubt that the legal estate in each child, during the life of that child, was in the trustees. See Mr. Jarman's note to 1 Pow. Dev. 221. And it is equally clear, that independent of the power of sale in the trustees, which will presently be noticed, the appointees or heirs, as the case may be, would take a legal estate by way of executory devise. Nor is the power of sale in the trustees inconsistent with this; because, though the power implies that the trustees have a fee-simple vested in them, and may sell and convey one, and thus defeat the executory estates in the particular land sold, yet there is no difficulty in substituting one fee for another by way of executory devise, or in making this substitution depend upon such contingencies as are provided for in this will. So that though a fee-simple is actually given to, and is to be held by, the trustees, as long as the trust continues, if no sale be made, and though it is contingent whether appointees or heirs are to take, yet, where the trust is fully performed, and the contingency is determined, the appointees or the heirs will take at once a legal estate in fee-simple, as purchasers under the will, by way of executory devise, the limita-

tions being in effect to Amory and Perkins in fee, provided that if they shall not have sold the land before the death of the child or grandchild, then it is to go to the appointees or heirs of that child or grandchild in fee. See 1 Pow. Dev. 187. And it is not material whether this estate is taken by the appointees or heirs by way of a shifting or springing use, the fee being in the trustees to serve that use, or by way of executory devise by force of the statute of wills, for in either event it is a legal estate in fee-simple. It follows that the rule in Shelley's Case is not applicable to this will; because the estate limited by it to the ancestor is an equitable estate for life, and the estate limited to the heir is a legal estate in fee. "It frequently happens," says Mr. Powell (Pow. Dev. 432), "that a testator devises lands in trust for a person for life, and after his death for the heirs of his body, but gives the trustees some office in regard to the tenant for life, that causes them to retain the legal estate in respect of his interest, but which, being confined to the estate for life, does not prevent the limitation to the heirs of the body from being vested in them. In such cases, they take as purchasers." See the cases cited by him in loco, and in volume 1, p. 221, note. Playford v. Hoare, 3 Younge & J. 175; 6 Greenl. Cruise, 312.

But there are other reasons why the rule in Shelley's Case is not applicable to this will. If, as is mentioned by the complainants, the provision of the will, that none but Anne Stewart Newton's maternal relations shall be decreed heirs at law, so as to take under the will, applies not to the heirs of the granddaughter alone, but to the heirs of all the children, then the limitation is not to the heirs at law, but only to a particular class of heirs; and as the same persons are not to take, upon whom the law would cast the inheritance, the limitation is not within the rule in Shelley's Case. Webster v. Cooper, 14 How. [55 U. S.] 488. I do not mean to decide the question whether this is the true interpretation of the will, because parties not before the court may be interested in it, and I do not deem it essential to the case to decide it. But I take it as the interpretation asserted by the complainants themselves; and, if correct, it destroys this ground of their claim. But independently of this, I am of opinion, that the statute of Massachusetts governs this case. That statute is as follows: "Where lands are given by deed or will to any person for life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such taker, and a remainder in fee-simple in his heirs." Rev. St. c. 59, § 9.

Two reasons are assigned why this statute does not include this case. First, that a power of disposal by will is given to the ancestor. Second, that a power of sale is given to the trustees. But the mere existence of these powers does not prevent the limitation to the heirs from taking effect. Notwithstanding their existence, there is still a limitation to one person for life, and after his death, to his heirs in fee. If there were not, there would be no ground to maintain that the rule in Shelley's Case was applicable; for the only reason why this case is said to be within that rule is, that the will gives the remainder in fee to the heirs of the ancestor to whom a life estate is given; and if so, the case is within the words of the statute. A power, given either to the tenant for life, or to a trustee, by the execution of which the remainder may be defeated, not being inconsistent with the application of the rule in Shelley's Case, ought not to be held inconsistent with the application of the statute, which was designed to abolish that rule in the cases it describes. If the power is duly executed, it defeats the estates given to the heirs. But, as the rule in Shelley's Case does not require that they should be indefeasible, so neither does the language, nor the apparent object of the statute, require that they should be indefeasible.

The purpose of the statute was to change the law, so that the real intent of testators should not be defeated by a technical rule, based on certain fixed principles, which have no place in our jurisprudence. The intention of this testatrix to have the ancestor take only an estate for life, and the heirs, after her death, take the fee, if no will or sale should be made, is as clear, and as justly entitled to be executed, as it would have been if no contingency existed. And as the words of the statute are satisfied, I can perceive no good reason why this case should not be governed by it. My opinion is, that the children and grandchild took only an equitable interest for life in the realty.

It remains to consider the effect of that clause in the will which disposes of the portion of a child dying in the lifetime of the testatrix. Reduced to those words only which are applicable to the event that happened, the decease of one of her sons, its language is as follows: "In case one of my sons should die before me, his heirs at law shall be entitled to the portion of income that would have come to him, had he survived me; and to the portion of the principal that would come to them in like manner." I think the purpose and effect of this clause are, to put the heirs at law of a son, dying in the lifetime of the testatrix, in the place of the son, so far as respects the income of his portion, and at the same time, to give to them the right to the principal fund, which they would have had, if this son had survived the testatrix, and afterwards died intestate. So that, on the decease of the testatrix, the heirs at law of her son, John T. S. Sullivan, became entitled, not only to the income of one eighth part of the estate, but also to the capital of the personalty, and the fee of the realty. In other words, they have succeeded both to what would have been his rights and their own, had he survived the testatrix and died intestate. They have thus the entire beneficial interest in the property, and may call for a conveyance of it at pleasure. The will provides for the duration of the trust, as to each child's share, while that child lives. No other termination of

the trust is fixed by the will. But this is manifestly inapplicable to the case of a child dying before the testatrix; in which case the heirs at law of such child, becoming entitled both to the income and principal, the trust is to continue no longer than those heirs may choose to require its execution. They do require it by this bill; and it must be decreed, subject to the prior trust to pay the debts of the testatrix.

I am also of opinion, that the provision of the will, requiring the shares of the daughters and granddaughter to be held as their separate property, is not applicable to what they take under the will, as heirs at law of their brother. The language of the will points only to the shares set apart by the trustees, for their several use, during their respective lives, pursuant to the directions of the will; and therefore, the married daughters and their husbands, and the unmarried daughter, and the two sons, are entitled to receive one eighth part of the estate; but the court, in pursuance of the usual rule which is administered when a husband comes into equity to recover property of his wife, must consider the married daughters entitled to a competent settlement out of this fund, unless satisfied by their separate examination, before a commissioner. that the right is voluntarily waived.

One direction in this will is, that after the payment of debts, the trustees shall divide the whole property into eight equal shares. This has not been done, for reasons stated in the answer of the trustees, and which seem to be sufficient to have thus far excused the performance of this duty. At any rate, no complaint is made that any loss or embarrassment has been thus far occasioned by its omission. But it is a plain direction of the will, in which not only the legatees for life, but those who may hereafter come into the executory estates, as appointees or heirs, are interested, that each one may bear the losses and receive the profits appropriate to the eighth part in which he or she is interested; and it is the duty of the court, upon this bill, to see that this direction is obeyed.

Case No. 17,147.

WARD et al. v. The A. ROSSITER.

[6 McLean, 63; [1] Newb. 225.]

Circuit Court, D. Illinois. Oct. Term, 1853.

COLLISION—STEAMER ENTERING HARBOR AT NIGHT—EXCESSIVE SPEED.

1. A steamer, in entering the harbor of Chicago in the night, at a speed of three and a half to four miles an hour, while another steamer was in the act of turning, just above a bend in the river, came in collision with the latter, at that moment lying across the river. The former was in fault, and was liable for the damages done. The river was full of craft, and the speed of the steamer was too great under the circumstances.

[Cited in The Blackstone, Case No. 1,473; The Free State, Id. 5,090; The Nacoochee, 28 Fed. 467.]

2. If a steamer, owing to any cause, cannot see its way clear before it, in entering a harbor in the night, it is its duty to stop.

[Cited in Illinois River Packet Co. v. Peoria Bridge Ass'n, 38 Ill. 476.]

[This was a libel by Eber B. Ward and Samuel Ward against the propeller A. Rossiter.]

Mr. Shumway, for libellant.

Mr. Goodrich, for claimant.

DRUMMOND, District Judge. On the 27th of August, 1851, the steamer St. Louis had returned from her nightly trip from New Buffalo to Chicago, and had entered the river and passed a little above her wharf to wind. It was about three o'clock in the morning. There was no regular place at that time for steamers to turn. They winded where they could, though there was a place—the excavation—where it was more convenient and wider than at other places. The St. Louis was in the act of turning, lying across the river (then two hundred and six feet wide only at that place, the St. Louis being one hundred and ninety-five feet long), when the Rossiter came into the harbor at a speed of three and a half to four miles an hour. In turning the bend of the river, not far from the ferry, a little more than seven hundred feet from the spot where the St. Louis was winding, the Rossiter encountered a thick smoke, coming across the river from the ruins of Haddock & Norton's warehouse, then recently destroyed by fire, which prevented those on board, as they allege, from seeing the St. Louis, though the people of the latter assert that they could easily distinguish the Rossiter. The Rossiter blew her whistle as she came up the river. The St. Louis had all necessary lights. The Rossiter was hailed as she approached, but without avail, as she immediately struck the St. Louis and caused damage to the amount of $258.61. It was a clear star-light night. These are the material facts in the case.

There can be no doubt that the Rossiter was in fault, and liable for the injury done. If those on board of the propeller could not see their way clear, owing to the smoke, it was their duty to proceed with extreme caution, especially as they were approaching a bend in the river. It is a rule of universal application, that a steamer in entering a harbor at night, crowded with craft as the Chicago river was at that time, shall be held to the greatest diligence and circumspection, and if owing to fog, smoke, or other cause, they cannot see their way before them, it is their duty to stop, or at least proceed with such slowness that they can stop at a moment's notice. It will not do for steamers to proceed at haphazard, and trust to chance to go clear. If they cannot see the way they must stop till they can. I have repeatedly been called upon to investigate cases which have originated from the recklessness with which steamers enter the harbor of Chicago, as well in the daytime as in the night. They must be more careful and

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

vigilant than they have been, or, clearly understood, they will have to answer in damages for the consequences. A decree will be entered against the claimant and his sureties for the sum of $258.61 and costs.

Case No. 17,148.

WARD v. ARREDONDO et al.

[1 Paine, 410.] [1]

Circuit Court, D. New York. April Term, 1825.

JURISDICTION OF FEDERAL COURTS—DIVERSE CITIZENSHIP—NOMINAL PARTIES—REMOVAL OF CAUSES—APPEARANCE.

1. The circuit courts are not deprived of their jurisdiction, where it arises from the citizenship or alienage of parties, by the joining of a mere nominal party, who does not possess the requisite character. But where, in equity, a decree against such party is essential to the relief sought, he is not a mere nominal party.

[Cited in Smith v. Rines, Case No. 13,100; Heriot v. Davis, Id. 6,404; Marshall v. Baltimore & O. R. Co., 16 How. (57 U. S.) 349; Adams v. Douglas Co., Case No. 52; Fields v. Lamb, Id. 4,775; Hatch v. Chicago, R. I. & P. R. Co., Id. 6,204; Sands v. Smith, Id. 12,305; Grover & Baker Sewing-Mach. Co. v. Florence Sewing-Mach Co., 18 Wall. (85 U. S.) 580, 586; Brigham v. Luddington, Case No. 1,874.]

2. Where there are several defendants entitled on appearance, to remove a cause from the state court into a circuit court, some of whom have appeared and others not, those who have appeared cannot alone remove the cause. But this rule is confined to cases, where from the subject matter of the suit, the judgment or decree must be joint.

[Cited in Smith v. Rines, Case No. 13,100; Nesmith v. Calvert, Id. 10,123; Field v. Lownsdale, Id. 4,769; Gard v. Durant, Id. 5,216; Sands v. Smith, Id. 12,305; Florence Sewing-Mach. Co. v. Grover & Baker Sewing-Mach. Co., Id. 4,883; Smith v. McKay, 4 Fed. 354; Prid v. Sebley, 7 Fed. 137.]

[Cited in Bryant v. Rich, 106 Mass. 192. Cited in brief in Cooke v. State Nat. Bank of Boston, 52 N. Y. 112. Cited in Gordon v. Green, 113 Mass. 261; Hadley v. Dunlap, 10 Ohio St. 5.]

3. Defendants can remove the cause or appear in the circuit court at different times, where their appearance is entered at different times in the state court.

4. Where some of the defendants have removed the cause regularly into a circuit court, the others cannot enter an original appearance in such court.

5. The circuit court can remand the cause in case the defendants do not all eventually appear.

[Cited in Field v. Lownsdale, Case No. 4,769; Pond v. Sebley, 7 Fed. 137.]

6. A state court cannot cause an appearance to be entered nunc pro tunc, so as to entertain a motion for removal.

In equity.

C. D. Colden and C. Graham, for plaintiff.

H. D. Sedgwick and R. Sedgwick, for defendants.

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

THOMPSON, Circuit Justice. This is a motion, that the appearance of Fernando Arredondo, one of the defendants, be entered in this court, for the purpose of removing the cause from the state court, where it was commenced, pursuant to the act of congress in such case made and provided. A brief statement of the situation of the cause is necessary to a right understanding of the questions that are presented for consideration. A bill in equity was filed by Ward, a citizen of the state of New-York, against the Arredondos, who are aliens, and Thomas, who is a citizen of the state of New-York, for the specific performance of a contract between the Arredondos and Ward, for the conveyance by them of a certain tract of land in Florida, under and by virtue of a contract which had been entered into between the parties, for the sale and purchase of the land in question, a deed for which had been duly executed by the Arredondos, and sent to Thomas for delivery, with certain instructions which will be noticed hereafter. The main object of the bill, was to compel a delivery of the deed to Ward, and to restrain Thomas from returning the same to the Arredondos, until the merits of the suit between them and Ward should be determined. Thomas appeared in the state court, and answered the bill.

One of the Arredondos has heretofore appeared in the state court, and petitioned for a removal of the cause into this court, and his appearance has been duly entered here. We lay out of view the objection urged on the argument, that the cause was not in the state circuit court when his appearance was entered, and the petition to remove the cause into this court was filed. It is alleged that the cause had been removed from that court into the court of chancery by appeal, and had not been remitted to the state circuit court, at the time the appearance was entered. We assume for the purpose of the present motion, that the cause was regularly in the state circuit court, and that the appearance of one of the Arredondos was duly entered there.

Under this state of the case, the questions presented for consideration, are: 1st. Whether, as Ward the complainant and Thomas one of the defendants, are both citizens of New-York, the cause can be removed into this court. 2ndly. As to the practice of removing causes from the state courts, when there are several defendants, and their appearance in the state court is entered at different times.

It is a well settled rule, and indeed has not been denied by the defendants' counsel, that when the jurisdiction of this court depends on the character of the parties, and such party, either plaintiff or defendant, consists of a number of individuals, each one must be competent to sue in the courts of the United States, or jurisdiction cannot be entertained. This is the general rule; the exceptions will be noticed hereafter, 3 Cranch [7 U. S.] 267. And under this rule, this court, prima facie, cannot take jurisdiction of this cause: for

Thomas, one of the defendants, is a citizen of the same state with the complainant. It is very evident that Ward could not originally have filed his bill in this court, against Thomas as one of the defendants, and it would seem to follow as a necessary consequence, that if jurisdiction could not be entertained directly, it ought not to be acquired indirectly. But it is said that Thomas is only a nominal party, and that the jurisdiction of this court cannot be taken away in such case. If the fact be so, that he is a mere nominal party, there is no doubt it would not deprive this court of jurisdiction. It has been so decided by the supreme court in the case of Brown v. Strode, 5 Cranch [9 U. S.] 303, and in Wormly v. Wormly, 8 Wheat. [21 U. S.] 451. In such cases the jurisdiction of the court, depending upon the question whether the individual who is prima facie, incompetent to appear in the courts of the United States, is a real and substantial, or only a nominal party, this court must of necessity go so far into the merits of the case as to enable it to decide that question. Is Thomas then a nominal party only, in the sense in which that rule is to be understood? And we think he is not; but that he is a real, and an indispensable party to the decision and final determination of the merits of this case. From the allegations in the bill, and the answers of Thomas, it appears that the deed for the land in question has been executed by the Arredondos, and placed in the hands of Thomas for delivery to Ward, upon his paying a sum of money, the amount not ascertained with certainty. The allegation in the bill is, that five thousand dollars, which was more than the balance due, had been tendered to Thomas, and the deed demanded. The answer of Thomas admits, that he was authorized by the Arredondos to deliver the deed upon the receipt of such sum (in addition to a balance of principal of about five thousand dollars, remaining due upon the contract) as he (Thomas) might think proper. He also admits the tender of the five thousand dollars; but that he demanded fifteen thousand dollars before he would deliver the deed. Thomas then, according to his admissions, held this deed in trust, with a discretionary power to deliver it upon the payment of such sum as he should demand over and above five thousand dollars. The five thousand dollars was duly tendered, but he chose to demand ten thousand dollars more. He assumed then either arbitrarily or upon his construction of the contract, to claim ten thousand dollars more than was admitted by the complainant to be due, and of course made himself, to a certain extent, a party to the merits of the question. And it was competent to the court of chancery to say, whether, upon examination, he had abused his trust, and demanded that, for which there was no colour, or to have decreed a delivery of the deed upon payment of such sum as should be found justly due, or to have dismissed the bill, according as it should find the merits of the case on examination. But he was an essential party to enable the complainant to obtain the relief sought, viz.: a title for the land. Thomas in his answer admits, that Ward had paid upwards of thirty-five thousand dollars upon the contract. Under the circumstances of this case, the very essence of the relief is to be obtained only by a decree against Thomas, to deliver the deed.

In the case of Wormly v. Wormly [supra], the criterion by which it was determined whether a party was nominal or not, was whether a decree against him was sought. The court said it would not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties, but will proceed without them, and decide upon the merits of the case between the parties who have the real interest before it, whenever it can be done without prejudice to the rights of others. Thomas, we think, is not a mere formal party, but that a decree against him is essential to the relief claimed, if the complainant is entitled to it. Whether he is or not, is a question upon which we give no opinion.

This view of the case leads to a denial of the motion, and remanding the cause to the state court, and renders it unnecessary to express any opinion upon the second point. But as it is in a great measure a question of practice, and may be applicable to other cases, it may not be amiss to express our present impressions on the point. The state court had unquestionably jurisdiction of the cause. The complainant had, therefore, a right to go there for relief, and indeed in this case he must have commenced his suit in the state court. But the present question is, supposing the Arredondos, both aliens, were the only defendants, one having appeared in the state court, and the other not; can the one who has appeared remove the cause and give the circuit court of the United States jurisdiction upon the merits? And we are inclined to think he cannot. We would be understood, however, as confining this rule to cases where from the subject matter of the suit the judgment or decree must be joint. There may be cases in equity where the several parties represent distinct interests, so that separate decrees may be made, where possibly some of the parties may take the cause into the circuit court, and others remain in the state court; but it ought even in such cases to be a very strong and palpable case of separate and distinct interests to sanction such a course. There is nothing disclosed in this case to bring it within any such rule. The interest is fairly to be presumed joint; and the cause must come entire or not at all into this court, before the merits can be decided. Can then one of the alien defendants compel his co-defendant to follow him into this court against his will? We put the case thus strongly in order to test the principle. And we cannot discover any satisfactory ground upon which such a doctrine can be sustained. The judiciary act considers the removal of the cause as the volun-

tary act of the party, and on his petition. By the word "party," as here used, must necessarily be understood the defendant, embracing all the individuals, be they more or less, constituting such party.

This application to remove the cause must be made at the time of entering the appearance in the state court. But there is nothing that makes it necessary, that such application should be made by all the defendants at the same time. This court is not possessed of the cause so as to proceed therein until all the defendants come here. But when the appearance in the state court shall be at different times by different defendants, there can be no objection to their appearance being entered in this court at different times; and indeed such a construction of the act is indispensable, as the application for the removal must be made on entering the appearance in the state court; and when the defendants are numerous, they may in suits, both at law and in equity, be brought into the state court at different times; and that court cannot cause the appearance then to be entered nunc pro tunc, so as to entertain the motion to remove the cause, after all the defendants are brought into court. Gibson v. Johnson [Case No. 5,397]. But if all the defendants should not petition to have the cause removed into this court, so as to enable it to proceed, the cause may be remanded to the state court, so as to give it possession of the whole case, 4 Cranch [8 U. S.] 421. An original appearance of some of the defendants, cannot be entered in this court. The cause having been regularly commenced in the state court, cannot be removed therefrom except in the mode prescribed by the act of congress; the appearance must first be entered in the state court, and the security then given, to enter the appearance in this court; and then the state court is prohibited from proceeding any further in the cause. But until then it may proceed, and the effect might be in some cases, that proceedings would be going on at the same time, in the same cause, in both courts. And this court is not authorized to take cognizance of the cause, unless removed in the manner pointed out by the act.

WARD (BAKER v.). See Case No. 785.

Case No. 17,149.

WARD v. The BANNER.

[14 Law Rep. 465.]

District Court, D. Michigan. 1852.

TOWAGE LIEN.

[Towage services constitute a lien upon the vessel.]

[Cited in The Williams, Case No. 17,710.]

In admiralty.

WILKINS, District Judge, held that towage constitutes a lien or demand against a vessel. He says: "The interest of the vessel is to make her voyage with convenient speed, and it is the duty of the master to resort to every means in his power, to attain that object. A vessel on her upward cruise, from Buffalo to Chicago, may be stranded or becalmed at the mouth of the Detroit river; or, being injured by a storm, may be compelled to make for the nearest harbor, to repair; in either exigency, towage would constitute a necessary service, to enable her to prosecute profitably her voyage. Such service is maritime, and within the legitimate scope of the master's authority."

Case No. 17,150.

WARD v. BARKER.

[Nowhere reported; opinion not now accessible.]

WARD (BLAKE CRUSHER CO. v.). See Case No. 1,505.

Case No. 17,151.

WARD et al. v. CHAMBERLAIN et al.

[5 Am. Law Reg. 330.]

Circuit Court, S. D. Ohio. May Term, 1855.[1]

COLLISION—VESSELS MEETING—RULES OF THE TRINITY MASTERS.

1. When two vessels are approaching each other, and the character and course of either cannot be determined by the watch on board, such vessel should be stopped or slowed until the course of the approaching vessel be ascertained, whether it be a sail or a steam vessel.

2. Some of the rules of the Trinity masters, intended to apply in navigating a river, when applied to the open sea, are more likely to produce collisions than to avoid them.

3. In certain conditions, one vessel is to keep her course, and the other to avoid her. How can a concurrence of judgment as to their position, by their respective masters, be expected, so as to comply with the rule of right, when the wind is fresh? Uncertainty in this respect produces many collisions.

4. All the rules of navigation should be simple and easily understood.

5. Complicated rules are often misunderstood, and more frequently applied to facts supposed, which have no existence.

6. So far as my limited experience on this subject enables me to speak, the rules of navigation recognized, instead of insuring safety, have greatly increased the number of collisions. Per McLean, J.

7. If the rule were, that all vessels meeting each other should turn to the right, all would understand it, and collisions would be avoided. Each vessel, in such case, would know the course of the other; and if either could not turn as directed, it would not run in the path of the other. I am aware that this is too simple and too easily understood for technical lawyers, on the bench or at the bar. It is the rule on every turnpike road, and such maxims are

[1] [Reversing Case No. 17,158. Decree of circuit court affirmed by supreme court in 21 How. (62 U. S.) 572.]

always founded on common sense. Per McLean, J.

8. When fault may be attributed to two vessels, the damages are divided, and not apportioned according to the degree of fault.

[Appeal from the district court of the United States for the Southern district of Ohio.

[This was a libel filed in the district court by Eben B. Ward and others, owners of the steamboat Atlantic, against the propeller Ogdensburgh, and also in personam against her owners, Philo Chamberlain and others. The cause was heard in the district court upon the merits, and at the same time upon an exception to the libel for misjoinder of a suit in rem and a suit in personam. The exception was sustained; and, upon the merits, the libel was dismissed, and a decree entered in favor of the respondents in the sum of $3,000, as compensation for damages received by their vessel. Case No. 17,158. From this decree the present appeal was taken.]

Emmons, Swayne & Newberry, for libellants.

Spalding & Stanberry, for respondents.

McLEAN, Circuit Justice. This is an appeal in admiralty. The libellants allege that they were the owners of the steamboat Atlantic, which was engaged in the transportation of passengers and freight between the port of Buffalo, New York, and that of Detroit, Michigan; that on the 19th of August, 1852, in the evening, she left Buffalo for Detroit, with freight and a large number of passengers; that at half-past two o'clock on the morning of the 20th August, being on her usual course off Long Point, on the Canada shore, the propeller Ogdensburgh, of which Robert Richardson was master, then being on her way from Cleveland to the entrance of the Welland Canal, run into the Atlantic with great force, the bow of the propeller striking the larboard side of the Atlantic near the forward gangway, which opened her side, so that in a short time she sunk in about twenty-five fathoms water.

The respondents say, in their answer, that on the 19th of August, 1852, the Ogdensburgh, being heavily laden, left the port of Cleveland, between twelve and one o'clock, and proceeded down the lake by Fairport, in Ohio, towards her port of destination, Ogdensburgh, New York, through the Welland Canal, in Canada. That at about two o'clock on the morning of the next day, the propeller, being on her correct course, northeast by east, the wind being light from the southwest, and the weather somewhat hazy, the watch on her deck discovered a steamboat light, from two to three points on the propeller's starboard bow, at the distance, as was supposed, of about three miles. The propeller was running about seven miles an hour; her second mate, being on watch, perceived the light was nearing him rapidly, and he gave the signal to slow; and seeing the light continued to near him, he then made the signal to stop the engine, and immediately afterward to reverse it; but, notwithstanding these precautions, a collision ensued. The true course of the Atlantic is alleged in the answer to have been, for Detroit, southwest by west, which, if pursued from the time her light was discovered, would have taken them near a mile south of the propeller. The evidence is voluminous on both sides. This, if not required, is justified by the amount in controversy; and especially by the deplorable consequences of the collision, which caused the loss of some one hundred and forty persons.

Omitting matters in detail and incidental, the evidence of the libellant makes the following case: The Atlantic was a staunch steamer of the first class, of a capacity to carry upwards of eight hundred tons, with an engine of a thousand horse power. She had her complement of officers and men, with her lights brightly burning. At the usual time of departure, between nine and ten o'clock at night, she left Buffalo for Detroit, loaded with freight, and more than five hundred passengers. In performing her two weekly trips between Buffalo and Detroit, the course of the Atlantic was usually southwest by west, and she was steered that course on the night of the collision. It was a starlight night, the wind being slight, but a haze rested upon the lake, which extended upwards some twenty or thirty feet. The lights of a vessel could be seen some five or six miles. The course of the Atlantic lay near Long Point, which projects into the lake on the Canada side, on the point of which there is a light house, and which is some sixty or seventy miles from Buffalo. After making Long Point, the Atlantic was some fifteen or twenty minutes in running abreast of it, her course being changed one-fourth of a point to the southward. At this place the former course of southwest by west was resumed. The officer of the deck, the second mate, occupied no particular place, but was on the top of the promenade deck, in the pilot house not to exceed one or two minutes, on the top of it, on the hurricane deck, sometimes on the starboard or larboard of the promenade deck. While standing in the pilot-house, the light of the propeller was made; one light was at first seen, then another, both having the appearance of glimmering stars. They were made on the larboard bow of the Atlantic, bearing three-fourths of a point. They were supposed to be lights on a sail vessel. At this time, the signal lights of the steamer were burning brightly, On seeing the lights of the approaching vessel, the helmsman of the Atlantic was ordered to port her wheel, which was done. Shortly after, from the top of the pilot-house, the lights discovered were observed to be nearing the Atlantic, and, in fact, were close to her. The wheel of the Atlantic was then ordered hard a-port. From the top of the pilot-house, and not before, the

approaching vessel, by the reflected lights of the Atlantic, was discovered to be a propeller. It was then too late to stop the steamer, and the only chance of escape, as supposed by the deck officer, was to let her go ahead. The signal lights of the propeller were looked for, but not seen. The propeller struck the steamer on the larboard side, which penetrated into the main hatch and below the water line, through which the water gushed into the Atlantic, and in one or two minutes her bow sunk, and the fires were extinguished. The stern remained above the water until sunrise the next morning. The respondents' case, as shown by the evidence on their part, is, the propeller left Cleveland, the 19th of August, 1852; was kept down the lake near the shore to Grand river, and continued from that place east-north-east until two o'clock, when she was hauled off north-east by east. Soon after this change, a light was observed on the propeller, two or two and one-half points on her starboard bow; and the helmsman was directed to keep her on her course. The light was supposed to be at a distance of three miles. The light approached the propeller, but did not appear to cross her path. In two or three minutes, the bell was rung to slow the engine, and in six minutes, more or less, the engine was stopped and reversed. Seeing that a collision was inevitable, the wheel was then put hard a-starboard, with the view to break the force of the blow. By the oaths of the captain, mate and helmsman of the propeller, at the time of the collision, her signal and other lights were burning brightly. The same witnesses say, that by the stoppage and reversal of the engine, the force of the propeller was reduced to some three miles an hour, at the time she struck the Atlantic.

It is important to ascertain the position and course of the vessel, immediately before the collision. A map of Lake Erie, made on actual survey, by the bureau of topographical engineers of the United States, was used on the trial, on which was marked the courses as proved to have been run by the respective vessels, from Buffalo and Cleveland, up to the time of the collision. This map is presumed to be accurate. McNatt, the mate of the propeller, says his watch commenced at twelve o'clock at night, and that he kept the propeller east-north east, until two o'clock, and then hauled off from the southern shore of the lake, north-east by east, and that soon after this change, the lights of the Atlantic appeared. If McNatt, as he swears, from twelve o'clock to two, steered the propeller the course she had run, east-north-east, and then changed to north-east by east, he would not have passed within ten miles of the place of collision. From the statement of Captain Richardson, the collision took place some four or five miles west by south of Long Point, the Atlantic having passed within about four miles of the light-house. This is only important as showing the inaccuracy of the statements of Captain Richardson and his mate, McNatt, as to the course of the propeller; and that, when she struck the Atlantic, her course was from the southern shore of the lake, at an angle with the course of the Atlantic, which must have made the larboard lights of the Atlantic, on the starboard bow of the propeller. As the vessels approached each other, on the above hypothesis, the lights would become less perceptible, and to a person on the deck of the propeller, the Atlantic would seem to be heading on to her. This supposition is sustained by the evidence in the case, and by the declarations of McNatt, that his course crossed the path of the Atlantic.

The lights of the propeller, except the signal lights, were made on the larboard bow of the Atlantic, and the larboard lights of the Atlantic, including the red light, were made on the starboard bow of the propeller. The course of the Atlantic was south-west by west, that of the propeller, as stated by McNatt, was north-east by east. Now, if the propeller had been running this line, north of the line of the Atlantic, the lights of the propeller could not be made on the larboard bow of the Atlantic. It will be recollected that the lights of both vessels, as at first seen, continued to be displayed, until the moment before the collision. The Atlantic was running westerly, the propeller easterly, it is alleged, on parallel lines: now, without a reversal of the order of nature, on this hypothesis, the starboard lights of the propeller could not be displayed on the larboard bow of the Atlantic, nor could the larboard lights of the Atlantic be made on the starboard bow of the propeller. This sufficiently demonstrates the error of the respondents, in assuming that the propeller, when the larboard lights of the Atlantic were made on her starboard bow, was north of the Atlantic. And this is the position taken in the argument.

The hypothesis that the propeller was approaching the path of the Atlantic, from the south, by an angle which displayed the light of the propeller to the larboard bow of the Atlantic, and caused her larboard lights to shine on the starboard bow of the propeller, is consistent with the evidence in the case; and the demonstration above stated is conclusive of the fact. It seems to be clear, from the facts stated, that McNatt intended to pass the bow of the Atlantic. But this does not rest upon inference alone; McNatt repeatedly declared, at different times, in explanation of the collision, and immediately after its occurrence, that he did intend to pass the bow of the Atlantic, and that he would have accomplished his purpose had not that vessel ported her wheel. These remarks were made at different times and occasions, as shown by some fifteen or twenty witnesses. Whether the declarations of McNatt, thus proved, be considered as evidence in chief, or as discrediting the witness, the result, under the facts, must be the same.

If these declarations of McNatt be true,—and on one occasion he verified their truth by an oath,—no one can doubt that the propeller was south of the line of the Atlantic. Could McNatt wish to pass the bow of a vessel behind him? This determination to cross the path of the Atlantic was carried so far as to render the collision inevitable. Until this was perceived by McNatt, to use his own words, he did not apprehend danger. The right to keep his course was, probably, an afterthought with McNatt. Seeing the terrible result of his act, it was natural for him to seek some palliation or excuse. The fact was attributed to the Atlantic in porting her helm; but he had a right to keep on his course. This right he has no doubt claimed from a rule in navigation which, under certain circumstances, allows one of two vessels meeting each other, to keep on her course, while the other is required to give way. This rule is more calculated to cause collisions than to avoid them. Is a concurrence of judgment to be expected in the masters of two vessels approaching each other, as to the conditions prescribed, even in daylight, and especially at night? A rule of navigation, to be effectual, must be simple and positive. It should be liable to no exceptions. It should be so plain that any man who knows his right hand from his left can follow it. "Where two vessels approach each other in opposite directions, each should turn to the right." Let this be observed, and there will be no collisions. The rule should apply indiscriminately to all vessels, whether propelled by wind or steam. And if it should happen that one vessel is unable to turn to the right, the other vessel will never doubt as to its course, if practicable, and that will be sufficient to avoid her.

Although the officers of the propeller saw the steamer at the distance of three miles, and from her lights knew her character, the propeller kept on her course; when the vessels approached each other very near, an order was given to slow the propeller, to stop the engine, and then to reverse it, which McNatt swears broke the force of her blow, as she could not have been moving more than at the rate of three or four miles an hour; but on other occasions, it is proved he said these measures were taken so short a time before the collision, as not materially to lessen the force of her movement. And this would seem to be the fact from the wound inflicted on the Atlantic. It is true the helm of the propeller was starboarded, when the vessels were nearly in contact, which was done, as McNatt states, not to avoid a collision, but to render the conflict less injurious by a slanting blow.

It is argued that the propeller, under existing circumstances, was bound to keep her course. That to have thrown her helm a-port while the Atlantic was from two to three points on her starboard bow, would have been a gross violation of the rules of navigation; and several experts have given their opinion approving of the course of McNatt. Those opinions were given and the usage stated, on the hypothesis that the boats were running on parallel lines, that of the Atlantic being south of the propeller's. This supposition is shown to be incorrect from the fact that the red light of the Atlantic was seen on the starboard bow of the propeller, and the lights of the propeller made three-fourths of a point on the larboard bow of the Atlantic. This would be impossible if the propeller were running on a parallel line with the Atlantic. That the lights were seen as stated, no one can doubt, as the witnesses on both boats concur. The captain of the propeller seems to differ from his experts and the counsel. When he met McNatt on the deck, after the collision, he inquired of him if he saw the red light of the steamer, and being answered that he did, with great emphasis, the captain said, "Why did you not port?" The captain knew, as McNatt afterwards swore, that the propeller's line was from the southern shore of the lake, and that it lay across the path of the Atlantic.

The libel charges that the propeller had not her signal lights burning, and displayed as the law requires. That the deck officer of the Atlantic supposed the lights were on a sail vessel, and that he was warranted in so judging, and in running the Atlantic, Carney, the watch on the Atlantic, Brigham, an experienced seaman, who was a passenger, Rose, a fireman, Barry, the wheelman, all on board the Atlantic, and all of whom saw the approach of the propeller until she struck the Atlantic, and they all looked for signal lights, and saw none on the propeller.

Warner, respondent's witness, was on board the Atlantic; saw a white light at about 2 o'clock, or after, one point over her larboard bow; thought it was a sail vessel; when the vessels were within fifty feet of each other, he then, for the first time, saw a signal light, he thinks, but is not certain. But, Wells, McPherson, Barnes, Kenedy, Welsh, Meeler and McGrain, all hands on board of the propeller, and Mr. and Mrs. Ring, passengers on that boat, concur in saying the signal lights were nearly out, and could not be seen more than a few rods. It is true that McNatt and Captain Richardson swear that the signal lights were burning at the time of the collision, and continued to burn until the propeller landed at Erie. But the facts sworn to by these witnesses are disproved by so great a number as to leave no doubt that the signal lights were so nearly extinguished, as not to be seen further than one or two lengths of the vessel. McGrain, whose duty it was to trim the lamps, after the collision, when he came on deck, says the captain ordered him to trim that light, pointing to the signal light. The witness brushed off the scum or hard crust that was on the top of the wick of the light, picked it and put it back in its place. One of the tubes of this signal light was entirely out. The light could not be

seen, McGrain says, but little further than the length of the boat. The signal lights, unless trimmed by twelve o'clock at night, he says, would not afford a light more than twice the length of the vessel. They were not trimmed on the night of the collision, until after it occurred. Several of the witnesses saw these lamps burning after they were trimmed. As two white lights were shown by the propeller, it is argued that the officer of the deck of the Atlantic might have known they were not carried by a sail vessel. But it is proved that many sail vessels carry two white lights; and it is clear, that no number of white lights can excuse the want of colored lights which the law requires every steamer to carry.

On two grounds the propeller is clearly chargeable with fault: First, when she saw the light of the Atlantic she should have ported her helm, instead of continuing her course. The assumption that she was north of the line of the Atlantic is not sustained by the evidence, and is contradicted by the declarations of McNatt, by the lights made on the bows of both vessels, which showed the supposition was unfounded, and could not, in the nature of things, be true. No doubt is entertained that the display of lights is accounted for by the angle at which the vessels approached each other, and which is the only hypothesis sustained by the evidence. Had the propeller ported her wheel, and put it hard-a-port, there would have been no collision. This would have caused the propeller to pass the stern of the Atlantic. McNatt was either ignorant of his duty or perversely wrong, in continuing his course, and especially in his attempt to pass the bow of the Atlantic. There is no rule of navigation which sustains him, but the contrary. And to this act of his, more than any other, is the sad calamity to be attributed.

In the case of The Ann & Mary, 9 Eng. Adm. R. [2 W. Rob. Adm.] 195, the Trinity masters say: "We beg to observe to this court, that the golden rule so long established, must be strictly adhered to; it is this, that the larboard tack is to give way, and the vessel on the starboard tack to hold on." This rule when applied to the open sea is pregnant with danger, as above observed. It is salutary, no doubt, when applied in a narrow river, where its shores show the position and course of each vessel. But the masters say: "And the new rule which has been lately made for steam vessels, namely, each to put the helm a-port under all doubtful circumstances." This rule is founded on common sense and common prudence. It was disregarded by the propeller.

But in the second place, the propeller was chargeable with fault, in not having her signal lights in order. These lights, it is true, to some extent were burning. They were not entirely out, but, for all practical purposes, they might as well have been extinguished. They were so low, and so encrusted by the atmosphere, that they could not be seen scarcely twice the length of the boat. It is true the mate on deck, the captain, and one or two others, swear those lights were burning at the time of the collision. After the collision, the captain directed McGrain to fix this or these lights. He saw the defects, and this order shows it; and it is proved by so many persons on both boats, and especially by those on board the Atlantic, who were experienced sailors, and who looked for the signal lights as the propeller approached, but did not see them, that the force of the evidence is irresistible. One witness only on the Atlantic thought he saw one of those lights at the time of the collision, but is not certain. Until Carney saw the hull of the propeller on her near approach, by the reflected lights of the Atlantic, he supposed the white lights seen were carried by a sail vessel. Had he been warned by the signal lights that the approaching vessel was a steamer, Carney says he would have stopped his vessel. Defective signal lights, which would not enable an approaching vessel to see them at such a distance as to avoid a collision, are not lights within the law. And this was the condition of the propeller's signal lights, at the time of the collision. The second ground of fault, in my judgment, is as clearly established as the first one.

But was the management of the Atlantic faultless? I think it was not. The objection that the captain, instead of standing his watch, substituted the second mate, and retired to rest, and was not seen on deck again until roused by the collision, is not in itself a fault. In this Captain Pettys, master of the Atlantic, did nothing more than was usually done by masters of steamers when the night is clear and calm. The second mate, under such circumstances, is often ordered to the deck. The assertion that the second mate was incompetent to the duties assigned him is disproved by a great number of experts, which relieves the second mate from any just imputation of ignorance or want of energy. The Atlantic had in her charge about five hundred passengers. This imposed upon the officer in command awful responsibilities. It should have quickened his solicitude and energy in the discharge of his duties. When he first descried the approaching vessel he put his helm a-port, and a moment before the contact he ordered it hard-a-port. Seeing only the white lights, he supposed the vessel carrying them to be a sail vessel. No signal lights indicating it to be a propeller were seen by him until after the collision, and after the signal lights had been trimmed.

The experts called by the libellant say that the Atlantic was very properly kept on her way without any abatement of her speed. They were right, probably, on the supposition that the propeller had been a sail vessel. From the slow progress of such a vessel, the steamer in all probability would have passed her without danger. But had the mate a right to presume the approaching light to be on a sail vessel, and to act accordingly? Technically, perhaps, he had. But could there be no doubt as to the character of the approaching vessel? Had Carney a right to hazard the safety of

his passengers on the faithful conduct of the master of the vessel in view? The lives of the passengers were ventured on the Atlantic on the character of the vessel, and the skill and efficiency of its officers. A trust was reposed in them, and not on the good conduct or skill of the officers of such vessels as they might meet. Under such circumstances, it is not enough for an officer to be within the rules of navigation so as to charge the wrong on the colliding vessel. Notwithstanding this wrong in an approaching vessel, the peril must be seen and guarded against, by an exercise of skill and firmness which, under such an emergency, might reasonably be expected from competent officers.

Prudence required, when the lights of the propeller were seen, that the Atlantic's helm should be ported, and the course of the approaching vessel ascertained; and if this could not be done except by slowing or stopping her engine, the boat should be checked or stopped. It is true that a steamer, by the present rules of navigation, may take either the larboard or starboard side of the sail vessel. This leads to many collisions, as the sail vessel may mistake the intentions of the steamer, and run across her path; but if each had to pass the other on the right, there could be no mistake.

In St. John v. Paine, 10 How. [51 U. S.] 557, speaking of the Trinity rules, the court say: "These rules have their exceptions in extreme cases, depending upon the special circumstances of the case, and in respect to which no general rule can be laid down or applied. Either vessel may find herself in a position at the time when it would be impossible to conform to them without certain peril. These cannot be anticipated, and therefore cannot be provided for by any fixed regulation. They can only be examined, and the management of the vessel approved or condemned, as the case may arise." And again, in Peck v. Sanderson, 17 How. [58 U. S.] 178, the court say: "Neither can the order to stop the engine and back, instead of changing the course of the steamship, be regarded as a fault. It would evidently have been unwise to change her course until the course of the approaching vessel was ascertained. She might be approaching at an angle that would clear the steamship, and a change in the course of the latter might produce a collision, instead of preventing it."

Carney admitted, that if he had known the approaching vessel was a propeller, he would have stopped the engine. For the safety of his boat and passengers, it was important that he should know the character of the vessel and her course. But he did not stop to ascertain either. He judged of the one by the light which appeared, and of the other, from the light made on his starboard bow. But he erred in both cases. The approaching boat was running at an angle to the line of the Atlantic, and, in such case, porting his helm then hard-a-port would not, and did not, avoid her.

The commander of a boat has no right to incur any risk which jeopards the lives of his passengers, and which he may avoid. Had the engine of the Atlantic been slowed two minutes, there would have been no collision. The experts sustain Carney in keeping the Atlantic at full speed on her course. The opinions of experienced seamen may be relied on, where there is no mistake in the facts on which it is founded. They judged in the present case from the lights made on the larboard bow of the Atlantic, not knowing whether the light so made was from the starboard or larboard light of the approaching vessel. The fact proved that the larboard lights of the Atlantic were made on the starboard bow of the propeller, which showed that the course of the propeller crossed the path of the Atlantic; and in such a case no prudent man could advise the Atlantic to keep her course and speed. Under such circumstances, a collision was certain if the vessels should meet at the point where the propeller's line crossed that of the Atlantic. When lights are made, it is always difficult, and often impossible, to tell the course of the approaching vessel; and until this shall be ascertained, the vessels should stop their engines. Where the vessels are approaching each other at an angle, whether they will meet at the angle depends upon the relative distances and speed of the boats, which no one can calculate or determine. Under such circumstances, there is no safety but in the stoppage and reversal of the engines. When vessels are approaching each other in parallel lines, or in the same lines, the helm of each should be ported.

On the approach of danger, every officer should be called to the deck, and the master, to whom the vessel is chiefly entrusted, should take the command. I am aware that this has not been required; and I am also aware that the destruction of human life has become so common from collisions of steamboats, that the country look upon them as ordinary occurrences. The Atlantic cannot be held faultless, as the measures dictated by prudence and necessity were not taken to avoid the collision.

There is evidence in the case tending to show the most reprehensible and inhuman conduct of Captain Pettys, of the Atlantic, after the collision. This has been explained, or contradicted, by other testimony. He is charged with calling, when in the lifeboat of the Atlantic, on the boat of the propeller to come and take him on that boat, as he was Captain Pettys, of the Atlantic. It seems Captain Pettys was in the boat, but that it was not he, but another person, in the same boat, who made the request. It is also stated that, when on board the propeller, he advised Captain Richardson not to go to the wreck of the Atlantic with the propeller, as the passengers were so numerous as to sink her. It is said by other witnesses that Pettys expressed much solicitude to save the passengers, and advised Captain Richardson to exert himself. Before Pettys left the sinking vessel, it is

charged that he used force to prevent the passengers from entering the boats until he and his crew was safe. This is not proved, except upon very doubtful evidence. Before he left the boat, Pettys directed her to be listed down to the starboard, with the view to elevate the wounded part above the water. The vessel was careened, but it did not save her from sinking.

Captain Pettys, it is proved, received a severe wound in the head, directly after the collision, which for a time disabled him; and it seems he was under medical treatment for some time after his arrival at Erie. He is spoken of by the witnesses as a competent and popular master. Capt. Richardson says, when the propeller reached Erie, not being acquainted with the entrance to the harbor, he hesitated about entering it, when Captain Pettys took the command of the vessel and landed her. If this be so, his wound could not have been as severe as some of the witnesses supposed. But I cannot but observe that the haste with which Captain Pettys left the sinking steamer shows that he had not the moral daring which fitted him for such a crisis. The captain of a ship should be the last to leave her; he should go down with her, or buffet the waves, rather than save himself by occupying a place in a live-boat, to the exclusion of a passenger. The wound might, perhaps, have influenced the act of Captain Pettys, and may excuse him in leaving the steamer. Carney, the second mate, remained on the wreck until after sunrise. And, from the evidence, it appears all the passengers might have been saved if they had collected on that part of the stern of the Atlantic which remained above water until after sunrise. Captain Richardson and McNatt, by unremitting and judicious efforts, rescued many of the passengers.

The weight of the responsibility for this great calamity lies on the propeller. The Atlantic was in fault, but not in the same degree as the propeller. Where the fault is mutual, the damages are divided, and not apportioned by the comparative culpabilities of the parties. The decree of the district court is reversed, and a decree will be entered that the damages stipulated be divided, one-half of which shall be paid to the libellants by the respondents. It is not improper to remark, that the additional evidence procured in this case since the decree in the district court has greatly changed its aspect. In the argument, the counsel for the libellants admitted the decree in that court was correct, on the evidence before it.

[NOTE. From the decree entered pursuant to the foregoing opinion, both parties appealed to the supreme court of the United States, where the decree was affirmed, without costs; Justices Greer and Daniel dissenting. 21 How. (62 U. S.) 572. After the going down of the mandate, and the entry of a decree pursuant thereto, further proceedings were had, by means of a bill of discovery for the purpose of enforcing the same. See Case No. 17,152, and 2 Black (67 U. S.) 430.]

Case No. 17,152.

WARD et al. v. CHAMBERLIN et al.

[9 Am. Law Reg. 171; 2 West. Law Month. 621.]

Circuit Court, N. D. Ohio. Nov., 1860.

ADMIRALTY DECREES—MODE OF EXECUTION—LEVY ON CHATTELS—EXECUTION AGAINST LAND—COURT RULES—BILL FOR DISCOVERY.

1. Decrees in the admiralty can only be enforced in the courts of the United States, in the mode and by the process properly ordained by acts of congress and rules of court for their execution.

2. The character and effect of such decrees in admiralty, and their modes of execution, are within the province of congress to determine.

3. Under the existing acts of congress and rules of court, the libellant in admiralty may have an attachment or a capias against the person of the defendant, or a fieri facias against his goods and chattels: and these are the only writs and the only mode prescribed, whereby an admiralty decree can be lawfully executed in the circuit and district courts.

4. The court of admiralty has no power to issue an execution against the lands of a defendant, to collect the amount due on a decree in admiralty, for the payment of money.

5. The supreme court of the United States has power to regulate the practice of the courts of admiralty, and to frame rules in relation to executions and other process to be used therein.

6. An admiralty decree is not a lien on land, and has never been treated as a lien on land in either England or this country.

7. A court of equity will grant a discovery and general relief in a case where a plain, adequate, and complete remedy cannot be had at law; hence, when an execution had been issued, and no property found on which to levy, a judgment creditor may file his bill for relief, and is entitled to the aid of the court, to discover and apply the debtor's property to the payment of the judgment.

Swayne, Andrews & Wyman, for complainants.

R. S. Spalding and R. P. Ranney, for defendants.

WILLSON, District Judge. Several important and novel questions of law are presented for our consideration in this case. They arise on a demurrer to the complainants' bill, interposed by Philo Chamberlin, one of the defendants. Upon some of these questions, the members of this court entertain conflicting opinions. But this conflict of opinion is, perhaps, not to be regretted, since, by certifying the points of difference, the parties will be enabled to take the case at once to the supreme court, and there obtain a final settlement of the questions of law which it involves. In differing from the learned presiding judge, it is but just to myself to state the reasons in support of my own conclusions.

The facts in the case are correctly set forth in the abstract of the bill furnished by the counsel for complainants. On the 12th of November, 1856, the complainants obtained a decree in the circuit court of the United States

for the Southern district of Ohio against two of the defendants, Chamberlin and Crawford. [See Cases Nos. 17,158 and 17,151.] The suit was a proceeding in admiralty for damages sustained by the libellants in the loss of the steamer Atlantic by a collision with the propeller Ogdensburgh, a vessel owned by said defendants. The case was appealed to the supreme court of the United States, and the decree of the circuit court was there affirmed. [21 How. (62 U. S.) 572.]

On the 7th of July, 1859, by agreement of the parties, a joint decree was entered in the circuit court (on a mandate from the supreme court) against Chamberlin and Crawford and their sureties, in the appeal to the supreme court. This decree provided, that if certain payments should be made by the original defendants, at defined periods, then no execution should issue on the decree; but in default of such payments being made, the complainants were authorized to proceed and collect the amount due as they should see fit. Two payments were made as required by the decree, and it is averred that two defaults had occurred previous to the filing of the bill in this case, and that the complainants have caused execution to issue upon said decree, against the goods and chattels, lands and tenements of the defendants in said decree; that the marshal found no goods or chattels whereon to levy, and that for the want of such goods and chattels, he levied on the lands and tenements of said defendants, described in the bill, and situate in the Northern district of Ohio. The other defendants, it is alleged, claim rights in and liens upon said land, the nature and extent of which they are called upon to disclose. It is also averred in the bill, that said defendants in said decree have no goods or chattels liable to execution, and no lands or tenements in the state of Ohio, other than those described as levied upon by the marshal. The prayer of the bill is for a discovery, and for an adjustment of liens upon and of claims of certain of the defendants in the land; and also for a sale of the several parcels of real estate levied upon, and the proceeds applied in payment of the amount due on said decree. There is also a prayer for general relief. A portion of the defendants claiming liens upon the land have answered, disclosing their several interests in the property. But the questions of law which we are now called upon to decide, arise upon the demurrer to the complainants' bill. The cause of demurrer is placed on two grounds. 1st. That the courts of the United States, in the exercise of admiralty powers, have no authority to issue executions against lands upon decrees in admiralty. 2d. That the facts, as set forth in the bill, do not, in a court of chancery, entitle the complainants to the general relief prayed for.

The authority by which the federal courts are empowered to issue executions upon decrees in admiralty, is to be found in the various acts of congress relating to process, and in the rules of practice, prescribed by the supreme court for the government of the circuit and district courts of the United States. It, therefore, becomes necessary to refer to and carefully examine those acts of congress, and those rules of admiralty practice, in order to determine the first question raised by the demurrer. By the 14th section of the judiciary act of 1789, the courts of the United States are empowered to issue all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. 1 Stat. 81. The second section of the process act of 1789 provides, that the "writs and executions," in causes of equity and admiralty and maritime jurisdiction, shall be according to the course of the civil law. 1 Stat. 93. The second section of the process act of 1792 declares, that the forms of writs, executions, and other process in courts of equity, and courts of admiralty and maritime jurisdiction, shall be according to the principles, rules, and usages which belong to courts of equity, and to courts of admiralty respectively, as contradistinguished from courts of common law, except so far as may have been provided for by the act establishing the judicial courts of the United States, subject, however, to such alterations and additions as the said courts shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same. 1 Stat. 275. By the act of May 19th, 1828 [4 Stat. 278], which has application to the federal courts in states admitted into the Union since the 29th day of September, 1789, it is provided, that proceedings in suits in courts of admiralty and maritime jurisdiction shall be according to the principles, rules, and usages which belong to courts of admiralty as contradistinguished from courts of common law: subject, however, to such alterations and additions as the said courts shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rules, to prescribe to any circuit or district court concerning the same. And by the third section of the same law it is further provided, that "writs of execution and other final process issued on judgments and decrees, rendered in any of the courts of the United States, and the proceedings thereupon shall be the same, except their style, in each state respectively as are now used in the courts of such state, saving to the courts of the United States in which there are not courts of equity, with the ordinary equity jurisdiction, the power of prescribing the mode of executing their decrees in equity by rules of court: provided, however, that it shall be in the power of the courts, if they see fit, in

their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." The act of August 23d, 1842 [5 Stat. 516], further supplementary to the judiciary act of 1789, declares, that the supreme court shall have full power and authority, from time to time, to prescribe and regulate and alter the forms of writs and other process to be used and issued in the district and circuit courts of the United States, in suits at common law, or in admiralty, and in equity, pending in the said courts, and generally to regulate the whole practice of said courts. In pursuance of the power and authority granted by this act of congress, the supreme court of the United States, in 1845, adopted and promulgated a set of rules for the government of the federal courts in admiralty proceedings. The rule regulating final process upon decrees for the payment of money, reads as follows (rule 21): "In all cases where the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a capias and of a fieri facias, commanding the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and, for want thereof, to arrest his body to answer the exigency of the execution." "In all other cases the decree may be enforced by an attachment to compel the defendant to perform the decree, and upon such attachment, the defendant may be arrested and committed to prison until he performs the decree. or is otherwise discharged by law, or by order of the court."

It is insisted, by the counsel for the defendants, that the foregoing rule, taken in connection with the act of August 23d, 1842, is fully equivalent to an enactment by congress, regulating final process in admiralty on decrees for the payment of money; and that the legislation of the different states, and the practice of the state courts, in matters of law and equity, have no bearing upon the subject; and, further, that as there is no act of congress expressly making lands liable to execution upon admiralty decrees, and as it is not in accordance with long-established usage in the high court of admiralty, in England, to issue executions against lands on its decrees; for these reasons it is urged that the act of congress of May 19, 1828, should not be so interpreted as to conflict with the true intent of the twenty-first rule of admiralty practice, but that said rule should be regarded as designed to cover the whole subject, and as alone containing the present regulation, respecting the execution of admiralty decrees in the circuit and district courts of the United States. On the contrary, it is insisted, by the counsel for the complainants, that by the 4th section of the act of congress of July 4th, 1840 (5 Stat. 392), decrees in admiralty are, by fair implication, made liens upon the real estate of the parties against whom they are rendered; and the like effect (as to admiralty decrees) is claimed to exist under the act of 1828, in virtue of state laws. Hence it is urged that the lien of admiralty decrees, in the courts of the United States, is a legal right attaching to land, and is, therefore, a rule of property arising under the laws of the several states, and cannot be abrogated by a rule of the supreme court.

The language employed in framing the twenty-first rule of admiralty practice, leaves no room to doubt the real and true purpose of its authors: "In all cases where the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a capias and of a fieri facias commanding the marshal to levy the amount thereof of the goods and chattels of the defendant, and for want thereof to arrest his body to answer the exigency of the execution." Decrees in courts of admiralty can only be enforced in the mode and by the process properly ordained for their execution. The character and effect of such decrees, and the mode of their execution, is, unquestionably, within the province of congress to determine. By the act of 1842, congress determined and declared, that the supreme court should have full power and authority to prescribe and regulate and alter the forms of writs and other process to be used and issued in the district and circuit courts of the United States. Congress has thus delegated to the supreme court the full and unqualified power to prescribe, to regulate, and to alter writs for the enforcement of decrees in admiralty; and the supreme court has exercised that power, in prescribing the exact process and regulating the particular mode of executing an admiralty decree for the payment of money. The libellant may have an attachment or a capias against the person of the defendant, or a fieri facias against his goods and chattels. These are the only writs, and the mode prescribed is the only mode, by which decrees in admiralty can be lawfully executed by the circuit and district courts. And if the rule is of paramount authority and of binding obligation upon those courts, then they have no power or competent authority to issue an execution against the lands of a defendant, to collect the amount due on a decree in admiralty, for the payment of money. That the supreme court has full power and authority to establish the rule, I have no doubt. In the case of Thompson v. Phillips [Case No. 13,974], the court say: "Laws which relate to practice, process, or modes of proceeding before or after judgment, are exceptions to the thirty-fourth section of the judiciary act, as congress has legislated on the subject. The supreme court of the United States have established the distinction to be this: State laws, which furnish the court a rule for forming a judgment, are binding on the federal courts, but not laws for carrying that judgment into execution—that is, governed by the acts of

congress and the rules and practice adopted pursuant thereto." So, too, in the case of Bank of U. S. v. Holstead, 10 Wheat. [23 U. S.] 51, where the question arose as to the power of the circuit court of the United States to subject certain property to execution, by rule of court. The supreme court say, that "there is no doubt that congress might have legislated more specifically on the subject, and declared what property should be subject to execution from the courts of the United States. But it does not follow that, because congress might have done this, they necessarily must do it, and cannot commit the power to courts of justice. Congress might regulate the whole practice of the courts, if it was deemed expedient so to do. But this power is vested in the courts." This exposition of the power of the supreme court of the United States to frame rules in relation to executions and other process, is conclusive authority in this court.

But it is said that a decree in admiralty operates as a lien upon the lands of the defendant, and that where a lien exists, the right to issue execution, to levy upon and sell the land to satisfy and discharge the decree, is not only a necessary result of the lien, but is also authorized by the legislation of congress. In England, from which country we derive the fundamental principles of maritime, equity, and common law, no lien on lands is created by a decree in admiralty; nor, according to long-established usage, can execution there be issued against lands upon such a decree. 1 Com. Dig. 393; Clerke, Praxis Adm. 137, 139; Godb. 268; Hall, Adm. 112; Browne, Civ. & Adm. Law, 410. And until the statute of Westminster II. (13 Ed. I.), judgments in personal actions were not liens upon land by the common law. That statute gave the right to issue a writ of elegit, which created the lien. So, too, in relation to decrees in equity for the payment of money. They did not operate as liens on land until the act of 1 & 2 Vict. c. 110. This act of parliament provides that decrees in chancery for the payment of money "shall have the effect of judgments in the superior courts of common law." But no innovation of this kind has ever been incorporated into the maritime jurisprudence of England; and the same exemption of lands from admiralty liens obtains in this country, unless it has been removed by the legislation of congress. I can see nothing in the act of congress of May, 1828, and of July, 1840, that gives to a decree in admiralty the effect of a lien on land. The clause in the third section of the act of 1828, declares that "writs of execution, and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same (except the style) in each state respectively as are now used in the courts of such states." This provision has reference, doubtless, to judgments at law and decrees in chancery, and proceedings upon such judgments and decrees. It cannot, by any known rule of construction, have application to decrees in admiralty, or to proceedings upon such decrees, and for the obvious reason that by the constitution and laws of the United States, the state courts have no admiralty and maritime jurisdiction, and consequently can render no decrees in admiralty and maritime causes. Equally fallacious is the inference sought to be drawn from the fourth section of the act of 1840. This section provides, that "judgments and decrees shall cease to be liens on real estate in the same manner as judgments and decrees of the state courts now cease, by law, to be liens thereon." The plain import of this statute is, that judgments at law and decrees in chancery rendered in the circuit and district courts of the United States (in any state), having liens upon land, shall cease to be liens, in the same manner as judgments at law and decrees in chancery of the courts of such states cease to be liens. State laws, in virtue of which liens are created on judgments and decrees in the state courts, furnish rules of property; and it was the purpose of congress to put liens of like judgments and decrees in the federal courts upon the same footing. It is analogous in principle to the limitation laws of the several states, which have always been regarded as affording rules of property, and, therefore, rules of decision in the federal courts. The object of the provision, doubtless, was to obtain uniformity of a rule of property, in courts of different jurisdictions, and that rule to be in conformity to state laws. I am unable to see how the fourth section of the act of 1840 should have reference to liens, which by no possibility can have an existence in virtue of state laws, and especially as it was the purpose of congress to limit, and not to extend, the liens of judgments and decrees rendered in the federal courts.

Again, it was urged in the argument, that it is in accordance with the practice and usage of the United States courts, to issue executions against land, or decrees in admiralty; and our attention has been called to the rules of court for the Southern district of New York, as authority for the practice. By the 59th rule of the district court for the Southern district of New York, there is an express consent required, connected with the stipulation, that if the condition is not performed, the court may order execution against the goods, chattels, lands, and tenements of the stipulators; and by the 147th rule of the same court, it is declared that the writ of fieri facias and venditioni exponas should be adopted as final process in that court in all cases for the sale of property, and that the proceedings therein, in admiralty cases, should be conformable to those on the common law side of that court. Those rules were adopted in 1838, and in pursuance of authority supposed to be conferred by the various acts of congress then in force. Whatever authority to prescribe and regulate process was given to the circuit and district courts by

the judiciary and process acts of 1789, and the act of 1792, that authority was merged in the one of like power conferred on the supreme court of the United States by the act of 1842; and the supreme court having exercised the power thus conferred, and prescribed the exact process and designated the particular mode of executing admiralty decrees, it would seem to be conclusive that the inferior courts of the United States could not adopt process and pursue a practice in conflict with that ordained by the supreme court. But I am not advised of the existence of any rule of practice upon the subject of final process and the mode of executing admiralty decrees, adopted by the circuit and district courts for the Southern district of Ohio. What the effect would be of a written consent connected with the stipulation, authorizing the court to issue execution against the land of the stipulators, if the condition should not be performed, it is not now necessary to determine, as no such consent was connected with the stipulation in the case under consideration. From a careful examination of the question raised by the first ground of the demurrer, I am led to the unavoidable conclusion that the circuit court of the United States for the Southern district of Ohio had no authority to issue an execution against the lands of the defendants on said decree in admiralty, and, consequently, that the levy of such execution upon land, and the proceedings of the marshal in relation thereto, are void and of no effect.

It remains to consider whether, upon the facts disclosed by the record, the complainants are entitled, in a court of chancery, to the discovery and general relief prayed for in this case. It is averred (in substance) by the complainants, in their bill, that the defendants owe them a sum of money, certain in amount, evidenced by an admiralty decree, rendered by a court of record and of competent jurisdiction; that a fieri facias has been issued on said decree, and no goods and chattels found by the marshal whereon to levy; that the defendants have lands which can be made subject to the payment of said decree only through the aid, and by the interposition, of a court of equity. These are simple, and yet they are the important facts for consideration in this branch of the case. It is both the policy and the principle of American as well as of English jurisprudence, to subject a debtor's property to the payment of his debts; and it is laid down as an undeniable proposition, that the jurisdiction of a court of equity will be exercised when the principles of law by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate for the purpose. Mitf. Eq. Pl. 103; 1 Vern. 399; 3 Atk. 192; Ves. 51; 2 Johns. Ch. 283. This doctrine, in its broadest sense, was recognized by the supreme court of Ohio in the case of Cram v. Green's Adm'r, 6 Ohio, 429. The court there say: "That the chancellor has jurisdiction in those cases where a plain, adequate, and complete remedy cannot be had at law, is an apothegm by which his power is limited in every country where the distinction is known between courts of law and equity. The extent of this restriction has been long since defined. It is a technical maxim (say the court), adopted by our legislature in its technical sense, and received the same interpretation here as elsewhere. In our practice we do not give it a restricted meaning, but sustain our powers to the same extent as other similar tribunals, where jurisdiction depends on this principle. It is a part of the general chancery law, that where a class of cases are the objects of chancery jurisdiction, that jurisdiction is not taken away because courts of law subsequently administer a remedy." Hence, it is a principle sanctioned by courts of equity everywhere, that in order to obtain satisfaction of a judgment at law, where execution has been issued, and no property found on which to levy, the judgment creditor may file his bill in a court of chancery for relief, and he will be entitled to the aid of that court to discover and apply the debtor's property to the payment of the judgment. This principle is so well established that illustration and citation of authorities is deemed to be unnecessary. The case before us is where a decree in admiralty for the payment of money was obtained, an execution issued upon it against the goods and chattels of the defendants, and a return of the writ by the marshal, with an endorsement of nulla bona. I think the case is not distinguishable, in principle, from that of a proceeding in equity, where the foundation of the suit is an unsatisfied judgment at law. The claim is for the payment of money as much in the one case as in the other, and both are results of adjudications of courts of record. It is true, that by the 21st rule of admiralty practice, the creditor in the one case may have a ca. sa. against the body of the defendant, which has not been resorted to. So, too, upon a judgment at law in cases of fraudulent contract, the creditor may have his writ of capias against the body of the defendant. Yet this cumulative remedy (neglected to be exercised) is, of itself, no obstacle in the way of equity proceedings to satisfy the judgment. The analogy holds good in like proceedings on a decree in admiralty. The right to a capias against the body is cumulative upon the right to a fieri facias against goods and chattels, and I am unable to see why the neglecting to issue a capias on the decree should operate as an obstacle to a chancery proceeding to obtain satisfaction of the debt, any more than a like neglect to issue a capias on a judgment at law, where a party is entitled to it.

On the whole, I am of the opinion that the demurrer should be sustained, so far as the allegations in the bill relate to the issuing of an execution against land, and the levy and

other proceedings of the marshal thereon affecting the lands of the defendants. But, as the bill in other respects presents a case on which it is both competent and proper for the court to grant the discovery and general relief prayed for, the demurrer should be overruled.

[The case was afterwards taken to the supreme court, upon a certificate of division in opinion between the judges. See 2 Black (67 U. S.) 430.]

WARD (CLAGGETT v.). See Case No. 2,780.

Case No. 17,153.

WARD et al. v. The DOUSMAN.

[6 McLean, 231;[1] Newb. 236.]

Circuit Court, D. Illinois. Oct., 1854.

COLLISION—STEAMER OVERTAKING SAIL—EXCESSIVE SPEED—EVIDENCE—APPORTIONMENT OF DAMAGES.

1. In a collision which took place between a steamer and a schooner as they were entering the harbor of Chicago, the evidence shows that the schooner was ahead, and was sailing the channel usually taken by vessels when the wind was as at that time, and that the steamer attempted to pass, in a narrow space, between the schooner and the pier, without any considerable abatement of speed. This was a fault, and under the circumstances the steamer cannot maintain a libel for the injury done by the collision. The steamer should have allowed the schooner to continue her course without interruption, and if necessary should have stopped.

2. When it appears in a case of collision, one party is in fault, before a court of admiralty will allow any compensation by apportionment or otherwise to such party, the evidence must clearly show there was a fault on the other side. If it is conflicting so as to leave it doubtful, or if it should appear that there might be some slight mistake or error which was occasioned by the original flagrant fault of the first named, no apportionment will be made.

3. Whenever a sail vessel is entering upon difficult navigation, as approaching a harbor, &c., a steamer following should take extreme precaution to keep out of the way. A steamer is considered under command, and should avoid sail vessels; and this rule is to be enforced with peculiar strictness under the circumstances of this case.

[This was a libel by Samuel Ward, Eben B. Ward, and Thomas G. Butlin against the schooner M. Dousman to recover damages for injuries sustained by a collision.]

H. G. & E. S. Shumway, for libellant.

Mr. Goodrich, for claimant.

DRUMMOND, District Judge. This is a libel filed by the owners of the steamer Arctic. It alleges that the steamer, being about to enter the harbor of Chicago, on the 13th day of August, 1851, turned to pass around the north pier; that after the steamer commenced turning, the schooner M. Dousman, which was entering the harbor at the same time, with the wind free, and being on the easterly side of the steamer, negligently and improperly changed her course, struck the steamer on the larboard side and damaged her to a considerable amount. It states that there was sufficient room and depth of water for the schooner to enter the harbor without changing her course northerly, and that with proper care on the part of the schooner the collision might have been avoided; that the steamer was so situated at the time the schooner approached, it was impossible for the Arctic to get out of the way: the steamer being between the schooner and the north pier. The owners of the Arctic claim compensation for the damages done by this collision.

The answer states that the schooner, loaded and drawing eight feet of water, with the wind north, was entering the harbor in the channel usually taken by vessels with such a wind; that at the mouth of the harbor, and south of the channel the vessel was sailing, there is shoal water—usually called the middle ground—on which the schooner would have been in danger of grounding and of being lost or injured, if she had kept too far south. That the Arctic, just after the M. Dousman had doubled the north pier, undertook to pass between the schooner and the pier; that in so doing she came in contact with the schooner and did some damage to the latter. The owner denies that the schooner changed her course more than was prudent to keep her off the middle ground, and that there was not sufficient room for the Arctic to pass between the schooner and the pier; and avers that the steamer ought to have been stopped or backed so as to allow the schooner to pass into the harbor.

There is the usual conflict of testimony in this case. In a collision between two vessels, there is generally an effort by those on board of one to cast the blame on the other. There are, however, some main facts in this case which cannot be controverted. The M. Dousman was a schooner under sail, with the wind about north, trying to make the harbor of Chicago by the north channel. The entrance to the harbor is quite narrow. At the time the schooner changed her course to run into the harbor, the Arctic was several hundred yards astern of the schooner. As the wind was then, vessels coming in by the north channel keep as near the north pier as they can with safety, on account of the current which sweeps around the pier. The Arctic, astern of the schooner, and herself about to make the harbor under a full head of steam, undertook to go to windward of the schooner, and between her and the north pier. Those who had the management of the steamer knew, or were bound to know, the risk they ran in attempting so very difficult and delicate a maneuver.

When we come to the details of the collision, we find great discrepancy in the evidence. According to those on the Arctic, no collision would have taken place if the schooner had not suddenly changed her course and luffed up across the line of the steamer, while according to those on the schooner the collision could not have been avoided, and whatever

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

change of course there was, was caused by a fear of striking the middle ground, a bad shoal lying near the mouth of the harbor. It seems that the helmsman of the schooner, when he saw the approach of the Arctic and the danger of a collision, kept the schooner away without any direction to that effect, whereupon the captain ordered him to keep the vessel straight and not mind the steamer. The people of the M. Dousman concur in saying that the vessel luffed to avoid grounding. Those on the Arctic, on the contrary, affirm there was plenty of room with good water to the southward of the course of the vessel. It is true that the schooner cannot escape the consequences of its own fault by showing that the steamer was also in fault, but I do not think it necessary to weigh and examine the testimony very minutely to determine whether there might not have been some trifling fault on the part of the schooner, because the faults of the steamer were so many and flagrant, that whatever error, if any, of the schooner there was, (and I am not prepared in this conflict of testimony to say there was any,) it might well be considered, under the circumstances, as trivial.

I think the weight of the evidence is, that the collision occurred as the Arctic was in the act of swinging as she changed her course to enter the harbor. All the witnesses on the schooner do not agree as to this; but the master of the brig Mary, which was a short distance behind, and about to enter the port, speaks particularly on this point, and his position gave him the best opportunity of judging. Besides, this conclusion is strengthened by the manner of the contact, and by the nature of the injury that was done to the steamer and to the schooner. The luffing up of the schooner may have contributed slightly to it, but it is not certain that the collision would not have taken place in any event. It would not be surprising if the helmsman of the schooner was a little alarmed when he saw the imminence of the danger, and should try to avoid it; nor that the captain, through an apprehension of running aground, should give an order to luff. These are niceties which need not be severely criticised. We must recollect that the captain of the schooner had a right to presume that the steamer would keep out of his way; and though we should hold him to the exercise of all reasonable skill and prudence, still we must judge of these by the light of the circumstances which surrounded him.

The first and second mate of the Arctic unite in giving it as their opinion that the checking bell was not rung, and that her speed, which had been from eight to twelve miles an hour, had not been slackened. It is true one of the men says that the checking bell was rung fifteen minutes before the collision; and yet this same witness declares, in another part of his testimony, that at that time they were only seventy or eighty feet from the pier. No reliance whatever can be placed on the evidence of this witness. He was examined before me; and his whole manner indicated a total recklessness as to the facts, and his eagerness to screen the Arctic involved him in endless contradictions. It is manifest that the Arctic, whether her speed had been lessened or not, was going at too rapid a rate. It would be attended with very ruinous consequences to sanction such speed under such circumstances. Coming into a harbor with a narrow passage, right in the wake of another vessel, at a speed of ten miles an hour! Steamers cannot be too stringently held to caution and circumspection in this particular. They are constantly violating all the rules we adopt, and I do not feel disposed to relax those wholesome restraints which the courts have thrown around their management. The schooner was ahead, and had the right to choose her course; in this instance, with the wind north, it was her only course. It was the duty of the steamer to keep out of the way of the schooner; and there can be no doubt it was a gross fault for the steamer to attempt, under the circumstances, to pass between the schooner and the north pier. This is the opinion of the nautical witness who has been examined on that point, and I concur fully in its correctness. It was attended with great risk and peril in every aspect, as well to the steamer as to the schooner.

I think it may be laid down as the rule, without exception, that whenever a sail vessel is entering a harbor so difficult of access as that of Chicago, a steamer following should take extreme precaution to keep out of the way of such vessel, and, if need be, stop entirely. It is the only safe rule. The general rule applicable to steamers is, that they are always considered under command, and should keep out of the way of sailing vessels; and it seems to me this rule should be enforced with peculiar strictness upon a steamer situated as the Arctic was in this case.

If this were a libel promoted by the owners of the M. Dousman, I should have no hesitation in awarding to them compensation for the damage their vessel sustained, as it is, I dismiss the libel with costs.

Case No. 17,154.

WARD et al. v. The FASHION.

[Newb. 8;[1] 6 McLean, 152.]

District Court, D. Michigan. Oct., 1854.

COLLISION BETWEEN STEAMER AND SAIL — PROOF OF FAULT — INEVITABLE ACCIDENT — ERROR IN EXTREMIS — PLEADINGS AS EVIDENCE — WEIGHT OF TESTIMONY — PROTEST — NAUTICAL PHRASES — EXCESSIVE SPEED IN STEAMERS.

1. In case of a collision, between a steamer and a sail vessel, in which the owners of the former libel the latter, the libelants must not only show fault in the sail vessel, but all precautionary measures, on their own part, to avoid the danger to which she was exposed.

2. When a collision is deemed inevitable, an injudicious order, given in the excitement and alarm of the moment, is not to be considered

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

the only cause, even if deemed a fault, should the antecedent negligence and conduct of the one party have placed the other in a situation where there was no time for judicious action.

3. Where no fault can be found on either side, the collision will be deemed an inevitable accident.

[Cited in Austin v. New Jersey Steamboat Co., 43 N. Y. 81.]

4. Where a collision occurs from inevitable accident, without the negligence or fault of either party, each should bear his own loss.

5. Allegations in pleading are admissions by the pleader, and need no proof, unless denied and put in issue: and as against the pleader, will be taken as matter conceded.

6. A witness swearing that he thought a particular order was given, and to his belief that it was obeyed, is not contradicted by testimony positively averring that such an order was not given.

7. The testimony of a witness should not be rejected, because in a hurried conversation, immediately after the collision, he gave a different statement as to a particular fact, from that positively sworn to in court.

8. The protest of the captain and crew, made the morning after the collision, when admitted in evidence, may be considered as evidence corroborative of the testimony of the witnesses in court, when, as to all material facts, they correspond.

9. Doubtful words in a statute, if not scientific or technical, are to be interpreted according to their familiar use and acceptation. The phrase "going off large" is nautical, and signifies having the wind free on either tack.

10. Since the introduction of steam in the propulsion of vessels, the rule of navigation has been enlarged, and steamers are required to use all their power and care, under all circumstances, to keep clear of sailing vessels. The former can be controlled and guided by human skill; the latter are governed by the wind.

[Cited in The Sunnyside, Case No. 13,620.]

[Cited in Parrott v. Knickerbocker & N. Y. Ice Co., 46 N. Y. 368.]

11. Every precaution must be taken by a steamer to avoid a collision with a sail vessel, and the timely slackening of her speed is a necessary precaution at night, when passing through a fleet of sail vessels anchored at the mouth of a river. Under such circumstances, a mere conformity with the rules of navigation will not excuse the steamer.

12. A rate of speed in steamers, which, under the circumstances, necessarily endangers the property of others, is unjustifiable, and makes the owners responsible for the consequences.

[This was a libel by E. B. Ward and S. Ward, owners of the steamboat Pacific, against the brig Fashion to recover damages sustained by a collision.]

H. H. Emmons, G. V. N. Lothrop, and J. S. Newberry, for libelants.

I. In the case of the Woodrop Sims [2 Dod. 82], cited in Abb. Shipp. 229, Lord Stowell stated four classes of collision in the English admiralty: 1st. Where the collision is without fault on either side, as by inevitable accident or vis major; there the loss is left where it fell. 2d. Where both parties are to blame; there the whole loss is put together and divided in equal moieties, each party bearing half. Rogers v. The Rival [Case No. 11,867]. This is also the rule where there is actual fault, but it is inscrutable, that is, uncertain on which side it lies. The Sciota [Case No. 12,508]. 3d. Where the fault is with the suffering party alone; in this case he must bear his own loss. 4th. Where the fault is with the other party alone; then the offending party must respond to the injured party in full damages. The first proposition as laid down, it will be observed, is a mere dictum, and is not necessarily law in our courts. On questions of jurisdiction and admiralty law, our courts are not bound by the English courts, but may go to the great sources of admiralty law to be found in the codes of the commercial states of Europe. See Ben. Adm. c. 12, "Resume." Such is the doctrine of the United States courts. The Jefferson, 10 Wheat. [23 U. S.] 428; Waring v. Clarke, 5 How. [46 U. S.] 441; The Genesee Chief, 12 How. [53 U. S.] 443. The first proposition of Lord Stowell we submit, is not law in this country. (1) Because it has never been so adjudged in this country. (2) By the laws of most of the maritime states of Europe, the loss was divided in case of inevitable accident. See Abb. Shipp. 229. Such was the law of Valin, Oleron, Hanseatic ordinance, Vinnius and Stypmann, and the French ordinance. (3) Because one of the most accomplished and experienced of the American admiralty jurists has decided otherwise. The Sciota [supra]. But in the case at bar we claim the brig Fashion to be solely in fault.

II. It is the duty of a steamer, all other things being equal, to port her helm, and go to the right, on meeting a vessel coming from the opposite direction. Story, Bailm. § 611.

III. Where either party has neglected any ordinary precaution, or varied from any right or duty, they are presumptively liable. 1 Conk. Adm. Prac. 303; [Newton v. Stebbins] 10 How. [51 U. S.] 605; [St. John v. Paine] Id. 584. (1) The showing a green light by the Fashion when on the larboard tack, was an ordinary—nay more, a statutory prescribed, precaution. Laws Cong. 1847; Bulloch v. The Lamar [Case No. 2,129]. (2) A sailing vessel meeting a steamer has a right to keep her course, and it is her duty to do so. Conk. Adm. Prac. 308, 309; 2 Hagg. Adm. 173. Corollary first: The Fashion was on her larboard tack, not showing a green light; she is therefore in fault. Corollary second: The Fashion changed her course and headed obliquely across the channel.

IV. The libelants may recover though some fault is attributable to them. 1 Greenl. Ev. § 232a; Butterfield v. Forrester, 11 East, 60; Bridge v. Grand Junction R. Co., 3 Mees. & W. 244; Davies v. Mann, 10 Mees. & W. 546; Barrett v. Williamson [Case No. 1,051].

A. D. Fraser, James A. Van Dyke, and William Gray, for respondents.

To entitle the libelants to recover, they must show negligence on the part of the respondents, and entire vigilance, and no neg-

ligence on their own. Abb. Shipp. 501 (top paging); also, Id. 606; 1 Cromp. & M. (1832) 20; 38 E. C. L. 252. The libelants must show fault on part of defendants. The Atlantic & Ogdensburgh [Case No. 17,158]; Story, Bailm. 609, note; 3 Kent, Comm. 231. The speed of the Pacific was too great under the circumstances, and puts her officers in fault. 2 W. Rob. Adm. 9; Id. 271; 3 W. Rob. Adm. 76; 2 W. Rob. Adm. 2, 202, 379, 426; 3 W. Rob. Adm. 288. It is a mark of suspicion that the libelants did not offer their protest in evidence. 3 W. Rob. Adm. 295; 2 W. Rob. Adm. 318. In conflict of testimony the presumption is that the respondents did their duty. 2 W. Rob. Adm. 245.

WILKINS, District Judge. This is a cause of collision between a steamer and a brig, at the mouth of the river Detroit. The libelants were the owners of the steamer Pacific, and exhibited in their bill the following allegations, viz.: "That the said steamboat, of the burthen of 500 tons and over, on the 26th of May, 1853, sailed from the port of Detroit with a large load of passengers and a small cargo of merchandise, on a voyage to the port of Cleveland, in the state of Ohio; that, in the evening, when about a mile and three-quarters below the port of Malden, and about three-quarters of a mile below the Malden light-house, and near the mouth of the river, while running her usual track, and only at the rate of five miles an hour, because the night was dark, without a moon, and it thus being impossible to distinguish a vessel at more than about twice the length of the said steamboat distant; and, furthermore, because the master of the steamboat thus slowed the speed of the said steamboat, in order to pass a vessel about five or six hundred feet above the brig Fashion; the master being on watch and on the look out, descried a small light ahead, and soon discovered a vessel approaching the steamer he commanded, dead ahead, and apparently about three hundred feet distant, which was but twice the length of the said steamboat; that as soon as he discovered the said brig Fashion thus approaching the steamer, he ordered his helm to be put 'hard a-port,' designing to pass to her right, and leave her on his larboard side; that the helm of the steamer was accordingly put 'hard a-port,' and so kept until the said steamboat had lapped her bow upon said vessel about twenty or thirty feet; and that when he perceived the Fashion was about to strike the steamer, he ordered his helm 'hard a-starboard,' in order to throw his stern off and avoid a collision, which was accordingly done, but the said brig struck the said steamboat with her bow about midships, carrying away the wheel-house, the kitchen and pantry, with its crockery and furniture, and also the wheel beams, deck frames, pillar block, and breaking the wheel of the said steamboat."

The libel further exhibits, that at the time the light of the Fashion was first seen, the steamer Pacific "carried a bright light at the top of her pilot-house, a red light on her larboard side front of the wheel-house, and a green light on her starboard side opposite the red; and that the said lights remained in their positions burning, when the brig struck the steamer, and that they could easily have been seen from the Fashion for a long time before, and in season for her to have avoided a collision."

It is further alleged in the libel, that "when the Fashion was first seen, she was so near the Canada shore, that the steamer could not safely pass between her and the shore; that when first discovered by the Pacific, she was sufficiently near for those on the steamer to see her exact course, and that her bow pointed from the Canada shore towards the middle of the river; that, when the Pacific was nearing her, and about to pass her on the right, instead of hugging the said shore, or putting her helm to larboard, as she was bound to do, or instead of keeping on her course, she omitted to do either, but put her helm to the starboard, and thereby throwing her bow out from the shore, across the track of the steamer, and by reason whereof the collision occurred; that the orders 'to starboard' were distinctly heard given on board of the brig, and that, in obedience thereto, she bore out from the shore across the track of the steamboat, until just as the bow of the brig was about to strike the steamer, when the order was given 'to port her helm and bear away,' which was too late to avoid the collision."

After thus succinctly narrating the circumstances attending, and the immediate cause producing the collision (which, as the libel was prepared and filed within four days after the events described, and when the facts were then fresh in the memory of the captain of the steamer and his crew, may be fairly considered as their view of the facts at the time), the libel proceeds to confirm this view of the transaction, by the recital of the admission of the captain of the brig, that his vessel was in fact starboarded, as thus represented; and that the collision was consequently occasioned by the carelessness and mismanagement of the captain and crew of the Fashion, in not putting her helm to the larboard, or otherwise continuing her course up the river on the Canada side of the channel.

The respondents deny that the collision was occasioned by the fault of the brig; but directly charge the same to the carelessness and mismanagement of the steamer, averring that it was occasioned by the steamer's attempting to cross the bows of the said brig, when she should have continued her course and gone to the starboard. They further deny, that the brig was pursuing a course upward near the Canada shore; and aver, that the brig, being on a voyage from the port of Buffalo to Chicago, entered the mouth of the river Detroit, from Lake Erie, about 8½ o'clock in the evening of the day when the

collision occurred; that having by the compass brought the light-house to bear from their vessel north by east, they pursued a course up the river west of mid-channel, direct for the Bois Blanc light-house; that they continued such course without material variation; that on entering the mouth of the river, all their crew, ten in number, were summoned upon deck, and stationed at the braces and other suitable places, so as easily to manage the vessel in case of emergency; that she was staunch, strong, well manned and equipped; that she had a signal lamp burning and suspended over the pawl bits, visible to those approaching; that in addition thereto, a man with a large globe lamp was stationed forward of the railing; that when she was two and a half miles up the river, and a quarter of a mile from the light-house, and about half a mile from the Canada shore, her master, who was on the look out, discerned the light of the Pacific coming down the river about half a mile off; that both the lights of the steamer were then visible, and continued so, until she approached to within forty or fifty rods of the brig, when the larboard light disappeared and continued so until within twenty rods; that at this time she was from two to three points to the starboard of the said brig's bow, and was then pursuing a course which would have carried her some fifteen rods to the starboard, and prevented the collision; that there was an abundance of room then between the brig and the Canada shore, for the steamer to pass with entire freedom and safety, the river being about two miles wide in that locality; that the said steamer here suddenly changed her course, and her larboard light again appeared; that the Fashion was then sailing up the river at the rate of a mile and a half an hour, and on the same course with which she had entered, and that her course was not altered until a collision with the Pacific appeared inevitable, at which time her helm was ordered a-port to ease off the blow of the steamer; that within a minute after the re-appearance of the larboard light of the Pacific, she ran across the course of the brig, striking her larboard bow, carrying away her jib-boom, bowsprit, and breaking through her larboard bow; that the speed of the said steamer was, at the time, unchecked. The respondents, therefore, fully deny that the collision complained of, could have been avoided by the brig Fashion, but affirm that it was caused by the sudden and improper change made in the course of the steamer. They deny further, putting the helm of the brig to the starboard, and aver that she only changed her course at the time, in the direction and to the extent and for the purpose previously stated; and further affirm that no order to starboard was given by the master or any one on board said brig, and that no collision would have occurred, had the Pacific kept her course to the Canada shore, or stopped her engine when the danger first became apparent.

The issue of fact, thus presented by these allegations of the respective parties, comprehends, therefore, the affirmation of the libelants that the collision was caused by the unskillful starboarding of the Fashion, when the vessels approached each other; and the denial of the same by the respondents. But assuming the fact to be according to the statement of the libel, and that such an order was given and obeyed by the brig, it by no means exonerates the steamer from fault, and attaches responsibility to the respondents, unless the alleged consequence of such order was solely attributable to such alleged false movement of the brig. The libelants must show that their vessel performed the duty which devolved upon her under the existing circumstances, in adopting all precautionary measures to avoid the danger to which she was exposed. They are not only called upon to establish fault in the respondents, but to prove ordinary care and diligence on their own part. At the moment a collision is apprehended to be inevitable, an injudicious order, given in the excitement and alarm of the moment, is not to be considered as the only cause, even if deemed a fault, should the antecedent negligence and conduct of the one party have placed the other in a situation where there was no time for judicious action. Bulloch v. The Lamar [Case No. 2,129]; [The Genesee Chief v. Fitzhugh] 12 How. [53 U. S.] 461.

Hence the inquiry of the court embraces the consideration of other facts than those composing the issue specified in the libel and answer. The pleadings admitting a collision, the principal inquiry is, whether it was the result of inevitable accident, beyond the control of human care and skill, or, if not, which vessel was in fault; or, were both in such fault as would call for an equitable apportionment of the damages? It was clearly not an event caused by a sudden storm, or, any such vis major as caused the vessels to be driven against each other, and which human foresight could not have prevented. Yet, if there can be no fault found by the testimony on either side, it will nevertheless be considered as an inevitable accident. The steamer was on her usual evening trip to Cleveland, Ohio, and the brig on her voyage to Chicago, had entered the mouth of the Detroit river, in the vicinage of which and within the range of a mile of the light-house, a fleet of fifty or sixty sail vessels, bound upward, were detained by unfavorable weather. In the language of Captain Shepherd, of the Hope, "The vessels were so thick in the channel, and the night so dark, that it was a difficult matter for a steamer to steer safely through them, and required the greatest precaution."

The testimony, which is principally applicable to the other points involved, is not only voluminous, but greatly contradictory. This is necessarily incidental to all cases of this description. The witnesses, usually the crews of the colliding vessels, are not at all times the most reliable; and, viewing the leading incidents from

different and ever varying positions, a correspondence in their testimony cannot always be expected. With much care and attention, I have laboriously examined and studied the facts in the case, and will not undertake to reconcile the marked discrepancy in the evidence. Certain prominent facts are free from all doubt, and on them mainly will the decision of this court depend. Other facts are left in uncertainty, by the witnesses on the one side contradicting each other on material points, widely differing in matters of judgment, as to time, place, distance, and the character of the night; and all of them, almost with one accord, positively affirming the leading fact in the controversy, which is flatly, and as positively denied by all the witnesses on the other side.

Before we proceed, however, to an examination of this testimony, it would be well to notice four very material facts, placed on the record of the case by the libel. Allegations in pleading, are admissions by the pleader, and need no proof, unless denied and put in issue; and as against the pleader, will always be taken as matter conceded. These facts are: 1. The night of the collision was very dark, and so dark as to be impossible to distinguish objects at more than twice the distance of the Pacific. 2. The speed of the Pacific was slackened to five miles an hour, in order to pass a vessel about five or six hundred feet above the brig Fashion. 3. Captain Goodsell, of the steamer, first discovered the brig Fashion approaching the Pacific dead ahead and at the time about 300 feet off. 4. That as soon as he discovered the Fashion, thus approaching his vessel and at this distance, 300 feet, he first ordered his helm "hard a-port," and kept her so, until she lapped her bow upon the brig about twenty or thirty feet; and then perceiving that the Fashion was about to strike the steamer, he ordered his helm "hard a-starboard," in order to throw his stern off, which was done, and then the collision occurred.

I. The first proposition presented by the pleadings and the proofs is, was the collision the result of the fault, or the unskillful conduct of the officers and crew of the Fashion? It is argued on the part of the libelants, that the Fashion, in her onward course up the river, closely hugged the Canada side of the channel; that she was on this course when first seen from the Pacific; that she continued on this course until nearly opposite to, although somewhat below, a house on the Canada shore designated as the Elliot House, and stated by Mr. Elliot to be "about sixty feet below the light-house"; that the Pacific having a minute before slackened her speed, to avoid a collision with the vessels lying in front of the light-house, was slowly proceeding onward in mid-channel, when the Fashion, suddenly changing her course for the American side, recklessly crossed the track of the steamer, and by unskillfully putting her helm to the starboard, rendered a collision unavoidable. Such a state of facts, if sustained by proof of every precautionary measure taken by the steamer to pass in safety, would certainly fully exonerate the steamer, and render the respondents liable to the amount of the damage incurred. Is such a view of the case maintained by the preponderance of the evidence? I think not. While no two of the crew of the Pacific agree as to the relative position of the Fashion to the Hope and to the Canada side; and Smith Holt, the wheelsman, locates the Hope "in mid-channel, tailing towards Canada"; while Noble, the clerk, says, "She seemed to be coming up the eastern shore, and did not alter her course until a minute before the collision"; while Elliot swears "that the point of collision was further off in the stream and near the middle of the channel"; while Goodsell states that he could not doubt as to the position of the vessel, and that her course was up the river on the Canada side, and about 250 feet from the shore; and in cross-examination, invalidating the strength of this testimony, by swearing that the collision occurred half a mile below the island, and consequently locating the Hope at a greater distance from the Canada side, and the light-house, than the same is fixed by Shepherd and Dumont; while such glaring discrepancy weakens the position of the libelants in this respect, the captain, the two mates, the helmsman and seamen, numbering nine in all, and constituting the entire crew of the Fashion, clearly, unitedly and emphatically testify to her course from opposite Bar Point upward, west of mid-channel in a specified direct bearing for the light-house. And in this they are mainly supported by Wolf of the Walbridge, and Marshal Capron of the Blossom, the one following and the latter preceding the Fashion in the same course, and passing unobstructed up the stream to the light-house point, between the Hope and the so-called American side shortly before the collision, the crash of which was heard distinctly on her decks.

If, then, taking the Canada side of the channel and continuing in the same until the moment of collision, and putting the helm at that crisis to the starboard, thereby suddenly turning her bow to the left and across the river, is the fault of the Fashion, I cannot, from all the consideration I have given the evidence, so find that fact. The libelants' witnesses by no means agree with each other as to hearing the order "to starboard," or from what quarter it proceeded; and those of them who testify to such a fact, are positively contradicted by the captain and the entire crew of the Fashion, who must have heard such an order had the same been given, and must have been conversant of the fact had such an order been obeyed by the vessel. They could not be mistaken; while it is probable that those on board the steamer were so, hearing such a shout from the Walbridge, and from the appearance of the Fashion in "easing off her main sheet." If the fact was so, and such an order was given and obeyed, the captain, the mates, the helmsman, and the seamen of the Fashion have knowingly and corruptly sworn to a falsehood, material in this controversy, and which would require of

this court, so believing the fact, to direct their recognizance to respond to a criminal accusation. Not so in regard to Goodsell, Fish, Dumont, Noble, and the wheelsman, Holt. There is a mental reservation, or a cautious modification in their testimony, which, however morally inexcusable if the fact was otherwise, would be protection of them on an indictment for perjury. Thinking such an order was given on board the Fashion, and believing the brig then swinging to the left, is not an oath contradictory to the fact, that no such order was given, and that no starboarding nautically considered ever occurred.

Captain Goodsell says, in his testimony in chief: "I heard them on board the brig sing out 'Starboard,' and then 'Hard starboard,' and saw the Fashion swing towards our vessel;" and in cross-examination, he says, "I think she put her helm to starboard, when we put our helm to port." All this may be consistent with the fact that the Fashion was not put to the starboard. Fish did not hear the order to starboard, but says, "The Fashion seemed to be swinging towards us, after Goodsell gave the order 'to port,' and then it was too late for either vessel to have avoided a collision"; corresponding with the statement of Kennedy Andrews "that the Fashion, at the time, eased her main sheets," which would appear to those on the steamer, as if she was starboarding. Dumont says "that he heard the order 'to starboard,' but the Fashion was so close, that he couldn't say whether she swung or not." Noble says, "the Fashion seemed to be coming up on the Canada side; heard the order 'Hard a-port' on the steamer, and observed an alteration in the course of the Fashion towards us, and immediately the collision occurred." And Holt says, "I think the Fashion luffed up just before the collision, and changed her course, heard the order 'to starboard,' but can't say the sound came from the Fashion." All of which testimony amounts not to the weight of a spider's thread, when contrasted with the unequivocal denial of the fact by nine witnesses, who best knew of the circumstance, if it occurred, and still more so when taken in connection with the testimony of Wolf, that he, immediately before the collision, gave such an order on board of the Walbridge, whose position was directly astern of the Fashion. And were I to accept the equivocal affirmation of the libelant's witnesses on this point, thus explained by the order given on the Walbridge, and reject the positive and direct denial of the respondent's witnesses, I should give a preponderance to doubt over certainty, and establish a new rule of evidence for the discovery of truth. I am obliged, therefore, to say, that my examination of the evidence, in regard to this very serious conflict between the witnesses, has led me irresistibly to the conclusion, that no such order was given on board the Fashion, and therein she was not in fault.

Heretofore I have considered the course and conduct of the Fashion, principally with the light shed thereon by the crew of the steamer. Their testimony certainly does not make out the case, as exhibited in the libel. Nor is much strength superadded thereto by Simonea and Guiteau; the latter of whom, by his conduct on the stand, did not commend his oath to the favorable regard of the court. We will presently consider the weight to which their evidence is entitled, with reference to the object for which it was offered.

During the recess of the day, when the libelants closed their testimony in chief, my mind was impressed with the conviction that they had not presented a case so free from doubt, as to warrant a decree in their favor. With that conviction, I was disposed to stop the further investigation; but, conceiving that the examination of the crew of the Fashion might lead either to an amicable adjustment by the parties, or to a decree on the basis that the real facts of the case were inscrutable, I permitted the hearing to proceed. But the testimony of the respondents gives an entirely different view of the transaction, and, if worthy of credence, completely exonerates them from all liability, leaving only for the determination of the court, the credibility of the witnesses who testify to the facts. It establishes that the brig Fashion was on the right course, as confirmed by Captain Willoughby, bearing from off Bar Point north by east, and heading for the light-house; that that course was kept without variation, except in passing the Walbridge, and the shoal which made out from the head of the Island; that she was properly manned; that she had a proper look-out; that she used extraordinary precautions to escape a collision with other vessels; that she added to the usual lights required by the law, the captain placing a man with a globe lamp outside of the railing; that, with the wind lightly freshening from the west, she crept up the stream at less than two miles an hour; that every man of her crew was at his post; and that she made no injudicious movement whatever, continuing on her course until colliding with the Pacific. Such is the substance of the testimony of Captain McKee, corroborated in every important particular by Andrews, Salmon, Rogers, Flack, Mason, Sheely, and others. How has it been impeached? I must confess I place but little reliance upon the mathematical argument, or that which has been adduced to show the inconsistency of this testimony with natural truth. Such argument is based upon a misapprehension of the testimony as to the position of the other vessels; for displace the Hope a few rods further west or south, or farther from the light-house (localities about which all the witnesses for libelants greatly differ, and no two agree), locate the Deer further up or down, and change but a few feet the witness Elliot, and the whole argument as to the place of collision falls to the ground. It requires but a little variation in the lines drawn upon the chart to demonstrate this. Besides, if the witnesses locating these objects (no one of which can be safely considered as a fixed object but Elliot's house and the Island light)

had satisfactorily agreed in relation to the same, which is not the case, it would only amount to the testimony of three witnesses hypothetically contradicting that of nine; for Capron and Wolf, in this respect, sustain the crew of the Fashion, who place the point of collision below the Hope, and some thirty rods off, and the course of the Fashion at the time westward, or more towards the American side of the channel.

Neither can I accede to the opinion that, because Chart B, drawn by Mr. Campeau, represents a straight line from the point of starting, near Bar Point, to the light-house, and these witnesses testified to its accuracy, as representing the mouth of the river, and the course and position of the vessels in its vicinage, that, therefore, they swore to such a straight line as the course of the Fashion, which would consequently be inconsistent with keeping the light constantly in view over their larboard bow, when steering by the compass north by east. Their testimony was in substance, "that having fixed the compass, and taken the bearing north by east in starting up the river, their course was made direct for the light-house, sailing or heading direct for it, until coming near the shoals, when they sheered off a little to avoid them, resuming again their course by the light." In the language of the captain, "When the light bore north by east, we kept away, steering directly for the light." In pursuing this course, it is true, the Fashion would be continually nearing the eastern side of the channel as she advanced up the stream, because, as Captain Willoughby testified, "The Canada shore protrudes more westwardly, and the channel contracts as we approach the mouth of the river, and as the point of starting was more or less west of the light-house." And here I must say that a careful examination of the testimony has corrected the mistake under which I labored for a short time during the able argument of the counsel of the libelants; that, in this respect, the testimony of McKee and his crew was as to an impossibility and, therefore, so to be considered. But, on review, I find instead of "keeping the light bearing a little over the larboard bow," the testimony is, that they kept the position of the Fashion directly ahead for the light, as is fully and intelligently explained by Andrews, the first mate, saying: "We kept away till we opened Bois Blanc light, a little on our larboard bow, and then, that is, after this, steered by the light and compass, the man at the wheel going by the light." And Flack, the helmsman, swearing "that he kept his eye on the light, and kept it as right ahead as he could see."

I was very careful in noting the testimony as given by McKee, Andrews, Flack and their companions, as to the course of the vessel, reading over repeatedly to them what I had written ere they closed their testimony, that I might not afterwards be misled; and I am satisfied their testimony is not obnoxious to the objection which has just been considered. But, it is furthermore urged, that McKee should at least be discredited, because, as is charged in the libel, he stated on the following day, when he arrived in Detroit, "that his vessel was starboarded," and that such a statement differs from the testimony he has delivered in court. That he told a different story on the occasion alluded to, is not so clearly established. The conversation he had with Mr. Thompson and others was a hurried one, just as he had landed, and when on his way to telegraph the owners; and it was an easy matter for them, under circumstances, to have misunderstood the purport of his language, or, for him unintentionally to have let fall a word that did not technically convey his meaning. Thompson, Montgomery, Fish and McDonald decline testifying to his using the term starboard, while only Murray and Goodsell, of the eight that were present, swear positively that such was his language. Goodsell had preceded him to Detroit, and given his version of the transaction, and yet the same remarkable want of coincidence between this witness and the first mate, Fish, which distinguished their testimony as to the relative position of the vessels, and their conduct at the period of collision, characterizes their testimony as to the strong point of this conversation. Goodsell swears positively that he said "he gave the order and starboarded his vessel," while Fish "will not be so positive about the word starboard being uttered," but, that he said "he thought that the Pacific would go between him and the Canada shore, and that he headed a little for the American shore, and gave her a wide berth on the Canada side"; which is not materially variant from McKee's testimony on the stand. The witness Thompson, however, places this matter of impeachment, I have no doubt, in its true light, as it occurred; and giving to his version its proper weight, it would not justify the entire rejection of McKee's testimony, on the ground taken by the libelants. With the change of one word, his narration of the transaction to Mr. Thompson, is but an epitome of his testimony in court, as I have recorded the same. He said to Thompson, "he saw the Pacific descending the river, he watched her to see her course, she seemed to change some as she approached, shutting out and opening, her lights"; from all of which he, McKee, concluded she was going to take the Canada side, and he, willing to give her a wide berth, "put to the American shore." But, that he told another story, is successfully rebutted by the protest, which, if not competent evidence as to any fact it contains, is at least evidence, that he and his whole crew, the morning after this conversation on the dock, entertained the same opinions, and narrated succinctly the same facts, to which they have testified in court; and so far raises the probability that the witnesses thus impeaching the memory or integrity of McKee, were clearly mistaken as to his meaning, if not as to his language. Where a witness is

sought to be impeached in this manner, by a number of others, it would be more satisfactory if those others could agree among themselves, or, that the memory of each had caught and retained at least the convicting word of the reported conversation. Moreover, the rejection of his testimony would in this case amount to nothing; it would not weaken the preponderance, as the same facts are testified to by Andrews, Sheely, Flack and the others; and if McKee has sworn falsely, they all have sworn falsely; and not only so, but their moral turpitude is magnified beyond the one offence of perjury, to a corrupt combination deliberately to swear, by whole cloth manufacture, to a tissue of falsehoods, to the injury of the libelants—a supposition too monstrous for judicial confidence. McKee might have a motive, in self protection, as between him and the others; but it is hard to imagine how his crew could be brought to such a stage of crime, without the appliance of the usual incentives to human action. The intelligent, demonstrative and conclusive evidence of Kennedy Andrews, was in all particulars corroborative of McKee; and Flack, the helmsman, was as direct as to the same facts as either; and my confidence in both of them, as witnesses, has not been impaired. The great point of controversy, in the impeachment of Captain McKee, is as to the course he ran, and the necessity he was under to order his helm a-starboard. If he was on the Canada shore, such necessity may be conceived possible; but if, on the other hand, he was on the American side of mid-channel, such an order would only tend to put his vessel unnecessarily more in that direction. Now, that McKee is right, is confirmed by a portion of the testimony of the libelants. Let a line be drawn through the river, from the starting place off Bar Point upwards, equidistant from both sides of the channel. Call the same mid-channel. Now, according to the testimony of Noble and Smith Holt, the wheelsman, the Hope lay in mid-channel, tailing, or with her stern towards the Canada side; Noble saying, "the Hope lay in mid-channel, and as we rounded her, we left her on our starboard side." The bow of the Hope, then, would of course be pointed to the American side. But Shepherd says, "that the Pacific, in passing, rounded the Hope." In doing so, her stern would of course tail or turn several points to the Canada shore, and consequently her bowsprit across mid-channel, would directly point down the river westward, towards the American shore. But Fish swears that the collision took place thirty-five or forty rods below the Hope; and Goodsell, that the Fashion was dead ahead, and consequently that distance in a line, drawn from and along her bow westward, places beyond controversy, according to the testimony of these four witnesses of the libelants, the point of collision on the American side of the channel; and therefore sustains McKee in the testimony he has given.

Thus disposing of this branch of the case, we are called upon to decide a two-fold objection which arises from the testimony of the respondents, viz.: 1. That the Fashion being on her larboard tack, as is contended, she did not display the signal light as required by the 5th section of the act of congress of 1849 [9 Stat. 382]. 2. That the ignorance of Captain McKee, as to the new regulations in regard to navigation by steamers, exhibits such a want of seamanship, as to prove that the Fashion was not well manned.

Apart from the consideration that the display of an erroneous light, is not made, either by the libel or the evidence, the cause of the collision, I am by no means satisfied that this objection is well taken under the provision of the statute. The language of the 5th section of the act of 1849, is as follows: "During the night, vessels on the starboard tack shall show a red light; vessels on the larboard tack, a green light; and vessels going off large, or before the wind, or at anchor, a white light." It would seem from the use of the conjunction "or," in the last branch of the sentence, that legislation designed to contradistinguish "going off large" from sailing "before the wind," and to direct the display of the white light under three contingencies. If so, the phrase, "before the wind," cannot be considered as definatory of "going off large." What then was meant by the latter contingency? Doubtful words in a statute, if not scientific or technical, are to be interpreted according to their familiar acceptation. But the words here are all technical, and have a nautical meaning in the science of navigation, with which, in the interpretation of a statute, it is presumed courts of justice are acquainted. No experts need be called on to interpret the law. Many terms and phrases are used in our law books, and reports in admiralty, that are not in common use out of that jurisdiction. Booms, and pawl bits, and cat heads, and braces, and aft, and abaft, and larboard, and starboard occupy a prominence in admiralty, and are all, in legal supposition, at least, known to the court. So in regard to the phrase under consideration; its definition is the interpretation of the statute. Congress designed to provide three signal lights, for five contingencies, and "going off large," and being "before the wind," and "at anchor" in the river, of a dark night, presenting a similar peril to approaching vessels ahead, have assigned them the same signal light as a warning. "Going off large" is having the wind free on either tack, properly termed a vessel "off large," because it is in her power to take a course to either side—starboard or larboard—proceed straight forward on her course, or return back to her anchorage, or to the point from which she started. In other language, she is free to the wind. She is not bound, but like a discharged debtor under the old insolvent system, who being at large, is at liberty to leave, as a free man, his prison bounds, and go whithersoever he

will. Was such the condition of the Fashion? McKee testifies, "that the wind on entering the river was W. S. W.; that at first it was very light, and scarcely sufficient to take them up the river, and that he had everything arranged to let go her anchor. But it soon blew a little stronger, and kept us moving slowly on our course." And Fish and Dumont both say, that when they first discovered her, "they could not tell whether she was at anchor or not." And Andrews says, "that they had aboard her larboard tacks"; and he and his companions, all testify, that the course of the brig was direct, without any change of helm or sails, and free to the breeze. Moreover, McKee swears, "that he had the regular signal light burning on the 'pawl bit,'" which, being the white light, and taken in connection with the evidence already quoted, shows that she was "going off large" with the wind on her larboard. Being, then, a vessel "off large," on a larboard tack, or, to use the phrase of Judge Nelson, in 10 How., "having on board her larboard tacks," she was not in fault in displaying, in such a contingency, her white light from the pawl bit.

2. Neither can the second objection, as to the brig not being well manned, be considered as of any force, unless the catastrophe can be fairly attributed to the ignorance of Captain McKee of the rules and regulations adopted by the board of inspectors, under the 29th section of the act of 1852 [10 Stat. 72]. The act itself, in its various provisions, is only applicable to vessels propelled in whole or in part by steam; and no special provision is made for promulging these "rules and regulations" to be observed by steamers, beyond "furnishing to each steamer two printed copies, to be kept in conspicuous places." The law did not go into operation, except as to the appointment and qualification of inspectors, and the licensing of pilots and engineers, until the 15th of January last; and there being no proof of these regulations being promulged until after the opening of spring navigation, the notice of the existence of such new rules, and, therefore, the knowledge of the consequent change as to lights, was limited to steam vessels. Excepting the application of the old maxim, that ignorance of the law is no excuse, it is not easily apprehended, how the ignorance of the captain of the brig as to these regulations, can be seriously deemed bad seamanship. Besides, he made no movement whatever founded upon his belief that the old regulations were still in force. He, his two mates, and his helmsman, swear, that they fixed their course and took their heading near two miles below, and kept it, without deviation, until the collision.

Such, then, being the preponderance of the testimony, I am constrained to determine, that I find no fault in the Fashion; because I find no material discrepancy in the evidence sustaining the defence—but much difference, both as to fact and opinion, between the witnesses called to sustain the libel. Neither am I able to say that McKee and his crew were mistaken or deceived as to the course and movements of the brig; but, on the other hand, if that to which they have testified be untrue, in the main or in any important particular, I must declare they are guilty of willful and corrupt perjury, and should not be permitted to escape with impunity.

Our next inquiry is, whether or not the collision occurred in consequence of, or can properly be attributable to the negligence or misconduct of the steamer Pacific. And this inquiry is necessary, in order to determine the question of inevitable accident. The rule is well settled in cases of this description, that the libelants must not only show that the collision was occasioned by the fault of the opposite party, but also, that ordinary care and diligence were used on their own part to avoid it. A failure in either respect will dismiss the libel. The law imposes the burden of proof on them, with one single exception; and that is where the libelants establish misconduct or negligence on the part of the respondent's vessel, the burden of proof is partially shifted, requiring them to show that such fault did not cause the collision. As is observed by Mr. Justice Nelson, in Newton v. Stebbins, 10 How. [51 U. S.] 605: "If every proper precautionary measure was carefully and timely taken by the steamer to pass the sloop Hamlet in safety, and the accident happened solely in consequence of the mismanagement and unskillfulness of the officer in charge of that vessel; then the damage can only be attributed to his own inattention and want of skill, and not to the steamer." Otherwise, if the steamer was in fault. Vide, as to similar ruling, Clapp v. Young [Case No. 2,786], and [Waring v. Clarke] 5 How. [46 U. S.] 465. In this last case, Mr. Justice Wayne, by whom the opinion of the supreme court was delivered, emphatically observes that: "In cases of collision, where the one vessel is clearly proved to have neglected a duty imposed by law, she will be held responsible for all losses, unless it also appears that the collision was not caused by such neglect." Another rule has been likewise well settled in admiralty, both in England and in this country, and that is, "that a vessel having the wind free is obliged to get out of the way of a vessel close-hauled, and the burthen of proof is on the former to show the exercise of all care and skill to prevent a collision. Vide 3 Hagg. Adm. 214; 2 Dod. 33, 86; 1 Conk. Adm. Prac. 305; St. John v. Paine, 10 How. [51 U. S.] 581. Since the introduction and application of steam in the propulsion of vessels, this rule has been so construed and enlarged as to require from steamers the use of all their power, under all circumstances, to keep clear of sailing vessels, and for this reason, that their impetus being controlled by human skill, they are considered as vessels navigating with a fair wind, or (in the language of Judge Nelson, in [St. John v. Paine] 10 How. [51 U. S.] 581), "going off large," and, therefore, bound to give way to sailing vessels beating to the windward on ei-

ther tack. Vide the cases of The Perth, 3 Hagg. Adm. 414; The Shannon, 2 Hagg. Adm. 173; The James Watt, 2 W. Rob. Adm. 277; The Birkenhead, 3 W. Rob. Adm. 82. These four cases, taken from recent English admiralty reports, in their application, strongly illustrate the rule as to steamers. In the first, the steamer Perth ran foul of the libelant's brig, while she was running at the rate of twelve miles an hour, in a dense fog, and in a track frequented by coasters. The brig was not discovered until the steamer was close upon her. The order to port helm was immediately given, but no order to stop the engines. The only question with the court was, "had the steamer done all in her power to avoid the collision?" and it was held that, considering the fog, and that the track was frequented by coasters, she ought to have reduced her speed at least one-half, or to six miles an hour; and that such precaution was due to the safety of other vessels; the Trinity masters declaring that, from their own experience, a steamer could be stopped in a little more than her own length. Here, then, the fault was that of the steamer, in not slackening her speed one-half in passing through the fog, and also in neglecting to stop her engine on first discovering the brig. In the second case, which is that of the Shannon, and was also the case of a steamer and a sail vessel, the court held, that although the Shannon made out a clear case of a compliance on her part with the rules of navigation, and proved that the sail vessel was navigating in violation of the same; yet, as the former received her impetus from steam, and discovered the latter ascending the river five miles off, she should have been then under her master's control, and was therefore bound to give way, and in not doing so, was at fault, and decreed to suffer the loss which had accrued; and this on the principle, that the steamer did not use all the necessary precaution. The third case is that of the steamer James Watt, which collided with the schooner Perseverance, while the latter was ascending and the former descending the river on a dark night. The master of the Watt, being in doubt what course the schooner would take, put her helm to port when the collision occurred. It was held, that the Watt was bound, under the circumstances (stress being laid on the doubt of the captain as to what course the schooner was in), instead of porting his helm, to have slackened his speed, until the course and situation of the other vessel were discoverable, and then to have acted according to circumstances. In the other case, that of The Birkenhead, it was held, that although the watch on board were justified in an erroneous belief, occasioned by the darkness of the night, as to the character and position of the brig with which the Birkenhead collided; yet, that the proper precaution was not taken on board of the steamer, by reversing her engine in time, and keeping it so until the fact was ascertained, whether or not the brig could be passed on either side. These cases, and others of a kindred character in the English admiralty, have been specially cited and recognized as law, and their principles adopted by the supreme court of the United States. [St. John v. Paine] 10 How. [51 U. S.] 584. The general rule is thereby established, that in all cases of collision between a sail vessel and a steamer, the latter will not be exonerated from liability, unless on proof that every precautionary measure was adopted by her to avoid a collision. And timely slackening the speed, is deemed a necessary precaution. A mere conformity to the rules of navigation will not excuse; neither can she under such circumstances, attach responsibility to the sail vessel, on showing her fault, in non-conformity to such rules, unless such fault and non-conformity, and not the steamer's want of the utmost care, was the sole cause of the accident. Steamers invoke a power in navigation, highly advantageous to trade and commerce, but at the same time perilous to other vessels, unless managed with the greatest care, and the most constant vigilance. Greater than the winds, and not so capricious, this power is ever under the guidance of experience and skill; and in their greatest speed steamers can be almost instantly stopped, by stopping their engines, or their course, "though they be so great, easily turned about, with a very small helm, whithersoever the governor listeth." The law, therefore, in tender regard to human life and property, will not sanction the use of this power, however convenient to the public, to the destruction of the rights and interests of others. In St. John v. Paine, 10 How. [51 U. S.] 557, Judge Nelson, in delivering the opinion of the supreme court, and approvingly citing The Perth and The Shannon, declares: "The obligation of steamers to avoid a collision, extends further than sail vessels, because they possess a power not belonging to the latter, even with a fair wind, the captain having the steamer ever under his command, both by altering the helm, and by stopping the engines." "Greater caution and vigilance, therefore, will be exacted of them, and, as a general rule, when meeting a sail vessel, whether close-hauled or with a free wind, the steamer must adopt such precautions as will avoid collision." The rule is imperative. The steamer must do all in her power. Any omission of a duty, under the exigency, will make her owners liable for the consequences. In Newton v. Stebbins, 10 How. [51 U. S.] 606, the same judge, announcing the opinion of the court, again declares: "The steamer was greatly to blame in not having slackened her speed (she then running from eight to ten miles an hour), as she approached the fleet of river craft." "It is manifest to common sense," says the supreme court, "that this rate of speed, under such circumstances, exposed the other vessels to unreasonable and unnecessary peril, and we adopt the remark of the court in the case of The Rose, 2 W. Rob. Adm. 3: 'That it may be a matter of convenience that steamers should proceed with great rapidity, but they will not be justified in such rapidity, to the injury of others.'" And in the case of The Genesee Chief, 12 How. [53 U. S.] 563, Chief Justice Taney ob-

serves: "A steamer having the command of her own course and her own speed, it is her duty to pass an approaching vessel at such distance, as to avoid all danger where she has room; and if the water is narrow, her speed should be so checked, as to accomplish the same purpose." The supreme court of the United States, then, have gone to the fullest extent of the English authorities, and in adopting the language of the court in The Rose, have also adopted the principle which governed that case, viz: that a rate of speed in steamers, which under the circumstances, necessarily endangers the property of others, is unjustifiable, and makes the owners responsible for the consequences.

In the case of The Rose, the night was dark and hazy, she had her lights burning, the sail vessel had none, and no vessel could be discerned at a greater distance than a quarter of a mile; and at the time of the collision the steamer was running at the rate of ten or eleven miles an hour; under such circumstances, and based upon the speed of the Rose, was the remark made by the court, as approvingly cited in Newton v. Stebbins. Time, place and circumstances, therefore, are all to be carefully considered and weighed, in the formation of a judgment as to what would constitute a legitimate speed in case of a collision. It would vary under different vicissitudes. Full speed would not be improper in an open lake, with a wide berth in daylight, or in navigating a river clear to observation and free from obstruction; while, on the other hand the greatest caution and the utmost care are essentially requisite at night, on a narrow channel, frequented by other vessels, and especially where a number are known to be anchored, or detained by stress of weather. Under such circumstances, a steamer is obligated by the law, either to stop her engine, in order to ascertain her course, or, slowly to feel her way, under no greater power of steam than that which is barely necessary for steerage purposes; and any greater rate, even where the peril is imminent, and has been foreseen, would be unjustifiable. Moreover, in the last case cited, that of The Genesee Chief, the supreme court has established a rule, that must govern in all such cases. It presents a simple alternative to steamers in meeting sail vessels, by declaring, that they must "pass approaching vessels at a safe distance if possible; or, if not possible, they must stop their further progress until the difficulty be obviated."

Such a rule, then, being authoritatively given by our highest judicial tribunal, our duty is to apply it to the facts of this case; and in doing so, a two-fold inquiry is presented, which we will briefly discuss: 1st. Was the speed of the Pacific, at the time and under the circumstances of the collision, such as to amount to a fault occasioning the accident? 2d. Was there space for her to have passed on the Canada or American side of the channel, and thereby have avoided the Fashion?

Were it not for the great discrepancy in the testimony of the officers and crew of the Pacific, as to the question of speed, the court would have very little difficulty in fixing the fact. For their testimony on that point, especially that of the engineer Hickey, is more reliable than the testimony of the other witnesses, who were not on board of the steamer. With all of them, except the engineer, it would be but a matter of opinion, and with him, it is knowledge derived from experience and observation of his machinery and the revolutions of his wheels. The libel fixes the speed at five miles an hour, and no doubt the proctor in drawing his bill, obtained this fact from that source; then fresh in the recollection of the party. The testimony adduced on the part of the libelants, varies from four to seven miles; while that of the respondents runs up from seven to fifteen miles an hour Shepherd stood on the brig Hope, and noticed the vessels passing, and thinks the speed of the steamer between six and seven miles; but I am of opinion that the satisfactory preponderance is with the officers of the steamer, who should be best conversant of the fact, and better qualified to form a right judgment, while one of them could know the fact, if he thought proper to have directed his attention at the time to the subject. There can be no doubt, that until she was abreast of the Virago, her speed was as usual, about fifteen miles an hour; and that then, for the first time, observing the peril to which she was exposed, she checked her speed, and, in the intervening space between that vessel and the Hope (they being a quarter of a mile apart), the steamer was carefully worked by hand; and "hooked on" again as she rounded the Hope, and not a minute before the accident. Her speed, therefore, between the Virago and the point of collision, becomes the important question. Anterior to this, there could be no fault in her full speed, as it endangered not the property of others; and she was not obligated to check or change until the necessity was apparent, when, abreast of the Virago, the captain and the mate first discovered their vicinage to the fleet of sail vessels, and observed the brig ascending half a mile off. Our attention, therefore, is limited to the testimony as to her speed in that space. Captain Goodsell swears: "On passing the Virago, we checked our speed, by backing and reversing the engine; and at the time of the collision, the Pacific was passing the land at the rate of four or five miles an hour, the current being there four miles an hour." Gooley, the captain of the Virago, swears: "That he heard the bell ring to stop the engine, when the Pacific passed the Virago." Hickey, the engineer, on whom I most rely, swears: "Between the Virago and the Hope, the steamer was passing the land at the rate of five miles an hour, with a current of four miles. Her speed had been checked a few minutes before the collision took place. The engine was stopped and backed, and I worked her very slow by hand, with no greater motion than a good steerage way, making but seven or eight revolutions of the wheel. Before she was checked, she was running at

the rate of fourteen or fifteen miles an hour. 'Hooked on', just before the crash, and stopped the engine at the same time. Her speed but one mile an hour." Fish, the mate who had the temporary command, swears: "When we got near the Virago, I ordered the engine reversed and backed, almost stopping her headway; and her speed did not exceed four miles an hour from that time till the collision," including the current. Dumont, second mate, swears: "On nearing the Virago, we reversed our engine, and slackened our speed from three to five revolutions, and continued so until the collision. Passing the land at four miles an hour, and about a mile an hour was sufficient steerage way." Considering the official position occupied by these witnesses, the one captain, who ought to know; his two mates, who had every opportunity of knowing; and the engineer, whose especial function was to direct the machinery, so as to attain with safety a certain power as to speed, all of whom had ability and experience to form a correct judgment, and all concurring that the speed did not exceed, including the current, five miles an hour; and the fact is satisfactorily settled, that her impetus at the time did not exceed more than what was necessary for steerage purposes. For if the current was four miles, some motion of the machinery was necessary, to enable the wheelsman to guide the ship, and move her through the perils by which she was surrounded. All agree that the night was dark—no moon or starlight—and objects but dimly discerned at a few rods' distance. Her duty then was to move cautiously, not to return, but to feel her way in her downward progress, and without absolutely anchoring in the stream. She must exercise some power to enable her to avoid a collision. I do not question the integrity of these witnesses, and I confide in their ability to give a reliable estimate as to this very important point. Had the testimony been otherwise, had the speed exceeded that which was merely necessary as steerage power, had her officers neglected the precaution of reversing her engine and stopping her headway, when off the Virago, and when they were first apprised of the peril ahead, the steamer would have been grossly in fault, and under no pretence could claim the protection of this court.

The next question is, whether there was room for her to have passed on either side of the Hope. Here there is great discrepancy in the testimony. While the crew of the Fashion testify positively that there was such an open space on the Canada side, and there is no doubt but what other steamers passed both, shortly before and shortly after the collision, and while the Blossom reached the light-house on the American channel; yet Goodsell and Fish, with whom the responsibility of navigating the steamer rested, testify that the latter channel was blocked up, and that although there was an open space on the Canada side, yet there was danger of running aground. From this discrepancy, as to this point, I am not able to declare the course of the steamer a fault. How much soever we know the fact now, yet, at the time, either passage seemed hazardous to the officers of the steamer. I am of opinion, therefore, that the collision was an inevitable accident, resulting from the darkness of the night, and is not attributable to the fault of either party. Both, from the preponderance of the testimony, did all in their power, all that was called for under the circumstances; both vessels were properly manned and skillfully managed, and both used every precaution that could be used under the circumstances to escape the catastrophe which occurred. Under such circumstances, the settled rule in the United States is the rule of the admiralty in England, and not the rule which prevails among the maritime states of the continent of Europe. That rule has not merely been cited and recognized by the supreme court of the United States, as by Woodbury, J., in Waring v. Clark, but expressly adopted and directly applied. Vide [Smith v. Condry] 1 How. 28, 30; [Waring v. Clark] 5 How. [46 U. S.] 503; and [Stairback v. Rae] 14 How. [55 U. S.] 538. In the last case, that of Stairback v. Rae, after citing the English and the two preceding American cases, and the continental rule, Judge Nelson, who delivered the unanimous opinion of the supreme court, says as follows: "We think it more just and equitable, and more consistent with sound principles, that where the loss happens from a collision which is the result of inevitable accident, without the negligence or fault of either party, that each should bear his own loss. There seems no good reason for charging one of the vessels with a share of a loss resulting from a common calamity beyond that happening to herself, when she is without fault, and therefore, in no just sense, is responsible for it." This reverses the New England decision, and the libel, therefore, must be dismissed, with costs.

[For a subsequent proceeding, see Case No. 17,155.]

Case No. 17,155.

WARD et al. v. The FASHION.

[Newb. 41;[1] 6 McLean, 195.]

District Court, D. Michigan. Oct., 1854.

DECREES IN ADMIRALTY—MATTERS TO BE INCLUDED—COLLATERAL SUBJECTS—COLLISION CASES.

1. A decree in admiralty is the judgment of the court on the subject in controversy, submitted by the pleadings, and must correspond with, and apply to that issue.

2. The opinion of the judge on collateral matters, not involved in the record, is not to be incorporated in the judgment of the court.

3. When a recovery in damages is sought in cases of collision between two vessels, and the proof exhibits faults in both, or no fault in either, and the libel is therefore dismissed, the decree need not set forth the ground assumed by the court, unless the pleadings presented such issue.

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

4. Especially will such course be avoided in framing the decree, if the court is apprised, that the same matter is litigated between the parties in another district.

In admiralty. The opinion of the judge in deciding this case upon the merits, is fully reported [in Case No. 17,154]. After this suit had been commenced in this court, the owners of the brig Fashion filed their libel in the district court of the United States, for the district of Ohio, against the steamboat Pacific. The steamer was seized, bonded, and the Wards as claimants appeared in the Ohio district court, and filed their answer. The court in the decision above referred to, designated this collision as arising from inevitable accident, holding, that from the testimony presented, neither party was to blame. The counsel for libellants [Eber B. Ward and S. Ward] wished to have those facts recited in, and made a part of the decree; in order that this judgment might be pleaded in the suit pending in the United States district court, for the district of Ohio as res adjudicata.

Emmons, Lothrop & Newberry, for libellants.

Fraser, Vandyke & Gray, for respondents.

WILKINS, District Judge. In this case a motion was made, in open court, by the proctors of the brig Fashion, that a decree be entered dismissing the libel with costs, according to the judgment of this court previously pronounced in the case. After the court had pronounced its opinion, directing the libel to be dismissed with costs, and one of the proctors had notified the court of the intention of the libellants to appeal, the court was requested by the senior proctor for the libellants, to direct the clerk to suspend entering a decree, as the form of the same would be amicably agreed upon by the solicitors on both sides. To this, Mr. Gray, the proctor of the respondents assented.

The court are now apprised that such agreement cannot be had, and are asked by the motion to direct the decree to be entered as specified in the motion under consideration. This is resisted by the libellants, on the ground, that inasmuch as the court, in the opinion pronounced, declared, that from the evidence, no fault could be found in the management of the steamer Pacific, and that therefore the collision was the result of inevitable accident, that such conclusion should be incorporated in the decree to be entered of record. Before proceeding to the trial, the court was informed that a suit had been instituted in the district of Ohio by the respondents, who had there libelled the steamer Pacific, which suit was still pending and undetermined. The form of the decree is deemed of importance, as the libellants here, desire as defendants there, to arrest further proceedings on the ground that all the matters in controversy have been adjudicated upon by this court, and determined here.

Such would be their right if such had been the case, in the litigation in this court, and the form of the decree would be of little consequence, if the pleadings exhibited the same. If to a libel the plea of jurisdiction is alone set up in the answer, and on hearing the libel be dismissed, the decree need not state, as the cause of the dismissal, the want of jurisdiction, for that sufficiently appears by the record of the case, the decree having reference to the issue. What is the decree but the judgment of the court, on the subject matter submitted,—the judicial determination of the issue? It must correspond with, and apply to that issue.

So far as the opinion of the judge embraces collateral, or matters not involved in the issue, so far the opinion is but judicial reasoning, and illustration, and cannot and should not be made the basis of, or be incorporated in, the judgment. In the present cause the libel exhibited a case of collision between the brig Fashion and the steamer Pacific, and specified certain allegations upon which a recovery in damages was sought. They were these: 1st. The unskilful navigation of the brig Fashion, in starboarding her helm, when she should have ported; by reason whereof the collision occurred. 2d. The unseamanlike conduct of the officers and crew of the Fashion, in not pursuing her course up the river close to the Canada shore, but suddenly changing that course and crossing the track of the Pacific when it was too late for the latter to avoid a collision.

Thus was gross negligence and fault charged by the libel on the vessel of the respondents. The answer denied both these averments, and alleged that the course of the Fashion was on the American side of the channel, and that she was not starboarded, and did not cross the track of the steamer.

The evidence was not strictly confined to this issue; other matters were embraced in the examination, and in the argument of the counsel. It was strenuously and ably urged upon the court, that if the evidence did not make out fault upon the part of the Fashion, yet there was no fault proved upon the part of the Pacific, and that consequently the damages should be apportioned between the colliding vessels. The court took the whole matter into consideration, and having determined that the preponderance of the testimony was with the respondents, so declared its conviction, and that on the issue presented, the libel must be dismissed, not being sustained. Here the opinion would have rested, and such was the intention of the court, and it is so declared. But the question of the apportionment of damages resting on the circumstances of the collision's being an inevitable accident, the court went further than the pleadings warranted, and having fully considered and analyzed the testimony in regard to that proposition, could not, from the testimony, come to any more satisfactory conclusion, than that stated at the close of the written opinion. The exam-

ination and consideration of the question were due to the able counsel who presented the argument, but were not incorporated in the written opinion as forming the basis of the judgment of the court. The language is emphatic, viz.: "The libellants having failed to establish fault in the Fashion, the libel must of course be dismissed."

Although still of the opinion that the preponderance of the testimony as to the speed of the Pacific, the only point determined by the court, was no more than the necessary steerage power under the circumstances, yet I cannot conscientiously so direct the form of the decree, as to preclude the respondents from recovering in their suit, by a prejudgment in this court, when the defense of casualty is not set up in their answer, and the point was not directly specified in the issue. I more readily adopt this course, as the libellants have notified the court of their intention to appeal, which is attended without cost, where the testimony can be more minutely examined with reference to this point, and where my error of judgment can and will be corrected by the circuit judge, and consequently where no damages but the delay of a few months can accrue to the libellants.

NOTE. This cause was taken by appeal to the circuit court of the United States, but with the suit in the district court of the United States, for the district of Ohio, it was compromised.

WARD (FRANKLIN v.). See Case No. 5,055.

WARD (GILBERT v.). See Case No. 5,415.

WARD (HERBERT v.). See Case No. 6,398.

WARD v. The M. DOUSMAN. See Case No. 17,153.

Case No. 17,156.

WARD v. MISSISSIPPI & M. R. CO.

[Nowhere reported; opinion not now accessible.]

Case No. 17,157.

WARD et al. v. NEW ENGLAND SCREW CO.

[1 Cliff. 565.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1860.

GUARDIAN AND WARD—AUTHORITY TO SELL LAND—SPECIAL LEGISLATIVE AUTHORITY—CONSTRUCTION OF STATUTE—DEEDS—CONDITIONS PRECEDENT AND SUBSEQUENT.

1. Inasmuch as the legislature of a state may confer upon the courts the power of granting licenses for the sale of the estates of minors, and the investment of the proceeds, it may, it seems, also exercise the power directly by special act.

2. Such act is remedial, and cannot be distinguished in principle from a general law upon the same subject.

3. In this case the act of the legislature was not an exercise of the power of eminent domain.

4. A guardian petitioned the legislature for leave to sell a portion of the minors' estate to a town, "to erect a pest-house upon." Leave was granted by special act to sell the land "for the said purpose," and to invest the proceeds for the benefit of the minors; and the act, moreover, provided that the deed should "vest in the purchaser all the right, title, and interest" that the parent of the minors had in the estate. *Held*, that the guardian was authorized by the act of the legislature to sell all the right, title, and interest in the property which the parent of his wards in his lifetime possessed, and to make and execute a sufficient deed for that purpose.

5. Pursuant to that license a conveyance of the land was made to the town treasurer or his successors in office forever, "to erect a pest-house upon," to enjoy "in the manner aforesaid," "discharged from all manner of encumbrances," and in the granting clause it purported to be an absolute and full conveyance of the land, without condition. *Held*, that the words "to erect a pest-house upon" were merely descriptive of the use to which the town intended to put the land, at the time of purchase, and were not intended as a condition in the grant, or a limitation of the estate conveyed.

6. Whether conditions in a conveyance be precedent or subsequent, as there are no technical words to distinguish them, is a matter of construction, and depends upon the intention of the party creating the estate.

7. Conditions subsequent are not favored in law, and must be strictly construed.

8. The habendum of a deed was as follows: "To have and to hold the said bargained and granted premises with all the privileges and appurtenances thereto belonging, or in any wise pertaining, for the use aforesaid, forever." *Held*, the words "for the use aforesaid" could not be construed as a condition in the grant, or a limitation to the estate.

This was an action of trespass and ejectment to recover possession of a tract of land situated in the southerly part of the city of Providence. Special pleas were filed by the corporation defendants, setting up title in themselves. To each of these pleas the plaintiffs [Andrew H. Ward and wife and others] filed a replication traversing the matters of fact set forth in the pleas, and tendering an issue to the country. They also filed a special replication controverting the title set up by the defendants, and setting up a title in themselves to a moiety of the premises by descent in regular succession, through one George Field, and to the other moiety by virtue of a quit-claim deed from one Mary Manchester, who was the sister of George Field. George and Mary Field were the children and heirs of Isaac Field, who died in 1781; and the land in controversy, together with other real estate, descended to them at the decease of their father, as tenants in common. George Field subsequently died, leaving one son as his sole heir, who also died, leaving as his lawful heirs two daughters, Anna H. and Mary G., who were plaintiffs in this suit. Mary Field married Isaac Manchester, who died, leaving her a widow; and on September 21, 1855, she, in consideration of ten dollars, released all her title in the premises to Anna H. and Mary G., to whom,

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

as the plaintiffs alleged, the other moiety descended, in regular succession, from George Field. On the other hand, the title of defendants, as disclosed in the plaintiffs' replication, was also derived through George and Mary Field, to whom the premises descended at the decease of their father. He died intestate, leaving two minor children, George and Mary. Their mother, Martha Field, administered upon the estate of their father, and was appointed their guardian. As administratrix and guardian, she petitioned the general assembly of the state for authority to sell a portion of their real estate, which petition was granted at the session held at Bristol, on the fourth Monday of August, 1785; and, pursuant to the authority so granted, she conveyed the land in controversy to the town of Providence, under whom defendants claim title. The following was the act of assembly: "Whereas Martha Field of Providence, in the county of Providence, widow and administratrix of the estate of Isaac Field, late of said Providence, deceased, and guardian to the heirs of the said estate, preferred a petition, and represented unto this assembly, that the committee appointed by the town of Providence, to procure a convenient place to erect a small-pox house for the use of said town, having made choice of a remote corner of the real estate of the said deceased, adjoining Providence River and Hawkins Cove, so called, as the most commodious spot within the bounds of the said town, for the said purpose, have applied to her to sell about two acres a half of the said land to the said town; and that she is desirous of accommodating the said town, and the said land is of but very little consequence to the said estate, the soil being barren; and thereupon, the said Martha Field prayed this assembly to empower her to sell the said land to the said town for the said purpose. On consideration whereof, be it enacted by this general assembly, and by the authority thereof it is enacted, that the prayer of said petition be granted; that the said Martha Field be, and she is hereby, authorized to make sale of the said two acres and a half of land for the said purpose; that a deed thereof, made and executed pursuant to this act, shall vest in the purchaser all the right and interest of the said Isaac Field in and to the same; that the money arising therefrom be appropriated to the use of the said heirs; that the said sale be under the direction of the town council of Providence; and that she account with the said council for the appropriation of the money."

Omitting unnecessary portions, the deed was in the following terms: "To all people unto whom these presents shall come: I, Martha Field of Providence, county of Providence, state of Rhode Island and Providence Plantations, widow, send greeting: Know ye, that I, the said Martha Field, widow, by the authority given to me by the general assembly of the said state, at their session held at Bristol, on the fourth Monday of August, A. D. 1785, to sell and convey to the said town of Providence a certain piece of land for the purpose of erecting a pest-house upon; for and in consideration of the sum of one hundred and nine Spanish silver milled dollars and three eighths of a dollar, in hand before the ensealing hereof, well and truly paid by James Arnold, Esq., of said Providence, in the county and state aforesaid, town treasurer of said town, the receipt whereof I do hereby acknowledge, and myself therewith fully satisfied, contented, and paid, and thereof and of every part and parcel thereof do exonerate and acquit and discharge him, the said James Arnold, his heirs and successors, as town treasurer of the said town, forever, by these presents. Have given, granted, sold, conveyed, and confirmed, and by these presents do freely, fully, and absolutely give, grant, sell, convey, and confirm unto him, the said James Arnold and his successors in office as town treasurer of said town of Providence, forever, in trust for said town, a certain piece or tract of land lying and being in the town of Providence aforesaid, and is butted and bounded as followeth: . . . . To have and to hold the said granted and bargained premises, with all the appurtenances and privileges thereto belonging or in any wise appertaining to him, the said James Arnold and his successors in the office of town treasurer of said town of Providence, for the use aforesaid forever. And I, the said Martha Field, for myself, my heirs, executors, and administrators, do promise, covenant, and grant to and with the said James Arnold, his successors in office as aforesaid, that I have good right and lawful authority to grant, sell, bargain, convey, and confirm the said bargained premises in manner as aforesaid. And that the said James Arnold and his successors in the office of town treasurer, in trust for the said town of Providence, shall and may from time to time, and at all times forever hereafter, by force and virtue of these presents, lawfully, peaceably, and quietly hold, occupy, possess, and enjoy the said demised and bargained premises in manner as aforesaid, with all the privileges and appurtenances thereto belonging, freely and clearly acquitted, exonerated, and discharged from all manner of encumbrances, of what name or nature soever, that might in any measure obstruct or make void this present deed. Furthermore, I, the said Martha Field, for myself, my heirs, executors, and administrators, the above demised premises to the said James Arnold, his successors in office as aforesaid, against the lawful claims or demands of all persons, forever will warrant and defend by these presents."

It was claimed by the plaintiffs that the guardian of George and Mary Field was authorized only to convey the premises to the town of Providence as a site for the erection of a small-pox house for the use of the town, and that, by the true construction of the deed

and act of assembly authorizing the same, the land in controversy was conveyed for that purpose only, and upon the implied condition that it should revert to the minors whenever the town of Providence ceased to use it for such purpose. They further alleged that the city of Providence, successors to the town of Providence, had long ceased to use and occupy the premises, and conveyed the same to the defendants, who had appropriated them to a use different from that specified in the deed. To the special replication the defendants demurred, and the plaintiffs joined in the demurrer. On the part of the defendants it was insisted that the deed of Martha Field vested in the town of Providence an absolute estate in fee simple, clogged by no condition or limitation.

G. H. Brown, for plaintiffs.

A contingent interest in the estate remained in the owners at the time of the conveyance, entitling them or their heirs to the possession thereof, whenever the same ceased to be used for the purposes expressed in the act and deed. Hayden v. Stoughton, 5 Pick. 528; Brigham v. Shattuck, 10 Pick. 308; Clapp v. Stoughton, 10 Pick. 463. Were this the case of a common purchase, authorities are not wanting tending to show that the words employed in the habendum of this deed created a conditional fee. 2 Co. Litt. 203a, § 328; 4 Kent, Comm. 132; 2 Greenl. Cruise (2d Ed.) 729; 2 Bl. Comm. 154, 155; 3 Greenl. Cruise (2d Ed.) 432; Wheeler v. Walker, 2 Conn. 196; Austin v. Cambridgeport Parish, 21 Pick. 215; Police Jury v. Reeves, 6 Mart. [N. S.] 221; Stuyvesant v. Mayor, etc., of New York, 11 Paige, 427; Hayden v. Stoughton, 5 Pick. 528; Town of Castleton v. Langdon, 19 Vt. 210; Parsons v. Miller, 15 Wend. 564. This, however, was not a common purchase, but a grant by the sovereign power, and is analogous to a grant from the king. Such being the case, it is clear that the words employed in the habendum of the deed are the technical words, if any are necessary, to create a condition. 2 Co. Litt. 204a, § 330. The modern rule of interpretation, as applicable to all deeds, is to give effect to the whole and every part of the instrument, whether it be a will or deed, or any other contract. 2 Greenl. Cruise (2d Ed.) 468, and notes; Id. 586 et seq. and notes, passim. The act of assembly, also, being a legislative act, is to be construed according to the intention and power of the legislature, apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature. Wilkinson v. Leland, 2 Pet. [27 U. S.] 662. It was obligatory on the town of Providence to hold and occupy these premises for the purposes of a pest-house, or forfeit the estate. In the case of a grant by a private citizen, the rule is, that the deed shall be taken most strongly against the grantor; but in the case of a grant by the sovereign power, it is to be construed most strongly against the grantee, and nothing will pass by implication. 2 Greenl. Cruise (2d Ed.) 912 et seq., and the numerous cases cited in the notes. The authority conferred by this act of assembly was an exercise of the prerogative right of eminent domain. Then it follows that, as the purpose for which the land was conveyed has ceased, the plaintiffs are entitled to have these premises, as of the former estate of the persons, owners, through or under whom they claim. Westbrook v. North, 2 Greenl. 179; Town of Hampton v. Coffin, 4 N. H. 517; Harrington v. Commissioners, 22 Pick. 263; People v. White, 11 Barb. 26, and cases cited; Bonaparte v. Camden R. Co. [Case No. 1,617]. The legislature has no right to take the property of one person without his consent, and transfer it to another, or authorize the same to be done, even for a full compensation, except by virtue of the right of eminent domain. Ang. & D. High. 55, and cases cited; 2 Kent, Comm. 339, and cases cited; Wilkinson v. Leland, 2 Pet. [27 U. S.] 657. Besides, it plainly appears from the act and deed themselves, that the purpose and object of the conveyance was of a public, and not a private nature; that the act and deed were made without the concurrence of the owners, and that the public alone were to be benefited by the transaction. No particular mode of exercising the right of eminent domain is necessary. It may be exercised by the government, through its immediate officers or agents, or indirectly, through the medium of corporate bodies or private individuals. Pittsburgh v. Scott, 1 Barr. [1 Pa. St.] 314; Wilson v. Blackbird Creek Marsh Co., 2 Pet. [27 U. S.] 251; West River Bridge Co. v. Dix, 6 How. [47 U. S.] 507; 2 Greenl. Cruise (2d Ed.) 477, 563, 723.

T. A. Jenckes, for defendants.

To make a clause in an instrument of conveyance a condition, on the non-performance of which a forfeiture results, or in consequence of which the grantee holds only a base or determinable fee, certain clear and express terms are required. And this is equally true of limitations. Whether words amount to a condition, or a limitation, or a covenant, may be a matter of construction depending upon the contract. Conditions and limitations are not readily to be raised by mere inference and argument. 4 Kent, Comm. 123 et seq.; Id. 132, note, and cases cited. The words usually employed in creating a condition are, "upon condition"; and this, says Lord Coke, is the most appropriate expression; or the words may be "so that; provided; if it shall happen," &c. The apt words of limitation are "while; as long as; until; during," &c. The words "provided always" may, under the circumstances, be taken as a condition, or as a limitation, and sometimes as a covenant. 4 Kent, Comm. 132; Co. Litt. 203a, 203b; Bac. Abr. tit. "Condition," A and H; 1 Greenl. Cruise, 3. The ancestor of the plaintiffs parted with

the entire title. This estops any claim that there was a dedication by that ancestor. City of Cincinnati v. White's Lessee, 6 Pet. [31 U. S.] 431–438. And as to the principle on which dedication rests. Beatty v. Kurtz, 2 Pet. [27 U. S.] 566; Barclay v. Howell, 6 Pet. [31 U. S.] 498; Irwin v. Dixion, 9 How. [50 U. S.] 10; Hills v. Miller, 3 Paige, 254. This conveyance must be construed according to the well-established rules of law. The intent of the parties, the circumstances attending the sale, the particular situation of the parties, the state of the country and the thing granted at the time,—are all to be considered. Adams v. Frothingham, 3 Mass. 352. That construction of an instrumnt is to be favored which is most strongly against the grantor, particularly when the instrument may be capable of two constructions. Cocheco Manuf'g Co. v. Whittier, 10 N. H. 308; City of Alton v. Illinois Transp. Co., 12 Ill. 38. The intention of the parties, when clearly ascertained, is of controlling efficacy. That intention is to be collected from the words of the deed as expressive of and defining the meaning of the parties. The deed is to be construed most favorably to the grantee, if there is any doubt about the meaning of the parties. 4 Kent, Comm. 132; Howard v. Rogers, 4 Har. & J. 281. It is submitted that the words referred to can be properly construed in no other way than as words of description. That they were inserted not to operate as a condition, but for the special and express purpose of preventing any claim by the grantors or their heirs upon the town, for injury to the surrounding and adjoining estates by the nuisance which this pest-house might thereafter become.

CLIFFORD, Circuit Justice. To solve the matter in dispute, it becomes necessary to attend with some care to the language both of the act of assembly and of the deed. Both parties concede that Martha Field was the duly constituted guardian of George and Mary Field, and it is not questioned by either that she petitioned for authority to sell a portion of the estate of her wards. By the preamble to the act of assembly, it appears that she represented in her petition that a committee appointed by the town to procure a place to erect a small-pox house, for the use of the town, had made choice of a remote corner of the estate of her wards, and had applied to her to sell the same to the town. She also represented that the part applied for was barren, and of little consequence; and being desirous of accommodating the town, she prayed that she might be empowered to sell the same to the town for that purpose. After reciting these facts in the preamble, the act of assembly, among other things, provides that the said Martha Field be, and she is hereby, authorized to make sale of the said two acres and a half of land for the said purpose; and that a deed thereof, made and executed pursuant to this act, shall vest in the purchaser all the right, title, and interest of the said Isaac Field in and to the same; and it also provides that the money arising therefrom be appropriated to the use of the said heirs, and that the sale be made under the direction of the town council of Providence, with the usual provision, requiring the guardian to account with the said council for the appropriation of the money. On the face of the act, it is apparent that the legislative assembly intended to exercise the power of granting a license for the sale of that portion of the minors' real estate. That conclusion rests, not only upon the fact that the legislative act is based upon the petition of the administratrix of the estate and the guardian of the minors, but upon the express declaration that a deed made and executed in pursuance of the authority granted should vest in the purchaser all the interest which descended to the minors at the decease of their father. Most of the states have general laws making provision for the sale of estates of minors by their guardians, either for their support or education, or to pay their just debts, or for the purpose of changing the investment. Such laws generally require a license from some court of record; and the license is not usually granted, except on petition of the guardian, and after public notice to all interested. No one probably at this day would question the validity of such a general law to provide for the granting of licenses to authorize the sale of such estates, whether the authority was conferred upon a court of general jurisdiction, or a district or county court, or even upon the court of probate. Assuming that the legislature may confer such power upon the courts of a state, for the sale of a minor's real estate, and for the investment of the proceeds, it is difficult to see any reason why the legislature may not exercise the power directly by special act. Clearly, the character of the act in question is remedial, and in point of fact it has no other characteristic; and we think it cannot be distinguished in principle from a general law upon the same subject. Authority is given to sell the land and invest the proceeds, but a sale is not ordered or directed; nor is there a word in the act to control the legal discretion vested in the guardian. She was left to fix the terms of sale without restraint, and to sell or not, as she might thereafter determine to be best for the interest of her wards. But it is insisted by the plaintiffs, that the act in question is not one where the legislature attempted to exercise its tutelary power over the estates of minors or other persons incapable of disposing of the same. On the contrary, it is insisted that it was the exercise, on the part of the legislature, of the power of eminent domain. Looking at the whole act, however, there does not appear to be any foundation for the proposition; and sufficient has already been remarked, we think, to demonstrate its fallacy. Whatever is said respecting the use to which the land was to be applied by the town was mere inducement to the legislative assembly to grant the prayer of the petition; and that remark applies with equal force to every one of the phrases in the recitals of the preamble, on which the theory of the plaintiffs is based. Uni-

versal experience teaches that the tribunals intrusted with the ultimate power of granting licenses in cases of this description find it necessary, as it is their duty, to examine each particular application with scrutiny, and to exercise a careful supervision over the rights of those interested in the estate. Consequently the petitioner is required to assign solid reasons for the application, and oftentimes finds it prudent to introduce defensive allegations against the inference of interested motives. Allusion was accordingly made in this case to the promotion of the public health, to guard against any such suspicion, and to show that the petitioner did not originate the suggestion.

Another allegation in the petition is, that the land was barren, and of little consequence; and that representation was doubtless made, not only to show that the residue of the estate would not be injured by the sale, but also to show that a change of investment would be beneficial to the minors. Unconditional provision was made in the act that the money should be appropriated to the use of the heirs; and it was expressly provided that the sale should be made under the direction of the town council. At that period in the history of the state the town council, so called, exercised all the ordinary powers of a court of probate; and it was also provided, in effect, that the guardian should account to the town council for the proceeds of the sale. Without entering more into detail, suffice it to say, that we are of the opinion that, by the true construction of the act of assembly, it must be understood as conferring a license upon Martha Field, guardian of George and Mary Field, to sell such portion of the real estate of her wards as was therein described, and to invest the proceeds of the sale for their benefit, under the direction of the town council of Providence; and she was not only authorized to sell the land, but to make and execute a sufficient deed to vest in the purchaser all the right, title, and interest in and to the same which descended to her wards from their father.

Having ascertained the true nature and extent of the authority conferred upon the guardian, it only remains to consider and determine in what manner that authority was exercised. As described in the deed, the parcel of land sold and conveyed contained two acres and thirty poles; and it was sold, as appears from the consideration recited in the deed, for the sum of one hundred and nine and three eighths Spanish milled dollars. Nothing, therefore, can be inferred in favor of the theory of the plaintiffs from any supposed inadequacy of consideration, as fifty dollars an acre, at that period of time, for barren land, situated in a remote corner of the town of Providence, may well be assumed as its fair value. Among other things, the deed shows that the conveyance was made to the town treasurer, or his successors in office, forever, in trust for the town; and in the granting clause it purports to be a full, free, and absolute conveyance of the land, without condition or limitation. But the introductory part of the instrument, preceding the granting clause, refers to the authority to sell and convey, as derived from the act of assembly, and in that connection recites the purpose the town had in view in making the purchase. Considering, however, that the same recital was inserted in the act of assembly, which, nevertheless, authorized an absolute conveyance of all the right, title, and interest of the minors in the premises, we are of the opinion that the words "for the purpose of erecting a pest-house upon" are merely descriptive of the use to which it was the intention of the town, at the time of the purchase, to apply the land, and that they were not inserted as a condition in the grant, or as a limitation or qualification to the estate conveyed. They would scarcely have that effect even if taken separately, but when considered in connection with the words of the granting clause it is quite obvious, we think, that the parties never intended to give them any such signification. When considered in connection with the other parts of the instrument, it is much more reasonable to suppose that they were inserted for the benefit of the purchaser. Undoubtedly it was the intention of the town to erect a small-pox house on the land purchased; and it may well be that the recital was inserted in the deed to foreclose all future complaint against such an appropriation of the premises. Be that as it may, it must, nevertheless, be assumed that if the grantor had intended to create any such condition or limitation to the estate as is supposed by the plaintiffs, she would have employed, either in the granting clause or the habendum of the deed, some fit and proper language to signify such an intention. Nothing of the kind is pretended by the plaintiffs, so far as respects the granting clause, but reliance is placed upon the concluding phrase of the habendum, as tending to support that theory. As given in the instrument, the habendum reads as follows: "To have and to hold the said granted and bargained premises, with all the privileges and appurtenances thereto belonging or in any wise appertaining, . . . for the use aforesaid, forever." Conditions in a conveyance are either precedent or subsequent; and as there are no technical words to distinguish them, it follows that whether they be the one or the other is a matter of construction, and depends upon the intention of the party creating the estate. Hotham v. East India Co., 1 Term R. 645; Finlay v. King's Lessee, 3 Pet. [28 U. S.] 374. Precedent conditions are such as must take place before the estate can vest, and must be literally performed. Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated or forfeited. 4 Kent, Comm. (9th Ed.) 125. Most of the estates upon condition in law are of the latter kind, and are liable to be defeated upon breach of the condition, as on failure to pay rent, or the non-performance of other services annexed to the estate.

Where a devise of lands was made to a town for a school-house, provided it should be built within a hundred rods of a given place, the proviso was held to be valid, as a condition subsequent, and that the estate was forfeited by a neglect to fulfil the condition for a period of twenty years. Hayden v. Stoughton, 5 Pick. 539. Unquestionably a breach of the condition authorizes the heir to enter; and if he make good his claim, he may hold the land, although it was vested for a time in the grantee or devisee. Shep. Touch. 450; 2 Bl. Comm., by Shars. 155. Conditions subsequent, says Chancellor Kent, are not favored in law, and are to be construed strictly, because they tend to destroy estates; but whether so or not, it is clear that they are not to be implied, unless it appear from the language employed in the instrument that such was the intention of the parties. Merrifield v. Cobleigh, 4 Cush. 178; Catlin v. Springfield Fire Ins. Co. [Case No. 2,522]; Doe v. Bancks, 4 Barn. & Ald. 401; Co. Litt. 205b; 4 Kent, Comm. (9th Ed.) 146. Certain words and phrases, it is said, make an estate conditional, of themselves, without expressly giving the power of entry; and examples to that effect are given in several standard treatises upon the subject of conditional estates. Co. Litt. 203a, 203b; Litt. Ten. (by Toml.) 374; 2 Greenl. Cruise, 3; 2 Bac. Abr. (by Bouv.) tit. "Condition," a, h, 280, 287. None of the words, however, put by the elementary writers as examples of what will create a condition in a deed of conveyance, are to be found in the deed in this case, nor any other which, properly understood, falls within the same category. Deeds, as well as other written instruments, ought in general to receive a liberal construction so as to uphold them, if possible, and carry into effect the intention of the parties. Effect ought to be given, if reasonably practicable, to every part of the instrument; and in order to accomplish that object, it is indispensably necessary to compare one part with another, and apply the whole to the subject-matter described in the instrument.

Applying these rules to the present case, it is quite obvious that the words of the habendum, "for the use aforesaid, forever," cannot possibly be construed as a condition in the grant, or as a limitation to the estate. Those words must be taken in connection with the words of the granting clause, which clearly show that it was the intention both of the grantor and grantee to convey an absolute unconditional estate; and they must also be weighed and interpreted in connection with what follows in the same instrument. Contrary to what is usual in conveyances of this description, the grantor not only covenants that she has good right and lawful authority to sell and convey the described parcel of land, but also covenants that the grantee shall quietly and peaceably enjoy the premises in manner aforesaid, and that she will forever warrant and defend the same against the lawful claims and demands of all persons. Comparing one part of the instrument with another, and the whole with the act of assembly authorizing the sale, not a doubt is entertained by the court that it was the intention of the grantor to convey to the town of Providence all the right, title, and interest which her wards acquired in the premises by descent at the decease of their father. Two theories are suggested as to the precise signification of the particular words under consideration, either of which appears to be more reasonable, and more in consonance with the general tenor and scope of the instrument, and consequently to be preferred to that suggested by the plaintiffs. One is, that they must be regarded as a substitute for the words "in trust for said town," which are contained in the granting clause of the instrument, and that they were inserted to exclude the conclusion that the conveyance was made for the individual benefit of the grantee named in the deed. Another is, that they were employed merely as descriptive of the purpose which the town had in view in making the purchase; but whether the one or the other, it is nevertheless obvious that they were not employed as creating a condition in the conveyance, or as a limitation to the estate. Such a construction would be a forced one, even if the words were separately considered; but when the phrase is compared with the other parts of the instrument, and the act of assembly authorizing the sale, it is clear that it cannot be sustained. Neither the act of assembly nor the deed affords any evidence that the town had agreed with the grantor to make the contemplated erection on the premises, or that she thought it of consequence to stipulate that the land should be appropriated to that use; and in the absence of any such stipulation or agreement, it can hardly be inferred that the adjacent proprietors are damaged by its discontinuance. For these reasons, we are of the opinion that the demurrer of the defendants to the plaintiffs' special replication must be sustained, and judgment must be entered accordingly.

Case No. 17,158.

WARD et al. v. The OGDENSBURGH.

[5 McLean, 622;[1] Newb. 139; 10 West. Law J. 433.]

District Court, D. Ohio. Oct. Term, 1853.[2]

COLLISION — SUFFICIENCY OF LOOKOUT — VESSELS MEETING — DUTY OF STEAMERS TO SLOW DOWN — PRACTICE — CROSS LIBEL — JOINDER OF ACTIONS IN REM AND IN PERSONAM.

1. The maritime law is rigid in its exactions of unremitting care and vigilance on the part of those entrusted with the navigation and safe keeping of vessels of every kind, to avoid acci-

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

[2] [Reversed in Case No. 17,151. Decree of circuit court affirmed by supreme court in 21 How. (62 U. S.) 572.]

dents and injuries by collision. Any negligence, inattention, or want of skill, resulting in injury to others, will entitle the sufferer to remuneration.

[Cited in The Iron Chief, 11 C. C. A. 198, 63 Fed. 291.]

2. A competent and vigilant look-out, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching, at the earliest moment, is indispensable, to exempt the steamboat from blame in case of accident in the night time, while navigating waters on which it is accustomed to meet other watercrafts. The mate, who has command of the deck, is not a sufficient look-out. He must be a person who makes the look-out his exclusive business. Nor is the wheel-house a proper place to station the look-out. He should be stationed forward, where he can see without interruption.

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

3. In general, it is the duty of vessels, whether propelled by steam or wind, when meeting dead ahead, or nearly so, to port helm, and each turn to the right. But if they are approaching, with berth enough to exclude the possibility of their coming together, each pursuing its onward course, they are not required to port helm. Porting the helm, under such circumstances, may be a fault.

[Cited in The Golden Grove, 13 Fed. 691.]

4. When steam vessels are approaching each other, and from the darkness or fog, there is the least uncertainty as to the course or position of the other, it is the duty of each instantly to check the speed, and then, if necessary, to stop, and back.

5. The defendants in an admiralty suit, who have suffered from a collision, and are in no fault themselves, may by a cross libel set up the damage they have sustained, and will be entitled to a decree in their favor for compensation.

6. The libellants can not join in this libel a demand in rem against the vessel, and one in personam against the owners. He may proceed in rem, or in personam, or successively in each way, until he has full satisfaction, but he can not blend the proceedings in one libel.

[Cited in The Illinois, Case No. 7,003; The Sabine, 101 U. S. 389; Joice v. Canal Boats Nos. 1,758 and 1,892.]

[3] [This was a libel for collision, brought by the owners of the steamboat Atlantic, a large, first class passenger steamboat, running between Buffalo and Detroit, against the propeller Ogdensburgh, a freight boat running from Cleveland through the Welland Canal to Ogdensburgh, and against the owners of the boat; the libel being in personam and in rem. The facts of the case will be found so much at large in the opinion of the judge, that it is not necessary to repeat them here. The respondents excepted to the libel for a misjoinder.

[Spalding, in support of the exception, citing 1 Conk. Adm. §§ 380–386; Citizens' Bank v. Nantucket Steamboat Co. [Case No. 2,730]; 3 Hagg. Adm. 114; Sup. Ct. Rules Adm. 15; Ben. Adm. p. 215, § 391; The Hope, 1 W. Rob. Adm. 154; The Volant, Id. 385; [Waring v. Clarke] 5 How. [46 U. S.] 441; Laws 1843, 5 Stat. 626; Leland v. Medora [Case No. 8,237.]

[Lothrop, in reply, citing for analogies, The Anne [Case No. 412]; Citizens' Bank v. Nantucket Steamboat Co. [Case No. 2,730]; Arthur v. The Cassius [Case No. 564]; Ben. Adm. §§ 387, 396, 397.

[After a full argument, the judge reserved his opinion to be incorporated in the final decree. The testimony in the case was then taken, occupying seven days.

[On behalf of libellant, the following references were made: Abb. Shipp. marg. p. 236; Rules of the Trinity, 9 & 10 Vict.; Abb. Shipp. 237; Story, Bailm. § 611b; The Friends, 1 W. Rob. Adm. 478; The Sciota [Case No. 12,508]. There are four classes of circumstances under which collision may occur: (1) Inevitable accident; neither party to blame. (2) Where both parties in fault. (3) Where suffering party alone is to blame. (4) Where the fault is in the party doing the damage. The Woodrop-Sims, 2 Dod. 83; Story, Bailm. 608 et seq.; Reeves v. The Constitution [Case No. 11,659]; 1 Conk. Adm. 300, 301, 303; Abb. Shipp. 229; The Rival [Case No. 11,867]; Story, Bailm. 611; 2 Wend. 452; 19 Wend. 397; St. John v. Paine, 10 How. [51 U. S.] 584, 605; [Williamson v. Barrett] 13 How. [54 U. S.] 108.

[On behalf of respondents, the following references were made: 2 Dod. 83; 2 W. Rob. Adm. 217; The Emily [Case No. 4,452]; The Northern Indiana [Case No. 10,320], MS. Dec. of Judge Hall, of N. Y., 1852; Waring v. Clarke, 5 How. [46 U. S.] 498; The Europa, 2 Eng. Law & Eq. 557; St. John v. Paine, 10 How. [51 U. S.] 557; The James Watt, 2 W. Rob. Adm. 270; 3 W. Rob. Adm. 75; Whart. Dig. 388; Halderman v. Beckwith [Case No. 5,907]; The Rose, 2 W. Rob. Adm. 2; The Iron Duke, 2 W. Rob. Adm. 377.] [3]

Lothrop, Swayne, Wade & Newberry, for libellant.

Spalding, Stanbery, McNett & Kimball, for respondents.

LEAVITT, District Judge. The libellants aver substantially, that said steamboat, being of eight hundred tons burden, with passengers and freight on board, left Buffalo on the evening of the 19th of August, 1852, for Detroit, and proceeding on her voyage across the lake, by the usual and direct route, with all her signal lights burning and in good condition, about half-past two o'clock, in the morning of the 20th of August, off Long Point, on the Canada shore, was run into with great violence by the propeller Ogdensburgh, then on her way from Cleveland to the entrance of the Welland Canal; the said steamboat being struck on her larboard side, near the forward gangway, and the guard and hull being so broken, that she filled with water, sunk, and was a total loss to the libellants. It is also averred, that at the time of said collision, the Ogdensburgh did not have lights burning and properly displayed, as required by law; and was not then steering on the usual and proper route from Cleveland to the Welland Canal; and, that on the

[3] [From Newb. 139.]

[3] [From Newb. 139.]

approach of the Atlantic, though clearly visible for at least two miles, the propeller did not stop her engine, lessen her speed, alter her course, or take any other precaution to avoid a collision. It is also alleged, that the officers and crew of said steamboat, as the propeller approached, first put the helm a-port, and then hard a-port, to get out of the course of the propeller, and used every effort to prevent a collision, but that the propeller, though seeing the lights of the Atlantic at a great distance, did not port her helm, or slacken her speed, or display lawful signal lights, but was so unskillfully and improperly managed, that she was run nearly at right angles into and against the Atlantic; and that the collision resulted from the carelessness, negligence, and unskillfulness of the officers and crew of said propeller; and that the libellants have sustained damage thereby to the amount of one hundred thousand dollars.

The answer of Chamberlain & Crawford, the claimants of the Ogdensburgh, which they aver to be a propeller of three hundred and fifty-three tons burthen, sets up in substance, that she left Cleveland with a heavy freight, about twenty minutes after twelve o'clock, in the afternoon of the 19th of August, 1852, and proceeded by way of Fairport, toward Ogdensburgh, New York, the place of her destination, which was to be reached by means of the Welland Canal, in Canada; that about two o'clock, the next morning, steering her proper course, N. E. by E., for the entrance of said canal, the wind being light from S. W., and the weather somewhat hazy, her watch on deck discovered a steamboat light, from two to three points off her starboard bow, and at the supposed distance of three miles; that keeping on her course at a speed of about seven miles an hour, her mate ascertained that the light was fast nearing her, and gave the signal to "slow" the engine; which was done, and the light still coming nearer, an order was given to stop; that finding the boats were in danger of collision, the engine of the propeller was reversed, and she was backed; that these orders were given with all possible dispatch, but in spite of all these precautions a collision ensued.

The answer then avers, that by reason of the Atlantic's turning from her proper course, and continuing with unabated speed fifteen miles an hour, in a direction across the bow of the propeller, she fell with all her momentum upon the propeller's stem, wrenching it out of place, and carrying her half round. It is charged, that the collision was wholly caused by the unparalleled recklessness of the persons in command of the Atlantic; and that those navigating the propeller managed her according to the approved rules of lake navigation, and with a due regard to the safety of both vessels. It is also averred, that the propeller had all her lights burning, and displayed as required by law.

The claimants ask for a decree for the injury sustained by the propeller, as the result of the collision, and by the agreement of the parties, such a decree is to be rendered in this case, if in the judgment of the court the claimants are entitled to compensation. It is also further agreed, that the value of the Atlantic was seventy thousand dollars, and is to be so considered by the court if it shall be adjudged that the libellants are entitled to a decree in their favor.

The matters in controversy in this case are indicated by the foregoing summary statement of the libel and answer.

A great mass of testimony, partly oral and partly in the form of depositions, has been exhibited to the court in support of the opposite claims of the parties, and as usual in investigations growing out of marine collisions, there is, in some material points, great conflict in the testimony. Without noticing the large portions of the evidence, which have no direct bearing on the points in dispute, I shall refer to that only which forms the basis of the conclusions to which I have been led.

But before noticing the facts, it will be proper to state some of the settled doctrines of the maritime law as to collisions. Lord Stowell, justly distinguished for his eminent ability as an admiralty judge, classifies the cases in which collisions may occur as follows: "In the first place a collision may happen, without blame being imputable to either party, as where the loss is occasioned by a storm, or other vis major. In that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly: A misfortune of this kind may arise where both parties are to blame, where there has been want of due diligence or skill on both sides. In such case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly: It may happen by the conduct of the suffering party only; and then the rule is, that the sufferer must bear his own burden. Lastly: It may have been the fault of the ship which ran the other down; and in this case, the innocent party would be entitled to an entire compensation from the other." 2 Dod. Adm. 83; Abb. Shipp. marg. p. 230.

It is clear, from the general phase of the present case, that it does not fall within the first classification. The disastrous collision under consideration did not happen through an agency beyond human control. There is a fault resting somewhere; a wrong-doer, chargeable with want of skill, or inattention to duty. The libellants insist that they are losers of their valuable steamboat and her appendages, by reason of the mismanagement of the Ogdensburgh. The respondents, on the other hand, insist, not only that they are not liable for the loss of the Atlantic, but that they are entitled to compensation for the injury sustained by them, as the result of the collision.

To make good their claim to indemnity, the libellants must show that the collision was caused by the fault of the other party, and that no censure attaches to those charged with the management and navigation of their boat. And, if

the respondents would show a just ground of claim for remuneration for their loss, it must appear that they are without fault. I think there is no foundation for urging that the present is a case of mutual culpability, calling for an apportionment of the loss between both parties. The maritime law is rigid in its exactions of unremitting care and vigilance on the part of those entrusted with the navigation and safe keeping of vessels of every kind, to avoid accidents and injuries by collision. Any negligence, inattention, or want of skill, resulting in injury to others, will entitle the sufferer to remuneration. These are general and admitted principles, touching the rights and liabilities of parties, in cases of collision. It is now proper to inquire what is the result of their application to the facts of this case.

The facts, as exhibited in the evidence of the opposing parties, are in some essential particulars, widely variant. On the part of the libellants, the material facts proved, may be summarily stated as follows: The steamboat Atlantic, the property of the libellants, being a first class passenger boat on Lake Erie, of the tonnage before stated, and with an engine of a thousand horse power, navigated and managed with the usual complement of officers and hands, having on board, including passengers and crew, between five and six hundred persons, and furnished with the lamps and lights required by law, and the usages of lake navigation, left the port of Buffalo about, or a few minutes after, 9 o'clock in the evening of the 19th of August last, on her regular trip to Detroit. It seems according to the usual course of navigation by steamers between the places named, that Point au Pelee, putting out from the Canada shore, near the upper end of the lake, is the terminus of a direct line usually pursued; the course from Buffalo to that point bearing S. W. by W. This line of navigation runs within a short distance of Long Point, on the eastern extremity of which there is a light-house. This is sixty-eight or seventy miles distant from Buffalo. On the night in question, the Atlantic pursued the usual course of steamers, and came abreast of Long Point light-house about 2 o'clock. It was a star-light night, but a haze or smoke hung over the lake, extending upward from twenty-five to thirty feet, which rendered it difficult to discover objects involved in it at any considerable distance. The second mate of the boat was on watch from the time of leaving Buffalo till the collision.

It was the starboard watch, as it is called by mariners, and belonged properly to the master, who, on this occasion, does not seem to have been on deck during the entire watch. The second mate and wheelsman were joined on deck, at 12 o'clock, by a passenger, who had some experience as a navigator on the lake. According to the testimony of the three persons, after the Atlantic had proceeded about one mile beyond Long Point light, a little after two o'clock they made a light—two white lights—which the mate took for the lights of a sailing vessel, heading southward. These witnesses agree in the statement that the steamer holding on her course S. W. by W., made the lights seen from a half to three quarters of a point over her larboard bow, indicating that the position of the approaching craft was a little south of the line of the steamer's course. The lights, when first seen, in the opinion of one of the witnesses, were about one mile distant. The steamer kept her course, under a full head of steam, at the rate of not less than fifteen miles an hour, when it was ascertained distinctly that the lights seen belonged to a propeller steering for Gravelly Bay, through which the entrance into the Welland Canal is reached. The steamer continued to approach without any diminution of her speed, until within three or four lengths of the boat from the propeller, when the order was given to the wheelsman to port his helm, which was almost immediately succeeded by the order to put the helm hard aport. Very soon after the Atlantic's larboard side, just aft the forward gangway, came violently in contact with the propeller's bow, causing a breach in the steamer's side some seven feet in width, extending downward below the water line, and inward nearly to the middle hatch. Without stopping the engine, the order was given to head her to the shore, and after running between half a mile and a mile, such was the rapid inflow of water, that she sunk at a point where the lake is twenty-five fathoms deep.

Such is the case, very briefly stated, as presented by the witnesses for the libellants. On the part of the respondents, the witnesses produced are the master, wheelsman, first mate, clerk, engineer, and a fireman on the Ogdensburgh. In the first place it may be remarked, that they satisfactorily disprove the allegation in the libel that the propeller was not furnished with and did not display, on the night of the collision, the red and green signal lights required by statute. The boat was provided with these lights, and they were suitably displayed and lighted.

The Ogdensburgh in addition had two white globe lights on her cross-trees, together with several lesser lights. These, it is in proof, were all lighted, and in good order throughout the night on which the collision occurred.

It appears that starting off across the lake from a point a few miles off Ashtabula, on the southern shore, the propeller was put upon her proper course, N. E. by E., for the entrance of the Welland Canal; and that, although there had been previously a slight variation from it, she was on it when the lights of the steamer were made, and continued upon it till the collision happened; that the lights of the Atlantic were first made by the propeller two and a half points over her starboard bow, and at the estimated distance of two and a half or three miles; that the mate having first taken the bearings of the light by compass, and seeing that the light opened a few points on the starboard, had ordered the wheelsman to keep on his course, and immediately thereafter, being uncertain

as to the bearings of the steamer's lights, gave the order to slow the engine; that after watching the lights closely for a short time, the mate saw the red signal lights of the steamer, and ascertaining that she was within four or five times her length of the propeller, rung the bell to stop and back almost simultaneously; that before the order to slow, the propeller was running at the rate of eight miles an hour; that after the order to slow, and when the orders to stop and back were given, her speed had been reduced to about three miles an hour; that all the orders referred to had been promptly obeyed, and the propeller brought almost if not wholly to a stand; that the Atlantic, without either slowing or stopping, continued her course toward the propeller, heading, as the nautical phrase is, "stem on;" that the mate seeing the collision inevitable, gave the order to starboard the helm, hoping thereby to receive only a glancing blow, but this movement produced little or no effect, as the propeller was stopped or nearly so, and of course did not obey her helm. The Atlantic thus struck the bow of the propeller, causing the breach in the steamer before noticed, and carrying away the lower part of the propeller's stem, loosing and turning the other part from its position, unfastening the ends of the planks, and causing an opening through which the water found its way into the boat.

This synopsis of the testimony on both sides, as to the course and relative position of the boats, when the lights of each other were made, their subsequent conduct, and the facts relating to the collision, will suffice to show the material discrepancies between the witnesses on either side, and afford some intelligible landmarks for the court, in settling the rights of the parties.

It will be noticed that the essential differences between the parties consist in the opposite statements of the witnesses as to the bearings of the lines, on which the steamer and the propeller neared each other. On the hypothesis of the libellants, the lights of the propeller were first seen, in seamen's phrase, nearly dead ahead of the Atlantic, being less than a point over her larboard bow. Thus meeting, if the Atlantic had exercised the proper precaution of checking her speed, and porting her helm, and the propeller had failed to use the proper prudential measures, a collision being the result, the fault would be chargeable to the latter. But, on the respondents' proof, the lights of the steamer were seen two and a half points over the propeller's starboard bow, indicating clearly that she was on her proper course, north of the steamer's proper line of travel; and that, by improperly porting and hard porting, the steamer had been turned too far north, and carried across the propeller's bows. This latter supposition, I am obliged, as the case is presented, to adopt. I have failed to perceive any reason, why the statements of the respondents' witnesses, as to the matters in which they are in conflict with those of the libellants, should be repudiated. They are not only more numerous, but for reasons of a higher and more decisive character, better entitled to credit.

In this view, how stands the case? The propeller has done all that reason, usage, or law required. The many experienced and highly intelligent navigators, who have testified as experts, have declared as with one voice, that every precautionary measure adopted by her was sensible and judicious. She did all in her power to avoid the collision, while she omitted nothing that could have been done. True, the order given by her mate to starboard the helm just preceding the collision, was not called for; but for the reason before stated, it produced no result, and may well be designated as "an error," without being "a fault."

In coming to this conclusion, I am not unmindful that it was strenuously insisted in the argument, that by the settled usages of navigation, as also by judicial determinations, it is the duty of vessels, whether propelled by steam or wind, when meeting "dead ahead," or nearly so, to port helm, and each turn to the right. There can be no doubt of the existence of this rule, or of its obligatory nature; but it must be limited to cases in which it properly applies. The experts who were questioned on this subject, agree in stating, that if two boats or vessels are approaching in opposite directions, yet with berth enough to exclude the possibility of coming together, each pursuing their onward course, they are not required to port helm. Indeed, they agree in stating what is clearly obvious, that in the case supposed, the porting helms would tend rather to bring about, than avoid, collisions. These experts also say, that under the circumstances in which the Atlantic and the Ogdensburgh approached, the latter was not required to depart from her course, and that the Atlantic was wrong in porting her helm and diverging from her track.

It is clear then that the libellants have no claim to compensation from the owners of the Ogdensburgh, for the whole or any part of the loss sustained by them, as a result of this disastrous collision. It remains to inquire, whether a decree shall pass against the libellants for the loss suffered by respondents in the injury to the propeller.

By agreement of parties, the question whether it is competent in a proceeding by libel, where the answer, as in this case, asserts a claim against the libellants, and prays for a decree accordingly, to treat it as a cross libel, is waived; and it is stipulated that a decree may be entered for the owners of the Ogdensburgh, if in the opinion of the court, they are entitled to it, on the law and facts of the case. The right to such a decree depends clearly on the answer to the inquiry, whether their loss is attributable to the sole fault of the libellants' steamer. That the libellants are great sufferers from the collision, and have chosen to initiate this pro-

ceeding, can not deprive the owners of the propeller of their claim to compensation, if they are chargeable with no fault. They are to be viewed precisely as if they were the libellants, seeking indemnity for a loss; and, if they make out a good case, are entitled to a decree in their favor.

The inquiry is then presented, whether the facts and the law applicable to them, show a case of such exclusive culpability on the part of the Atlantic as not only to preclude her owners from any right to compensation, but to make them responsible for the injury sustained by the Ogdensburgh. This is contended for, by the respondents' counsel, on several grounds.

1. It is insisted that the Atlantic had no sufficient watch on deck during the night of the collision. The night, as already noticed, was not dark, but the haze on the lake made it difficult to distinguish objects at any considerable distance. The route of the steamer, especially in the vicinity of Long Point light, was one much frequented by vessels and steamers, passing up and down the lake, and to and from points along the southern shore, by propellers and other craft, carrying on commerce with the lower lakes through the Welland Canal. The Atlantic was a steamer of great power, and of great speed; and, on the night referred to, was the freighter of between five and six hundred human beings. These facts are quite sufficient to justify the conclusion, that those entrusted with her management and navigation were called upon for the exercise of the greatest watchfulness and care. It seems the only persons on deck having any rightful connection with the steamer, from the time she left Buffalo till the occurrence of the terrible collision, which sent her to the bottom of the lake, and occasioned the loss of some two hundred human lives, were the second mate and the wheelsman. As before noticed, it was the captain's watch; and the testimony of the most experienced and reliable experts is, that under the circumstances of the case, it was wholly improper that the captain should have entrusted the care of the boat to the sole management of the second mate; an officer in whom the higher qualifications of a navigator are not looked for, and who, in the language of a very intelligent expert, is viewed as the mere "drudge" or assistant of the captain. In point of fact, the second mate, even if his competency for the station is admitted (which is, at least, doubtful), did not keep a vigilant look-out, within the requirements of the decisions of the highest judicial tribunals of the country. He was, by his own statement, in the pilot house at the time he made the lights of the propeller, looking from one of the windows; and did not make these lights till they were about one mile distant.

In the case of St. John v. Paine, 10 How. [51 U. S.] 557, it was said by Judge Nelson, in delivering the opinion of the court, that "the steamboat was in fault in not keeping at the time a proper look-out on the forward part of the deck; and that the failure to descry the schooner at a greater distance than half a mile ahead, is attributable to this neglect. The pilot-house in the night, especially if dark and the view obscured by clouds in the distance, was not the proper place, whether the windows were up or down. The view of a look-out stationed there must necessarily be interrupted." And in the same case the court held, "that a competent and vigilant look-out, stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching, at the earliest moment, is indispensable to exempt the steamboat from blame in case of accident in the night time, while navigating waters on which it is accustomed to meet other water craft." And again, the court, said: "There is nothing harsh or unreasonable in this rule; and its strict observance and enforcement will be found as beneficial to the interests of the owner, as to the safety of navigation."

In the case of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, in giving the opinion of the court, Chief Justice Taney says: "It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant look-out, besides the helmsman. It is impossible for him to steer the vessel, and keep the proper watch in his wheel house. His position is unfavorable to it, and he can not safely leave the wheel to give notice when it becomes necessary to check suddenly the speed of the boat. And whenever a collision happens with a sailing vessel, and it appears that there was no other look-out than the helmsman, or that such look-out was not stationed in a proper place, or not actively and vigilantly employed in his duty, it must be regarded as prima facie evidence that it was occasioned by her fault."

In a recent case of admiralty against the steamboat Northern Indiana, a passenger boat on Lake Erie, decided by Judge Hall, of the district court of the United States for the Northern district of New York, it was held, that the mate alone, while the officer of the deck, though in all respects competent to the duty, did not constitute a sufficient look-out, within the requirement of the decisions of the supreme court of the United States, referred to. The judge remarks that, "the mate was the officer of the deck, holding the temporary command of the vessel, and liable to be continually called to the discharge of duties inconsistent with the keeping of a constant and vigilant watch, and ought not to have been relied on for that purpose." In England, the rules prescribed by the courts in regard to look-outs are more stringent than in the United States. A case is reported in 2 Eng. Law & Eq. 557, in which the Europa, one of the Atlantic steamers, was condemned for an injury to a sailing vessel, occurring during a thick fog, on the route of steam travel between the United

States and England, on the ground of the insufficiency of her look-out; when the proof was, that there was an officer stationed on the bridge, a quarter-master on the top-gallant fore-castle, another quarter-master at the con, besides one at the wheel.

I can not hesitate to say, in view of these authorities, that the Atlantic did not maintain a sufficient look-out, on the night of the collision.

2. In the next place it is urged, that the steamer was guilty of a great error in porting, and then hard-porting her helm, thereby running across the bow of the propeller, so as to make the collision an almost certain result. It has been before stated, that in the relative position and courses of the two vessels, and the time the lights of each were made by the other, there was no obligation on the propeller to port her helm. From the width of the berth between the two boats, if each had kept its course, there could by no possibility have been a collision. They would have passed at a distance probably not less than a mile apart. The law, therefore, requiring vessels and boats, approaching on the same or near the same line, to port their helms, as already remarked, does not apply. And it was palpably wrong in the steamer, and necessarily attended with danger, to port her helm, and diverge from her course, especially without checking her speed. The movement indicated great want of skill and judgment in navigation. The steamer should have "given way" as the nautical phrase is, and have passed under the stern of the propeller. 2 W. Rob. Adm. 5.

3. But another fault, very much insisted on by the advocates for the respondents, was the omission of the mate to check the speed of the Atlantic. There is no pretense that any order to that effect was given, or that in fact the velocity of the boat was at any time checked. This gross dereliction of duty, if the mate of the Atlantic was chargeable with no other, would, under the circumstances of this case, make the boat responsible for all the consequences which followed. It is entirely without excuse or palliation. It is proved that the boat at the time of making the propeller's lights was going forward under high steam pressure, and her rate of travel was not less than fifteen miles an hour. Her mate says, that from the haze on the lake he did not see the propeller's lights till within about a mile of her; and concluded, when first seen, they were on a sailing vessel going south. Yet, notwithstanding the difficulty of vision, and the uncertainty that existed as to the character of the craft, and the direction of her course—her lights seen, as he says, less than one point over the steamer's larboard bow—he pressed on with criminal recklessness, and without the least reduction of her dangerous speed. The numerous experts who have testified in this case, as well those called for the libellants, as for the respondents, agree in saying, it was the obvious duty of the Atlantic's mate, when the propeller's lights were first made, if, after noticing their bearing, there was the least uncertainty as to their position and motion, instantly to check the speed of the steamer, and then, if necessary, to stop, and back. They agree also in saying, if this course had been pursued, there was not a possibility that a collision could have happened. The propeller, pursuing her course N. E. by E., would have passed beyond the reach of the steamer, and the frightful calamity that took place would have been avoided. And it is amazing that a course so plain and safe had not suggested itself to the mate. That instead of this, he should have crowded the helm hard aport, and with unchecked velocity, turned the steamer almost across the path of the propeller, imports a recklessness and stupidity that argue badly for his fitness for the truly responsible position he occupied.

It was not deemed necessary to notice specially the judicial decisions, both in England and in this country, enforcing rigidly the obligations and duties of those connected with steam navigation. Many of these were presented and ably commented upon by the advocates of the respondents in the argument of this case. In addition to those noticed in the previous part of this opinion, many others were adduced, of pertinent application to this subject. Among them the following are noted: The Europa, 2 Eng. Law & Eq. 557; The Genesee Chief, 12 How. [53 U. S.] 443; The Rose, 2 W. Rob. Adm. 1; The Virgil, Id. 201; The James Watt, Id. 270; 2 Hagg. Adm. 356; The Leopard [Case No. 8,264]; Whart. Dig. 1852, Supp. 388.

The general tendency of these authorities is to enforce the duty of great caution, and unremitting vigilance, on the part of those engaged in the navigation of vessels propelled by steam. The obligation of lessening the speed of steamboats, under all circumstances, where unchecked velocity may be supposed to be dangerous, is especially enjoined. And there can be no question that the preservation of human life, as well as of property, demands at this day, when there is such a disposition to sacrifice everything to rapidity of movement, that owners and managers of steamboats should be held to a most rigid accountability.

I can not well conceive of a case, calling more urgently for the application of these principles, than the one under consideration. The calamity which has befallen the ill-fated Atlantic, putting in the most imminent peril the lives of upwards of five hundred persons, and attended with the actual loss of more than two hundred, has resulted from an insane neglect of duty in not checking her rapid speed at the proper time, and a desire to make headway at all hazards. And it is certainly a somewhat singular feature of this case, that her owners, responsible morally and legally, for the misconduct and incompetency of the officers and agents, whom they had placed in charge of their boat, should ask remuneration for a loss, arising clearly from their recklessness or unskillfulness. As to the master of the Atlantic, some conclusion may be drawn in relation to his pro-

fessional character and qualifications, from the fact, that although it was his watch, it does not appear that he was on deck, from the time the boat left Buffalo, till he was roused from his slumbers by the fatal collision; and afterwards was distinguished for his "masterly inactivity" in every thing but the carrying out of measures to save his own life. The second mate, who was invested with the sole management and command of the boat, and to whom was committed the safe keeping of more than five hundred persons, was not qualified for his trust, as is apparent from the facts already noticed. In a word, it is impossible to review the incidents of that sad catastrophe, without a painful impression, that those occupying official stations on the Atlantic were grossly deficient, not only in professional skill and intelligence, but in the higher moral qualities of trustworthy navigators.

Under the belief that the foregoing views sufficiently indicate the grounds on which it is designed to place the decision of this case, I forbear to notice some other points made in the arguments. In my judgment, the libellants on the law and the facts, are not entitled to a decree, either for the whole, or any part of the value of the steamer Atlantic; and the respondents have a just claim to compensation for the injury sustained by the Ogdensburgh, arising from the faulty management of the Atlantic. The amount of this injury, by agreement of parties, is three thousand dollars; for which sum I decree against the libellants, with costs.

In connection with this case, a preliminary question of admiralty practice is presented by the first article of the respondents' answer, as matter exceptive to the libel, which is stated as follows: "That the libellants have improperly joined a proceeding in rem against the propeller Ogdensburgh, with a proceeding in personam against the respondents as her owners." This point was argued fully before the hearing; and reserved for further consideration. Its decision now is no way material to these parties, as the court has decreed in favor of the respondents, on the merits. It may be desirable, however, that the views of the court on the point raised should be known, that the practice hereafter may conform to them.

After an examination of the authorities cited, in connection with rule 15, of the rules adopted by the supreme court of the United States, for the practice of the admiralty courts of the Union, I am satisfied that the joinder in the same libel of a proceeding in rem, against a ship, and in personam, against the owner, in an action for damage by collision, is not admissible. In one case, before Judge Story, prior to the adoption of the rules of the supreme court, he expressed himself strongly against the propriety of such a joinder.

The case referred to is Citizens' Bank v. Nantucket Steamboat Co. [Case No. 2,730]. In the opinion delivered by Judge Story in that case, he remarks: "In the course of the argument it has been intimated that in libels of this sort, the proceeding might be properly instituted, both in rem against the steamboat, and in personam against the owner and master thereof. I ventured at that time to say, that I knew of no principle or authority, in the general jurisprudence of courts of admiralty, which would justify such joinder of proceedings, so very different in their nature, and character, and decretal effect. On the contrary, in this court, every proceeding of this sort has been constantly discountenanced, as irregular and improper." Again, the judge says: "In cases of collision the injured party may proceed in rem or in personam, or successively in each way, until he has full satisfaction. But, I do not understand how the proceedings can be blended in one libel." The case referred to was before Judge Story in 1841. At the January term, 1845, the supreme court, in pursuance of express authority conferred by an act of congress, prescribed the rules of admiralty practice. Rule 15 is as follows: "In all suits for damages by collision, the libellants may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone, in personam."

There seems to be no room for doubt as to the true construction of this rule. It is understood these admiralty rules were drafted by Judge Story; and the rule above quoted, was designed to carry out his views of the correct practice, as very clearly stated in the foregoing extract from his opinion. The rule provides specifically how a party may be proceeded against for an injury by collision. It may be: (1) Against the ship and master. (2) Against the ship. (3) Against the owner alone. (4) Against the master alone, in personam. Clearly a proceeding in rem against the ship, and in personam against the owner, not being authorized by this rule, is prohibited.

The rule quoted was thus understood and construed by the late Judge Woodbury. In Leland v. The Medora [Case No. 8,237], in delivering the opinion of the court, he says: "The other objection is the misjoinder of the vessel and owners, in the same libel. This involves a proceeding in personam and in rem, in the same case, and contravenes the settled rules of admiralty proceedings." He refers to rule 15, before cited, and also the 17th rule, as sustaining his views. Judge Conkling, in his work on Admiralty (volume 2, p. 380 et seq.), after discussing the question, whether before the adoption of the rules of the supreme court, a proceeding in rem and in personam could be joined, holds, that the practice, if it was before allowable, is abolished by rule 15.

I see no reason to doubt the conclusion, that at least, in suits for collision, it was the intention of the supreme court to direct what proceedings were admissible; and in pointing out the course which they regarded as proper, to prohibit all others. The exception to the libel is therefore sustained, and the libellants have leave to amend.

[NOTE. On appeal to the circuit court, the decree entered in this case was reversed, and a decree entered equally dividing the damages be-

tween the parties. Case No. 17,151. From the latter decree, both parties appealed to the supreme court, by which the same was affirmed. 21 How. (62 U. S.) 572.]

Case No. 17,159.

WARD v. The PANAMA.

[See Case No. 10,703.]

WARD (ROBERTS v.). See Case No. 11,-918.

Case No. 17,160.

WARD v. SEABRING.

[4 Wash. C. C. 472.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1824.

PRACTICE IN EQUITY—SUBSTITUTED SERVICE.

In cases of injunctions to stay proceedings at law, and in cross suits in equity, and in no others, will the court direct service of the subpœna to be made on the attorney at law, or upon the adverse solicitor in the cross suit.

[Approved in Oglesby v. Attrill, 12 Fed. 228. Cited in Gregory v. Pike, 29 Fed. 590; Johnson Railroad Signal Co. v. Union Switch & Signal Co., 43 Fed. 332; The Eliza Lines, 61 Fed. 324.]

The plaintiff having filed a bill of discovery on the equity side of the court, in relation to a certain lot of ground, for the recovery of which an ejectment is now depending in this court, at the suit of the lessee of Seabring; the solicitor of the plaintiff in equity moved the court for an order, that service of the subpœna on the attorney of the plaintiff at law, should be considered as good service. The ground of the motion was, that the plaintiff at law resides at New York, and cannot be personally served with process in this district.

Mr. Wharton, for plaintiff in equity.

Mr. Meredith, for plaintiff at law and defendant in equity.

WASHINGTON, Circuit Justice. A motion similar to the present was made in this very case, at the October term, 1823 [see Case No. 17,161]; with no other difference, except that the bill, then filed, contained a prayer for an injunction, and consequently presented a case more favourable to the motion than the present bill does, which is strictly a bill of discovery. The court considering that as an injunction bill, granted the motion for an injunction on the common terms of confessing judgment and releasing errors; stating to the solicitor who made the motion, that if those terms were complied with, the order asked for would be made. The terms not being complied with, nothing further was done. I have only to repeat what was then said, that the order asked for has never been made by this court, except in cross causes, and injunction bills, to stay proceedings at law, and that this practice is in strict conformity with that of the English chancery, as is abundantly proved by the authorities then referred to. It is also supported by those relied upon by the counsel who made the present motion. 1 Har. Ch. Prac. 207, 208; 2 Madd. Ch. Prac. 198. But if the English practice went farther than that which this court has adopted, I should consider myself restrained from following it by the eleventh section of the judiciary act of 1789, which declares, "that no civil suit shall be brought before either of the said courts against an inhabitant of the United States by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Now, this court has never considered this section as applying to injunctions to stay proceedings at law, or to cross bills, because, strictly speaking, they are not original suits, nor are they within the meaning and policy of the restriction. Cooper, in his treatise of Pleading on the Equity Side of the Court of Chancery, page 44, speaks of bills not original, as being those which are filed for the purposes of cross litigation of matters already depending before the court, of controverting, suspending, avoiding, or carrying into execution a judgment of the court. And in page 45, he distinctly ranks cross bills with those which are not original. Maddock, in his treatise on the Chancery Practice, vol. 2, page 198, remarks, "that in case of an injunction bill for restraining an action at law, the attorney at law is the agent of the plaintiff at law to prosecute that suit, and the suit in equity is a defence to that suit, and therefore service on him is held good service." In short, the injunction spoken of when granted, particularly in the circuit courts of the United States, is nothing more than an order of the court on its equity side, to stay further proceedings on a judgment rendered on the other side, on the ground that it is contrary to equity and good conscience that it should be carried into execution. It bears, therefore, no resemblance to a strictly original suit. The practice of the court directing service of the subpœna on the attorney of the plaintiff at law in cases of injunctions, and on the solicitor of the plaintiff in the original suit where a cross bill is filed, is founded on the necessity of the case, the plaintiff in the action at law, and in the original suit in equity, in most cases residing out of the district in which the court sits, and there being no remedy for the party unless it is afforded by entertaining those suits and countenancing a service of the subpœna on the law agent of the non-resident party. For it is not competent for the chancery court of one district or state to enjoin the proceedings at law in the circuit court of another district, and it is obvious that a cross bill can be filed only in the court where the original bill is depending. In all cases of original bills, and a bill of discovery is strictly of that kind, relief may be obtained in the fed-

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

eral or state chancery courts of the state where the party against whom it is sought resides, and, consequently, there is no necessity for applying to those cases the practice which is adopted in injunction and cross bills, even if the eleventh section of the judiciary act were not in the way. It must always be kept in mind, that the injunction bills spoken of in this opinion are exclusively such as seek to restrain judgments at law in the same court. Motion overruled.

Case No. 17,161.

WARD v. SEABRY.

[4 Wash. C. C. 426.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1823.

PRACTICE IN EQUITY—SUBSTITUTED SERVICE.

Practice of the court in equity cases, in reference to the service of the subpœna issued to the defendant, or his attorney, on the record of a suit at law.

[Cited in Sawyer v. Gill, Case No. 12,399; Segee v. Thomas, Id. 12,633; Cortes Co. v. Thannhauser, 9 Fed. 228.]

Seabry brought an ejectment in this court against Ward, and is also plaintiff in an injunction bill to stay waste. The counsel for Ward, after stating that a bill of discovery was intended to be filed in reference to the land in controversy, moved that service of the subpœna upon the solicitor of Seabry, who resides in the state of New York, should be deemed sufficient.

Mr. Wharton, for the motion.

WASHINGTON, Circuit Justice, informed the counsel that the bill must be filed before the motion could be attended to.

The bill being afterwards filed, it charged the defendant with fraud in obtaining from the plaintiff a title to the land by introducing it with other property into a lease by the defendant to the plaintiff, without the plaintiff's knowledge, and praying that the deed might be delivered up to be cancelled, and for an injunction to stay proceedings at law. The motion was then renewed.

WASHINGTON, Circuit Justice. In Hitner v. Suckley [Case No. 6,543], the plaintiff in the ejectment and in the injunction to stay waste, moved that service of the subpœna on the attorney of Suckley, who was plaintiff in an action at law in this court for slandering his title to the land in dispute, should be deemed good service, Suckley living in some other of the states. This motion was refused. This subject was again brought to the consideration of this court in the case of Eckert v. Bauert [Case No. 4,266]. The court again refused the motion, and stated, in their opinion, that a motion of this kind had never prevailed in this court, except in cases of injunction bills to stay proceedings at law, and in cross causes. The practice of this court is in strict conformity with that of the English chancery court. 1 Newl. Ch. Prac. 65; 2 Madd. Ch. Prac. 327; 4 Brown, Ch. 478. The cases cited upon the present motion from 1 Har. Ch. Prac. (8th Ed.) 362, 363, are all cases of injunctions to stay proceedings at law. This is not strictly a cross cause, and has no one feature of a bill of discovery of facts in the defendant's knowledge, which may assist the plaintiff in his defence to the first cause. But it is an original bill, seeking relief, except so far as it asks an injunction to stay proceedings in the ejectment. If the injunction is granted, it must be upon the terms of the plaintiff confessing judgment in the ejectment, and releasing errors. If this is done, the court will grant the present motion. This being declined, the motion was overruled.

[Another motion to the same effect was subsequently made and overruled. See Case No. 17,160.]

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

WARD v. SEBRING. See Case No. 17,160.

WARD (SEBRING v.). See Case No. 12,598.

WARD (SPICER v.). See Case No. 13,241.

Case No. 17,162.

WARD v. THOMPSON.

[Newb. 95.] [1]

District Court, D. Michigan. 1856.

ADMIRALTY JURISDICTION — CONTRACT FOR RUNNING VESSEL—PARTNERSHIP—BAILMENT.

1. W. being owner of the steamboat Detroit, agreed with T. that he might run the boat during two sailing seasons. The boat was to be under the control of T. and he was to appoint all the officers and crew of the boat, except the clerk. The clerk was to be under the control of W. and to make reports to him of the receipts and expenditures of the boat. The receipts were to be applied, 1st, to the payment of the boat's expenses; 2d, to her insurance; 3d, to the payment of $6,000 to W., and the balance to be divided between W. and T. T. was to be allowed $300 per annum for his services as agent of the boat. *Held*, that although by this agreement the parties became partners after a certain event, in the profits of the business of the boat, they were not partners to such an extent as to oust the admiralty court of jurisdiction in a cause for the recovery of damages for a breach of the agreement.

[Cited in The Monte A., 12 Fed. 338.]

2. Where T. was to run the boat of W. for a fixed period, under a special agreement, by the terms of which the earnings of the boat were to be applied, 1st, to payment of the boat's expenses; 2d, her insurance; 3d, a given sum to W., the owner, and the balance to be divided between W. and T.,—*held*, that until the expenses, insurance money and the given sum to be paid to W. were realized, T. was but the bailee or agent of W.

3. At any stage of a proceeding in admiralty, until final hearing, the question of jurisdiction is open.

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

This was a libel in personam, promoted by Eber B. Ward, as survivor of himself and Samuel Ward, deceased. The libel alleged that in the month of June, 1852, the libelant and said Samuel Ward, being the owners of the steamboat Detroit, chartered said boat to the respondent, [Charles] Thompson, for two years, and delivered her to the defendant in good order and condition; that by the terms of the charter agreement the respondent was to run the boat between Pentanguishine and other ports on the Georgian Bay, on the east shore of Lake Huron, and Sault Ste. Marie, Michigan, as a passage and freight boat; that the respondent was to employ good, careful and competent officers and men on board the boat, except the clerk, who was to be employed by the Wards; that the clerk was to receive all the earnings of the boat, and after paying her expenses, to remit the first net $6,000 to the libelant, and also one-half of all her earnings above that sum. The libel then alleges that the respondent did not use said boat as he had agreed to do; that he employed her as a "trading boat," in consequence whereof, the libelants sustained damage to the amount of $1,000; that he did not employ good, careful and competent men on board of the boat, but the contrary; and that by the carelessness and incompetency of the men so employed, the boat's engine was damaged $500, and the boat set on fire and damaged $1,500, and that the respondent neglected to pay the boat's earnings to the clerk, but used them for his own private purposes, and neglected to account for large sums of money received by him from the Canadian government, on account of the boat, to the libelant's damage $1,000. To recover these damages the libel was filed. The answer denied that the respondent ever chartered the steamboat, as alleged by the libelant, as also, all and singular the allegations of damages set forth in the libel; and averred, that by virtue of the agreement referred to by the libelant, the respondent had entered into a copartnership with the Wards, touching the employment of the boat for the two years therein mentioned. The agreement was annexed to the answer, and a full statement thereof, so far as essential to the purposes of this case, is contained in the opinion of the court. The answer further averred, that in a suit at law which the respondent had prosecuted against the libelant in the court of queen's bench in Upper Canada, based upon said agreement, the libelant had insisted, by way of defence, that said agreement constituted him a copartner with the respondent; that the defence thus set up by the libelant, was sustained by the court of queen's bench; and that judgment was thereupon entered accordingly, which judgment has never been reversed or set aside. The respondent therefore insisted that the libelant was estopped from denying the copartnership, and that this court has no jurisdiction of the matters in controversy, the same not being properly cognizable in admiralty courts, but rather in the courts of common law and in equity. After the issue had thus been made up, a motion was made to dismiss the libel, on the question of jurisdiction raised by the answer. On the argument of this motion an exemplification of the record of the case in the court of queen's bench, referred to in the respondent's answer, together with a manuscript copy of the opinion of the court pronounced in the case, were presented and read. From these it appeared that the question of copartnership between the parties was not presented by the pleadings, and formed no part of the issue made in the case; but that upon a motion made by defendant's counsel to vacate the judgment, and grant a new trial in the cause, the agreement annexed to the respondent's answer in this suit was read, and it was insisted that this agreement constituted the parties copartners in the boat, and that inasmuch as the greater portion of the plaintiff's claim in that suit, was for earnings of the boat while employed under said agreement, the judgment which had been rendered was erroneous. Of the view taken by the Canadian court upon this motion, sufficient will be seen in the opinion of the court upon the question of jurisdiction raised in the present case.

Lothrop & Duffield, in support of the motion.

Towle, Hunt & Newberry, contra.

WILKINS, District Judge. A motion is made in this case to dismiss the libel for want of jurisdiction, on the ground that the article of agreement, for the breach of which the libelant seeks to recover damages, was a covenant of partnership.

The answer of the respondent sets forth the agreement, by which it appears, that the libelant and Samuel Ward, now deceased, were at the time of the execution of the agreement, the joint owners of the steamboat 'Detroit; and agreed "to allow the respondent to run the same between the Sault Ste. Marie and Pentanguishine, during the sailing seasons of 1852 and 1853—in a line with and under the control and management" of the respondent, who was authorized to appoint the officers and crew, with the exception of the clerk, who was placed under the control of the Wards, and was to make reports to them of the receipts and expenditures of the boat every two weeks. The receipts were to be applied, first, to the payment of all expenses for the crew, fuel, repairs and supplies; second, to the payment of the money advanced for insurance; third, to the payment of the sum of $6,000 to the Wards; and lastly, the sum remaining after these payments was to be equally divided between the parties to the contract; the respondent being allowed, out of the earnings of said boat, over and above the division last specified, the sum of "$300 per annum for his services as agent of the boat." Unquestionably this agreement constituted the Wards and the respondent partners in the profits of the business in which the

steamer was to be employed. Their interest in the profits or losses of the adventure was joint and of the same nature. But they were not joint owners of the boat, which was, by the express terms of the agreement, chartered to the respondent for the consideration of $6,000, which was to be paid to the Wards antecedent to any division of the profits. Until that sum was paid we think the partnership did not commence. This view accords with the opinion of Chief Justice Robinson, in the case of Thompson v. Ward, decided in the court of queen's bench of the province of Upper Canada. In that case, Thompson sought to recover from the Wards, freight and passage money earned by the Detroit "directly after she was chartered by the plaintiff" (Thompson), and to which the defendants (Wards) objected, setting forth this agreement. The court held, that Thompson could not recover this freight and passage money, because the Wards were entitled to it, not as partners, but as owners of the chartered vessel. Mr. Justice Robinson expressly saying, "that this money should go towards liquidating the $6,000, which would then accelerate the period when Thompson would be entitled to share with the Wards the earnings of the boat, and, in respect to all earned after that period, they would be partners." Such is the language of the opinion. Certainly, if this freight and passage money had been paid into the clerk's office by a third party, and Thompson could not recover it by suit against the clerk, the Wards could; and if so, the libelant can recover the same from Thompson as part of the consideration agreed to be paid for the charter of the boat. Until this money was realized by the Wards, to the extent specified by the third clause in the agreement, the fourth constituting them partners, could not operate, and until then, Thompson was but their bailee or agent.

With these views, the court deems it unnecessary to pass upon the proposition stated in the argument, that the construction of the agreement is res adjudicata. The records of the queen's bench, show that the question was not presented by the pleadings. It arose incidentally, on the statement of counsel, and a verdict was entered, with the understanding, that on the production of such an agreement as was stated, at a subsequent term, the verdict would be set aside, as to the amount for which credit was claimed. But, as on a careful consideration of the opinion of Chief Justice Robinson, I am not enabled to see wherein he pronounces the entire agreement between those parties a covenant of partnership, any further than as to the profits accruing subsequent to the payment of the $6,000, and concurring therein at present in such construction, it is unnecessary to announce any judgment of this court as to the estoppel of the proceeding here on the part of the libellant. In overruling the present motion I feel less reluctance than I should was this a final determination of the questions raised. The language employed by the contracting parties certainly rendered the instrument they executed somewhat equivocal. Their intention, though clear as to the "sharing of the earnings," upon a certain contingency, is somewhat obscure as to whether the writing should be considered as a charter party on specified stipulations, or as a covenant of copartnership. My mind is not free from doubt; but as no injustice can arise from the further prosecution of the cause and entertaining jurisdiction, the objections raised will be held under reservation. At any stage of the proceeding, until final hearing, the question of jurisdiction is open; and if, on further and more full consideration of the able argument of the proctor of the respondent, and the cases cited by him, I should see ground to change the opinion now expressed, the proceedings will at once be dismissed. As at present advised I must refuse the motion. Motion denied.

[The cause was subsequently heard on the merits, and a decree entered dismissing the libel. An appeal was taken to the circuit court, where the decree of this court was affirmed. Case unreported. Subsequently the libelant appealed to the supreme court, where the decree of the circuit court was affirmed, with costs. 22 How. (63 U. S.) 330.]

WARD (UNITED STATES v.). See Case No. 16,639.

Case No. 17,163.

WARD v. WASHINGTON.

[4 Cranch, C. C. 232.] [1]

Circuit Court, District of Columbia. May Term, 1832.

MUNICIPAL CORPORATIONS — LICENSE OF BRICK-KILNS—NUISANCES—APPEAL FROM JUSTICE'S JUDGMENT—COSTS.

1. Under the by-law of the corporation of Washington, D. C., of the 14th of August, 1819, no person or officer was authorized to grant a license to erect or use a brick-kiln in that city.

2. The continued use of a brick-kiln without license is a single offence, the penalty of which is, by the by-law, to be measured by the number of weeks it is used; and all the weeks elapsed before prosecution, must be included in that prosecution. But the by-law is so imperfect that it will not sustain a prosecution in any form.

3. It is in the discretion of the court to allow or refuse costs upon the reversal of the judgment of a justice of the peace.

[Cited in Dixon v. Washington, Case No. 3,935.]

4. Under the power to prevent nuisances, and to superintend the health of the city, the corporation had a right to prohibit the erection and use of brick kilns without a license.

This was an appeal [by Ulysses Ward] from the judgment of Robert Clarke, Esq., a justice of the peace for the county of Washington, who had rendered judgments in favor of the corporation upon five separate warrants, for the penalty of ten dollars in each case, for using a brickkiln without license for

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

five successive weeks. The warrants were all issued on the 9th of August, 1831. These penalties were claimed under the third section of the by-law of the 14th of August, 1819.

Mr. Fendall, for defendant, contended that the corporation had no right to prevent a man from making bricks, unless in such a situation as to be a nuisance. It is not a nuisance per se.

R. S. Coxe, for plaintiff, claimed the right to require a previous license under the power to lay and collect taxes, and to superintend the health of the city.

Mr. Fendall, in reply, to show that the corporation can exercise no power not expressly given, or not necessary to the exercise of powers expressly given, or in derogation of the general law of the land, cited 1 Bac. Abr. tit. "By-Law," 544; Kirk v. Nowill, 1 Term R. 124; Head v. Providence Ins. Co., 2 Cranch [6 U. S.] 169; and the charters of 1802, 1804, and 1812.

THE COURT (MORSELL, Circuit Judge, doubting) was of opinion that the corporation had a right to pass such a by-law, under the power to prevent nuisances, and to superintend the health of the city; but reversed the judgments upon the ground stated in the following opinion, delivered by CRANCH, Chief Judge (nem. con.):

On the 9th of August, 1831, five warrants were issued by Robert Clarke, Esq., against Ulysses Ward, at the suit of the mayor, board of aldermen, and board of common council of the city of Washington, for a penalty of $10 in each case, "for that he the said U. W. did erect and use a brickkiln in the city of Washington, at the county aforesaid, one week, from 1st to the 8th day—July in — year of 1831, without first obtaining a license from the mayor of the said city, contrary to the act or acts of the said mayor, &c., on that subject made and provided." Each warrant was in the same form, for each of the four successive weeks, ending on the 5th of August, 1831, and all dated on the same 9th of August, 1831. They were all tried before the same justice on the 18th of August, and a judgment was rendered in each case for the plaintiff. From these judgments the defendant appeals. The by-law of the corporation upon which these warrants were founded, was passed on the 14th of August, 1819. The first section repeals all the previous "acts of this corporation providing for the issuing licenses for erecting or using of slaughter-houses, and brick and lime kilns." The second section enacts, "that any person who shall erect or use a slaughter-house, without first obtaining a license from the mayor therefor," &c., "shall, for each offence, forfeit and pay, on conviction, the sum of $10," &c. The third section does not make any provision for granting licenses for brick or lime kilns, by any officer, but prohibits them from being granted for more than a year, and enacts, "that any person who shall, without such license, erect or use a brick or lime kiln, shall incur a penalty of $10 for every week he continues to use the same without license." There being no officer authorized to grant a license, it was impossible for the defendant to obtain one; and the by-law, therefore, in effect amounted to a total prohibition of the erection or use of a brick or lime kiln in any part of the world; for it is not, in its terms, limited to the city of Washington. Such an act would be void for want of power in the corporation. But if the by-laws were in force, and if the mayor had authority to grant a license for a brickkiln, yet the using of a brickkiln is a single offence, the penalty of which is to be measured by the number of weeks it was used; so that all the weeks which elapsed before the prosecution, should have been included in one prosecution. The offence cannot be divided into several parts, according to the number of weeks during which the defendant continued to use the kiln. The use had been continued for five weeks, before the commencement of these five prosecutions, which were all commenced on the 9th of August, 1831. If there could be judgment at all, it could be only in one of them. But the by-law is so imperfect, that we think it will not support a prosecution in any form. We are, therefore, of opinion, that the judgments in these five cases should be reversed; and that in the other two cases in which the judgment of the justice was in favor of the defendant, the judgments should be affirmed with costs.

Mr. Fendall, for defendant, then prayed the court that the judgment upon the reversal should be with costs, and cited Montalet v. Murray, 4 Cranch [8 U. S.] 47; McIver v. Wharton, 9 Wheat. [22 U. S.] 650; Law Md. 1785, c. 80, § 6; Clerk v. Harwood, 3 Dall. [3 U. S.] 342; 12 East, 768.

Mr. Coxe, contra, cited Mr. Justice Baldwin's opinion in 5 Pet. [30 U. S.] 724.

At a subsequent term in 1835, THE COURT ordered the reversal to be with costs; the cause having been continued under curia advisare vult.

WARD (WOOD v.). See Cases Nos. 17,965 and 17,966.

WARD, The AGNES H. See Case No. 99.

WARD, The JOANNA. See Case No. 7,328.

Case No. 17,164.

WARDELL v. UNION PAC. R. CO. et al.

[4 Dill. 330;[1] 5 Cent. Law J. 527.]

Circuit Court, D. Nebraska. 1877.[2]

FRAUDULENT CONTRACT MADE BY OFFICERS OF A CORPORATION—CREDIT MOBILIER.

1. A contract made on behalf of a corporation by the executive committee of the board of di-

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

[2] [Affirmed in 103 U. S. 651.]

rectors with a third person, in which the members of the executive committee have a secret interest, is fraudulent as against the corporation, and the corporation may repudiate it, although it may have been long acted upon and recognized by the officers of the corporation who made it.

[Cited in Bill v. W. U. Tel. Co., 16 Fed. 16.]

[Cited in Higgins v. Lansingh, 154 Ill. 305, 40 N. E. 380. Cited in brief in Dunphy v. Traveller Newspaper Ass'n (Mass.) 16 N. E. 429.]

2. Accordingly, a contract made by the Union Pacific Railroad Company with a person who afterwards organized with others and formed a corporation called the Wyoming Coal and Mining Company, by which the former company conveyed the right to prospect for coal upon its line to the latter for fifteen years, agreeing to purchase coal needed for its use for the said term, from the latter, at prices named in the contract, was set aside on the ground of fraud, the officers of the Union Pacific Railroad being shown to have been jointly interested with the other party to the contract.

[Cited in U. S. v. Union Pac. R. Co., 98 U. S. 610; Thomas v. Brownville, Ft. K. & P. Ry. Co., 2 Fed. 878; Id., 109 U. S. 524, 3 Sup. Ct. 317, 318; Jackson v. McLean, 36 Fed. 216.]

3. After such a contract had been acted on for some years, the railroad company, on a change of management, having become the owner of nine-tenths of the stock of the coal company, forcibly took possession of the property of the latter company. On a bill filed by the owner of the one-tenth of the stock (he being the person with whom the fraudulent contract was made), the court decreed the contract to be fraudulent, and laid down the principles on which an accounting should be had between him and the railroad company.

This case is submitted to the court for final decree, on the bill and amended bill, the answers, replication, and evidence. The allegations of the plaintiff's bill, about which there is really no dispute, are that, on or about the 16th day of July, 1868, he and Cyrus O. Godfrey entered into a contract, in writing, with the Union Pacific Railroad Company, concerning the mining of coal in the lands of that company. This contract is made an exhibit of the bill, and reads as follows: "This agreement, made this 16th day of July, in the year of our Lord one thousand eight hundred and sixty-eight, between the Union Pacific Railway, by its officers, of the first part, and Cyrus O. Godfrey and Thomas Wardell, of the state of Missouri, or assigns, parties of the second part, witnesseth: That the said party of the first part agrees that the said parties of the second part may prospect, at their own expense, for coal on the whole line of the Union Pacific Railway, and its branches and extensions, and open and operate any mines discovered, at their own expense; that said railroad company agrees to purchase of said parties of the second part all clean, merchantable coal mined along its road, needed for engines, depots, shops, and other purposes of the company, and to pay for the same—the first two years at the rate of six dollars per ton, for the next three years at five dollars per ton, for the four years thereafter at four dollars per ton, and for the six years remaining at the rate of three dollars per ton—delivered upon the cars at the mines of the said parties of the second part, and which shall not be less than ten per cent. added to the cost of the same to the said parties of the second part. This contract to be and remain in full force and effect for the full term of fifteen years from the date hereof. The said railroad company agrees to facilitate the operations of the said parties of the second part, in prospecting and otherwise, by means of such information as it may possess, and by furnishing free passes on its road to the agents of the parties of the second part, not exceeding six in number. Said railroad company further agrees to put in switches and the necessary side tracks, at such points as may be mutually agreed upon, for the accommodation of the business of the said parties of the second part; that the said parties of the second part agree to make all necessary exertions to increase the demand and consumption of coal by outside parties along the line of said railroad, and to open and operate mines at such points, where coal may be discovered, as may be desired by said railroad company, and to expend within the first five years from the date of this agreement, in the purchase and development of mines and mining lands, and in improvements for the opening, successful and economical working of the same, not less than twenty thousand dollars; also to furnish for the use of said railroad company good, merchantable coal, and to pay all expenses for improvements for loading coal into cars. Any improvement desired by said railroad company, in regard to the coal to be used by it, shall be at the cost of said railroad company. In consideration of their exertions to increase the demand for coal, and the large sum to be expended in improvements, it is further agreed that the parties of the second part shall have the right to transport over said railroad and its branches, for the next fifteen years from the date of this agreement, coal for general consumption, at the same freight that will be charged to others; but the said parties of the second part shall be entitled, in consideration of services to be rendered as herein provided, to a drawback of twenty-five per cent. on all sums charged for transportation of coal. The said railroad company agrees to furnish the parties of the second part such cars as they may require in the operation of their business, and to transport them as promptly as possible. This agreement to remain in force for fifteen years. The coal lands owned by said party of the first part are hereby leased for the full term of fifteen years to the said parties of the second part, or their assigns, for the purpose of working the same as may seem to them profitable; said parties of the second part to pay, for the first nine years, a royalty of twenty-five cents per ton for each ton of coal taken from their lands, excepting always coal taken from entries, air courses, or passage-ways, for which coal no royalty shall be paid; payments for the same being due and

payable monthly. The royalty for the last six years of this lease shall be free, provided the price of coal to the railway is reduced to three dollars per ton. If three dollars and twenty-five cents or more per ton, then, in that case, the royalty shall be as during the first nine years. In witness whereof, we have hereunto set our hands and seals, this, the day and year first above mentioned. (Signed.) Oliver Ames, President of the Union Pacific Railroad Company. Thomas Wardell."

The bill then alleges that, a few months after this, Godfrey assigned to Wardell his interest in the contract, and, after that, divers persons, with himself, organized, under the laws of Nebraska, a corporation called the Wyoming Coal and Mining Company, to which corporation he assigned the coal contract. Plaintiff alleges that, before this organization was effected, he had discovered and opened mines, and was in the profitable fulfillment of his part of contract by delivery of coal to the railroad company; and that, after the organization of this company and up to the 13th of March, 1874, he, as the superintendent, secretary, and general manager of the coal company, had successfully operated these mines, and had delivered all the coal needed by the railroad company, and that this latter company was at that date largely indebted to the former; that on that day the officers or agents of the railroad company, under a resolution of its board of directors, took forcible possession of the mines, books, papers, implements, tools, and personal property of the coal company, and have held and used them ever since; that the president and a majority, if not all, the directors and stockholders of the coal company, except himself, being also stockholders and directors in the railroad company, he can obtain no relief by any action of the coal company against the railroad company, and he prays the court for such relief. There are many other allegations which are denied, and about which there is conflicting testimony —such as the extent and nature of plaintiff's interest in the original contract, and also in the coal company; but the making of the original contract, the assignment of Godfrey's interest in it, the subsequent formation of the coal company, the assignment of the contract to that company, and the taking possession of its effects by the railroad company, are established facts in the case.

The answer of the Union Pacific Railroad Company says that the aforementioned contract was a fraud upon that corporation; that it was made, on the part of the railroad company, by the executive committee of the board of directors, the whole or a majority of whom were, by agreement with Godfrey and Wardell, to be jointly interested with them in the contract; that the terms of it were, for that reason, made so favorable to Godfrey and Wardell, and so unfavorable to the railroad company, as to enable the former to defraud the latter out of millions of dollars; that the organization of the Wyoming Coal and Mining Company was a device to enable the directors of the railroad company to participate in the profits, and had been agreed upon between themselves and Godfrey and Wardell, before the contract with them was executed. They, therefore, deny its validity, and its binding obligation on the company, whether in the hands of Wardell, or of the Wyoming Coal Company. As regards the taking forcible possession of the property of the coal company, they say that the railroad company had, by the assignment of the other stockholders than Wardell, become the owner of nine-tenths of the stock of the coal company; that differences arising between the railroad company and Wardell, who, as superintendent of the coal company, had control of its affairs, and being wholly dependent for fuel to run their trains on the supply furnished by that company, and fearing a suspension by Wardell of that supply, they were compelled, in self-defence, to take control of the property, of which they were the owners in the proportion of nine to one. They further allege that, after this, the railroad company and the coal company, by their several boards of directors, had a settlement of their transactions, by which the contract with Wardell and Godfrey was rescinded, and an indebtedness of the railroad company to the coal company of a million of dollars was agreed upon as a full settlement of all transactions between them; that both the coal company and the railroad company set apart and tendered to Wardell $100,000 for his share in the coal company, under that settlement. A general replication put all these allegations in issue.

J. M. Woolworth, for complainant.

A. J. Poppleton and E. Wakely, for defendants.

Before MILLER, Circuit Justice, and DUNDY, District Judge.

MILLER, Circuit Justice. This cause has been submitted for final decree on the pleadings and proofs. We have been aided by a full oral argument, which has been reproduced in print.

1. The first and most important inquiry is, whether the charge of fraud upon the Union Pacific Railroad Company (the principal defendant) in the inception of the contract of the 16th of July, 1868, is sustained by the proof.

After the fullest examination of the testimony, and the maturest consideration of the very fully printed arguments submitted to me during the summer vacation, I have reluctantly arrived at the clear conviction that it was a gross fraud upon that corporation and upon its shareholders, who were not interested in the contract.

The parties, on behalf of the railroad company, or rather the authority by which it was bound, was the executive committee of the board of directors of the company, and not the board itself. This committee was composed of a limited number of the directors, including the president. A majority of this committee, and those who are found to have been its controlling members, were interested in this con-

tract when it was made. They were, therefore, making a contract on behalf of the railroad company, with themselves, in a matter in which their interest was wholly adverse to the company, and on their own side. Such a contract is void upon the clearest principles of public policy. The corporation is represented by an agent who controls both sides of the contract, and whose interest is in every way against his principal and in his own favor. All the selfishness of human nature is brought into play to secure terms most favorable to the party who acts for both parties, himself being one of them. While the glaring evil of this thing may be obscured by using the name of the corporation as one party, and that of individuals having no connection with the corporation as the other party, the danger that selfish greed will make with the agents of the corporation a contract of which they will reap the advantage and in which the corporation will suffer all the losses, is only increased by the fact that the names of the parties really interested do not appear in the transaction.

The fraudulent character of this contract is not lessened by an inspection of its terms, or the evidence of its actual operation. It gave up the control of all the coal lands of the company for fifteen years. It bound them for that time to purchase all the fuel for a railroad of over a thousand miles from this company. It fixed the price to be paid at rates which, if the coal could be obtained at all in these lands, would amount to a fabulous profit. And it exacted no security from Godfrey and Wardell, who were men of limited means, for the performance of their contract to expend a considerable sum of money in seeking for and developing the coal mines.

We accordingly find that Mr. Wardell now claims, after a few years' operation under that contract, in which he has been repaid all his actual outlays with large profits, that the company organized under it was, when seized by the railroad company, possessed of property and rights of the value of two or two and a half millions of dollars. What was given for this? Nothing. It was made, if it existed at all, out of the property and the necessities of the railroad company, by means of the betrayal of its rights in that contract.

On the part of complainant, it is scarcely denied that the part taken by the executive committee and by Godfrey in this transaction was very reprehensible. But a vigorous effort is made to show that Wardell is innocent of anything wrong. The argument is that though Wardell was in the same building or suite of rooms occupied by the railroad company, or its executive committee, while the negotiations were going on which preceded the execution of the contract, he was kept in actual ignorance that any of the executive committee were to have an interest in it, until after it was signed. And Wardell testifies that he was kept in an outer chamber while Godfrey was taken into the sanctum where the chief priests of the fraud were consulted; and that he knew nothing of the interest which those men had or were to have in the contract until it was all over.

If this were true, it would be difficult to see how he can escape responsibility for their acts and the knowledge of his partner. If he chose to entrust that partner with negotiation of the contract, while he sat twirling his thumbs within ear-shot of what was going on, he must be bound by the result when he accepted and signed the agreement. To meet the force of this objection, it is urged in argument that the contract was made and completed on the 15th, and that nothing was said, even to Godfrey, of the interest of those members of the executive committee in it, until the 16th.

But for the zeal which the very able counsel for complainant has brought to the aid of this argument, I should feel inclined to give it but little consideration. In the first place, the contract bears date on this day—the 16th. It must, therefore, be prima facie held to have been made on that day. Next, while Mr. Wardell admits that on that day he did learn and consent to the arrangement by which all but one-tenth, or at most two-tenths, of the interest in that contract was to be divided among certain members of the executive committee, it is hard to perceive how the fact that he learned and consented to this on that day mitigated its flagitious character. And, lastly, it appears that neither Wardell nor Godfrey took possession of the written instrument, but that it was left, with their consent, in the hands of the clerk of the construction company, or credit mobilier, whose history has been so much ventilated since. Wardell stands alone in his version of this part of the transaction, and he is directly contradicted by Godfrey, who, when testifying, had no interest in the matter.

It is not necessary to refer to all the testimony on this subject. It leaves in my mind no doubt that both Wardell and Godfrey knew they were getting a more advantageous contract from the railroad company by reason of the interest which the officers of that company were to have in it, and that such was their purpose and expectation from the beginning.

An attempt is made to negative the fraudulent character of the contract by the testimony of the members of the executive committee, to the effect that all they did was in the interest of the railroad company, and that they always intended to hold their interest in that contract in trust for the company. But I am satisfied that this is an afterthought, born of the odium of the credit mobilier explosion, and not at all established by the fact that after all had been discovered and difficulty with Wardell became imminent, they made a declaration of trust in favor of the company.

Nor do I see that the fact so much insisted on, if it were proved, that the Wyoming Coal Company scheme, or the scheme of any corporation by which the interests of the members of the executive committee in the contract might be realized and identified, was one conceived sometime after the contract was made, instead of before, is material. It is true that

the answer avers that it was agreed on at the time the contract was made, and that this is not very clearly established. But whether that interest was to remain a secret trust in the contract in the hands of Godfrey and Wardell, or a recognized interest in a corporation founded on that contract, can make no difference in the fraud on which it was founded. It is the same contract, obtained by the same means, and controlled in its inception by the same parties, in the one case as in the other. Nor is there anything in the subsequent history of the transactions between the parties to remove the vice which attaches to that contract by reason of the fraud. The same men who made the contract on the part of the railroad company remained in its directory and had control of its affairs until about the time the rupture with Wardell took place. As soon as a new set of men, with Mr. Jay Gould at their head, obtained control of the corporation, they began to take measures to get rid of the contract. It is idle to say that the men by whose fraud the contract was executed, could, by their recognition of it afterwards, make it obligatory on the company, or estop it from setting up the fraud when it is made the foundation of a suit. It may be that the company cannot recover back money paid under that contract, but it seems very clear that it cannot be made to pay any more in compliance with its terms, by the action of a court of equity.

By what rule, then, shall we measure Mr. Wardell's rights? He has spent time and labor and money in discovering these mines, and in placing them in condition to be profitably worked. There has been accumulated in his hands, or in the hands of the Wyoming Coal Company, property of considerable value, which was taken possession of by the railroad company, and is still retained by it. Apart from the contract, and if it had never existed, he is entitled to a fair and reasonable compensation for his labor and time and skill. The fraud gives the railroad company no right to these without just compensation. This, however, cannot be measured by the profits of the mining as fixed by the prices of the contract, or the prices subsequently fixed between the two companies, for the mines were and are the mines of the railroad company, the coal was and is their coal, and the profits are their profits, except so far as Mr. Wardell's labor, skill, and any money actually advanced by him in the progress of the business, might authorize him to claim a share of those profits.

I am of opinion that, whatever moral excuse for the seizure of the property of the coal company by the railroad company may be found in the existing circumstances, the act was unwarranted in law. Nor do I think that Wardell can be bound by a settlement made by the directors of the two companies, for the same reason that his contract is not valid, namely, that both interests were practically represented by the same parties, and both were hostile to him. But, while there is here no defence of the company against Wardell, the extent of his remedy remains to be considered. The contract cannot be restored, for it never had a valid existence. The mines must remain under the control of the railroad company, for the possession of Wardell and the coal company was a fraudulent one. The transactions of the past cannot be measured by the prices of that contract, for the same reason. The two companies have made a nominal or formal settlement of this question, which binds them, and they offered Mr. Wardell his share—all that, I think, as a member of the coal company, he is entitled to.

I have grave doubts, with the views which I entertain as to the principles on which an accounting should be had, whether he can get any more. I am inclined to give him a decree for the one hundred thousand dollars which has thus been offered to him, without interest to the date of the decree, each party to pay his own costs. But if he insists upon a reference to a master for an accounting, he can have such an order, the account to be taken on the basis of a fair compensation for his time, skill, and services while engaged in the business, with a return of his money actually invested, and compensation for its use—the sum thus ascertained to be credited with what he has actually received, during the time, out of the business. If plaintiff accepts the former alternative, let a decree be entered accordingly. If he claims the latter, and it becomes necessary, I will consider a written or printed argument as to the basis of the reference.

Decree accordingly.

[Upon an appeal to the supreme court, the decree of this court was affirmed. 103 U. S. 651.]

Case No. 17,165.

WARDER et al. v. LA BELLE CREOLE.

[1 Pet. Adm. 31.][1]

District Court, D. Pennsylvania. 1792.

SALVAGE—DERELICT—ABANDONMENT—WHO MAY ABANDON—COMPENSATION—DEVIATION.

[1. The cases of dereliction, in which the doctrine that things abandoned become the property of the first occupant is founded, generally run on the principle of a voluntary abandonment by the owner with his free consent, and not on such a relinquishment as force, necessity, or danger compel.]

[2. The owner alone can make such an abandonment. The master cannot do so, even by an express consent to give the goods to the salvors.]

[3. The promises of the master in respect to the quantum of salvage are not to be regarded, when made in time of distress, but the reward must be measured according to circumstances.]

[4. Ships forsaken through fear of enemies or loss of life are not legally derelict, so as to warrant full right by occupancy.]

[5. Delays for saving ships, goods, or mariners, producing uncommon risks, are deviations which are not excused, under policies of insurance as generally made, and the increased risk incurred by the owner is to be considered in determining the question of salvage.]

[6. The principle of salvage compensation is not confined to mere quantum meruit, as to

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

the persons saving, but is expanded so as to comprehend a reward for the risks of life and property, labor and danger, as well as a premium operating as an inducement to similar exertions.]

[Cited in Clayton v. The Harmony, Case No. 2,871; Brevoor v. The Fair American, Id. 1,847; Coulon v. The Neptune, Id. 3,273. Approved in Bond v. The Cora, Id. 1,621; Hand v. The Elvira, Id. 6,015. Cited in The Dupuy de Lome, 55 Fed. 95.]

[7. Salvage also varies according to the description and value of articles saved. On plate, jewels, and money, it is the least, and on other articles according to circumstances.]

[8. The ship Amiable encountered the French ship La Belle Creole at sea, in a perishing and hopeless condition, and remained by her at some risk, and with considerable delay; taking out the officers and crew, part of the ship's furniture, wares, and merchandise, and also some plate and money. *Held*, that the salvors should be awarded one-third the gross proceeds of the goods, wares, and merchandise, and one-eighth of the appraised value of the plate and money.]

[Followed in Taylor v. The Cato, Case No. 13,786. Cited in Markham v. Simpson, 22 Fed. 745.]

PETERS, District Judge. The state of the case will appear in the libel, and the testimony and exhibits in this cause.[1] The testimony, though in some points contradictory, and in many irrelevant, will shew, from a general view of it, the leading facts. I have, in addition thereto, examined the log-books of both ships, and find by the state of the winds and weather, as therein mentioned, that the Amiable was retarded in her passage, by the circumstances related in the libel; though, for some time during her stay with the Belle Creole, the winds were adverse. The distressed and hopeless condition of the Belle Creole, is described in her log-book, in the great points nearly according with the testimony. This log-book confirms, in many important points, the testimony on the part of the libellants, contradicts, in some instances, and supplies in others, facts omitted by the witnesses for the claimants and respondents. I do not find that the Amiable was in any real, though, like all vessels loitering on a coast, she was exposed to possible, danger, and unnecessarily protracted risque.

There have been three points made in this cause: 1st. Dereliction, and a claim of the whole under words used by the captain, said to amount to an express abandonment; and, from the circumstances of the case, a dereliction by implication. 2d. That the delay of the Amiable, while attending on, and giving assistance to, and saving the goods out of, the Belle Creole, was a deviation which exposed to risque, out of the common course of the voyage, and would have forfeited any insurance which might have been made on the vessel and cargo, or either of them. 3d. The quantum of salvage, if the first point should be determined against the libellants.

On the first point I have translated an authority out of Burlemaqui, which contains what I believe to be an accurate account of the ideas of the best writers on the subject of dereliction, and occupancy, consequential upon it: "One may acquire, by the right of the first occupant, things which the proprietor has abandoned with a design never more to hold them as his own. Although one is not in possession of a thing, the right of recovery is not lost, unless it is renounced in a manner either express or implied. Hence the injustice of those countries which confiscate the property of goods shipwrecked, thrown overboard to lighten the vessel, or stolen, in place of returning them to the owners." The cases of dereliction, in which the maxim of "Occupantis fiunt derelicta" is founded, generally run on the principle of a voluntary abandonment by the owner, with his free consent; and not on such a relinquishment as force, necessity, or danger, compel. The instances of wreck, or goods thrown overboard to lighten the vessel, may be given to elucidate this doctrine; and these are always recoverable, on payment or tender of salvage. It should seem that little prospect of recovery existed in the case of goods ejected, to lighten and save the ship; yet the right of recovery is not lost; but, on proof of property, they are recoverable, on payment, or tender of salvage, if either driven on shore, or taken flotsam or jetsam. If the evidence in this cause, supported (and I think it does not) the captain's consent to give the goods to the libellants, I do not consider it as binding on the owners; and, according to the authority from Burlemaqui, (and many others) it must be the owner who abandons. The captain is vested with certain powers, both express and implied, over the ship and goods, for certain purposes beneficial to the owner; such as the power of hypothecation—of compounding for part, to save the rest—detaining for freight—throwing over part to preserve the residue—but herein he has a qualified and not an absolute propriety. He may act, under the limited rights with which he is thus invested for the benefit of the owner, but cannot totally divest him of all the right, and transfer it, without special authority, even for a valuable consideration. He is inhibited, by the marine laws, to sell (though he may pledge) the tackle, or furniture saved from shipwreck, though necessary for the subsistance or payment of himself and crew: nor, even in cases of the quantum of salvage, should promises made by the master, in time of distress, be regarded; but the reward must be measured according to circumstances. Much less to be valued are the expressions he makes use of, tending to shew a dereliction, or abandonment of the property. I cannot, therefore, be of opinion that, in this case, there is an express dereliction, in the legal interpretation of the word. As to the implied dereliction, there are no circumstances to prove it, but those which generally accompany such unfortunate cases. If these were to be taken as proofs of abandonment, on which the right of occupancy would attach, there would be an

[1] [See note at end of case.]

end to all enquiries relating to salvage, in instances of ships or goods forsaken. But the law is otherwise; and the ship, though forsaken, through fear of enemies, or to save the lives of the people, is not legally derelict, or even wreck or lost. I shall therefore dismiss, as untenable, the first point made in this cause, with the supplemental libel on which it arises.

As to the second point, which respects the quantum of salvage, and tends to shew the risque incurred, by the assistance given to the master and crew of the Belle Creole, to wit, the deviation, I should, in a case which I was under the necessity of determining, consider it as such. I am persuaded that the delay of the Amiable exposed her to uncommon danger: and, as it was not necessary, in the course of the voyage, for any purposes which insurers might have had in view, but was merely produced by the circumstances stated in the libel, it would, I think, have availed, in case of loss, to repel a claim of insurance. And the principle is the same, as to all consequences necessary to be considered in this cause, whether the owner remained his own insurer, or threw the risque on others, by a policy descriptive of the voyage. A deviation is not merely the unnecessary going out of the track, or course usually taken, but it is also a departure from either the express or implied terms of the contract. It needs not much reasoning or discussion to shew that delays for saving of ships, goods or mariners, producing uncommon risque, cannot be legal excuses on the part of the insured on policies as they are generally made. Such delays being breaches of the implied terms of the contract, by exposing to hazards not originally counted upon, foreseen, or in the contemplation of the parties. They are justified to the heart, though not (in this respect) to the law, on principles of humanity, commendable in themselves, expected from all, and particularly from those who are exposed to similar misfortunes. Ships with letters of marque may chase an enemy, but cruising after prizes incurs deviation. But, without entering into many particular references to cases or instances, it appears to me that all excuses for leaving the course, or delays must be from necessity; and not with a view to lucrative objects. Putting into port by stress of weather—to stop a leak—obtain provisions, &c.—going out of the track to avoid an enemy—for convoy or other purposes—for the safety of the ship or goods, being beneficial to the insurers, are justifiable. But it is different in the case of cruizing for prizes, and cases of a similar nature, which might be mentioned; and none of them appear to me stronger than the one in question.

On the third point I have taken into consideration all the circumstances of the case, and the law respecting it, so far as I can perceive it applicable. With respect to goods and merchandize, I can find no decided rules as to the proportion of salvage; those of the maritime laws, which have made any designations of proportions, varying from each other, and giving from a twentieth to a half, according to the description and value of the articles saved, and the risk, labour, and expense of salvage. On plate, jewels and money, the salvage is the least; and on articles of other descriptions, according to circumstances. I find, however, that the former articles are not exempted, either from average, contributions, or salvage. The general principle is not confined to mere quantum meruit, as to the person saving; but is expanded, so as to comprehend a reward for the risk of life and property, labour and danger, in the undertaking, as well as a premium operating as an inducement to similar exertions. It is laid down as a principle both of justice and policy, that "he who has recovered the property of another from imminent danger, by great labour, or perhaps at the hazard of his life, should be rewarded by him who has been so materially benefitted by that labour."

I consider, in the case in question, the property risked by the owners of the ship Amiable combined with the danger to which her officers and crew were exposed in the enterprise; and, though I do not depreciate the exertions of the officers and crew of La Belle Creole, yet all these exertions would have been useless, unnecessary, and impracticable, if the Amiable had not been present and exposed in the undertaking to risk, and her officers and crew to danger. The labour and difficulty, too, exercised and experienced by the latter, were considerable, and unremitted. The season of the year, and the place where the transaction happened, exposed the Amiable and her cargo to extraordinary hazard. With respect to the proportion of salvage, all circumstances taken into view, I have, in the general, been guided by what I consider just in the present case, as well as politic in all cases. Combining both these circumstances together, I cannot have a better guide, nor one which ought to be more satisfactory to one of the parties in this cause at least, than the 17th article of book 4, c. 19, of the Marine Ordinances of France, on the subject of wreck, which I have translated: "If the effects, however wrecked, are found on the sea, or drawn from its bottom, the third part thereof shall be immediately delivered, without expense, either specifically or in money, to those who have saved them, and the two other thirds shall be kept to be delivered to the owners, if they shall claim them within the time above mentioned; after which they shall be equally divided between us and the admiral, the costs of prosecution being previously deducted from the two thirds." Although I do not exactly follow, yet I have as nearly accommodated my determination to, this ordinance, as I think right. I do therefore adjudge, order and decree, that the libellants in this cause, to wit, the owner or owu-

ers of the ship Amiable, and the master, first and second mate, the carpenter, and crew (including boys and cook) of the said ship, have and receive, in full satisfaction, for and as salvage, the one third part of the gross amount of the sales of the goods, wares and merchandize, as mentioned in the account of sales rendered by the marshal of the district, free and clear of all expenses, costs, duties and charges whatsoever; and also the one eighth part of the appraised value and amount of the plate and money mentioned in the inventory, No. 2, to be divided among the said owner, or owners, master, mates, carpenter and crew, in the following proportions, to wit:

Three fourth parts thereof shall be received and taken by Jeremiah Warder or the owner or owners of the ship Amiable, for his and their sole and separate use and property. That the remaining fourth part of the said salvage (which, though less than is common in a case of prize in war, is, I think, with their wages, sufficient; as the danger of conflict did not exist, which as to prizes adds to the risk, and increases the reward) shall be divided to and among the officers and crew of the said ship, in manner following, to wit, the said fourth part shall be divided into twenty-six equal shares or parts, whereof

	Shares
The captain shall and is hereby directed to receive	8
The chief mate	4
The second mate	3
The carpenter	2
And each mariner and the cook one share	8
Each boy half a share	1
Amounting in the whole to	26

That the plate and money shall be restored to Captain Davor, for the use of himself and those of the French officers and crew of La Belle Creole, to whom the articles therein contained respectively belong, on payment of the proportion of the appraised value thereof, herein before decreed for salvage. That the whole amount of the proceeds of the sales, of the goods and merchandize, as mentioned in the marshal's return, and account of sales, together with the salvage decreed on the plate and money, be brought into court; and, after paying thereout the one third of the amount of the former, and the salvage as aforesaid on the latter, the other two remaining thirds shall be subject to the following expenses and payments, which are hereby directed to be discharged and made forthwith.

The costs accrued, and to accrue, in this cause, shall be fully paid and discharged, and all expenses incurred in the storage, and on the sale of the whole, as they shall be examined and taxed; and all duties and customs therein legally chargeable, and charged, shall also be paid thereout. After all the said costs and charges and duties shall be fully paid and discharged, the balance of the said two thirds shall remain in this court, subject to the further order, judgment and decree thereof.

NOTE. The libel states that, on the 10th day of November, 1792, the Amiable being on a voyage from Charleston, South Carolina, for Philadelphia, a ship was discovered in distress; upon which the Amiable shortened sail, changed her course, and found said ship to be La Belle Creole, commanded by Davor, bound to Bordeaux. La Belle Creole was declared to be sinking, and the master of the Amiable requested to remain by her, which was done by making light sail on board the Amiable. The distress of La Belle Creole continued; the weather was tempestuous, and on the 12th, after repeated solicitations from the master and crew of La Belle Creole, they were received on board the Amiable; and, before they left La Belle Creole, a proposition was made by them to burn her. On the master and crew of La Belle Creole leaving their ship, they declared they relinquished and abandoned her, and every thing on board of her. La Belle Creole was left without a living person on board of her. On the following morning she was again boarded by the master and crew of the Amiable, and a large quantity of merchandise taken from her. On the evening of the same day, at the request of Captain Davor, she was set on fire. The Amiable afterwards arrived in Philadelphia. The libel prays a reasonable salvage may be allowed.

A supplementary libel was afterwards filed, in which the goods are claimed by the owners, master, and crew of the Amiable, as wholly belonging to them "as goods derelict and abandoned," and their delivery to the owners, &c. is prayed.

The claim and answer of Captain Davor, master of La Belle Creole, state, that his ship was in great distress, and in danger of perishing; and that he, together with his crew, were taken on board the Amiable on the 15th day of November. That on that day, and before and afterwards, the mate of the Amiable, and some mariners belonging to her, together with the crew of La Belle Creole, saved the goods and materials libelled and claimed. Captain Davor denies the abandonment of the ship and cargo, but declares an intention was entertained by him to repossess the same, should he at any time after be able so to do; and particularly denies the surrender of La Belle Creole, &c. to the master and crew of the Amiable; and asserts, that the said master and crew of the Amiable, at the period aforesaid, declared that all they saved was for the master and crew of La Belle Creole. The claim and answer further state, that the master of La Belle Creole could not abandon the goods, &c. as they did not belong to him, but to persons in France; and that, even had they so abandoned them, the same being done under the impression of fear and danger, and from extreme necessity, could have no effect. It is also stated that, as the respondents were always in sight, or within reach of the property, and assisted in saving them, by the civil and maritime law they cannot be considered as derelict. The respondents say they are willing to allow the libellants "a reasonable salvage, proportionate to their trouble and exertions." Captain Davor states that the articles found in his trunks, not being merchandise, but money, furniture, &c. belonging only to himself, and the mariners of La Belle Creole, are not by the maritime law and custom liable to salvage; he therefore prays, that the marshall be ordered to return the same to him, free of salvage and all charges.

By the depositions of the witnesses produced on the part of Warder and others, the principal facts, as stated in the libel, are established; and it is further stated, that at the time the master and crew of La Belle Creole were taken on board the Amiable, and before the greater part of the goods were saved, Captain Davor

ordered the ship to be burned, and this was only prevented by the interference of the master of the Amiable. It is further stated, that after the master and crew of La Belle Creole were received on board the Amiable, they lost sight of the said vessel, and, supposing she had gone down, the master of the Amiable determined to proceed to America. When the sun rose the next day La Belle Creole was discovered, boarded, and the greater part of the articles saved were taken on board the Amiable. She had, at this time, eleven feet of water in the hold, and the water was up to the cabin floor: on leaving her she was set on fire. It is also admitted in the depositions of these witnesses, that the crew of La Belle Creole assisted in saving the goods, &c. After the arrival of the Amiable in Philadelphia, an attempt was made, by the officers of La Belle Creole, to bribe the mate, and one of the seamen of the Amiable, to assist in smuggling some of the articles saved. In the depositions of the witnesses produced on the part of the respondents, some of the circumstances stated in the claim and answer are detailed; but no proof was offered in support of the assertion in the claim and answer, that Captain Davor entertained any expectation, or intention, that he would, at any time, regain possession of the ship, goods, &c. One half of the cargo of La Belle Creole had been thrown overboard before the Amiable was spoken; and, but for her assistance, all would have perished.

Case No. 17,166.

WARDROP v. DOBSON.

[Cited in Scott v. Jones, Case No. 12,536. See note attached thereto. Nowhere reported; opinion not now accessible.]

WARDWELL (SANDS v.). See Case No. 12,306.

WARDWELL (U. S. v.). See Case No. 16,640.

Case No. 17,167.

WARE v. BALTIMORE STEAM TOWING CO.

[Cited in Wallis v. Chesney, Case No. 17,110. Nowhere reported; opinion not now accessible.]

Case No. 17,168.

WARE v. BRADBURY et al.

[3 Sumn. 186.] [1]

Circuit Court, D. Maine. May Term, 1838.

TAX ASSESSORS—CERTIFICATE OF OFFICIAL OATH—MODE OF ASSESSMENT.

1. A memorandum on the books of the town clerk, that certain persons were "sworn to office" as assessors, signed by the clerk, as a justice of the peace, and not as town clerk, is a sufficient certificate of the official oath, according to the requirements of the statutes of Maine.

2. Where a person hands to the assessors a schedule of all his taxable property, in order to be taxed, they must either tender him his oath to the schedule, or tax him according to it. But where the schedule is not presented as complete, then the tax will not be rendered illegal if the assessors tax the party for money at interest, although no such item is contained in the schedule.

This was an action of trespass and false imprisonment. Plea, the general issue.

The cause was tried before Ware, the district judge, at the October term, 1836. The plaintiff, to prove the issue on his part, produced Jos. H. Hill, the deputy jailer for Somerset county, by whom it was proved, that the plaintiff was committed to jail, February 19, 1835, on a warrant from the defendants. He was liberated the same day, on giving the usual bond for the jail liberties. The officer committing him had a tax bill, which, at the time, was compared with the copy left with the jailer. The defendants justified as assessors of the town of Athens, for the years 1833 and 1834. To prove the legality of the road or highway tax assessed on the plaintiff in 1833, the defendants produced the warrant for the town meeting for 1833, and the records of the town, showing the proceedings of that meeting.

The first objection raised on the part of the plaintiff was, that no certificate was filed of the administration of the oath to the defendants by a justice of the peace; but this objection, on the inspection of the records, was overruled.

The second objection arising on the tax of 1833 was, that the plaintiff, in pursuance of law, handed in to the assessors a schedule of his taxable property in the town of Athens, which was received by the assessors, without requiring the plaintiff to make oath to the same, and that afterwards, without further notice to the plaintiff, and without again calling on the plaintiff, they greatly increased his valuation, by adding thereto a large amount of money at interest. On this point the defendants introduced, as a witness, William Hight, who testified, that he was one of the assessors for the year 1833. That the assessors called on the plaintiff for a list of his taxable property. That [John] Ware had a list, which he handed to the assessors. [Wingate] Bradbury looked at it, and said he expected him to give in an account of his money at interest. Ware gave him to understand he should leave it with the assessors. There was no discussion about the amount of money at interest. One item on his list was stock in trade. He did give a list of taxable property to the assessors. Bradbury, one of the defendants, took the list, which Ware handed. They did not require Ware to make oath to the list. At the time the assessors met to make the assessment they had his list before them.

Lemuel Williams, called by the plaintiff, testified, that he was present with the assessors of 1833, when the plaintiff gave in to the assessors a schedule of taxable property. Ware handed the schedule, and they took it down. Among the items was stock in trade.

The judge, on this point, ruled that the tax of 1833 was not rendered void by increasing

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

or adding to the valuation of the plaintiff, which was furnished by the plaintiff, under the circumstances of the case.

A verdict was found for defendants. Afterwards a motion was made for a new trial by S. Fessenden, for the plaintiff, who founded his motion upon the foregoing facts.

The cause was afterwards spoken to by Fessenden & Deblois, for plaintiff, and by Mr. Preble, for defendants, at October term, 1837, and again at the present term.

STORY, Circuit Justice. When this cause was formerly spoken to by the counsel, some misapprehension existed, on my part, as to the true state of the facts. It was then supposed by me, that the objection made at the trial was, that all the assessors were not sworn, there being no proof by any certificate that William Hight, one of the assessors, was sworn. It now, however, distinctly appears, from the papers produced to the court, that Hight was at another time regularly sworn, and a certificate thereof was made by the town clerk. The real objection, therefore, is of a more limited character. It appears from the records of the town of Athens, that at a legal meeting of the inhabitants, on the 1st of April, 1833, Wingate Bradbury, William Hight, and Gilman Hall were chosen selectmen of the town for the year 1833; and afterwards it was at the same meeting voted, "That the selectmen be assessors and overseers of the poor." Benjamin F. Greene was then the town clerk, and also a justice of the peace; and he entered upon the records of the town, immediately opposite to the names of the selectmen, "Sworn to office by B. F. Greene, J. Peace, except Deacon Hight"; and immediately below the vote appointing the selectmen to be assessors and overseers, he added, "Sworn to office by B. F. Greene, J. Peace, except Deacon Hight." Now, the objection taken is, that this memorandum on the town records, though signed by the town clerk, as a justice of the peace, is not a sufficient certificate of the official oath taken by Bradbury and Hall, as assessors, according to the requirements of law. We cannot yield to this objection. In our judgment, the certificate is sufficient to establish the fact, that the official oath was duly taken by the assessors; and the form or place in which the certificate was made or recorded cannot be material. This objection is therefore overruled.

The other objection is founded upon a mistaken view of the actual ruling of the district judge at the trial. He has certified that his direction to the jury was in substance as follows: "That if the jury believe that Ware (the plaintiff), handed to the assessors a schedule of his property, as containing his whole property taxable in Athens, they (the assessors), were bound either to tender him his oath to the schedule, or to tax him according to the schedule. But if the jury believed that it was not handed to them (the assessors), as a complete schedule, then the tax was not rendered illegal by taxing him for money at interest, although no such item as that was contained in the schedule delivered to the assessors." This direction seems to me entirely unexceptionable, in point of law, and, indeed, it is precisely what the argument of the learned counsel for the plaintiff supposes to have been required by the circumstances of the case.[2] Motion overruled.

Case No. 17,169.

WARE v. The BRANDON.

[Nowhere reported; opinion not now accessible.]

Case No. 17,170.

WARE v. BROWN.

[2 Bond, 267.][1]

Circuit Court, S. D. Ohio. April Term, 1869.

TORTS — ASSIGNABILITY OF CAUSE OF ACTION — FALSE CERTIFICATE OF NOTARY PUBLIC TO DEED.

1. A right of action for a tort is not assignable by operation of law or otherwise; and an action for damages resulting from a tort, can only be sustained by the person directly injured thereby, and not by one alleging a collateral or resulting injury.

2. No right of action exists against a notary public for an alleged official malfeasance, in corruptly and falsely certifying to the execution and acknowledgment of an assignment of an interest in real estate in favor of a purchaser under such fraudulent assignment, for damages resulting from his defective title, arising from the malfeasance of the notary public.

[Cited in Eslava v. Jones, 83 Ala. 139, 3 South. 318.]

3. The redress for the malfeasance of the notary can only be obtained by the person to whom the fraudulent assignment was made, and whose title was thereby invalidated.

[This was an action for damages by John H. Ware against Henry T. Brown. Heard on demurrer to the declaration.]

W. H. Mackoy, for plaintiff.

Hoadly, Jackson & Johnson, for defendant.

LEAVITT, District Judge. The question before the court is presented on a demurrer to the declaration. The declaration is of great length and very special. Briefly stated, it is substantially as follows: One Cochran had a leasehold interest in an acre of land, for oil purposes, in West Virginia, and sold and assigned an interest of three-fifths of his leasehold interest to three persons—Stimson, Stein, and Love; these persons, by deed, sold and assigned the entire leasehold interest in the land to one Buffington, the said Cochran not joining in, or being a party to, the deed of assignment; this deed or instrument, with the name and seal of Cochran and the other parties, was presented to the defendant Brown, an acting no-

[2] [See act of Maine respecting assessment of taxes (2 Laws Me. 1821, c. 116, § 12).]

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

tary public of Athens county, Ohio, for his official certificate of the acknowledgment of the due execution of the same. It is then averred that the defendant, knowingly, falsely, and corruptly, under his notarial seal, certified that all the parties to the deed of assignment, including the said Cochran, personally appeared before him, and acknowledged the signing and sealing thereof; and that defendant subscribed his name thereto, as an attesting witness of its execution by all the parties, knowing that the name of said Cochran was a forgery, and that he had not executed the deed, or acknowledged the same before him. The plaintiff then avers that Buffington, supposing he had a perfect title to the entire leasehold interest in the tract, under the deed of assignment thus authenticated, sold the same for a valuable consideration to the defendant, and executed a deed of assignment for the same in due form; that the defendant, ignorant of the fraudulent character of the assignment to Buffington and the corrupt action of the defendant in falsely and corruptly certifying to its execution, and supposing he had a good title to the interests of all the parties, including the interest of the two-fifths vested in Cochran, contracted to sell, and did sell, the entire leasehold to other parties. And it is then averred that upon the discovery of the fraud in the assignment to Buffington and the corrupt act of the defendant in his false certificate of the acknowledgment of the same, the plaintiff was compelled to pay a large sum to perfect his title, whereby he was greatly injured, and claims damages of the defendant.

Upon the case thus made in the declaration, the question is, whether the plaintiff shows a good cause of action, and a right to recover damages for the alleged official malfeasance charged against the defendant. I regret that no prepared briefs were submitted to the court by the counsel, and that the pressure of other duties has not enabled me to look into the authorities as fully as I could have desired. From a cursory examination of the point, I can find no adjudicated cases sustaining the right of the plaintiff to a recovery in this action; while there are some that lead directly to the opposite conclusion.

The fraud and malfeasance of the defendant, if the facts averred in the declaration are true, undoubtedly show the most repulsive official corruption on the part of this defendant. And if this action was prosecuted by Buffington, who was the person directly defrauded by the acts alleged against the defendant in his official character as a notary public, there would be no question that it would be sustained, and that he could recover to the extent of any loss or injury he may have suffered. But it is a very different question, whether this plaintiff has a right of action. The general principle is, that no one but the party directly injured by the commission of a tort can sue for the injury arising from it. It is well settled that a right to compensation for a wrong committed is not assignable in fact, or by operation of law. [Comegys v. Vasse] 1 Pet. [26 U. S.] 193. There was no privity between this plaintiff and the parties implicated in the fraudulent acts alleged. He then had no interest in the property, and there could have been no intention to defraud or injure him. The alleged fraud was in the sale and conveyance to Buffington and the false authentication of the assignment to him. It was the obvious duty of the plaintiff to have inquired into the validity of Buffington's title, and I see no reason why the doctrine of caveat emptor does not apply.

The case of Dehn v. Heckman, 12 Ohio St. 181, seems to sustain the principle suggested, that the person directly injured by a tortious act, or a wrongful neglect of official duty, only has a right of action. In that case a justice of the peace was sued for not having issued process and entered judgment against the maker of a promissory note, left with him for collection. An indorser paid the note, and brought suit against the justice for neglect of duty. The court held that the owner or holder of the note had the legal right of action against the justice, and that the action by the indorser could not be sustained.

The case of Wells v. Cook, 16 Ohio St. 67, is a direct authority upon the question before the court. It is elaborately considered by Judge Brinkerhoff, in delivering the opinion of the court, and numerous cases from the English report are referred to. Instead of expanding this opinion by a special notice of these cases, I content myself by referring to them, as collected and commented on by the learned judge in his opinion.

The demurrer is sustained.

Case No. 17,171.

WARE et al. v. BRUSH.

[1 McLean, 533.] [1]

Circuit Court, D. Ohio. July Term, 1839.[2]

MILITARY LAND WARRANTS—PATENT TO ASSIGNEE—EQUITY JURISDICTION—ASSIGNMENT BY EXECUTOR — LIMITATIONS — LOCATOR'S IMPROVEMENTS.

1. As between the heirs at law and the assignee of a military land warrant, a court of chancery will go behind the patent and investigate the assignment of the warrant, or of the certificate of right, given by the council of Virginia, on which a warrant and afterwards a patent issued.

[Distinguished in Scott v. Evans, Case No. 12,529.]

[Cited in Rogers v. Brent, 5 Gil. 580.]

2. An executor, having no specific power given in the will, cannot assign a military warrant or a certificate on which a warrant was obtained. And where such an assignment is made by an executor, which appears on the face of the warrant and is copied into the patent, it is

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

[2] [Affirmed in 15 Pet. (40 U. S.) 93.]

notice to the assignee of the warrant or the patentee.

[Cited in brief in Wiseman v. Hutchinson, 20 Ind. 43; Bonner v. Ware, 10 Ohio, 468. Cited in Bell v. Duncan, 11 Ohio, 196.]

3. Lapse of time does not operate against minors, especially where they reside in a different state, and had no knowledge of their rights.

4. The locator, having made the entry claiming the land entered upon it, and made improvements, may claim, from heirs at law, under the circumstances of this case, the part of the land usually given to a locator.

Goodenow & Wright, for plaintiffs.

Mr. Brush, for defendant.

McLEAN, Circuit Justice. The complainants [John H. Ware and others] represent themselves to be the only heirs and representatives of John Hockaday, deceased, who was an officer of the revolution, in the Virginia line on continental establishment. That he was entitled to four thousand acres of land, in the Virginia military tract in Ohio; and that he died in 1799, before the warrants were obtained. That before his decease he made a will, in which he disposed of his personal estate, and appointed Robert S. Ware, his son-in-law, William Parish and John Saunders, his executors; but Ware only proved the will, and entered upon the duties of executor. That the executor never executed the will, or settled the estate. He had no right to interfere as executor with the real estate of the deceased; and the military right to the land above stated in Virginia was considered real estate. The wife of Robert Ware died in 1805, leaving the complainants minors and heirs, and in 1808 Robert S. Ware died, leaving the complainants the exclusive interest as heirs in the land. That the executor, through one Joseph Ladd, a stranger and since deceased, without heirs and insolvent, surreptitiously procured a certificate to be issued by the council of the commonwealth of Virginia, certifying that the representatives of John Hockaday were entitled to the proportion of land, &c.; and with that certificate the said Joseph Ladd afterwards, to wit, on the 6th August, 1808, by fraud procured of the executor, an informal and illegal transfer or sale thereof to himself, by virtue of which he procured from the register of the land office of Virginia four warrants for the land aforesaid to be issued to him as assignee of Robert S. Ware, executor of John Hockaday, deceased; that one of these warrants was located in Madison county; six hundred acres of which are in the possession of the defendant [Henry Brush], who as assignee of John Hoffman, who was assignee of Joseph Hoffman, Rachel Hoffman, &c. who were assignees of Joseph Ladd, obtained in 1818 a patent for the land in his own name. That the complainants were minors, and a knowledge of these facts was recently acquired by them. In his answer the defendant denies notice, asserts that Ladd received the assignment on a valuable consideration being paid, insists that the assignment by the executor was valid; and he relies upon lapse of time. He also insists that under the circumstances, he is at least, entitled to the locator's share, &c. That he entered upon the land, has made large and valuable improvements upon it, &c.

The first question for the consideration of the court in this case is, whether the court can look behind the patent and to the assignment of the warrant; or rather the certificate on which the warrant was issued. On the part of the defendant it is earnestly contended, that the assignment of the certificate having been sanctioned by the register of the land office, in Virginia, by issuing the warrant; and by the federal officers in issuing the patent, it is not now open for investigation. That the rights of the parties must be determined by the patent, and not by acts anterior to it. The council of Virginia, in deciding the right of Hockaday, acted judicially; and it may be admitted that the grounds of their decision may not be afterwards examinable. But about this right there is no controversy between the present parties. They all claim under the military right of Hockaday. Can the evidence on which the register acted be examined? This would be going not only behind the patent, but behind the warrant also. And why may not this be done? Miller v. Kerr, 7 Wheat [20 U. S.] 1; [Hoofnagle v. Anderson] Id. 212. The register in issuing the warrant acted ministerially; and so did the commissioner of the general land office, in issuing the patent. They could determine no matter which settled the right between the present parties. Their duties were ministerial and not judicial. This is not a controversy between a claimant under Hockaday, and a stranger to such claim. It might well be doubted whether a person claiming adversely to Hockaday's assignees, could go into the validity of the assignments, either before or after the issuing of the warrant. As between such parties, the entry and patent might be conclusive. But this is a controversy between the heirs at law of Hockaday and his assignees. If the assignment was illegal or fraudulent, as asserted by the complainants, the right to the warrant and the land is in the heirs at law, and not in the assignee and patentee. The complainants are not only heirs, but they are minor heirs. At the time of the alleged assignment they had no knowledge of it, being all minors of tender years—some of them, indeed, were not then born. Could not this matter have been investigated shortly after the date of the warrant? The plea of the lapse of time will be hereafter considered, and the question will be now examined, as free from embarrassment on that ground. Suppose a suit had been instituted by the minor heirs, before the emanation of the patent. Could not the whole matter of the assignment, have been investigated in chancery. This seems to be so clear, that it is not easy to imagine, what substantial objection could have been interposed. Unless the action of the register was conclusive on the rights of the parties, there

could have been no solid objection to such an investigation. And it would be against all authority and reason to hold, that the acts of a ministerial officer can fix, absolutely the rights of parties. He may, by his act, give greater dignity to a right, but he cannot essentially change the principle on which such right is founded. This proposition would seem to be too plain for argument, and it will not be further discussed.

The question of the assignment as between the heirs of Hockaday and his assignees is open. The emanation of the patent can make no difference in this respect. And if we may investigate the assignment on which the register issued the warrant to Ladd, there can be little or no doubt of its illegality. The right of Hockaday to military land, whether it was evidenced by a statutory provision and proof of service, or by a certificate of the council, or by a warrant from the register, pertained to the realty, and did not constitute a part of his personal property. And the will gave the executor no power over the real estate. In Virginia the realty may become assets in the hands of the administrator or executor, where the personal property is insufficient to pay the debts of the deceased. But the land can only be made liable on showing to the probate court, the debts unpaid, after the exhaustion of the personal assets; and the court will then order a sale of the land. But there is no pretence that any such proceeding was had in the present case. The assignment or order for the warrant was made by the executor, as in the ordinary performance of his duties. It is in proof that the consideration received was a pair of boots and forty dollars. The inadequacy of consideration is so gross, as to afford strong presumption of fraud. The right was for four thousand acres of land, to be located in a rich and fertile district in Ohio, and this known to both the parties; and yet this valuable tract was sold to Ladd, by the executor, for some forty-four or forty-five dollars. The circumstances of this transfer, independent of the want of power in the executor, as between the present complainants and Ladd, would be sufficient evidence of fraud to set aside the assignment. But the assignment by the executor was wholly without authority; and therefore could convey no right to his assignee. Is the defendant chargeable with notice of this want of power in the executor? We think he is a purchaser with notice. The assignment, by the executor, appears upon the face of the warrant, which was transferred to the defendant, and copied into the patent.

This was clearly notice to the defendant, that the assignment was made by the executor; and it was the duty of the defendant to examine the will for the power to make it. Ordinarily, an executor does not possess this power; and the defendant was bound to look into his authority. The defendant is as much chargeable with notice, as if the assignment had been made by an attorney, and no inquiry had been made into the power under which he acted. The executor was in fact a mere agent, and could only act within the limit of his authority. Any assignment beyond this, could transfer no right. 4 Ohio, 446. Is this defect of authority, in the executor, cured by the lapse of time? The right of the complainants is not barred by the statute of limitations, as they are residents of Virginia, and do not appear to have ever been in this state. The statute therefore does not run against them. But they were minors, and on this ground, if they were residents of Ohio, the statute would not be a bar. It is admitted, that lapse of time may operate, in cases where the statute does not bar; but the circumstances which would prevent the effect of the statute, if the complainants were residents, are conclusive against the lapse of time. This principle is applied by a court of chancery under its own rules, where a party has slept upon his rights. But what negligence has there been in this case? Lapse of time can no more operate against minors, than the statute of limitations. And the complainants are proved to have been minors until within a few years past. They are citizens of another state, and they came very lately to a knowledge of their rights. Under such circumstances, there can be no negligence attributed to them. They have not slept upon their rights. On the contrary, so soon as they attained a knowledge of the mode by which a very valuable property, which had descended to them, had been disposed of by the executor, they sought legal redress. They have proved their heirship and their minority; and this proof, under the circumstances of the case, is a full and satisfactory answer to the argument drawn from the lapse of time.

The defendant must be considered as holding the lands in trust for the complainants. That Ladd was guilty of fraud in procuring the warrant in his own name as assignee, and in obtaining the assignment from the executor, there is little doubt; and it is very clear that the executor had no authority to make the transfer. But the defendant seems to have acted fairly and in good faith, in procuring his right to the warrant and entry; although he was negligent in not investigating the assignment to Ladd. By the location of the warrant, the survey of the land, its improvement, and the payment of the taxes, the complainants have been greatly benefitted; and as this has been through the instrumentality of the defendant, or of those under whom he claims, it is equitable that some compensation should be made to him. And as the master has reported that it was customary to give the locator one-third and sometimes one-fifth of the land for locating, and that in this case, under the usage, the defendant is entitled to one-fourth of the land located, the court adopt the report. This is in conformity to usage, and seems to be an equitable mode of compensating locators; and

the circumstances of this case, render this mode peculiarly appropriate and just. This usage may not be so general and so well established, as to give to the locator a lien on the land entered, for any portion of it in the hands of a purchaser. But where the locator enters into the possession of the land, and uses it in every respect as his own, making valuable and lasting improvements on it; and his title is found defective, as in this case, it is most equitable that he retain such a portion of the land, as is usually given to the locator. This interest, though not specifically assigned, may be held to have passed with a general assignment of all right in the warrant and entry to the defendant; or if he made the location he may claim this compensation for services rendered, and not by virtue of an assignment. And we think that the part thus allotted to the locator should be so laid off to the defendant, as to include his improvements; as it appears this can be done, having a reference to the value of the whole tract in its natural state, and without impairing the value of the residue of the tract. Three fourths of the amount paid for taxes on the land, the court will order the complainants to pay to the clerk for the use of the defendant; out of which the costs shall be paid, and the residue of the money to be paid over to the defendant. And the court will decree that the defendant shall convey three fourths of the land, as laid down in the master's report, with special warranty to the complainants.

[Affirmed in 15 Pet. (40 U. S.) 93.]

WARE (GIRARD v.). See Case No. 5,460.

Case No. 17,172.

WARE v. ST. PAUL WATER CO.

[1 Dill. 465;[1] 2 Abb. U. S. 261; 3 Chi. Leg. News, 41; 12 Int. Rev. Rec. 194.]

Circuit Court, D. Minnesota. Oct., 1870.[2]

DEFECTIVE STREETS—LIABILITY.

1. The author of a dangerous nuisance on the public streets of a city is liable for the damages it occasions, as well as the city corporation.

2. Where a person or corporation is engaged in a work, in the ordinary doing of which a nuisance necessarily occurs, there is a liability on the part of the person or corporation doing the work for injuries resulting from carelessness or negligence, though the work be done by a contractor, and though the contractor be not an unskillful or improper person.

3. Where, in such cases, the work is a lawful undertaking, the jury must be satisfied that the plaintiff was using reasonable care, and that the defendant was negligent.

The plaintiff [Edward B. Ware] was thrown from his buggy and injured, while driving upon a street, in which the defendant, through a contractor, was blasting, and using a steam drill for making trenches for pipes. He claims that the injury was the result of negligence on the part of the defendant. The issue was tried before a jury.

C. K. Davis, for plaintiff.

Allis, Gilfillan & Williams, for defendant.

NELSON, District Judge (charging jury). This action is brought against the defendant to recover damages for an injury to the plaintiff, on one of the streets of the city of St. Paul, in July last. There is no doubt about the fact of the injury having been suffered by the plaintiff; both bones of his leg below the knee were broken, as was testified to by the attending surgeon. This action is brought upon the principle, which is pretty well settled in this country, at least so far as the federal courts are concerned, that where "a person (company or corporation included) is engaged in a work, in the ordinary doing of which a nuisance necessarily occurs, the person is liable for any injury that may result to third parties from carelessness and negligence, though the work may be done by a contractor." Chicago v. Robbins, 2 Black [67 U. S.] 418; [Robbins v. Chicago] 4 Wall. [71 U. S.] 658, and 9 Am. Law Reg. No. 9. Although the plaintiff might have sustained an action against the city, it is his right to seek his remedy against the party who created the nuisance, and the case is not altered from this fact.

The defendant claims that it cannot be held liable for any negligence of the contractor or his employes, unless it appears that an unskillful or improper person was employed as contractor. While we admit that such a rule of law might apply in some cases, we are of opinion that this case is not of that class. Early in the history of cases of this character it was the settled law that the "owner of land was liable, at all events, for the negligence of employes in doing work, whether there was an intermediate contractor or not. Subsequent decisions restricted the application of this rule until at last it was held by very able and learned judges that the relation of principal and agent, or master and servant, must be established in all cases before any responsibility could be fixed upon the person who authorized the work. The principle, however, upon which this suit is sought to be maintained, soon became an exception to this rule. The plaintiff, however, must satisfy you, if the work was a lawful undertaking, that there was reasonable care and prudence on his part, as well as negligence on the part of the defendant. If the work was not authorized to be done, he would be required to show reasonable care for his personal safety only. The defendant, however, in this case, by its charter, as well as by an ordinance of the city, was authorized to prosecute this work in excavating and laying water-pipes through the streets. It was a public improvement necessary to be done, and though

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

[2] [Affirmed in 16 Wall. (83 U. S.) 566.]

the streets were more or less obstructed in digging trenches and operating steam drills in the rocks underlying the street, still the public must yield the enjoyment of a free and unobstructed passage for such reasonable time as might be required to perfect the work. The defendant cannot relieve itself from the duty of exercising care and diligence for the protection of the public, because the improvement was a necessity. It is said: "Necessity justifies actions that would otherwise be nuisances. Yet unless prudence and care be exercised, they become nuisances, and can be abated." It is no argument against the prosecution of this work that it is a hazardous undertaking, and requires the use of dangerous implements and material in its prosecution. The more hazardous the work, the more dangerous the machine used, the greater became the duty of the defendant to exercise extraordinary precaution.

There was some evidence given which tended to show that the plaintiff, when driving rapidly down the street in which pipe was being laid, suddenly urged his horse with the whip, and turned the corner into a side street, after passing all of the obstructions, and at a time when the steam drill was not in operation, and work was virtually suspended, and in so doing struck the curb, which overturned the buggy and produced the injury. If you believe that such was the fact, and that the injury did not result from the want of care on the part of the defendant, there is an end of the case, and the plaintiff cannot recover. And if, rejecting this theory, you are satisfied that at the time of, and preceding, the injury, the persons engaged in doing the work and having charge thereof, used the care and precaution to prevent injury to others, which ordinarily prudent persons would use under like circumstances, then the plaintiff cannot recover; or, if you are satisfied that the plaintiff did not use all the care to avoid danger or injury, which ordinarily prudent persons would use under like circumstances, and his neglect to use such care contributed to bring the injury on himself, then defendant is entitled to a verdict; or, if you believe that there was culpable negligence on the part of the plaintiff as well as on the part of the defendant, the defendant should have a verdict. But if you believe that the negligence of those doing the work was the cause of the injury, and that the plaintiff was exercising all reasonable care for his personal safety, you will return a verdict against the defendant. These are questions of fact for your determination, and you must decide them according to your best judgment.

If you think the plaintiff is entitled to recover, you will next consider what amount of damages is due him. The following general rule, which, I believe, is settled, will govern your action. The party aggrieved is entitled to recover not only actual expenses, including medical attendance, but also a reasonable compensation for mental and bodily suffering, loss of time, and for any permanent or incurable injury inflicted. The damages must be strictly compensatory.

The jury found for the plaintiff.

[A writ of error was subsequently sued out from the supreme court, where the judgment of this court was affirmed. 16 Wall. (83 U. S.) 566.]

NOTE. That the author of nuisance on the streets is directly liable to the person injured, or liable over to the municipal corporation: Milford v. Holbrook, 9 Allen, 17; Wood v. Mears, 12 Ind. 515; Ball v. Armstrong, 10 Ind. 181; Congreve v. Smith, 18 N. Y. 79, 84; Littleton v. Richardson, 32 N. H. 59; Clark v. Fry, 8 Ohio St. 359; Bush v. Johnston, 23 Pa. St. 209. Effect of judgment against city corporation on the liability of the author of nuisance: Littleton v. Richardson, 34 N. H. 179; Chicago v. Robbins, 2 Black [67 U. S.] 418; Milford v. Holbrook, 9 Allen, 17; Portland v. Richardson, 54 Me. 46; Veazie v. Railroad Co., 49 Me. 119.

WARE (UNITED STATES v.). See Case No. 16,641.

Case No. 17,173.

The WAR EAGLE.

[6 Biss. 364.] [1]

Circuit Court, W. D. Wisconsin. June, 1875.

LIMITED LIABILITY OF SHIP-OWNERS.

1. A steamer used in the upper Mississippi river, is not within the act of congress of March 3, 1851, limiting the liability of ship-owners.

[Cited in The Mamie, 5 Fed. 820; The Garden City, 26 Fed. 774; The Katie, 40 Fed. 482.]

2. The district court will not, therefore, restrain claimants from suing the owner at common law to recover the full value of freight lost by fire.

[Cited in Goodrich Transp. Co. v. Gagnon, 36 Fed. 127.]

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

In admiralty. This was a petition originally presented to the district court by the Northwestern Union Packet Company, owner of the steamer War Eagle, praying for limitation under the act of congress of March 3, 1851, of their liability for loss by reason of the destruction of said steamer and its cargo by fire. The War Eagle was a steamer of more than twenty tons burden, duly enrolled and licensed for the coasting trade, and plying between the ports of Dubuque, Iowa, and St. Paul, Minnesota, touching at intermediate points. While making one of her regular trips, on the 24th day of May, 1870, she was burned with her cargo, her boilers and iron, afterwards raised, being the only salvage. The different owners of the cargo commenced suits at common law against the petitioner to recover the value of their goods, and this petition prayed that the interest of petitioner in the wreck and articles saved might be appraised, and upon payment into court of the amount of such appraisement, the various claimants might be cited to prove their re-

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

spective claims against this fund, and the petitioner be relieved under said act from any further liability, and that the prosecution of suits against petitioner for claims arising for such loss be perpetually restrained. The district court held that it had no jurisdiction of the case, and dismissed the petition [case unreported], whereupon petitioner prayed an appeal to the circuit court.

Wm. Hull, for petitioner.
I. C. Sloan, for respondent.

DRUMMOND, Circuit Judge. The only question in this case is whether the War Eagle was within the terms of the act. The district court held that it was not. The War Eagle was a steamer of more than twenty tons burden, duly registered and enrolled under the acts of congress, and engaged in trade and commerce between the several states, but solely on the river Mississippi and its tributaries, when in May, 1870, at La Crosse, it was destroyed by fire, with a large quantity of goods on board. The petitioner claims that the War Eagle was not within the last clause of the act, viz.: "This act shall not apply to the owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation." 9 Stat. 635.

If the War Eagle was a vessel used in rivers or inland navigation as therein meant, then it was not within the terms of the statute, but was subject to its common law liability.

This clause in the statute was the subject of much consideration in the case of Moore v. American Transp. Co., 24 How. [65 U. S.] 1. The question there was whether the navigation of our great northern lakes was inland within the meaning of the law, and the supreme court held that it was not.

In that case the counsel of the defendant contended that the act applied wherever admiralty jurisdiction extends, and the counsel of the plaintiff insisted that navigation of the Mississippi river and its tributaries was expressly within the words of the clause. The court in its opinion refers to the craft named in the clause, as canal boat, barge or lighter, and says that the character of the craft named will serve to some extent to indicate the class of vessels designated by the place where employed. But in another part of the opinion the court speaks of vessels, whatever may be their class or description, solely employed in rivers or inland navigation, the last two words meaning internal waters connected with rivers, such as bays, inlets, straits, etc. Did the court mean by internal waters those exclusively within the limits of some state, or such internal waters as the Mississippi and its tributaries, running through or along several? We hardly think the former was meant, because it was believed congress could not legislate as to these, and so the exception was unnecessary. The clause in question was added to the bill in its passage through the senate, and reference was undoubtedly had to an act of George III., which provided that that act should not extend to the owners of any lighter, barge, boat, or vessel of any burden or description whatsoever, used wholly in rivers or inland navigation, or vessel not duly regis tered according to law.

Now if congress intended to exclude from the operation of the act all registered or enrolled vessels, it is certainly singular that the language to that effect in the English statute was omitted from ours. Then it must be borne in mind that the act of 1851 was passed before the decision of the supreme court in the case of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, and when among lawyers and judges it was not known that the case of The Thomas Jefferson, 10 Wheat. [23 U. S.] 428, would be reversed, and when the act of 1845, as to admiralty on the lakes, was supposed to depend upon the authority of congress to regulate commerce between the states.

On the whole, notwithstanding the case of Moore v. American Transp. Co. [supra], I cannot doubt that it was the intention of congress to except out of the operation of the act of 1851, a steamer such as the War Eagle.

Decree affirmed.

WARFIELD (FOWLER v.). See Case No. 5,004.

WARFIELD v. The H. J. MAY. See Case No. 3,494.

WARFIELD (NICHOLLS v.). See Cases Nos. 10,233 and 10,234.

WARFIELD (TRIPLET v.). See Case No. 14,177.

Case No. 17,174.

WARFIELD v. WIRT.

[2 Cranch, C. C. 102.] [1]

Circuit Court, District of Columbia. June Term, 1814.

EXECUTION—MOTION TO QUASH.

The court will not, upon motion, quash the return of a fi. fa. levied upon an equity of redemption.

Mr. Wallach, in support of the motion, cited the following authorities: Statute De Mercatoribus, 13 Eliz. 1, St. 3; The Statute Staple, 27 Eliz. c. 3; 23 Hen. VIII. c. 6; 5 Geo. II. c. 7; 2 Cruise, 106; Keech v. Hall, 1 Doug. 21; Pow. Mortg. 227, 232; Birch v. Wright, 1 Term R. 378; Moss v. Gallimore, Doug. 279; Bac. Abr. tit. "Execution"; Com. Dig. tit. "Execution"; Scott v. Scholey, 8 East, 467; Cadogan v. Kennett, Cowp. 432; Hartwell v. Chitters, Amb. 308; Lyster v. Dolland, 1 Ves. Jr. 431; Burden v. Kennedy, 3 Atk. 739; Burgess v. Wheate, 1 W. Bl. 135; Turner v. Fendall, 1 Cranch [5 U. S.] 115; Plunket v. Penson, 2 Atk. 294; Esp. N. P. 447; Laws Md. 1794, c. 60, § 10, which provides the mode of getting at equitable interests, by application to the chancellors, and the recent act of Mary-

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

land to subject equitable interests to execution.

F. S. Key, contra, admitted the old doctrine in England to be as contended for by the defendant. But it has been decided in Maryland that no release is necessary by a mortgagee to a mortgagor to enable the latter to maintain ejectment. The statute 5 Geo. II. c. 7, ought to be construed to make equitable interests liable upon fieri facias. An equitable title to land is a real estate. Estate means right to land, whether legal or equitable. The act of 1794, c. 60, § 10, applies only to cases of equitable title by contract, &c., where the creditors are without remedy either at law or in equity, where the vendee has not paid the money, and the creditor has no right to step in and pay it for him, and avail himself of the benefit of the contract.

Mr. Key also mentioned the case of Campbell v. Morris [3 Har. & McH. 535], in the court of appeals in Maryland, in which an attachment of an equity of redemption was supported by that court, against the opinion of the general court; but he admitted that some of the judges of the court who decided that case had certified that although that point seems to be decided in that case, yet they did not mean to decide it.

Mr. Law, in reply, cited Tidd, Prac. 919.

THE COURT (nem. con.) refused to quash the return, because the point did not appear upon the return; and they also doubted their jurisdiction to decide the question upon such a motion, or to quash a return upon any such ground.

Case No. 17,175.

WARFORD v. NOBLE et al.

[19 Am. Law Reg. (N. S.) 44; 4 Cin. Law Bul. 1003.] [1]

District Court, D. Indiana. 1880.[2]

BANKRUPTCY—ADJUDICATION AGAINST HUSBAND—EFFECT ON DOWER—FOLLOWING STATE DECISIONS.

1. An adjudication of bankruptcy having been held by the courts of Indiana, to have the same effect upon the wife's claim to dower as a judicial sale of the husband's real estate, the federal courts will follow that rule in regard to land in that state.

2. By the law of Indiana, a wife's inchoate right of dower becomes absolute, upon the judicial sale of her husband's real estate and she is entitled to immediate possession.

3. But this rule does not apply to land in which the husband has only an equitable title. As to such lands an adjudication of bankruptcy against the husband, passes his title to the assignee free from any claim of the wife.

Bill to quiet title. On exceptions to master's report. The plaintiff is the assignee of William F. Noble, a bankrupt. Rachael Noble, one of the defendants, is the wife of the bankrupt. Among the assets of the bankrupt that passed to his assignee was a parcel of real estate that had formerly constituted a portion of the common-school lands of the state. William F. Noble, the bankrupt, held title to it by certificate of purchase from the officer authorized to sell the school lands. He had paid a portion only of the purchase-money, and had received no deed. His only muniment of title was his certificate of purchase. He had been in possession of the land under his purchase for many years before his bankruptcy. In the course of his administration of the bankrupt's estate, the assignee, pursuant to authority of the court, borrowed money upon security of the land and paid the remainder of the purchase-money. This suit was brought by the assignee to quiet the title as against a claim asserted by Rachael Noble to a marital interest in the land.

The 27th section of the Indiana statute of descents (18 Davis' St. p. 413) is as follows: "A surviving wife is entitled, except as in section 17 excepted, to one-third of all the real estate of which her husband may have been seised in fee-simple, at any time during the marriage, and in the conveyance of which she may not have joined in due form of law; and also of all lands in which her husband had an equitable interest at the time of his death; provided, that if the husband shall have left a will the wife may elect to take under the will instead of this or the foregoing provisions of this act." The 29th section of that statute is as follows: "If the husband shall have made a contract for lands, and at the time of his decease the consideration, whole or in part, shall not have been paid, but after his death the same shall be paid out of the proceeds of his estate, his widow shall have one-third of said lands in the same manner as if the legal estate had vested in the husband during the coverture."

An act of the state legislature, approved March 11, 1875 (Laws 1875, p. 178), provides that a married woman's inchoate interest in her husband's lands shall become perfect, and that she shall be entitled to present possession and enjoyment in certain contingencies. Its first section is as follows: "Be it enacted by the general assembly of the state of Indiana, that in all cases of judicial sales of real property, in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold, or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of married women now becomes absolute upon the death of the husband, whenever by virtue of said sale the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of this act, and not otherwise. That when such inchoate right shall

[1] [4 Cin. Law Bul. 1003, contains only a partial report.]

[2] [Reversed in 2 Fed. 202.]

become vested, under the provisions of this act, such wife shall have the right to the immediate possession thereof, and may have partition, upon agreement with the purchaser, his heirs or assigns, or upon demand, without the payment of rent, have the same set off to her."

Rooker & Norton, for plaintiff.

Claypool, Newcomb & Ketcham and Dailey & Pickrell, for defendant.

GRESHAM, District Judge. It is urged by counsel for Mrs. Noble, that the adjudication of bankruptcy against her husband, and the transference of her husband's title to his property to his assignee, amount to a "judicial sale" of his property within the meaning of the act of March 11th, 1875, and that she stands vested with the same interest in his estate as she would have inherited in the event of his death. The first branch of this proposition is sustained by the recent decision of the supreme court of the state in Roberts v. Shroyer, which is not reported. This being a decision of the highest court of the state, upon a statute of the state, and upon a question relating to real property, must govern the same question in this court. I assume, therefore, that Mrs. Noble's right to immediate absolute ownership and possession of her marital interest in the lands of her husband is as complete as it would have been had the sale been made on execution under the judgment of a state court. But as to the other branch of the proposition, viz., that the interest she takes in such contingency in real estate to which her husband held but an equitable title, is the same that she would inherit in the event of her husband's death—that is not decided by the case cited, nor by any other to which my attention has been called. The supreme court of the state has repeatedly held, that a married woman is vested with an inchoate title, during the lifetime of her husband, to all the real estate of which he was seised in fee during coverture, that, under the statute, would descend to her at his death. He cannot, without her concurrence, alienate or suffer alienation of this inchoate title vested in her. But as to lands in which he holds but an equitable title only, the case is different. In such lands she has no inchoate title. The twenty-seventh section of the descent law above cited shows this, and the supreme court of the state has repeatedly held, that the husband without her concurrence may dispose of such equitable title, and that the purchaser will hold the same clear of any claim of the wife. When land owned by the husband in fee is sold upon execution against him, the wife's vested inchoate right remains intact. That cannot be sold on execution against him, for it is not his. He cannot sell it himself, for it is vested in his wife. The act of March, 1875, enlarges the wife's right, in so far that it terminates in the contingency provided for the husband's right of survivorship, and admits her into ownership and possession during his lifetime. But in respect of land held by the husband by a merely equitable title, the case is entirely different. In such land the wife has no vested inchoate interest during his lifetime. While he lives, the equitable title is his absolutely. He may sell it without consulting her. His dominion and ownership are absolute. This being the character of his ownership of an equitable title to land, it must, of course, be subject, like any other property owned absolutely by him, to the claims of his creditors. If, upon creditor's bill, or upon proceedings supplemental to execution, it is subjected to the claims of his creditors during his lifetime, he would not, of course, hold "an equitable interest at the time of his death," within the meaning of section 27 of the descent law, and his widow would inherit nothing.

As said before, I regard the case of Roberts v. Shroyer, 68 Ind. 64, as an authoritative interpretation of the act of March, 1875, irrespective of any question respecting its original merits. I may add, however, that it accords with my own view of the proper interpretation of that act. Conceding, therefore, to that act, as thus interpreted, the greatest efficacy that can be claimed for it here, we have but the case of a judicial sale of an equitable title to real estate, made in a husband's lifetime, to pay his debts, leaving nothing to descend to his wife. The act of March 11th, 1875, neither by its letter nor spirit gives the wife an interest in such case. By its terms it applies only to judicial sales of real estate of the husband, in which the wife "has an inchoate interest by virtue of her marriage." The twenty-ninth section of the statute of descents, above cited, is not applicable here. That section has reference to the settlement of a decedent's estate and the descent of real property, as between the widow and the other heirs. It was not intended to establish the rights of the widow as against creditors. The case under consideration is that of a contract for the purchase of real estate where but partial payments of purchase-money have been made, being subjected to sale to satisfy the demands of creditors. The exceptions to the master's report are overruled.

[An appeal was taken to the circuit court, where the decree of this court was reversed. 2 Fed. 202.]

Case No. 17,176.

WARING v. BUCHANAN et al.

[19 N. B. R. 502.] [1]

District Court, S. D. New York. May 27, 1879.

BANKRUPTCY — AVOIDANCE OF GENERAL ASSIGNMENT—EFFECT—INTERVENING LEVIES —UNLAWFUL PREFERENCE.

[1. Upon the avoidance of a general assignment as in violation of the bankrupt law, the title of the assignee in bankruptcy dates back to

[1] [Reprinted by permission.]

the time of such voluntary assignment, so as to avoid an intermediate levy of execution.]

[2. If the property received by a creditor on an exchange between him and the bankrupt is of much greater value than that surrendered by him, the transaction is to be deemed a preference, if an original transaction would, under the circumstances, be so treated.]

[3. A creditor of the bankrupt, who had been in business with him, and knew the condition of his affairs, surrendered notes of the bankrupt held by him, and secured by chattel mortgage, and took a new note for the same amount, payable on demand. Payment was demanded the same day, and, this being refused, suit was immediately commenced. No defense was made, and judgment was entered for the creditor, who immediately issued execution; and a levy was made on all the property of the bankrupt, including a large stock of goods not covered by the mortgage. These goods had been purchased immediately after the change of securities, and the amount of the purchase was much larger than required by the condition of the business, and the levy was made immediately after the purchase. *Held*, that the change of securities was evidently a fraudulent preference.]

L. Henry, for complainant.

W. D. Dickey, for defendants.

CHOATE, District Judge. This is a suit in equity brought by the assignee in bankruptcy of one Burke to set aside, as void under the bankrupt law, a general assignment made by Burke to the defendant Buchanan January 2, 1878, and also the levy of an execution on a judgment against Burke in favor of Buchanan, which levy was made on the same day that the assignment was executed, but prior to the delivery thereof, upon all the stock in trade, furniture, and fixtures in Burke's place of business, a confectionery store and bakery in the city of Newburgh. The bankruptcy proceedings were commenced by creditors' petition January 18, 1878. The suit is brought against Buchanan, the voluntary assignee and judgment creditor, who claims to hold the property also by the levy of his execution, Reuben R. Carr, the sheriff of Orange county, one Hallock, the assignee of Buchanan's judgment, who claims to have paid five hundred dollars therefor, and one Skidmore, who recovered a judgment against Burke, and whose execution was put in the sheriff's hands January 16, 1878, under which it is claimed that a levy was made on that day. Skidmore was served but did not appear. The other defendants appeared and defend the suit.

Prior to May, 1877, Buchanan owned and carried on this bakery and confectionery store. At that time Burke purchased one-half interest in it for four thousand dollars, giving two thousand nine hundred dollars in cash, and a bond for the balance, secured by a mortgage on other property belonging to his wife. They then carried on the business together. On the 11th day of September, 1877, Burke bought out Buchanan's remaining interest for four thousand dollars, for which he gave four notes of one thousand dollars each, payable in four, nine, twelve, and eighteen months from September 11th, secured by chattel mortgage on the tools, furniture, and fixtures of the establishment. They had cost about two thousand five hundred dollars a year before. After this purchase, Buchanan continued in Burke's employ at a salary, and down to the date of the assignment, and levy in question, January 2, 1878, he was entirely familiar with Burke's affairs. On the 23d of November, 1877, Buchanan surrendered the chattel mortgage and two of the notes having the longest time to run, and Burke gave him a new note for two thousand dollars on demand. Payment was demanded the same day, and, the same being refused, a suit was commenced thereon the same day. Burke made no defence, and December 31, 1877, judgment was entered on his default for two thousand and thirty-five dollars. Execution was immediately issued, and January 2, 1878, the sheriff levied under the same upon all the visible property of Burke, including not only the property covered by the chattel mortgage, but a large stock of goods, most of which were purchased by Burke in December, 1877. Later in the same day, the general assignment was executed. It covered all of Burke's property, and was for the benefit of all his creditors, without any preference. Buchanan took immediate possession of all the property. The sheriff appointed him his keeper, and authorized him to carry on the business and work up the materials on hand, and he continued to do so till January 19, 1878, when he was stopped by injunction from this court. During this time he admits having sold goods to the amount of about five hundred and forty-six dollars. Since the service of the injunction, by consent of all parties the property has been sold by the sheriff, and the proceeds, less certain amounts deducted for his fees and disbursements, have been deposited subject to the order of this court. The whole proceeds, as returned by the sheriff, are two thousand one hundred and thirteen dollars and forty-one cents. His bill of fees, etc., amounts to seven hundred and five dollars and eighty-four cents. The proceeds of the property included in the chattel mortgage were about two hundred and sixty dollars.

The general assignment was clearly void as against the assignee in bankruptcy, under the well-settled rule of construction of the bankrupt law as applied in this court. And the avoidance of the assignment carries the title of the assignee in bankruptcy back to the date of the voluntary assignment, so as to avoid the intermediate levy of the defendant Skidmore. In re Beisenthal [Case No. 1,236].

The question whether the defendant Buchanan's levy on the 2d of January is to be set aside, depends upon the question whether the transaction of November 23d, surrendering the two notes and chattel mortgage for the demand note, is to be regarded as an unlawful preference. Upon a careful consideration of all the testimony, I think this transaction is clear-

ly shown to have been a fraudulent preference, within the statute (Rev. St. § 5128). It is well settled that a mere change of securities or other exchange of property between the creditor and the bankrupt, though within the period and under circumstances of knowledge as to the debtor's condition which would make an original transaction a preference, cannot be impeached as such, provided that the exchange is really and in good faith what it purports to be. Sawyer v. Turpin 91 U. S. 114. But, if the property received is of much greater value than that surrendered, it seems clear that the transaction must be obnoxious to the objection that it is a preference if an original transaction at the same time and under the same circumstances would be so. In the present case the avowed purpose of taking the demand note, instead of the time note secured by chattel mortgage, was to effect a change of securities that is to give the creditor, instead of his chattel mortgage, the advantage of a levy on the debtor's property subject to execution. The security he was to obtain was not within the expectation of either party to be restricted to the property covered by the chattel mortgage, which, though nominally worth as much as the new note, was not, if sought to be applied to the payment of the debt, nearly sufficient for that purpose. The bringing of an action at once, and the placing of the creditor at the earliest time consistent with fair appearances in a position where he could levy, was unquestionably part of the intention of both parties at the time of the substitution. Without such further proceedings on the new note, it would have been no security at all, and the acts of the parties leave no room for doubt that the immediate demand and the immediate commencement of the action, so that after twenty days the creditor could at any moment perfect his lien by execution, were parts of the arrangement between them, of which the surrender of the chattel mortgage and the time notes, and the giving of the demand note, constituted the first steps. The transaction was out of the usual course of the debtor's business, and so presumptively fraudulent under the statute, but independently of the statute, which throws the burden of proof on those who affirm the good faith of the transaction, there are many and abundant badges of fraud connected with it. Buchanan was intimately acquainted with Burke's business affairs up to and after the 23d of November. Burke was undoubtedly insolvent at that time, and Buchanan must have known it. I think the evidence shows also that, after this change of securities, Burke, at the suggestion of Buchanan, made large purchases,—much larger than the nature and condition of his business required or warranted. The proper conclusion, I think, from the evidence, is that they sought thereby to accumulate a sufficient stock of goods to satisfy Buchanan's execution with. Burke purchased over nine thousand dollars worth of goods, mostly on credit, in the month of December. No sufficient explanation of this is given. Certainly, what is disclosed about the amount of business he had reason to believe he could do does not justify the conclusion that it was for any legitimate business purpose. By this accession of property, Buchanan was enabled to secure his judgment, and he appears to have waited just long enough after the 12th of December, when he might have entered his judgment, to enable Burke thus to replenish his stock. The correspondence between Burke and his creditors shows that the existence of the chattel mortgage had been the means of injuring his credit, but the subsequent acts of the parties were too plainly directed to giving Buchanan an advantage over other creditors, and too well adapted to that purpose, and too regardless of all other interests, to allow any credit to be given to the pretence made that the only reason for changing the security was because Burke's credit was thus injuriously affected, and that they had no other purpose in view than giving him a better credit, and enabling him to go on with his business. It is urged that the chattel mortgage was good security for the two thousand dollars, but the nature of the property was such that, although it cost more than that, it would realize very little if sold and separated from the establishment, as the result showed, and undoubtedly at that time Buchanan desired to realize his claim against Burke.

The seizure of the bankrupt's property under Buchanan's execution must therefore be declared void as an unlawful preference, and Buchanan must account for the property which came into his possession. The sheriff's bill has never been allowed or passed on by this court, and it contains several questionable items. A decree for an account must be entered against him. The defendant Hallock took nothing by his assignment from Buchanan, but as it does not appear that he ever received any of the property or its proceeds, he is not obliged to render an account. Decree accordingly.

WARLEY, The ELLA. See Cases Nos. 4,370–4,374.

WARMOUTH (KELLOGG v.). See Case No. 7,667.

Case No. 17,177.

In re WARNER et al.

[5 N. B. R. 414.] [1]

District Court, E. D. Michigan. Nov. 8, 1871.

ACTS OF BANKRUPTCY—DISCHARGE OF BANKRUPT FRAUDULENT PREFERENCES—BANK DEPOSITS—LIEN.

1. Where a debtor's liabilities exceed his assets, and he has ceased to meet his indebtedness as it falls due, a pledge, payment, transfer, assignment or conveyance of any part of his property, absolutely or conditionally, made while in this condition, is an act of bankruptcy, and constitutes sufficient ground, under the twenty-

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ninth section of the bankrupt act [of 1867 (14 Stat. 531)], for refusing him a discharge.

[Cited in Re Wolfskill, Case No. 17,930; Re Carrier, 47 Fed. 444.]

2. A banker has no lien upon the moneys of a depositor for any separate debt which the depositor may be owing him, hence, any amount on deposit, in the name of the bankrupt, must go in as assets, and the banker must prove his debt and take his dividends with the other creditors.

3. When a banker, in accordance with his usual custom, charges his depositor, in his deposit account, for the notes or other obligations as they fall due, the transaction is valid only as between the banker and the depositor, but in the event of the depositor becoming bankrupt, it might constitute an unlawful preference under said act.

[In the matter of S. P. Warner and others, bankrupts.]

Mr. Reilly, for opposing creditors.

Mr. Kent, for bankrupts.

LONGYEAR, District Judge. As I deem the second and third specifications sustained by the proofs, and sufficient to defeat a discharge under the bankrupt act, the other specifications will not be considered. The second and third specifications charge the bankrupts with having given fraudulent preferences contrary to the provisions of the act, and also charge the same acts to have been done by the bankrupts in contemplation of becoming bankrupt and for the purpose of preventing their property from being distributed under the provisions of the act, and of defeating and delaying the operation thereof. Section twenty-nine of the act, provides that no discharge shall be granted, or if granted be valid, if the bankrupt has, among other things: First. "Given any fraudulent preference contrary to this act," or, Second. "In contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under any liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or being distributed under this act in satisfaction of his debts." The first provision above cited is general in its terms, and under it it is sufficient to show a preference, which was fraudulent under any of the provisions of the act. The second provision is specific, and it is necessary that the proofs should bring the case clearly within its terms, and show especially that the act charged was done "in contemplation of becoming bankrupt." In re Rosenfeld [Cases Nos. 12,057, 12,058]; In re Locke [Id. 8,439]; In re Burgess [Id. 2,153]; In re Gay [Id. 5,279]; In re Louis [Id. 8,527]; In re Foster [Id. 4,961]. Where, however, as in this case, the specifications bring the case within both provisions, proof sustaining either is sufficient. What constitutes a fraudulent preference within the meaning of the first provision of section twenty-nine, above cited, is defined in the first clause of section thirty-five, and it is composed of the following elements: First, actual insolvency of the debtor, or, in lieu thereof, contemplation of insolvency, and, second, that the act complained of was done with a view to give a preference. It is within this provision that I think this case is brought by the proofs.

The specific acts charged and proved are: First. Payment to Thomas Hughes, a creditor, a debt of twenty-six dollars and fifty cents, July twenty-first, eighteen hundred and sixty-eight; and, Second. Payment to David Preston & Co., creditors, on indebtedness, one hundred and ninety-three dollars and fifty cents, July fifteenth, eighteen hundred and sixty-eight. Under the rule above laid down, the following questions arise: First. Were the bankrupts insolvent when these respective payments were made? Second. Were these payments, or was either of them, made with a view to give a preference? In answer to the first question, it is sufficient to state that it is not contested, neither can it be doubted under the proofs, that the bankrupts were in fact insolvent at the times mentioned. But an affirmative answer to the second question is contested. It is claimed, first, that the bankrupts, although in fact insolvent, did not know of their insolvency at the time the payments were made, and that it is therefore impossible that the payments were made with a view to give a preference. The conclusion is no doubt a correct one, from the fact assumed or claimed to exist, but the proofs do not sustain the assumption.

It has been held, and no doubt correctly, that every person is presumed to know his own pecuniary condition. That presumption, however, may be rebutted, and a person may show that he was innocently mistaken as to his true condition. The burden is, however, upon the person setting up such claim. In this case, the claim that the bankrupts were ignorant of their true condition is founded upon some proof in the case tending to show that when they commenced business, which was in February, eighteen hundred and sixty-eight, by a mistake in footing up their assets they appeared then to be amply solvent. Some time, however, in July, eighteen hundred and sixty-eight, but at what particular day does not clearly appear, but somewhere about the twelfth or fifteenth, the bankrupts took an inventory of their assets, and then learned, and it is not controverted that they then knew, whatever may have been their belief before, that they were insolvent. It also appears from the proofs that they ceased to meet their engagements as they fell due in the ordinary course of the business in which they were engaged in the latter part of June. This being of itself evidence of insolvency under the bankrupt act, was sufficient at least to

put them on inquiry as to their true condition, and to warn them to suspend all payments until they could ascertain whether they could safely pay any of their creditors without jeopardizing the interests of the others. Resort to this fact is, however, unnecessary, because I consider it clearly proven that both the payments were made after the inventory in July, from which, as we have seen, the bankrupts ascertained a clear knowledge of their insolvent condition. According to the entries in the bankrupts' cash account, the payment to Hughes was made July twenty-first, eighteen hundred and sixty-eight, which date is, beyond all question, after the taking of the inventory, and which, in the absence of all explanation, must be taken to be the correct date. True, Russell C. Warner, one of the bankrupts, testifies that he thinks nothing was paid Hughes after the inventory was taken. Such mere loose opinion can of course be given no weight as against the deliberate entry upon their books, evidently made at the time the transaction took place. The payment to Preston & Co. was unquestionably made July fifteenth, eighteen hundred and sixty-eight. Looking at this date alone, and in consideration of the uncertainty as to the exact date of the taking of the inventory, there might be room for doubt as to which took place first. But Russell C. Warner, who gave the check to Preston & Co., testifies that he gave the check while S. P. Warner was in New York, and that the latter did not leave for New York until after the inventory had been taken. This renders it clear, beyond all controversy, that the payment to Preston & Co. was made after the taking of the inventory, and of course when the bankrupts had full knowledge of their insolvency. But it is further claimed, that although the bankrupts were in fact insolvent, and were cognizant of the fact when the payments were made, the proof shows that at those times they were intending to go on with their business, and hoped and expected eventually to pay all their creditors in full, and that therefore they could not have made the payments with a view to give a preference. In other words, it is claimed that these bankrupts, notwithstanding the fact, well known to them, that they were insolvent and had not sufficient assets to pay all their debts in full, decided to take the administration of their estate into their own hands, instead of placing it in the bankruptcy court, (where the law, in its spirit and intent, if not by its letter, contemplates it should be placed under such circumstances,) with the hope that their creditors would suffer them to carry out such decision, but without any arrangement, consent or understanding with such creditors, upon which to found such hope. Therefore, any payments which the bankrupts made in carrying out such decision cannot be held to have been made with a view to give a preference, because in such case the payment was made with the intent eventually to pay all in full. I cannot subscribe to any such doctrine. When a debtor's liabilities exceed his assets, and he has ceased to meet his indebtedness as it falls due, and has thus become in law, as well as in fact, insolvent, then every payment made by him is in fact a preference of the creditor so paid over his other creditors; and when such debtor, with a full knowledge of his bankrupt condition, deliberately decides to administer his estate himself, and proceeds to make partial payments, he must be held to have decided and intended to do just what he does do, viz.: to prefer and to pay off such creditors first as to him shall seem fit. Such a decision is, in a general sense, nothing more and nothing less than what a decision of such debtor to pay a particular debt is in a particular sense; and the one is as much in violation of the bankrupt law as the other.

Neither is the case of the bankrupts aided by the claim that is set up for them—that they hoped eventually to be able to pay all their creditors in full; because, in the first place, such hope necessarily involves the idea that the debtor has a right to pay when he pleases, and to prefer whom he pleases, which is in direct violation of the well recognized principle of law that a creditor's right to receive his pay when due is just as great as his right to receive his pay at all; and in the second place, in the condition in which these bankrupts appear to have been, no such hope could have been reasonably entertained. There was no foundation for it in fact. This really appears to have been the conclusion of the bankrupts themselves, because in about a month after they ascertained their real condition, we find them, without any new developments in their affairs, voluntarily going into bankruptcy, thereby doing just what they should have done in the first instance. Therefore, the bankrupts being in fact insolvent when the payments were made, such payments operated necessarily as a preference to those creditors to whom they were made, and such payments having been made with full knowledge on the part of the bankrupts of their true condition, they must be presumed, as fair minded, reasonable business men, to have known that such was the operation of such payments, and of course that they made the same with that view. The proof not being sufficient to do away with such presumption, the same remains in full force. I therefore hold that the second and third specifications are sustained. The sooner it comes to be generally understood that the only safe, lawful and strictly honest course for insolvent debtors to pursue, is at once, upon their condition becoming apparent to themselves, to place their assets in the control of their creditors, where all may share alike, by availing themselves of the provisions of the bankrupt act, the better it will be for both the debtor and the creditor classes.

There is one other position taken by the learned counsellor for the bankrupts which should not be passed by without notice. Da-

vid Preston & Co., to whom the payment of one hundred and ninety-three dollars and fifty cents was made, were bankers, and with whom the bankrupts kept their deposits. Preston & Co. held the bankrupts' note for about seven hundred dollars, and the one hundred and ninety-three dollars and fifty cents was the amount which the bankrupts had on deposit with them, and the check which was given to Preston & Co. was for that amount to apply on the note. It was claimed that Preston & Co. had the right to apply the amount of deposits on their note even without any check or other direction of the bankrupts, and that, therefore, the application of it was no preference. In the first place, I do not consider the position a sound one in law, especially as between the banker and the other creditors of the bankrupt depositor. The banker has no lien upon the moneys of depositors for any separate debt which the depositor may be owing him, and he therefore has no right to apply the same to the payment of such debt without the consent of the depositor. Were it otherwise the bankrupt's estate might be all in money thus on deposit, and the banker might hold indebtedness against him sufficient to absorb the whole, and the other creditors be thus left without anything whatever, thus effectually defeating the object and purpose of the bankrupt law. The amount on deposit must go in as assets, and the banker must prove his debt and take his dividends with the other creditors. Where, however, it is according to the usual and generally understood custom of a banker to charge to his depositors in their deposit account the notes or other obligations of the depositors as they fall due, the consent of the depositor to such course may fairly be presumed, and the transaction be thus brought within the rule as above stated. But even this would make the transaction valid only as between the banker and the depositor, but as between them on the one hand, and the other creditors on the other hand, it might constitute an unlawful preference under the bankrupt law, and for that reason be void. But in any view of the law the position assumed cannot be maintained in this case, because the note held by Preston & Co., according to the statement of it as given by the bankrupts in the schedule of their indebtedness attached to their petition for adjudication of bankruptcy, was not due at the time the check was given. The check was given July fifteenth, and the note was not due till the sixth day of August following. Preston & Co., therefore, had no demand against the bankrupts at the time the payment was made, and the payment stands out, in one sense, as a mere gratuity, and clearly as a preference carrying with it evidence that it was so intended.

The second and third specifications being sustained, a discharge is refused.

Case No. 17,178.

In re WARNER et al.

[7 N. B. R. 47; [1] 4 Pac. Law Rep. 123.]

District Court, S. D. New York. Dec. 29, 1871.

BANKRUPTCY—PARTNERSHIP BETWEEN FIRMS.

Two firms shared in a certain venture, and kept an account at bank in the name of one firm, adding the word "Co.," and so signed the checks. *Held*, that these checks did not establish a copartnership between the two firms, and that the holder of one of the checks thus signed could not file a petition in bankruptcy against the members of both firms. Petition dismissed with costs.

[In the matter of J. H. Warner and others, bankrupts.]

Norwood & Coggeshall, for petitioning creditor.

H. B. Whitbeck, for Anderson, Willits, and Abrams.

BLATCHFORD, District Judge. In this case it is very clear, on the evidence, that there ought not to be any adjudication against Anderson, Willits, or Abrams, for these reasons:

First. The petitioning creditor was never the creditor of Anderson, Willits, or Abrams, otherwise than through such liability on their part as could arise out of the checks given him which were signed in the name of Warner, Dickson, McElrath & Co., by Anderson.

Second. Those checks, in view of the evidence, do not establish that there was any copartnership called Warner, Dickson, McElrath & Co., of which Anderson, Willits and Abrams were members, or either of them was a member. They were merely drawn against moneys which, if on deposit to meet them, would have been so on deposit as the specific proceeds of the sales of peaches, and would have been deposited to the credit of an account which had been opened in the name of Warner, Dickson, McElrath & Co., as representing such proceeds, to keep them separate from moneys on deposit in the same bank to the credit of an account which had been opened in the name of Warner, Dickson & McElrath.

Third. The written agreement between the two firms of Warner, Dickson & McElrath and Anderson & Co., in their firm names, did not constitute a partnership between the six members of the two firms, in respect to the peach business, so as to make the members of the firm of Anderson & Co. liable to the petitioning creditor on any of the indebtedness set forth in the petition.

Fourth. It is not established that any such partnership, created in any manner, existed.

The petition is dismissed with costs.

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[1] [Reprinted from 7 N. B. R. 47, by permission.]

WARNER (BLANCHARD'S GUN-STOCK TURNING FACTORY v.). See Case No. 1,521.

Case No. 17,179.

WARNER v. BRINTON.

[15 Haz. Reg. Pa. 49.]

Circuit Court, E. D. Pennsylvania. 1835.

CONSTRUCTION OF WILLS — ADMISSIBILITY OF EXTRINSIC EVIDENCE—INSTRUCTIONS TO SOLICITOR.

[1. Instructions given to a solicitor for the preparation of a will are in no case admissible to control or contradict the plain words of the will as afterwards executed, or to supply an omission, unless there is something on the face of the instrument which shows a mistake or omission by pointing or referring to something which the instructions will explain. In such case the instructions are considered as connected with the will by the reference, so as to bring the case within the rule, "Id certum est quod certum reddi potest."]

[2. When a will is ambiguous in its words, and contains no reference to anything which can make it certain, or on its face admits of no construction, it is void.]

[3. Where a will duly and validly executed in all respects, and containing a clause revoking in absolute and unqualified terms all previous wills, wholly omitted to make any disposition of certain lands belonging to the testator, and there was no ambiguity on the face of the instrument, *held*, that the will could not be aided by admitting in evidence a clause in the instructions given by the testator to his solicitor, which contained directions for the disposal of this property, but to which no reference was made by the will, and which could not be connected with it by any construction; nor was such evidence rendered admissible by a recital in the introductory clause of the will, indicating an intention on the part of the testator to dispose of all of his property. In such case the testator must be held to have died intestate as to the land in question.]

At law.

BALDWIN, Circuit Justice (charging jury). Edward Brinton, in his lifetime, was seized of a tract of land in Birmingham township, Chester county, lying on the south side of the Kennett road, on which he resided, containing by estimation eighty acres; he died leaving one son, the defendant, and eight daughters, of whom the wife of the lessor of the plaintiff is one. Six of the other daughters, with their husbands, have conveyed their shares to him, so that he is invested with the title to seven-ninth parts of this land, if Edward Brinton had not disposed of it in his lifetime by his will duly executed, so as to pass the land to the defendant, and will be in such case entitled to your verdict. On the other hand, if Edward Brinton did devise this land to his son James, your verdict must be for the defendant. The whole case therefore turns on the single question of whether he made a valid testamentary disposition of this property, by which the descent to all his children, as directed by the act of assembly in case of his dying without a will, will be interrupted in favor of his son.

It is not pretended that Edward Brinton died without any will; it is admitted that the paper executed on the 7th August, 1806, is a valid will, duly executed and proved according to law to pass real estate, but by this will he only disposes of the property in question during the widowhood of his wife, saying nothing to whom it should go after her marriage or death. Unless, therefore, he has disposed of the remainder in fee, by some other paper duly authenticated to pass lands, or which can be transferred to, and be made a part of his last will and testament, the law considers him as dying intestate as to his land, as if he had made no will at all.

The act of assembly requires that all wills concerning real estate shall be in writing, and be proved by two witnesses. You will then consider a will to be the written declaration of a man of his intention as to what shall become of his property after his death, proved by two witnesses. The evidence in the case is before us in the transcript of the proceedings of the register's court of Chester county, (vide the copy of the will and certificate of probate,) and the petition to the legislature. This is legal and competent evidence to establish the paper set up as a will, in the absence of any opposing testimony. None has been offered in opposition to the executed will, you will therefore take that so far as it goes, as the established will of Edward Brinton, agreed to by both parties now, and never intended to be contested by any of the family.

As to the paper of instructions, or the rough draft of the will, drawn up by Mr. Gibbons, which is copied into the certificate of probate, you will take it only as prima facie or presumptive evidence of its being any part of the will of Edward Brinton, open to be contradicted or disproved by any testimony competent to show, either that he did not make it his will in fact, or that it is not in law his will. The other children are as fully at liberty to contest the paper after probate as before, the decree of the register's court concludes them in no matter either of law or fact, whether it relates to the sanity of the testator, the execution proof or construction of the paper. 3 Rawle, 20; 4 Serg. & R. 193; 12 Serg. & R. 283; 10 Serg. & R. 84. It is only in virtue of the act of assembly, that the proceedings of the register, or the register's court can be admitted in evidence; neither the copy or probate of a will are evidence of a devise of lands at common law. 5 Serg. & R. 213; Harrison v. Rowan [Case No. 6,141]; [Darby v. Mayer] 10 Wheat. [23 U. S.] 465; [M'Cormick v. Sullivant] Id. 201. And however regular and full the probate may be, it is only prima facie evidence; its effect is destroyed if, on the face of it, the will appears to have been unduly admitted to record, or it appears by extrinsic evidence. 5 Serg. & R. 215; Hylton v. Brown [Cases Nos. 6,981 and 6,982]. This may be done by proof of the incompetency of the witnesses, defect in their evidence to establish the necessary facts, or by showing that in point of law the proof before the register was insufficient to establish the paper ad-

mitted to probate as the last will and testament of the testator. 1 Yeates, 87, 90; 4 Yeates, 413. In order to show the legal insufficiency of the proof on which the register's court acted in the present case, the plaintiff has given in evidence the whole proceedings before the register and in the register's court, which were the foundation of their decree, admitting the paper in question to probate, as part of the will of Mr. Brinton. It was necessary for them to do this, in order to make their objections to its establishment as a will, for otherwise the certificate of probate, under the seal of the court, would have been open to the allegation, that it was made in due and legal evidence; and as the copy and probate were evidence without inquiring on what ground the court acted, the plaintiff would have been much embarrassed, without resorting to the testimony referred to in their minutes. By inspecting them, it now appears, that the only proof of the devise of this land to the defendant is contained in the minutes of the evidence of James Gibbons, of William and Amos Brinton, and a deposition or statement of James Gibbons which was read in the register's court, but is now lost, and no copy or evidence of its contents produced, and the instructions themselves. These minutes are as follows: (Vide minutes and instructions.)

There is no doubt that the plaintiff had a right to refer to these minutes, to show the foundation of the decree of the register's court, but we entertain strong doubts whether they are competent evidence in an ejectment to try the title to the land; they relate exclusively to a matter wholly unconnected with the personal estate, or the administration of the will; and it might have been a serious question whether the evidence was admissible, had the objection been made. Vide Boudereau v. Montgomery [Case No. 1,694]; [Marine Ins. Co. v. Hodgson] 6 Cranch [10 U. S.] 219; [Wood v. Davis] 7 Cranch [11 U. S.] 271, 273; [Ferguson v. Harwood] Id. 412; [Hopkins v. Lee] 6 Wheat. [19 U. S.] 113; 2 Yeates, 341; 2 Bin. 511; 3 Rawle, 20; 4 Yeates, 413; 4 Serg. & R. 193; 10 Serg. & R. 84; 12 Serg. & R. 283, 284; 2 Rawle, 178; [Barr v. Gratz] 4 Wheat. [17 U. S.] 220; [McCormick v. Sullivant] 10 Wheat. [23 U. S.] 201, 204; [Darby v. Mayer] Id. 465, 470; 5 Serg. & R. 214, 215; Boudereau v. Montgomery [supra]. But as the counsel on both sides have considered it properly before us, and have rested the case of their respective clients in its legal sufficiency, to establish this clause in the instructions or rough draft of the will as a devise of the land in question, the court will consider it in this aspect alone. Taking the testimony as it is reduced to writing with all legal inferences which a jury can legally draw from it, as true to the full extent, and connecting it with the only other evidence in the cause, the petition to the legislature, we proceed to inquire whether Edward Brinton did devise this land to the defendant.

For all the purposes of this case, the facts as stated are admitted to be proved, and the only question which remains is their sufficiency in law to make out the issue on the part of the defendant. This is a question of law, which the law must decide. 8 Coke, 155a. It is an universal rule of property that it must descend and be enjoyed according to the course which the law has prescribed, unless the owner has made some other disposition of it which the law recognizes as valid and binding. 3 Rawle, 20.

The acts of assembly of Pennsylvania have directed that the estate of a person undisposed of by will shall descend to and be enjoyed equally by all his children; of the natural justice of this provision, and its perfect congeniality with the genius and spirit of all the institutions of the state and country, no man can doubt. It was a rule of the common law, founded in the wisdom of ages, and adopted by our ancestors, that the heir at law should not be disinherited unless by the plain words or necessary implication from the will of his ancestor, and this rule is assumed as a sacred land mark of property in all countries where the law of the land is respected, as the guardian of the rights of the people. It is never departed from in that country from which we derive our best rules of jurisprudence, in which the oldest son is the sole heir to all his father's lands; surely it ought not to be less respected here, where there is no odious law of primogeniture, and equality of right between the sexes has been established from the first settlement of the province, in conformity with the policy of its founder.

This law leaves every man at liberty to do with his property as he pleases—his will is the supreme law, and when he speaks it must be obeyed. It is only when he makes no will or none which disposes of any particular part of his estate, that the law makes a will for him, and does that which he omits to do for himself, by declaring to whom it shall go if he leaves behind him no directions testifying his intention in writing, and so attested as to afford authentic evidence of his will as a muniment of title to the favored object of his bounty.

There is no rule more reasonable than that which imposes on those who wish to divert the property of a deceased person from the established course of succession, the necessity of doing it by legal and satisfactory proof; nor is there any subject in which a regard to the peace of society and the security of property makes it more incumbent on juries and courts to adhere to fixed and settled rules than in cases of wills. They are the title deeds to a vast proportion of the property held by our citizens, and unless they are regulated by steady and well established principles, we lay a train of gunpowder under the possessions of purchasers. If a paper is established as a will, upon other than legal proof with any view to avoid a supposed hardship in a particular case, the consequences are interminable. If a paper defective in law to pass an estate should be permitted to disturb the succession established by the act of

assembly, we must give effect to one the object of which was to revoke a former will, and thus in the zeal to make wills where a deceased person had made none, we should destroy those which had been most solemnly executed. For it must not be forgotten, that the same evidence which will take an estate from an heir at law, will take one from a devisee under a will, which generally speaking is made and recorded by the same acts, and they have the same effect for both purposes.

The law is very liberal in favor of last wills; it makes great allowance for infirmities of body and mind, dispenses with all forms, and requires no solemnities which are not absolutely indispensable in point of substance, to show the deliberate intention of the maker to dispose of his property in some definite manner. The requisites are few and simple, every man, however unlettered, has the means of making his will by expressing his intention in writing and the writing proved by two witnesses; he has only to thus point out the thing he gives, the person to whom it is given, and the law effectuates his intention by declaring such paper to be his last will and testament.

Has Edward Brinton done so as to this tract of land? If he has, the defendant is entitled to it; if not we cannot make a will for him. The question is whether this paper is his will. In cases of this kind very interesting questions often arise as to the kind of evidence, which is admissible to prove the various facts on which the validity of wills depend; those which have been made in this case are highly so; they have been argued on both sides with great ability and learning, and deserve your and our most serious consideration. We do not know how much property may depend on the final settlement of the principles involved, and questions arising on this case, and cannot proceed with too much deliberation; we cannot settle the law; our opinion is subject to the revision of a higher tribunal, which will correct our errors, but cannot reach yours. In laying down the law to you, it is not as one may think it ought to be, but as in our consciences and on our oaths we believe it to be settled by the legislature and courts of justice, as a rule from which we cannot depart. We shall do it plainly and without reserve, so that, whether our judgment is affirmed or reversed, this case will eventually place some principles beyond further discussion, and those who will read it, be able to understand what is, and what is not, a will. There is but one kind of evidence on which a paper can be established as the last will and testament of any man,—it must be in writing, and proved by two witnesses, to be the written declaration of the maker's intention, to dispose of his property according to its directions. The disposing intention and the fact of disposition must appear substantially on the face of the paper; there must be a devisor and a devisee and a thing devised. When, by a fair construction of the instrument it contains these three requisites, it is a will, however informal if duly proved; if either are wanting, it is no will.

In the will executed by Mr. Brinton, and witnessed by the subscribing witnesses, there is no devise of the remainder of this land; if there is any, it is by the instructions or rough draft written by Gibbons, but it is admitted that these were superseded in every thing but the one paragraph by the executed will.

We must then be satisfied that this clause of the rough draft was legally intended to remain as his will, while all the rest was supplied. The law requires that the will should be in writing, and proved by two witnesses, but it need not be signed by the testator (6 Serg. & R. 5); nor attested by subscribing witnesses, though it must be proved by two. [Lawson v. Morrison] 2 Dall. [2 U. S.] 286; 6 Serg. & R. 47, 223, 484; 16 Serg. & R. 84; Hylton v. Brown [Cases Nos. 6,981 and 6,982]. It need not be written by the testator; if done by his desire or consent by another, and he adopts it, and that is proved by two witnesses, it is sufficient. 1 Yeates, 91; 1 Serg. & R. 263; 6 Serg. & R. 454. Or if a paper containing "the substance of a will with the usual act of execution subjoined, though without subscribing witnesses or proof of publication, if found in his possession, that is prima facie evidence of its adoption as a testamentary act." But if the paper is destitute of every formal act of authentication, the presumption is adverse, in the absence of proof of actual publication or any other act of recognition equally satisfactory. The omission to perfect an instrument which carries with it intrinsic evidence of a design to superadd an act of authentication which the decedent has not been prevented from executing by sudden death, is referred to a change of intention. Scraps of paper notes—or memoranda or indorsements—on bonds, though intended to denote a testamentary disposition, must contain at least the substance of a devise. 3 Rawle, 20, 21; 4 Serg. & R. 557.

The testator may intend to correct the paper; he may give the rough notes or instructions to a scrivener to make a formal draft of a will; yet these will not invalidate it as a will, if he dies before the formal draft is executed or read over to him for his approbation; if the original instructions are duly proved, they will control it when they differ. 3 Yeates, 511, 514. And positive proof by one witness and circumstances equal to such proof by another are sufficient. 16 Serg. & R. 84, 85. But the paper must contain sufficient intrinsic evidence of a testamentary disposition, and be intended to be his last act in disposing of his property after his death.

This, then, is the important question in this case: Was this devise in the instructions devising the homestead to James, intended by the testator to be his last will as to this part of his estate? That it was so in fact we have no doubt, but this does not suffice to make it operative as a will under the act of assembly. That intention must not only have existed in fact, but be now so proved as to enable the court to carry it into effect according to the

law. As at present advised, we should not doubt that if the testator had died without an opportunity of putting the rough draft into form by executing a will, these instructions would have been considered as his testamentary disposition of his property, but in the event which has happened a very different case is presented. He makes a formal will, executes it in all legal form and solemnity. It is attested and proved by three subscribing witnesses, and published as such in their presence. It expressly revokes all former wills by him before made and declares this and no other to be his last will and testament. Such a will would have revoked the most solemnly executed will which he had made before, and it must have the same effect as to all other papers of a testamentary nature; the important question then arises, can this clause in the rough draft be now established as his will, in relation to the property in controversy, on the evidence before us? If it has any effect, in law, it must be to make another will besides the one he has thus executed, when he has solemnly declared that no other will shall be his will though before made by him; to confirm and ratify what he has annulled, by setting up a revoked paper, and virtually expunging the revoking clause from the executed will. The evidence must go farther than enabling us to get rid of the revocation; it must authorize us to add the revoked paper to the will, so as to make it a part of it, in the same manner as if it had been introduced into it by the testator himself.

On a careful examination of the evidence, we find none which goes to show any act or declaration of the testator in relation to the disposition of his property subsequent to the execution of his will. What precedes the execution can have no bearing on the revoking clause, for a revoked will must be republished before it can have life or effect. 4 Serg. & R. 296, 297. The testator has declared the executed will to be his only and last will and testament, so we must adjudge it unless the law will permit us to alter, explain, or construe it by evidence aliunde, as a case of ambiguity,—either (1) an ambiguity or doubt on the face of or in the body of the will; (2) that which arises on matter not in the will, but out of it, when the words are clear; (3) that which is intermediate, partaking of the character of patent and latent ambiguity. Bac. Law Tracts, 99, 100; Earle v. Sawyer [Case No. 4,247]. That which arises from a mistake of the testator or his omission to express himself intelligibly without explanation by averment or collateral proof.

In the case of Packer v. Nixon [Case No. 10,653], we expressed our entire concurrence with the declaration made by the present chief justice of the supreme court of this state, that "any settled rule which leads to a determinate effect (in comparison with which the fulfilment of any particular intent is of secondary value) is preferable to a process which would destroy every thing like stability of decision, and leave titles depending on intention to the decision of chance and the sport of opinion." Page 13; 2 Rawle, 32; [Wright v. Denn] 10 Wheat. [23 U. S.] 228. We also laid it down as a settled rule, that the intention of a testator must be collected from the words of the will, that no averment ought to be taken out of the will which cannot be so collected from the whole will applied to the subject matter to which it relates (page 14; 3 Coke, 28b; 3 Atk. 258; 4 Coke, 4S; 5 Coke, 6Sb; Latch, 137; Harg. Law Tracts, 495, 496; 1 Brown, Ch. 216; 3 Bin. 14S, 161); and that the parol declaration of the testator as to who should be his heir was of no effect in law (page 18, Pl. 345b).

There are however cases in which parol evidence will be admitted to show or explain the written intention of a testator in cases of what are termed latent ambiguities or doubts, which are thus defined by Lord Bacon: "There be two sorts of ambiguities by words. 'Patens' is that which appears to be ambiguous on the face of the instrument. 'Latens' is that which seemeth certain and without ambiguity for any thing that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity." Bac. Law Tracts, 99; 1 Mar. 11; Hob. 32; 4 Dowl. 93. "Ambiguitas patens is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law, for that were to make all deeds hollow and subject to averment, and so, in effect, that to pass without deed which the law appointeth shall not pass but by deed." Bac. Law Tracts, 99; Vide [Grant v. Naylor] 4 Cranch [8 U. S.] 224, 234; 8 Coke, 155. "Ambiguity of words by matter within the deed and not out of the deed shall be holpen by construction, or in some cases by election, but never by an averment, but rather make the deed void for uncertainty. 8 Coke, 155a. As if a man give land to J. D. and J. S. and heirs and do not limit to whether of their heirs, or give land in tail, the remainder in tail with a proviso, that if he or they or any of them do any, &c., it cannot be averred on this clause, that the restraint was only on him in the remainder and the heirs of his body, and that the tenant in tail in possession was meant to be at large." Bac. Law Tracts, 99. "When the uncertainty cannot be helped by construction or intention it shall be holpen by election; as if I grant ten acres of wood in sale where I have an hundred acres; whether I say in my deed or not that I grant out of my 100 acres, yet here shall be an election in the grantee, which 10 he will take, and the reason is plain, for where the thing is only nominated by quantity, the presumption of the law is that the parties had indifferent intention, which should be taken." Bac. Law Tracts, 100; 21 C. L. 290; 8 Coke,

155; Hob. 32. "But if the ambiguity is latent, as if I grant my manor of S. to I. F., and I have two manors, North S. and South S., this ambiguity is matter of fact, and shall be holpen by averment, whether of them it was that the party intended should pass. But if the deed recites whereas I am seised of the manor of North S. and South S., and I lease you one manor of S., there is clearly an election; so if the recital is of two tenements in D., and one is leased, these cases are where one name and appellation denominates divers things. There is another class of cases where the same thing is called by divers names, which shall be holpen by averment, because there is no ambiguity in the words; the variance is matter of fact; but the averment shall not be of intention, because it doth stand with the words, for in the case of equivocation the general intent includes both the special, and therefore stands with the records." Bac. Law Tracts, 101; Peisch v. Dickson [Case No. 10,911]; [Mechanics' Bank v. Bank of Columbia] 5 Wheat. [18 U. S.] 336, 337, S. P. "As if I give lands to Christ's Church in Oxford, and the name of the corporation is C. C. in the University of O., this shall be holpen by averment, because there is no ambiguity in the words." Bac. Law Tracts, 101; Hob. 32.

These are the illustrations of the maxims, "Ambiguitas verborum verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti, tollitur," by a great jurist in ancient times, conformably to which are those which have since received the highest judicial sanction. When a latent ambiguity is produced in the only way in which it can be produced, that is by parol evidence, it must be dissolved in the same way, and there is no cause for admitting it to show the intention upon a patent ambiguity on the face of the will. They are all cases of latent ambiguity, and the objection to supply the imperfections of a will are founded on the soundest rules of policy and law. [Faw v. Marsteller] 2 Cranch [6 U. S] 29. It would be full of great inconvenience that none should know by the written words of a will what construction to make or advise to give, but that it should be controlled by collateral averments out of the will; and if they are admitted, how can there be any certainty? A will may be any thing, every thing, nothing. 1 Johns. Cas. 234; 6 Conn. 275. The statute appointed the will to be in writing, to make a certainty, and, should we admit collateral averments and proofs, and make it utterly uncertain, the witnesses, and not the testator, would make the will. 1 Mod. 210; 3 P. Wms. 354. "If the effect of the introduction of the evidence would be to add new matters to the will, either the subject of the devise, or the name of the devisee, it would also authorise the striking out of what was contained in an executed will, and thus though the will was made in form by the testator in his lifetime, it would be really made by the attorney after his death, and all the guards of the law be utterly swept away." 21 C. L. 288, 292.

The established rules of law are safer guides in the administration of justice, than any considerations as to their bearing on any particular case of supposed hardship; and it is more wholesome to struggle not to let little circumstances take a case out of a general rule, than to struggle by them, to prevent its application. 6 Ves. 641.

As to instructions for making a will the established rules are that where they are subscribed as preparatory to a will, the execution of the will supersedes them, and where they differ the presumption is that the testator adopted the alteration. 21 C. L. 292. To establish any paper as a testamentary one, the court must be satisfied that the testator intended it to be a part of his will, and if there is more than one paper set up as a will, it must be shown that they were intended to be cumulative. 1 Cond. Ecc. [3 Phillim. Ecc.] 452; 1 Cond. Ecc. [1 Phillim. Ecc.] 30, 63.

If an unfinished draft is propounded as a will, it must appear that the deceased was prevented from executing it by invincible necessity or the act of God. 1 Cond. Ecc. [1 Phillim. Ecc.] 30, 31, 63; S. P., 3 Rawle, 20, 21. If he omits to transfer a provision from the draft to the will, it cannot be supplied by parol evidence in connection with the draft, whatever may be the opinion of the court as to the actual intention or hardship of the case, though when the mistake was pointed out to the testator, he proposed to insert the omitted legacies in the formal will; but, as he did not do it, the court could not supply the defect. 1 Cond. Ecc. [1 Phillim. Ecc.] 63, 64. When an instrument is executed by a competent person, he is presumed to know its contents and effect, and intend to give it the effect which follows from its contents and construction. 3 Cond. Ecc. [1 Hagg. Ecc.] 290; 4 Cond. Ecc. [2 Hagg. Ecc.] 209. Subsequent instructions intended for a new will, duly proved, may be a codicillary paper, and operate as a revocation pro tanto of a former executed will. 1 Cond. Ecc. [2 Phillim. Ecc.] 267, 269, 270; 3 Rawle, 20.

In some cases instructions may be given in evidence when the executed will is ambiguous on the face of it, as to the person devisee,—as a bequest to "her." The question was to whom the reference was. The instructions were admitted to show that testator had directed the legacy to be given to his wife, and that her name was omitted by mistake of the scrivener. 1 Cond. Ecc. [3 Phillim. Ecc.] 444, 455. Here the will pointed out the ambiguity, and on its face necessarily referred to an explanation of the intention as to the meaning of the word "her," it was a case of an ambiguity helped by the reference in the will itself. So, where the executed will was, "I give £60,000 in legacies," which were enumerated to the amount of 51,000, it then gave

"the residue 4,000"—making only 55,000, the draft of the will in testator's handwriting, at the bottom of which he had inserted the date of the will and the names of the witnesses, was admitted to show the mistaken omission. 2 Cond. Ecc. [3 Addams, Ecc.] 509, 512.

Here the mistake appeared on the face of the will, and was helped by reference. So where the 20th sheet of a will was missing, and it appeared from the 19th and 21st pages, that the missing sheet was necessary to connect them as a component part of the will, that its omission was unintentional, and that it had been detached by accident—it was supplied by proof of instructions and other evidence. 2 Cond. Ecc. [3 Addams, Ecc.] 506; 21 C. L. 294, S. C. So where a paper was executed in 1802, declared to be a codicil to the will of 1798, which had been destroyed, and a new one executed in 1800, these facts were admitted to show, that the testator intended to refer to the existing will of 1800, and had, by mistake, referred to the cancelled one of 1798. 1 Cond. Ecc. [3 Phillim. Ecc.] 445, 452. So where a will was endorsed "plan of a will," and so headed, but was otherwise perfect and complete, evidence was admitted to show whether it was intended to be a will, or was only authenticated as instructions (1 Cond. Ecc. [3 Phillim. Ecc.] 452), being consistent with the words of the will. So where a deed in trust for A. and B. was indefinite as to the parts they should take, a deed from the trustee defining their shares and other evidence was admitted to show that it was according to the intention of the parties who intended that both instruments should operate as one deed (17 Serg. & R. 110), both being executed at the same time.

In this respect there is no distinction between devises of real and personal property. In a leading case, the testator devised his estate to his executors, one of whom owed him by bond £3,000; evidence was offered to show that he instructed the scrivener in writing to give the money to the executor, but he refused to insert it in the will, insisting that making him executor would release the debt; that the testator took counsel on it, who gave the same opinion, in confidence of which, the testator executed the will without the devise. The evidence was not received, and the debtor executor was decreed to pay his co-executor one-half of the bond. Talb. 240, 241. On an appeal to the house of lords, they refused to hear the evidence read, and affirmed the decree. 4 Brown, Parl. Cas. 180, 184. The authority of this case remains unquestioned, and it has been expressly adopted in this state. 2 Yeates, 304; 7 Serg. & R. 114; 1 Johns. Cas. 235. It matters not how clear and full the instructions may be, or that they are signed by the testator, and in the body of them declared to be a will, if the executed will contains no reference to them, and is on its face clear of ambiguity as to the subject matter. 3 Cond. Ecc. [1 Hagg. Ecc.] 290; 4 Cond. Ecc. [2 Hagg. Ecc.] 209; 2 Ves. & B. 318; 6 Conn. 276; 4 Dessaus. Eq. 215.

Instructions to a scrivener cannot be given in evidence. 2 Vern. 98. He cannot be allowed to prove that he used a word with a meaning different from its import of the true meaning of which he was ignorant. 7 Serg. & R. 113, 114. A mistake in drafting a will does not make it void. 8 Conn. 265. And when a testator declares a paper to be his will, the court must take it as it is written. 1 Cond. Ecc. [3 Phillim. Ecc.] 452, 455; 6 Conn. 274, 275. Mistakes are not to be supposed, if any construction that is agreeable to reason can be found out—the will that is in writing must pass the land, and must be decided by what is contained in it. 1 Atk. 415.

The written declarations of a testator made after the will are not evidence (5 Bing. 435; 15 C. L. 490; 8 Conn. 264), unless the paper may be proved as a codicillary (1 Cond. Ecc. [2 Phillim Ecc.] 267, 270), or a testamentary one (6 Ves. 397; 4 Dowl. 89). A paper may be a will as to personal, though not as to real property, here and in England; the statute of wills of 34 & 35 Hen. VIII. requires only that wills should be in writing, and the statute of frauds and perjuries requires subscribing witnesses only to wills devising real estate. Instructions may be read to prove that testator knew he had particular relations, but no farther to prove what he meant by the words "poor relations." 1 Ves. Sr. 231, 232. On a question whether the devise to the wife was in lieu of dower, a rough draft of the will in testator's handwriting, containing the devise and the words "in lieu of dower," which were omitted by the mistake of the scrivener, was not admitted. 2 Yeates, 304.

The rule deducible from these cases is, that instructions are in no case admissible to control or contradict the plain words of a will, or to supply an omission, unless there is something on the face of the executed will, which shows a mistake or omission by pointing or referring to something which the instructions will explain. When there is such a reference, whether the ambiguity is latent or patent, it may be removed by the instructions or other matter referred to or pointed out, the thing referred to being considered as connected with the will by the reference, so as to bring the case within the rule, "Id certum est quod certum reddi potest." But when the will is ambiguous in its words, and contains no reference to any thing which can make it certain, or on its face admits of no construction, it is void. 1 I. C. 235, 256, 286; 3 Atk. 258; 3 Serg. & R. 607; 7 Serg. & R. 114; 8 Coke, 155. As to parol or extrinsic evidence the rules are well settled.

It is not admissible to fill up a blank (2 Atk. 239; 3 Brown, Ch. 311, 313; 21 C. L. 291, 293), or the omission of a devisee (3 Atk. 257); nor to supply the written words of a will; it must be construed ex visceribus suis (1 Yeates, 432; 2 Yeates, 304); nor to explain it unless it refers to something dehors of so ambiguous a nature as to require explanation, not of a doubt in the will, but a doubt on a matter out of the will (7 Serg. & R. 113, 114; 1 I. C.

234); not in its construction, but its factum (3 Cond. Ecc. [1 Hagg. Ecc.] 290; 4 Cond. Ecc. [2 Hagg. Ecc.] 209; 21 C. L. 291). When there is no description of the devisee or thing devised, it is not admissible, nor where the thing devised, is well described or defined in terms or by reference, in order to embrace what is not so described. As a devise of "my money," evidence will not be admitted to show that the testator intended to give bonds, notes, and mortgages. 1 I. C. 231, 234; 14 I. R. 9, 14. So of a devise of my farm in the occupation of A., an averment that he intended to pass land in the occupation of B. cannot be admitted. 11 Johns. 212, 220; 14 C. L. 291; Godb. 16.

If the devise has a certain effect and operation to pass lands at the place described, it shall not be extended by extrinsic evidence to embrace lands elsewhere, unless the intention can be collected from the will itself. 21 C. L. 290. A new description cannot be introduced into the body of the will, and no estate can pass that does not answer the description it contains, nor can evidence be received which amounts to a new devise, which the testator is supposed to have omitted, or to add words which he has not used (21 C. L. 291; 3 Durn. & E. [Term R.] 87); or where the will is silent, to apply it to a new subject matter of devise or new devisee, as to prove that the word "Gloucester" was omitted by mistake, so as to make the lands in that county pass by the will, though not referred to (21 C. L. 292, 294; Newberg v. Newburgh, in Dom. Proc. cited), but is admissible where a description of the subject matter is imperfect. So of the devisee, or where the description is true in part, but not in every part, if there is a sufficient indication on the face of the will to justify the application of the evidence. 21 C. L. 294.

If there is in any part of the will a sufficient description, it shall not be vitiated by any mistaken description or circumstance for "utile per inutile non vitiatur." 7 I. R. 217; 1 Maule & S. 301; Vide Bac. Law Tracts, 102 et seq., Reg. 25. Or if it can be collected from the words of the will, that the description of two estates has been transposed by mistake—the local description may be rejected as surplusage for "falsa demonstratio non nocet," where enough appears after the false description is rejected. 21 C. L. 291, 294. "An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator. Godb. 131; Hob. 32. In deciding on the admission of evidence, and the construction of wills, the court will look to the situation of the testator's family when it was made (3 Dowl. 68; 2 Ves. Sr. 217; 1 Wash. Va. 55, 56), and of the property he owned, in order to ascertain to whom he intended to give it, and what he intended to give by construing the words consistently with the state of his property and family, but not to introduce new words into the will (21 C. L. 288, 294). Or to strike out those it contains; as a devise of "all my lands in the parish of C. called Hoplands, to my son J. If he dies without issue, Hoplands shall remain to B." Hoplands was an entire farm, extending into two parishes, but that part only passed which was in C. Cro. Jac. 22, 23. So a devise of "my lands of Ashton, or at Ashton" (which mean the same thing), other lands not situate there, will not pass by any evidence aliunde. Dowl. 65, 87, 91. The same rule was adopted on a devise of "his freehold and real estates, in the city of Limerick, and county of Limerick." The testator had a small estate in the city, but none in the county of L., but had estates in the county of Clare; yet evidence of his intention was not admissible to show that he intended to give the estates in the county of C. 21 C. L. 28, 29; 8 Bing. 244.

"The court cannot do for a testator what he has not done for himself" (Peisch v. Dickson [Case No. 10,911]); "or make a will for him while he sleeps in his grave" (6 Conn. 174); and they cannot receive evidence of his declarations before or after the making of the will (2 Vern. 98; 8 Conn. 264; Stevens v. Vancleve [Case No. 13,412]; 4 Dessaus. Eq. 215, etc.; 4 Gall. 172; Gilpins v. Consequa [Case No. 5,452]; [Hunt v. Rousmanier] 8 Wheat. [21 U. S.] 211). Courts of law have always been jealous of admitting extrinsic evidence to explain the intention of the testator, and it is admitted only where an ambiguity is introduced by extrinsic circumstances (4 Dowl. 93); or in that class of intermediate cases, referred to by Lord Bacon and Judge Story, which partake both of the character of latent and patent ambiguity; as where the words are clear, but admit of two constructions, consistently with the meaning (Bac. Law Tracts, 100; Peisch v. Dickson [supra]; [Mechanics' Bank v. Bank of Columbia] 5 Wheat. [18 U. S.] 336, 337; S. P., 2 Ves. Sr. 217). The admission of the evidence in such cases, is to give effect to the will by removing the ambiguity (4 Dowl. 93), and is of such a nature as stands well with the words of the will (8 Coke, 155a).

It is admitted where there are two persons of the same name, to show which was intended (2 Atk. 373, 375, 686; [Powell v. Biddle] 2 Dall. [2 U. S.] 70, 72; 8 Coke, 155; 1 Wash. Va. 55); where there is a mistake in the Christian or sur name of the devisee (2 Ves. Sr. 218; 2 Atk. 373; Godb. 17; Co. Litt. 3a); if there is a certainty of the person meant (Swab. 480); in cases of resulting trusts (2 Atk. 373; 1 Vern. 31, note); or where the testator used to call James, "Jackey," and gave a legacy to "John" (Amb. 175; [Powell v. Biddle] 2 Dall. [2 U. S.] 70; 1 Ves. Sr. 231). So where he had a niece named "Gertrude Yardley," whom he used to call "Gatty," and often declared he would do well for her; she took a legacy given to "Catherine Evanley," there being no such person as C. E. 2 P. Wms. 141, 143. If the testator errs in the name, and not in the person, the devise is not hurt by the error. Swinb. Wills, 480, 18.

If a devise is made to the Church, it shall go to the parish church of the testator; or, if

he names a church, and there are divers of the same name, it shall go to the one where he usually resorted: so if to "the poor," it shall go to the poor of his parish (Swinb. Wills, 489); or if he was a refugee, the devises to the poor generally, it shall be intended to mean poor refugees of the same nation with himself (Amb. 422; 2 Rop. Leg. 147); or to the charity school, and if there were two in the place, the legacy went to the one of the children of which testator was fond, and to whom he had declared he would leave something at his death (1 P. Wms. 674, 675).

The court will look to the situation and circumstances of the testator, to ascertain his intention (2 Eq. Cas. Abr. 366; 2 Ves. Sr. 213); the use to which the thing devised had been applied (3 P. Wms. 145); and the association of the testator with one of the persons of the same name, to whom he had given a legacy ([Powell v. Biddle] 2 Dall. [2 U. S.] 70, 72; 2 Vern. 593; 1 Vern. 31). On the same principle, the court will look to the testator's property, in order to ascertain what he intended to devise. 1 Wash. (Va.) 55, etc. As where he had no real estate of his own, but had a power of appointment over real estate, and devised "all his real estate," it will pass the latter; otherwise the will would be inoperative. Hob. 160, 166, 176; 3 Serg. & R. 111, 115; 1 Rawle, 249; Seaton v. Kuhen, 2 Ves. Jr. 589; 21 C. L. 292. So where one devised all his freehold houses in a street, but had no freehold houses there, though he had leasehold houses there, the latter passed by the will. 1 P. Wms. 286; 21 C. L. 292; 2 Leon. 153; 3 P. Wms. 386.

It is sufficient if the devise shows the intention of the testator in substance, though it is defective in circumstances, or they fail. Hob. 32. As a devise of "my T. farm in the occupation of A.," it appeared that only part was in his occupation; yet as the T. farm was a sufficient description, the whole passed. 1 Maule & S. 301. So where he owned a house in 4th street, occupied by A., and devised "his house in 3d street, occupied by A.," the house in 4th street passed. Allen v. Lyons [Case No. 227].

For these purposes extrinsic evidence is admissible to correct mistakes or remove ambiguities, by referring to the facts and circumstances on which the will is predicated, to apply the words and written intention of the testator to the devisee and thing devised, and thus to effectuate the declared objects of the testator consistently with his will. But when the evidence offered does not remove the doubt completely, then it is inadmissible (3 Cond. Ecc. [1 Hagg. Ecc.] 290; 4 Cond. Ecc. [2 Hagg. Ecc.] 209); for if admitting its truth, there is a doubt on the words of the will, it is void, for uncertainty by the judgment of the law, and no averment dehors can make that good which, upon consideration of the deed, is apparent to be void. If the averment which is out of the will stands well with its words it shall be tried by the country, if otherwise it is matter of law. 8 Coke, 155a.

On a subject which has so often arisen in courts of law and equity as this has, there is a multitude of cases in which general principles have been settled or recognised from the passage of the statutes of wills that have never been departed from; we have noticed a sufficient number of the leading ones, to enable us to come to a conclusion entirely satisfactory in their application to this case. Here is a perfect will, duly and fully proved, which wholly omits any disposition of the land in question; there is no ambiguity on its face which can make it void; the revoking clause is absolute, unqualified, and without exception; we can therefore establish no other paper or part of a paper as the will of the testator, without directly expunging the clause of revocation. There is no latent ambiguity which arises from the application of the words of the will to the subject-matter of the devise, or the person to whom it is devised. The evidence relied on does not "stand well with the words of the will"; it is wholly extrinsic and dehors the will, which as to the remainder of the estate in the homestead, contains neither a devisor, a devisee, or any thing devised. To make out the existence of either, we must introduce into the body of the will, a clause from the instructions to which no reference is made, which cannot be connected with it by any construction, but is a new subject matter of devise wholly foreign from the will. This is a fatal objection to the title of the defendant, which cannot be removed by the court without overruling the best established rules and principles of law in the construction of the statutes of wills in England, adopted in this country in their application to our own acts of assembly. Vide 1 Rawle, 120, 121.

If in the adjudged cases, we had found any judicial precedent to authorize us to add this clause to the executed will, we should have felt at liberty to have followed it, as it would have accorded with what we are satisfied was the actual intention of the testator, as proved by the witnesses to the instructions or rough draft, as well as the general understanding of the family, appearing by their assent to the decree of the register's court, and their petition to the legislature to supply the omission, to insert the devise in the will. But in every view which we can take of the case, there are difficulties which cannot be overcome. There is not a particle of evidence to justify us in striking out the revoking clause of the executed will; it must remain as an operative clause, and while it remains we can adjudge no other paper to be his will; if, however, this objection to the defendant's title could be removed the others are insuperable. The evidence removes no doubt or ambiguity which existed without it; the only defect which it could cure is, the want of a clause devising the homestead; but as the will is wholly

silent on this subject, the effect of the evidence is to make a new devise, not to explain a doubtful phrase or word in the will. 1 Rawle, 120, 121. This would be more than filling a blank by extrinsic averments, for it would be to supply the three indispensable requisites of a will, by collateral proof out of the will, when the law directs that they shall appear in writing in the body of the will.

That which is executed contains no disposition which affects the case; there is no devisor, devisee, or thing devised, without declaring the law to be, that instructions or the rough draft of a will are not superseded by a perfect executed instrument, and that the latter shall not be referred to a change of intention when they differ, but shall be controlled by the former. Admitting that the omission to transfer the devise from the draft, to the will, was a mistake in the scrivener, or of the testator, it is a case which has often occurred and been repeatedly decided to be incurable, unless there is some allegation of fraud or imposition practiced on the testator, neither of which is alleged in this case. The consequences of an omission to make a will at all, or to dispose of any particular part of a man's estate, is not to authorise a court and jury to make such an one as they may think he intended to make, but omitted to do it by mistake; that would be a repeal of the statute of wills, and introducing the very evils against which they were intended to guard, produce most utter confusion in titles depending on dispositions of property which were to operate after the death of the owner. There may be cases of hardship growing out of the application of the law to special cases of individuals; they however are of trifling consideration when contrasted with the general mischiefs which would pervade society if there was no certainty in the law.

If men intend to dispose of their property by will in a particular way, and do not do it in the manner pointed out by law, they die intestate; the fault is not in the law, it is in the testator; the hardship which it may cause to the intended object of his bounty, is not visitable on the administrators of the law who must act within the line defined by the legislature. If the law is unjust, it must be amended by the legislative department of the government. You and we have only to ascertain what the law is; they must declare what it ought to be. In the decision of causes we have our appropriate duties; it is yours to declare what facts are proved by the evidence before you; it is ours to declare what the law is upon the evidence offered or the facts found. In this case, there is no question of fact; the truth of all the evidence is admitted; it is upon paper showing for itself; it admits of no doubt. You can find nothing more than that Edward Brinton intended to devise his homestead to James; that he put that intention into writing, by instructions or rough draft, and intended to insert it in the will, but that by mistake, or some other cause, it was not done. Yet you cannot find that he did not make the executed will; that he did not revoke all former wills, or that the last one contains every clause which disposes of the remainder to James, or shows any mistake in its body. The facts which you can find are out of the will; they cannot be introduced into it by any power save that of the testator; they cannot be deemed a new will as they existed before the execution of the authenticated one; they cannot amount to a will by themselves, because the paper is revoked, nor be connected with the existing will, which contains not the least reference to the matter. The law therefore adjudges the evidence to be entirely insufficient to establish as the will of Edward Brinton, any other paper than the one he executed.

The counsel of the defendant has endeavored to take this case out of the general rules of law, by the force of the introductory clause, "as to what worldly estate God has been pleased to bless me with I give and dispose of in the following manner," which he considers as indicating an intention to dispose of his whole estate by that will, and that the omission to do it is an ambiguity which can be explained and cured by averment of extrinsic matter. There is no authority for giving such operation to this clause as to let in evidence of a devise not referred to in the will; the law is well settled that an introductory clause will not, by its own force, enlarge an estate given in the body of the will, nor for such purpose be attached to a subsequent devising clause, so as to give it a wider range. 1 Rawle, 415. The most that can be said is that, where the words of the devise admit of passing a greater interest than for life, courts will lay hold of the introductory clause, to assist them in ascertaining the intention. [Wright v. Denn] 10 Wheat. [23 U. S.] 228, 229; Page v. Wright [Case No. 10,669]. It is carried down to the devising clause, in order to show the intention, but will not of itself give a fee. 8 Serg. & R. 289. Nor carry an estate that is clearly omitted; but if it be dubious whether it be omitted or not, it will help the interpretation. [Busby v. Busby] 1 Dall. [1 U. S.] 226. Vide 1 Rawle, 415.

In this case, there is no devising clause to which the introductory words can be carried; if we give them any effect, it will be to make them the will itself, by republishing and establishing a revoked paper; this would be to overrule all authority, and to reverse every settled principle which governs the construction of wills. A clause which cannot connect a devise for life with one in fee, cannot by its own force create a fee where no devise is made. Besides, if we consider it evidence of the intention of the testator to dispose of his whole estate, it will not answer the purposes of the defendant; for the declared intention is to dispose of it by that will, and not a former one; it contains no reference to any other paper,

and declares that he disposes of his estate in the following manner,—that is, as the will directs and none other. The utmost meaning, therefore, of which it is susceptible, is to show that as to the land in question, he had not fully executed his first intention declared in the beginning of the will; in other words, he has not devised the fee simple, and has left it to be distributed according to law.

It is, lastly, contended that connecting the other evidence with the executed will, such a case is presented as will authorize the court to make it conform to the evident intention of the testator. As a court of law, we have no power to reform any instruments; we must decide upon them according to their legal construction, effect, and operation, apparent on their face, or with the aid of such evidence as is admissible by the rules of law to explain them. Courts of equity will reform instruments made to carry into effect the contracts and agreements of parties according to their original intention, the agreement being the standard of right and equity between the parties, will be carried into effect, notwithstanding any defect in the instrument adopted as its execution. Yet where an instrument has been deliberately executed by the parties, under a mistaken opinion, of both as to its legal effect, a court of equity will not reform it, though it fails to effectuate their intention [Hunt v. Rhodes] 1 Pet. [26 U. S.] 17. But there is no analogy between these and cases of wills; there is no antecedent or existing standard by which to reform the instrument made to carry into effect the final and last will of a testator. Unlike a contract or agreement which requires the meeting of two minds to give it efficacy, a will is the written declaration of the party, proved by two witnesses, to be a testamentary disposition of the testator's property. It then becomes its own standard; the only evidence of the will and volition of the testator which a court of law or equity can notice. The intention must be found in its body, and when once ascertained, cannot be altered by any other power than that which formed and expressed it in writing.

In cases of contracts, courts of equity act upon the conscience of a party, by compelling him to execute it in good faith, according to the intention with which it is made; but they do not assume the power of altering or reforming original agreements differently from the intention of the parties; the extent of their power is to correct any instrument, reducing it to writing, or executed to carry it into effect contrary to the true meaning and intention of the contracting parties.

In cases on wills, the executed declaration of intention made according to the forms and solemnities enjoined by law is the standard of right by all the rules of law as well as equity, between the heir at law and the devisee, which no court can alter, modify, construe, or reform, on any other evidence of intention, than can be collected from its words, as the testator has made and declared it. So, all courts and juries are bound to take and respect it as his last will and testament, revoking all others, and passing only such estate as it professes to dispose of, or such as by construction can be brought within its provisions. We must take this will as we find it, and, notwithstanding any evidence which has been received, feel bound to declare that it does not devise the property in question to the defendant. The consequence is, that your verdict ought to be for the plaintiff, for the seven undivided ninth parts.

Case No. 17,180.

WARNER v. CRONKHITE.

[6 Biss. 453; 13 N. B. R. 52; 1 N. Y. Wkly. Dig. 291; 8 Chi. Leg. N. 17; 7 Leg. Gaz. 329.] [1]

Circuit Court, E. D. Wisconsin. Sept., 1875.

BANKRUPTCY—DEBT CREATED BY FRAUD—EFFECT OF AGREEMENT NOT TO ARREST—MASSACHUSETTS INSOLVENT LAW.

1. Debt created by fraud is not discharged in bankruptcy, even though reduced to a simple judgment for money, in which there is no mention of fraud; if the original action was based upon fraud, the fraud is not merged in the judgment.

[Cited in Re Pitts, Case No. 11,190.]

[Cited in Hamilton v. Reynolds, 88 Ind. 195.]

2. A stipulation between the parties after the judgment, by which the plaintiff waived his right to execution against the body of defendant, does not affect this question of discharge.

3. Massachusetts insolvent law, and many cases commented on and distinguished.

This action comes into this court by removal from the circuit court of Outagamie county.

The complaint sets forth the following state of facts: That on the 11th of June, 1859, the plaintiff brought an action against the defendant in the circuit court of Outagamie county, to recover damages claimed to have been sustained by the plaintiff, by reason of alleged frauds practiced by defendant upon plaintiff in the sale of certain lands; that the action and the right of the plaintiff to recover therein were founded solely upon the said frauds; that issue was joined in that action by the parties thereto, trial by jury had, and verdict and judgment were rendered in favor of plaintiff against defendant for $1258.87, damages and costs; that this judgment has never been appealed from, reversed or set aside, and has not been paid. The complaint then alleges, that after the rendition of this judgment, the defendant procured from the United States district court for the Eastern district of Missouri, his discharge in bankruptcy, and that the defendant claims that by this discharge his liability to the plaintiff, upon the debt represented by the judgment, is discharged. The complaint next alleges, that the debt represented by the judgment was created solely by the fraud of the judgment debtor, and that the debt is not canceled by the dis-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 1 N. Y. Wkly. Dig. 291, contains only a partial report.]

charge in bankruptcy; and closes with the allegation that this action was commenced upon such judgment by leave of the circuit court of Outagamie county, and judgment is demanded for the amount alleged to be due upon said former judgment, with interest. The defendant answers this complaint and says, that after the rendition of the judgment mentioned in the complaint, the parties to that judgment entered into a written stipulation, by which the plaintiff waived his right to an execution against the body of defendant upon the judgment, and expressly agreed that no execution should ever be issued against the body of the defendant in that action; and by which stipulation the defendant, on his part, waived all errors in entering said judgment, and in all orders prior to the entry thereof, and further agreed that he would not take any appeal from the judgment or any of said orders. It was further stipulated between the parties, that said judgment should be and remain in all respects binding upon the real and personal property of the defendant, and that no other or further right of the plaintiff than that of execution against defendant's body, was relinquished by the stipulation. To this answer the plaintiff interposed a demurrer, and the question is, does the stipulation set forth in the answer constitute a defense to this action? Annexed to the complaint is a certified copy of the judgment record in the original action, from which it appears that that action was founded upon certain alleged false and fraudulent representations made by defendant to plaintiff in an exchange of property between the parties. The gravamen of the complaint in that action, and the gist of the action, was fraud. The judgment rendered was in terms and form a simple money judgment, no reference to the ground of action being mentioned therein.

D. G. Hooker, for plaintiff.
Finches, Lynde & Miller, for defendant.

DYER, District Judge. Section thirty-three of the bankrupt act provides, "that no debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt." It is claimed by the plaintiff that the ground of the action in which the judgment now sued on was rendered being fraud, the debt was not discharged by the bankruptcy proceedings, and that the stipulation in question did not extract from the judgment, which at the time of the bankrupt's discharge represented the debt, the element of fraud upon which it was originally founded. It is claimed by defendant's counsel that the original debt or claim was merged in the judgment; that to show the alleged fraud, within the meaning of section thirty-three of the bankrupt act [of 1867 (14 Stat. 533)], so as to make the debt in this case one from which the defendant was not discharged by the bankruptcy proceedings, it must be disclosed by the judgment itself, that it was necessarily based upon the fraud, and that in any event the stipulation made by the parties gave to the judgment the character of a mere contract debt, which was discharged by the debtor's discharge in bankruptcy.

When the original action between these parties was commenced, and when the judgment here sued upon was rendered, there was no statute in force in this state authorizing an arrest of a defendant, or an execution against his body in a case where fraud in contracting a debt or incurring an obligation was the sole ground of action. It was not until 1863, that a statute was enacted, authorizing an arrest in such a case. So that, although the parties seem by their stipulation to have supposed that the right to an execution against the body in that action then existed, in fact it did not exist. This being so, that stipulation becomes insufficient as a defense to this action, if the action itself can be maintained. For it is apparent that the plaintiff's demurrer to the defendant's answer reaches back to the question whether the original demand, debt or judgment, was discharged by the defendant's discharge in bankruptcy, and consequently, whether this action will lie. There is some conflict of authority upon the question as to whether a recovery of a judgment upon a debt fraudulently contracted merges the original cause of action, so as to relieve from liability to arrest, even where there is a statute authorizing arrests in civil actions founded upon fraud. In the case of McButt v. Hirsch, 4 Abb. Prac. 441, it was held, that in an action upon a judgment recovered upon a debt fraudulently contracted, the defendant was not liable to arrest on the ground of fraud in the original debt, and that the original cause of action was merged in the judgment recovered upon it. It will be observed here, that the point was not whether an execution could be issued upon the judgment against the body of the defendant, but the question was, whether, in a new action upon the judgment, the defendant could be arrested because of the fraud in the original debt; and in this state of the case the principle above stated was applied.

In the case of Mallory v. Leach, reported in note to 14 Abb. Prac. 449, there was a similar decision of the question. A judgment was recovered in an action for fraud. Another action was brought upon that judgment, and it was held that this second action was upon contract, and not for fraud, and the defendant could not, therefore, be arrested.

I have referred particularly to these two cases, because they as strongly affirm the principle of merger as any I find. The case at bar must be distinguished from those cases. We do not have here an action upon the judgment with an accompanying proceeding to procure an arrest, on the ground that the original cause of action upon which the judgment sued on was recovered, sprung from the defendant's fraud. The question here is, whether the original cause of action was so merged in the judgment, and

the original fraud so extinguished by the judgment, that it must now be held a debt which was discharged by the defendant's discharge in bankruptcy.

Judge Blatchford, in the Case of Patterson [Case No. 10,817], after stating that the point involved was whether the debt in that case was one excepted by section thirty-three of the bankrupt act from the operation of a discharge, says: "It is claimed on the part of the bankrupt that the debt being in the shape of a judgment, this court cannot, in applying the 33d section, go behind the judgment to see whether the claim on which the judgment was recovered was created by fraud; that the judgment, which is now the only debt, was created by the claim and not by the fraud, and that though the judgment was created by the claim, and the claim by the fraud, yet the judgment was not created by the fraud. This view is unsound. Wherever the debt, no matter whether it be in the shape of a judgment or in any other form, was created by fraud, had its root and origin in fraud, then it is not to be discharged. To hold that the recovery of a judgment in an action where the gravamen of the complaint is fraud, condones that very fraud by so merging the original claim that the judgment cannot be said to be a debt created by the fraud set out in the complaint as the ground for recovering the judgment, would fritter away entirely the good sense and plain intention of the 33d section."

The same principle is recognized and applied by Judge Lowell, in Re Whitehouse [Case No. 17,564], petitioner for habeas corpus, and I think that the conclusions arrived at in these cases are sound, when applied to a case in which it appears by the record that the original demand or cause of action sprung from fraud. Now, in the case at bar, what does the record show? The complaint in the action in which the judgment sued on was rendered, shows a cause of action springing exclusively from alleged fraudulent representations in an exchange of property. It was not an action upon contract with immaterial allegations of fraud, but it was an action grounded solely upon the fraud. The summons in the action was not upon a liquidated money demand, but in terms demanded relief as it should in an action to recover unliquidated damages. The issue joined between the parties was upon the question of fraud, as appears by the complaint and answer. There was a trial by jury and an assessment of damages, and a judgment upon the issue of fact involved was entered on the verdict. Was it necessary that the judgment on its face should show that the ground of the action, or that the origin of the plaintiff's demand was fraud, in order to make it a case of a debt or demand created by fraud not dischargeable under the bankrupt law? I cannot think so. As the record of the action "shows a material and traversable allegation of fraud as its sole foundation, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him." In re Whitehouse [supra]. The distinction must not be ignored between the question as it presents itself in the case at bar and as it would be presented in a case where the allegations of fraud in the original action were incidental and immaterial, or in a case of an attempted remedy against the person of the defendant in an action on the judgment. Upon the record, it would seem that had there been no fraud, there could have been no claim, and had there been no fraud, and consequently no claim, there would have been no judgment. Accepting the record as evidence of the character of the original cause of action, the debt in this instance, though now represented by a judgment, was created by fraud, and so excepted by the bankrupt act from the operation of a discharge.

Shuman v. Strauss, 52 N. Y. 404, is cited by defendant's counsel. But that was an action for the recovery of money only, and the summons was in the form prescribed by subdivision one of the section of the code relating to the form of the summons, which subdivision has reference to actions upon liquidated demands. It was held in such a case that upon the non-appearance of the defendant, judgment being perfected upon an assessment of damages by the clerk, the defendant is not concluded by the allegations of fraud in the complaint; but that the plaintiff's right of action for, or remedy under the statutes by reason of the fraud, is merged in the judgment. The court, after speaking approvingly, as I understand their decision, of the doctrine laid down in the Case of Patterson [supra], and some other similar cases, say that they come far short of the claim of the plaintiff in the case then decided, and a mere statement of the character of that case, as already given, makes the correctness of that observation of the court obvious.

Wood v. Henry, 40 N. Y. 124, is also cited. In that case the defendants, as commission merchants, received certain property for sale from the plaintiff. They sold the property, but did not account for the proceeds. These facts were alleged in the complaint, and so it appeared that the defendants acted in a fiduciary character. Judgment was taken by default. No order of arrest had been obtained during the pendency of the action, and the question was whether an execution upon the judgment could be issued against the persons of the defendants. A majority of the court held that the allegations of the fiduciary character of the defendants were not traversable, and that no execution could issue against the person upon the judgment, because the cause of action did not necessarily import liability to arrest, the cause of action and cause of arrest not being identical. In other words, upon trial, proof of the fiduciary relation was not indispensable to recovery. Here is a plain distinction between that case and this at bar; for here there could have been no recovery with-

out proof of the alleged fraud, for the fraud was the entire basis of the action. It was, in short, the sole cause of action. Prouty v. Swift, 51 N. Y. 594, is in character and principle like Wood v. Henry, while Roberts v. Prosser, 53 N. Y. 260, enforces the principle applied in the case at bar, as distinguished from the other cases cited. I do not think Bangs v. Watson, 9 Gray, 211, is applicable to the question we have here. The original cause of action in that case arose upon contract. Judgment was recovered, and it was held that there was a merger of the original indebtedness in the judgment, and that the judgment did not, within the provisions of the insolvent law of Massachusetts, constitute a claim for necessaries not dischargeable under the act, although the original demand was for necessaries. The language of that act was: "No discharge of a debtor shall bar any claim for necessaries furnished to such debtor." The language of the 33d section of the bankrupt law is: "No debt created by fraud shall be discharged under this act." The Massachusetts statute specifies the claim in the form in which it exists at the time of the insolvency proceedings. It must, then, to be excepted from the operation of a discharge, be in the form of a claim for necessaries, and it is not in such form when in judgment. The language of the bankrupt act requires an inquiry into the origin, the creation of the debt, and if created by fraud, it is not to be held discharged. In the case of Palmer v. Preston, 45 Vt. 154, cited by defendant's counsel, the action was upon contract. Fraudulent representations had been made to procure a certain indorsement, but the fraud was not the foundation of the judgment recovered. The judgment was held to be discharged by the bankruptcy proceedings, and not to be within the exception of the 33d section of the bankrupt act, because the debt in question was created by contract, and as the debt had been treated as a demand so created, it was held that the fraud was waived. The case is, therefore, inapplicable to that under consideration. The demurrer to defendant's answer must be sustained.

Case No. 17,181.

WARNER v. DANIELS et al.

[1 Woodb. & M. 90;[1] 9 Law Rep. 160.]

Circuit Court, D. Massachusetts. Oct. Term, 1845.

COMPETENCY OF WITNESSES—RESCISSION OF DEEDS—MISTAKE AND FRAUD—PRESUMPTIONS—FAILURE OF CONSIDERATION—ADMISSIBILITY OF EVIDENCE—DISCOVERY IN AID OF ACTION AT LAW—LIMITATIONS AND LACHES.

1. In a suit in equity brought by the vendor of land to set aside the conveyance for fraud, a mortgagee of the vendee was brought in to defend, but it was shown that the mortgage was discharged before the bill was filed, and there was no evidence of any collusion. It was *held*, that the mortgagee was a competent witness for the respondent; but that he would not have been, if he had remained interested.

2. A witness is not rendered incompetent by having received a copy of the interrogatories before the time of testifying, without any comments or any influence used to affect his answers.

3. A witness is not rendered incompetent by having received a letter from one of the parties, requesting him to tell the whole truth, without any suggestion as to what the writer considered the truth to be.

4. A mistake as to the value of the consideration given for the conveyance of land, is not a sufficient ground for setting aside the conveyance, where the vendor had means of avoiding the mistake by inquiry, and no fraud or falsehood was used to influence his judgment.

[Cited in Mason v. Crosby, Case No. 9,234; Veazie v. Williams, 8 How. (49 U. S.) 150; Grymes v. Sanders, 93 U. S. 62.]

[Cited in brief in Pratt v. Philbrook, 41 Me. 138. Cited in Shaddle v. Disborough, 30 N. J. Eq. 381.]

5. But if a vendor of land is clearly shown to have been overreached in a material degree, by impositions, concealments, or misrepresentations, made by the vendee, on which he properly relied, he will be relieved in equity.

[Cited in Ferson v. Sanger, Case No. 4,752; Tuthill v. Babcock, Id. 14,275; Austin v. Felton, 41 Fed. 163.]

6. And to sustain such a charge, the whole circumstances of the case, and the character and relations of the parties, are proper subjects of consideration.

7. Courts of equity can go more on what is called "presumptive evidence," than courts of law.

8. Where the bill charges that a company, represented by the respondents to have been duly organized, was never duly organized, the record of the organization is the best, and suitable evidence, of the fact, and not the oath of one of its officers.

9. Where the vendee of land made representations respecting the value of what was taken for the consideration, which were false in material points, and which influenced the vendor to sell, whether the vendee knew them to be false or not, it was held that they would vitiate the sale.

[Cited in Frenzel v. Miller, 37 Ind. 12; Smith v. Countryman, 30 N. Y. 671; Woodruff v. Garner, 27 Ind. 9.]

10. So, also, if they were made by another person, in the presence of the vendee, and he was benefited by them.

11. Suppressio veri, is as fatal as suggestio falsi.

12. Conversations of the respondent with other persons, on a subject of a kindred character, near the time of the transaction, and illustrating his intention, are competent evidence for the complaint.

[Cited in brief in Pratt v. Philbrook, 41 Me. 134.]

13. An entire failure of consideration, in the receipt of what is mere moonshine, is often sufficient to rescind a contract; although mere inadequacy of consideration is not sufficient.

[Cited in Clark's Appeal, 57 Conn. 573, 19 Atl. 332.]

14. Where the aid of a court of chancery is indispensable to obtain the discovery of the important facts in the case, an application for relief can be sustained in connection with that discovery, in the circuit courts of the United

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

States, notwithstanding the 16th section of the judiciary act [1 Stat. 82], prohibits such relief, when it can be obtained at law in as ample a manner.

[Cited in Foster v. Swazey, Case No. 4,984; Jewett v. Cunard, Id. 7,310.]

15. Length of time, short of the statute of limitations, is sometimes a bar; but not if fraud exists, or if the delay is accounted for, or if such a course would work injustice.

[Smith v. Babcock, Id. 13,009; Veazie v. Williams, 8 How. (49 U. S.) 158.]

16. If either party cannot restore the property in good condition, damages may be given; and if the inability to restore happens by the course of the complainant, it should not prevent his obtaining relief in some manner, if he was not then aware of the fraud.

[Cited in Simpson v. Wiggin, Case No. 12,887.]

[Cited in brief in Gatling v. Newell, 9 Ind. 587.]

17. D. purchased a farm of W., paying him therefor in shares of the stock of the Cleft Ledge Granite Co., which he represented to be worth $6000. Several representations were made to W. by D. and also by F., who was concerned in the same company, to induce W. to take the stock in payment, which representations proved to be false, and the stock worthless. On a bill in equity by W. for relief, it was decreed, that the sale should be rescinded, the shares reconveyed by W. to D., and the farm by D. to W., and a master appointed to report the amount of rents and waste, after deducting permanent improvements, which should be allowed to W. by D.

18. But if neither the land nor the shares could be reconveyed, the master must examine and report the damage done to W. by the misrepresentations of D. and F., and a decree be entered against them for the amount. And if the land could be reconveyed, and not the shares, the land must be reconveyed, and the value, if any thing, of the shares, at the time of the sale, deducted from the net income, and a decree made for the balance.

[Cited in Almy v. Wilbur, Case No. 256.]

This was a bill in equity. It alleged that on the 19th of November, 1836, the complainant [Samuel Warner] was seized of a farm in Wrentham, in this state, worth $6000; that [Adams] Daniels and [Josephe.] Fales then held what purported to be certificates of shares in the Cleft Ledge Granite Company in New Hampshire, valued at $6000, the company having a capital paid in of $200,000; that they proposed to purchase said farm of the complainant for a valuable consideration, and pay him in shares of said company; but in order to induce him to make the exchange, they averred, that the stock was worth its nominal value in Boston, and more than any Boston bank stock; and that it would pay a handsome dividend next spring; and if the quarry was worked, would yield 100 per cent. on its value; that they wanted the farm for the silk business; that they owned a brig, employed in carrying stone, and wished the complainant, formerly a sea captain, to command it, by which he would make $1500 a year; that they owned some other vessels employed in the same business, had a number of contracts for furnishing stone, and one with the government for $100,000; that several persons from Newport had bought into the company, and that Colonel Bates and various other men were employed by it, and large contracts, through their influence, were likely to be obtained at Newport and Portsmouth in behalf of the United States. The bill next alleged that, relying on these assurances, he entered into an agreement with the respondent, Daniels, who was then acting for himself and Fales, to convey to him the farm for $6000, to be paid for in said shares at the price per share which should be paid in per share when the deed was executed; and that still relying on the aforesaid assertions of Daniels and Fales, the complainant, on the 8th of December, 1836, made a warranty deed of the land to Daniels, and received from him therefor a number of papers purporting to be certificates of 240 shares in the Cleft Granite Ledge Company, representing $25 each of its capital stock, amounting by computation to $6000, and which were the only consideration paid to him by Daniels, and were received on the supposition that $25 had actually been paid in on each of them.

The bill further alleged, that the company never, in truth, had any thing paid in on said shares, or any of its capital; that it was a mere fiction, got up to defraud the public; that the stock never had or could have any value; that the certificates therefor were false and fraudulent, and so known to be to Daniels and Fales, and that they were aware that the assertions made about them were false, and with intent to defraud the complainant. Moreover, in order to "bewilder" the complainant, and prevent him from causing the conveyance of the farm to be annulled, it was averred that Daniels, on the 10th of December, 1836, executed a mortgage deed of the farm to Elisha F. Fales, a brother of J. E. Fales, purporting to secure a note of the same date to him for $1765, and for the same purpose, on the 9th of October, 1837, Daniels made another mortgage thereof to S. B. Scott, a copartner in trade and brother-in-law of Daniels, to secure a note of the same date for $4200; and it was charged, that the mortgagees conspired with Daniels and Fales to enable them to complete their imposition on the complainant, and took the mortgages without any bona fide consideration passing between them; and prayed that they be made parties to the bill. The bill alleged further that, notwithstanding all these falsehoods and frauds, the respondents had refused to yield any relief; had cut valuable timber from the land; had declined to get the mortgages discharged, and to reconvey the land, or to pay rent for the same, or pay to him the nominal value of the shares; and therefore it put them to answer certain interrogatories under oath: and concluded, praying a decree against them for the $6000 and interest since the original conveyance, or to have the mortgages cancelled and the land reconveyed with payment for the strip and waste and rent. A prayer was also interposed for an injunction against

waste during the pendency of the bill, and the appointment of a receiver of the rents.

The answer of Daniels admitted that Warner once owned the land, but denied it to have been worth even $3000; and averred that he and Fales, being in Wrentham about the time named in the bill, accidentally, without any previous concert or design, heard that the complainant had a farm to sell, and expressed a willingness to buy it, if they could be allowed to pay for it in their way; that they examined the farm and informed him they had no means to pay therefor, except in shares of the Cleft Ledge Granite Company; but denied that he exhibited more than one certificate of said shares, or any papers, showing it had a capital stock paid in of $200,000, or that said stock was alleged to be of par value, or would pay a handsome dividend, or that the farm was wanted for the silk business, or that the company owned a brig, &c.; and extended the denial to all the averments of that description, set out in the bill; and to any other of like tenor, said to be made either by him or his agents. The answer then proceeded to allege that in August, 1835, Daniels purchased about 300 acres of land in Maine; for which he gave $8 per acre, paying ¼ in cash and the rest in three annual instalments; and in October, 1836, sold ¾ of his interest in the same to Joseph Fales at cost, taking in payment therefor Fales's obligation for $5249 in Cleft Ledge Granite stock, and the balance in notes of that company, and that in his first interview with Warner he informed him of this obligation from Fales, and left with him a copy of the act of incorporation of the company, and the by-laws and list of officers thereof, and a report of Doctor C. T. Jackson, a distinguished geologist, as to the quarry; and stated only the truth on the subject. The answer further declared that the respondent Daniels informed the complainant, he was but little acquainted with the value of the stock; but that Warner could visit Boston and ascertain its value, and go to Durham and examine the quarry before trading, and if then concluding to make the exchange, might find him at the Lamb Tavern in Boston. That in about a week after, Warner did visit Boston, and said he came to inquire into the value of the stock; but little passed between them till the next evening he informed the respondent that he had conversed with the president of the company, and was willing to take the stock at par value, if the price of the farm could be mutually agreed on; that the parties spent nearly two days in settling the price at $6000, being much beyond the true value, in consequence, as the respondent avers, of false and exaggerated representations of the complainant; and that in the course of the conversations, then had, the respondent learned, for the first time, from the complainant, that the quarry had been purchased originally for $4500 by some individuals connected with it, and then sold to the company for $53,000, the latter giving notes on time for the consideration, and which must be paid before a dividend could be made; that this would take a long period, and the holders of the notes must receive stock in payment, or it must be sacrificed in the market to pay the notes; that the quarry might not prove as good as it now appeared; and urged these facts, not before known to Daniels, as considerations to induce him to give a larger sum for the farm in exchange for the stock at par; that thereupon he decided to give the $6000. payable in stock at par, and a bond was accordingly drawn to secure the fulfilment of the bargain; that Fales had no agency, or instructions, or part in the business; that, on the 8th of December, Daniels, having received from Fales 240 shares in said company, made out to Fales and by him assigned to Warner, proceeded with it to Wrentham, and Warner caused a deed to be executed to him of the farm, on receiving the shares aforesaid; and declared at the time, he knew all about the stock, and more than the respondent; that no complaint was made to him by Warner about the trade, wishing to annul it, till August 18th, 1841.

The answer stated next, that Warner, on the 16th March, 1840, parted with all his stock except 24 shares; that he has no reason to believe the company to be a fiction, got up to defraud; but believes it possesses a valuable quarry of granite in Durham, N. H., examined and so reported by Dr. Jackson; that the quarry was bought by four persons in the fall of 1835, viz.: J. E. Fales, J. C. Thompson, James M. Thompson, and Newell A. Thompson, for $4500; that about $3500 were afterwards expended on it in roads, wharves, and shops, employing near fifty men there before they sold it to the company, and fully testing the good quality thereof; that several persons not interested there, united with those four in petitioning the New Hampshire legislature for an act of incorporation; and on the 10th of June, 1836, they were duly incorporated, and on the 25th of August ensuing, purchased the quarry for $53,000, payable ¼ in one year and ¾ in annual instalments thereafter; that the capital stock was divided into 2000 shares, at $100 each, and on the 7th of December, 1836, only 303 shares had been issued, on which 30 per cent. had been assessed and paid; that on November 28, 1836, it was agreed to increase the number of shares to 8000, and to reduce the par value to $25 each; that the old certificates were to be renewed, and that on the 7th of December, Fales being the holder of 73 shares of old stock, surrendered them for 240 shares of the new stock, paying the difference by cash $10 and $3800 indorsed on the note he held against the company; that these are the same shares sold to Warner, and were paid for by the respondent by giving up to Fales his obligation before named for $5249 and the balance by a note, of which $400 was since paid in cash, and the rest by a note of Fales bought of a third person by Daniels; that Daniels has never mortgaged the land to

bewilder Warner or defraud him, but for bona fide debts, since paid, and the mortgage of one debt was discharged about the 1st of February, 1842, before the filing of the bill in this case, and the other about the 25th of September, 1841; and denied all collusion with the mortgagees to defraud Warner, and all false statements in any way concerning the stock. The answer then proceeded to reply to the different interrogatories in detail; in the course of which, it was averred, in addition to what has already been stated, that he owned no stock in the company before the 240 shares, nor any since except 40 shares; that the sums paid to the company by the stockholders are unknown to him; but he has been told and believes they have been $12,900 or $6900, beside the $6000 worth in dispute in this case. The old shares issued are stated to be 230, and the new 240. Most of the assessments and shares appear to have been paid by indorsements on notes the company owed, or for services done the company; and the cash for all does not seem to exceed from $100 to $1000, though some more is claimed.

The answer of J. E. Fales accords in substance, so far as he knows any thing, with Daniels' answer, and denies all joint interest in the subject-matter, or any co-operation together in the trade, or any agency on his part in it for Daniels or himself, though admitting he was one of the original purchasers of the quarry, and a member of the company and director, and under contract to convey shares to Daniels at his first interview with Warner, and so informed the latter; and that Colonel Bates was their agent at a salary perhaps of $1200, but not $1500, and had a clerk and a large number of hands employed, and was negotiating for various contracts; but denies he said any had been made, except at Portsmouth; or that any persons at Newport were imploring contracts; though he admits he stated that several persons there had bought into the company; that when Warner came to Boston, some days before the 28th of March, 1836, Fales, at his request, introduced him to the president and clerk of the company; but denies any interest in the sale to him, or in the farm, or any misrepresentation then or before as to the company or its property, and denies that the company was a fiction, but avers that it originated and was organized and bought the quarry as before described; that there was nothing in the manner of conducting the company designed or likely to defraud; that at the time of this transaction the quarry was worked and a large quantity of stone sent to Portsmouth and New York, and large sums received therefor, and more stone was got out, which was attached by one of its creditors; that the first assessment on the shares was $25 and the next $25; and the certificates were not issued till the assessments were paid; that, at the time of the trade, he did entertain and express sanguine opinions in respect to the value of the stock; that it was worth its nominal value, and would pay a handsome dividend; and so Warner professed to think, after making certain estimates; that he said nothing about a brig or vessel to be commanded by Warner till near a year after the sale of the farm; that the land he obtained of Daniels for the shares was valuable, and its cost can be realized from it; though he has since taken the benefit of the bankrupt law in Massachusetts.

The answer of E. F. Fales and Scott accorded in respect to the mortgages to them, with what was stated in Daniels' answer.

Exceptions were filed to the answers of Daniels and J. E. Fales for alleged omissions and evasions, and they both put in amended answers; Daniels denying that he furnished to Warner any estimates of the value of the stock, or stated as a fact its value; but averred that he insisted to Warner that he must inquire and decide for himself, and buy on his own judgment, if at all, and that Warner did inquire, and knew as much about its value as any one; that Daniels and Fales were not looking for a farm when the first interview took place, but the complainant applied to them to buy; that no mortgage remained on the Maine land sold to Fales, which prejudiced its value, and the consideration promised by Daniels for it had been paid to the extent of $4000 before the sale to Fales, and the rest since; that if the shares are now worth less than they were in 1836, it is owing to the general change in trade and enterprise; and their value in 1836 as compared with the farm was better known to Warner than to Daniels, and for aught Daniels knows, is now equal to the value of the farm; that since the trade with Warner, he has purchased 54 shares more in the company, of Newell A. Thompson, at $25 per share, by taking them at par in part payment of some land sold to him; that Fales appears by the books to own since, 135 shares more, but how he obtained or paid for them is not known to the respondent Daniels; that the company had, in December, 1836, besides the property before stated, tools, carts, a blacksmith's and hammering shop, and various blocks of granite, partly hammered, all of several thousand dollars in value.

Fales, in his amended answer, adds only the following facts, which it is deemed material to state, viz.: That the company commenced issuing shares on the 24th of October, 1836; that on the 19th of November, the company owned the quarry and farm connected therewith, and buildings, wharf, forges, tools, shops, carts, several yoke of oxen, &c., and the real estate, subject to a mortgage for the purchase-money; that a large part of the purchase-money had been paid for by the proceeds of the stock sales at that time, and valuable additions made to the means of the company by aid and credit from individuals, and all had been duly appropriated; and that this was the subject of conversation with Warner when he came to Boston to inquire; and as the operations and organization were new, the value of the stock lay rather in estimates and opinions

of what would be yielded thereafter, than the intrinsic value of the quarry; that Daniels had paid $10,000 towards the Maine land, sold to him before their trade, and has since removed the mortgage then on it for the balance of the consideration; and that Fales at once took possession of that land, and exercised acts of ownership over it till sold by him in 1837; that one half of the original purchase-money for the quarry had been paid in cash before Warner's trade, and the balance was secured by mortgage; that $40,000 of the second purchase had been paid, and the rest secured by a second mortgage; and all this was made known to Warner before his trade.

The evidence in the case was voluminous, and will be further referred to in the opinion, so far as material to the facts, which are found to be proved satisfactorily, and which bear on the points of law decided by the court.

Jonathan P. Bishop and George M. Brown, for complainant.

Benjamin R. Curtis, for Daniels.

Frederick W. Sawyer, for Fales.

WOODBURY, Circuit Justice. There was a preliminary objection in this case, as to the competency of the testimony of Scott and Gilbert, and G. C. Thompson, that must first be examined. Scott was brought in to defend, after the institution of these proceedings, on account of a mortgage of the premises to him by one of the respondents. But it is now admitted, as well as proved, that his interest ceased before the bill was filed; and he denies, as do the rest of the parties, any collusion or combination with Daniels; and there is no witness in the case testifying to the contrary. It is proper, then, to say in the outset, that not being responsible at all, nor interested when he gave his testimony, it ought to be and is admitted. 1 Barb. Ch. 260; Murray v. Shadwell, 2 Ves. & B. 401; M'Donald v. Neilson, 2 Cow. 139. If he was interested, he could not testify for his co-defendant. 3 Johns. Ch. 612. The objections to Gilbert were, that a copy of the interrogatories was forwarded to him beforehand. But this does not render him incompetent, nor make his testimony inadmissible, as no comments accompanied them; and if they came from the respondents, the latter neither dictated nor wrote the answers, nor used any influence to shape them into any particular form. The letter to Thompson also merely requested him to tell the truth, without any suggestion as to what the writer of it considered to be the truth. The evidence of all of them is then properly in the case.

The grounds set up for relief on the merits, are, first, on account of an important mistake as to the value of the shares received in payment for the farm by the complainant; and secondly, on account of fraud, false representation and imposition by the respondents in making the exchange of the shares for the farm. In respect to the first ground, I do not think it tenable on the facts of the case here, though it is often a good ground for interfering when well supported. See cases in 3 Cow. 537; 14 Ves. 288; 2 Ves. Sr. 627; Rosevelt v. Dale, 2 Cow. 129; Daniel v. Mitchell [Case No. 3,562]. I doubt its validity here, because, great as was the acknowledged difference between the real value of the shares and that supposed by the complainant when he took them, being as some of the witnesses testify, from nothing to a par value; yet he had means of avoiding much of the mistake, if there had not been falsehood and fraud. He was referred to the officers of the company, and to a personal examination of the property of the company, and allowed time for the purpose of full inquiry, and actually did consult the officers, as far as he deemed it useful to consult them. He relied then rather on the means pointed out and used by himself to get information as to most matters, than on the statements alone of the parties; and in such cases, generally, if a mistake as to a material fact occurs without any fraud or falsehood on the part of the respondent, no relief can be granted on account of the mistake alone. Daniel v. Mitchell [supra]; Hough v. Richardson [Case No. 6,722]; and Attwood v. Small, 6 Clark & F. 523, note; Moffat v. Winslow, 7 Paige, 124. It is true that the facts, connected with his examination into the matter tend strongly to sustain the idea that the difference between the real and pretended value of the shares, in the rash and speculating mania of the times in 1836, could not then be detected by anybody so easily as now. Beside the times being so "out of joint," a mistake in the value, however great, could with difficulty, even after a very full scrutiny, have become manifest to one, who, like the complainant, seemed so infatuated and so bent on cheating himself. Under the general delusion which then prevailed, and the plausible mode adopted by the respondents to make the complainant seem rather to go forward than they, he acted on that occasion with what seems now an apparent determination to be duped, which would almost justify placing him under guardianship. Such circumstances rendered a mistake almost inevitable. But it is still doubtful whether it is remediable, when the means of judging were so opened to him, if no deception had been practised upon him, no concealments, exaggerations and falsehoods, which he had not the means to detect readily, nor the keenness to suspect or expose, and hence became their victim.

This brings us to the second ground for relief—fraud or imposition. In order to sustain that, the whole circumstances of the case, as well as the positive testimony and the character and relations of the parties, are all proper subjects of consideration. Courts of equity can go more on what is called "presumptive evidence," than those of law. 1 Story, Eq. Jur. § 190; Rosevelt v. Dale, 2 Cow. 129; Neville v. Wilkinson, 1 Brown, Ch. 543, 546. After examining all the facts in the general aspect, and then in detail, if the conclusion follows clearly that the complainant has been overreached, and that in some material degree,

by impositions or concealments, or misrepresentations, by the respondents, on which he properly relied, he ought to be relieved. 1 Story, Eq. Jur. §§ 192, 222; 7 Paige, 124; Colt v. Woollaston, 2 P. Wms. 154; Blain v. Agar, 1 Sim. 37, 45, 2 Sim. 289; 1 Schoales & L. 429. Nothing should in that event prevent relief, but great and unexplained delay in seeking it, or an adequate and ample remedy at law, or a condition of the property in controversy, which renders it impracticable for the court on any sound principle to grant redress.

The great feature of the whole case is, that the complainant, in 1836, from being a wealthy and prosperous farmer, is stripped of the whole by the respondents, through the transaction complained of. There does not seem to have been in him the imbecility of mind which, though not idiocy, makes one liable to imposition, and calls aloud for the aid of a court of equity. Story, Eq. Jur. §§ 237, 238; Willis v. Jernegan, 2 Atk. 251; Huguenin v. Baseley, 14 Ves. 273, 290. Nor does he appear to have been a man rash in character, or inexperienced in business; and the difficulty in the outset, under these facts, is to find any reason for this catastrophe, except in some fraud practised upon him in making the contract. Many circumstances in the transaction, whose truth is admitted, were calculated to mislead a common observer, such as the first interview seeming to be accidental, and not apparently sought by Daniels and Fales; such likewise as their referring him to the officers of the company for full information, and not hurrying the bargain; such as the reluctance of Daniels to exchange his stock for the farm at so high a price; and the respectability of the president and treasurer and the agent at Durham, and the geologist who certified; with the large number of persons employed, and the important contracts said to be negotiating, or made, by a company apparently authorized by law and duly organized, and with so much capital represented to have been fairly paid in. But, amidst all this plausible exterior, it was a fact that the person introducing him to Daniels and Fales was a brother-in-law of one of them; and that the brother of that person was an owner of some of the stock, as is disclosed since his death. Yet neither of these circumstances appear to have been known to Warner. That the company was incorporated so as to appear larger and more imposing than it really was, by including in the charter several persons, not original purchasers of the quarry, nor owners of any of its stock; that it was organized, if at all, by those original purchasers; and its stock at first appears to have been entirely theirs, rather than belonging to others in some considerable amount at that time. That it thus converted the apparent sale of the quarry for $53,000 to others, merely into a real sale to themselves alone,—at first in a corporate capacity, by themselves in an individual capacity, and, in this way, they charged other stockholders who should afterwards buy in, the enormous difference between that sum and the seven or eight thousand dollars only, which was the original cost of the whole and the improvements. That, beside some of this being not disclosed fully to Warner, so far as any evidence is put in, the president and secretary were not proprietors of the stock originally, nor acquainted intimately with its concerns, nor was the agent, Bates; and the former had been induced to officiate in their stations under flattering assurances, which all failed, and for stock chiefly given to them for services, and which peculiar situation of theirs tended directly to mislead those confiding in their general respectability and judgment, as members and purchasers of stock in the ordinary manner. That, instead of a large amount of capital having ever been paid in with money, as was represented, the treasurer swears he never received in that way over one hundred dollars; and, from the exhibits in the case, not over a thousand was probably at any time so paid; an important fact, unknown to Warner, for aught which appears, and contrary to the distinct averments in Fales' answer. That the original proprietors of the quarry, as members of the company, or creditors of it, were still interested in all the stock, except two hundred and thirty shares, out of two thousand of the old emission, and two hundred and forty out of eight thousand of the new emission, instead of the new owners being numerous, and to a large amount, as Warner probably supposed; that inquiries of officers, who owned nothing, or only a few shares given to them for their services, and knew little about the company, were not likely to be very useful, but rather to mislead, as their information must have been chiefly obtained from parties deeply interested to make sales; that the geologist who reported on the quarry, did so before it had been much opened or worked, and had been induced by Fales to leave out the important facts of there being much more granite in the immediate neighborhood of this; and that every owner of the stock, and especially the original purchasers of the quarry, among whom was Fales, had a strong motive and interest, to the extent in all of near $50,000, in getting new owners of shares.

It is further manifest, that Daniels' representation of a number of persons in Newport having bought into the company, and which he admits he made, and which was calculated to have much influence on a purchaser, was unfounded. It is not supported by any proof; and the statements by him and Fales, as to the company being duly organized, which goes to the essence of the validity of the shares, and of the purchase of the quarry, and is denied in the bill, do not appear to be sustained from the records,—the evidence proper for that purpose, in an issue like this, though they are by the oath of one of its officers, who aided to organize it. All this

evidence on record, if existing, is in possession of the respondents, and is the best and suitable evidence of such a fact. Denning v. Roome, 6 Wend. 651, 656; Owings v. Speed, 5 Wheat. [18 U. S.] 420. It is also the suitable evidence to prove not only the organization, but the authority to buy the quarry, and execute the notes, issue the shares, and other material proceedings of the corporation. Rex v. Mothersell, 1 Strange, 93. This, and not the incompetency of the owners of the quarry to pass a title to a corporation, if duly organized and composed, chiefly or only of themselves as members, is the ground on which this part of the case is very defective, and leads to a strong presumption that radical objections exist to the regularity of the proceedings of the company in these important matters. It is charged in the bill, that the company was fictitious, and hence this point becomes material. But I should hesitate to decide the case on this objection alone, as the error may be one that could be removed by further evidence, and may have happened from an impression that it was the duty of the complainant to put in the record, or that the oath of the clerk was sufficient evidence to show the original organization, and the charter and acts done under it, as may suffice under different issues, and when the question is an incidental one. 3 Metc. (Mass.) 133; Id. 282; 7 Metc. (Mass.) 592.

But, finally, it is manifest, further, that several misrepresentations very material, and calculated to mislead Warner, were made by both of the respondents. Thus, the statements which are admitted to have been made by both Daniels and Fales of the successful operations, then going on, viz., on the 19th of November, 1836, under the agent, Bates, and of the valuable contract which had been made, and was fulfilling at Portsmouth, and which were calculated to be very influential with Warner, or any other purchaser, and to be much relied on by them, as it was testing by experiment what was before theoretical as to the goodness and value of the quarry, were utterly unfounded, and known to be so to Fales, if not to Daniels. These were assurances not only relied on probably, but were material, distinct, not vague, and such as were proper to be relied on. Trower v. Newcome, 3 Mer. 704; Scott v. Hanson, 1 Sim. 13. They were the most important representations, next to the legal existence or continuance of the company itself, which could be made; and by Fales' own letter of October 5, to the agent at Durham, as well as by the agent's testimony, they were, not only then, on the 19th of November, known to be false, by Fales; but Fales, as early as the 5th of October, urged the agent to keep the truth concealed from the public, lest it might injure the value of the property. On this account Warner had not the means of detecting the groundlessness of those misrepresentations. The agent left Durham entirely, about the 1st of November, and went to New York for the company; and he left their employment the last of November. Daniels joined with Fales, or was principal, in all these last unfounded assertions, calculated to deceive Warner in most important particulars. He had opportunities to know, and must be presumed to know, if this be necessary to charge him, that some of them were entirely groundless, and especially that one, made by him alone, concerning a large number of persons at Newport having bought into the company. These, then, vitiate the transaction as representations untrue, on material points; and, if untrue by mistake, still vitiating as much by such a mistake in material matters as if there was a fraudulent design. Daniel v. Mitchell [Case No. 3,562]. So it is the better opinion, that whether Daniels himself knew these accounts to be false or not, is immaterial, if they were false and influential. 1 Story, Eq. Jur. § 193; Ainslie v. Medlycott, 9 Ves. 13, 21; Graves v. White, Freem. 57; Pearson v. Morgan, 2 Brown, Ch. 388; Shackelford v. Hendley, 1 A. K. Marsh. 500. So if Daniels himself had not made some of these false representations, but was present when Fales made them, and was benefited by them, it vitiates the transaction. McMeekin v. Edmonds, 1 Hill, Eq. 288, 293; 1 Grant, Ch. 267. He adopts the contract, and these were a part of it—some of the res gestæ. He cannot take part and repudiate part, when the other contractor acts on the whole. The Portsmouth contract with the government, which Daniels admits he stated to Warner, in exhibiting the extent of their business and prospects, on November 19th, had also been obliged to be abandoned or transferred, at a loss of five hundred dollars, as early as October, from the unfitness of the stone to fulfil it. But this last fact seems to have been entirely concealed or suppressed; and suppressio veri is as bad as suggestio falsi; and it here related to a particular highly important in respect to the prospective value of the shares and the quarry. It was a fact, likewise, more within his own knowledge, and which it was his duty to disclose. Story, Eq. Jur. §§ 147, 197; 2 Kent, Comm. 484.

The agent employed, Colonel Bates, whose character is admitted to have been high, and to commend any business in which he was engaged, was spoken of to Warner, and his high salary as an evidence of the extent of their business; but the important facts were suppressed, not only that he had reported against the goodness of the quarry, but their inability, on that account, to fulfil the Portsmouth contract, and their failure to supply him his own salary, or with means for working the quarry further. So Dr. Jackson's report was printed and distributed, and a copy delivered to Warner; but the fact concealed that Fales had requested him to strike out what was said of other granite quarries near. These were extensive, and that fact, if known, would of course tend to diminish the value of theirs. It is difficult, also, to see why Daniels should be so anxious to sell more of his stock to Whiting, as well as pay Warner only in this stock, if, as he represented, it was at par value in Boston; if the

quarry was likely to yield a dividend in the spring, of seven per cent., if it was the best stock in the market, or if it was worth dollar for dollar; all of which considerations he urged on Whiting, in November, 1836, when Warner was present. His declarations about a week after, in trying to sell a note to Whiting, against the company, were of a like character, and hardly to be explained on any honest hypothesis. For he averred, that the company "would cash a demand against them at any time;" when, if true, why was he so anxious to sell the note? And why had Bates, the agent, been obliged to stop work in part for want of funds? And why had not the five hundred dollars been paid for the loss on the Portsmouth contract? And why had not the numerous other debts, and especially the original mortgage, been paid? And, if true, how were the means obtained, when only from one hundred or one thousand dollars, to the utmost, had ever been paid in by the stockholders? This last talk with Whiting is competent evidence (Bradley v. Chase, 22 Me. 511), being on a subject of a kindred character, near the time of the transaction in question, and illustrating his intention. Wood v. U. S., 16 Pet. [41 U. S.] 342, 360; [U. S. v. Wood] 14 Pet. [39 U. S.] 430; 1 Starkie, Ev. 64; 2 Starkie, Ev. 220; 1 Phil. Ev. (Cow. Ed.) 179; 2 Id. 452, 463; 4 Bos. & P. 92; 7 Bing. 543. The entire worthlessness of the shares soon became apparent to those officers who had been duped, as well as to several others. The whole estate, including the quarry, which had been mortgaged, was foreclosed, and went merely to pay the balance of the small amount of the original purchase-money. The tools, stone, &c., remaining, were attached to secure other debts; and the original purchasers of the quarry, having most of the stock of their corporation left on their own hands, became bankrupts, like Fales. Instead of $40,000 having been paid in on the shares, as Daniels alleges, the only receipts in money satisfactorily proved, were only from a hundred to a thousand dollars, but a drop in the bucket to their expenses; and the company thus, for aught which appears, ceased to have legal existence, or credit, or property, and exploded, as one of the worst among the thousand bubbles in the speculating mania of that period. Often an entire failure of consideration in the receipt of what is mere moonshine, is sufficient to rescind a contract. Terry v. Breck, 1 Grant, Ch. 367; Chesterfield v. Janssen, 2 Ves. Sr. 155; Dyer v. Rich, 1 Metc. (Mass.) 180, 192. It shocks the conscience on the face of the transaction, and is sometimes plenary evidence of fraud. But mere inadequacy of consideration may honestly occur, and often raises no certain presumption of deceit (1 Story, Eq. Jur. §§ 244–246), as the difference may be small, or, if large, occurring from other causes than fraud, and more especially is this the case in speculating times like those of 1836 (Blachford v. Christian, 1 Knapp, 73, 77; 1 Brown, Ch. 558, 560. It is not, per se, fraud. Griffith v. Spratley, 1 Cox, Ch. 383; Low v. Barchard, 8 Ves. 133; 3 Ves. & B. 180). To charge such a loss on an innocent purchaser of its shares, rather than on its projectors and early owners, would seem inequitable, if the contract had not been carried into effect; but even after that, if it turns out to have been carried into effect by fraudulent representations and falsehoods, on points very material (Smith v. Richards, 13 Pet. [38 U. S.] 26, 37), it would be derogatory to courts of equity and justice, if they could not, and did not lend relief. Attwood v. Small, 6 Clark & F. 232; 2 Ridg. App. 397; Jackson v. Ashton, 11 Pet. [36 U. S.] 229; Osgood v. Franklin, 2 Johns. Ch. 1, 23; White v. Damon, 7 Ves. 30; 18 Ves. 335.

The points here, where misrepresentation occurred, were manifestly material, as they should be, to present a ground for our interference. Phillips v. Duke of Bucks, 1 Vern. 227. Nor is this a case of clear and sufficient redress at law. The aid of a court of chancery was indispensable to obtain the discovery of most of the important facts in the case; and hence an application for relief here can well be sustained on, and in connection with that discovery, notwithstanding the 16th section of the judiciary act of the United States, requiring us to refuse aid in chancery when it can be obtained as fully at law.

I do not find it necessary to consider several other matters, pressed at the hearing, or if not pressed, disclosed in the pleadings and evidence. These, to which I have referred, rest on facts admitted, or clearly proved for the complainant, and not disproved on the part of the respondents by proper evidence. These also give the case a direction that seems to accord with the broad face of the whole transaction. They will work no injustice to any one, as the result will be merely to place the parties in statu quo, as they stood before November 19th, A. D. 1836.

The only remaining objection is the length of time that has since elapsed. But it appears that steps have been taken to obtain this relief, since 1840. That the complainant was induced to believe for some years that the revulsions in the times were the cause of the works not going on; that till about 1840 he was not aware he possessed a remedy in chancery; and that the shares and the farm have not been affected by the delay since, so as to render a rescinding of the contract either impracticable or inconvenient. The value of neither appears to have materially changed since, which when happening, sometimes constitutes an objection. McNeil v. Magee [Case No. 8,915]; [Pratt v. Carroll], 8 Cranch [12 U. S.] 471; 8 Clark & F. 650. Length of time unexplained may sometimes be a bar short of the statute of limitations; but if fraud exists, or the delay is accounted for, it is no bar. See 2 Schoales & L. 629; 17 Ves. 99; 7 Johns. Ch. 90; Ang. Lim.; Hough v. Richardson, before referred to, and Vigers v. Pike, 8 Clark & F. 562; Sanborn v. Stetson [Case No. 12,291]; [Bowman v. Wathen], 1 How. [42 U. S.] 192. So it will not be a bar by analogy to

the statute, as to length of time, if such a course would work injustice. 1 Story, Eq. Jur. § 64a; 1 Johns. Ch. 316; 2 Ves. Jr. 571; 1 Atk. 493; 10 Ves. 466, 467; 12 Ves. 266, 374; 1 Ves. Jr. 374; 14 Ves. 91; Cooper, Ch. 204; 20 Johns. 58, &c.

If either party cannot restore the property in good condition, that may be good ground for not rescinding; but, at the same time, damages can be and should be given instead of rescinding, if necessary to enforce what is just, and the case is properly in chancery. Thus, if the inability to restore happens by the course of the complainant, it should not prejudice him in getting some kind of relief, if he was not then aware of the fraud. 3 Litt. (Ky.) 365. But if damages alone are sought, and alone can be given, and the fraud related to personal property, the relief is usually at law. Russell v. Clark, 7 Cranch [11 U. S.] 84. Though some cases hold otherwise, even there. Evans v. Bicknell, 6 Ves. 182; Bacon v. Bronson, 7 Johns. Ch. 194, 201; 1 Story, Eq. Jur. § 184, etc. But it could not be held otherwise in the United States courts, under the clause in the judiciary act before referred to, if the remedy at law be complete, since then, it is provided, resort shall be had to law, rather than equity.

In cases of fraud in the sale of real estate, as here, when a court of equity can set aside the sale, and a court of law cannot, the jurisdiction of the former is usually held to be clear. 1 Bibb, 244; 1 Story, Eq. Jur. § 184 et seq.; 2 Story, Eq. Jur. §§ 798, 799, et seq.; Hepburn v. Dunlop, 1 Wheat. [14 U. S.] 197. So the jurisdiction in equity is clear, where a discovery is sought as here. Gaines v. Chew, 2 How. [43 U. S.] 619. In relation to the sale in this case, then, let it be rescinded, and the shares conveyed by Warner to Daniels, and the farm by Daniels to Warner, and a master be appointed to report the amount of rents and waste (after deducting permanent improvements) that, in the mean time, should be allowed to Warner by Daniels. 1 Bibb, 244; Daniel v. Mitchell [supra].

It appears, I think, from the printed case, that when it was made up, Daniels still owned, and was in a situation to reconvey, the farm, and that Warner, though the shares stood in his son's name as owner, still probably could control and reconvey them. Should such still be the case, it can be closed, as just directed, without any complexity, or resort to any estimate of damages, on the master's reporting. But if the condition of either party should be materially altered in this respect, it will be proper to provide for it, if the power and right to do so exist in this court. Some cases hold, that if either party, pending the proceedings, sells the property, so that he cannot reconvey, damages alone should be given, though not in other cases. Todd v. Gee, 17 Ves. 273; Denton v. Stewart, 1 Cox, Ch. 258. But some authorities hold, that in all cases, where the jurisdiction in equity has once attached clearly to the case, damages alone may be given, whenever reasonable, and may be estimated, either by a master in chancery, or on an issue quantum damnificatus to a jury. See cases cited in 2 Story, Eq. Jur. §§ 794–799; [Pratt v. Law] 9 Cranch [13 U. S.] 493; 1 P. Wms. 570; 4 Ves. 497; 3 Atk. 512.

If, contrary to expectation, then, neither the land nor the shares can be reconveyed, the master can hereafter examine and report the damages done to Warner by the misrepresentations of Daniels and Fales, and a decree be entered against them for the amount. If the farm can be reconveyed, and not the shares, the former can be done, and the net income ascertained and paid as before directed,—the value of the shares, if any thing, in December, 1836, and interest since being reported by a master, and deducted therefrom. In rescinding a contract, it seems reasonable to adopt a rule like that in enforcing a specific performance, which is, to go as far as you can, pro tanto, and give proportionate damages for the residue. 2 Story, Eq. Jur. § 779; McKay v. Carrington [Case No. 8,841]; 1 Fonb. Eq. bk. 1, c. 1, § 8; [Hepburn v. Dunlop] 1 Wheat. [14 U. S.] 197; Paton v. Rogers, 1 Ves. & B. 351. Should the facts, therefore, require more than what has first been proposed by mutual reconveyances, I am prepared to go further according to what seems to me to be sound principle, sustained by several precedents, in addition to what has already been cited.

The parties in this case come here for discovery and relief, and have obtained the former, when it could not be had in a court of law; and, in order to make the redress perfect, if third persons have since become interested in the property, so that the fraudulent sale cannot be set aside, and a reconveyance made of the whole, the relief for damages becomes necessary and proper, either in part or in full. A court of equity may relieve as to part of land or contract, if the fraud does not reach the whole. It will go to the extent of the injury. Dunlap v. Stetson [Case No. 4,164]. Thus in Pratt v. Law, 9 Cranch [13 U. S.] 494, in a bill in equity, where a contract has been partly performed, and the rest, that is, other lots, cannot be conveyed specifically, because sold, &c., the court can make an issue quantum damnificatus, and decree the amount, or, without it, make the party pay the ratio of the price given for all, which the deficiency of lots bears to all. So in Woodcock v. Bennet, 1 Cow. 711, in a prayer for a specific performance, it was held that the court may refer it to a master to assess the damages, and not dismiss the bill, because they cannot enforce a specific performance, the land having been conveyed away. 1 Fonb. Eq. 38, in y, and 165, in b; 3 Atk. 512–517; 1 P. Wms. 570; Colt v. Nettervill, 2 P. Wms. 304; Denton v. Stewart, 1 Cox, Ch. 258; Greenaway v. Adams, 12 Ves. 401.

The bill, then, must be dismissed as to E. Fales and Scott, and a final decree entered against Joseph Fales and Daniels, on the principles above set out, and with costs.

Case No. 17,182.

WARNER v. FOWLER.

[4 Blatchf. 311;[1] 3 Wkly. Law Gaz. 246.]

Circuit Court, S. D. New York. March 17, 1859.

REMOVAL OF CAUSES—ACTION AGAINST POSTMASTER—REVENUE AND POST-OFFICE LAWS.

1. The post-office laws of the United States are "revenue laws," within the meaning of section 3 of the act of congress of March 2, 1833 (4 Stat. 633), providing for the removal into a circuit court of the United States, from a state court, of a suit brought against a person for an act done under the revenue laws of the United States, or under color thereof.

[Distinguished in U. S. v. Norton, 91 U. S. 569. Approved in U. S. v. James, Case No. 15,464; Eaton v. Calhoun, 15 Fed. 157.]

2. An action brought in a state court against a postmaster, for an alleged wrongful refusal to deliver a letter to the plaintiff, is removable into the circuit court of the United States, under that act.

This was an action originally brought against the postmaster of the United States for the city of New York, in the supreme court of the state of New York, for an alleged wrongful refusal to deliver certain letters to the plaintiff [James W. Warner]. The defendant [Isaac V. Fowler] set up that, in so refusing, he was acting under color of the laws of the United States in relation to the post-office department, and took the proper steps, under section 3 of the act of congress of March 2, 1833 (4 Stat. 633), to remove the cause into this court, claiming that the act for which he was sued was done by him under the revenue laws of the United States, and under color thereof, and in pursuance of a right given to him by those laws. It is provided by said 3d section, that when a suit or prosecution shall be commenced in a court of any state, against any officer of the United States or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer or other person, under any such law of the United States, it shall be lawful for the defendant, at any time before trial, upon a petition to the circuit court of the United States in and for the district in which the defendant shall have been served with process, setting forth the nature of the suit, and verifying the petition by affidavit, together with a certificate, signed by an attorney or counsellor at law of some court of record of the state in which the suit shall have been commenced, or of the United States, setting forth that, as counsel for the petitioner, he has examined the proceedings against him, and has carefully inquired into the matters set forth in the petition, and that he believes the same to be true, and, upon presenting the same to the said circuit court, if in session, and, if not, to the clerk thereof, at his office, the said cause shall thereupon be entered on the docket of said circuit court, and be thereafter proceeded in as a cause originally commenced in that court. And it is made the duty of the clerk of such circuit court, if the suit was commenced in the state court by summons, to issue a writ of certiorari to the state court, requiring such court to send to the circuit court the record and proceedings in the cause, and, if it was commenced by capias, the clerk is directed to issue a habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the state court, or left at his office by the marshal, or by some person duly authorized; and, thereupon it is made the duty of the state court to stay all further proceedings in such cause, and the said suit, upon delivery of such process to the clerk of the state court, or leaving the same at his office, shall be deemed and taken to be removed to the circuit court, and further proceedings in the state court shall be wholly null and void. The plaintiff now moved to have the cause remanded to the state court, and to have all the proceedings for its removal into this court vacated, on the ground that the post-office laws of the United States were not revenue laws of the United States, within the meaning of those terms, as used in said 3d section.

Welcome R. Beebe, for plaintiff.

Theodore Sedgwick, Dist. Atty., for defendant.

INGERSOLL, District Judge. The revenue of the state is the produce of taxes, excise, customs, and duties, which it collects and receives into the treasury for public use. It is the income which it receives to enable it to perform its proper functions. And laws relating to the revenue, or revenue laws, are such laws as are enacted in reference to such income, such as give rules as to the mode of its collection, and as to the manner in which the officials employed in such collections shall conduct. All taxes which are imposed by the state, whether such taxes be direct or indirect, are, when collected, the revenue of the state. They are its income. As they are the revenue of the state, all laws regulating such taxes and giving such rules for their collection are taxes relating to the revenue. The duty paid for the carriage of letters by the agency of government is at times a most important branch of the public revenue, and the laws relating to the same are of the greatest importance to the revenue. From this duty the government, in time of war, or at any time when, from any cause, the income from customs is materially impaired and cannot be increased, derives an essential part of its revenue. Duties or taxes collected under the tariff laws of the United States, upon the importation of foreign goods into the country, are the revenue of the state; and the laws regulating the collection of such duties or taxes, and prescribing rules to officials employed in such collection, are laws relating to the revenue. This is conceded. But such duties or taxes are no more the revenue of the state than are the duties or taxes collected under the post-office laws of the United States, for the carriage of

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

letters in the public mails, the revenue of the state. And the laws regulating the collection of duties or taxes upon the importation of foreign goods into the country, and prescribing rules for the government of officials in the collection of such duties or taxes, are no more laws relating to the revenue than are the laws which regulate the mode of collecting duties or taxes for the carriage of letters in the public mails, or which prescribe rules for the conduct of officials in the collection of such duties or taxes for such carriage.

One of the earliest post-office acts, that of February 20th, 1792, in the 28th section (1 Stat. 239), speaks of the "surplus revenue of the general post-office." The act of May 8, 1794, section 2 (1 Stat. 357), speaks of the income from the post-office establishment as "the revenue thence arising." The act of March 3, 1825, section 1 (4 Stat. 102), directs the payment of the expenses of the post-office department in "the collection of the revenue" of the office, from such revenue. The act of July 2, 1836, section 1 (5 Stat. 80), directs that the revenues arising in the post-office department shall be paid into the treasury of the United States.

The act of congress of the 31st of May, 1844 (5 Stat. 658), provides that final judgments in any circuit court of the United States, in any civil action brought by the United States for the enforcement of the revenue laws of the United States, may be re-examined, and reversed or affirmed, in the supreme court of the United States, upon writ of error, without regard to the sum in controversy. In the case of U. S. v. Bromley, 12 How. [53 U. S.] 88, which was an action of debt founded upon the 10th section of the post-office law of March 3, 1845 (5 Stat. 736), it was held that such post-office law was a revenue law of the United States. An act done under it would, then, be an act done "under the revenue laws of the United States, or under color thereof."

With this view of the case, it must be held that it was properly removed from the supreme court of the state into this court, and that the motion to remand it must be denied.

Case No. 17,183.

WARNER v. GOODYEAR.

[Mac.A. Pat. Cas. 60; Cranch, Pat. Dec. 125.]

Circuit Court, District of Columbia. July 17, 1846.

PATENTS — INTERFERENCES — STIPULATION AS TO EVIDENCE—EVIDENCE OF PRIORITY.

[1. An agreement that all testimony taken before certain named commissioners before a given date "shall be heard and considered by the commissioner of patents whether the same be filed before the 12th of January instant or not," operates as a waiver of objections to the competency of the witnesses.]

[2. Proof that one claiming to be the inventor of a combination was the first to make a machine embodying the same is prima facie evidence that he invented it; but this proof is rebutted by the fact that while so doing he was working for an employer at his trade of machinist; that he did not claim to be the inventor until long after his alleged invention, but allowed his employer to apply for a patent without objection, and did not himself make application for over 18 months after his supposed invention, and nearly 6 months after his employer had obtained a patent.]

[Cited in Burlew v. O'Neil, Case No. 2,167.]

[This was an appeal by Solomon C. Warner from a decision of the commissioner of patents in interference proceedings, awarding a patent to Charles Goodyear for a machine for manufacturing corrugated or shirred India rubber goods.]

Edgar S. Van Winkle, for appellant.
William Indran, for appellee.

CRANCH, Chief Judge. Appeal from the decision of the commissioner of patents refusing a patent to S. C. Warner for combining with metallic calender rollers an elastic endless apron and a stretching-frame, for manufacturing corrugated or shirred India-rubber goods. The only material point involved in the reasons of appeal, and to which my revision must be limited, is whether Solomon C. Warner was the first inventor of that combination (which is the same combination for which Charles Goodyear obtained a patent on the 9th of March, 1844 [No. 3,461], upon a specification dated July 24, 1843, more than fifteen months before the application of Solomon C. Warner); for if he was not the first inventor, it is immaterial to this cause who was. Upon this point the commissioner of patents had decided that he was not the first inventor; and upon his appeal from that decision the question is now brought before me, and must be decided according to the evidence produced before the commissioner and now laid before me. That a patentable improvement in the manufacture of corrugated or shirred India-rubber goods by machinery has been invented, is admitted by both parties; and in order to ascertain who was the inventor, it seems to be necessary, first, to ascertain in what this patentable improvement consists. It does not consist in the whole machine, nor in any particular part of it, for neither the whole nor any part of it is new. The invention consists only of a new combination of some known mechanical principles or powers. The calenders, the rollers, the endless apron, and the stretching-frame are all old instruments, and as such cannot be patented; but when a certain particular combination of them produces a new and useful effect in the manufacture, that combination becomes the lawful subject of a patent. Warner's specification says that what he claims as new is the combining with the metallic calender rollers an elastic endless apron and a stretching-frame. Goodyear's specification is in the same words, omitting the word "metallic." The question, then, is, was Solomon C. Warner the first inventor of that combination? A vast deal of testimony has been taken; much of it is immaterial. The coun-

sel for the claimant objects to some of Mr. Goodyear's witnesses as incompetent by reason of their interest. But there is an agreement signed by the counsel of the parties, dated January 9, 1846, "that all testimony taken before —— Goodyear, Esq., U. S. Commissioner, and —— Metcalf, Esq., U. S. Commissioner, up to and during the 9th of January, 1846, shall be heard and considered by the commissioner of patents whether the same be filed before the 12th of January instant or not; rights reserved as to all other testimony taken after this date." All the testimony to which the objection relates was taken before those commissioners, or one of them, and before or during the 9th of January, 1846. This agreement seems to me to be a waiver of the objection to the competency of the witnesses whose testimony is thus agreed to be heard and considered. The objection, however, may go to their credit and have its due right. The principle evidence in favor of Solomon C. Warner is the inference drawn from the fact that he made the machine which contains the combination for which he desires to obtain a patent. This is prima facie evidence that he was the first inventor of that combination. This inference, however, is rebutted by the fact that in making that machine he was working at his trade as a machinist in the employment and for the benefit of Mr. Goodyear for wages; that he did not claim to be the inventor of that combination for a long time after his supposed invention, but stood by and saw Mr. Goodyear apply for and obtain a patent for it without objection; and did not apply for a patent for it as his own invention until the 4th of November, 1844, more than eighteen months after his supposed invention, and nearly six months after Goodyear had obtained his patent for the same invention, and not till Norton & Lawrence had agreed to secure him against all costs and expenses to be incurred in procuring the patent. Those facts seem to me to rebut the inference drawn from the fact that Mr. Warner was the fabricator of the machine which contains the combination. The greater part of the testimony produced by him is to prove the fact that he built the machine. The presumption, from the fact that Warner made the machine for Goodyear at his request, for his benefit, and at his expense, is that it was made according to his directions; and the burden of proof is then on Warner to show that the machine was not according to his directions. By a careful examination of the testimony, I am satisfied that in the fall of 1842 Mr. Charles Goodyear made several experiments combining the principle of the calenders, the stretching-frame, and the elastic apron passing through the calenders with the cloth intended to be corrugated, and ascertained that a machine combining these principles, if properly made, would effect the object he had in view, viz., the shirring of India-rubber goods by machinery. This combination, the effect of which Mr. Goodyear had thus ascertained, was reduced to practice by the machine built by Solomon C. Warner, at the request or by the order and at the expense of Mr. Goodyear; so that it was in fact Mr. Goodyear, and not Mr. Warner, who reduced the invention to practice. Whether the apron shall be an endless or a straight apron, does not affect the principle. The object was to have an elastic matter pass through the calenders with the cloth intended to be corrugated. The one way does the work better than the other, but neither of these effects the object intended. Mr. Goodyear's invention or discovery was in 1842. Mr. Warner claims only from the spring of 1843. Without deciding, therefore, the question whether or not Mr. Solomon C. Warner received his instruction from Mr. Goodyear or from Mr. Emory Kider, or from any one else, I am of opinion from the evidence that Mr. Solomon C. Warner was not the first inventor of the combination for which he asks to obtain a patent.

[For other cases involving this patent, see Ex parte Robinson, Case No. 11,932; Gardner v. Goodyear Dental Vulcanite Co., 21 U. S. (Lawy. Ed.) 141; Goodyear v. Carey, Case No. 5,562; Day v. Stellman, Id. 3,690; Goodyear v. Day, Id. 5,568.]

Case No. 17,184.

WARNER et ux. v. HOWELL et ux.

[3 Wash. C. C. 12.] [1]

Circuit Court, D. Pennsylvania. April Term, 1811.

EXECUTION OF POWERS—WHEN VALID.

1. Where, in a will, a power has been given, and there has been a complete execution of it, and something added which is improper, and inconsistent with the purpose of the power, the execution is good, and the excess is void.

2. Aliter, if the boundaries between the excess and the execution, are not distinguishable.

3. Courts always lean in favour of the execution of the power, if it can be supported, even if it should disappoint the person executing the power.

[Cited in brief in Sturgeon v. Ely, 6 Pa. St. 408.]

Samuel Howell, by will, devised as follows:—"I give and bequeath to my granddaughter Elizabeth Douglass, the sum of £4000 Pennsylvania currency, to be placed out and kept at interest by my executors, on good real security, and the interest to be paid her annually till her marriage, when she is to receive the principal sum; and, in case of her death, she shall have the right by will, to bequeath the said sum unto whichever of my grandchildren she shall think proper, but unto no other person whatsoever; and in default of such will or disposal, I do bequeath the said sum of £4000, to be equally divided between

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

my six grandchildren, (by name,) and their heirs, &c.; provided, that if my said granddaughter Elizabeth Douglass gets married, then the said legacy belongs to her and her heirs, to dispose of as she may think proper." Elizabeth Douglass, not having been married, duly made her last will and testament, and after reciting the above devise, proceeds thus,—"in execution of that power, I will and bequeath to my dear cousin Elizabeth Howell, who is a grandchild of my said grandfather Samuel Howell, the said sum of £4000; and it is done with a dying request and hope, that she will give a part of it to my executor; viz. 4500 dollars, within two months after my decease, or as soon as she can get possession of the money; which sum of 4500 dollars, is to be disposed of as follows, &c. (and then distributes this sum amongst different persons, not the granddaughters of Samuel Howell). But in case my said cousin Elizabeth Howell, shall decline to comply with this request, then, and in such case, I will the said £4000 to my cousin Elizabeth Stretch, also a grandchild of the said Samuel Howell, with a like dying request, that she will comply with the above request made to Elizabeth Howell." The complainant, Elizabeth, the wife of the other plaintiff, is the devisee and appointee, named in the will of Elizabeth Douglass, by the name of Elizabeth Howell. For the plaintiff, it was contended, that she is entitled to the whole £4000, the appointment to her being good, and the condition void. But if the 4500 dollars should be considered as a devise over of that sum, and not a qualification of the whole sum, then, the plaintiff is entitled to the residue under the appointment, and to her proportion of the 4500 dollars, as so much undisposed of. Cases cited, 2 Term R. 241; Alexander v. Alexander, 2 Ves. Sr. 641; Pow. Powers, 346, 361, 363; 2 Ves. Jr. 336, 356, 698. On the other side, it was contended, that the whole devise is void, because the appointee, to take at all, must do so on the terms it is given; and, as she cannot do this, then the power is not executed. Cited 1 Wils. 224.

WASHINGTON, Circuit Justice. The rule laid down in Alexander v. Alexander [supra], as well as in other cases, is, that where there is a complete execution of a power, and something ex abundanti added, which is improper, the execution is good, and only the excess void; otherwise, if there is not a complete execution of the power, where the boundaries between the excess and execution are not distinguishable. To illustrate the rule, the master of the rolls puts the case of the devisee under the power annexing a condition to the appointment, that the appointee should release a debt owing to him, or pay money over, where the appointment would be absolute, and the condition only void. The rule, with the illustration, is decisive of the present case. The condition annexed to the devise to Elizabeth Howell, is perfectly distinguishable from the devise of the £4000 to her, which is complete, and consequently, the excess only is void. We take the reason of the rule to be this, that the appointee under the power, takes under the first devisor, and not under the person appointing; and that by naming the person intended to take, the power is executed, and every thing beyond that which is inconsistent with the power, is void. The leaning of the court is strongly in favour of the execution of the power, if it can be supported, even though it should disappoint the intention of the person executing the power. Of this, there is a strong proof in the principal case before mentioned, where the whole interest devised for the support of Francis, his wife and children, is declared to vest in Francis alone, by supplying the words "if the wife and children shall by law be capable." It was contended, in this case, that if the whole devise to Elizabeth Howell is not void, still it is to be construed as a devise of 4500 dollars to the persons to whom it is given by the will of Elizabeth Douglass. But there is certainly no ground for this. The condition cannot be void, so far as it qualifies the devise to Elizabeth Howell, and yet good as a substantive devise to those persons of 4500 dollars; more particularly, as such a construction would be to create a devise to persons incapable of taking, for the purpose of defeating the execution of the power in part, and to leave such part undisposed of. We are therefore of opinion, that the plaintiffs are entitled to a decree for the whole sum of £4000, with interest.

Case No. 17,184a.

WARNER v. The ILLINOIS.

[18 Reporter, 11.] [1]

Circuit Court, E. D. Pennsylvania. May 5, 1884.

ADMIRALTY—CARRIER—DELIVERY.

1. A mere deposit of goods by a carrier upon his own wharf without separating and setting them apart from the rest of the cargo and without acceptance by the consignee and without a reasonable time and opportunity for the removal of the goods, does not constitute a delivery, and the goods remain at the risk of the carrier.

2. Where a carrier suffers goods of a consignee on being discharged from the vessel to become mingled with the rest of the cargo, and to be carried off by persons claiming to be entitled to similar goods, he is liable to the owner of the goods carried off, whether by fraud or mistake.

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

The facts appeared as follows: In March, 1877, sixteen bales of dry Servian goat skins were bought for the libellant in London, and being marked "W. B. T.," and numbered from 4015 to 4030 inclusive, were delivered at Liverpool to the agent of the steamship Illinois, on board of which vessel they were received on May 1, 1877, under a bill of lading, and carried

[1] [Reprinted by permission.]

to Philadelphia, where the Illinois arrived on May 31, 1877. During the next two days they were discharged from the ship on its own wharf, and were mixed up with skins of other shippers without any separation of the several lots. The consignees or their draymen were allowed to select the skins they claimed as theirs, without any control by the agents of the ships. The libellant, on June 2d, on examination of the skins on the wharf, could find none belonging to him. Afterwards five bales were found and accepted by him, but the remaining eleven were never traced. He claimed the value of the eleven bales, viz., $1,529.22. The district court gave judgment for the respondent. The libellant took this appeal.

J. Warren Coulston, for appellant.
H. G. Ward and M. P. Henry, contra.

McKENNAN, Circuit Judge (after stating the facts). The liability of the respondent depends upon whether there was a sufficient delivery of the skins in question to the libellant. It is clearly shown that they were not actually received by him. They were discharged from the vessel on the wharf at which she was moored, and of this the libellant had due notice, because he was at the wharf on the second day on which the ship was being unloaded to identify and remove his portion of the cargo. They were not, however, placed on the wharf by themselves or separately from other cargo of like character, but were mingled with other lots of goat skins discharged at the same time and consigned to other persons. Was there then a legal delivery of his skins to the libellant? I think not. The ship's duty was not fully performed by merely depositing the libellant's goods on the usual wharf; they must be there placed separate and apart from the residue of the cargo, so that they may thus be open to inspection and conveniently accessible to the owner and timely notice be given to him. Failure to observe either of these conditions will not absolve the ship from liability for the loss of the goods. The rule is thus concisely and accurately stated in Redmond v. Liverpool, New York & P. Steamboat Co., 46 N. Y. 584: "A mere deposit of the goods by the respondents on their own wharf, without acceptance by the consignee, not separated and set apart from the residue of the cargo, and without a reasonable opportunity and time for their removal, does not discharge the respondents, and they remain at the risk of the carriers." In The Eddy, 5 Wall. [72 U. S.] 495, Mr. Justice Clifford employs substantially the same language in defining the duty of a carrier by water in discharging his cargo not accepted by the consignee. The libellant's skins were improperly mixed on the wharf in the process of unloading with the skins of other consignees, and when on the day after the discharge of the cargo commenced the libellant applied at the wharf for his skins those in question could not be found, but had been removed by some one else without his sanction. By reason then of this improper intermixture of the cargo there was no sufficient delivery of the libellant's goods, and the ship still remained under its obligation to deliver them to their true owner, and it is not relieved therefrom by their removal and appropriation by a stranger, whether by fraud or mistake. The Thames, 14 Wall. [81 U. S.] 107.

Decree for libellant for $1,529.22, with interest from June 2, 1877, and costs in both courts.

Case No. 17,185.

WARNER et al. v. MAYER.

[23 Int. Rev. Rec. 234.]

Circuit Court, D. Massachusetts. 1877.

SALE OF TOBACCO—DEFECTIVE CONDITION.

The facts in this case were as follows: Some time in the fall of 1874 Mr. L. Mayer, member of the leaf firm J. Mayer's Sons, New York City, purchased a crop of 1874 tobacco from E. S. and W. Warner, Hatfield, Mass., who are the plaintiffs in this action. It being, to all appearances, a fine crop, a high figure was paid for this tobacco by defendant, L. Mayer. The tobacco, after having been packed into cases by plaintiffs, was tendered to the defendant, who upon examination found a portion of the same to be rotten, apparently from the free use of a sprinkling can. He (defendant) thereupon refused to accept the tobacco, but signified his willingness to accept it if the damaged part would be taken out of the lot, and that the price he should pay for the damaged part would be left to an arbitration. To this proposal the plaintiffs agreed, and documents to that effect were drawn up and properly signed by both plaintiffs and defendants; shortly thereafter though, for some reason unexplained, plaintiffs refused to comply with these last terms, and brought suit in their district courts against J. Mayer's Sons for the purpose of forcing the last named firm to accept the tobacco in its rotten condition, claiming that such condition was produced by the action of atmosphere or some unknown cause. On motion of the attorneys of J. Mayer's Sons, the case was transferred to the United States courts at Boston and tried.

The most important point developed during the trial was the admission of the plaintiffs of having wetted the tobacco previous to packing it into cases. Witnesses for the complainants testified that the tobacco did not rot from having been wetted. Experts called by the defendants gave their opinion, though, that the tobacco did rot from having been wetted, and that no leaf tobacco could rot unless it had previously been in a wet condition. Notwithstanding the damaging testimony to their own case given by plaintiffs themselves, and the important and correct views of the experts, verdict was rendered by the jury in favor of plaintiffs.

Case No. 17,186.

WARNER v. PENNSYLVANIA R. CO.

[13 Blatchf. 231.] [1]

Circuit Court, S. D. New York. Jan. 7, 1876.

REMOVAL OF CAUSES—CASES NOT WITHIN ORIGINAL JURISDICTION—TIME OF REMOVAL.

1. A suit in a state court, which falls within the description of suits removable into this court, may be removed, although it could not originally have been brought in this court.
[Cited in Erwin v. Walsh, 27 Fed. 580.]

2. That principle is not changed by the provision of section 5 of the act of March 3, 1875 (18 Stat. 472), which provides for the dismissal or remanding by this court of suits not really and substantially involving a dispute or controversy within the jurisdiction of this court.

3. Under section 3 of said act of 1875, which provides that a suit cannot be removed unless the application for removal is made before or at the term at which the cause could be first tried, if the term at which the cause could otherwise be first tried is one which occurs during the time a trial of the cause is stayed by an order of the state court, it is not such a term as is meant by the statute.
[Cited in Wheeler v. Liverpool, London & Globe Ins. Co., 8 Fed. 198; Dwight v. Central V. R. Co., 9 Fed. 792.]
[Cited in First Nat. Bank of Wausau v. Conway, 67 Wis. 218, 30 N. W. 218.]

[This was a suit by Charles P. Warner against the Pennsylvania Railroad Company. Heard on a motion to remand the case to the state court.]

Dennis McMahon, for plaintiff.
Charles F. Sanford, for defendants.

JOHNSON, Circuit Judge. The plaintiff applies to have this cause remanded to the state court, upon the ground that this court has no jurisdiction, the defendant being a corporation created under the laws of Pennsylvania, and, therefore, not an inhabitant of this district, nor capable of being found therein, within the meaning of section 1 of the act of March 3, 1875 (18 Stat. 470). But, this view assumes that the jurisdiction of the court in respect to causes removed is limited in the same way, in respect to inhabitancy and being found in the district, as it is in respect to suits originally brought in the court. It was, however, well settled, previous to the act of 1875, above referred to, that these restrictions upon the jurisdiction, in respect to suits originally brought in the court, did not apply to suits otherwise capable of being removed; and that a suit in a state court, which fell within the description of removable causes, might be removed, although it could not originally have been brought in the circuit court. Barney v. Globe Bank [Case No. 1,031]; Sayles v. Northwestern Ins. Co. [Id. 12,421]. It is now urged, that section 5 of the same act has introduced a different rule. That section provides, that, if a suit commenced in a circuit court, or removed there from a state court, afterwards appears not to involve really and substantially a dispute or controversy within the jurisdiction of said circuit court, or that the parties to the suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the act, the court shall dismiss it, or remand it to the state court. All that is necessary to bring the case really and substantially within the jurisdiction is, that it involves a controversy of the character, either as to the subject-matter or the parties, specified in either the section which defines the jurisdiction by original suit, or that which authorizes removal and the acquisition of jurisdiction in that manner.

In this case, the controversy is between citizens of different states, and was pending in the state court within this district. It is true, that the defendant could not have been originally proceeded against in this court; but it has, upon its own motion, come into this court, and has thus placed itself in a position where it could not question its jurisdiction, even if it desired to do so. Bushnell v. Kennedy, 9 Wall. [76 U. S.] 387, 393, 394. It comes here, not as originally subject to the compulsory jurisdiction of this court, but as entitled to the privilege of a resort to its authority, under the statute referred to.

Another point is suggested as ground for the motion, and that is, that the application to remove was made too late. It was decided in Merchants' & Manufacturers' Bank v. Wheeler [Case No. 9,439], that the phrase of section 3 of the act of March 3d, 1875, fixing the time when the application to remove must be made, "the term at which said cause could be first tried," must be construed to mean a term after the law mentioned took effect. In this case, therefore, such a term was one occurring after the 3d of March, 1875. At that time; it appears by the record that a stay of proceedings in the cause existed, upon an order requiring the plaintiff to file security for costs, which had been granted before the act in question became a law. On the 30th of March, in an order for a commission for the examination of witnesses, the trial of the cause was stayed until the return of the commission. This stay continued until after the petition for removal was presented. The question, therefore, in this regard, is, whether, where a trial is stayed by order of the court, a term occurring during such stay can be said to be, within the meaning of the statute, a term at which the trial could be had. When no legal obstacle to a trial exists at a particular term, it may be said that the trial could be had at that term, although, in point of fact, the state of the business of the term may satisfy the court that the particular cause will not be called for trial. But, if a legal obstacle exists to a trial at a particular term, it is difficult to see in what just sense it can be said that the trial could be had at that term. The general purpose of the statute is to require diligence in

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

making the application to remove. It must be made before the trial, and before or at the earliest term at which a trial could be had. But, if, by reason of a stay of proceedings, or for any other cause, the case could not be brought to trial at a particular term, even if it were the only case pending, then that is not such a term as is described in the statute. The application to remove, in this case, was, therefore, made in time, having been made before or at the term at which the cause could be first tried, occurring after the passage of the statute.

The motion to remand must be denied.

Case No. 17,187.

WARNER et al. v. The RALPH POST.

[N. Y. Times, Oct. 8, 1862.]

District Court, S. D. New York. July, 1862.

ADMIRALTY—NOTICE OF FILING ANSWERS.

[If libelant's proctor negotiates the postponement of the trial, he cannot thereafter allege ignorance of the fact that the answer was on file.]

This was a motion [by J. L. Warner and others] to set aside a default. The libel was filed July 19, 1861. The answer was filed May 3, 1862. The default was taken July 9 and Aug. 13. The stipulations for costs and value were canceled. The libelants' proctor alleged that he had no notice of the filing of the answer, and that the respondents' proceedings were, accordingly, irregular, under rule 88. It appeared, however, that the cause was on the calendar for May and June terms, and that libelants' proctor attended court in May, and got the consent of the respondents' proctor to put it off for the term. There was great discrepancy in the affidavits on the motion.

Mr. Seymour, for libelants.

Beebe, Dean & Donohue, for claimants.

HELD BY THE COURT: That the 88th rule does not require that knowledge of the filing of the answer should be imparted by formal notice in writing. His negotiating the postponement of the trial concludes him from alleging ignorance of the fact that the answer was on file. That on the proofs, the laches lies with the libelants, and not with respondents. Motion denied.

Case No. 17,188.

WARNER et al. v. RISING FAWN IRON CO.

[3 Woods, 514.] [1]

Circuit Court, N. D., Georgia. March, 1878.

APPOINTMENT OF RECEIVERS — FORECLOSURE OF MORTGAGE — PLEDGE OF BONDS PAYABLE TO BEARER—DEMAND OF PAYMENT.

1. A mortgage to secure an issue of bonds provided that, after a default continuing for six months, in the payment of the interest coupons attached to the bonds, the trustees named in the mortgage might, upon the request of any holder of bonds, take possession of the mortgaged property and advertise and sell the same to pay the bonds and coupons. A bill having been filed to foreclose the mortgage, *held*, that the fact that the condition existed which authorized the trustees to take possession of the mortgaged property, and the refusal of the trustees to take possession, were sufficient grounds for the appointment of a receiver.

[Cited in Dow v. Memphis & L. R. Co., 20 Fed. 264.]

2. Pledgees of bonds payable to bearer, hypothecated to secure a debt, are legal holders, and are entitled to demand payment of coupons which fall due before the maturity of the debt which the bonds were pledged to secure.

3. Generally suit may be brought on any commercial paper payable at a particular place without a previous demand at that place.

4. Bonds, payable to bearer, issued by an incorporated company, contained the following provision in relation to the payment of interest, viz.: "With interest at the rate of ten per cent per annum, payable semi-annually on the first days of January and July in each year, on the presentation of the respective coupons hereto attached, both principal and interest payable at the principal office of said company in the city of New York." *Held*, that under this form of bond the coupons might be sued without previous presentation for payment.

In equity. Heard upon motion to continue receiver and injunction.

During the vacation of the circuit court, to wit, on January 26, 1878, Judge Erskine, the district judge, on the application of complainants [James C. Warner and others], and after due notice to defendants and argument of counsel, directed an injunction to issue restraining the defendants, their agents and attorneys, from interfering with or controlling the property described in the deed of trust, to foreclose which the suit was brought. He also appointed a receiver to take possession of the trust property and preserve and manage the same under the direction of the court. During the regular term of court following, beginning on the second Monday of March, the complainants moved that the injunction allowed by the district judge, and his order appointing a receiver, be continued. This motion, which was strenuously resisted by the defendants, was, by consent of parties, continued until June, 1878, and the motion was then heard and argued upon the showing made on the original hearing and upon additional affidavits introduced by both parties.

The bill was filed by complainants as holders of first mortgage bonds to the amount of $88,000, issued by the defendant, the Rising Fawn Iron Company, and secured by a first mortgage upon all its property, situated in Dade county, Georgia, consisting of lands, a blast furnace erected thereon, and all the property, whether real or personal, used by the company in Dade county, Georgia, in the manufacture of iron and in carrying on that business. The bonds were issued and the trust deed to secure them executed by authority of an act of the legislature of Georgia, approved February 2, 1876, entitled "An act to amend the charter of

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

the Rising Fawn Iron Company," etc. (Laws Ga. 1876, p. 248). This act authorized the company, on a vote of a majority of the stock, to execute its first mortgage bonds for any sum not exceeding $125,000, one hundred of said bonds to be for the sum of $1,000 each, and fifty for the sum of $500 each; all to fall due in five years, and bear a rate of interest not exceeding ten per cent per annum, "payable semi-annually on the first days of January and July, for which interest coupons shall be attached to said bonds specifying the amount of interest due on each and the date of its payment." The act further authorized the company to execute a deed of trust on all its property, real and personal, in Dade county, Georgia, used in carrying on its business and in manufacturing pig iron, to secure the principal and interests of said bonds, and the act declared, "in case the coupons due on said first mortgage bonds shall at any time remain unpaid for the space of six months, the principal of said first mortgage bonds shall then become due on account of the failure to pay said coupons, and it shall be the duty of the trustees mentioned in said trust-deed, within sixty days after said default, to pay the interest due as aforesaid," to advertise and sell the property conveyed by said deed of trust, and to convey the same to the purchaser and to apply the proceeds to the payment first of said first mortgage bonds and coupons. The act further provided that when said deed of trust was recorded in the proper office, the bonds and coupons secured thereby should be "the first lien prior and superior to all others on all the property included in said trust deed." The trust deed was drafted in substantial conformity with the statute. The bonds declared that they were "payable on the first day of March, 1881, with interest at the rate of ten per cent per annum, payable semi-annually on the first days of January and July in each year, on presentation of the respective coupons hereto attached, both principal and interest being payable at the financial office of said company in the city of New York." The bonds further declared: "Should the coupons due on said first mortgage bonds remain unpaid after becoming due for the space of six months, the principal of said first mortgage bonds shall then become due." The deed of trust also declared: "And in case said party of the first part shall, for the space of six months, make default in the payment of the semi-annual interest to become due upon said mortgage bonds, then after the expiration of said six months from the time it becomes due, the whole principal sum mentioned in each and all of said mortgage bonds, then outstanding, shall then forthwith become due and payable, and the lien or incumbrance hereby created for the security and payment thereof, may at once be enforced as hereinafter provided. And it is agreed, in case of the default of the payment of the semi-annual interest for six months, as above provided, that said trustees or their successors are hereby expressly authorized and empowered, upon the request of the owners or holders of said bonds, or any of them, to enter into and upon and take actual possession of all the property, real and personal, hereby conveyed, and each and every part thereof, within sixty days after said default of six months to pay said interest coupons, and to advertise and sell said property," etc., and make a deed therefor to the purchaser. The deed of trust further declared as follows: "The conveyance hereby effected is subject to the possession and management of said property by said party of the first part (the Rising Fawn Iron Company), its successors and assigns, so long as no default shall be made in the payment of the principal or interest of said bonds or either of them, and so long as said party of the first part shall well and truly keep, observe and perform all the covenants, agreements, conditions and stipulations of said bonds," etc. The company issued one hundred bonds of $1,000 each, and fifty bonds of $500 each, all secured by the deed of trust. The complainants claimed to be the holders of $88,000 of said first mortgage bonds; that of the bonds for $1,000 each they held those numbered from one to fifty-two, both numbers inclusive; number fifty-six; numbers from sixty-three to sixty-seven, both inclusive; numbers from seventy-two to seventy-eight, both inclusive; number eighty-three; and numbers ninety-five, ninety-six and ninety-seven; and of the bonds of the denomination of $500 they held all numbered from one to thirty, both inclusive, except numbers five, six, twelve and twenty-nine. Complainants claimed that the coupons attached to the bonds for one thousand dollars each, numbered from thirty-one to thirty-eight, both inclusive, held by them and due July 1, 1876, were not paid and were still due and unpaid, and that the coupons due on said bonds on the first days of January and July had not been paid, and that none of the coupons falling due July 1, 1877, on the bonds held by complainants, had been paid.

It was made to appear by the evidence submitted that on the 31st day of August, 1876, the Rising Fawn Iron Company ceased to carry on business, and that all its officers left the state of Georgia, where its property was situate. The property was, however, left in charge of T. J. Lumpkin, an attorney-at-law, as agent for the company. On September 9, 1876, all the personal property of the company was sold to one Hale on execution at sheriff's sale for the benefit of judgment creditors, and on December 21, 1876, the personal and real property of the company was sold on execution to J. W. Cureton, and that he took possession of both the real and personal property. In March, 1877, a convention of the creditors of the company who were not holders of first mortgage bonds, leased the furnace and other property to one W. C. Peters, who went into possession and kept the furnace in operation from April, 1877, to July 26 of the same year, when Cureton again took possession of said property. He carried on said furnace for a short time after he resumed possession, but soon blew out and

quit work for want, as he stated, of a supply of fuel, and the furnace had not again been put in blast until after the filing of the bill in this case.

It was charged in the bill, and not denied, that the property covered by the deed of trust consisted of several thousand acres of land, on which a blast furnace had been erected, with all the machinery, tools and appliances necessary to carry on the business of manufacturing pig iron. There was also on said land about five miles of railway and two locomotive engines and several cars, a large pair of scales, tools of various kinds, movable engines, and other valuable property not attached to the realty. After the sales above referred to, a large part of said movable property was carried away from the premises and state, or used up and worn out. At the time of the filing of the bill many persons were living on the land who paid no rent and cut timber and did other acts of waste, and some of the land had been sold for taxes. While the property was in the possession of Peters it was greatly damaged and materially deterioriated in value. When the furnace was blown out by Cureton, soon after the tenancy of Peters ceased, it was partially filled with a mass of cinders, iron, limestone and other matter which had chilled and solidified, and could only be removed by drilling and blasting. For some time before this bill was filed, Cureton had been engaged in removing this mass from the furnace and in putting it generally in order, and after the bill was filed he put the furnace in blast, and the weight of the evidence was that when the receiver in this case was appointed, the furnace was in good repair, and, under the management of Cureton, was doing well.

The complainants claimed that they were the holders and owners, among others, of eight bonds of $1,000 each, numbered from thirty-one to thirty-eight, inclusive, dated March 6, 1876, on which the interest coupons, due July 1, 1876, for $31.94 each, were and still remained unpaid, as well as the interest coupons due January 1, 1877, for $50 each. The facts with regard to the issue of these and other bonds held by the complainants were, as appeared from the evidence, as follows: Some time before July 1, 1876, when the first coupons fell due, the Rising Fawn Iron Company had hypothecated said bonds, with all the coupons attached to secure certain debts, evidenced by notes, which the company owed. These notes were not due at the time of the hypothecation, nor did they fall due until some time after July 1, 1876. The parties for whose benefit these bonds were hypothecated had no right, under the contract of hypothecation, to sell the bonds until after the notes they were given to secure became due, and the bonds were not in fact sold by the pledgees until after that time. J. S. Haselton testified that about June 15, 1877, he contracted to sell to Morrow, one of the complainants, first mortgage bonds of the company to the amount of forty thousand dollars, and in a few days afterwards the contract was completed by the delivery of the bonds to Morrow and the payment therefor by him, and among the bonds so delivered were eight to which all the coupons were attached. At the time of the contract between Morrow and Haselton the bonds, afterwards delivered to Morrow, were hypothecated or held by creditors of the Rising Fawn Iron Company, and this fact was then known to Morrow. After the date of said contract, said bonds so held as collateral were sold by the pledgees and purchased by Haselton, so that he might be able to perform his contract with Morrow. There was no presentation for payment on July 1, 1876, of the coupons on the eight bonds held by complainants, nor was it shown or claimed that there were funds provided at the place where said coupons were payable to pay the same on that day. It appeared by a supplemental bill that none of the coupons on any of the bonds due January 1, 1878, and July 1, 1878, had been paid, although on July 1, 1878, the coupons held by complainants were presented and payment demanded. The complainants claiming that default had been made in the payment of the interest coupons due July 1, 1876, on the said eight bonds heretofore particularly mentioned, and on coupons attached to other bonds held by them, served notice on the trustees named in the deed of trust, of such default, and required them to take possession of said trust property in accordance with the terms of the trust-deed, and to proceed to advertise and sell the same, and to apply the proceeds to the payment of the sums due on the first mortgage bonds. With this demand the trustees refused to comply, and thereupon complainants filed this bill to enforce, for their benefit and the benefit of all other holders of first mortgage bonds, the trusts in said deed of trust contained.

J. L. Hopkins and J. T. Glenn, for complainants.

H. K. McCay and R. P. Trippe, for defendants.

WOODS, Circuit Judge. The question to be determined is, whether, on the facts shown by the pleadings and evidence, the court ought to discontinue the injunction and to discharge the receiver and restore the possession of the trust property to Cureton, the alleged purchaser at sheriff's sale. No objection is made to the receiver appointed by the court or to his management of the property—which his reports show to be reasonably successful and profitable. In my judgment, the facts abundantly justified the appointment of a receiver in the first instance, as the case was then presented to the district judge. If there was a default in the payment of interest coupons for the period of six months after they fell due, the trustees named in the deed of trust were authorized, upon the request of the holder or holders of any of the bonds, to enter upon and take actual possession of the trust property, and to advertise and sell the same. And by the express stipulation of the trust-deed, the Rising Fawn Iron Company reserved the right to the possession

and management of the trust property only so long as no default should be made in the payment of either interest or principal of the bonds. Cureton, by his purchase at sheriff's sale on a subsequent incumbrance, could not place himself in a stronger position than the company itself. Suppose there had been no sheriff's sale, and the company had remained in possession of the trust property, could it have lawfully resisted the right of the trustees to demand and take possession of the trust property after six months' default in the payment of the principal or interest of the bonds? The right to the possession after such default is as clearly conferred by the trust-deed as the right to payment of the principal and interest on the bonds. If the company could not resist the demand of the trustees to take possession of the trust property after default, neither could it claim that this court could not rightfully take possession on a bill filed by the bondholders to enforce their rights under the trust-deed. If the contingency existed when it was the right and duty of the trustees, in the execution of their trust, to take possession of the trust property, it was incumbent on the court, upon failure of the trustees to discharge that duty, to compel them to act or to appoint some one to act in their stead. Independent, therefore, of any jeopardy to the trust property, the company lost, and the trustees acquired, the right to the possession of the trust property, after six months' default in the payment of the interest coupons. But the evidence is satisfactory to the point that there had been, at the time of the filing of the bill, serious loss and depreciation of the trust property.

The question on which the motion turns is, has there been any default on the part of the Rising Fawn Iron Company, in the payment of the interest coupons attached to the first mortgage bonds held by complainants? The complainants assert that there has, and the defendants, the Rising Fawn Iron Company and Cureton, assert that there has not. There is no dispute that the interest coupons, due July 1, 1876, on the eight bonds heretofore specified, held by the complainants, were not paid on that day, and have not since been paid. The reply of the defendants to this fact is: First. That there was nothing payable on the coupons falling due July 1, 1876, because the bonds to which they were attached were deposited before July 1, 1876, as collateral security for debts which did not mature until after that date. This ground appears to me to be clearly untenable. By depositing the bonds as collateral security, with all the coupons attached, the company made the pledgee the legal holder, subject only to the rights of the company, on payment of the debt for which they were held as security. If the pledgee had transferred the bonds to an innocent purchaser, such transfer would have carried with it the legal title. In Georgia, by express enactment, the holder of a note, as collateral security for a debt, stands upon the same footing as a purchaser. Code Ga. § 2788. See, also, Goodman v. Simonds, 20 How. [61 U. S.] 343; 1 Daniel, Neg. Inst. §§ 820-822, 824, 825. When, therefore, the bonds were pledged as collateral security, the pledgee became the legal holder, and he became the holder of all the coupons attached and not due, as well as of the bond itself. The bonds and the coupons were all pledged for the payment of the debt which was secured by the deposit of the bonds and coupons. The fact that the debt secured was not due did not relieve the coupons, any more than the bond itself, from the effect of this hypothecation. To hold otherwise would be to hold that if the bonds themselves fell due before the debt secured by the pledge of the bonds, their hypothecation was without any effect whatever. 1 Daniel, Neg. Inst. §§ 825, 826. This is true, where the pledge is made to secure a pre-existing debt. In this case it does not appear that the bonds were transferred to secure a debt already existing. The presumption is, that the creation of the debt and the giving of the security were contemporaneous.

It is clear to my mind that the pledgees of the bonds deposited as collateral security, before July 1, 1876, were legal holders, and had the right to demand and receive the interest due July 1, 1876. This right was a part of their security. Upon the failure to pay the coupons, the pledgee had all the rights of any other legal holder or purchaser of the bonds. And a default, for six months, in the payment of such interest, gave the pledgee the same right as any other purchaser to insist that the principal of the bond had become due in accordance with its terms and the terms of the trust-deed. In short, the collateral holder took the bonds and coupons with all their terms and stipulations, unaffected by the fact that they were held as security for another debt, and that that debt was not due. He had the right to collect the interest on the bond as it fell due, and to enforce payment of the principal in accordance with the terms of the bond. He only differed from an absolute owner in this, that he was bound to account for any surplus received from the bonds and coupons, over and above what was necessary to the payment of his debt. When the pledgee transferred the bonds to the complainants, they acquired all his rights. The fact, therefore, that the complainants knew before they purchased the bonds, that they were in pledge, has no effect, for the complainants are claiming no rights which the parties from whom they purchased the bonds did not have.

It is insisted that because the pledgee did not know that he was entitled to collect the interest coupons which fell due before the maturity of the debt secured by the pledge of the bonds, therefore he had no such right. But men's rights are not lost by the fact that they are ignorant of them, much less can such ignorance destroy the rights of the subsequent holder of the bonds. In my judg-

ment, the collateral holder of the bonds, on July 1, 1876, had the right to demand payment of the coupons due on that day, and on a default of payment continuing six months, had the right to demand as due, by reason of such default, both the principal and interest on his bonds, and that when he transferred his bonds and coupons, for value, to a purchaser, the transfer carried with it all the rights of the original collateral holder.

But it is claimed, second, by defendants, that there was no default in the failure to pay the coupons due July 1, 1876, because there was no presentation of the coupons for payment. Generally, a suit may be brought on any commercial paper, payable at a particular place, without demand at that place. Wallace v. McConnell, 13 Pet. [38 U. S.] 136; Montgomery v. Elliott, 6 Ala. 701. The peculiar form of the bond, in this case, it is insisted, takes it out of this general rule. The bond promises to pay the principal and "interest at the rate of ten per cent per annum, payable semi-annually on the first days of January and July in each year, on presentation of the respective coupons hereto attached, both principal and interest being payable at the financial office of said company, in the city of New York." Neither the act authorizing the company to issue bonds, nor the mortgage nor the coupons themselves, say anything about the presentation of the coupons as a condition of payment. Does the form of the bond require presentation of the coupon and demand of payment before the company can be put in default? It seems to me that it does not. If a cause of action accrues on a coupon in which the words "on presentation" do not occur, as soon as it falls due and is unpaid, without any demand, I do not think the insertion, in the trust-deed, of the words "on presentation of this coupon," changes the rule. The evident purpose is to indicate that the interest is to be paid on the coupon, without the production of the bond. The words do not change the legal effect of the coupon, for the company is not bound to pay unless the coupon is not only presented but delivered up: Wolcott v. Van Santvoord, 17 Johns. 248; 2 Daniel, Neg. Inst. § 1508. But it is said that if this construction is correct any coupon holder could, by failure to present his coupon for payment when due, cause both the principal and interest on all the bonds to become payable long before the date named for their maturity. No such result would follow if the company could truly aver that it had funds at the place designated for the payment sufficient to pay the coupons if they had been presented. This would be a conclusive answer to the claim that the principal of the bonds had become due, by reason of default in the payment of interest.

It is averred in the bill that no funds were provided for the payment of these coupons on the eight specified bonds which fell due July 1, 1876. This is not denied in any answer or affidavit filed in this case, though it was clearly within the power of the company to prove the fact that it had provided for the payment of these coupons at maturity, if such had been the case, for it is not pretended or claimed that funds were ready for the payment of these coupons, if they had been presented. The defense relied on is the failure to present the coupons for payment at a place, where there was no money provided to pay them. The coupons attached to the eight bonds were due July 1, 1876. They were not paid on that day, nor was any money provided for their payment. No payment was made, nor offered to be made, within six months after the maturity of the coupons. By the terms of the bond and trust-deed, both the principal and interest of the bonds became due. No offer has been made to pay the principal and interest. The company itself has never provided any funds to pay interest, and the interest due January 1 and July 1, 1878, has never been paid by any one. The evidence is overwhelming, that in a commercial sense the company is insolvent. It appears to me, from the facts of the case, that its property, if brought to sale, would not pay the first mortgage bonds and interest. There appears, therefore, no reason why the order of the district judge, in vacation, appointing a receiver, should be revoked. On the contrary, if the case were presented here for the first time, we should feel bound to accede to the prayer of the bill, and allow the injunction and appoint a receiver, as has already been done.

It was suggested in the argument, that the sale of the bonds of the company, which had been pledged as collateral security for the company's own debt, at a price below par, amounted to usury, and the bonds and coupons were, therefore, void. As this is nowhere set up in any of the answers filed in the case, it is not necessary or proper now to discuss or decide it. It was also claimed, in argument, that some of the judgments on which the Rising Fawn Iron Company's property was sold were founded on mechanics' liens, and that they were superior to the lien of the first mortgage bonds, under the constitution of Georgia. This, also, is matter of defense not set up in any of the answers. On the contrary, the answers of the company admit that the first mortgage bonds were the first and highest lien on the property covered by the trust-deed. It is, therefore, unnecessary at this time, to discuss this question.

The motion to continue the receiver and injunction must prevail.

Case No. 17,189.

WARNER v. ROBERTSON.

[Nowhere reported; opinion not now accessible.]

Case No. 17,189a.

WARNER v. ROEHR.

Circuit Court, N. D. Illinois. March, 1884.

COUNTERFEITING TRADE-MARK.

[One injured by the counterfeiting of his trade-mark may recover exemplary damages.]

[This was an action on the case by H. H. Warner against Frank Roehr to recover $25,000 damages for counterfeiting trade-marks. The defendant had bought from old junk dealers genuine bottles that had contained Warner's Safe Kidney and Liver Cure, and, filling them with some concoction of his own, affixed a counterfeit label. The defense attempted to show that the genuine article was sold much below the regular price, the object being to prove that it was on this account, rather than on Roehr's competition, that Warner's sales fell off.] [1]

BLODGETT, District Judge, in instructing the jury, said: The interference with the plaintiff's business, and injury to the public confidence in the genuineness of the article which the plaintiff deals in, by reason of the fact becoming known to the public that the fraudulent and simulated imitation of this medicine had been placed before the public. These are the elements of damage which you are to consider. * * * In cases of this character, where you are satisfied from the proof and from the admissions in the case that the fraud—the intention to defraud—is at the bottom of the matter, * * * the jury are not confined to the exact monetary damages shown by the evidence, but may give what are known as vindictive or exemplary damages, for the purpose of deterring others from embarking in the same scheme of fraud or deception. * * * You are to take into consideration what has been told you in reference to the fact that his (plaintiff's) sales were diminished; that he has apparently lost something; that he was obliged to notify the public of the fact that simulations or imitations of his goods are in the market, and notify them how to detect this simulation. You are to say what, under the circumstances, will compensate the plaintiff, and act as smart money to deter others from embarking in other similar transactions in the future.

There was a verdict for twenty-six hundred and fifty dollars, with costs.

[NOTE. There was also at the same time, in a state criminal court, a case of People of the State of Illinois against Roehr for counterfeiting the trade-marks of H. H. Warner.]

[This case is nowhere more fully reported. The above opinion was taken from Browne, Trade-Marks, §§ 443, 452, and 520. The Chicago Tribune and the Chicago Interocean for March 20, 1884, contain accounts of the trial, from which the information contained in the statement was compiled.]

[1] [See note at end of case.]

Case No. 17,190.

WARNER v. The SOUTH AMERICA.

[Betts' Scr. Bk. 275.]

District Court, S. D. New York. Sept. 22, 1853.

ADMIRALTY—DAMAGES FOR COLLISION.

[The compensation for injuries to a vessel, caused by a collision, is to be determined by the market price or value of the services of the vessel for the time during which she is detained from her business for repairs.]

A decree had heretofore been rendered in this case in favor of the libellant [Sylvanus Warner] for damages occasioned by collision of the steamboat against his sloop, and a reference made to a commissioner to ascertain and report the amount of damages. The commissioner reported an allowance of $20 per day demurrage for the detention of the sloop from her business while undergoing repairs, upon proof that at the time of the collision she was earning in her business $20 per day. The owner of the steamboat excepted as to the allowance.

HELD BY THE COURT: That the compensation to the injured vessel could not be estimated upon the footing of the profits or earnings she was making per day, or might be supposed capable of making, unless she was under a charter at a stipulated hire. The rule of compensation is the market price or value of the services of the vessel for the time being, and proof should have been taken to determine that price. The owner of the sloop would be entitled to recover such sum in indemnification of his actual loss until the vessel was placed in a condition equal to that when injured. The exceptions allowed, and the report set aside with costs, with an order for re-reference.

Mr. Donohue, for libellant.
H. S. Dodge, for respondent.

WARNER (UNITED STATES v.). See Cases Nos. 16,642, 16,643.

WARR (UNITED STATES v.). See Case No. 16,644.

WARRAN (SOUTH AMERICA, The, v.). See Case No. 13,180a.

Case No. 17,191.

In re WARREN.

[2 Ware (Dav. 320) 322; [1] 5 N. Y. Leg. Obs. 327.]

District Court, D. Maine. Sept., 1847.

WHAT CONSTITUTES A PARTNERSHIP—BUYING AND SELLING LANDS—MAKING NEGOTIABLE PAPER—DISSOLUTION—FIRM AND INDIVIDUAL CREDITORS—BANKRUPTCY.

1. A partnership may exist in a single as well as in a series of transactions. If there is a joint purchase, with a view to a joint sale and

[1] [Reported by Edward H. Davies, Esq.]

a communion of profit and loss, this will constitute a partnership.

2. There may be a partnership in buying and selling lands as well as merchandise; and so far as third persons are concerned, it may be proved by the same evidence, though, as between the partners, it may be necessary to prove the partnership by written evidence.

3. Generally, when a member of a firm makes a note, or draws a bill, in his own name, though it is known to be on the partnership account, the firm will not be bound.

4. But this rule does not prevail where there is a secret partner unknown to the creditor.

5. Nor when one of a firm has been in the habit of drawing and indorsing bills in his own name for the use of the firm, and the other partners have treated them as binding the firm.

6. Where two persons, who are partners, unite in drawing a bill or making a note though they sign their several names and not that of the firm, if it is in fact on the partnership account, it seems that it will be treated throughout as a partnership security.

[Cited in brief in Ex parte Nason, 70 Me. 369.]

7. On the dissolution of a partnership, in cases of insolvency, the rule of equity is that the partnership creditors have a preferred claim against the assets of the firm, over the separate creditors of the partners, and the separate creditors have a like preference over the partnership creditors, against the separate assets.

8. This rule of equity is established as the rule of distribution, by the 14th section of the bankrupt law [of 1841 (5 Stat. 448)].

[Cited in Ex parte First Nat. Bank, 70 Me. 379.]

In this case, the bankrupt petitioned both as an individual and as a partner in the late firm of Warren & Brown. The firm and both partners were insolvent. The separate assets of [Henry] Warren were considerably more than the partnership assets, and a question arose between the different classes of creditors, whether the partnership, which was originally entered into in the business of attorneys and counsellors at law, extended to their speculations in lands, and if so, by what criterion the debts, which originated in land transactions, should be distinguished from the separate debts.

The case was argued by Jewett & Hobbs, for the separate creditors of Warren, and by Adams & Rowe, for several creditors, whose claims originated in the land transactions of Warren & Brown, and who, it was contended on the other side, were partnership creditors.

WARE, District Judge. In the spring of 1834, Warren and Brown formed a partnership for carrying on the business of attorneys and counselors at law. There were no written articles of partnership, but the understanding between them was, that it was to be confined to their professional business. Without any additional agreement, they began soon after buying and selling timber-lands. There was no formal agreement as to the terms on which this business was to be carried on, but they do not appear originally to have contemplated a general partnership in land transactions, and probably did not anticipate the extent to which their speculations were eventually carried. It was understood between them that either might purchase, but that the other was not bound to take a share in the purchase, without his own consent to each particular purchase, but when both parties assented to the purchase, they were to share in equal portions in the profit or loss. According to the usage of the time, they sometimes purchased and sold lands directly, and sometimes preëmption bonds or contracts for the sale of lands. This land business was commenced in the fall of 1834, and was continued on an extensive scale through the ensuing winter and summer, until the period of speculation was over. Though they did not contemplate originally a general partnership, and each was considered at liberty to purchase and sell on his own private account, there were in fact no timber-lands purchased by either, except what were taken on joint account. When they commenced the business, they gave their joint notes, signing separately, and not the partnership name, but more frequently the securities, for the convenience of negotiation, were in the form of bills of exchange, drawn by one and accepted by the other. It was not long, however, before the name of the firm was freely used in these land securities; at first, it seems, by Brown, but not objected to by Warren. This trade in timber-lands appears to have led to the lumbering business, in which they seem to have been engaged in the same way without any special partnership agreement. Whatever may have been the private intentions of the parties, it seems that they must have soon come to be considered, and dealt with by others, as a firm. A list of notes or bills of exchange is produced, taken from the books of Warren, more than sixty in number, commencing with the spring of 1836, and continued to the fall of 1839, growing out of land and lumber transactions, in which the name of the firm is used as promisor, drawer, acceptor, and indorser for various amounts, from small sums up to two, three, and five thousand dollars, and in the whole exceeding $50,000. It is quite impossible that such an amount of business, continued for such a length of time, could have been done in the partnership name, without its being generally understood that a partnership in the business existed. Third persons must have dealt with them and given them credit on that understanding.

The earliest land transaction in which they were engaged was with Thacher and Parker. This was an obligation of Thacher and Parker, to convey to them 12,040 acres of land at the price of two dollars an acre, part to be paid in cash, and part on credit of one, two, and three years, provided satisfactory security was given in sixty days. This obligation is in the handwriting of Warren, and the obligation runs to them in their partnership name; so that from the very commencement of their speculations, whatever may have been the private intentions of the parties, the business was transacted in a way that must have led those

who dealt with them to suppose that a partnership existed, and that the trade was on partnership account. Between the parties themselves, in the earlier part of their speculations, each purchase was treated as a separate and independent transaction, and, when the land was sold, the parties settled it and divided the profits and loss. But this was a private affair between themselves, and not known to third persons with whom they dealt.

A partnership may exist in a single transaction as well as in a series. Story, Partn. § 21; Pothier, Contrat de Societé, No. 54; 3 Kent, Comm. 30. If there is a joint purchase, with a view to a joint sale and a communion of profit and loss, it is a partnership trade, although it is confined to a single thing. Dig. 17, 2, 5. Now every purchase was made with a view to a joint sale on joint account, so that, without any general agreement for a partnership, they were, in law, partners in every purchase, and, by the habit of buying and selling in this way, they held themselves out to the public as general partners in the business. There may be a partnership, in buying and selling lands, as well as in ordinary commercial business. Dudley v. Littlefield, 21 Me. 418; Story, Partn. § 23. And so far as the rights of third persons are involved, it is not perceived why it may not be proved by the same evidence. To give full effect in law to the partnership, between the partners themselves, it seems to be necessary that the articles be in writing. For if the partnership is by parol only, and one of the partners makes a purchase in his own name, but intended for the benefit of the firm, the other, on the mere ground of the partnership, that being by parol, cannot take advantage of the contract, for, if he could, he would acquire an interest in lands by parol, directly in opposition to the statute of frauds. Smith v. Burnham [Case No. 13,019]. But this is only between themselves. Third persons, dealing with them, are not affected by any private arrangements between the partners unknown to them. If they hold themselves out to the public as partners, those who deal with them have a right so to regard them, and they will be bound as partners.

It appears to me that there is abundant evidence to prove a partnership in their land speculations, as to third persons. Their very first contract was in the name of the firm, and every succeeding one, whether made in form in the name of the firm or not, was adopted by them and taken on joint account. Though the securities they gave in their earlier transactions were not given in the partnership name, yet when they gave their joint note, or one drew a bill and the other accepted it, it was as well understood to be a partnership transaction, as if the name of the firm had been used. But the business having been transacted in this way, a question arises of some difficulty, whether, on the bankruptcy or insolvency of the partners, these debts are to be placed to the partnership account, or are a charge on the separate estates of the partners. By the general rule of law, if one member of a firm makes his separate note, or draws a bill of exchange in his own name, he will be bound, and not the firm, although it is on account and for the benefit of the partnership. Story, Partn. §§ 124, 127. The general reason by which this decision is vindicated is, that the creditor, by accepting the separate security of the individual partner, is supposed to have elected to take that in preference to the security of the firm. As the decision proceeds on the ground of a supposed choice in the creditor, it does not hold in cases where it appears that no choice could have been made; and consequently where there is a dormant partner, and not known to the creditor, if the contract is for the benefit of the partnership, he will be bound, although he is not named. And for the same reason, where one of the partners has been in the habit of drawing and indorsing bills and notes in his own name, for the use and benefit of the firm, if it appears that the other partners have treated such signature as binding on the firm, the name of the partner will be held as standing for that of the firm and be binding upon them. So it was ruled in the case of South Carolina Bank v. Case, 8 Barn. & C. 427; Story, Partn. § 142. The creditor will be held as trusting not the partner alone but the firm. It is not therefore universally true, when a contract appears on its face to be the separate contract of one partner, that it will not be binding on the firm if it is understood to be, and is in fact, for their benefit The presumption that arises from the form of the security, that the separate name of the partner was taken from choice, may be overcome by proof that no such election was made. The true and more general principle seems to be, that when the intention of the contracting parties is that the firm shall be bound, and the contract is within the scope of the partnership business, the contract will bind the firm in whatever form it may be made. But when a partnership consists of two persons, and they both sign a note or bill with their individual names and not by the name of the firm, or one draws a bill and the other accepts it, if it be in fact for a joint or partnership object, there would seem to be strong reasons for putting it, in the marshaling of securities, to the partnership account. Indeed, it has been held that if two persons, who are not partners, unite in drawing a bill of exchange, they are to be considered as partners in that bill. It is said that the public are to infer their relation to each other from the face of the paper. 3 Kent, Comm. 30; Carvick v. Vickery, 2 Doug. 653, note. And a like decision has been made on a joint and several promissory note, so that a demand or notice to one is a demand or notice to both, though perhaps the weight of authority is, where the parties are not in fact partners, the other way. Story, Prom. Notes, § 239, note; Story, Bills, § 197. But where two persons, who are partners, unite in drawing a bill or

making a note, though they sign their several names and not that of the firm, if it is in fact for partnership purposes, I am not aware that it has been decided that such a note or bill is not to be treated throughout as a partnership security; that a demand or notice to one is not a demand or notice to both, or that a creditor holding such a security would not have, in the administration of assets, a preference against the joint estate, over the separate creditors of the partners. The general language of elementary writers leads to the conclusion, that such a note or bill is to be treated for all purposes as strictly a partnership security. The reason for so doing, in the marshaling of assets and securities, is certainly very strong. The fruits of the contract have gone to increase the social fund, and there is a natural equity in allowing the creditor a preference against that fund which his contract has contributed to augment.

On the dissolution of a partnership, in cases of insolvency, the rule in equity is, that the partnership creditors have a preferred claim against the partnership assets, over the separate creditors of the partners, and the separate creditors of the individual partners have a like preference over the partnership creditors, against the separate assets. The principle is, that each class of creditors is thrown on that fund to which he has given credit, and which he has contributed to enrich, and neither class can come on the other estate, until the appropriate creditors of that estate have been fully satisfied. 3 Kent, Comm. 64, 65, note. The same general rule holds in bankruptcy. In England it is indeed, in bankruptcy, qualified by some exceptions partly founded on technical reasoning, and partly on some supposed convenience, but certainly not standing on any plain and intelligible rule of equity or justice. Story, Partn. §§ 377, 381; Eden, Bankr. Law, 170, 175.

The rule of distribution, established in the general jurisprudence of courts of equity, has been incorporated in express terms into our bankrupt law. The 14th section directs that after the expenses and disbursements of the assignee are fully paid, the whole of which are a charge on the whole property, "the net proceeds of the joint estate shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to his separate creditors; and the balance, if any, of each estate, after paying the debts primarily chargeable upon it, shall be carried to the other estate." The language of the law is clear and explicit, and the only question left is, which are partnership and which separate creditors? I have already expressed my opinion that the speculations in land were, from the beginning, on partnership account, and in whatever form the securities were given, the presumption is that credit was given to the firm. That presumption, however, may be overcome by proof that credit was in fact given to the individual partners.

Case No. 17,192.

The WARREN.

[2 Ben. 498.] [1]

District Court, S. D. New York. July, 1868.

COLLISION—PLEADING—COSTS.

Where a libel for a collision failed to convey any idea of the manner in which the collision took place, but was not excepted to, and on the hearing a decree was made dismissing it: *Held*, that no costs would be given, because the libel should have been excepted to and dismissed.

[See The Albemarle, Case No. 135.]

In admiralty.

L. B. Bunnell, for libelants.

Beebe, Dean & Donohue, for claimants.

BENEDICT, District Judge. The libel in this case is filed to recover the sum of $250, being the damages alleged to have been sustained by the steamer Utah, in two collisions with the ferry-boat Warren. It is meager in its details, and fails entirely to convey any idea of the manner in which either collision took place. It sets forth none of the movements of either vessel on either occasion, makes no allusion to the causes of either accident, and fails to state the nature or amount of injury sustained on each occasion. The only fact, tending to describe either accident, which is stated, is that the Utah was on each occasion leaving her pier in the East river. This fact is contradicted by the only witness called by the libellant, who states that the first collision was in the morning, when the Utah was coming in, and the second in the afternoon, when she was leaving her pier. This witness, as to the first collision, says it was of little account, and the pilot and deck hand of the ferry-boat testify that they never knew of any such occurrence. As to the second collision, the witness is more particular, but I cannot believe he describes it with accuracy. It seems to me to be highly improbable that any such accident as this witness describes could have occurred. This single witness, called by the libellant, is positively contradicted by two witnesses from the ferry-boat, who, while they admit that the ferry-boat touched the Utah one day as she went out, deny in toto the story of the libellant's witness, and aver that the slight accident that did occur was caused by the backing of the Utah, and after the ferry-boat had fairly entered her slip, and had dropped her pin. Furthermore, while the libel is filed to recover $250 as the amount of damage sustained, it is shown that at the time the damages were stated to be only $31, and a bill for that amount was rendered. In such a state of the pleadings and proofs, no decree can be rendered in favor of the libellants. The libel must therefore be dismissed. I withhold costs, however, for the reason that a libel so

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

entirely insufficient upon its face, according to well-established decisions should have been excepted to, and thus dismissed.

Case No. 17,193.

The WARREN.

[12 N. Y. Leg. Obs. 257.]

District Court, S. D. New York. 1853.[1]

EXTRA PILOTAGE—DISABLED VESSEL.

The ship Warren had lost her rudder, bowsprit, foretop-gallant mast, maintop-gallant-mast, and had rigged temporary substitutes. A pilot took charge of her 60 miles outside Sandy Hook, bearing E. S. E., and navigated her to within 15 miles of the Hook, when a steamboat took her in tow. The ship had on board some sixty passengers. *Held*, that the pilot was entitled to $100 over and above the regular off-shore pilotage, on account of superadded responsibility, hazard and risk, resulting from the disabled condition of the vessel.

W. Q. Morton and H. Morton, for the pilot.

Peter Y. Cutler and Charles H. Hunt, for the ship.

BETTS, District Judge. The libellant is a pilot, following the business of piloting vessels to sea from the port of New York, and from sea into that port. Whilst cruising in pursuit of vessels wanting a pilot on the 21st of March, 1851, he fell in with the ship Warren, sixty miles east-southeast off Sandy Hook, bound to this port. No flag was flying for a pilot, and no application was made to the libellant to come in aid of the ship; but the libellant boarded her and offered his services as a pilot, and was accepted as such by the master. The ship had then been over one hundred days at sea on her voyage from Glasgow to New York. Soon after leaving port she had encountered violent weather, and had lost thereby her rudder, bowsprit, foretopmast, foretop-gallant-mast, maintop-gallant-mast, and head of her maintop-mast. A temporary rudder had been rigged with hawsers, planks, etc., with which she was steered by tackles and guys geered to the wheel. A spar had been substituted for the bowsprit, which was broken short off, and a jury foretop-mast and top-gallant-mast had been rigged. With these arrangements the ship could tack and wear and had been navigated over twenty-eight hundred miles. The ship, after being taken charge of by the libellant, was navigated with some delay and difficulty to within about 15 miles of Sandy Hook, when the master employed a steamboat to tow her into port. The libellant demands for his services ordinary off-shore pilotage to the amount of $52.44, and, in addition thereto, $100 as extra pilotage compensation in the nature of salvage. The master of the ship was ready and offered to pay the ordinary off-shore pilotage, admitted to be $52.44, but refused to pay extra pilotage. That amount was duly tendered and paid into court. A libel was thereupon filed and process taken out against the ship in rem and in personam against the master to recover those demands.

It is in proof that the ordinary voyage of a ship like the Warren from Glasgow to New York, in the winter season, if in a seaworthy condition, would be forty days, and fifty days would be a long voyage. It is also in proof that in her crippled state the ship would be in imminent danger in approaching land if the weather was unfavorable, and that there would be great difficulty and hazard in working her off the coast in a gale, and that additional delay, hazard and responsibility would be imposed on a pilot bringing her in, during ordinary weather, as she was found. No contract being made between the master and the libellant, these considerations afford a proper ground for claiming extra compensation for services which are not merely those of pilotage. In the case of The Dido, in this court [Case No. 3,900], the circuit court on appeal allowed extra pilotage, and awarded $162 compensation for towing her into port by the pilot boat, because her rudder was lost and there was difficulty in steering her by sails. The Dido was a smaller vessel and much nearer the port, and was brought to anchor within six or seven hours after the pilot took possession of her. The Warren is a large ship, and the libellant was occupied a day and night in working her up to where the steamboat took her in tow.

The general principle is that double pilotage is payable for conducting a vessel in a crippled state (2 Hagg. 178, note), or a remuneration equivalent to the extra service, including the distance, labor and hazard of the piloting service. The Dido [supra] U. S. Cir. Ct., Dec., 1840, S. D. N. Y. Double pilotage over mere pilot ground would not, in my opinion, be a reasonable reward for the time and risk involved in those services. But I do not find in the proofs evidence of that extraordinary degree of skill or benefit bestowed by the libellant which should give him a right to a compensation of a special magnitude, nor even equal to what would have been readily paid by owners or insurers to a steam vessel for taking the ship in tow at that point. I think, considering the defective condition of the ship, the season of the year, her proximity to the coast, and the distance she had to be navigated under circumstances of serious disadvantage, that the libellant is entitled to receive one hundred dollars in addition to the sum paid into court.

Decree for $152.44, with taxed costs.

The above case was argued on appeal before the Hon. Samuel Nelson, Circuit Judge, and the decree affirmed, Sept. 6, 1853. [Case No. 14,101.]

[1] [Affirmed in Case No. 14,101.]

WARREN (COGGSWELL v.). See Case No. 2,958.

Case No. 17,194.

WARREN v. DELAWARE, L. & W. RY. CO.

[7 N. B. R. 451;[1] 5 Chi. Leg. News, 205; 4 Leg. Op. 533.]

District Court, N. D. New York. Dec. 23, 1872.

BANKRUPTCY—BILL BY ASSIGNEE TO AVOID FRAUDULENT JUDGMENTS—COSTS.

An assignee in bankruptcy filed a bill in equity against a creditor of the bankrupt for the purpose of obtaining a decree that several judgments in favor of that creditor and against the bankrupt, and the executions issued thereon were fraudulent and void as against the said assignee. *Held*, that under the proofs in the case and the authorities cited, the assignee's right to the decree was undoubted; that the judgments in question were obtained when the bankrupt was insolvent, such creditor having reasonable cause to believe his debtor was insolvent at the time such actions were brought; that the creditor having fought this case to the bitter end to maintain his preference, the assignee must have costs.

In equity.

HALL, District Judge. This is a bill in equity, filed by the plaintiff, as assignee in bankruptcy of the Wadsworth Iron Works, for the purpose of obtaining a decree that several judgments in favor of the defendant, against the bankrupt, and the executions issued thereon are fraudulent and void as against such assignee. The petition in bankruptcy, under which the plaintiff was appointed assignee, was filed against the bankrupt on the 20th day of April, 1871. It appears by the pleadings and proofs that in February, March and April, 1871, the defendant recovered against the bankrupt, by default, five several judgments in the supreme court of the state of New York, and procured executions to be issued thereon to the sheriff of Erie county by whom such executions were levied upon the personal property of the bankrupt. Such judgments may be, briefly, further described as follows, viz.:

I. A judgment recovered February 18th, 1871, for the sum of eight thousand nine hundred and fifty-one dollars and two cents upon a promissory note of the bankrupt for eight thousand eight hundred and eighty-five dollars and sixty cents, dated October 18th, 1870, and payable in three months after the date thereof.

II. A judgment for four thousand seven hundred and fifty-seven dollars and seventy cents, recovered February 25th, 1871, on the promissory note of the bankrupt for four thousand seven hundred and sixteen dollars and ninety-two cents, dated October 25th, 1870, and payable in three months after the date thereof.

III. A judgment for four thousand seven hundred and sixty dollars and fifty-three cents, recovered March 4th, 1871, on a promissory note of the bankrupt for four thousand seven hundred and sixteen dollars and ninety-two cents, dated November 1st, 1870, and payable in three months after such date.

IV. A judgment for four thousand seven hundred and fifty-nine dollars and fifty-eight cents, recovered March 7th, 1871, on a promissory note of the bankrupt dated November 7th, 1870, and payable three months after such date.

V. A judgment recovered April 1st, 1871, for five thousand nine hundred and forty dollars and thirty-four cents, on a promissory note of the bankrupt, dated December 1, 1870, and payable in three months after date.

It further appears that no defence was interposed in any or either of the suits in which said judgments were so recovered; and upon the proof in the case it is very clear that the Wadsworth Iron Works, the bankrupt and defendant in such suits, for some time prior to January 1st, 1870, and ever after, was, in fact, insolvent and wholly unable to pay all its debts as they fell due in the ordinary course of business; and that the property of such bankrupt was never, after that time, sufficient to pay and discharge all its debts and liabilities upon a final settlement and closing of its business and estate. It also appears that a promissory note of the bankrupt, dated September 11th, 1870, for eight thousand four hundred and eighty-six dollars and ten cents, payable to the defendant three months after its date, and which had been endorsed by the defendant to the National City Bank of New York, was protested for non-payment at its maturity, December 3d, 1870; that the bankrupt was soon after prosecuted thereon by such bank at the request of the financial agents of the defendant; that a judgment was recovered thereon against the bankrupt by default, for the amount thereof, January 3d, 1871; that another note of the bankrupt, dated October 1st, 1870, and given to the defendant for the sum of eight thousand eight hundred and fifty-five dollars and ninety cents, payable three months after date, was also protested for non-payment at its maturity, and that the defendant recovered a judgment by default against the bankrupt for the amount thereof, February 1st, 1871; that the amount of the first of the two judgments last above named was collected by or paid to the sheriff, February 27th, 1861; and that the amount of the second was so paid or collected, March 27th, 1871. It also appears that Mr. Wadsworth, the president and chief manager of the bankrupt corporation, at some time in the fall of 1870, applied to the financial officers of the defendant for an extension of payment on a promissory note of the bankrupt about to fall due, and which had been given to the defendant by the bankrupt; and that in answer to such application he was told that the note had passed out of the hands of the defendant; that shortly before the maturity of the said note falling due December 3d, 1870, he applied for an extension of the payment of such note, and stated that if the payment of that note and the one to become due in January could be extended he would pay the others at maturity; that such application was declined and that thereupon Mr. Wadsworth was very angry.

The bankrupt was a manufacturer and the

[1] [Reprinted from 7 N. B. R. 451, by permission.]

seven notes referred to were severally its commercial paper. It is thus apparent that the Wadsworth Iron Works was not only insolvent when each of the notes upon which the judgments in controversy in this suit matured, but that it had committed repeated acts of bankruptcy to the knowledge of the defendant's officers and agents before the first of such judgments was recovered. That the agents and officers of the defendant had not only reasonable but very abundant cause to believe that the Wadsworth Iron Works was then insolvent is beyond doubt; and they certainly knew it was bankrupt, and liable to be proceeded against under the bankrupt act [of 1867 (14 Stat. 517)]. Under such circumstances the judgments in controversy can only be sustained, if they can be sustained at all, upon very clear and satisfactory proofs to repel the legal presumptions of actual or legal intent to give and to obtain a preference in fraud of the provisions, policy and purpose of the bankrupt act. Shawhan v. Wherrit, 7 How. [48 U. S.] 627; In re Bininger [Case No. 1,420]; Bump, Bankr. (5th Ed.) 468–470; In re Bininger [Case No. 1,420].

It was strongly insisted that there was no intention on the part of the bankrupt corporation to give a preference to the defendant, and the testimony of the treasurer and another active officer of the defendant has been taken for the purpose of showing that the omission to pay the notes above referred to, and the suffering of the judgments, executions and levies upon the property of the corporation as heretofore stated, were believed to be, and were, the result of a feeling of spite and vindictiveness on the part of Wadsworth, the principal stockholder and president of the bankrupt corporation, caused by the refusal of the defendant to grant an extension of further time for the payment of the aforesaid notes which fell due December 3d, 1870, and January 4th, 1871. The testimony of Mr. Wadsworth was not taken by either party, and the other evidence in the case is very far from satisfactorily establishing the allegation that he acted under the influence of such feeling, and intended, by refusing to cause the payment of the commercial paper of the corporation, and then suffering judgments, executions, and levies, as hereinbefore set forth, to injure rather than benefit the defendant. It must be presumed that he, as the principal stockholder, chief officer and manager of the corporation, knew, as the vice-president (who was examined) well knew, that the corporation was hopelessly insolvent and wholly unable to pay its debts in full. Knowing this and suffering these judgments to be taken and executions to be issued and levied, one after another, for many weeks, without giving notice to other creditors that they might institute proceedings in bankruptcy, he can not be allowed to say that he did not intend to give a preference to the defendant. He clearly intended to suffer and allow precisely what was done, and, as the necessary and inevitable consequence of its being done was to give such preference, he could not, if he had been examined as a witness, have effectually denied the intention which, under such circumstances, is by law conclusively presumed. In re Bininger [supra], and cases there cited; Bump, Bankr. (5th Ed.) 49, 472–477, and cases cited; Toof v. Martin [13 Wall. (80 U. S.) 40].

The suffering of the judgments, executions and levies in controversy, was, in effect, a transfer of so much of the bankrupt's property as was necessary to satisfy such executions, while the bankrupt was hopelessly insolvent, and when the defendant had reasonable cause to believe such insolvency existed, and knew that acts of bankruptcy had been committed. The leading case of Toof v. Martin [supra], decided by the supreme court of the United States at the last December term, and which is only an affirmance of doctrines frequently acted upon by judges of the circuit and district courts, is deemed entirely decisive of this case. In that case it was declared by the court that "it is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy. * * * " "It is manifest not only that the bankrupts were insolvent when they made the conveyances in controversy, but that the creditors Toof, Phillips & Co., had reasonable cause to believe that they were insolvent. The statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point, nor even that they should, in fact, have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was the fact. And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations in the ordinary course of their business. * * * It only remains to add that the creditors had also reasonable ground to believe that the conveyances were made in fraud of the provisions of the act. This, indeed, follows necessarily from the facts already stated. The act of congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any transfer made with a view to secure the property, or any part of it, to any one, and thus prevent

an equal distribution, is a transfer in fraud of the act." See, also, Smith v. Buchanan [Case No. 13,016]; Haskell v. Ingalls [Id. 6,193]; Bump, Bankr. (5th Ed.) 478, 479, and cases cited.

It was very earnestly insisted in behalf of the defendant, that the officers and agents of the defendant actually believed the bankrupt corporation to be entirely solvent, until after the proceedings in bankruptcy were commenced, and that the repeated failures of the bankrupt to pay at maturity, and the long continued suspension of the payment of the commercial paper in which the defendant was so largely interested, and the suffering of judgments, executions and levies to be had thereon, was caused by the unwillingness and not by the inability of the debtor; and that they sought to obtain such judgments without any intent to obtain a preference, and without any suspicion or cause to suppose that a fraud on the bankrupt act was intended. In support of these positions the testimony of two of the defendant's officers and agents was relied on, and one of them, although he knew at the time that an urgent application for an extension upon one or two of the first of the dishonored notes herein referred to was made a short time before the first of said notes became due, and also knew of the repeated failures to pay such notes, and of the legal proceedings thereon promptly commenced upon such refusals to pay, and had been told by the president of the defendant immediately after Mr. Wadsworth first refused to meet his indebtedness to the defendant, that "he (the witness) must get the money out of it as soon as he could," nevertheless testified that up to time of the issuing of the execution on the last judgment against the bankrupt he believed the bankrupt to be responsible and solvent; that he had no information to the contrary, and that when he obtained such judgments and caused executions to be issued, it was not done with any intent to obtain a preference over any other creditor. In charity to the witness it may be presumed that he testified in ignorance of the legal definition of insolvency, and of the natural and legal presumptions arising upon the knowledge and information in his possession, and perhaps confounded the ideas of motive and intent, and believed he was testifying truthfully. But to allow such testimony to control the rights of the general creditors, in cases like the present, would defeat the purposes and policy of the bankrupt act; and if the proper construction and administration of the act requires it, the act is, indeed, but a miserable abortion.

The language of the learned circuit judge who decided the Case of Bininger [Case No. 1,420], applies in its full force to the question of the intentions of the defendant, or the officers of the defendant, in this case. He says: "The debtor," (and of course the creditor, also) "must be taken to know the law, and to know the precise legal effect of his act. He did certainly intend the act and all the legal consequences of the act. "It is easy to confound motive with intent, and that has been done, I think, in the discussion of this case. It was done by the debtor, Clark, in his testimony. No doubt he testified truthfully, when he said, in substance, that he did not intend to procure the appointment of a receiver with the intent to defeat the operation of the bankrupt law. I have no doubt he means by this, that defeating or delaying the operation of the bankrupt act, was not the motive which induced him to procure such appointment. He did intend to do the very thing which hinders and defeats that act, and in judgment of law, he knew when he did it that it would have that effect. Knowing the effect he must have intended to produce it, when he voluntarily chose to do the act. Whatever his motive was, he acted voluntarily in choosing, and therefore, in intending all the legal results which would flow from his action in the matter."

Upon the proofs in this case, and the authorities cited, it is impossible to doubt the right of the plaintiff to a decree, and the defendant having fought this case to the bitter end to maintain the preference claimed, the plaintiff must have costs.

NOTE. It was not necessary in this case, or in the case of Toof v. Martin [supra] to decide the question whether acts done in contravention of the general purposes and policy of the bankrupt act, and which directly tend to defeat such policy and purpose, by securing a preference of one creditor over other creditors of a known insolvent debtor, can be held invalid and be set aside when the case cannot be brought within any of the express provisions of the act declaring fraudulent and void certain specified acts by which it is attempted to secure such preferences. See Shawhan v. Wherrit, 7 How. [48 U. S.] 627; Bell v. Leggett, 3 Seld. [7 N. Y.] 176, Beattie v. Gardner [Case No. 1,195], and cases cited.

Case No. 17,195.

WARREN v. EMERSON.

[1 Curt. 239.] [1]

Circuit Court, D. Maine. Sept. Term, 1852.

NEGOTIABLE INSTRUMENTS—TRANSFER IN TRUST—DEFENCES.

1. A transfer of a negotiable note and mortgage to the plaintiff, to indemnify him, he agreeing to retransfer them if indemnified, *held*, not a legal mortgage, but a conveyance in trust.

2. The maker of the note, having acquired the equitable interest of the assignor, may use it in his defence to an action at law on the note.

This was an action by the indorsee of a promissory note against the maker. At the time the note was indorsed to the plaintiff, he gave to the indorser, who was also the payee of the note, the following memorandum, in writing:

"Boston, December 22, 1848. Whereas, Nathaniel Hatch, of Porter township, state of Pennsylvania, has this day indorsed and delivered over to me the note of Albert Emer-

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

son, of Bangor, dated September 14, 1847, for the sum of twelve hundred dollars, payable in two years from the date thereof, with interest; which note is secured by mortgage of land in Bangor, Maine, named in the mortgage deed of September 10, 1847, and this day assigned to me by said Hatch; all of which is done to hold me harmless against the payment of my two acceptances this day to said Hatch's order, payable at the Bank of Commerce, in Philadelphia, for the sum of five hundred dollars each, at six months from date; and on the payment of said acceptances, on the day on which the same are payable, and the sum of fifty dollars, I agree to deliver said note, and reassign said mortgage to said Hatch. Henry Warren."

Only one of the plaintiff's acceptances was negotiated by Hatch, who failed to take it up at its maturity; and it was ultimately paid by the plaintiff. On the second day of November, 1850, Hatch gave to Emerson the following order:

"Bangor, November 2, 1850. Henry Warren, Esq. Dear Sir:—Having settled with Albert Emerson the amount due on mortgage from him to me, the same which I assigned to you, you will assign said mortgage to him, or discharge the same, as he may direct, upon his satisfying your claim on the same. Nathaniel Hatch."

The question was, whether the plaintiff could recover of the defendant any greater sum than was necessary for his indemnity, and the sum of fifty dollars, mentioned in the memorandum.

Mr. Warren, pro se.

Mr. Rowe, for defendant.

CURTIS, Circuit Justice. The memorandum, given by the plaintiff to Hatch, declares the trust upon which the note and mortgage were held by him. The legal effect of the arrangement was, that the plaintiff became the holder of the legal title to the note and mortgage, clothed with an equitable right to apply their proceeds to his own indemnification; and that, subject to this right of the plaintiff, the equitable interest and ownership remained in Hatch. In other terms, the plaintiff held the note and mortgage in trust, to apply so much of their proceeds as might be needful to indemnify himself and pay the sum of fifty dollars, and the residue to pay to Hatch.

It has been argued, that the transaction amounted to a legal mortgage of a chattel, which became absolute in sixty days after the breach of the condition, according to the local law of Maine. But to constitute a technical legal mortgage, there must be a condition in the conveyance, or in some defeasance making part of the same transaction, by the mere force of which the title is revested in the mortgagor, if the condition is performed. This memorandum does not contain such a condition; it provides for a retransfer of the title from the plaintiff to Hatch, if the acceptances shall be paid by Hatch at their maturity; and if it did set out such a condition, still it would not amount to a defeasance, so as to constitute a technical mortgage, because an interest in the realty was conveyed by deed, and the instrument of defeasance must be under seal. It is true, the note is a chattel; but it can hardly be, that the interest in the realty was intended to be held by one species of title, and the note by another. Both were transferred to the plaintiff for the same purpose, and as one transaction; both were agreed to be retransferred by him at the same time, and in the same event; and the note and mortgage together, made one security. To suppose that the parties intended to mortgage the note, and convey the interest in the realty in trust, is quite inadmissible. This renders it unnecessary to examine the cases in 2 Barb. 538, 3 Hill, 593, and 2 Comst. [2 N. Y.] 443, which, being either pledges or mortgages of stocks, are distinguishable from this case.

I am of opinion this was not a legal mortgage, but a taking of security by way of an absolute transfer of the whole legal title, leaving the equitable title to the proceeds in Hatch, subject to the plaintiff's rights, above stated. This being so, Hatch could certainly transfer his equitable title to Emerson, and by his order on the plaintiff, has done so. In Mandeville v. Welch, 5 Wheat. [18 U. S.] 286, the supreme court say: "In cases where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund; and, after notice to the drawee, it binds the fund in his hands." The question is, whether Emerson can avail himself of this equitable title in his defence. There are certain equitable titles, which courts of law, in modern times, take notice of and give effect to. Among them are assignments of choses in action, which are protected by courts of law from all adverse proceedings by the holder of the legal title; and I can perceive no reason why this equitable title, gained by Emerson through the assignment from Hatch, should not be protected. It is true that, ordinarily, it is only the assignee of the whole chose in action who is protected; and the doctrine is not extended to partial assignments. Mandeville v. Welch, 5 Wheat. [18 U. S.] 277. But here the whole chose in action, arising out of the written promise of the plaintiff to Hatch, is assigned to Emerson; and the reason of the limitation of the doctrine can have no application to this case; that reason is, that a debtor cannot, by having a demand split up by partial assignments, be made accountable to different persons without his own consent. But here the debtor does consent; he is himself the assignee. It is true, the person here seeking protection for an equitable title, is the debtor; he desires to avail himself of it in his defence, valeat quantum. But why should he not be allowed to do so, as well as a plaintiff be allowed to make a similar title the ground of a valid claim? There is one reason for allowing this de-

fence, which often determines courts of law to give effect to defences. It prevents circuity of action. If the plaintiff should recover the whole sum of Emerson, he could sustain a suit in equity, or an action for money had and received, in the name of Hatch, to recover from the plaintiff, under his written memorandum, whatever may remain after his claims are satisfied. I do not perceive that there is any thing inconsistent with established modes of proceeding at the common law, in doing complete justice between the parties in this action, by giving effect to the equitable title of the defendant. It is a new case, in its facts, but I think not in its principles. Neponset Bank v. Leland, 5 Metc. [Mass.] 259. A judgment will, therefore, be entered for the amount paid by the plaintiff, and interest and cost of protest of the bill; and to this is to be added the sum of fifty dollars, and interest from the 22d June, 1849, the time when that sum was agreed to be paid.

Case No. 17,196.

WARREN et al. v. GARBER.

[1 Hughes, 365;[1] 15 N. B. R. 409.]

Circuit Court, E. D. Virginia. April, 1877.

BANKRUPTCY — SUIT BY ASSIGNEE TO RECOVER FRAUDULENT PAYMENT—PLEADING—EVIDENCE UNDER GENERAL COUNTS.

1. Under section 13 of the Revised Statutes of the United States, in a suit brought by an assignee in bankruptcy after the passage of the act of June 22d, 1874 [18 Stat. 178], amending the bankruptcy act [of 1867 (14 Stat. 517)], to recover back money paid before March 14th, 1874, in violation of section 5128 of the Revised Statutes, it is sufficient for the declaration to lay the payment as made within four months of the bankruptcy instead of two months; and to charge that the defendant had reasonable cause for believing that the payment was made in fraud of the provisions of the bankruptcy law, and it need not charge that the defendant knew that it was so made.

2. Under the general money counts in such a declaration, evidence will not be admitted to prove any liability, on implied promises, contract, or obligation, arising exclusively under section 5128 of the Revised Statutes.

3. When a petition in bankruptcy is filed at 9 a. m., on the 14th March, 1874, *held*, that a preferential payment made on the 14th November, 1873, must be construed as made more than four months before the bankruptcy.

The first count in the declaration was as follows: "And thereupon the said plaintiffs [E. J. Warren and others] say that heretofore, to wit, on the 23d day of September, 1873, the said Mutual Building Fund and Dollar Savings Bank suspended payment, and has not since said day resumed payment; that said Mutual Building Fund and Dollar Savings Bank was adjudicated a bankrupt by the district court of the United States for the Eastern district of Virginia, on the 26th day of March, 1874, upon the petition of A. Cappell & Co., creditors of said Mutual Building Fund and Dollar Savings Bank, filed in said district court on the 14th day of March, 1874, and that by legal proceedings had thereon, the plaintiffs were by said court appointed and confirmed trustees in bankruptcy of the estate and effects of said Mutual Building Fund and Dollar Savings Bank, and the legal title to the estate and effects thereof was vested in them, that said Mutual Building Fund and Dollar Savings Bank being insolvent within four months before the filing of the petition aforesaid, with a view to give a preference to the said A. W. Garber, a creditor of the Mutual Building Fund and Dollar Savings Bank, paid to him, the said A. W. Garber, out of the funds of said Mutual Building Fund and Dollar Savings Bank, a large sum of money, to wit, $4412.90, the said A. W. Garber then having reasonable cause to believe the said Mutual Building Fund and Dollar Savings Bank to be insolvent, and that said payment was made in fraud of the provisions of the bankrupt act, thereby preventing said sum of money from coming into the hands of the plaintiffs to the damage of the plaintiffs." It will be seen that the declaration was based upon section 5128 of the Revised Statutes as it stood before the amendment of June 22d, 1874. That amendment changed the period within which a preferential payment, etc., contemplated by it should be made to two months instead of four; and made it necessary for the person receiving the benefit of the preference to know that it was in fraud of the provisions of the bankruptcy law, substituting the word "know" used in this connection for the words "having reasonable cause to believe." The second count of the declaration was similar to the first as to the use of four months in its recital, but charged that the defendant knew that the payment was in fraud of the provisions of the bankruptcy act. The third count was the same as the first, except that it mentioned in detail certain sums paid (parts of the gross sum of $4412.90) instead of mentioning the gross sum. The fourth count was like the second one, but differed from it in mentioning detailed payments instead of the gross sum of $4412.90. Then were added the usual general money counts, without any introductory recital of incidental facts bringing the assumpsit within the terms of section 5128.

There was a demurrer to the declaration, which was accompanied by the following memorandum of the grounds of law relied on: "1st. The first count of said declaration does not aver that the said sum of $4412.90, alleged therein to have been paid to said defendant, was paid to him within two months before the filing of said petition, nor does it aver that the defendant 'receiving such payment,' received it 'knowing such payment was made in fraud of the provision of the bankrupt law.' 2d. The second count of the declaration does not aver that the said sum of

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

$4412.90, alleged therein to have been paid to the defendant, was paid to him within two months before the filing of said petition. 3d. The third count does not aver that the said several sums of money, therein alleged to have been paid to the defendant, were paid to him within two months before the filing of said petition; nor does it aver that the defendant, 'receiving such payments' received them, 'knowing such payments were made in fraud of the provisions of the bankruptcy law.' 4th. The fourth count does not aver that the said several sums of money therein alleged to have been paid the defendant, were paid to him within four months before the filing of this petition [this objection was not true, as there was an averment of this fact]; nor does it aver that they were paid to him within two months before filing of said petition. 5th. The 5th, 6th, 7th, 8th, 9th, and 10th counts in said declaration are the common counts in indebitatus assumpsit—in neither of said counts is it averred that at the time the acts there mentioned were done, and the indebtedness therein claimed accrued, that the bank was insolvent, or was in contemplation of insolvency, or that it was within four or two months before the filing of said petition, or with a view to give a preferment to said defendant, nor is it averred that said defendant had reasonable cause to believe the bank insolvent, or knew that they were done in fraud of the provisions of the bankrupt law. The declaration avers that at the time these payments were made, or acts done, the said defendant was a creditor of the bank, and that they were made before the filing of the petition; if so, they are valid, and there can be no recovery back in assumpsit. It is only when the payments are made under the circumstances specified in section 5128 of the act, that the payments are void, and can be recovered back by the assignee; and to enable him to do so, he must aver all the acts and circumstances specified in that section, as it is a statutory action. They are conditions precedent to his recovery, and must be averred in the declaration and proved in the trial. For the act expressly declares that the assignee may recover the property, or the value of it, from the person receiving it."

James Neeson and Thomas G. Jackson, for plaintiffs.

John A. Meredith and John B. Young, for defendant.

HUGHES, District Judge. The demurrant's objections to the declaration are founded upon two propositions, viz.: First. That section 5128 of the Revised Statutes is a penal law, or at least a law imposing a forfeiture; and, second, that it must, as such, be treated as if it had read before the 22d of June, 1874, as it has read since it was amended on that day, as to violations of it committed before the date of the amendment, and sued upon afterwards. Neither of these propositions is true. Section 5128 is not a penal law, nor does it impose a forfeiture. It creates a disability. It imposes a liability in case its disabling provisions are violated. It establishes upon that liability a right. And it gives a remedy for that right. The policy of the bankruptcy law being to distribute the assets of the bankrupt equally among his creditors, this section was inserted in aid of that purpose. As at common law an infant or a married woman could make no valid contract, so this section provides that insolvents shall not, within a defined period of their bankruptcy, be able to dispose of their property to persons who have reasonable cause to believe that they are insolvent, and are acting in contemplation of bankruptcy. If they do dispose of their property, under the circumstances defined by the section, the law declares that the transaction is void, and authorizes their assignees in bankruptcy to recover back the property so disposed of, or its value. If money be paid out by the insolvent under the circumstances detailed by the section, then the payment is void, the creditor who receives the money receives it under a void payment, which carries no title to him, just as the payment of money by a child to an adult person is a void payment, and an implied contract at once arises by which the person receiving the money becomes debtor to the person entitled to it, the law implying a promise on his part to return it. Section 5128, therefore, has two distinct characters: First, it declares void, among other things, a preferential payment of money, and raises an implied promise or contract as of the date of the transaction on the part of the receiver of the money, to repay it. Second, it authorizes the assignee of the bankrupt who paid the money, to sue for and recover it. Only in this last respect is section 5128 remedial. Only in this last respect can an amendment of the law affect the rights which arose or were vested before the passage of the amending law. On the other hand, that part of the section which defines the circumstances under which a payment shall be void, is declaratory and not remedial, creating a disability in the insolvent to pay within a certain period, creating a liability in the person receiving the money to repay it, making void the transaction, and doing all as of the date of the transaction itself. Any payment by this bankrupt which was made within four months before the date of its bankruptcy, the 14th of March, 1874, under circumstances described by the law as it was during that period, was void, and void by virtue of the law as then in force.

It is very true on the general principles governing the construction of laws which have been amended, that where a penalty, forfeiture, or disability, is imposed, and that disability is narrowed by the amending law, the amended is held to prevail over the original law. Sedg. St. & Const. Law, 129, 130, and Cooley, Const. Lim. 381, and the numerous cases there cited. It is also true, that where a general clause of the amended law repeals all provisions of the

original law inconsistent with those of the new law, as in this case, it is, in general, construed to have the effect to substitute the new law for the old, retroactively as to penalties, forfeitures, and disabilities. But while this is the case as to mere disabilities, it is not so as to such disabilities as are coupled with liabilities, out of which rights accrue to third persons, as in the case now before us. Here the disability to make a preferential payment within four months of the bankruptcy, imposed by the law upon the insolvent, was coupled with a corresponding liability of the receiver of the money to restore it, and an implied contract to restore it to a third person entitled, in equity, and upon principles of natural justice, to receive it. Judge Dillon, in Singer v. Sloan [Case No. 12,898], seems to have overlooked the distinction between a mere disability and a disability complicated with liabilities, and with resulting equitable and statutory rights. Notwithstanding the high authority of that eminent jurist, his decision in this case has been overruled in several cases subsequently decided, and I should not feel at liberty to follow it here even on general principles. See Singer v. Sloan [Cases Nos. 12,898 and 12,899]; Tinker v. Van Dyke [Case No. 14,058]; Van Dyke v. Tinker [Id. 16,849]; Barnewell v. Jones [Id. 1,027]; In re Lee [Id. 8,179]; Oxford Iron Co. v. Slafter [Id. 10,637]. For if any doubt were left on this head, it would be removed by section 13, Revised Statutes of the United States, which applies to all laws of congress, and which provides in express terms, that "the repeal of any statute shall not have the effect to release or extinguish any . . . . liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action . . . . for the enforcement of such liability." The Revised Statutes were enacted on the 22d of June, 1874, simultaneously with amended bankruptcy act. I hold, therefore, that those counts of the declaration are good which set forth the liability created by section 5128, as it was during the period four months before the 14th of March, 1874, which was the day of the filing of the petition in bankruptcy; they are sufficient in laying the payment sued upon within four months, and in averring that the defendant had reasonable cause to believe that the money was paid him in fraud of the provisions of the bankruptcy act. They need not lay the payment within two months, nor aver that the defendant knew that the payment was made in fraud of the provisions of the bankruptcy act. The demurrer, therefore, to the four special counts in the declaration is overruled. As to the general counts, it is proper to say in advance, that while the demurrer to them is overruled, the court will not permit any evidence to be given under them at the trial, of a liability, contract, promise, or obligation arising exclusively under section 5128.

Proceedings at the Trial.

Thereupon the case went to trial, the plaintiffs having filed the following bill of particulars, setting forth the items claimed; the first two items being for money received by the defendant, on his checks drawn before the beginning of the period of four months preceding the bankruptcy; the remaining four items being for money received on checks drawn within that period:

Bill of Particulars.

1873						
Oct. 30.	To cash on your check of this date				.....	$2616 72
Nov. 14.	"	"	"	"	.....	517 01
Nov. 15.	"	"	"	"	.....	133 10
Dec. 2.	"	"	"	"	.....	1034 50
Dec. 2.	"	"	"	"	.....	21 00
Dec. 4.	"	"	"	"	.....	84 57

The petition in bankruptcy having been filed at 9 a. m. on the 14th March, 1874, plaintiffs raised a question whether the 14th November, 1873, was not part of the four months so as to include the check paid on that day. But THE COURT ruled that that day should be excluded; first, because section 5013 expressly so provided; and second, because, on general principles, the law will presume that the payment was made while the person was competent to make it in cases of doubt.

Plaintiffs also contended that the president and cashier were not authorized to pay the two first checks to one depositor while the bank was unable to pay all depositors; but failed to show that these officers were forbidden to make such payments.

On the questions thus arising, THE COURT gave the following instructions to the jury:

First Instruction. The court instructs the jury that in order for the plaintiffs to recover back any payments made to the defendant within four months before the 14th of March, 1874, the jury must believe from the evidence: 1st. That the Mutual Building Fund and Dollar Savings Bank was insolvent at the time of the payment. 2d. That the bank made the payment with a view to give a preference to the defendant. 3d. That the defendant had reasonable cause to believe that the bank was insolvent. 4th. And that the defendant also had reasonable cause to believe that the payment was made in fraud of the provisions of the bankrupt act. The jury must believe that all this was so, or else they should not find for the plaintiffs as to any such payment.

Second Instruction. The jury are further instructed that, in contemplation of the law of bankruptcy, insolvency consists in being unable to pay and not paying just and legal demands for money due and payable in the ordinary course of the debtor's business.

Third Instruction. They are also instructed that before or on the 14th day of November, 1873, the president and cashier of the bank had a right to make bona fide settlement of the indebtedness of the bank with its assets as they thought best for its interests subject to the control of the board of directors; and that upon and prior to the 14th day of March, 1873, the bank had a right to make any bona fide pay-

ment to any of its creditors, whether the same was a preference or not, and that the acts of the cashier of the bank in any such payment while he occupied and filled, in fact, that office, are to be taken as the acts of the bank, unless they were forbidden by the bank, and such prohibition was known to the party receiving payment.

Fourth Instruction. If defendant received money, or property converted into money or its equivalent, which he was not entitled to receive, either by fraud or from any one not authorized to give or deliver the same to him, which was the money or property of the said bank, though it was more than four months before the filing of the petition in bankruptcy, the plaintiffs may recover the same or the value thereof in this case and on the common counts.

The jury found a verdict for the plaintiffs in the sum of $1276.17, the amount of the payments made within four months.

WARREN (GOODENOUGH v.). See Case No. 5,534.

WARREN (HALL v.). See Case No. 5,952.

Case No. 17,197.

WARREN v. IVES et al.

[1 Flip. 356; [1] 1 Am. Law T. Rep. (N. S.) 363; 1 Cent. Law J. 312.]

Circuit Court, W. D. Michigan. March 21, 1874.

REMOVAL OF CAUSES — INJUNCTION PENDING MOTION TO REMAND.

If a cause has been removed from a state to the federal court and an objection be raised to the jurisdiction of the latter court in the given case, the federal court will protect the rights of all parties during the interval and prior to the decision of that question; and if land be the subject of the controversy will, if necessary, award an injunction restraining waste.

In equity.

Norris, Blair & Kingsley, for complainant.
Eggleston & Kleinhaus, for defendants.

WITHEY, District Judge. In 1872 Stewart Ives commenced suit by bill in equity in the state court of Mecosta county, against George B. Warren and others, claiming to be the owner of a tract of some four thousand acres of land, by title derived from Chauncy P. Ives, and alleging that said Chauncy P. Ives, prior to the conveyance to Stewart Ives, had by deed, absolute on its face, of date July 15, 1859, conveyed same land to George B. Warren and Frederick B. Leonard, to secure indebtedness from the grantor to the grantees. The bill claims such prior conveyance to be but a mortgage, prays for an accounting, offers to pay any balance found due to Warren and Leonard, and asks that the deed to them be decreed to be cancelled.

Warren and the other defendants, being citizens of New York, petitioned to have the cause removed to this court, which was opposed, but the state court held the petition to be sufficient and ordered the removal. In May, 1873, the papers were presented and allowed to be filed in this court. This was followed by a motion of Ives to remand for non-compliance with the act of congress providing for the removal of causes from the state to the national courts. After hearing that motion, my impression was that the cause ought to be remanded, but the question raised was new and the case an important one. I therefore reserved the motion for hearing before the circuit judge, and ordered it placed on the reserved list. Owing to Judge Emmons' continued absence the motion has not been heard.

On the 25th of February last, the cause and parties being thus situated, Mr. Warren, by leave, filed his cross-bill in this court against Stewart Ives and others, in which he sets up his title in fee to the land in question; claims the conveyance of July 15, 1859, from Chauncy P. Ives to Warren and Leonard, was not only absolute in form, but made, executed and delivered as such, and not for the purpose of securing indebtedness. Statements are made in the bill for the purpose of showing the absolute character of the deed, and of the intention of the parties to it. The lands are shown to be principally valuable for their standing pine timber, and defendants, or some of them, have, during the winter 1873–4, cut and removed a large quantity of the timber, and were when the bill was filed, still at work cutting and removing the timber. Complainant prays that his title be confirmed, and that defendants be restrained from committing waste, and from sawing, selling or using the saw-logs already removed, etc. A provisional injunction was issued, and an order granted on defendants to show cause. They have answered, and filed affidavits against the injunction. The showing is conclusive on the question of waste, and if the court has power to protect the lands from depredation, pending a settlement of the question of title, it should be exercised.

Jurisdictional questions are urged by defendants' counsel, and these I proceed first to dispose of. It is claimed that the bill filed by Warren is a cross-bill, and as such cannot be sustained, for the reason that there has been no removal of the cause of Ives against Warren and others from the state court. Again, that as an original suit, this court has no jurisdiction of complainant's bill, inasmuch as it covers the same subject matter and is between the same parties in interest as the suit brought by Ives in the state court.

When the bill of complaint of Warren was presented to me for leave to file, and for an order for a provisional injunction against waste, I understood it to be framed with a double aspect, asking that the bill stand as a cross-bill if the motion to remand was denied, or as an original bill in case that motion should prevail. By reference to page 26 of the printed

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

bill it will be seen that such must have been the original intention of the pleader, but its language very singularly asks that the bill may stand as a cross-bill in either event. Thus framed, the clause wants appropriateness and proper expression. After what complainant's counsel has said at the argument, that the bill was designed to be in the alternative, I shall so regard the case, and permit an amendment at once and without terms.

Touching the status of the suit brought by Mr. Ives in the state court, and sought to be removed to this by Warren and others, it is urged that inasmuch as I intimated the petition to be defective, on the argument of the motion to remand, any exercise of jurisdiction now by the court over that case would be inconsistent with such expressed views, and prima facie unauthorized. This objection assumes the bill filed by Warren to be a cross-bill and nothing more, whereas, it was, as already explained, presented and allowed to be filed either as a cross-bill or as an original bill, depending upon the disposition which should ultimately be made by Judge Emmons of the motion to remand. As I shall show when the second objection is discussed, jurisdiction attaches to Mr. Warren's bill as an original bill if the suit by Ives is dismissed to the state court. But I entertain the view that, as a cross-bill, the court would be justified in asserting jurisdiction. The question is new, for I find no authorities to govern me; but prima facie, the suit of Mr. Ives has been removed from the Mecosta circuit court and is pending here. That court ordered the cause removed, and it was so far consummated that the papers were taken from that into this court, and are here filed and the case docketed. The state tribunal, by an order of removal granted after a hearing, judicially declared itself without further jurisdiction, and would not now probably assert further jurisdiction. The case is one clearly within the act of congress providing for the removal, and defendants in that suit have attempted, and, as they claim, successfully, to comply with the statute. This court has so far entertained the cause as to hear a motion to remand, after allowing the papers to be filed, and without deciding the motion, has allowed a provisional injunction to protect rights for the time being. The simple fact that the jurisdiction of this court is challenged does not raise a prima facie case against it, nor do I quite appreciate why a previous intimation against retaining the cause, but which intimation is not a decision, should have the effect claimed of preventing the court from giving such incidental protection as the rights of the parties require, while the jurisdictional question is pending and undetermined. For the present the controversy is pending here prima facie, and while courts are careful not to exercise a doubtful jurisdiction, they will not, while parties are before them under a claim of right, refuse to protect the interests of the parties in an emergency like the present one, from the fact that jurisdiction is questioned or even doubtful.

But as I have already said, the bill by complainant Warren is not to be regarded merely as a cross-bill for the purposes of this motion. Whether it will stand here as a cross or as an original bill depends upon the future disposition of the motion to remand. It is claimed, however, that by the well-recognized rule of comity, this court will not entertain a suit where it appears the same parties in interest are litigating the same subject matter in a state court. The proposition is fully conceded, and if we are to regard this bill as an original and not as a cross-bill, then the rule of comity insisted upon fails to defeat jurisdiction, for the reason that it appears that the question of an injunction to restrain waste is not involved in the suit by Ives against Warren and Leonard, and although the title to the land is in controversy in that suit, this court may properly entertain a suit between the same parties having for its object the prevention of waste pending the litigation in the state tribunal. Citizenship of the parties and the amount in controversy, as well as the subject-matter, injunction, gives to complainant the right to invoke the jurisdiction and power of this court to protect his rights in the land, and so far as those rights are not involved in the other suit, this court has no right to refuse what the act of congress imposes as a duty.

It is true this bill is framed to meet an emergency, and, therefore, is more than an injunction-bill, inasmuch as it asks other relief than an injunction. The undetermined question on the motion to remand the Ives suit induced and justified framing the bill in this present aspect.

Should the Ives suit be remanded, it would be competent for complainant to so amend the prayer of his bill as to render it simply an injunction-bill, and under the circumstances attending the case, the court would so administer the rules of practice as to accomplish the end and purpose of jurisdiction instead of defeating them. It is one of the distinguishing features of equity that it adapts itself to the circumstances and rights of parties, when once its jurisdiction attaches, so that if it cannot give the precise remedy asked, it will grant such as the very right of the matter demands under the general prayer for other relief. Upon the whole I am not in doubt as to jurisdiction.

Authorities were cited and discussion had touching the absolute or conditional character of the deed of July 15, 1859, by Chauncy P. Ives to Warren and Leonard; it is enough to dispose of that question for the present, that the showing here leaves that consequence in doubt. "Who owns the land?" is the principal and vital question at issue, and when the evidence shall be before the court, it can be more intelligently determined. Thus far the showing on both sides is necessarily incomplete, and, as it is ex parte, is unsatisfactory for the purpose of passing on the absolute or conditional character of such deed. This belongs to the final hearing, and should await that stage of the cause. Meanwhile neither party ought to be suffered to remove the timber, which is the

chief value of the land. So far I feel constrained to go under the showing. But Mr. Ives having been suffered to remove timber during the winter of 1873–4, and having a steam-mill to be stocked from the logs got in part from the lands in question, to enjoin him from sawing and disposing of this lumber, would work great, if not irreparable injury to him. I am not disposed to do that which will break up his business, under all the facts and circumstances of the case. Mr Warren is not without remedy at law for the value of the timber cut, or by replevin for the logs, if he is the owner. If the deed is but a mortgage, then the land and remaining timber, worth not less than one hundred and twenty thousand dollars, are ample security for his debt.

The injunction will be modified to prevent cutting the timber, and continued. Injunction awarded.

WARREN (MARSH v.). See Case No. 9,121.

WARREN (MAURAN v.). See Case No. 9,310.

Case No. 17,198.

WARREN et al. v. PEASLEE.

[2 Curt. 231.] [1]

Circuit Court, D. Massachusetts. May Term, 1855.

CUSTOMS DUTIES — DUTIABLE CHARGES — COMMISSIONS—PROTEST.

1. Expenses of land transportation to get merchandise on shipboard are dutiable charges.

2. Whether the commission, which is to be added as a dutiable charge, is to be cast on the foot of the invoice, with or without the addition of the charges, depends on usage, and is not fixed by law.

3. A notice, at the close of a protest, that it is to apply to all future similar importations, does not dispense with the necessity of a protest, in reference to those importations.

[Cited in Baxter v. Maxwell, Case No. 1,126; Hutton v. Schell, Id. 6,961; Ullman v. Murphy, Id. 14,325; Curtis v. Fielder, 2 Black (67 U. S.) 481; Davies v. Arthur, Case No. 3,611; Chung Yune v. Kelly, 14 Fed. 641; Davies v. Miller, 130 U. S. 285, 9 Sup. Ct. 561; Schell v. Fauché, 138 U. S. 566, 11 Sup. Ct. 380; Herrman v. Robertson, 152 Sup. Ct. 521, 14 Sup. Ct. 687; Saltonstall v. Birtwell, 66 Fed. 974.]

[This was an action by George W. Warren and others against Charles H. Peaslee, collector of the port of Boston, to recover back duties paid under protest.]

CURTIS, Circuit Justice. This case is decided by the opinion of the court in Gant v. Peaslee [Case No. 5,212], so far as respects freight being a dutiable charge. Two other questions have been made. The first is, whether charges of inland transportation between Paris, where the merchandise was purchased, and Havre, where it was put on shipboard, are dutiable charges. I am of opinion that they are. Under the comprehensive words, "all costs and charges," I consider all charges incurred to get the property on shipboard, are included. If the merchandise be purchased in the port at which it is shipped, the cost of drayage would usually be the only actual charge for transporting it by land. If it be purchased in another place, and brought thence to the port of shipment, there is an increased actual charge for land or internal transportation; and this is as fairly included as drayage. It can make no difference whether the internal transportation, necessary to get the property from the place of purchase, on board ship, is greater or less, in length or cost.

The other question is, whether the rate of commissions which the law requires to be included, is to be cast on the invoice value alone, or upon that and the charges. It is argued that commissions constitute one of the charges, and are so deemed by the law, which says, adding all costs and charges, "including, in all cases, a commission, at the usual rate." It must be admitted, that a commission is a charge; and it would seem, from the language of the act, that it is one of those charges, which are to be added to the invoice cost. But this does not decide, on what the commission is to be cast. It does not seem to me that the act has prescribed, or intended to prescribe any one fixed rule on that subject. The act does not define what it means by a commission. It uses a well-known mercantile term, and undoubtedly employs it in the sense in which merchants, generally, employ it. It is a percentage cast on some amount, ascertained in the course of a particular transaction; and usage determines, not only the rate of this percentage, but also on what it is to be computed. What authority is there, for saying it is to be computed upon the foot of the invoice, where a purchase is made by an agent, and not upon any other sum? Manifestly none other than usage, for the law is silent. In my opinion, therefore, the question, what is the commission referred to by the act, can only be answered by ascertaining, on what it had usually been cast, in such cases, when the act in question was passed. If on the foot of the invoice alone, then it should be so cast to ascertain its amount as a dutiable charge; if on that and moneys paid for charges, then the sum of both the cost and charges is the proper basis of a commission. If the usage was both ways, then I do not perceive why the secretary of the treasury, might not properly adopt either usage as affording a rule. As no evidence has been offered by the plaintiffs to show that the collector acted contrary to the usage existing among merchants, in such cases, when the act of 1851 (9 Stat. 629) was passed, for this item of claim, they cannot recover.

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

After this opinion was pronounced, the parties agreed on the following statement of facts, for the purpose of determining the amount the plaintiffs were entitled to recover:—

"It is agreed that the whole amount of duty exacted by defendant and paid by the plaintiffs on freight from Havre to Liverpool, up to the date of the plaintiffs' writ, is $119. It is also agreed that to the first twelve or fifteen entries made by the plaintiffs, there was attached at time of payment a protest in the form of the copy hereto annexed marked 'A,' and that the duty assessed on the freight charged on these entries having such a protest attached amounted to $109, and that the subsequent entries, on which the balance of the $119 was assessed and paid, had no such protest attached to them. It is submitted to the court, whether in point of law the plaintiffs can recover back such excess of duty paid on such subsequent entries after the protest made on the preceding entries, it being admitted that no such protest was attached to such subsequent entries. It is also admitted that the amount of duties so levied and paid on each of said subsequent entries, is small, not exceeding, in some instances, to from one to three dollars.

"Almon W. Griswold, Attorney to Plaintiffs.

"B. F. Hallett, Defendant's Attorney.

"A true copy. Attest, H. W. Fuller, Clerk U. S. C. C."

"A.

"Protest.

"Boston, ——, 185–.

"To the Collector:—Sir,—We protest against the payment of duty charged on the additions made to the annexed entry for freight or charges from Havre to Liverpool, on packages marked as per annexed entry, believing that under existing laws said merchandise is liable only to a duty ad valorem upon the fair market value at the time of shipment from Havre—said port being the 'port of exportation to the United States;' that said goods were shipped from Havre to Boston, via Liverpool, because of the greater facilities for rapid transportation by that route; that we contracted for the freight of said goods from Havre to Boston at a fixed rate, payable on delivery at Boston, and no additional compensation was allowed, nor abatement in price made, by reason of any departure from the direct route from Havre to Boston. We also protest against the payment of duty, on the additions made to the annexed entry for inland freight or charges, because said goods are invoiced free on board, and the price named in the invoice includes all charges and expenses to the port of exportation, and we pay no separate expense or charges on said goods. We also protest against being compelled to pay duty on 2½ per centum commission on the 'charges' or expenses on the merchandise embraced in the annexed entry, believing said commission is chargeable only on the cost or market value of said merchandise without the 'charges;' and we pay the amount exacted on this entry, in order to get possession of the goods. (You are hereby notified that we desire and intend this protest to apply to all future similar importations made by us.)

"(A. W. G.) Signed, Geo. W. Warren & Co."

The question was argued by—

Mr. Griswold, for plaintiffs.

Mr. Hallett, Dist. Atty., contra.

CURTIS, Circuit Justice. I understand that the act of February 26, 1845 (5 Stat. 727), which requires a protest, had two main objects in view; one being to apprise the collector of the objections entertained by the importer, before it should be too late to remove them, if capable of being removed; the other, to hold the importer to those objections which he then contemplated, and on which he really acted, and prevent him, or others in his behalf, from seeking out defects in the proceedings, after the business should be closed, by the payment of the money into the treasury.

It is apparent, that each of these objects will be attained very imperfectly, if at all, by allowing one general protest to be made and to apply through all coming time, to all similar importations made by the importer. I think such a mode of protesting is far too vague to meet the requirement of this act. It would not be in conformity with any known course of proceeding in similar cases. The grounds of objection to the particular payment sought to be recovered back, must be not only distinctly, but specifically set forth. And it must be applied to that particular payment. Here is a protest which the importer says is to apply to all future similar importations. What is to constitute their similarity, so as to bring them within it? The collector, even if he were bound to keep in view, through an indefinite period of time, the fact that such a protest had been made, would have no certain means of knowing, whether any particular importation was or was not intended by the importer to come within the protest; and the importer himself might change his own views on the subject at pleasure; and though, when he made the payment, he did not consider the importation similar, and so had no intention to protest, he might afterwards insist it was similar, and so within the protest.

The plaintiffs rely on the decision of the supreme court, in the case of Marriott v. Bruce, 9 How. [50 U. S.] 619. The circumstances of that case were very peculiar, and they are relied on by the court as the reasons for the decision, at which they manifestly felt great difficulty and hesitation in arriving. When such a case as that presents itself, I shall, of course, follow it. This is not such a case; and I have no doubt the general notice at the end of the protest is ineffectual.

Case No. 17,198a.

WARREN et al. v. ROBERTSON.

[MS.]

Circuit Court, D. Connecticut. Sept., 1876.

NEW TRIAL—EXCESSIVE DAMAGES.

[On a motion for a new trial in an action of tort, on the ground of excessive damages, the plaintiff may be required to remit the excess, instead of being required to submit to a new trial.]

[This was an action by Warren & Howard against C. M. Robertson for damages. Verdict for plaintiffs. Defendant moves for a new trial.]

SHIPMAN, District Judge. This case was tried to the jury at the present term of this court, who returned a verdict for the plaintiffs to recover $4,000 damages. The defendant has filed within the proper time a motion for a new trial. The two grounds upon which he relies are that the verdict is unsupported by, and contrary to, the evidence, and that the damages were grossly excessive. The action was to recover damages which had accrued to the plaintiffs in consequence of a reliance upon material misrepresentations of the defendant in regard to the pecuniary position and responsibility of the Rockland Paper Company, a corporation of which he was president. Three questions of fact were submitted to the jury: (1) Were the alleged misrepresentations made to the plaintiffs. (2) Did the plaintiffs alter their position, relying upon the truth of said representations, and in consequence thereof? (3) Were the plaintiffs damnified thereby, and what was the extent of said damages?

Upon the first two questions the verdict of the jury was in accordance with the opinion of the court. Upon the third question the verdict was not in accordance with my opinion, which was that substantial damages had not been proved. The question of damages is one peculiarly within the province of a jury, and the verdict ought not to be set aside unless it is, in the opinion of the court, grossly excessive, and indicates that the jury must have been influenced by unworthy motives, or by such misconception of the evidence as to cause the result to be an act of clear and manifest injustice to the defeated party. The damages, if any, which resulted to the plaintiffs, were those arising from their renewal of the notes of the corporation of which the defendant was president, to become due after November 20, 1875, and the evidence satisfied me that as to the notes maturing after January 10, 1876, the plaintiffs had not suffered from the misrepresentations; but the question of fact was left to the jury to find, whether the previous conduct of the defendant had placed the plaintiffs in such a condition that, as to those notes, they were damnified. They have evidently found that there was damage, but they have, in my opinion, greatly exceeded any just or reasonable amount. I am clearly of opinion that to allow a verdict of $4,000 to remain would be an act of injustice, from which a court ought not to discharge itself by passing the responsibility over upon the jury. But as there may have been some evidence that the plaintiffs were injured as to the transactions occurring prior to January 10, 1876, and as the question of fact was left to them as to any damage after that time, it seems to me that I ought not to set the verdict aside absolutely, but to give the plaintiffs the option of a new trial, or of a remitter. In actions of tort, upon a motion for a new trial upon the ground of excessive damages courts have the right to require the plaintiff to remit the excess, instead of being required to submit to a new trial. Russell v. Place [Case No. 12,161]; Stafford v. Pawtucket Hair-Cloth Co. [Id. 13,275]. The sum of $1,475 includes all the damages which the plaintiffs could have suffered by the transactions between November 20, 1875, and January 10, 1876, and also the sum of $400, and interest upon the whole sum. Let there be a new trial, and verdict set aside, unless the plaintiffs shall consent to remit $2,525 of the verdict; such remittitur to be filed with the clerk on or before December 15, 1876. In the event of the remittitur, judgment to be entered for $1,475, as of the date of the verdict.

Case No. 17,199.

WARREN v. ST. PAUL et al.

[5 Dill. 498; 4 Law & Eq. Rep. 556; 1 N. W. Rep. (O. S.) 100.] [1]

Circuit Court, D. Minnesota. 1877.

MUNICIPAL CORPORATIONS — POWER TO SETTLE DISPUTED CLAIMS—REMEDY OF TAXPAYER.

1. Municipal corporations with power to make contracts, and to sue and be sued in respect thereto, may, in the absence of special legislative restriction, compromise a disputed claim, and the settlement is binding on the municipality and its taxpayers, unless it can be impeached for fraud.

2. The city of St. Paul possesses this power, and it is not restricted by the creation of the board of public works.

3. A taxpayer cannot overhaul or question the settlement, fairly made by a municipal corporation, of a disputed claim arising under a contract not ultra vires.

This action is brought [by George B. Warren] to forever restrain the city of St. Paul from allowing, recognizing, or paying eight thousand four hundred and ninety-five dollars and fifty-one cents ($8,495.51), or any part thereof, claimed by the defendants, McCarthy, Butler, and Eaton, on account of the grading of lower Third street in said city. The city of St. Paul undertook, in May, 1873, to grade this part of one of its public thoroughfares, and to that end its board of public works, having authority in the premises, duly advertised for proposals for doing the work,

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 4 Law & Eq. Rep. 556, contains only a partial report.]

fixing a time and place for receiving bids. Prior to such advertisement, the city engineer was directed to make an estimate of the amount of earth required to bring the street up to the proposed grade. The ground to be filled was bog or marsh, and the earth deposited thereon would sink, more or less, from its own weight, but the estimate made did not include any sinkage, and was limited to measurements from the surface of the street to the grade line. The approximate quantity required to make the filling complete to the grade line was computed to be fifty-four thousand eight hundred cubic yards. This estimate was posted up in the engineer's office, and contractors seeking information were referred to it by him and his subordinates. The defendants, McCarthy, Butler, and Eaton, under the name of J. C. McCarthy & Co., offered to do the work for the sum of $18,975, and their bid was accepted, and a contract duly entered into between the city and themselves. The contractors, by the 23d of June, 1874, had deposited more than the number of cubic yards of earth specified in the approximate estimate, and fully one-half of this amount had disappeared below the original surface of the street, and, on a measurement made the last of May, 1874, it was found that the amount of earth in sight was less than on the first of the month, although five thousand yards had been put on the street during the month, and between April 6th and June 12th about eighteen thousand yards had disappeared in the same way. The city authorities insisting on a strict performance of the contract, and more than ninety thousand cubic yards of earth being required to bring the street to grade, the contractors, in view of the facts, stopped work June 23d, 1874, and demanded payment for the value of the work done, for which they threatened to sue the city, claiming that they had been deceived by the city authorities as to the quantity of work to be done, and by the representations of the city engineer under the directions of the board of public works. The contractors had been paid upon the contract $9,630.04, and the balance claimed by them to be justly due for work performed was nearly $9,000. After several efforts were made for an adjustment of the claim against the city, a special committee was appointed by the common council and an investigation had, and a report was made, with the concurrence of the city attorney, recommending a settlement. The common council of the city adopted the report of its committee, which allowed the sum of $8,495.51 as a compromise, payable out of the local improvement fund, and was proceeding to make the payment when the complainant, the owner of certain city lots fronting the street to be graded, brought this suit in the district court of Ramsey county, in this state, and a temporary injunction was obtained. The suit was removed to this court under the act of congress of March 3, 1875 [18 Stat. 470]. The city of St. Paul suffers a default.

I. V. D. Heard, for complainant.

Morris Lamprey and George L. Otis, for defendants, McCarthy, Butler, and Eaton.

NELSON, District Judge. The corporation of the city of St. Paul is, under its charter (chapter 1, § 1, 1874), invested with all the general powers possessed by municipal corporations at common law, including the power to contract for the grading of streets, and can sue and be sued upon such contracts. It may, therefore, lawfully take any steps which an individual could, to arrange all differences growing out of such contracts by an amicable settlement and adjustment. It could relieve from performance, refer to arbitration, or compromise by agreement, and the question of expediency in so doing is left entirely to its judgment. Unless collusion between the officers of the corporation and contractors is shown, or fraud exists, nothing less than a legislative restriction can prevent the exercise of this power by the proper authorities. See Dill. Mun. Corp. § 398, and numerous authorities cited. Endowed with liberal and plenary authority, the corporation must necessarily, for the general welfare of its inhabitants, and incident to the powers expressed in the charter, possess an inherent right to adjust all disputed claims, and a decision bona fide made by the proper corporate officers is final and conclusive. I do not understand this proposition to be disputed, but it is said that the creation of a board of public works in the charter, and the law compelling the owners of the property benefited to pay for local improvements, have limited and restricted the right ordinarily conferred upon the common council of a municipal corporation, with reference to compromising and adjusting claims growing out of public improvements. I find nothing in the city charter intrusting this power to any other than the governing body. The common council are specially intrusted with the care, supervision, and control of all public thoroughfares and public improvements within the city limits. Charter 1874, c. 4, § 7. An executive department, entitled "the board of public works," was organized and constituted by chapter 6, but nothing therein limits this general supervision and care conferred upon the council.

The execution of contemplated local improvements ordered by the common council, and assessments for the expenses thereof, are intrusted to this department, but the power to initiate all improvements relating to the grading of streets, etc., emanates from the former, and, by a unanimous vote of the members thereof, can be ordered irrespective of the approval or disapproval of the board of public works. Charter 1874, c. 7, § 5.

In view of these provisions of the charter, and applying thereto the ordinary principles of construction, the common council, acting in behalf of the corporation, are authorized to exercise the power of compromising or submitting to arbitration disputed claims against the

city, to be paid out of such funds as are provided by law to meet any and all liabilities incurred, and additional legislation is unnecessary.

The charter, as amended in 1876, merely defined the manner in which the common council might submit any matter to arbitration, and restricted the exercise of the power already existing to a two-thirds vote. The repeal of this section left it, as before, to a majority.

A taxpayer may, perhaps, by injunction, restrain the corporate authorities from a misappropriation of money raised by taxation; but when the proposed appropriation is to settle a disputed claim arising under a contract not ultra vires and within the scope of their powers, a court will not interfere. It is urged that the common council acted upon a mistaken idea as to the law governing the rights of the corporation in the premises. Admit it, and the case is not altered. The compromise is a matter of discretion and judgment, exercised in a manner deemed for the best interests of the city. If unwisely adopted, it is an error of opinion as to the expediency of an adjustment, and does not originate in any bad motive. The report of a committee of investigation in favor of this settlement, and the concurrence therein of the city attorney, after a full examination of the facts, were first obtained before any compromise was favored by the council.

I lay out of view entirely the position assumed by counsel, that the city was not liable in any event, and the contractors could not enforce, by suit, their claim. This question does not enter into a decision of the case, and to my mind the fact that the city might successfully interpose a defence if suit was commenced by the contractors is immaterial when bad faith is not alleged.

The action of the common council recognized the existence of a contract between the city corporation and the defendants named, and presupposes a liability to pay something.

It is urged that the complainant can have no relief if denied in this suit. The stringency of the local assessment or improvement provisions of the charter affects both resident and nonresident property-holders alike. When enacted, the statute was regarded as beneficial and necessary to an equitable and proper exercise of the general powers of the corporation. If experience has demonstrated it to be harsh and cumbersome, and illy adapted to subserve the interests of the city, an appeal should be made to the legislature to modify it or substitute some other more simple and less expensive mode of making improvements. While such provisions are embodied in the charter, and the corporation is in good faith proceeding to enforce them, the fact, if true, as stated, that no relief can be had by a taxpayer interested, except in the manner pointed out in the law, can afford no justification for judicial interference.

Bill dismissed.

WARREN (STODDART v.). See Case No. 13,471.

Case No. 17,200.

WARREN et al. v. TENTH NAT. BANK OF CITY OF NEW YORK et al.

[5 Ben. 395;[1] 5 N. B. R. 479; 42 How. Prac. 169.]

District Court, S. D. New York. Nov. 21, 1871.[2]

BANKRUPTCY — INVALID PREFERENCE — SUFFERING PROPERTY TO BE TAKEN ON EXECUTION — KNOWLEDGE OF INSOLVENCY.

1. The firm of E. P. S. & Co., on August 23d and 24th, 1870, gave checks to W. H. M. S., which he passed to a bank, and which were not paid on presentation at the bank on which they were drawn. In September, 1870, E. P. S. & Co. failed. On November 3d, the bank, as holder of the checks, commenced suit against E. P. S. & Co., in which suit judgment for want of an answer was entered on January 12th, 1871, and, execution being issued, the sheriff levied on the goods of E. P. S. & Co., on that day. Proceedings in bankruptcy being commenced against E. P. S. & Co., the court ordered the sheriff to sell under the executions, and hold the property subject to the order of the court. The assignees in bankruptcy, when appointed, filed this bill against the sheriff and the plaintiff in the execution, to recover the amount of the proceeds of sale. It appeared that, when the suit was brought, the president of the bank understood that E. P. S. & Co. had, some time before, compromised with their creditors at forty-five cents on the dollar, and that the prospect of their business was good. No other officer of the bank had anything to do with the transaction. At the time of the levy by the sheriff an attachment in favor of other parties had already been laid on part of the property levied on, but this was not known to the bank. *Held*, that the bank was put on inquiry by the non-payment of the checks, but that it did not appear that the bank had any reasonable cause to believe that the debtors intended, by suffering the execution to be levied, to give the bank a preference over any creditor who had a subsisting enforceable debt at the time;

2. What transpired after the levies were made could not affect the rights of the parties, and the bill must be dismissed.

[This was a suit in equity by Richard Warren and others, assignees of Edward P. Sanger and Walter Scott, bankrupts, against the Tenth National Bank of the City of New York and Matthew T. Brennan, sheriff. For a petition to review an interlocutory order refusing a trial by jury, see Case No. 17,201.]

A. Blumenstiel, for plaintiffs.

H. E. Tremain, for the bank.

J. Sterling Smith, for the sheriff.

BLATCHFORD, District Judge. On a petition in involuntary bankruptcy, filed February 24th, 1871, in this court, Edmund P. Sanger and Walter Scott were, on the 11th of March, 1871, adjudged bankrupts. The plaintiffs were, on the 11th of April, 1871, appointed assignees, and an assignment in the usual form

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

[2] [Reversed in Case No. 17,202. Decree of circuit court reversed in 96 U. S. 539.]

was executed to them on the 14th of April, 1871.

The bill alleges, that, on the 12th of January, 1871, and within four months before the filing of the petition, the bankrupts, being insolvent, with a view to give a preference to the Tenth National Bank of the City of New York, which then had a claim against them, procured or suffered their property to be seized on two executions, amounting respectively to $4,803.47 and $5,051.01, issued out of the supreme court of the state of New York to the sheriff of the city and county of New York; that, under such executions, the said sheriff did, on the 12th of January, 1871, levy upon and seize the property of the said bankrupts; that such executions were obtained upon actions brought in the said supreme court by the said bank, to which the bankrupts interposed no defence, and in which they suffered and permitted judgments for said sums respectively to be entered against them on the 12th of January, 1871; that the sheriff, under the instructions of the bank, remained in possession of the property until after the filing of the petition; that, on the 11th of March, 1871, an order was made by this court that the property be sold under the direction of the sheriff, and that he hold the net proceeds of the sale subject to the further order of this court; that thereupon the property was sold at auction, and the net proceeds, amounting to $8,910.57, were received by the sheriff, who now holds the same under said order; that the bank refuses to release its alleged claims on the moneys, and its alleged liens under the executions; that, at the time of the entering of the said judgments, and of the issuing of the said executions, and of the said seizures thereunder, and of the said sales, the defendants had reasonable cause to believe the bankrupts to be insolvent, and that the executions and the seizures thereunder were issued and made and procured, or suffered to be issued and made, in fraud of the provisions of the bankruptcy act, and with a view to give the bank a preference, and to prevent the property of the bankrupts from coming to their assignees in bankruptcy, and to prevent the same from being distributed under the said act, and to defeat the object of, and impair, hinder, impede and delay the operation of, said act; and that the defendants withhold and detain the proceeds of the said property from the plaintiffs with the intent and object aforesaid, and in fraud of the said act. The bill prays that the said seizures and executions may be declared fraudulent and void; that the plaintiffs may be declared to be entitled to the possession of the property so seized or the value thereof, as assets of the bankrupts; and that the plaintiffs may recover the same from the defendants. The bill was filed on the 19th of April, 1871.

The question of fact principally contested in the proofs is, as to whether the bank, at the time the property of the bankrupts was taken on the executions, had reasonable cause to believe that the bankrupts were insolvent, and that the conveyance and transfer of the property of the bankrupts, made by such taking, was made in fraud of the provisions of the act, by being made with a view, on the part of the bankrupts, to give the bank a preference, or to prevent their property from coming to their assignee in bankruptcy, or to prevent the same from being distributed under the act, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of, the act.

On the 23d of August, 1870, the bankrupts, under their firm name of E. P. Sanger & Co. made and delivered to one William H. M. Sanger their check, dated that day, drawn on the Central National Bank of the City of New York, payable to the order of said William H. M. Sanger, for $4,891.64. On the 24th of August, 1870, they made and delivered to said William H. M. Sanger a like check, for $4,651.37. These checks were indorsed and passed by William H. M. Sanger to the defendants, the Tenth National Bank. On presentment at the Central National Bank, payment of them was refused. A suit was brought on each of the checks against the makers and the indorser. The summons and complaint in each of the suits were served on Edmund P. Sanger, on the 3d of November, 1870, and on Walter Scott, on the 29th of November, 1870. A judgment was entered against them, in each suit, for want of appearance and of answer or demurrer, and against William H. M. Sanger, on the 12th of January, 1871, the judgments being severally for the sums of $5,051.01 and $4,803.47. On these judgments the executions referred to were on the same day issued, and the levies made.

When the deputy sheriff made the levies, he made a demand for the money. The debtors said, in reply, that they did not have the money at that time, but expected to get it soon. The sheriff held possession for forty-five days of the property levied on, and it was then sold. The proceeds are in the hands of the sheriff. When the levies were made, part of the property levied on was already under attachment, under process from a state court.

The firm of E. P. Sanger & Co. failed in September, 1870. It did not after that resume general payment of its debts, although it bought a few bills of goods for cash. It did not after that meet any of its obligations except those specially arranged for, and absolutely necessary to carry on its business. It owed, when it failed, from $150,000 to $200,000. The reason why it did not pay the amounts claimed in the suits on the checks was, that it did not have any money. A few days after the executions were levied, according to the bankrupt Sanger's testimony, he, in a conversation with the president of the bank, proposed to pay him $2,500, if he would withdraw the sheriff and vacate the judgments; but the president refused to do so, assigning as a reason that the bankrupts had not settled with all their creditors, and that the bank had to refuse in order to protect itself, but offered to take $3,000 in

cash, and withdraw the sheriff, but not vacate the judgments. Sanger says that this offer was refused by the bankrupts, and that the same offers on both sides were afterwards made and refused several times. The president of the bank testifies, that his offer was to take forty-five per cent. of the claims, and withdraw the sheriff, and wait some time for the remainder. From the time it was so sued, the firm was not able to pay the demands sued on, and it was not, from September, 1870, able to pay its debts in full.

The checks referred to were received on deposit by the bank from William H. M. Sanger, who kept an account with it. After the checks were dishonored, and before suit was brought on them, the president of the bank had an interview in regard to them with the two Sangers. The substance of the conversation was a request for the forbearance of the payment of the checks. One of the reasons assigned for the request was, that Edmund P. Sanger was going on nicely with his business, and expected William H. M. Sanger, who was his brother, to provide for them, and that any pressure on the part of the bank would embarrass Edmund P. Sanger. By reason of promises made for an earlier payment or settlement, the bank refrained from bringing suit. The president was assured by William H. M. Sanger, that his brother was in a most excellent condition; that the firm had failed and had compromised some time previously, but was then going on nicely; and that it had a large stock in process of manufacture, and, as soon as the autumn business opened, would be able to make satisfactory arrangements. After the suit was brought, the two Sangers urged very hard for an extension of time, and it was given.

The president of the bank testifies, that the understanding he derived from his conversation with the bankrupt Sanger, after the levies were made, was, that the firm had some time before compromised with its creditors at forty-five cents on the dollar; and that he had the same understanding when the suits were brought and the judgments were obtained, and was further informed that the compromise would leave them a very handsome surplus, that they had no considerable amount to pay until April, 1871, and that the prospect of their business was excellent. The president of the bank had no knowledge, until after the levies were made, of the existence of any prior attachment on any of the goods levied on. It does not appear that any officer of the bank except the president had anything to do with any of the transactions in question.

Notwithstanding the provision of the 35th section of the act, that, if the challenged transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud, I do not see in this case any satisfactory evidence that the bank had any reasonable cause to believe that the debtors intended, by suffering the executions to be levied, to give the bank a preference. The bank was put on inquiry by the non-payment of the checks. It made inquiry, and made it in the most proper quarters, as to the status and prospects of the debtors, and as to their relations to other creditors, if any. The evidence rebuts the presumption that the bank intended to obtain, or supposed it was obtaining, a preference over any creditor who had a subsisting enforceable claim at the time; or that the debtors intended to give the bank, or suffer it to have, any such preference; or that the bank had reasonable cause to believe that the debtors had any such intention or view. When the levies were made, the debtors were going on with their business. They continued it for six weeks afterwards, before the petition against them was filed. It does not appear that the levying of the executions broke up their business, or suspended its continuance. Although the firm failed in September, 1870, and did not after that pay its debts in full, yet, during the interval between that time and the levies, it was making compromises as its debts matured, at the rate of forty-five cents on the dollar, to the satisfaction of those who so compromised, and, as I understand the evidence, was disposing of its debts, as they matured, by such compromises. It does not appear that, at the time of the levies, the bank had reasonable cause to believe that there were any creditors not compromised with, and over whom it could obtain a preference. What transpired after the levies were made cannot affect the rights of the parties. The question is as to what the bank had reasonable cause to believe at the time the levies were made. It results, therefore, that the bill must be dismissed, with costs.

[NOTE. The case was taken on an appeal to the circuit court, where the decree of this court was reversed. Case No. 17,202. From the circuit the cause was subsequently appealed to the supreme court, where the decree of the circuit court was reversed, and that of this court, dismissing the bill with costs, affirmed. 96 U. S. 539.]

Case No. 17,201.

WARREN et al. v. TENTH NAT. BANK et al.

[9 Blatchf. 193.] [1]

Circuit Court, S. D. New York. Oct. 19, 1871.

BANKRUPT ACT—PETITION OF REVIEW.

Even if this court can, in a suit in equity, brought in the district court by an assignee in bankruptcy, to set aside an alleged preference averred to have been obtained in violation of the bankruptcy act of March 2d, 1867 (14 Stat. 517), review, before a final decree is made in the cause by the district court, an interlocutory order made by that court therein, such review can be had only by means of an appeal, under the eighth section of the act, and cannot be had by means of a petition of review under the second section of the act.

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

This was a suit in equity [by Richard Warren and Edward Rowe, assignees in bankruptcy] brought in the district court, to set aside an alleged preference, which it was averred had been obtained by the defendants the Tenth National Bank, in violation of the bankruptcy act, by means of a judgment and an execution against the bankrupts. The defendants moved, in the district court, for an order directing a trial by a jury of issues to be framed in the suit. That court denied the motion. [Case unreported.] The defendants then petitioned this court, before a final hearing of the cause in the district court, for a review by this court, and a reversal, of the order of the district court denying the motion for a trial of issues by a jury, claiming the exercise of such power of review under the second section of the bankruptcy act of March 2d, 1867 (14 Stat. 518).

Alexander Blumenstiel, for plaintiffs.
H. E. Tremain, for defendants.

THE COURT (WOODRUFF, Circuit Judge) dismissed the petition, on the ground that, even if this court could review, before a final decree had been made in the cause by the district court, an interlocutory order made by that court therein, the review could be had only by means of an appeal, under the eighth section of the bankruptcy act, and could not be had by means of a petition of review under the second section of said act.

[See Cases Nos. 17,200 and 17,202.]

Case No. 17,202.

WARREN et al. v. TENTH NAT. BANK et al.

[10 Blatchf. 493; [1] 7 N. B. R. 481.]

Circuit Court, S. D. New York. March 3, 1873.[2]

PREFERENCE BY BANKRUPT — VALIDITY — KNOWLEDGE OF INSOLVENCY.

1. Knowledge of the non-payment of the commercial paper of a merchant, at maturity, furnishes reasonable cause to believe that he is insolvent.

2. Inability to pay commercial paper, in the due course of business, is, in the case of a merchant, insolvency.

3. A creditor holding the commercial paper of his debtor, in respect to which the debtor has committed an act of bankruptcy, by suffering it to remain unpaid in the hands of such creditor, for more than two months after its maturity, must be held to know that the debtor is insolvent and has committed an act of bankruptcy, if such creditor, instead of putting the debtor into bankruptcy for such act, proceeds to take measures to secure a preference over other creditors.

4. What constitutes insolvency in a debtor, and knowledge by him of his insolvency, considered.

5. If a debtor suffers a creditor to do acts which will secure a preference, and knows the consequences of such acts, he intends such consequences, because he can prevent them, by using the means provided to effect an equal distribution of his property among his creditors.

6. What constitutes, on the part of a creditor, reasonable cause to believe that he is obtaining a preference.

7. Where a debtor has committed no act of bankruptcy, and will not voluntarily petition, a creditor may sue him, so as to force him to commit an act of bankruptcy, and then himself proceed against him, for such act, in involuntary bankruptcy.

8. Motive and intent distinguished. To do an act, with knowledge of its consequences, is to intend the consequences.

9. Where a preference is obtained through a judgment, and a levy of execution, an assignee in bankruptcy may proceed, by a suit in equity, to set aside the lien, and may make the sheriff, as well as the creditor, a party, if the proceeds of the execution be still in the hands of the sheriff.

10. On awarding such proceeds to the assignee in bankruptcy, the sheriff was allowed his legal fees, and his costs of suit, and such costs were, with the costs of the assignee, charged on the creditor.

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

Alexander Blumenstiel, for plaintiffs.
Henry E. Tremain, for Tenth Nat. Bank.
Brown, Hall & Vanderpoel, for the sheriff.

WOODRUFF, Circuit Judge. The bankrupts were, in and prior to the month of September, 1870, merchants and traders, in the city of New York. In August, 1870, their bank checks, drawn in their firm name of E. P. Sanger & Company, on the Central National Bank in the city of New York, dated, one, August 23d, 1870, for $4,891.64, and one, August 24th, 1870, for $4,651.37, were received in the regular course of business, and were held by the defendant, the Tenth National Bank, and, upon presentation thereof to the bank on which they were drawn, payment was refused, and the same remained unpaid, the drawers soliciting and obtaining delay of prosecution thereon, by the assurance of a hope that they should, by a successful continuance of their business, be able to pay them. It is proved, also, by the testimony of one of the bankrupts, that, in September, 1870, the firm failed, and never afterwards resumed payment "generally" of their debts. By this qualification, the witness' explanation shows that he meant that they, after their failure, bought a few bills for cash, and paid certain of their notes, open accounts, or checks, which were specially arranged for and absolutely necessary to carry on their business. They owed, when they failed, from $150,000 to $200,000. The distinct and only reason why they did not pay the checks held by the defendant, the Tenth National Bank, was, that they had no money, and the proofs show that, in fact, they were insolvent. I do not deem it very material, but it is also proved, that the firm of E. P. Sanger & Co. had also failed some time previously, and had compromised

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

[2] [Reversing Case No. 17,200. Decree of circuit court reversed by supreme court, in 96 U. S. 539.]

with some of their creditors; and it was represented to the president of the bank, by the person from whom the checks were received, as an inducement to delay the prosecution of the checks, that the firm had compromised with their creditors, and that his brother, (E. P. Sanger,) was in a "most excellent condition," and would be able to make a satisfactory arrangement in the fall. The president of the bank, in his testimony, shows, that, in his apprehension, the non-payment of the checks indicated, per se, inability to pay; and the negotiations for delay, and the urgency employed to gain an extension of time, and the assurance of expected future ability, show, conclusively, that he knew that the debtors had not then present ability to pay the checks, and he was distinctly told, that "any pressure on the part of the bank would embarrass E. P. Sanger." In September, as testified, the firm failed, which must mean, I think, that they were unable to meet their other obligations, and suffered them to remain unpaid, as herein above stated. The checks remained unpaid, and, on the 3d of November, the bank commenced suits thereon, in which judgments were recovered against the bankrupts on the 12th of January, 1871, by default. The defendants therein, having no legal defence, submitted to such recovery without opposition, and without taking any measures to prevent the bank from obtaining any advantage which might be gained by such judgment and the execution thereof by seizure and sale of their goods; and, on the same day, executions were issued and levied upon the goods of the debtors. After such levy, the debtors, who appear to have been engaged in an endeavor to compromise again with their creditors, urged the bank to withdraw the levy, they, apparently, still hoping, that, by a compromise with their creditors, at 45 cents on the dollar, they might extricate themselves from their difficulties; and, yielding to solicitation, the bank delayed a sale under the executions. During this delay, and while the goods were in the custody of the sheriff under the levy of such executions, a petition was filed by other creditors, on the 24th of February, 1871, in the district court, upon which the debtors were adjudged bankrupts, and the complainants in this suit were appointed assignees. The district court issued an injunction, restraining the bank and the sheriff from disposing of the goods of the debtors so held, which injunction appears to be in full force, except so far as modified by an order which permitted the sale of the goods, the sheriff to hold and retain the proceeds of sale, and the said injunction to apply thereto, with the same force and effect as it applied to the property before such order was made. This suit was thereupon commenced against the bank, to avoid the lien of the executions and levy, establish the title of the assignees in bankruptcy, and obtain possession of the moneys so held, and the sheriff is made a party defendant, as the custodian of the fund in dispute, and, in order that the adjudication herein may be conclusive upon both, and as protection to the sheriff against any claim of the bank upon him, but, otherwise, or beyond this, no personal claim is made on the sheriff. The bill herein was dismissed, with costs, in the district court, on the ground, that it did not appear that the bank, when the levies were made, had reasonable cause to believe that the debtors intended, by suffering the executions to be levied, to give the bank a preference, or that the bank intended to obtain a preference, or that any fraud on the bankrupt law was intended by either. [Case No. 17,200.] The assignees have appealed to this court, and here the claim of the assignees to the fund in question is resisted upon various grounds, which, so far as I think material, will be briefly noticed, or, at least, be covered by the conclusions which will be stated.

I. (1.) Before the suits were commenced, the bank had reasonable cause to believe that the debtors were insolvent. The non-payment of their commercial paper at maturity was, of itself, sufficient cause for such a belief, as has more than once been held, in this circuit. But, added to this, the proofs above recited show, that the president of the bank knew that the non-payment was by reason of inability to pay; and, inability to pay, in due course of business, is, in fact, in the case of a merchant, insolvency, within the meaning of that term. This has been so often adjudged, in giving a construction to the bankrupt law [of 1867 (14 Stat. 517)], that it has passed into a maxim. Nor is this all. The president of the bank was informed, before the suits were commenced, that, if the bank should press the debtors for payment, it would embarrass the debtors. This was a singular expression to apply to debtors who, as he knew, were already in a condition in which they could not meet their bank checks, and were urging for delay; and it could only mean, that, if the bank attempted coercion, it would break up their business. I am aware, that it was represented that the debtors were "in excellent condition," and that, if not pressed for payment, there was ground of expectation that they would soon be able to pay. But, this does not make it less certain, that they were, in fact, then insolvent, and that the president of the bank knew the facts constituting insolvency in the law; and it is quite impossible to hold, upon all these proofs, that the bank had not, when the suits were commenced, reasonable cause to believe such insolvency. The contrary is inevitable, from facts which are proved and, in substance, admitted by the president of the bank himself.

(2.) Before the commencement of the suits, the debtors had committed an act of bankruptcy, and the bank knew it. Non-payment of the checks, (which were commercial paper,) and neglecting to pay them for more than two months, was, itself, an act or acts of bankruptcy. It is true, that a solvent man can commit an act of bankruptcy, but, it is not according to the usual course of events, for solvent persons to commit such acts of bankruptcy as these; and the bank should be held

to the just and reasonable inferences from such acts, when, instead of proceeding, as the bank might have done, to have the debtors adjudged bankrupt, and compel that equal distribution which the bankrupt law aims to secure, it adopted measures which, if successful, must result in giving itself a preference over other creditors.

(3.) All the facts of which the bank had knowledge, and those which the bank had reasonable cause to believe, were perfectly and fully known to the debtors themselves. They knew they were insolvent within the meaning of the law, and they were, in fact, insolvent, in every sense of the term.

(4.) The debtors also knew, that, if they submitted to suits, judgments, levies and sale of their goods, for the payment of the bank, it would give the bank a preference over other creditors, whom they could not pay. It is very true, that they were reluctant to be sued; they implored further delay; they begged to have the levies withdrawn; they earnestly desired to struggle on yet longer, for the purpose of an endeavor, at least, to make such profits in their business as would enable them to pay the bank, and enable them to compromise with their creditors. Possibly, they deemed such a result probable, if time were given them; but, from the moment suits were brought, they knew—they must have known—that, if those suits were carried to judgments, executions, sales, and the receipt of the money, this would give to the bank a preference over other creditors. In this condition of things, if they had themselves sold a portion of their goods, for the purpose of paying the bank in full, and had made that payment, it would have been an illegal preference, plainly and intentionally so. Standing by and suffering the same result, with certain knowledge of the consequence, was suffering the bank to gain such preference; and it is doing violence to reason, good sense and the proper meaning of language, to say, that debtors do not intend the necessary consequence of their acts, or of the acts which they permit or suffer to be done, and which they can prevent, if they will, by the means which the law places at their command, to effect a legal and equal distribution among their creditors.

(5.) The like observations, in the particulars last named, apply to the bank. Having the knowledge it possessed, it is very little to say, that it had reasonable cause to believe that the necessary consequence of success in its suits, if it obtained a levy and sale and collected its judgments, would be to gain a preference, and that the debtors would not be able to pay their other creditors. In this view, it is wholly immaterial whether other debts were then due and payable, or not. From the moment the suits were begun, and begun, as they were, with the express notice above mentioned, that, if there was any pressure, the debtors would be "embarrassed," or, in other words, would be in no situation to pay their debts, they acted in disregard of the duty of the debtors to provide for the equal distribution of their property, in like disregard of the right of other creditors to such distribution, and with the single purpose to compel payment to themselves, at all events. They had not the apology for bringing suit, which creditors often have, where the debtor has committed no act of bankruptcy, and will not himself voluntarily apply to be declared a bankrupt, and so commit his estate to that distribution which the law provides for. Such a creditor may properly sue, and, by so doing, force his debtor into an act of bankruptcy, upon which proceedings in bankruptcy may be taken against him by the creditor himself so suing. Here, an act of bankruptcy had been committed, and it was known to the bank. Why did they not proceed thereupon? Plainly, because they were seeking to compel payment to themselves, without regard to other creditors. Both the president and the debtor deny an intent to prefer the bank. This is not unusual. The debtor may, no doubt, truthfully say, that the motive which governed him was not a preference for the bank over other creditors. As to both of the witnesses, it is plain, that they regard motive and intent as identical. Not so. An intent often exists, where a motive is wholly wanting, and mere indifference exists. When a man does an act, or omits to do an act, with knowledge of the consequences, he intends the consequences, just as truly as he intends to do, or to omit, the thing done or omitted.

(6.) These conclusions make the conduct of the bank and of the debtors a fraud upon the bankrupt law. The bank intended to procure payment, without regard to the other creditors. The debtors knowingly, and, therefore, intentionally, suffered the bank to go on to secure this object, knowing and, therefore, intending this result. Otherwise, they would, as easily they might, have prevented it. All this was, of course, known to the bank.

(7.) These views bring the present case distinctly within the decision of this court in Smith v. Buchanan [Case No. 13,016], and within the opinion of the supreme court, recently pronounced (Buchanan v. Smith [16 Wall. (83 U. S.) 277]), affirming the decision in that case. The facts are, in every material particular, identical. Cases might be multiplied, similar in principle. See Haskell v. Ingalls [Case No. 6,193]. And the opinion of Dillon, Circuit Judge, in Vanderhoof v. City Bank [Id. 16,842], expresses like views. I find no ground for sustaining the claim of the bank to the fund in question, without retracting very much that has been announced in the opinions of this court, and rejecting the opinions of most of the judges called to administer the bankrupt act. The opinion of the supreme court, on affirming the decision of this court in Smith v. Buchanan [supra], is very full in support of the views above expressed. It denominates the silent acquiescence of the debtors, without invoking the protecting shield of the bankrupt act, "the passive assistance" rendered by the debtors to the procurement of

the lien which would necessarily, if not defeated, give the creditors an illegal preference, and would be a fraud upon the act.

II. It is urged, that the remedy of the assignees was at law, and not in equity; and that the bill should have been dismissed upon that ground, also. The object of the bill was, to set aside the lien of the judgments of the bank, and of the executions upon the personal property of the debtors. Until that was done, the sheriff, who made his levy before the proceedings in bankruptcy were commenced, was acting in the clear line of his duty. He ought not to be proceeded against, or called upon to settle the question in conflict on his own responsibility, nor without such a proceeding as would, by concluding the bank, protect him in delivering the property levied upon to the assignees. Without asserting that the assignees could not maintain trover or replevin against the sheriff, I am of opinion, that a bill in equity was the most convenient and effectual. It enables the court to settle the rights of all the parties in one suit, and not leave the sheriff to a further litigation with the bank. Had trover been brought against the sheriff, he might, with great propriety, have applied to a court of equity to protect him, by bringing the real parties to the controversy into actual contest, for his protection. The sale of the property by order of the bankrupt court does not change the case in that respect. The order of that court substituted the money in the hands of the sheriff for the property itself, to be held by him under the injunction previously granted, and with the like effect, directly and incidentally, as he held the property before the sale. Smith v. Buchanan was a suit in equity, like the present, and numerous other like suits have been brought and sustained in the several circuits.

III. On behalf of the sheriff, it is insisted, that he is an officer of the state courts, and held the property by virtue of their mandate; that this is an interference with the authority and jurisdiction of the state courts; and, therefore, that the sheriff ought not to be made a party. There is nothing in this. The proceeding no more interferes with him, or with the state courts, than would an action of trover or replevin, when he levies upon and retains property which he has no right to apply, to pay an execution. He is made a party for his own protection, and because he holds the subject of the controversy. No decree is sought, and none should be made, affecting him, otherwise than as the custodian of the fund, and to secure the control of the court over it. He has in no other sense any personal interest in the controversy, and ought not to be prejudiced, in any manner, by the decree. If he had been sued at law, he would have been in a worse position, and might have found it necessary himself to apply to a court of equity for protection. Having actually taken the property, he would have had no bond or other indemnity from the bank, against the claim of the assignees.

The proofs show, that the sheriff has the money in his possession. His counsel, on the argument, stated, that, by direction of the state court, he had paid the money to the other defendant. But, no such fact is before the court.

The decree of the district court must be reversed, and a decree be entered awarding to the complainant the proceeds of the sale of the property in question, but allowing the sheriff any legal fees which have not been paid to him, and, also, his costs in this suit, but charging the other defendant with such costs, and also with the costs of the complainants herein.

[Upon an appeal to the supreme court, the decree of this court was reversed, and that of the court below, dismissing the bill, with costs, affirmed. 96 U. S. 539.]

WARREN, The (TOPPING v.). See Case No. 14,101.

Case No. 17,203.

WARREN et al. v. WEAVER.

[1 Wkly. Notes Cas. 107.]

Circuit Court, E. D. Pennsylvania. Dec. 4, 1874.

COSTS — TRAVELLING EXPENSES — WITNESS FEES.

[Plaintiffs *held* not entitled to expenses of coming to court to testify or to witness fees.]

Plaintiffs' bill of costs included their own travelling expenses incurred in coming to the court to testify, and a witness fee to each of them. These items were disallowed by the clerk, from whose taxation plaintiff appealed.

J. G. Johnson, for appellant.

THE COURT (CADWALADER, District Judge,) disallowed the appeal, and sustained the taxation of the clerk.

WARREN (WEBSTER v.). See Case No. 17,339.

WARREN (WING v.). See Case No. 17,871.

Case No. 17,204.

WARREN v. WISCONSIN VAL. R. CO.

[6 Biss. 425; [1] 7 Chi. Leg. News, 403; 2 Cent. Law J. 542; 21 Int. Rev. Rec. 300.]

Circuit Court, W. D. Wisconsin. Aug. 5, 1875.

CONDEMNATION PROCEEDINGS—JURISDICTION—REMOVAL OF CAUSE FROM STATE COURT.

A proceeding under the right of eminent domain to condemn land for a railroad is not a case in which the state is a party; and the federal courts may have jurisdiction. Nor is it a special proceeding, nor can the right of removal be limited by state laws. It is in effect a suit of civil nature, and if the parties are competent,

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

comes under the United States statutes for removal of causes.

[Cited in Davis v. James, 2 Fed. 621; Mineral Range R. Co. v. Detroit & L. S. Copper Co., 25 Fed. 520.]

[Distinguished in Baltimore & O. R. Co. v. Pittsburgh, W. & K. R. Co., 17 W. Va. 862. Cited in Green Bay & M. R. Co. v. Jennings, 56 Wis. 121, 14 N. W. 30.]

[This was a suit by Andrew Warren, Jr., against the Wisconsin Valley Railroad Company.]

Wm. F. Vilas, for plaintiff.

W. C. Silverthorn and P. L. Spooner, for defendant.

HOPKINS, District Judge. The railway company above named required certain portions of the plaintiff's land for the purpose of its road, and not agreeing with him upon the damages to be paid therefor, had them appraised by commissioners, according to the provisions of the railroad law of this state. Gen. Laws 1872, c. 119. The company had separate awards for each tract or government description through which it ran, being six in number. The plaintiff not being satisfied with the amount awarded by the commissioners, appealed to the circuit court of Marathon county from each award, in accordance with the provisions of the act aforesaid.

After the appeals, the plaintiff, being a citizen of the state of Illinois, filed his petition in the state circuit court, stating that he was a citizen of the state of Illinois, and that the railroad company was a citizen of this state, also that the amount in dispute exceeded the sum of $500 in each case, and prayed for the removal of the cases for trial into this court. The state court granted the order and accepted the bond, and copies of the records in each case were filed and the cases duly docketed in this court.

The plaintiff now moves to consolidate said cases, which motion is opposed by defendants on the ground that this court has not jurisdiction, but conceding that if the court has, they should be consolidated. The defendant, in order to present the question directly before the court, moved to remand the cases to the state circuit court, for the reason that this court had not jurisdiction thereof.

Section seventeen of the state statute aforesaid provides for an appeal by either party, and declares that upon filing a written notice of appeal in the office of the clerk of the circuit court of the county in which the land is situated, and where the award of the commissioners is required to be filed and recorded, "the appeal shall be considered an action pending in court subject to a change of the place of trial and appeal to the supreme court as other actions, and shall be entered by the clerk upon the records of the court by setting down the owners of the land for which such award was made, and who are parties to the appeal as plaintiffs, and the railroad company as defendants." It further declares that the appeal shall be tried by a jury unless waived, and that costs shall be awarded to the successful party on such appeal, and that judgments shall be rendered therein, according to the rights of the parties.

The award is to be recorded in the judgment book by the clerk in whose office it is filed. If the award is not paid in sixty days from the filing, or in case of appeal, if the judgment upon the appeal is not paid within sixty days, the plaintiff or party interested may have execution thereon. Section nineteen provides that upon the railroad company's paying into court the amount of the award or judgment, or filing in the clerk's office of the court a receipt therefor, duly signed and acknowledged by the owner, the clerk shall make a minute of such payment or filing of such receipt at the foot of the record of the report of the commissioners, in the judgment book of said court, and that thereupon the exclusive use of such premises shall vest in the railroad company without any further act, deed, or conveyance, and further declares that such record or a certified copy thereof shall be prima facie evidence of such title in all courts and places.

The motion to remand was based upon two grounds: First, that as it was a proceeding by the state in the exercise of its right of eminent domain the case was to be regarded as substantially against the state, and that this court had no jurisdiction in a suit against a state. This position is correct, if the state is a party. But I do not see how that can be maintained. The state statute above quoted declares that the railroad company shall be defendant, and that when it pays the amount of damages or compensation awarded by commissioners, or by the court on appeal, the title or use of the land shall vest exclusively in the railroad company. The state has no interest in the controversy. It is not a controversy where the state is a party nominally or beneficially. The statute conferred upon the railroad company the right to take what lands it required, but made it liable for all damages and compensation; and this controversy relates, not to the right of the railroad company or the state to take the lands described, but only to the amount of compensation the railroad company must pay as a condition of the taking. It seems very clear to my mind that this is not a suit prosecuted against a state, within the meaning of the constitution, and that, therefore, the first ground of objection is not well taken.

The second ground relied upon was, that it was not a suit in such a sense as to be removable; that it was a special proceeding, provided for ascertaining the damages and passing title to the land taken or condemned, especially applicable to proceedings in the state courts, and not adapted to the practice and modes of procedure in this court; and that the rights of the railroad company could not be obtained in the manner provided by the state statute in this court. If this objection states truly the essential nature of the case, it might be regarded as an answer to the jurisdiction of this court. But does it? It was suggested that the state could have provided for an assessment of damages by a sheriff's jury, and not given to

the proceedings any attribute of a suit. Without determining that question either one way or the other, the point to be passed upon here is, has the state stripped the proceedings of all the characteristics of an action? I think it has not. It is true, the mode of getting the case into the courts is different, but after having provided a way of getting the matter into court, it is then treated as an action. The act says, "The appeal shall be considered as an action pending in court," and from that time it is proceeded with in the same manner as other actions up to and including judgment and execution. The owner of the land is the plaintiff, and the railroad company defendant. So it seems to me the state has invested the proceedings with the dignity and attributes of an action, and the parties are not, therefore, at liberty to say it is not an action. The state has given the parties the plenary advantages of an ordinary suit at law, and the courts have but to see that they enjoy them.

But, even if the proceedings in the state courts are different from the usual modes of prosecuting suits for the enforcement of private rights, still it is in effect a suit of a civil nature, in which the controversy is between citizens of different states. The plaintiff is seeking to obtain compensation of the defendants for the land they have taken from him. It involves the question of the value of the land taken by defendants, and the damages of the plaintiff sustained thereby. It is not a new right of action given by the state. The common law gave a remedy by action in such a case, and the state legislature, by changing the mode of proceedings to ascertain the damages of a party whose lands have been taken, cannot change the essential character of the cause of action or right of action. It is still in effect a suit of a civil nature where a judgment may be rendered which concludes the parties as in other suits. The status of the parties is, I think, the same as in any suit of a civil nature at common law.

It was the intention of congress, under the power conferred by the constitution, to give to suitors having a right to sue in the federal courts remedies co-extensive with such rights. These remedies cannot be abridged or controlled by state legislation, by exempting a person or corporation of such state from suit. A citizen of another state, in this respect, possesses a right not pertaining to one of the same state. Suydam v. Broadnax, 14 Pet. [39 U. S.] 67; Railway Co. v. Whitton's Adm'r, 13 Wall. [80 U. S.] 270. In this last case it was held that where the state statute gave a new right of action and limited the prosecution for its recovery to a court established by the state, that the party-plaintiff, being a non-resident, was entitled to a removal of the case from the state to the federal courts for trial. The supreme court in that case lays down the doctrine that "when a general rule as to property or personal rights or injuries to either is established by state legislation, its enforcement by federal courts in a case between proper parties, is a matter of course, and the jurisdiction of the court in such case is not subject to state limitation." [2]

But, as I have before said, this plaintiff had a plain right and remedy for his damages in such a case as this at common law, and the supreme court, in Union Bank of Tennessee v. Jolly's Adm'rs, 18 How. [59 U. S.] 503, declared that a law of a state "limiting the remedies of its citizens in its own courts, cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state, for the recovery of any property or money there to which they may be legally or equitably entitled."

It may be that the proceedings in this court in ascertaining and enforcing the parties' rights will be different to some extent, but that does not prevent the removal. The supreme court has repeatedly held that the jurisdiction of the federal courts over controversies between citizens of different states cannot be impaired by the laws of the states which prescribe the modes of redress in their courts. In Hyde v. Stone, 20 How. [61 U. S.] 175, it is said in many cases "the forms of the proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." So that if this court could not assimilate its practice so as to give to the defendant all the rights it is entitled to, in the mode prescribed by this state statute, it is no answer to its jurisdiction, for it is the duty of this court to afford a sufficient and adequate remedy so as to secure to the defendant the right to which it is entitled upon paying the judgment finally rendered in the case, and there is no difficulty whatever in determining the remedy to effect that purpose. Payne v. Hook, 7 Wall. [74 U. S.] 425.

The twelfth section of the judiciary act of 1789, gave the right of removal to non-resident defendants. That was not as comprehensive as the constitutional provision on the subject, and congress has from time to time extended the right, and the act of March 3, 1875, has materially enlarged the right of suitors in respect to removal. 18 Stat. 470. It now embraces citizens of other states, whether plaintiff or defendant, and confers an unqualified right to have a case or suit of a civil nature at law or equity transferred on petition of either party to the federal courts for trial, when the parties are citizens of different states, upon complying with the conditions mentioned in the act, and the supreme court decided in Insurance Co. v. Dunn, 19 Wall. [86 U. S.] 214; Insurance Co. v. Morse,

[2] On this point see, also, U. S. v. Supervisors of Lee Co. [Case No. 15,589].

20 Wall. [87 U. S.] 445, "that no power of action thereafter remained" (after filing petition), "to the state court, and that every question, necessarily including the act of its own jurisdiction, must be decided in the federal court." To the same effect is the case of Osgood v. Chicago, D. & V. R. Co. [Case No. 10,604].

Applying the doctrine and principles of those decisions to this case, I must overrule the motion to remand the cases to the state court, and hold that this court has jurisdiction thereof.

Having held that this court has jurisdiction, I grant the order conceded by defendant's counsel to be right, consolidating said cases.

WARREN COUNTY (RAMSEY v.). See Case No. 11,547.

Case No. 17,205.

WARRENER v. KANKAKEE COUNTY.

[1 Month. West. Jur. 556.]

Circuit Court, N. D. Illinois. April, 1875.

RAILROAD AID BONDS—DEFENSES—CONSOLIDATION OF RAILROADS—VALIDITY.

[1. In a suit brought on coupons issued by a county for interest on railroad bonds issued by it to aid in the construction of a railroad, the defense interposed was that after the county had voted the bonds, but before actual delivery, the company had consolidated its stocks and franchises with the stock of another railroad corporation, and that said consolidation was invalid because not assented to in writing by all the resident stockholders of the former company, and also because such company had no road constructed, or in process of construction, at the time the latter company was chartered. *Held*, that the county could not set up this defense in this collateral proceeding, as it had allowed the consolidation, in some form, to take effect, and had allowed the consolidated company to put the bonds in circulation.]

[2. The fact that the right of one company to consolidate under its charter was limited did not deprive it of the right to consolidate under the general laws of the state.]

BLODGETT, District Judge. The suit was brought to recover on eight coupons, for $100 each, issued by the county of Kankakee, for interest maturing July, 1873 and 1874, on railroad bonds Nos. 10, 11, 12, 13, issued by Kankakee county to aid in the construction of the Kankakee & Illinois River Railroad. The bonds purported, on their face, to be in aid of the company, pursuant to the act of the legislature of this state to enable cities, towns, or communities to issue what are commonly known as "railroad aid bonds." The defense interposed was, in substance, that after the county had voted the bonds in aid of the railroads, but before actual delivery, the company had consolidated its stock and franchises with the stock of a railroad corporation in Indiana known as the Plymouth, Kankakee & Pacific Railroad Company; that said consolidation was invalid because it was not assented to in writing by all the stockholders of the company resident in the state of Illinois, and also because the Kankakee & Illinois River Railroad Company had no road constructed, or in the process of construction, at the time said Kankakee & Pacific Railroad Company was chartered. The court held that the defendant could not collaterally question the validity of the consolidation in the present suit. If it were irregular or illegal, it could only be inquired into by suit in the nature of a quo warranto properly brought by a stockholder for that purpose, and that it did not lie in the mouth of the defendant to question or avoid its liability for its bonds or contracts by attacking the consolidation indirectly. It appeared, from all the pleadings and admitted facts in the case, that there were some objects of the consolidation accomplished; that the consolidation company had in fact succeeded to, and in some manner exercised, the rights and franchises, and used the property, of the original roads from which it was composed. In other words, it became a corporation de facto, and used the franchises and powers which it claimed to exercise, and, while so doing, contracts made with it and rights derived through it would be enforced without inquiring into the regularity of the consolidation itself. It also appeared that the consolidation was made under the general law of this state, and that there was no irregularity, or want of compliance with the provisions of the law, except in the failure to obtain the consent of all the stockholders. It was not claimed that the county of Kankakee itself, the defendant, did not consent, but that all the stockholders did not consent. The county could not set up this defense in its own behalf, in the manner it had attempted to do; for it had lain by and allowed the consolidation, in some form, to take effect, and had allowed the consolidation company to put the bonds in circulation. The bonds had been purchased in the market, and value paid for them; and they were at present, as far as the record showed, held by bona fide holders, who should be protected. The right of the company to consolidate, under its charter, seemed limited; but that did not take away the right from the company to consolidate under the general law of the state, by complying with all the provisions of the law except the one named, which could not be made available in the present case.

The demurrer to the rebutter was therefore sustained.

WARREN INS. CO. (JORDAN v.). See Case No. 7,524.

WARREN INS. CO. (PALMER v.). See Case No. 10,698.

WARREN INS. CO. (PETERS v.). See Cases Nos. 11,034 and 11,035.

Case No. 17,206.

WARREN MANUF'G CO. v. ETNA INS. CO.

[2 Paine, 501.] [1]

Circuit Court, D. Connecticut.[2]

JUDGMENT OF STATE COURT—CONCLUSIVENESS IN OTHER STATES—FRAUD—NECESSITY OF PERSONAL SERVICE.

1. Prior to the adoption of the confederation and the constitution of the United States, the several states were considered entirely independent of each other, and judgments recovered in their respective courts were foreign judgments in every respect, as in any separate and independent government; and whatever changes now exist in this respect, must be sought for in the constitution and laws of the United States.

2. Conflict of opinion as to the construction of the constitution and act of congress relative to the force and effect of judgments rendered in the several states.

3. Under the constitution of the United States and act of congress of 1790 [1 Stat. 123] the judgment of a state court has the same credit, validity and effect, in every other court in the United States, which it has in the state where it was rendered; and whatever pleas would be good to a suit thereon in such state, and none other, could be pleaded in any other court in the United States.

4. It would be competent to show that the judgment was obtained by fraud.

[Cited in brief in Kinnier v. Kinnier, 45 N. Y. 536.]

5. Under the constitution and act of congress, the question of jurisdiction remains open as at common law. It may therefore be shown by proper evidence, that the court rendering the judgment had no jurisdiction; and the pleadings may be so shaped as to admit such evidence.

6. In order to sustain the judgment, the court must have had jurisdiction of the parties, as well as of the subject-matter.

[Cited in brief in Sevier v. Roddie, 51 Mo. 584.]

7. Except in proceedings under the statute process of foreign attachment, which is in the nature of a proceeding in rem, in order to give the court jurisdiction of the person, due notice of the suit or service of the process must be shown, or the judgment is a nullity. And even in case of attachment, if the goods attached are insufficient to satisfy the attachment, no suit can be sustained upon the judgment for the deficiency, because the defendant is not personally amenable to the jurisdiction of the court.

[Cited in brief in Blyler v. Kline, 64 Pa. St. 131.]

8. A judgment obtained without notice to the defendant, or his appearing in any manner to answer to the suit, can have no validity or binding effect.

9. The provision in the constitution of the United States, that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, does not apply to corporations; and bodies corporate have no right to establish themselves or transact business in a state otherwise than according to the laws of that state regulating their conduct.

[Cited in Farnum v. Phœnix Ins. Co., 83 Cal. 261, 23 Pac. 873.]

10. Statutes ought not to have a retrospective effect. As a general rule, when no time is fixed, they take effect from date. They cannot, by any fiction or relation, have any effect before they are actually passed.

[Cited in Ellis v. Connecticut Mut. Life Ins. Co., 8 Fed. 85.]

[Cited in brief in City of St. Louis v. Oeters, 36 Mo. 460.]

11. Where, therefore, the law under which a suit was brought on a policy of insurance, was passed in March, 1835; the loss for which judgment was obtained occurred in January, 1834; the policy expired in October of the same year, and the suit was commenced in April, 1835; it was *held*, that the law in its application to the proceedings and judgment was retrospective, and therefore a nullity.

At law.

THOMPSON, Circuit Justice. This is an action of debt brought by the Warren Manufacturing Company, a body corporate, duly incorporated by a law of the state of Maryland, located and doing business in Baltimore, and all the stockholders, residents and citizens of the state of Maryland, against the Etna Insurance Company, a body corporate, duly incorporated by a law of the state of Connecticut, doing business in Hartford, in the state of Connecticut, the stockholders residing in, and being citizens of the state of Connecticut: and the action is founded upon a judgment recovered in the county court of the Sixth judicial district of the state of Maryland, on the first day of January, in the year 1836, for the sum of $20,000. The defence set up in the case is embraced under four pleas: (1) Nil debit. (2) Nul tiel record. (3 and 4) Special pleas, stating in substance that the defendants, at the time of the commencement of the suit, were, and ever since have continued to be, inhabitants of the state of Connecticut, located, established and resident at Hartford, and were not, during said time, or at any other time, inhabitants of, or located, established or resident in the state of Maryland, or within the jurisdiction of the said state or the laws thereof, or any of the courts thereof; and that the defendants were never served with any process in said suit, nor had any notice thereof, and never answered thereto or appeared or defended therein, nor in anywise authorized any other person in their behalf to appear and answer, and defend the same; that they were incorporated by the legislature of the state of Connecticut, and were never in any otherwise incorporated than by the legislature of Connecticut.

The plaintiffs demur to the plea of nil debit, and take issue upon the plea of nul tiel record; and to the third and fourth pleas, the plaintiffs reply, setting out the incorporation of the defendants; and that, from the time of their incorporation up to the time of the commencement of the suit in the Maryland county court, they had an agent residing in Baltimore, invested with powers to receive proposals for insurance against loss by fire, by policies signed by the president of said company, and attested by their secretary and

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

[2] [Date not given. 2 Paine includes cases decided between 1827 and 1840.]

countersigned by their agent in Baltimore; and that, by virtue of said authority, the policy of insurance upon which the Maryland judgment was obtained, was duly effected, and from time to time renewed, and the premium paid to the said agent, and by him paid over to the defendants. And the plaintiffs, in their replication, further allege and set out an act of the legislature of Maryland, passed on the 7th day of March, in the year 1835; by which it is declared, that any insurance company not incorporated by the state of Maryland, which shall effect, or shall have effected, insurance upon property within that state, and shall transact business within that state, shall be deemed to hold and exercise franchises within the state; and that every such corporation which shall hold and exercise, or which shall have held and exercised franchises within the state, shall be liable to be sued within the state, in the courts of the state, upon contracts of insurance on property within the state, or on any dealings or transactions within the state; and that when any suit shall be instituted against any such insurance company, service of the writ issued, in such cause, upon the president or any directors of such company, or upon any agent of such company, shall be deemed sufficient service, and that judgment may be thereupon rendered by default, if such company shall fail to appear; and that, if any such company, after any liability shall occur or shall have occurred, withdraw its agent from the state, or shall revoke the authority of the agent, and shall not appoint another, and no president or directors of the company can be found within the state, upon whom to serve any writ or process, that service thereof upon the person last the agent of the company shall be deemed sufficient service, with a proviso that where such service shall be made upon an agent after his authority shall be revoked, before judgment by default shall be rendered, proof shall be made in the mode pointed out in the act, that a copy of such writ or process has been delivered to the president or two directors of the company within the state where such company shall have been incorporated; and the replication then avers, that the writ in the Maryland suit was duly served upon the said agent of the defendants, as provided by the act aforesaid; and the replication further avers, that before rendering the said judgment, a copy of the writ or declaration was, at the town of Hartford, in the state of Connecticut, served upon Thomas K. Brace, president of the company, whereby notice of the said suit was given to the defendants. To this replication the defendants rejoin, denying that they had any agent in the city of Baltimore, vested with the powers set forth in the replication, and denying, also, that the writ in the Maryland suit was served upon such supposed agent, as required by the Maryland law, and that the court did not thereby become invested with jurisdiction in and over said suit, or authorized thereby to render the said supposed judgment, and denying that a copy of the said writ and declaration was served on Thomas K. Brace, or actual notice thereby, of the pendency of said suit, was given to the defendants, or full opportunity afforded them of defending therein; and this they pray may be inquired of by the jury.

The cause came on to argument upon the demurrer to the plea of nil debit, and upon the admission of certain facts in relation to the issues of fact made by the pleadings in the cause. From the transcript of the record in the Maryland judgment, it appears that the suit was commenced on the 10th day of April, in the year 1835; and the declaration is upon a policy of insurance against fire, bearing date the 16th day of October, in the year 1830, and renewed from time to time, according to the provisions in the policy, and continued until the 16th of October, 1834; and the loss is alleged to have occurred on the 24th day of January, in 1834; and from the said record, and the return of the sheriff of Baltimore county, it appears that the writ was served on William Hope, agent of the Etna Insurance Company, on the 11th day of April, 1835; and that a copy of the writ and declaration was served on Thomas K. Brace, president of the Etna Insurance Company, on the 15th day April, in the year 1835, and the agency of William Hope, under the power of attorney, set out in the transcript of the record, is admitted, bearing date on the 18th day of March, 1833, giving him full powers to receive proposals for insurance against loss by fire, to act as surveyor of buildings, and insurance thereon to make, by policies signed by the president, and attested by the secretary, and countersigned by the said William Hope. It is admitted that Thomas K. Brace was president of the company, and that service of the writ and declaration was made on him, and the other proceedings had, as set forth in the transcript of the record, and that the court of Maryland had jurisdiction of the subject-matter of the suit in which judgment was rendered. The law of Maryland is also admitted.

Under this state of the pleadings and the admitted facts in the case, the cause must turn principally upon the effect and operation of the Maryland judgment, and the construction to be given to the law of that state regulating proceedings against foreign corporations doing business within the state. Prior to the adoption of the confederation and the constitution of the United States, the several states were considered entirely independent of each other; and the judgments recovered in their respective courts were foreign judgments in every respect, as in any separate and independent government; and whatever changes now exist in this respect must be sought for in the constitution and laws of the United States. The constitution declares that full faith and credit shall be given in each state

to the public acts, records and judicial proceedings of every state, and though congress may prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof; and the act of congress of 1790, passed in execution of this power, declares that judgments in the states shall have the same faith and credit given to them in every court within the United States as they have by law or usage in the courts of the states from whence the record shall be taken. There has been considerable diversity of opinion prevailing in the courts of the different states, with respect to the construction of the constitution and the act of congress upon this subject. Some holding that the act of congress relates only to the mode of authentication, and that the legal import and effect, and obligation of judgments of another state, is still open to be decided by the rules and principles of the common law. Others have held that the terms "faith and credit," as used in the act of congress, mean the same thing as the term "effect," and that this effect being the same in the state where they are used as in the state where the judgments are rendered, they are in all respects like domestic judgments, as to their conclusiveness against the party who is the subject of them.

But whatever diversity of opinion may have existed on this subject, the question in this court would seem to be settled by the cases of Mills v. Duryea, 7 Cranch [11 U. S.] 481, and Hampton v. McConnel, 3 Wheat. [16 U. S.] 234, decided in the supreme court of the United States. The doctrine of those cases is, that the judgment of a state is to have the same credit, validity and effect in every other court in the United States which it had in the state where it was pronounced; and that whatever pleas would be good to a suit thereon in such state, and none other, could be pleaded in any other court in the United States. In the case of Mills v. Duryea, it was held that nil debit was not a good plea to an action founded on a judgment of another state; and it has been supposed by some that this decision went the length of laying down the general doctrine that the plea of nul tiel record was the only proper plea to an action upon a state judgment. But such is not the conclusion to be drawn from that case, but only that nil debit was not a proper plea in that case, but nul tiel record should have been pleaded. "For," say the court, "beyond all doubt the judgment of the supreme court of New York was conclusive upon the parties in that state, for the defendant was arrested and gave bail in the suit;" and there can be no doubt that, where the judgment is conclusive, nul tiel record is the proper plea. But if the record is not conclusive, it is open to such plea as will let in the defence which the party has a right to set up; and it would be competent for the defendant to show that the judgment was obtained by fraud, or that the court in which the judgment was obtained had not jurisdiction of the cause. Such defence might, in some cases, be set up to a suit upon the judgment in a court of the state in which it was rendered. In the case of Andrews v. Montgomery, 19 Johns. 162, Spencer, C. J., observed, that with the qualifications that the party may show that the judgment was obtained by fraud, or that the state court had not jurisdiction of the person of the defendant, we are bound, by the authority of the case in the supreme court of the United States, to consider a judgment fairly obtained in another state as conclusive evidence of the matter adjudicated; and in the case of Bissell v. Briggs, 9 Mass. 462, Parsons, C. J., in considering the construction to be given to the constitution and law of the United States upon this subject, observes that judgments rendered in any other of the United States, are not, when produced here as the foundation of actions, to be considered as foreign judgments, the merits of which are to be inquired into, as well as the jurisdiction of the court rendering them; neither are they domestic judgments, rendered in our own courts of record, because the jurisdiction of the court rendering them is put in issue, but not the merits of the judgment. That when a record of a judgment of any court of any state is produced as conclusive evidence, the jurisdiction of the court rendering it is open to inquiry; and if it should appear that the court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment; and that if the court of any state should render judgment against a man not within the state, nor bound by its laws, nor amenable to the jurisdiction of its courts, if that judgment should be produced in any other state against the defendant, the jurisdiction of the court might be inquired into; and if a want of jurisdiction appeared, no credit would be given to the judgment;[3] and the court

[3] Such inquiry is always allowable when a foreign judgment, or the judgment of a neighboring state, comes in question (Rose v. Himeley, 4 Cranch [8 U. S.] 241, 269, per Marshall, C. J.; Cheriot v. Foussat, 3 Bin. 220; Moren v. Killibrew, 2 Yerg. 376, 379, 380; The Neuva Anna and Liebre, 6 Wheat. [19 U. S.] 193); but to what length is not very clearly defined. In Bank of North America v. McCall, 4 Bin. 371, an objection was started as to the jurisdiction of a court, acting at St. Domingo, which was said not to have been derived from the proper authority; and it was held sufficient that the court was one de facto, deriving its authority from those in whom the power of the country was for the time being vested; and, therefore, it was deemed to have the jurisdiction of a legitimate court. S. P., Ingram's Heirs v. Cocke, 1 Overt. 22. See, per Best, C. J., Yrisarri v. Clement, 2 Car. & P. 223. If the origin of the foreign court does not appear, it seems that it will be presumed legitimate; but where the source of its authority is stated, the tribunal before which its judgment is produced will examine it; and if it be contrary to the usual mode of constituting courts, it shifts the onus probandi upon the party who would sustain the judgment, and it will then be for him to establish that the foreign court was properly organized. See, per Washington, J., Snell v. Faussatt [Case No. 13,138], 3 Bin. 239.

must not only have jurisdiction of the cause but of the parties.

If the judgment has no binding effect or operation, and that appears upon the face of the record, the plea of nil debit may be a good plea. It is the general issue, denying the whole cause of action, and leaves the question of jurisdiction open to inquiry. But it is not important, in the present case, to decide whether the plea of nil debit is a good plea or not; for there can be no doubt that, under the constitution and act of congress, the question of jurisdiction remains open as at common law; and it may be shown by proper evidence, that the court rendering the judgment had no jurisdiction; and the pleadings may be so shaped as to admit such evidence; and if nil debit is not a proper plea for that purpose, the want of jurisdiction may be pleaded specially.

In the case of Shumway v. Stillman, 4 Cow. 292, it was decided by the supreme court of New York, that in an action upon a state judgment, it was competent for the defendant to show, by a special plea, that the court in which the judgment was rendered had no jurisdiction either of the subject-matter or of the person; and in the present case the defendants have plead specially the want of jurisdiction in the Maryland court which rendered the judgment; and from the record itself, it appears that the process to bring the defendants before the court was served on their agent in the city of Baltimore, and a copy thereof delivered to the president of the company in the state of Connecticut; and unless such service of the process was sufficient to bring the party before the court, the judgment was obtained without any notice of the suit being given to the defendants. It is admitted, in the present case, that the Maryland court had jurisdiction of the subject-matter of the suit; but jurisdiction over the person was also necessary in order to sustain the judgment; and to give jurisdiction of the person, due notice of the suit or service of the process must be shown, or the judgment is a nullity, except in cases of proceedings under the statute process of foreign attachment, which is in the nature of a proceeding in rem, and subjects the goods attached to the judgment when recovered. But, in such case, if the goods attached are insufficient to satisfy the judgment, no suit can be sustained upon the judgment for the deficiency, because the defendant, in such case, is not personally amenable to the jurisdiction of the court rendering the judgment. The language of the courts, on the subject of notice to the party in order to give any validity to the judgment, is very strong.[4]

In the case of Thurber v. Blackbourne, 1 N. H. 243, the court say, the common law never recognizes judicial proceedings as foreign judgments, unless rendered by a court of record, upon personal notice given to the defendant, or his appearance to the action. And in Kilburn v. Woodworth, 5 Johns. 37, the court refused to permit such a judgment to be given in evidence; and they say, to bind a person by a judgment when he was never personally summoned or had notice of the suit, would be contrary to the first principles of justice; and numerous other cases might be cited to the same effect. 10 Coke, 70; 1 Conn. 45; 9 Mass. 462; Kirb. 119. It may, therefore, I think, be assumed as the settled doctrine of the law, that a judgment either strictly foreign or coming within the operation of the constitution and law of

[4] In Obicini v. Bligh, 8 Bing. 335, a suit was instituted in England to recover damages awarded by the vice-admiralty of the Island of Malta; and it was held, that the decree, in order to be evidence of indebtedness, must show expressly, and not by mere inference, that the defendant was brought within the jurisdiction of the vice-admiralty court, and that the court where the suit was pending would not presume it. So, also, in Thurber v. Blackbourne, 1 N. H. 242, 246, where debt was brought, in New Hampshire, upon a judgment of the common pleas of Rhode Island, held, that inasmuch as it did not appear by the record that the defendant had personal notice of the suit, or appeared to the action in the court where the judgment was pronounced, the judgment must be regarded as obtained without jurisdiction, for these facts would not be presumed. In Bradshaw v. Heath, 13 Wend. 407, the plaintiff, Mary Bradshaw, brought ejectment in New York, for dower, and in answer to proof on the part of the defendant, that the plaintiff, previous to the marriage in virtue of which she claimed dower, was a married woman, and that her first husband was still alive, the plaintiff produced a record of the superior court of Connecticut, containing a sentence of divorce, on her petition, from her first husband. The petition, as stated in the record, alleged that the first husband had deserted the petitioner, and had ever since been to parts unknown. No appearance on the part of the husband was shown by the record, nor did it state that he was served with process, or had notice of the proceeding; but, on the contrary, the adjudication was alleged to have been made on hearing "the plea and evidence produced by the plaintiff." The defendant proved that the first husband, at the time of the presentation of the petition, and of the granting of the divorce, was an inhabitant of the state of New York; and the court held, that although the record of a court of competent jurisdiction of another state, granting a divorce, is conclusive, and entitled to full faith and credit, yet it is so only as to matters clearly and distinctly stated in it, and not as to those which are merely inferrible by argument from the judgment; that in the particular case, the record of divorce was no evidence of the jurisdiction of the court over the person of the defendant in those proceedings, because no fact was stated giving jurisdiction; and if jurisdiction was inferrible at all, it was only so by argument from the judgment; and consequently, that the presumption under the circumstances was against the validity of the decree. See Harding v. Alden, 9 Greenl. 140 et seq. Whether jurisdiction be founded upon the person being within the territory, or the property being there, the judgment will be deemed valid, so far as that jurisdiction could legitimately extend; but no farther. Thus, a very common course, in many of the United States and in many other countries, is to proceed against non-residents, by an arrest or attachment of their property within the territory. Judgment obtained upon process of this kind, will generally bind the property so arrested or attached; for to that extent the court has or can have jurisdiction. But such judgment will not be regarded by neighboring states or other nations as evidence of indebtedness or as operative in any measure in personam; and for this very obvious reason, viz., that except so far as

the United States, obtained without notice to the defendant, or his appearing in any manner to answer to the suit, can have no validity or binding effect and operation. And the inquiry then is, whether the Maryland judgment, upon which the present suit is founded, is a judgment of this description. It was admitted on the argument, that the service of a copy of the writ and declaration upon the president of the Etna Company in the state of Connecticut, could have no legal effect; and the notice to the defendants must, therefore, depend upon the service of the process upon their agent in the city of Baltimore. And the effect and operation of such service must depend upon the Maryland law set up in the replication; for, independent of that law, this service was a mere nullity. The powers of the agent did not embrace any authority to accept or acknowledge such service, or to appear and answer to any suit instituted against the company in the state of Maryland. He was, therefore, in this respect, a mere stranger to the defendants, and the service of the process on him, was no more binding or operative than if made upon any other person; and I think the Maryland law cannot be applied to the present case so as to give any validity to the service of the process on the agent. This law, in its application to the proceedings and judgment in question is entirely retrospective; the law was passed in March, 1835. The loss for which the judgment was obtained happened in January, 1834, and the policy expired in October of the same year; and the Maryland suit was commenced in April, 1835. From these dates of the several transactions, the law is in some measure obnoxious to the inference that it was passed

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the property attached is concerned, there is and can be no jurisdiction, no power of adjudication. Picquet v. Swan [Case No. 11,134]; Story, Confl. Laws, 461; Kilburn v. Woodworth, 5 Johns. 37; Pawling v. Willson, 13 Johns. 192; Serg. Attachm. 112-114, et seq.; M'Clenachan v. M'Carty, 1 Dall. [1 U. S.] 375; Phelps v. Holker, Id. 264; Robinson v. Ward's Ex'rs, 8 Johns. 86; Borden v. Fitch, 15 Johns. 121; Hall v. Williams, 6 Pick. 232; Betts v. Death, Add. 265; Fenton v. Garlick, 8 Johns. 194, 197; Flower v. Parker [Case No. 4,891], per Story, J.; Wilson v. Graham [Id. 17,804], per Washington, J.; Bissell v. Briggs, 9 Mass. 462; Kibbe v. Kibbe, Kirb. 119; Dennison v. Hyde, 6 Conn. 508; Aldrich v. Kinney, 4 Conn. 380, 387; Earthman's Adm'rs v. Jones, 2 Yerg. 484; Hoxie v. Wright, 2 Vt. 263; Rogers v. Coleman, Hardin, 413; Newell v. Newton, 10 Pick. 470, 472; Starbuck v. Murray, 5 Wend. 148; Holbrook v. Murray, Id. 161; Bradshaw v. Heath, 13 Wend. 407, 416; Bates v. Delavan, 5 Paige, 299, 305; Armstrong v. Harshaw, 1 Dev. 188. So as to judgments or decrees in other cases, obtained against persons resident abroad without notice to them, and an opportunity afforded of defending. See the above cases. Also, Bellows v. Ingham, 2 Vt. 576, 577; Woodward v. Tremere, 6 Pick. 354; Newell v. Newton, 10 Pick. 472; Bartlett v. Knight, 1 Mass. 401; Cone v. Cotton, 2 Blackf. 82; Moren v. Killibrew, 2 Yerg. 376; Thurber v. Blackbourne, 1 N. H. 242; Bradshaw v. Heath, 13 Wend. 407; Hart v. Lodwick, 8 La. 164; Spencer v. Sloo, Id. 290. And in order that the judgment under these circumstances may be rendered binding upon the defendant in personam, the notice must be personally served upon him. This will be found sustained by all the cases: and where notice was given by publication in the newspapers, as is frequently done in certain chancery proceedings in several of the states, to bring in some of the parties who were absent, held, that a decree, pursuant to notice of that character, as against such absent defendants, was no evidence of indebtedness. Miller's Ex'rs v. Miller, 1 Bailey, 242. See Moren v. Killibrew, 2 Yerg. 376; Cone v. Cotton, 2 Blackf. 82; Rogers v. Coleman, Hardin, 413; Warren v. Hall's Ex'r, 10 La. 377. The notice must, moreover, be served upon the defendant, while he is within the jurisdiction of the sovereignty under which the court acts; for no sovereign has a just right to issue such notice to the citizen of another state or country, and thereby draw the party from his own proper forum ad alium examen. Picquet v. Swan, supra; Dunn v. Dunn, 4 Paige, 425; Fenton v. Garlick, 8 Johns. 194, 197; Flower v. Parker, per Story, J.; Wilson v. Graham, per Washington, J. [supra]; Woodward v. Tremere, 6 Pick. 354; Harrod v. Barretto, 1 Hall, 155; Kilburn v. Woodworth, 5 Johns. 37; Arnold v. Tourtellot, 13 Pick. 172; Adams v. Rowe, 2 Fairf. [11 Maine] 98. But if the party, in any of these instances, chooses to appear and contest the merits, thereby waiving his personal immunity, and submitting to the jurisdiction of the court, the judgment would then doubtless bind him personally, and be entitled to the same measure of respect with the judgment of a neighboring state or a foreign country, as the case may be, obtained in the ordinary mode. Picquet v. Swan [Case No. 11,134]; Flower v. Parker; Hall v. Williams, 6 Pick. 237; Shumway v. Stillman, 6 Wend. 447, 4 Cow. 292; Starbuck v. Murray, 5 Wend. 148; Hoxie v. Wright, 2 Vt. 262; Bellows v. Ingham, Id. 575; Mayhew v. Thatcher, 6 Wheat. [19 U. S.] 129; Wheeler v. Raymond, 8 Cow. 311; Price v. Higgins, 1 Litt. (Ky.) 276; Moore v. Spackman, 12 Serg. & R. 287. See, also, Bradshaw v. Heath, 13 Wend. 407. Otherwise, however, it has been said in cases of foreign attachments, where the defendant has merely appeared to protect his property. Semble, Bissell v. Briggs, 9 Mass. 469, per Parsons, C. J.; Pawling v. Willson, 13 Johns. 207. But, in Starbuck v. Murray, 5 Wend. 159, Marcy, J., delivering the opinion after referring to the above case of Bissell v. Briggs, lays down the law as follows: "The court would not, in such a case, I concede, have jurisdiction over the defendant's person for any other but the direct objects of the proceedings; and so far as those were concerned, he would be subjected to the authority of the court. If a citizen of one state should go into another to claim property seized on attachment, and subject the attaching creditors to costs and expenses, which, in the due course of the proceedings, should be adjudged to them by a court of competent authority, will it be pretended that he could resist the payment of these costs on the ground that he was not subject to the jurisdiction of the court? For all the fair and direct objects of the suit, he was within its jurisdiction. So if the proceedings were not in rem, but the property of the defendant was attached to compel him to appear and answer to proceedings in personam, and he did in fact appear and litigate the cause with the plaintiff, he could not be heard to question the jurisdiction of the court over his person. I do not think Chief Justice Parsons intended to say more than this, that when a court had the jurisdiction of a defendant for one purpose, it could not legally bind him by a judgment or sentence in a distinct and different matter." See Moore v. Spackman, 12 Serg. & R. 287. If the party, by an act of lawless violence on the part of a few citizens of a particular state, is seized and brought within its jurisdiction from another state, he may, nevertheless, be subjected to the jurisdiction of the courts of the state into which he is so brought. State v. Smith, 1 Bailey, 283. See same case before the chancellor, Id. 290, note a.

to meet the very case. But this can form no objection to it if the case can be brought within it; and the abstract justice of the law as applicable to subsequent cases, cannot be questioned. The defendants, as a body corporate, could have no right to establish themselves, or transact business in the state of Maryland, otherwise than according to the provision of the laws of that state. The provision in the constitution of the United States, "that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," can not be applied to corporations; and the state of Maryland had a right to exclude the corporation from transacting business in that state. And if the defendants, after the passage of that law, had continued underwriting policies in that state, they would be presumed to do it upon the terms and conditions of the act; and as to all causes of action thereafter arising, would subject themselves to prosecution in the mode pointed out by the act. This law may be considered as a kind of quasi incorporation of insurance companies which have not been chartered by the state; and if such companies exercise franchises there, it is just and reasonable that they should subject themselves to prosecutions for losses, in the courts of that state, and will be deemed to have assented to the mode provided by the act for instituting suits for such losses. But the law in question, although it purports upon its face to have a retrospective operation, cannot be considered as having such effect and operation. It is a sound general principle that no statute ought to have a retrospective effect. It is the general rule that a statute takes effect from its date, when no time is fixed; and it cannot, upon sound principles, be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed. A retroactive statute partakes, in its character, of the mischiefs of an ex post facto law, and when applied to contracts or property, would be equally unjust and unsound in principle as ex post facto laws when applied to crimes and penalties. 1 Kent, Comm. 426; [Matthews v. Zane] 7 Wheat. [20 U. S.] 164; 7 Johns. 477; The Ann [Case No. 397].

Judgment for the defendant.

Case No. 17,207.

WARREN SAV. BANK v. PALMER et al.

[10 N. B. R. 239;[1] 10 Phila. 286; 31 Leg. Int. 261; 6 Chi. Leg. News, 366; 21 Pittsb. Leg. J. 193.]

District Court, W. D. Pennsylvania. 1874.

BANKRUPTCY PROCEEDING—FILING LIST OF CREDITORS.

Where an involuntary petition was filed since December 1, 1873, and the alleged bankrupt has made denial of the acts of bankruptcy and demanded a jury trial, he will, under section 39, as amended June 22, 1874 [18 Stat. 178], be required to file a list of his creditors, and the amount of their claims.

McCANDLESS, District Judge. The Warren Savings Bank in one case and the First National Bank of Warren in the other, filed involuntary petitions in bankruptcy against the respondents, J. K. Putnam & Co. Both were filed since the 1st of December, 1873. In each there was a denial, and a demand for trial by jury, which was ordered at this term. To these petitions a demurrer was filed yesterday, the 20th of July. This, in the language of the act, is a denial as to the requisite number of the petitioning creditors and the amount of their claims, a denial as to the sufficiency of the one-fourth in number of the creditors, and one-third in value of the debts. Thus far in the progress of the proceedings in these cases this would authorize the court to demand of the debtors a schedule of all their creditors, with the amount of the debts due to them respectively, to be rendered to the court forthwith. Before the court had any opportunity to make the order in these cases, the creditors anticipated the action of the court, by asking leave to file a supplemental and amended petition, containing a sufficient number of creditors, as is alleged, to perfect their case. Thus far, this is all proper, and the court now, as it would have done if the amended petition had not been filed, orders the debtors forthwith to file a list of their creditors, as provided in the amendment to the 39th section of the bankrupt law, and in the meantime the petition filed by the creditors on the 20th instant, to remain on file for the information of the court.

[1] [Reprinted from 10 N. B. R. 239, by permission.]

Case No. 17,208.

The WARRINGTON.

[Blatchf. & H. 335.][1]

District Court, S. D. New York. Oct. 19, 1832.

WAGES OF SEAMEN—RECOVERY—ACTION IN REM—TIME OF SUIT.

1. Where no wages are stipulated in shipping articles, a seaman may either prove, by parol evidence, what wages were agreed to be given, or may, under the statute (Act July 20, 1790, § 1; 1 Stat. 131), claim the highest rate payable at the port of shipment within the three months next preceding the date of the articles.

2. Although, in an action in rem for wages, a warrant is issued under a certificate of sufficient cause of complaint for admiralty process, conformably to the statute (Act July 20, 1790, § 6; 1 Stat. 133), yet the owner of the vessel may intervene by answer, and bar the action by proving that the libellant had no right to sue.

3. A seaman who hires for a trading voyage for a specified time, cannot sue for wages until the expiration of the time, unless there be proof of his actual or constructive release.

In admiralty. This was an action in rem, for wages. The libel set forth the voyage agreed upon, and averred that it had been performed, and charged that no shipping ar-

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

ticles for the voyage were signed by the libellant, and that the master agreed to pay him wages at the rate of $12 per month. The answer averred that shipping articles were regularly signed by the libellant, and that no wages were stipulated, because the libellant agreed to serve without any; and that, if he was entitled to wages, he had no right of action, inasmuch as the term of service stipulated in the articles yet remained unexpired. On the trial, shipping articles, signed by the libellant, were produced and proved. They contained no statement of any rate of wages agreed upon. The libellant offered parol evidence to prove what rate of wages the master agreed to pay, which evidence was objected to by the claimant.

Edwin Burr and Erastus C. Benedict, for libellant.

Thomas C. Pinckney, for claimant.

BETTS, District Judge. I perceive no objection to the competency of parol evidence to prove an agreement with the libellant as to the amount of wages to be paid. The seaman stands, in this particular, as if no articles had been entered into; and, in such case, the contract on both sides is a subject of parol proof. The Porcupine, 1 Hagg. Adm. 378; The Harvey, 2 Hagg. Adm. 79. The parol evidence does not contradict the articles. They are conclusive upon the libellant no further than his express engagements go, and no implication to his prejudice can be raised from an omission which is the fault of the master and not of the mariner. Nor is the right of the libellant limited to the highest rate of wages payable at this port within the three months next preceding the date of his contract. I apprehend that, under the fair implication of the statute (Act July 20, 1790, § 1; 1 Stat. 131), the master would be inhibited from giving evidence of any agreement by the mariner to accept less than such rate of wages, although a judge of high learning and experience has intimated a contrary opinion (Jamieson v. The Regulus [Case No. 7,198], note); but, manifestly, the restriction ought not to apply to seamen. It would often operate as a bounty to masters to disregard the injunctions of the statute, as well as a serious prejudice to mariners. The fluctuations in trade and navigation often work rapid changes in the rates of compensation to sailors. It is not unusual to find prices suddenly advance twenty-five or thirty per cent., with a brisk market and active freights; and seamen's wages, which have remained for months at from eight to twelve dollars, are known to rise at once to fifteen and twenty dollars per month for the same services. This profit should not be gained by the master and lost to the mariner, and the law will discountenance any rule applicable to the subject, which shall tend to favor the former at the expense of the latter. Assuming the contract to have been made within the United States, it was the duty of the master, specifically prescribed by the 1st section of the act of July 20th, 1790 (1 Stat. 131), to have made an agreement, in writing or print, with any seaman taken on board his ship, and he incurred a penalty by omitting to do so. This written contract is held conclusive against the seaman, as well in regard to wages as to the voyage and the term of service (The Isabella, 2 C. Rob. Adm. 241; White v. Wilson, 2 Bos. & P. 116; Bartlett v. Wyman, 14 Johns. 260; Johnson v. Dalton, 1 Cow. 543); although it is remarkable that the American statute does not require, as the English acts do, that the rate of wages shall be inserted in the articles. It would be against the plainest principles to suffer the mariner to be deprived of his rights or privileges through the misconduct or omission of the master in framing and taking the shipping contract. The statute speaks only of the master as the party acting primarily in the preparation of the written agreement. The words are, "every master, &c., shall, before he proceed on such voyage, make an agreement, in writing or in print, with every seaman or mariner on board, &c., declaring the voyage or voyages, term or terms of time for which such seaman or mariner shall be shipped; and, if any master, &c., shall carry out any seaman or mariner, &c., without such contract or agreement being first made and signed by the seaman or mariner, such master, &c., shall pay to every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping, * * * and shall, moreover, forfeit twenty dollars for every such seaman or mariner." 1 Stat. 131. It is plainly intended by the statute, that the crew are to act secondarily, and by the procurement of the master, in entering into the contract. No express obligation is laid on the seamen to execute the articles. They only lose their voyage if they refuse to sign the articles; and, in my opinion, the master cannot, by taking the mariners to sea without a written agreement, avail himself of his own misfeasance, either to limit their compensation to any prior rate of wages, or to prevent them from proving the actual agreement by parol, when he has deprived them of the higher evidence of the shipping articles. They are not obliged to accept less than the highest rate at the port of shipment during the preceding three months; but it seems to me, that it cannot be justly implied from the statute, that they are prohibited from recovering the actual value of their services at the time, or the sum agreed by the master, however that may exceed the accustomed pay antecedent to the time of the contract. Judge Peters held, that a mariner might recover the value of privileges granted him supplementary to the shipping articles, and not written in them, the act of congress not requiring their insertion.

Parker v. The Calliope [Case No. 10,729]. However this decision may be regarded as admitting, in effect, parol proof, to vary and enlarge the compensation fixed by the articles, it is a manifest recognition of the doctrine that, in the absence, in the written agreement, of all stipulations on that head the mariner is entitled to claim pay on the footing of a verbal contract with him.

This topic has been considered more in detail in this case, because, although, under the decree which will be rendered, the libellant can derive no advantage from the principle declared, yet, that principle has a material application to a point urged by the libellant against that branch of the defence which objects to the action as prematurely brought, and insists that it must, for that reason, be dismissed. To meet the objection that the agreed term of service is unexpired, it is urged, by the libellant, that the misconduct or laches of the master, in neglecting to have shipping articles signed by the seamen, with a distinct agreement for wages, renders the articles inoperative as to the stipulations for the voyage and the time of service.

The articles were entered into by the libellant on the 28th of January, 1832, for the term of ten months. The voyage was a circuitous one to Central America, the West Indies, and back to any port on the North Atlantic. The libellant entered on board at the same time, and served until the arrival of the vessel in this port, on the 27th of March last, leaving eight months of the term yet unserved. No proof is given that the voyage ended at this port. The libellant left the vessel immediately on her arrival in port, and the other men were paid off a few days subsequently; but there is no evidence that the libellant was discharged by the master. He was sick and useless on the voyage, and stated to one of the crew, that he left the ship to go to the hospital. If the case were one of meritorious services, I should be disposed to imply the consent of the master to the libellant's discharge, especially if there was any appearance of bad faith or overreaching in the conduct of the master in insisting upon the terms of the contract, particularly as it does not appear that the vessel was to proceed further, or that any duty remained for the libellant to perform on board. As the case stands, however, the libellant must be limited to the rights given him by the contract; and, under that, he establishes no title to maintain the present action. The argument, that the written agreement is void because a rate of wages is not stated in it, cannot be maintained. The libellant was competent to contract for a voyage and a term of service. The engagement of ten months was to his advantage; and, on the facts in evidence, he would be entitled to claim payment of wages for that term, had he demanded them and offered to fulfil the engagement on his part. He took to himself, however, the right to abandon the vessel, directly on her arrival in port, and commenced this suit to recover wages. The period of his hiring yet remaining unexpired, he establishes no present right of action.

As to the point taken by the libellant, that this action was instituted by summons, upon the hearing of which process was awarded against the vessel, pursuant to the statute (Act July 20, 1790, § 6; 1 Stat. 133), and that the defence now set up was not raised before the judge on that proceeding, this court has heretofore held, that matter in bar of the action may be set up in the answer, and be urged at the final hearing, although it was not presented on the preliminary hearing before the magistrate, on the summons. That hearing is not designed to preclude the owner from interposing a substantial defence on the merits, whether that defence is set up on such hearing or not. The silence of the claimant as to any such defence, is no implied waiver of it, nor is the decision of the magistrate, as to the sufficiency of the cause shown, regarded as conclusive. The libel must be dismissed, with costs. Decree accordingly.

Case No. 17,209.

In re WARSHING et al.

[5 N. B. R. 350.] [1]

District Court, S. D. New York. May 24, 1871.

BANKRUPTCY—COUNSEL FOR ASSIGNEE—COMPENSATION.

Where the register is called on to certify as to what sum he deems right to be paid to the counsel for the assignee, and signifies three hundred and fifty dollars as the utmost limit, but certifies the question to the court for its opinion because counsel feels aggrieved at the inadequateness of the sum, the ruling of the register was sustained.

[Cited in Re Cook, 17 Fed. 329.]

I, the undersigned register in bankruptcy, having charge of the above entitled matter, do hereby certify that I have been called upon by the assignee of the estate of the bankrupts above named [J. Warshing and S. Warshing] to tax and adjust the sum which his counsel shall be paid from the funds of said estate in his hands as assignee—or in other words to certify what sum I should think it right to allow him as paid to such counsel upon the final passing of the assignee's accounts. I have therefore entered upon an examination of the claim of the said counsel and have signified three hundred and fifty dollars as the utmost limit I should feel justified in allowing to him for such aid as he is or may have been entitled to have from counsel in the discharge of his trust. I have stricken out several of the items as not allowable under the second and third subdivisions of the printed instructions heretofore approved by this honorable court, a copy of which is printed upon the

[1] [Reprinted by permission.]

back of the assignment to the said assignee. I think it right further to certify, that the services of said counsel seems to me to have been faithful and well directed, and should the court think the amount allowed therefor too small, I shall, if so directed, cheerfully review my conclusion and allow a higher sum. I scarcely think that the present is a case which I am at liberty to certify to the court, but I do so as counsel seems aggrieved and desire the matter to be reviewed by the court.

I. T. WILLIAMS, Register.

BLATCHFORD, District Judge. I see no reason to believe that the sum allowed by the register is not an adequate sum.

Case No. 17,209a.

WARTH v. BROWNING et al.

[5 Ban. & A. 341; [1] 17 O. G. 624.]

Circuit Court, S. D. New York. April, 1880.

PATENTS—INFRINGEMENT.

Letters patent No. 10,986, May 30th, 1854; No. 106,101, August 2, 1870; No. 124,180, February 27, 1872; and reissued letters patent No. 5,004, 23rd July, 1872; and No. 5,186, 10th December, 1872, each granted to the complainant for improvements in machines for cutting cloth, construed by the court, and, upon the construction given, the defendants *held* not to have infringed.

[This was a bill in equity by Albin Warth against William C. Browning and others to restrain the alleged infringement of certain letters-patent.]

George Gifford and J. Van Santvoord, for complainant.

Edward N. Dickerson and George L. Roberts, for defendants.

WHEELER, District Judge. John Harraday invented a machine for cutting cloth, several thicknesses at a time, into patterns for garments and furniture, and took out letters patent No. 10,986, dated May 30th, 1854, for it. The orator invented improvements in such machines, and took out letters patent No. 106,101, dated August 2d, 1870, for some of them, and letters patent No. 124,180, dated February 27th, 1872, for others of them; and on the 23d day of July, 1872, his first letters patent were reissued to him in No. 5,004, and again, on the 10th day of December, 1872, in No. 5,186. The defendants use such machines, and this suit is brought for alleged infringements of the orator's patents by that use.

The rules of law applicable to this case appear to be stated by Mr. Justice Bradley in Railway Co. v. Sayles, 97 U. S. 554, where he says: "In such cases, if one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance towards the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs."

The question is, whether the defendants' machine differs from the orator's, and does not include the improvements which he made. Harraday's machine cut the layers of cloth by a knife reciprocating perpendicularly through a circular plate in the surface of a table, the knife being worked by machinery and cutting against a sharp edge of the plate at the side of the opening through which it worked, and both knife and plate turning by other machinery worked by hand, so as to cut in any direction required by the pattern as the cloth should be fed up to the knife. The orator arranged the machinery operating the knife so that the knife and plate could be turned directly by a handle fastened to the plate by a standard in rear of the knife, thus dispensing with machinery for turning them; placed flanges, mould-board shaped, each side and just forward of the standard supporting the handle, to divide the cloth more widely after being cut; made a socket in the plate to receive the knife, arranged so that the knife would work closely against its edges at each side of the knife; provided a presser-foot for holding the cloth down, and arranged a guard for the knife, to protect the hands of the operators when the machine was in use, and movable, so as to give access to the knife when not in use.

The defendants' machine consists of a revolving cutter working in a groove in a rectangular plate, oval on the upper side, from which a standard arises, supporting the axle of the cutter and connecting at its upper end with arms, having a universal joint, supporting machinery to carry the cutter, so that the cutter, with the plate in which it works, can be turned in any direction required by the pattern of the cloth, and carried in any direction over the table on which the machinery is placed—the plate under and the cutter through the cloth, guided by a handle fixed to the standard connected with the plate in rear of the cutter, the oval shape of the upper side of the plate separating the divided cloth wider than it would be otherwise, and the upper part of the cutter provided with a guard for the safety of the operator, removable, so as to afford access to the cutter when not in use.

The form of the defendants' machine is quite different from that of the orator. His is much more like Harraday's than theirs is like his. They do not infringe his patents unless their machine, although different in form, includes some of his patented improvements on Harraday's. His patent can be sustained only by construing it as covering those improvements

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

merely, in view of the prior machine. The most prominent of these improvements was doing away with the machinery which turned and controlled the direction of the knife and plate, and arranging the other machinery so that they could be directly turned and controlled by the handle back of the knife. This was a long step toward perfecting the machine, and must have been a great advantage to its operation. The defendants do not take any advantage from that step. They have neither Harraday's machinery, nor the orator's, by using which he made room for applying the handle. They have a cutter operated by machinery entirely different from either. Their machine does not include this part of the orator's improvements. He applied the handle in connection with his new machinery and arrangement, and, in that connection, his patent for that part of his invention would cover it. It is argued that it should cover the handle as used by the defendants. Had the use of handles for such purposes been his invention, his patent might have covered the handle by itself; but such use of handles was not new. The handles of the common shears of a tailor are not only a proved, but a well-known other mode of directing cutters in their proper course by the hand. The defendants have a cutter which of itself is entirely free from the orator's patent. It is capable of being moved over its table in the proper direction for cutting the cloth to the pattern. Their right to take hold of it and guide it without the handle would be unquestioned. It seems quite plain that they have also the right to put a handle on the cutter at the place where they wish to take hold, and to use that. It would only be making a new use of a very old device. Roberts v. Ryer, 91 U. S. 150.

It is argued, also, that the oval shape of the plate in which the revolving cutter works is an infringement of the part of the patent relating to the mould-board-shaped flanges. That shape does separate the divided parts of the cloth after the manner of the flanges, but not more like them than the thick part of the tailor's shears does. The orator's patent would not stand for that device by itself. The defendants do not infringe by using this device in any manner that the patent will cover and be valid. It has also been urged that the cutter working in the groove in the plate is the same as the knife of the orator working in its socket. It is said, on the other side, that the revolving cutter does not shear, but saws through the cloth. It does work like a saw, and not like shears; but the cloth is held by the edges of the socket for it to cut through, as the cloth is held by the orator's knife-receiving socket for his knife to cut through. Harraday's plate held the cloth in the same manner for his knife, however, and there does not appear to be any construction that can be given to the patent which will uphold it against this as an infringement. It does not appear that the defendants' machine includes any of the orator's patented devices. Let there be a decree dismissing the bill of complaint, with costs.

Case No. 17,210.

WARTMAN v. WARTMAN.

[Taney, 362.] [1]

Circuit Court, D. Maryland. April Term, 1853.

COMMITMENT FOR CONTEMPT—TRUST FUND—PAYMENT INTO COURT—DISOBEDIENCE OF ORDER—JUSTIFICATION—EFFECT OF INSOLVENCY.

1. On a bill, filed in January, 1852, praying that certain money held in trust by the defendant might be ordered to be brought into court, the defendant answered, admitting that he had the money in his hands, but resisting the claim to it set up by the complainant:. on the 2d of November, 1852, some months after the defendant had answered the bill, a petition was filed by the complainant, asking that the money might be brought into court, and on this petition, an order was passed, directing the defendant to pay the money into court, or show cause for not doing so; the defendant did not obey the order, and excused his so doing, on the ground that the complainant was not entitled to the money, and that he had paid it away to the persons who were entitled: thereupon, a peremptory order was passed, requiring him to bring the money into court, but in indulgence to him, a proviso was annexed, that a bond with security should be deemed a compliance with the order: this order was also disobeyed by the defendant, and his answer was put in, assigning the same reason as before for refusing to comply with it: *Held*, that the defendant was guilty of contempt in parting with the fund, whilst the question as to its disposition was pending before the court.

2. The assertion of want of title in the complainant, was a question to be decided upon the final hearing; the only question upon the order was, as to the safety of the trust fund, pending the litigation, so that it might be forthcoming when the rights of the parties were finally decided.

3. As to the request, in the answer to the second petition, that the order be suspended till the final hearing, it was nothing more nor less than an application to the court to abandon the measures it had taken to secure the fund, because the defendant had determined not to comply with its orders.

4. The defendant, being in contempt for disobedience to the authority of the court, was not entitled to be heard on any motion, nor authorized to take testimony, or to proceed in any other manner, until he purged himself of the contempt.

5. After arrest and commitment, it was not admissible for the party to apply to have the attachment set aside, and the question of his commitment heard, on the ground that his noncompliance with the order of the court arose from his inability so to do, and not from an intention to contemn the court's authority; that he had been informed by his counsel that nothing would be done with the attachment, till the following term, when the whole case would be settled; and that he had been busy since, in procuring testimony, in order to prepare the case for a final hearing, and to show that the complainant had no right to the fund.

6. Before the attachment was issued, opportunity had been given him to show cause against it, and if any such cause existed, then was the time to show it.

7. The question whether a contempt has or has not been committed, does not depend on the intention of the party, but on the act done.

[Cited in U. S. v. Anon., 21 Fed. 772.]

[Cited in Cartwright's Case, 114 Mass. 239.]

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

8. Contempt is a conclusion of law from the act; and disobedience to the legitimate authority of the court is, by law, a contempt, unless the party can show sufficient cause to excuse it. [Cited in Corbin v. Boies, 34 Fed. 699.]

9. If the defendant was not able, at the time he distributed the trust fund, to replace it, in case the court should order it to be brought in, or should finally decree in favor of the complainant, the distribution he made was not only in contempt of the authority of the court, but a fraudulent attempt to defeat the just rights of the complainant, if the decision should be ultimately in his favor.

10. If the matter were postponed till the time of the final hearing, it would not alter the case, as the question then to be first decided would still be upon the orders for the security of the fund; and there could be no final hearing till they were disposed of.

11. If he were now actually an insolvent debtor, and his property transferred to a trustee, appointed by the proper legal tribunal, this court would discharge him from the commitment for contempt, because he would be obliged, with his petition, to return a schedule of all his property; and the fact that it was all conveyed to the insolvent trustee, would show, that it was no longer in his power to pay the money into court, or give the security required for its forthcoming, if the final decision should be against him.

The defendant in this case was attached for contempt of court, in disobeying an order requiring him to bring into court, or give security for the forthcoming of, a sum of money, admitted, by his answer to a bill in equity, to be in his hands. Heard on application to be discharged from the attachment.

W. B. Prime, for complainant.

D. & J. Stewart and Wm. H. Norris, for defendant.

TANEY, Circuit Justice. In the case of Charles C. Wartman [by his next friend, John C. Bullit] against Michael K. Wartman, an application has been made to the court to discharge the respondent from the attachment heretofore issued against him, for a contempt in disobeying the order of the court, upon which attachment he is now imprisoned.

In deciding upon this application, it is necessary to review the proceedings prior to the attachment, and more especially, the orders of the court and the answers made to them by the defendant, which finally led to his commitment for a contempt.

It appears that Abraham Wartman, the father of the present defendant, devised to him a large sum of money, in trust for John K. Wartman (another son of the said Abraham), during his lifetime, and after his death, in trust for such child or children as the said John K. Wartman might thereafter have; and in default of such issue, the said fund was to be equally divided between the children of the testator. The will directed that the fund should be invetsed by his executors, during the lifetime of John K. Wartman, in stock or some other productive securities. This is the substance of the will and codicil of Abraham Wartman, so far as it is material to state their provisions in deciding the question now before the court.

John K. Wartman, for whose benefit the trust was created by his father, is since dead; and the complainant, who is an infant, filed his bill, by his next friend [John C. Bullit], in which he alleges that he is the only child of John K. Wartman, and as such, entitled to the whole of this trust property, under the will of his grandfather, Abraham Wartman; and praying that Michael K. Wartman may be compelled to render an account of the amount in his hands, and to pay it over to the complainant. The bill also alleges that the money is unsafe in the hands of the defendant, and prays that the same may be brought into court, and invested in some safe and productive security, under the authority of this court.

The bill was filed on the 5th of January, 1852, and the defendant answered on the 20th of April following. He admits that he had, at that time, in his hands, in cash, $7,544.83 of the trust fund created for the benefit of John K. Wartman; he admits that he had refused to account for it with the complainant or his agents, or to pay it over to him, because, as he avers, the complainant is not the child of John K. Wartman; he also avers that the said John K. Wartman died without leaving any issue, and that the trust fund belongs to the children of the testator, of whom the defendant is one.

The district judge, having been counsel in the case, and the chief justice, being necessarily absent during the whole of the April term, 1852, attending the supreme court, no order could be taken at that term, upon the application in the bill for an order to bring the money into court; and the case was continued to the next term, the parties, by consent, issuing a commission to take testimony, in order to prepare the case for final hearing. At the beginning of the next term, that is, on the 2d of November, 1852, the complainant filed his petition, again averring that the trust fund was insecure, and praying that the defendant might be ordered to bring the money into court, to be invested, under the direction of the court, in some productive security, to await the final decision of the controversy then pending between the parties. Upon this petition, the court passed the usual order in such cases, directing the defendant to bring the money into court, on the 24th of that month, or to show cause to the contrary.

The defendant did not bring the money into court, and assigned as his reason for not doing so, that the complainant was not the son of John K. Wartman, and had no interest in the trust fund, and that the defendant had, therefore, felt it to be his duty to distribute it among the persons who were entitled to it, upon the death of John K. Wartman without children, and having thus disposed of it, he had no longer any trust funds in his hands.

Now, whether the complainant was or was

not the child of John K. Wartman, is a question for the court to decide, upon the final hearing of the cause, and not for the defendant; it is the very matter in issue. The defendant admitted that the trust fund was in his hands, when he filed his answer to the bill, and he knew that the application made in the bill, for an order upon him to bring the money into court, upon the ground that it was insecure in his hands, was pending before the court and awaiting its decision. And he now offers as a justification for his refusal to pay it into court, that, in his judgment, the complainant was not entitled to it, and that he had, therefore, paid it to those whom he considered entitled, regardless of any order the court might pass for the security of the fund, pending the controversy. In other words, that he had decided the matter in dispute for himself, and had determined to evade and defeat any order the court might make for the security of the fund, by paying it over to others, and thus putting it out of the reach of the process of the court.

The answer has, at least, the merit of frankness; but the avowal of the contempt he had committed, in parting with this trust fund, while the question as to its disposition was pending before the court, can hardly be received as a justification for his refusal to replace the money.

After such an answer, a peremptory order to bring the money into court, was a matter of course; but as it was possible, that the party might have acted under some error of judgment, and might be subjected to some inconvenience, by being compelled to replace the trust fund, and as the only object of the court was to place it in a state of safety, until the decision of the question in issue between the parties, a proviso was annexed to the order, by which it was directed that a bond, with security for the forthcoming of the money, provided the decision was finally in favor of the complainant, should be received as a compliance with the order to bring the money into court. It left it, therefore, optional with the defendant, to pay the money into court, or to give security for its forthcoming. The order was issued on the 3d of December, 1852, and the defendant directed to comply with it on or before the first day of January following.

This order was also disobeyed, and an answer put in reiterating the same things that he had stated in answer to the former order, and assigning the same reason for refusing to comply with it. There is one fact, however, stated in it, which did not appear in his former answer, that is, that in the distribution he made of the trust fund, he retained in his hands the one-third of it (upwards of $2,000), as his own share, and now declines bringing it into court, because he had appropriated it to his own use. He takes no notice whatever of the alternative which the order permitted, of giving security that the trust fund should be forthcoming to abide the final decision of the court; he does not allege that he is unable to give the security, and assigns no other reason for his disobedience of the whole order, but his belief that the complainant is not the son of John K. Wartman, and therefore, not entitled to the fund.

As regards his assertion in this answer that the complainant is not the son of John K. Wartman, it is altogether irrelevant to the matter in hand and out of place; that question is to be decided on final hearing. The only question upon the order was, as to the safety of the trust fund, pending the controversy, so that it might be forthcoming when the rights of the parties were finally decided by the court. And as to the request contained in this answer, that the order be suspended until the final hearing, it is nothing more nor less than an application to the court, to abandon the measures it had taken to secure the fund, because the defendant had determined not to comply with its orders, and to contemn its authority.

It is, moreover, proper to remark, that the defendant, being in contempt for disobedience to the authority of the court, is not entitled to be heard on any motion, nor authorized to take testimony, or to proceed in any other manner, until he purges himself of the contempt. This is the well-settled principle of chancery law, and it would be impossible for the court to enforce its just authority upon any other principle.

The chief justice being at Washington, attending the supreme court, no order could be taken on this answer until he returned to Baltimore. Immediately upon his return, the complainant applied for an attachment against the defendant, to compel his obedience; and the court being unwilling to proceed to extreme measures, without giving the defendant every opportunity of purging himself of the contempt which he had openly committed and avowed, it directed notice of the motion to be given to his counsel, that he might show cause, if any he had, why the attachment should not issue. His counsel appeared and was fully heard; his objections consisted in an application for delay until the final hearing, and an objection to the want of the proper averments of citizenship in the bill so as to give jurisdiction to the court. As relates to the application to abandon the order, it was altogether inadmissible, for the reasons already stated; and as to the defect in the bill, it appeared, upon examining the papers in the case, that it had long before been amended, by consent of counsel, and the amendment had no doubt escaped the recollection of the counsel for the defendant, when the objection was taken.

In this state of the case, nothing remained for the court, but to surrender its authority over this trust, or enforce obedience by an attachment; and an attachment was accordingly ordered, upon which the defendant was arrested, and committed to prison in obedience to the writ.

Since his arrest and commitment to prison by the marshal, he filed in court an application, stating that his non-compliance with the order to bring the money into court, or to give security, arose from his inability to do either, and not from any intent to contemn the process of the court; that he had been informed by his counsel, that nothing would be done until the April term, when the whole case would be settled; and that he had been busy since in procuring testimony, in order to prepare the case for a final hearing, and to show that the complainant had no right to the fund. He denies that he was wilfully guilty of any contempt of the court. Upon this affidavit, an application has been made in his behalf, to set aside the attachment, upon the ground that the affidavit purges him of the contempt, and that he has not had an opportunity of being heard on that subject.

As relates to the suggestion in this application, that the party has not had an opportunity of being heard, to show cause against his commitment on this attachment, it is a mistake as to the fact; as has been already said, notice of the motion for the attachment was given to his counsel, who appeared and was fully heard; and this opportunity of being heard before the attachment issued, was given by the court, because it was more favorable to the defendant, and would save him from arrest, if he had any sufficient cause to show against it; and if any such cause existed, then was the time to have shown it.

As regards the question, whether a contempt has or has not been committed, it does not depend on the intention of the party, but upon the act he has done. It is a conclusion of law from the act; disobedience to the legitimate authority of the court, is, by law, a contempt, unless the party can show sufficient cause to excuse it.

As regards the acts of the party in this respect, they have been already stated. After he had been brought into court to answer for a trust fund, which he admits to be in his hands, in cash, when he answered, and while an application was pending to order the fund to be brought into court, because it was insecure in his hands, he says that he appropriated one-third of it to his own use, and paid the remaining two-thirds to others, and then sets up this open defiance of the authority of the court, as an excuse for his conduct. And as regards this defence, such as it is, he does not offer the slightest evidence to support his averment, that he had ever paid away two-thirds of this fund to any one, nor does he, in his answer, undertake to say when it was paid; for aught that appears, if the payment was ever made, it may have been done after the order was served upon him, and made for the very purpose of setting up that defence.

So too, as regards the security for the trust fund; he does not say that he was unable to have given it, either before he filed his answer, or when he distributed the trust fund. And if he was not able, at the time he distributed it, to replace it, in case the court should order it to be brought into court, or should finally decree in favor of the complainant, the distribution he made was, not only in contempt of the authority of the court, but a fraudulent attempt to defeat the just rights of the infant complainant, if the decision should be ultimately in his favor. But he does not say in his affidavit that he was unable to have given the security, when he paid away or appropriated the trust fund. And if he was able then, why is he unable now? He states no losses of property or money since that time; he does not say that the large portion of the fund which he retained for himself, has been lost, but merely that he appropriated it to his own use. If he purchased property with it, what has become of that property? Moreover, he did not, in his answer of the first of January, say he was unable to give the security, although that was an alternative presented by the order; he evaded that part of the order, and passed over it without offering any excuse for not complying with it; nor was any difficulty on that score suggested when his counsel was heard in opposition to the attachment. It is for the first time put forward in his affidavit, filed on the 26th of March, after he was in actual custody under the attachment. Such an excuse comes, at this late hour, under very suspicious circumstances, when he presents with it no schedule of his property, shows no losses since he paid away two-thirds of the trust fund, and does not even now offer to account for the one-third, which he retained in his own hands and appropriated to his own use.

As to the application again repeated in this affidavit, to abandon the proceedings to secure the trust fund, and proceed to the final hearing of the case, the court has already expressed its opinion upon a former similar application; and this constant reiteration tends only to confirm that opinion. He says that he was informed by his counsel, after his answer to the peremptory order to bring the money into court, or to give security for its forthcoming, that there would be no further proceedings until the meeting of the court on the first Monday in April. But he does not show that he was put to any disadvantage or inconvenience by this mistake of his counsel. He was not prepared, it seems, to pay the money or give the security on that day, nor has he yet tendered either, and if there had been no further proceedings until the meeting of the court, the question would then still have been precisely the same that it is now, and was when the attachment was applied for. The question to be first decided would still have been, upon the orders for the security of the fund; and there can be no final hearing, until they are disposed of. He states also, that a commission had issued, with the consent of the complainant, to take testimony and prepare the case for final hearing at the April term; but the court do not see how this circumstance affects the question. If the

complainant withdraws his application for process to secure the trust fund, that indeed would alter the case; but he has not done so. And the court would be forgetful of its duty, and surrender its whole power over trustees and trust property, if it failed to enforce its orders for the security of a trust fund, admitted to be in the hands of the trustee, when he answered, and deemed to be unsafe in his possession; for a final decree would be idle and nugatory, if, pending the litigation, a fraudulent trustee was left at liberty to waste or misapply the trust property, or place it beyond the reach of the process of the court. Certainly, this case, as it now stands, is not one in which the court would be disposed to depart from the ordinary course of chancery proceeding; for upon comparing the various answers and affidavits of the defendant, the conclusion seems to be irresistible, that this fund was partially paid away, and the residue applied to the defendant's own use, not only in contempt of the authority of the court, but for the purpose of defrauding the infant complainant of his just rights, if the decision of the court should be ultimately in his favor.

The defendant cannot exonerate himself from this imputation except in one of two ways. First. By showing by satisfactory proof, at what time two-thirds of this fund was paid away, and the other third appropriated to his own use and how appropriated; and that at the time of this payment and appropriation, he had sufficient means to replace it, if the decision of the court was against him, and if he had sufficient means at that time, how it has happened that he is not able to pay the money or secure the fund. Or, secondly. That he is now actually an insolvent debtor, and all of his property transferred to a trustee appointed by the proper legal tribunal, for the use of his creditors.

Until one of these two things is done, the attachment will not be set aside, and he must still stand committed.

NOTE TO THE OPINION.—I find from the argument of counsel, that the ground upon which the release of the party by the insolvent law, would be sufficient to discharge him from the commitment for contempt, has been misunderstood, and I, therefore, add this note to the opinion, to prevent any mistake on this point. He would be released in case he took the benefit of the insolvent law, not because his person would thereby be discharged from imprisonment for debt, for that discharge exists under the constitution of the state independently of the insolvent law. But the court would discharge him from the commitment for contempt, because he would be obliged with his petition to return a schedule of his property; and the fact that it was all conveyed to the insolvent trustees, would show that it was no longer in his power to pay the money into court, or give the security required for its forthcoming, if the final decision should be against him.

WARWICK, The AMY. See Cases Nos. 341–344.

WARY (UNITED STATES v.). See Case No. 16,645.

Case No. 17,211.

In re WASHBURN.

Ex parte TWICHELL.

[11 N. B. R. 66.] [1]

District Court, D. Massachusetts. 1874.

ASSIGNEE IN BANKRUPTCY — LIABILITY FOR RENT —ACCEPTANCE OF LEASE.

1. A filed his petition asking that the assignee be required to pay the rent of certain premises used by the bankrupt for the purpose of storing his goods, and for other purposes, in connection with an adjoining lumber mill, which he hired of another party. The assignee, by leave of court, had carried on business in the mill, but he did not know of the lease of the premises in question until some two or three months after his appointment, and as soon as applied to for the rent he denied his liability, and removed the bankrupt's goods from the premises. *Held*, that the assignee had never accepted the lease, and, in fact, derived no benefit from the premises. That no one is to be held bound to covenants without his own consent, and this is especially true of one who acts in a representative character.

2. There must be some positive and unequivocal act of acceptance before the assignee will be held liable. And in the absence of a positive acceptance the landlord has only the bankrupt to look to for payment of his rent.

[Cited in Re Ives, Case No. 7,116.]

[Cited in Smith v. Goodman, 149 Ill. 81, 36 N. E. 622.]

The petitioners asked that the assignees might be required to pay them the rent of certain premises in Causeway street, Boston. The evidence tended to show that the bankrupt had a lease of these rooms, and used them for storage, and for a blacksmith's shop, in connection with an adjoining lumber mill, which he hired of another person. By leave of court, the assignees had carried on business in the mill. They did not know of the lease of the blacksmith's shop until some two or three months after their appointment, and then, being applied to by the petitioners they denied their liability and removed the bankrupt's goods. There was a sub-tenant of one room, but the assignees had not received any rent from him.

D. F. Crane, for petitioners.

B. L. M. Tower, for assignees.

LOWELL, District Judge. I regret to be obliged to deny the petition. The evidence has failed to convince me that the assignees of Washburn accepted the lease, or that they in fact derived any benefit from the premises. The law on this subject is not in a very satisfactory state, and might be regulated to advantage by statute. Assignees in bankruptcy do not by accepting the trust become assignees of a lease or term belonging to the bankrupt. Bourdillon v. Dalton, 1 Esp. 233; Hendricks v. Judah, 2 Caines, 25; Turner v. Richardson, 7 East, 335; Hoyt v. Stoddard, 2 Allen, 442. No one is to be held bound to covenants without his own consent, and this is especially true of one who acts in a representative character.

[1] [Reprinted by permission.]

In ascertaining what acts or circumstances shall prove consent, the hardship of particular cases on the one side or the other will be found to have had much influence on the decision, but upon the whole, the law has become settled, that there must be some positive and unequivocal act of acceptance before the assignee will be held liable. Goodwin v. Noble, 8 El. & Bl. 585. Beginning with a case in which the goods of the bankrupt were left on the demised premises for more than twelve months, but with a distinct notice to the landlord that the term was not accepted by the assignees (Wheeler v. Bramah, 3 Camp. 340), it has been held that offering the lease for sale, and even making use of the premises to sell the goods was not such a binding act. Turner v. Richardson, 7 East, 335; Hastings v. Wilson, Holt, 290; Journeay v. Brackley, 1 Hilt. 447; How v. Kennett, 3 Adol. & E. 659. Nor was the release of a sub-tenant. No mere neglect has ever been held an acceptance unless after notice from the landlord that it will be so construed. The statute of 49 Geo. III. gave the landlord the right to apply to the lord chancellor to order the assignees to accept or reject the lease, and this law has been continued and enlarged from time to time. I notice this statute for the purpose of saying, that in my opinion, our court of bankruptcy would probably have a similar power without an express statute; the assignees being officers of the court, and there being an ample equitable jurisdiction. In the meantime, however, the term remains in the bankrupt, and if the rent is not paid when it accrues the remedies given by law or reserved by the lease may be availed of; and if the assignees interfere it must be either because they have accepted the lease and are bound to pay the rent, or that a reasonable time has not elapsed since their appointment in which to decide to take, or renounce, and in the latter case the whole matter would be within the control of the court. I suppose the matter is arranged in most cases by compromise; but in the absence of that, it is necessary that the landlord should take some step in the matter, because mere neglect by the assignee is of no importance, and in the absence of a positive acceptance, the landlord has only the bankrupt to look to. In this case nothing was done and the premises remained closed; and it turns out that the assignees, in point of fact, were not aware that there was a lease. As soon as they were called on they rejected the lease, and much more promptly than has been done in many of the decided cases. It is not, however, a question of promptness but of actual acceptance, and there is no evidence of that. There are many recent cases in which it is briefly said by learned judges that the assignees must pay for premises which they use, and I do not wish to be understood as impugning the correctness of those decisions. The court acting under its equitable powers ought to apply that rule in every case in which no absolute legal difficulty interposes. But here the evidence is that the assignees did not knowingly use the premises, and did not receive any benefit from them; and the neglect to act must work against the landlord from his legal relation to the parties. If he had undertaken to pursue his remedies, there can be no doubt that the assignees would have disclaimed earlier; and his loss would have been only such as is unavoidable in all cases of bankruptcy. Petition dismissed.

Case No. 17,212.

WASHBURN v. ARTISANS' INS. CO.

SAME v. PENNSYLVANIA INS. CO.

[27 Pittsb. Leg. J. (10 N. S.) 55; 12 Chi. Leg. News, 82; 9 Ins. Law J. 68; 14 Am. Law Rev. 85; 25 Int. Rev. Rec. 378.] [1]

Circuit Court, W. D. Pennsylvania. Nov. 10, 1879.

FIRE INSURANCE—CONSTRUCTION OF POLICY—EXPLOSION ON PREMISES—EXCEPTED RISK.

The policy of insurance in suit contained the following exceptions: "XI. Not Liable for.—This company shall not be liable for loss in case of fire happening by any insurrection, invasion, foreign enemy, civil commotion, riot, or any military or usurped power; nor for damage by lightning (unless fire ensues, and then for the loss or damage by fire only, which shall be determined by the value of the damaged property after the casualty by lightning); or explosions of any kind whatever within the premises." The weight of the testimony was that a destructive fire had broken out on the premises insured, and continued to burn for from five to eight minutes when an explosion occurred, almost immediately followed by a second explosion, which caused, with the fire, the total destruction of the premises. Found, by the circuit judge (trial by jury being waived), as matter of fact, that a destructive fire preceded the explosions and caused them; and *held*, 1st, that the fire being the proximate cause of the loss, the case is not within the exception contained in the policy, that it is immaterial that the destruction of the insured premises attacked by fire was accelerated or rendered more complete by the explosions, and that it is only in a case where an explosion originally produces the loss, or there is mere ignition of explosive matter and a destructive fire ensues, that the exception applies.

[Cited in Washburn v. Miami Valley Ins. Co., 2 Fed. 639.]

[These were actions at law by C. C. Washburn against the Artisans' Insurance Company and the Pennsylvania Insurance Company.]

R. B. Carnahan, for plaintiff.

Malcolm Hay and Thos. C. Lazear, for defendants.

McKENNAN, Circuit Judge. In this case the parties in writing stipulated to dispense with a jury and that, therefore, the facts should be found by the court. The suit was brought upon a policy of insurance against loss by fire, and the following facts are found as the result of the preponderance of the voluminous evidence in the case: 1. On the 15th of February, 1877, the defendant issued a policy of insurance to the plaintiff, by which it

[1] [4 Am. Law Rev. 85, contains only a partial report.]

agreed to insure the building known as Washburn Mill A. in the sum of $850, and the machinery therein in the sum of $1700 for one year. 2. This policy was renewed and extended for one year from the 15th of February, 1878. 3. On the 2d of May, 1878, the property described in the policy was totally destroyed, and proofs of loss were duly furnished by the plaintiff to the defendant. 4. The primary cause of the loss was a destructive fire which communicated with some explosive matter in the mill, a disastrous explosion ensued, and thus the entire premises were destroyed and consumed. 5. About the time and before the renewal of the policy in controversy, the plaintiff, by his agent, represented to the defendant, that no greater rate of premium than 3 per cent. would be paid for insurance of the same property during the year 1878, upon policies thereafter negotiated, and upon the faith of this assurance, the defendant renewed its policy. 6. No higher rate of premium than 3 per cent. was paid or agreed to be paid by the plaintiff after the renewal of the policy in suit, to any other company for insurance of the premises covered by the defendant's policy.

This special finding of facts necessarily leads to a general finding in favor of the plaintiff for the whole amount of his claim and interest from July 26th, 1878. This is liquidated at twenty-seven hundred and forty-seven dollars and sixty-three cents, as of date November 10th, 1879, for which judgment will be entered. The decisive question in this case is one of fact, and, if a jury had found it in favor of the plaintiff, they must have rendered a verdict for him. Was the loss caused by a destructive fire, or by an explosion within the insured premises? I have affirmed the first hypothesis, as supported by the weight of the evidence; but, in view of the effect of the explosion which occurred, it remains to consider whether the loss is within the exception in the policy. That the magnitude of the fire was rapidly increased, and hence the destruction of the premises was promoted and accelerated, by the explosion, is incontrovertible. The policy embraces all loss caused by fire, and, in this respect, the exception does not limit its scope. Both the body of the policy and the exception have reference to original or proximate causation, and to all the resulting consequences. It is only then in a case where an explosion originally produces the loss, or there is mere ignition of explosive matter and a destructive fire ensues, that the exception applies. But where an insured structure is attacked by fire, in the progress of which the ignition of an explosive substance is involved, and its destruction is thereby accelerated, or rendered more complete, the loss is just as much attributable to fire as if the result had been effected by unaided, gradual combustion. This is the import of the policy, and, as the explosion is found to have been a consequence of the fire, the liability of the insurer is unqualified by the exception.

Case No. 17,213.

WASHBURN v. CASS COUNTY.

[3 Dill. 251.] [1]

Circuit Court, W. D. Missouri. 1875.

CONSOLIDATION OF RAILWAY COMPANIES—VALIDITY—BONA FIDE PURCHASER OF BONDS.

1. Railroad company A was organized for the purpose of eventually consolidating, under a law of the state authorizing it, with company B. A township, under a statute giving the power, voted to issue bonds to pay for stock in company A, and it was accordingly subscribed. Afterwards companies A and B were consolidated and the bonds before voted were issued to the consolidated company and recited a due and legal consolidation. A defense to the bonds was made on the ground that the consolidation was void; held in favor of a bona fide holder of bonds for value without notice of the facts which it was insisted rendered the consolidation illegal, that the defense was unavailing; the case being considered to fall within the principle of Nugent v. Supervisors, 19 Wall. [86 U. S.] 241.

2. It seems that the Missouri railway consolidation act of March 24th, 1870 (1 Wag. St. 314), does not require, as a condition of a legal consolidation, that both of the constituent companies should own roads completed in whole or in part.

Action [by William B. Washburn] on bonds. The material facts are as follows: On the 19th day of July, 1870, a petition, signed by twenty-five tax-payers and residents of the municipal township of Polk, in Cass county, was presented to the county court of that county, setting forth the desire of the petitioners to vote a township subscription of $15,000 to the capital stock of the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company, and requesting the court to order an election to determine if such subscription should be made, upon certain terms named, among others, that the subscription should be payable in bonds. On the same day the petition was granted, and the election ordered to be held on the 30th day of August, 1870. On the 16th day of the next month (September) due proof having been made to the court that the election had been held and that two-thirds of the qualified voters of the township, voting thereat, had voted in favor of the subscription, it was accordingly made upon the terms prescribed. The Pleasant Hill Division of the Lexington, Chillicothe & Gulf Company, was a corporation created under the general incorporation act of Missouri, and was created, as appears by its articles of association, for the purpose, among others, of consolidating with, and becoming a part of, a certain other company, similarly created; and known as the Lexington, Chillicothe & Gulf Railroad Company. One of its proposed termini was to be such point in the south line of Cass county as would enable it most conveniently to intersect and consolidate with the latter company. On the 4th day of October, 1870, this consolidation was duly effected, both companies having

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

previously signified their acceptance of the general law relating to consolidation of railroads in the manner required thereby. The new or consolidated company took the name of the Lexington, Lake & Gulf Railroad Company, and by the terms agreed upon, became possessed of and entitled to all the powers, rights, franchises, privileges, assets, subscriptions, bonds, moneys and properties whatever of each of the constituent companies. On the 2d of May, 1871, the county court, by an order reciting all the steps previously taken by the court, the vote of the people, the object of the incorporation of the Pleasant Hill Division, and the fact of the consolidation, and also that the terms of the subscription had been faithfully complied with, directed that the bonds authorized by the vote of August 30th, be delivered to the Lexington, Lake & Gulf Company, at the same time acknowledging the receipt of certificates of full paid stock in that company to the proper amount. These bonds were accordingly issued, and contain the following recitals: "This bond being issued under and pursuant to an order of the county court of Cass county, by virtue of an act of the general assembly of the state of Missouri, approved March 23d, 1868, entitled 'An act to facilitate the construction of railroads in the state of Missouri,' and authorized by a vote of the people, taken August 30th, 1870, as required by law, upon the proposition to subscribe $15,000 to the capital stock of the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company, and which said railroad company last aforesaid, and the former Lexington, Chillicothe & Gulf Railroad Company, were on the 4th day of October, 1870, consolidated as required by law into one company, under the name of the Lexington, Lake & Gulf Railroad Company, and which said last named railroad company, as provided by law, and under said consolidation thereof, possesses all the powers, rights and privileges, and owns and controls all the assets, subscriptions, bonds, moneys and properties whatever of the two said several companies forming said consolidation, or either of them." On the 4th day of October, 1870 (the date of consolidation) no work had been done by the Pleasant Hill Division on the line. Afterwards the Lexington, Lake & Gulf Company graded and bridged a portion of it, but no part was ever completed. The relative positions of the consolidated and the two constituent roads were shown by a map, which constituted part of the agreed case. The coupons sued on are from the bonds issued as above shown; and the plaintiff is a holder of them for value, and without notice of any irregularity or illegality attending their issue, if any in fact exists, except such as results from operation of law from the facts hereinbefore stated.

The act of legislature of March 24th, 1870 (1 Wag. St. 314), in respect to the consolidation of railways, is as follows: "Any two or more railroad companies in this state existing under either general or special laws, and owning railroads constructed wholly or in part, which when completed and connected, will form in the whole or in the main, one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company, owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation the companies interested may enter into contract, fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders, regularly called for the purpose; or by the approval in writing of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the secretary of the state, when the consolidation shall be considered duly consummated; and a certified copy from the office of secretary of state shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock outstanding, in the several companies or roads, and issuing certificates of stock in the new consolidated company under such corporate name as may have been adopted; provided, however, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation a continuous line of road is secured, running in the whole, or in the main, in the same general direction, and provided, it shall not be lawful for said road to consolidate in the whole, or in part, when by so doing it will deprive the public of the benefit of competition between said roads; and in case any such railroads shall consolidate or attempt to consolidate their roads contrary to the provisions of this act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the circuit court of any county through which said road may pass, which court shall have jurisdiction in the case, and power to restrain by injunction or otherwise; and in case any railroad in this state shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars, without breaking bulk, upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads on fair and reasonable terms, and the same may be enforced by appropriate legisla-

tion. Before any railroad company shall consolidate their roads under the provisions of this act, they shall each file with the secretary of state a resolution accepting the provisions thereof, to be signed by their respective presidents, and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders thereof to be called for the purpose of considering the same."

T. K. Skinker and Davis & Smith, for plaintiff.

W. P. Hall and Gage & Ladd, for defendant.

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

KREKEL, District Judge. The main question is, could the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company consolidate with the Lexington, Chillicothe & Gulf Railroad Company without having a part of its road constructed, or having work done thereon.

The agreed statement of facts admits that on the 4th day of October, 1870, the date of filing the articles of consolidation between the two roads, and assuming the name of the Lexington, Lake & Gulf Railroad, The Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company had constructed no part of its said railroad, in whole or in part, and had done no work thereon. In order to arrive at the intention and meaning of the consolidation act, it is necessary to look into the various provisions of law conferring authority upon the companies concerned.

The Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad Company was duly organized. The act of March 23d, 1868, provides for a submission on the petition of twenty-five tax-payers of any municipal township, setting forth their desire to subscribe to the capital stock of any railroad company in this state, building or proposing to build a railroad.

When the twenty-five tax-payers presented their petition to the county court of Cass county, there was but one company organized to build a road "passing through or near said township of Polk" (quoting from the petition), and that company's articles of association in its second section provided that it was intended "eventually to consolidate with and form a link and be a part of the main line of the said Lexington, Chillicothe & Gulf Railroad." Without this connection it would have been a railroad beginning and ending in the open country.

The subscription (voted by the necessary two-thirds vote) was, on the 16th day of September, 1870, made by the county court to the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad; but it is said the bonds and coupons issued under it to the Lexington, Lake & Gulf Company (which is the corporate name of the consolidated company) are void, because the consolidation was illegal and null.

It is contended that to make a legal consolidation under the statute authorizing it, the company must own railroads constructed wholly or in part. Act March 24, 1870 (1 Wag. St. 314). The language of the first section of the act is: "Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole, or in the main, one continuous line of railroad, are hereby authorized to consolidate, in the whole or in the main, and form one company owning and controlling such continuous line." In the same section all consolidations, contrary to the act, are declared void, "and any person or party aggrieved, whether stockholder or not, may bring an action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise."

The question is, what is meant by the language, "owning railroads constructed wholly or in part"—must both roads be wholly or in part constructed? Looking to the object had in view in authorizing consolidation of roads wholly or in part constructed, the inference is, that the building and construction of roads were thereby to be advanced, and such construction should be given to the act as to accomplish this so far as the language used will reasonably permit.

A railroad company duly organized, and having private and corporate stock subscribed to it, may, under the language quoted, be said to be owning a railroad, and indeed would seem to own it, unless the words are construed to mean work done on the road, in grading, bridging, etc. But it is not necessary to give the construction here indicated, for as one of the consolidated roads, namely, the Lexington, Chillicothe & Gulf Road, was under actual construction at the time of consolidation, the law is fully complied with, unless both companies must own roads constructed wholly or in part.

The views as to the proper construction of the consolidation act here indicated, gain strength from the provisions of the act of March 23d, 1868, which authorizes subscriptions to capital stock to companies "building or proposing to build a railroad." Under this act, the vote and subscription were authorized, and that to a company whose declared purpose was to eventually make the very consolidation under consideration. Unless the consolidation was void, there can be no question but that the new company succeeded to all the rights of each of the companies consolidated, and that the issuing of the bonds to such consolidated company to pay a subscription to one of them —the Pleasant Hill Division—was lawful.

The question whether each of the consolidated companies "owned railroads constructed

wholly or in part," so far as this is a question of fact, was a fact peculiarly within the knowledge of the county court, and to the existence of which it certified by the recital in the bond, that the consolidation was in due form of the law. Even if such recital did not estop the defendant from denying it, an innocent purchaser of the bonds, for value, is not affected by its falsity, if false it was.

The question, whether the legal existence of a corporation, in the exercise of corporate functions as this consolidated company was, when building a part of the Pleasant Hill Division, after consolidation, as admitted in the agreed statement of facts, can be taken advantage of collaterally, is one which seems, on authority, to be against the defendant. It must have been so viewed by the legislature, for they provided a remedy without invoking the aid or awaiting the action of the state by declaring all consolidation contrary to the act void, and that "any person or party aggrieved, either stockholder or not, may bring an action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case, and power to restrain by injunction or otherwise."

There is some force in the position taken by the plaintiff, that if the consolidation was void in this case, the original subscription to the Pleasant Hill Division of the Lexington, Chillicothe & Gulf Railroad being unquestionably valid, these bonds may be held good under that subscription and in payment thereof.

Be this however, as it may, the plaintiff has declared on the bonds of the consolidated company and by that it must stand. With no decisions of the supreme court expounding the above mentioned consolidation act, such a construction has been given to it as in my view best harmonizes with the law, and the design of the legislature in enacting it.

The objections as to conditions of consolidation in other respects can have no application here, for it is obvious that a road, such as the Pleasant Hill Division, with no means to connect, would without consolidation be utterly useless and worthless. So well was this understood that "eventual consolidation" was provided for in the articles of association. The case is with the plaintiff.

DILLON, Circuit Judge. I concur in the result of the foregoing opinion and in the main in the views therein advanced.

The leading elements in the case are that the bonds are negotiable, were issued by the proper officers, and the plaintiff is a bona fide holder for value without any notice of the facts now ruled on as a defense, except so far as he is bound in law to take notice thereof.

The vote was duly had in favor of the Pleasant Hill Division, a distinct corporation, and whose articles in express terms provided for a consolidation with the very company with which it afterwards consolidated. The subscription was made to the stock of the company voted for; but afterwards and before the bonds in suit were issued, the contemplated consolidation was effected by the concurrent action of the stockholders of the two constituent companies, and a new company formed. All the steps required by law to effect this consolidation were taken, and the bonds were issued, as by the statute they were required to be, to the new company. See, also, Nugent v. Supervisors, 19 Wall. [86 U. S.] 241.

But it is said that this consolidation is void, and hence the bonds were illegally issued. It is to be remarked, however, that the validity of the organization of the new company has never been questioned by any stockholder, nor by the state. I do not consider it to be necessary in this case to determine whether on the facts agreed a stockholder or the state could successfully question the validity of the consolidation on the ground that one of the companies, although possessing capital stock paid in and subscribed, had in point of fact no part of its road actually constructed.

It is not claimed that the plaintiff had actual notice of this fact when he purchased the bonds; and the bonds in express terms recite that the consolidation was made as required by law. Upon this recital as respects facts in pais, the purchaser of the bonds had a right to rely; and in the face of this recital, the plaintiff was not bound to inquire whether each of the two constituent companies had all or some part of its road actually completed, nor whether the roads when completed would form a continuous line, even if each of these facts was an essential condition of a consolidation de jure.

This case is substantially within the doctrine of Nugent v. Supervisors, above cited, and differs from Harshman v. Bates County [Case No. 6,148], where the subscription was made after the consolidation, and where there was no authority in the charter of the company voted for to consolidate with another company. Judgment for plaintiff.

Other cases against Cass county: Kennard v. Cass County [Id. 7,697]; Jordan v. Cass County, [Id. 7,517].

Case No. 17,214.

WASHBURN et al. v. GOULD.

[3 Story, 122; 2 Robb. Pat. Cas. 206; 1 West. Law J. 465; 7 Law Rep. 276.] [1]

Circuit Court, D. Massachusetts. May Term, 1844.

PATENT FOR INVENTION—INTERPRETATION—ISSUE OF LETTERS—WHO ENTITLED—RIGHT TO USE—INFRINGEMENT SUIT BY GRANTEE—INJUNCTION—DAMAGES.

1. The extension of a patent may be granted to an administrator.

2. Whoever finally perfects a machine, and renders it capable of useful operation, is entitled to a patent, although others may have had the idea, and made experiments towards putting it into practice, and although all of the com-

[1] [Reported by William W. Story, Esq. 1 West. Law J. 465, and 7 Law Rep. 276, contain only partial reports.]

ponent parts may have been known under a different combination, or used for a different purpose.

[Cited in Allen v. Blunt, Case No. 217; Dietz v. Wade, Id. 3,903; White v. Allen, Id. 17,535; Smith v. Mercer, Id. 13,078; Agawam Woolen Co. v. Jordan, 7 Wall. (74 U. S.) 602; Seymour v. Osborne, 11 Wall. (78 U. S.) 552; Albright v. Celluloid Harness Trim. Co., Case No. 147; Union Paper-Bag Mach. Co. v. Pultz & Walkley Co., Id. 14,392; Judson v. Bradford, Id. 7,564; Smith v. Downing, Id. 13,036; American Bell Tel. Co. v. American Cush. Tel. Co., 35 Fed. 739.]

3. Drawings, not referred to in the specification of a patent, may be treated as part of the specification, and used to explain and enlarge it.

[Cited in Emerson v. Hogg, Case No. 4,440.]

4. A new trial will not be granted for surprise on account of new evidence, whenever, by reasonable diligence, it could have been previously obtained.

5. The meaning of technical words of art in commerce and manufactures, used in a patent, as well as the surrounding circumstances, which may materially affect their meaning, are to be interpreted by the jury.

[Cited in brief in Wilstach v. Hawkins, 14 Ind. 550.]

6. Every instrument is to be interpreted by a consideration of all its provisions, and its obvious design is not to be controlled by the precise force of single words.

[Cited in brief in Lowell v. Allen, 96 Mass. 134. Cited in Omohundro v. Omohundro, 21 Grat. 633.]

7. Where a grant was made of a right to construct and use fifty machines within certain localities, reserving to the grantor the right to construct, and to license others to construct, but not to use them therein, it was *held*, that the grant was of an exclusive right under the statute of 1836 in regard to patents, and that suits were to be brought in the name of the assignees, even though agreed to be at the expense of the grantor.

[Cited in Wilson v. Rousseau, Case No. 17,832; Woodworth v. Rogers, Id. 18,018; Birdsall v. Perego, Id. 1,435. Cited in dissenting opinion in Adams v. Burks, 17 Wall. (84 U. S.) 458. Cited in Nellis v. Pennock Manuf'g Co., 13 Fed. 453; Herman v. Herman, 29 Fed. 93.]

8. Where a patent has been granted, and there has been an exclusive possession of some duration under a patent, an injunction will be granted, without obliging the patentee previously to establish the validity of his patent by an action at law. But it is otherwise, if the patent be recent, and the injunction be resisted on the ground, that the patent ought not to have been granted, or is imperfectly stated in the specification.

[Cited in Smith v. Mercer, Case No. 13,078; Foster v. Moore, Id. 4,978; Howe v. Williams, Id. 6,778.]

9. The patent in the present case was, upon the true interpretation of the specification, a patent for an improved machine.

[10. The patentee is prima facie the inventor of that for which the letters patent were granted him.]

[Cited in Hill v. Dunklee, Case No. 6,489; American Bell Tel. Co. v. People's Tel. Co., 22 Fed. 313; Cantrell v. Wallick, 117 U. S. 696, 6 Sup. Ct. 974.]

[11. The rule of comity always observed by the justices of the supreme court in cases which admitted of being carried before the whole court was to conform to the opinions of each other, if any had been given.]

[Cited in Many v. Sizer, Case No. 9,057; Goodyear Dent. Vul. Co. v. Willis, Id. 5,603; Rumford Chem. Works v. Hecker, Id. 12,133; Wells v. Oregon Ry. & Nav. Co., 15 Fed. 570.]

[12. The actual damages sustained include all necessary and proper expenses in protecting one's violated rights. Though they should not include "smart money," or what is proper merely for example, they may well embrace everything really suffered by the wrong.]

[Cited in Aiken v. Bemis, Case No. 109; Allen v. Blunt, Id. 217.]

This was an action on the case [by William Washburn and others against James Gould] for the infringement of a patent right for "a new and useful improvement in the method of planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness; and also for facing and dressing brick, and cutting mouldings, or facing metallic, mineral or other substances," and described in the schedule annexed to the letters patent, and forming a part thereof, in the following words:

"The plank, boards or other material, being reduced to a width by circular saws, or friction wheels, as the case may be, is then placed on a carriage resting on a platform, with a rotary cutting wheel in the centre, either horizontal or vertical. The heads, or circular plates, fixed to an axis, may have one of the heads movable to accommodate any length of knife required. The knives fitted to the heads with screws or bolts, or the knives or cutters for moulding, fitted by screws or bolts to logs connecting the heads of the cylinder, and forming with, the edges of the knives or cutters a cylinder. The knives may be placed in a line with the axis of the cylinder or diagonally. The plank, or other material resting on the carriage, may be set so as to reduce it to any thickness required, and the carriage moving by a rack and pinion, or rollers, or any lateral motion, to the edge of the knives or cutters on the periphery of the cylinder or wheels, reduces it to any given thickness. After passing the planing and reducing wheel, it then approaches, if required, two revolving cutter wheels, one for cutting the groove, and the other for cutting the rabbets, that form the tongue. One wheel is placed directly over the other, and the lateral motion moving the plank, or other material, between the grooving and rabbeting wheels, so that one edge has a groove cut the whole length, and the other edge a rabbet cut on each side, leaving a tongue to match the groove. The grooving wheel is a circular plate, fixed on an axis, with a number of cutters attached to it to project beyond the periphery of the plate, so that, when put in motion, it will perform a deep cut or groove, parallel with the face of the plank or other material. The rabbeting wheel also of similar form, having a number of cutters on each side of the plate, projecting, like those on the grooving wheel, cuts

the rabbet on each side of the edge of the plank, and leaves the tongue or match for the groove. By placing the planing wheel axis and cutter knives vertical, the same wheel will plane two planks, or other material in the same time of one, by moving the plank or other material opposite ways, and parallel with each other, against the periphery of the planing or moulding wheel. The groove and tongue may be cut in the plank or other material, at the same time, by adding a grooving and rabbeting wheel. Said William Woodworth does not claim the invention of circular saws or cutter wheels, knowing they have long been in use, but he claims as his invention the improvement and application of cutting or planing wheels to planing boards, plank, timber or other material; also his improved method of cutters for grooving, and tonguing, and cutting mouldings on wood, stone, iron, metal, or other material, and also for facing and dressing brick, as all the wheels may be used single, and separately, for moulding, or any other purpose before indicated. He also claims as his improved method the application of circular saws for reducing floor plank and other materials to a width.

"Dated Troy, Dec. 4th, 1828.

"William Woodworth.

"Witnesses: Henry Everts,

"D. S. Gleason."

The original patentee was William Woodworth, to whom the aforesaid letters patent were granted on the 27th day of December, 1828, and who died on the 9th day of February, 1839. On the 14th day of February, 1839, administration of the goods and estate of the said William Woodworth was granted in the state of New York, to his son, William W. Woodworth, who subsequently, on the 16th day of November, 1842, obtained a renewal and extension of the said letters patent for the additional term of seven years from the expiration thereof. On the 2d day of January, 1843, the said administrator disclaimed so much of the claim in the said letters patent as embraced the application of circular saws to reduce floor plank and other materials to a width; and afterwards, on the 2d day of January, 1843, he granted to William Washburn and Charles W. Brown, the present plaintiffs, certain rights, to use the said patent, by the following deed, which was duly recorded in the patent office: "This indenture of three parts, made and concluded on the second day of January, in the year eighteen hundred and forty-three, by and between William W. Woodworth of the town of Hyde Park, of the county of Dutchess, and state of New York, Esq. as he is administrator of the goods and estate, which were of William Woodworth, hereinafter mentioned, deceased, of the first part, William Washburn, and Charles W. Brown, both of Boston, in the county of Suffolk, and state of Massachusetts, carpenters, of the second part, and James G. Wilson, of the city, county and state of New York, gentleman, of the third part, witnesseth: That whereas letters patent bearing date on the twenty-seventh day of December, in the year eighteen hundred and twenty-eight, were granted to William Woodworth, now deceased, by the United States of America, for an improvement in the method of tonguing, grooving, and cutting into mouldings, or either plank, boards, and other materials, and for reducing the same to an equal width and thickness, and also for facing and dressing brick, and cutting mouldings on, or facing metallic, mineral, or other substances. And whereas the term for which the said letters patent were granted, did expire by the limitation contained therein, on the twenty-seventh day of December now last past, and before the expiration of the said term such proceedings were had, that, pursuant to the act of congress in such case made and provided, the said letters patent were renewed and extended for the further period of seven years from and after the expiration of the said first term, the certificate of renewal whereof bearing date on the sixteenth day of November, being granted unto the party of the first part, one of the heirs, and the administrator of the said William Woodworth, deceased; and whereas the parties of the second part have paid to the party of the first part the sum of five hundred dollars, and have given to the party of the first part their negotiable promissory notes, bearing even date with these presents, one for the sum of one thousand dollars, payable in ninety days from the date thereof; one for the same sum, payable in six months from the date thereof; one for the same sum, and payable in twelve months from the date thereof; one for the same sum and payable in eighteen months from the date thereof; one for the same sum, and payable in two years from the date thereof; one for the same sum and payable in thirty months from the date thereof; and the last for the sum of five hundred dollars, payable in three years from the date thereof, and all the said seven promissory notes bearing interest from their date. And whereas, in consideration of the said money and notes, the party of the first part hath agreed to license and empower the parties of the second part to construct and use, and to license others to construct and use fifty of the said patented machines, within the counties of Suffolk and Norfolk, and in the towns of Charlestown, Cambridge, West Cambridge, Watertown, Medford, and Malden and Rockbottom village, in the county of Middlesex, in the state of Massachusetts—in such manner, nevertheless, that the license and authority so granted shall stand and be as security unto the party of the first part, and his assigns, for the payment of each and all of the said promissory notes.

"Now the said parties have covenanted, granted, and agreed in manner following: First. The party of the first part does hereby

license and empower the parties of the second part, and their executors and administrators, to construct and use fifty of the said patented machines within the territory aforesaid; and also within the same territory to license and empower other person or persons to construct and use one or more of the said patented machines, during the whole period for which the said letters patent have been granted; but the whole number of machines by the parties of the second part, and by all persons empowered by them, constructed and used during the said period in the said territory, shall not, at any one time, exceed the said number of fifty machines. And provided also, that if at any time or times the parties of the second part, or their representatives, shall make any default in the payment of the said promissory notes or either of them, it shall be lawful for the party of the first part, or his assigns, at any time while such neglect or default shall continue, to give notice in writing to the parties of the second part or their assigns, and to any person or persons, licensed and empowered by them to use the said machine, to cease and discontinue the use thereof; and if they or either of them shall fail so to do for the space of ten days after such notice, the parties of the second part hereby covenant with the party of the first part, and his assigns, that it shall be lawful for any court of equity, having jurisdiction of the premises, to enjoin the parties of the second part and their assigns, and all persons empowered by them as aforesaid, from using the said machines, until the further order of the court; and if such neglect or default should continue for the space of thirty days after such notice, it shall and may be lawful for the party of the first part, or his assigns, to sell at public auction, in the city of Boston, after advertising the same six times in some newspaper printed in the said city, all the right, title and interest which, by these presents, are in any way granted unto the said parties of the second part, and the party of the first part, or his assigns, may bid at such sale, and in the names of the parties of the second part, or their assigns, as the case may require, may convey and assure the same to the purchaser, and thereupon all license, power, and authority of the parties of the second part and their assigns, and of all persons empowered by them shall cease, and thereupon it shall and may be lawful for any court of equity having jurisdiction of the premises, perpetually to enjoin the parties of the second part and their assigns, and all persons empowered by them, from constructing or using any of the said patented machines. And the proceeds of such auction sale, after deducting all necessary expenses, shall be applied to the payment of all such of the said promissory notes as then remain unpaid, without prejudice to any remedy, which the party of the first part or his assigns may have for any balance, which may remain due to him; but if the said proceeds should be more than sufficient to pay the amounts remaining due on the said notes, such excess is to be paid to the parties of the second part, or their representatives or assigns. Second. The parties of the first part and third part covenant with the parties of the second part, that they will institute suits at law, and in equity, against any and all person or persons who shall infringe upon the patent aforesaid, within the territory aforesaid, during the period of two years from the date hereof, upon receiving notice of such infringement from the parties of the second part, that they will prosecute the said suits at their own expense to final judgment with due diligence, and that, after deducting all the expenses of such suits, and a reasonable compensation for their own expenses, time and pains in prosecuting them, they will pay over the damages recovered therein unto the parties of the second part, or their representatives or assigns. Third. If it should be finally decided in either of the suits, commenced as aforesaid, within the said period of two years, by the highest court, to which the said parties of the first and third part, or the defendants in such suits shall carry such suit by writ of error or appeal, that the said extended and renewed letters patent are void, the parties of the second part shall be thereby released and discharged of and from the payment of all such of the said promissory notes as shall then remain unpaid; and if either of the said notes shall then be paid, the said party of the first part, and the said party of the third part, each of them, severally, and not jointly, covenants with the parties of the second part, that each of them will repay to the parties of the second part, one half of whatever sum shall have been so paid on the said notes, with interest from the several times of payment, deducting however a reasonable compensation for any benefits, profits, or advantages, which shall then have been received by the parties of the second part, under or by virtue of the license hereby granted. Fourth. The parties of the second part covenant with the parties of the first and third parts, that they will at all times, during the said term of two years, suffer and permit the parties of the first and third parts to use their names in all such suits as may be commenced as aforesaid, and that they will aid and assist the parties of the first and third parts in procuring the necessary evidence to sustain such suits when commenced. Fifth. The party of the first part covenants with the party of the second part, that he will not license and empower any person or persons to use any of the aforesaid machines within the territory before named, during the said term of seven years, for which the said letters patent have been extended; but nothing herein contained shall be so construed as to prevent the party of the first part from constructing or licensing the construction of the said machine to be used elsewhere than in the territory aforesaid.

"In testimony whereof, the said parties have set their hands and seals, on the day and

year first above written, to this and to two other instruments of like tenor and date.

"W. W. Woodworth,
"W. Washburn,
"Charles W. Brown,
"James G. Wilson.

"Sealed and delivered in presence of
"Horace Philbrook."

The plea was the general issue, and a notice of special defence was filed.

The present action is brought by the plaintiffs for an alleged violation of their right under the said deed by the defendant, and the damages were laid at $2500.

Franklin Dexter and B. R. Curtis, for plaintiffs.

C. G. Loring, Joel Giles, and W. Dehon, for defendant.

At the trial the following points were made by the counsel for the defendants:

1st. That the plaintiffs could not bring the present action, they being merely limited licensees, and not exclusive owners of a right in the patent. That under the existing patent law, the plaintiffs must be either grantees of an undivided interest in the patent, or grantees or owners of the exclusive right in the patent within a given territory. That the term "exclusive," signified the "whole" interest, which the patent conferred, and that the patentee, having reserved to himself, by a clause in the contract with the plaintiffs, the right to construct and to license others to construct these machines within the territory for which the right was granted to the plaintiffs, the plaintiffs could in no sense be considered as possessing the exclusive right.

To this it was answered, in behalf of the plaintiffs, that the person actually interested in the patent right, was authorized by law to bring an action for a violation thereof; and that although the said clause in the contract was, taken separately, ambiguous, yet that the whole covenant, and especially that portion, providing, that the parties of the first and third parts might use the name of the party of the second part, plainly indicated, that the grant was of an exclusive right; and that, if the plaintiffs could not bring the action, no one could, for they were the only parties having an exclusive right and interest.

STORY, Circuit Justice. The language of the patent act, of 1836, § 11 [5 Stat. 121], refers to the grant of an exclusive right in a patent, and the term "exclusive" comprehends not only an exclusive right to the whole patent, but an exclusive right to the patent in a particular section of country. The action for the violation of an exclusive right is confined to the owner of such a right. But the right granted to the plaintiffs in this case is exclusive, for the limitation of the number of the machines does not destroy the character of that right. That the exclusive right in certain territories does exist in the assignees, is clearly indicated by the fourth clause in the indenture, and the grant of such a right is not inconsistent with the reservation, that the grantor might construct machines there, because he might do that by way of a license reserved to him under his assignees. The present judgment of the court is, that the grant to the assignees is of an exclusive right, and suits are to be brought in the name of the assignees, but at the expense of the grantor.

The second point raised by the defendants' counsel, was that, under the patent laws, nobody but the patentee was entitled to an extension or renewal of the patent, and that in this case, the patentee having died previous to such an extension, no one else was authorized to procure it. That such a right was nowhere given by the statute to the legal representative of a patentee, but solely and exclusively to the patentee himself, and that it was manifest, from all previous and subsequent legislation in the United States, that the absence of any such provision was not an accidental omission, but the result of design. That the right of renewal was intended as a personal privilege of the patentee alone.

To this point, it was answered by the counsel for the plaintiffs, that no new patent was issued, and no new right granted, but that there was a mere extension of an existing right for an increased length of time. That the design and policy of the act were to reward the inventor by securing to him, his family and representatives, the benefit of the invention, and consequently the grant was to him, his heirs, administrators, or assigns; and that this policy was inconsistent with the idea, that the benefit of his invention was to be strictly limited to the inventor. That there was nothing in the statute of 1832 [4 Stat. 559] to show, that an assignee was not entitled to a renewal; and that the counsel for the defendant had confounded the term "patentee" with that of "inventor," and assumed what the law did not, that one must necessarily be the other. But that, in point of fact, the term "patentee" applied to any person having a right under the patent, whether as executor, administrator, or assignee. That the right of the original grantee to make a contract for the renewed right, clearly established his power to make a valid assignment of all his rights and privileges in the patent; for it was not possible, that congress could have designed, that the death of the patentee should operate to put an end to that right, when vested in his grantee. That the application for the patent must, indeed, be in the name of the patentee, and that the holder of the legal interest must apply for it, and then that it would enure to the holder of the beneficial interest. That such was the practice of the board of commissioners for patents, and that such had been decided to be the law by Judge Thompson, in the case of Van Hook v. Scudder [Case No. 16,853], which was subsequently reaffirmed by him. That an injunction had been granted by Judge McKinley on the same ground; and that the same doctrine had been affirmed by Judge

McLean in the case of Brooks v. Bicknell [Id. 1,945].

STORY, Circuit Justice. The rule of comity always observed by the justices of the supreme court in cases, which admitted of being carried before the whole court, was to conform to the opinions of each other, if any had been given. Such decisions amounted to authority, which, though not conclusive, were operative, whenever the question should be carried up; and therefore, although his mind was not without much difficulty on this point, he should rule for the plaintiffs, in conformity with the opinion of Mr. Justice McLean.

3d. Another point made by the defendants was, that as the drawings of Woodworth's machine were not referred to in the specification, they could not be used to explain, aid, or enlarge it. This point was elaborately argued on both sides, and was ruled by THE COURT in favor of the plaintiffs, in accordance with the decision of Mr. Justice McLean, in Brooks v. Bicknell [supra].

4th. Another point contended for by the defendants was, that all parts of Woodworth's machine were previously known, and could be found described in Bentham's specification.

STORY, Circuit Justice. The law is, that whoever first perfects a machine, is entitled to the patent, and is the real inventor, although others may previously have had the idea, and made some experiments towards putting it in practice. In England, the law goes even so far as to grant such an one the patent, although the antecedent experiments of others were known to and used by him in perfecting his machine. The law in this country has not gone quite so far, but I do not mean to say, that there would be any difficulty in going to that extent. At any rate, he is the inventor, and is entitled to the patent, who first brought the machine to perfection, and made it capable of useful operation.

Various other points were made by the defendant, which, together with the ruling of the court, are sufficiently stated in the charge and in the opinion on the motion for a new trial. Much evidence was introduced by the defendant, to prove the vagueness and insufficiency of Woodworth's specification; and also to prove, that every thing claimed by Woodworth was to be found in the specification of the patent granted to Samuel Bentham, in England, April 23d, 1793, and printed in the Repertory of Arts and Manufacture, vol. 10, published in London, A. D. 1799; also in the specification of the patent granted to Bramah in England, A. D. 1802, and published in 28 Rees, Enc.; also in the specification of the patent granted to Malcom Muir, of the city of Glasgow in Scotland, dated June 1, A. D. 1827, an abstract of which was published in the London Journal of Arts (second series) vol. 2, p. 68, and a notice whereof was published in the United States, in the Franklin Journal, vol. 1, for A. D. 1828; also in the specification of the patent granted in the United States, to James Collins, of Anson, in the state of Maine, A. D. 1827, for shearing cloth by revolving shears. In rebutter of which, much evidence was also introduced on behalf of the plaintiffs.

In the course of the trial, the following question was suggested by the counsel for the defendants: Whether a license purchased under the original patent, would cease on the expiration of the patent, or continue in force during the subsequent extension.

STORY, Circuit Justice. I have an impression, but it is not a very distinct one, that some question of an analogous nature arose under the act of congress for the renewal of the patent of Oliver Evans,—Act 21st Jan., 1808, c. 117 [4 Bior. & D.'s Laws, 135; 6 Stat. 70],—which was, of course, governed by the old acts of 1793 and 1800 [1 Stat. 318; 2 Stat. 37]; and that it was then held, that any future use of the patented machine of Evans, after the renewal, except so far as it was saved by the proviso of that act, would be an infringement of his patent. Whether that applied to cases of licensees, I do not exactly remember.[2] But I have had occasion recently to decide the very point, in a case in Maine, in respect to a licensee. And I there held, upon full consideration, that every license, or assignment, under the old laws, before the act of 1836, expired with the limitation of the original patent, unless it was expressly in terms so granted as to be applicable to any renewal of the patent afterwards. The decision of the court proceeded upon the ground, that under the old laws, before the act of 1836, the licensee's, or assignee's right, was necessarily bounded by the same limits as that of the licensor, or patentee,—that is to say, to the original term granted by the patent to the licensor or patentee. If, afterwards, the patent was renewed, it was a new grant independent of the old, and the patentee was entitled to the sole and exclusive benefit thereof, unless the licensees or assignees under them had, by their original contract, secured to themselves by express covenant or grant, a right to the benefit of the renewed patent.

STORY, Circuit Justice (charging jury). This is a case, gentlemen of the jury, which, as you are well aware, has taken up a vast deal of time and attention. And, indeed, I may truly say, that it has been the most protracted civil cause ever tried in this court. Undoubtedly this planing machine is an invention of great utility, and the patent right, therefore, is the more likely to be contested; and it often happens, that in this class of actions, many points are made in the opening and perhaps much dwelt upon in the trial, which ultimately prove of small importance, and are abandoned or waived in the sequel. You have seen this in the present case. I do not feel called upon to go into any minute dis-

[2] The case referred to, probably, was Evans v. Jordan, 9 Cranch [13 U. S.] 199.

cussion of the points raised here, for after the full and elaborate arguments of the counsel, I could not aid your judgments by going over the whole ground; and shall only present to you a general view of the mass of the evidence, as it has been given. But before doing this, I shall take notice of what has been entirely omitted on each side. Not a word has been said as to the amount of damages, in case the verdict should be in favor of the plaintiffs. And this has been omitted, on the long-settled and very proper ground, that whenever a patent right is contested here for the first time—fully and fairly contested—it is only for the sake of determining whether the patent be valid or not. If its validity be sustained, then the patentee can obtain from the equity side of the court, an injunction to restrain a party from using the invention to the injury of the owner. Still it is your duty, if you find for the plaintiff, to give him such reasonable damages—not vindictive—but such as are not covered by any of the costs he will recover, to indemnify him for the necessary and unavoidable expenses of establishing his right. Observe, you are not always bound to do this; for I can conceive of cases, where only nominal damages should be rendered; as where a patentee fraudulently leads a party to infringe on his right, and then brings an action against him merely to gratify his own malice or revenge. But you should suffer no valid patent to go out of court without indemnifying the owner for his reasonable and necessary charges in establishing his true right; in other words, he should not be sent away worse than he came into court. Therefore, if you find for the plaintiffs, you will award such damages as you think them fairly and reasonably entitled to, under all the circumstances.

A considerable number of questions of law have been raised by the defendant, and reduced to writing, most of which have been disposed of, but which I will recapitulate before coming to the matters of fact. These questions are stated as follows:

1st. That the grant of an extension of patent to an administrator, is not within the statute of 1836. This point is overruled.

2d. That plaintiffs have not such title to any exclusive right as enables them to maintain this action under the indenture in their declaration mentioned. Overruled.

3d. That the patent was void at the time when, and from which, the contract between the plaintiffs and the administrator, and Wilson, took effect; because it purports to grant a right under the patent, as including the circular saw, which is disclaimed, and admitted not to be valid; and at the time of the date of said contract, the disclaimer of the circular saw had not been filed or recorded. Overruled.

4th. That the contract between the patentee and Strong, on one part, and Emmons and Toogood and others, of the other part, avoids both patents, being a mutual admission, that neither patent was good, because purporting, that each was of equal validity, whereas both could not be good; and because such contract operates as a fraud on the public. Overruled as an admission in point of law. And I hold that the occasion of the contract may be established by other evidence, and the reasons why it was entered into; and if the jury believes the evidence on this point in the case, the contract was a compromise on both sides, without any admission of, or intent to admit, on either side, the invalidity of the patent.

5th. That the surrender of the patent by the administrator defeated the title of plaintiffs. Overruled.

6th. That the patent is imperfect and void, for the want of suitable drawings and references, and that if the drawings may be referred to, they should be as composing part of the description, and not part of the claim. Overruled. The drawings are to be treated as part of the written specification, and may be referred to, to show the nature, and character, and extent of the claim, as well as to compose a part of the description.

7th. That the patent is void, for uncertainty and ambiguity in the description; and also for uncertainty and ambiguity in the claim. Answer. Whether the patent is void for uncertainty and ambiguity in the description, is a matter of fact to be decided upon the evidence of experts. The patent is not void for uncertainty and ambiguity in the claim, for the written specification of the claim may be, and is, aided by reference to the drawings. Upon examining the written specification, in connexion with the drawings, the claim, so far as it is a matter of law, must be deemed to be a claim for an improved machine, as described in the written specification and drawings.

8th. That the patent is void for multiplicity of claim. Overruled.

9th. That the patent is void for falsity of claim. Answer. This is not a mere matter of law, but involves matters of fact.

10th. That the disclaimer of the circular saw was not made within a reasonable time. Answer. This is not a mere matter of law in this case, but is to be judged of with reference to all the circumstances in evidence.

11th. That the claim stated by the counsel as that relied on in this trial, "as one for the whole machine or apparatus as an improved machine, capable of three distinct operations, or of producing three results, to wit: planing, tonguing and grooving at the same time in the manner described; and also of performing each of those operations, or producing each of those results separately, in the manner described," is not set forth in the specification; or, in other words, that the claim therein stated is not reasonably susceptible of this construction. Overruled, as a matter of law. The drawings are to be deemed a part of the specification, and taking the whole together, the patent is for an improved machine, and, as such, is not open to the objection stated.

12th. That the drawings cannot be referred to for the purpose of adding any thing to the specification or claim not specifically contained

or mentioned therein; so that if top pressure rollers be not described in the specification, recourse cannot be had to the drawings to supply or describe them, as making part of the specification or claim. Overruled. The drawings are to be deemed a part of the specification, and may be referred to for the purpose suggested in the objection.

13th. That the specification and drawings do not contain any description or claim of top pressure rollers with such reasonable certainty and precision, as the law requires, to constitute a valid claim therefor, as a part of the machine described, either separately or in combination with the cutting wheel. Answer. This is not a matter of law, but involves a matter of fact, as to the certainty and sufficiency of the description, in the particulars mentioned.

14th. That the patent cannot be maintained for a mere combination or connexion of the top pressure rollers with the rotary cutting wheel, because the claim set forth in the specification, and as made by counsel, described and embraced an organized machine, designed to be used in many cases without them, and where they cannot be applied. Answer. This is not a mere matter of law, but involves matter of fact. The patent is not understood by the court to be for a mere combination or connexion of the top pressure rollers with the rotary wheel, considered alone per sese, but in combination with other parts of the machine; and whether the top pressure rollers can be applied, or not, for all the uses described in the specification and drawings, is a matter of fact for the consideration of the jury.

15th. That if top pressure rollers for the purpose of confining the plank to the carriage, are embraced in the patent, nevertheless the defendant has not infringed, because he uses rollers, only for the purpose of feeding, and not for the purpose of confining the material to the carriage, as he uses no carriage; and the incidental effect of their serving as pressure rollers, if they do so, is no infringement of their patent, because the specification admits of feeding rollers as one means of lateral motion not claimed as an invention. Answer. This is a question of fact for the consideration of the jury.

16th. If plaintiffs have a valid patent for the organized machine described therein, the defendant has not infringed upon it; because the machine used by defendant is substantially different from that patented, the machine patented having as a part of its specified organization, a carriage, which is essential to many of the operations, which it is described as designed to perform, and several of which it cannot perform with the use of feeding rollers, and to which carriage alone the moving power is directed to be applied, and which carriage is described and pointed out as the only means of adjusting the material or machine for producing the various thicknesses that may be required; whereas the machine of defendant has no carriage, but applies the moving power always directly to the material, and no carriage can ever be useful for the purpose, for which it is constructed and used, and the adjustment for producing various thicknesses is regulated by means of boxes and apparatus applied to the cutting wheel for the purpose of raising or depressing it, as occasion may require. Answer. This, likewise, is a question of fact.

17th. Plaintiffs' claim is for a combination of machines, or mechanical means, all old, and none applied to a new use, and is not for an organized machine embracing any new part or parts put to new uses, and is, therefore, for a combination merely, and unless we infringe the whole, we do not violate the patent. Answer. This is not a mere matter of law. The court cannot judicially know, whether the machine patented is composed of parts, none of which are substantially new in their application.

18th. That the patent in this case, according to the specification and claim as therein contained and stated by the counsel, is not for any particular form or construction of a rotating cutting wheel, nor for any particular form of platform, nor for any particular form of carriage, nor for any particular mode of effecting the lateral motion of the carriage to the cutting wheel; and therefore, that if any machine described in Bentham's patent, or either of those testified to by Blanchard, was composed of a platform or bench with a sliding bed or carriage to which the material was attached, and which carriage was moved by any lateral motion to and along the cutting wheel, in such manner as that the surface of the material was cut, or planed, or reduced by the cutter wheel, and such machines were, in these respects, suitable for that purpose, then the defendant has not infringed the patent of the plaintiffs in these particulars or either of them. Answer. This is also not a mere matter of law, but involves facts, and skill and knowledge in mechanics. The jury must decide on the facts.

Having thus disposed of the questions of law, we come to those of fact relied upon by defendant, which naturally arrange themselves in four classes. The defendant alleges: 1st. That Woodworth's specification is too vague to enable a competent mechanic to construct a machine from it. 2d. That the invention was not new on the part of Woodworth, but previously known both to Bentham and Blanchard, the former having described it in his specification, and the latter having actually carried it into effect. 3d. That Gould's machine is substantially different from Woodworth's; and, as auxiliary to this, 4th. That Woodworth did not contemplate feeding rollers as a mode of operating his machine.

Now, gentlemen, it is for you to say, whether the invention belonged to Woodworth, or whether the planing machine was known and used prior to the issue of his patent. If

you think the latter, you need go no further, but find for the defendant at once. But as to this point, the burden of proof rests upon the defendant. He must satisfy you beyond a reasonable doubt, that there was a prior invention to Woodworth's, because the plaintiff has a right to rest upon his patent for his invention, till its validity is overthrown. And consequently, if it should so happen, that your minds are led to a reasonable doubt on the question, inasmuch as it is incumbent on the defendant to satisfy you beyond that doubt, you will find for the plaintiff so far as this point is concerned. In relation to this alleged priority of invention, there are but two modes in which it is attempted to be made out; viz. by Bentham's description, and by Blanchard's machine. Blanchard refers us to 1822–23, and gives a description of a machine, which he then constructed and used to plane blocks and gunstocks. He used a roller, to which knives were attached, but he did not use it long. In answer to a direct question put by the court, he said his machine was not like the one in evidence, and, as I understood, did not pretend, that he ever made a machine, which operated substantially by the same means as Woodworth's. He considered the movements of all these machines the same, but the means of operation different. But if the means are substantially different in any supposed cases, then there is or may be invention. The spinning machinery now so universal is an example of this; and the complicated means now used to produce the same result, formerly obtained by hand labor, and with infinitely more rapidity and regularity, no one will deny to be a great invention. Blanchard's machine was burnt, and we have nothing now before us, but his recollection of what it was; and it is for you to say, whether he has satisfied you, that it was substantially the same invention as Woodworth's. It is probable, however, that you will find it necessary to go further, and look into Bentham's description, which has been so copiously commented on in this case. For one, I do not comprehend a tithe of what may be found there; but the question is for your judgments, aided by the testimony of the experts, whether Woodworth's planing machine is contained in that description. Now, you have found, that the experts are not agreed, and, indeed, in the course of thirty years' experience, I have never, I think, known them to agree in opinion, as to whether any machine was really an invention or not. You will weigh their testimony and give it its proper effect. The whole argument, in regard to Bentham, turns on this question. Does he substantially describe, not a machine by which planing may be done, but a machine like the plaintiffs'? He does describe various things, which will accomplish various purposes. But the question is not, whether by using some parts of his invention we may make a machine, which will plane, but whether that machine will be substantially the same as the one Woodworth patented. That is the sole question; for he may have suggested fifty different modes or methods of planing, and still if this very mode be not there, it cannot be properly said, that he has described the plaintiffs' machine. You must see, in effect, that this same machine was substantially in Bentham's eye when writing his specification, and would be in the eye of an expert on reading it. I am not mechanic enough to aid you in explaining that specification; but you have heard several of the plaintiff's witnesses testify, that they could not discern this machine in it, that they could not make it from it. They are all able and ingenious men. Mr. Keller, whose opinion may well be regarded as of the very highest authority, since it is impossible for any man to have a more weighty experience on this subject, he having for so long incessantly devoted his attention to machinery and to patents,—Mr. Keller tells you distinctly, that there is no such machine as Woodworth's in Bentham's specification. On the other hand, Mr. Adams, also an extremely able and experienced man, states directly the contrary. And so of the others. You will remember the names of the witnesses on the one side and on the other, and also the diversity of their opinions on this point. Now, after all, in relation to this various evidence, all honestly and clearly given, by men of great skill and ability, what is your conclusion? Have you evidence, which leaves no reasonable doubt in your minds, that Bentham really does substantially describe Woodworth's machine?

Upon this point, the counsel for the plaintiff made a suggestion, towards the close of his argument, which struck the court as possessing great force. Bentham's specification was known and filed so early as 1793, while Woodworth's patent was not taken out till 1828. It is universally admitted, that the planing machine is a most valuable invention. The counsel have said, indeed, that it is the most valuable of all, which have been made; and though, for myself, I should scarcely go so far as that, but regard the cotton-gin, next after Fulton's wonderful invention of the steamboat, whose incalculable benefits the whole civilized world is every day experiencing, in the comparative annihilation of distance and time, and the consequent advancement of human improvement, as perhaps the most important invention within my knowledge; still I can have no hesitation in conforming to the general high estimate of the importance and utility of the planing machine. But in the best scientific works of the day, no planing machine like Woodworth's was ever alluded to, till after his patent was taken out, though Bentham's specification was constantly spoken of, and the planing machine he patented in 1791 was well known and is described. Now, with so many ingenious and inquiring minds constantly at work upon the construction and improvement of machinery, both in

Great Britain and America, all having easy access to well known publications relating to science and the arts, how could it have happened, that down to the year 1828, no man should ever construct this machine from Bentham's specification of 1793, if it is so clearly to be found therein? Why should it be, that for a period of thirty-five years, not a man in America or England, dreamt of constructing this machine, which has proved of such vast utility, from Bentham, if Bentham really had described it? Certainly, it could not have been from ignorance of the specification, for the Repertory of Arts, in which it was published, was a work of much authority in England, and was, besides, as well known here, as on the other side of the Atlantic. This seems to me a fact of great importance, though I have no right to say, how far it ought to affect your minds. But is not this total silence for so long a time, a circumstance, which may naturally aid you in forming a conclusion on this controverted point? And if, as I have before said, you are in doubt, your verdict in regard to this point must be for the plaintiffs.

But the great question of the case is, as indeed from an early period of the trial I thought it would be, this: Is the machine used by the defendant, substantially the machine, which Woodworth invented? And in regard to this, likewise, there is very great diversity in the testimony of the experts. At the opening for the plaintiff, four or five very intelligent men gave their evidence, that there is no substantial difference between the two; that a portion of the apparatus is different, but that substantially the mode of operation is the same; and that, in truth, the substance of defendant's machine is Woodworth's invention. But on the other hand, the testimony is just as positive, explicit, and strong the other way. And the burden here is upon the plaintiff, who must show, that there has been an infringement upon his right. This is a point, which will merit and require your deliberate and careful attention. Woodworth's claim is substantially for a planing machine; for a mode of accomplishing a particular end by certain means; and to maintain his case, the plaintiff must show, that there has been a substantial invasion of his machine by the defendant. There are various modes of operation mentioned in Woodworth's specification. He speaks in the first place of "rack and pinion," but does not confine himself to that means; for he says the carriage may be moved "by rollers, or by any lateral motion, to the edge of the knives or cutters." You will observe, that he contemplates the use of knives, as distinct from teeth or burrs. He speaks likewise of a carriage, throughout. He "does not claim the invention of circular saws, or cutter wheels," but he does claim "the improvement and application of cutter or planing wheels to planing boards, plank, timber, or other material." His claims, in effect, may be stated thus: "I claim this planing apparatus as my invention; but though I have pointed out one particular mode of operating it, I do not confine myself to that mode, but mention, that any lateral motion may be employed to advance the work to the cutting wheel." Now, if Gould in his machine only dispensed with the rack and pinion, still continuing to use the carriage, beyond all question there would be a plain invasion; for the rack and pinion are not made essential to the machine. It is true, that Woodworth always speaks of a carriage. There is nothing to show that he ever dispenses with it. But he says, that the movement may be given to the carriage by any of various ways. And here arises the question, whether, if an invention in the aggregate be new, and a party omits one part of the machine always used by the inventor, such mere omission will operate to deprive the inventor of his patent right? But the real pinch of this part of the case, is in this inquiry: Does the defendant, in using a part of Woodworth's machine, adopt a mode of movement essentially different from that pointed out by the inventor, or is that mode substantially within the scope of the invention?

Woodworth speaks throughout of a carriage. Gould does not use any carriage, in the technical sense of the term, but employs a platform. He uses feeding rollers to conduct the work of the cutters. He has no rack and pinion, for none is necessary. And his argument is, that as he uses merely feeding rollers, without a carriage, he employs a mode of operation not at all indicated in Woodworth's specification, and substantially different from moving a carriage by rollers or any other lateral motion. If there is this essential difference, the case is his. But if you are satisfied, that this principle of feeding rollers is substantially embraced in the specification and drawings, a mere change in the form or position of the rollers will not change the character of the patentee's right. The defendant contends, that neither in the specification nor the drawings, is there any reference to rollers as a moving power, distinct from a carriage; that feeding rollers, as such, are nowhere pointed out; and that the rollers, which are to be found in Woodworth, are merely friction or guiding rollers. On the other side, the plaintiff maintains, that even in the vertical machine represented in the drawings, the rollers are pressure rollers; that in changing the machine to a horizontal form, which the inventor expressly indicates may be done, they would operate as feeding rollers; and that any competent mechanic would understand them as so intended, and would contrive means to make them rise and fall, as necessary to produce the very result contemplated by the inventor. Now, are these rollers, as to this mode of operation, substantially described in the patent? The language relates to rollers generally. Their use is not pointed out in words, except so far as it mentioned, that the motion of the carriage may be given by rollers. Supposing the machine to be horizontal, say the plaintiffs' counsel, what office would these rollers perform? Those below the

plank, by being geared, would produce its motion to the cutter wheel; those above the plank and beyond the wheel would serve to keep it steady, and would operate as pressure rollers to the extent necessary for that object. So that in point of fact, the rollers above and below would operate as, and would be, feeding rollers. If it is true, that the rollers indicated in the drawings would perform this office, were the machine horizontal, and if a skilful machinist would know, that they necessarily must perform it, and would therefore give them the necessary means of adjustment to produce the intended result—then the point appears to be with the plaintiff. But the counsel on the other side take the opposite ground, and maintain that nothing is to be applied in the horizontal machine except in the precise manner, in which it is indicated to be applied in the vertical; that the vertical rollers are not geared in the drawings, and therefore we cannot suppose the inventor intended, that gearing should be given to the horizontal. I am not sufficiently acquainted with mechanical science to be able to decide about this; but I can scarcely think it an unreasonable supposition, that, where an inventor contemplates different forms and positions of his machine from that in which he describes it, a skilful machinist, in making the change of form, would also make the requisite changes in the parts, from his own knowledge. But there is a good deal of forcible argument on the part of the defendant, that these vertical rollers could never have been intended as feeding rollers, and that they could not perform such an office; though it is unnecessary to dwell on that part of the argument, founded on the want of top-journals in the drawing, because any skilful mechanic in building the machine would naturally, and almost of course, confine the rollers at both ends, whether they were intended for feeding, or pressure, or guiding rollers. And as to the rollers in the drawings, which are represented as beyond the cutting cylinder, the plaintiff says, as we have seen, that they are pressure rollers to some extent, and were meant as such; while the defendant again contends, that in the vertical machine they are guides merely, and in the horizontal machine would be nothing but the same guides. That is a question for your consideration, for on this point you are better judges than I possibly could be. That in the vertical machine with the carriage they are friction rollers in form, is, however, of no importance; for a change of form is not a change of substance. The defendant admits, too, that incidentally his feeding rollers comprehend, to some extent, pressure rollers. It is clear they must. But he alleges that their primary object is to draw the work along to the cutting cylinder, and that the character of pressure rollers is but an incidental, though necessary, result of their office. But on the other hand, the argument is just as good for the plaintiff, that his pressure rollers incidentally comprehend feeding rollers, and would operate to feed the work to the cutting wheel.

But again. Is the carriage, in Woodworth's specification, treated of as an essential and indispensable part of the invention, or might the machine be complete without the carriage, and by the substitution of some other means? If in all cases the inventor contemplated the use of a carriage, and of no other means, and if the defendant in dispensing with it thereby employs what the inventor never thought of, that is a good ground of defence. You are the judges of this; and if you find, that defendant's feeding rollers are not substantially in the patent, and that the carriage is an essential part of the Woodworth machine, your verdict, in that respect, must be for the defendant.

But then comes another consideration. Admitting all this to be true, as the defendant alleges, is there any other part of Woodworth's machine, on which he has infringed? Because, if his dispensing with the carriage and using the feeding rollers constitute the only differences in the two machines, and if the rest be the invention of Woodworth, not known before, then Gould has merely improved upon Woodworth, and has no right to use Woodworth's invention, up to the point where the difference commences. He might, to be sure, have a clear title to a patent for his improvement, but it must be as an improvement; and it would give him no authority to use the other parts of the machine, which Woodworth invented. Therefore it is not sufficient for him to show that his machine is a great deal better than Woodworth's; he must establish the fact, that he uses nothing, which Woodworth invented. Now, he does not use Woodworth's carriage, nor the rack and pinion, nor his pressure rollers, except in so far as his feeding rollers are necessarily pressure rollers. What of his then does he use? The cutters. No particular form of the cutting knives is mentioned in Woodworth's specification; nor was it necessary, because a change in the form, while the principle remains the same, will not escape a violation of patent right.

The question here for the jury to determine is, whether the defendant's improvement is made on the plaintiff's machine as a whole, by taking out part and substituting something better, but still retaining a part, or parts of the original invention; or whether the plaintiff's machine is a mere aggregate, a congregation of parts, all old in themselves, constituting a unit, to which the carriage, in combination with a rack and pinion, or rollers, or some lateral motion, is absolutely essential; and which unit, defendant has not invaded because he dispenses with some of its indispensable constituent parts. If you think, that there is any such invention, on the whole, as the patentee claims, and that defendant's alterations in the machine are mere improvements, but that the residue in the aggregate is the invention of the patentee, and was not known before him, then your verdict will be for the plaintiffs. The dif-

ficulty lies in saying, where the invention was; and you are to consider, whether, taking out the carriage, this machine in its other parts was an invention of those parts, or any of them, or whether it was merely a combination or aggregate. I confess, that my impression has been, that Woodworth meant his claim to be for an aggregate machine, but such is its obscurity, that I am unable to say, decidedly, what, in this respect, he did mean it to be. If you should be of opinion, that the original machine is composed of parts, all of which were known before, and that Woodworth's invention was merely of a new aggregate or combination of those parts, to which the carriage was indispensable, you will find for the defendant. But if on the contrary, you think, that the defendant uses parts of Woodworth's real invention, or if his machine is but an improvement on the original, and not substantially and essentially different from it, the verdict should be for the plaintiffs.

I do not know, gentlemen, that, by saying any thing more, I could aid you at all in coming to a conclusion, and indeed I fear, that I have not made myself so clearly understood throughout, as I could desire. But before leaving the case in your hands, I must take notice of the point of law, upon which the plaintiff's counsel have asked me to instruct you. The ground they take I consider clearly correct, and you will therefore regard it as the law, that the plaintiff's patent is not avoided by the publication of Bentham's specification, unless you are satisfied, that that specification contains an intelligible description of an organized machine, fit for the planing of plank or boards, substantially like plaintiff's; and that if every part of plaintiff's machine can be found described in Bentham's specification as parts of other machines, but not as combined in one machine in such a manner as to be fit for planing boards and plank, it will not avoid the plaintiff's patent.

The jury rendered a verdict for plaintiffs, with $50 damages.

On a subsequent day, a bill of equity was filed, setting forth the facts heretofore stated, and praying, that an injunction should be issued against the defendants, to restrain them from the further use of the machines, which were the subject of the present patent. Two motions were made, one on the law side of the court for a new trial, and the other on the equity side of the court for an injunction,—which were both argued at the same time.

The motion for a new trial was as follows:

William Washburn et al. v. James Gould.

And now after verdict and before judgment, the defendant respectfully prays this honorable court, that a new trial may be granted to him for the following reasons:

1st. Because the honorable judge, who presided at the trial, instructed the jury as a matter of law, that the plaintiffs under their indenture with the administrator of the patentee and Wilson, mentioned in the declaration, had title to such an exclusive right as would enable them to maintain this action.

2d. Because the honorable judge, who presided at the trial, instructed the jury as matter of law, that the patent was not void at the time when and from which, the indenture between the plaintiffs and the administrator and Wilson took effect, by reason of its purporting to grant a right under the patent, as including the circular saw, which was afterward disclaimed, and is admitted not to be valid; and which disclaimer at the time of the date of said contract had not been filed. Whereas the jury should have been instructed, that the patent was void, because at the time of the date of said indenture, when and from which said indenture took effect, it purported to grant a right under the patent, as including the circular saw, which has since been disclaimed and is admitted not to be valid; but which disclaimer had not been filed according to law at the time of the date of said indenture.

3d. Because the honorable judge, who presided at the trial, refused to instruct the jury, that the patent was imperfect and void for want of suitable drawings and references, and that if the drawings may be referred to, they should be as composing part of the description and not part of the claim.

4th. Because the honorable judge, who presided at the trial, instructed the jury as matter of law, that the patent was not void, for ambiguity and uncertainty in the claim.

5th. Because the honorable judge, who presided at the trial, refused to instruct the jury as prayed for by defendant's counsel, that the patent was void for multiplicity of claim.

6th. Because the honorable judge, who presided at the trial, refused to instruct the jury as matter of law, that the drawings could not be referred to for the purpose of adding any thing to the description or claim, not specifically mentioned therein; so that if top pressure rollers were not described in the specification, recourse could not be had to the drawings to supply or describe them, as making part of the specification; whereas the jury should have been instructed as prayed for by defendant's counsel.

7th. Because the honorable judge, who presided at the trial, refused to instruct the jury, that if top pressure rollers were embraced in the patent, for the purpose of confining the plank to the carriage, nevertheless defendant had not infringed in that respect, if he used rollers only for the purpose of feeding, and not for the purpose of confining the material to the carriage, and that the incidental effect of their serving as pressure rollers, if they did so, would not be an infringement of the patent, as the specification admitted, of feeding rollers as one means of lateral motion not claimed as new; whereas the jury

should have been instructed as prayed for by defendant's counsel.

8th. Because the honorable judge, who presided at the trial, refused to instruct the jury, that if the plaintiffs' machine consisted of a composition of machines or mechanical means, all old and none applied to new uses; and did not embrace any new parts, or parts put to new uses; it was in point of law a claim for a combination; and that if the defendants did not use the whole combination they did not infringe; whereas the jury should have been so instructed as prayed for by defendant's counsel.

9th. Because the honorable judge, who presided at the trial, refused to instruct the jury, as prayed for by defendant's counsel, that the patent, according to the specification and claim, as therein contained, was not for any particular form or combination of a rotary cutting cylinder—nor for any particular form of platform, nor for any particular form of carriage, nor for any particular mode of effecting the lateral motion of the carriage to the cutting wheel, and therefore, that if any machine described in Bentham's patent, or either of those testified to by Blanchard, was composed of a platform or bench, with a sliding bed or carriage, to which the material was attached, and which carriage was moved by any lateral motion to and along the cutting wheel, in such manner as that the surface of the material was cut or planed or reduced by the cutter wheel, and that such machines were suitable for that purpose, then, the defendant had not infringed the patent in these particulars or any of them.

10th. Because the honorable judge, who presided at the trial, instructed the jury that the plaintiffs' patent was not avoided by the publication of Bentham's specification, unless the jury were satisfied, that the specification contained an intelligible description of an organized machine fit for the planing of plank or board, substantially like the plaintiff's. And that if any parts of the plaintiffs' machine could be found described in Bentham's specification as parts of other machines, but not as combined in one machine in such a manner as to be fit for planing boards and plank, it would not avoid plaintiffs' patent.

11th. Because the honorable judge, who presided at the trial, omitted to construe the claim set forth and made by the patentee, but left it to the jury to decide, whether or not the claim was for an organized machine or for a combination merely.

12th. Because the honorable judge, who presided at the trial, instructed the jury, that it was not sufficient for defendant to show, that defendant's machine was a great deal better than Woodworth's, but the defendant must establish the fact, that he used nothing, that Woodworth had invented. That defendant did not use his carriage, nor rack and pinion, nor his pressure rollers, excepting in so far as his feeding rollers were pressure rollers, but that he did use the cutters. That no particular form of cutter knives was mentioned in this specification. Nor was it necessary, because a change in form, while the principle remains the same, would not escape a violation of the patent right: by means whereof the jury were led to understand, that the use of a cutting roller by the defendant was a violation of the right claimed by plaintiff.

13th. Because, by the course and result of the trial, the defendant is precluded from carrying up for final decision in the supreme court, the points of law, which were ruled against him for the purposes of the trial.

14th. Because the verdict was against the weight of evidence.

15th. Because of the discovery since the trial of new evidence, which defendant is advised, is material to the right decision of the case.

In support of this last point of his motion for a new trial, the defendant stated, that he should rely chiefly, but not exclusively, upon the deposition of Isaac Adams, the evidence of Thomas Blanchard, Charles M. Keller, and the charge of the judge, as published; and that, the new evidence would be disclosed in the affidavit of Daniel Dunbar, to be filed in the equity suit, on plaintiffs' motion for an injunction, to be heard at the same time as the above motion for a new trial.

The motion for a new trial was then briefly spoken to by the counsel on both sides. Upon the motion for an injunction,

B. R. Curtis, for plaintiffs, argued, that the injunction should be granted upon three grounds: 1st. Because of the long possession by the patentee and his assigns under the patent; to which point he cited Bolton v. Bull, 3 Ves. 140; Universities of Oxford v. Richardson, 6 Ves. 707; Harmer v. Plane, 14 Ves. 130. 2d. Because of the renewal of the patent by the board of commissioners, which was a strong circumstance to show, that the possession was lawful. 3d. Because of the verdict in the trial at law, which was a decisive reason, why it should be granted; and to this point he cited Bolton v. Bull, 3 Ves. 140.

Dehon & Giles, for defendant, argued, that the possession, which would entitle a party to an injunction, must be long and undisputed; whereas the present patent had been disputed. To this point was cited Collard v. Allison, 4 Mylne & C. 487; Hill v. Thompson, 3 Mer. 622.

STORY, Circuit Justice. After the very elaborate arguments had at the trial at law in this case, and unexampled in length in this court, I do not deem it fit or proper to go over the various grounds for a new trial, which have again been argued at large at the bar. Some of the questions, which then occurred, were new to my mind, and upon which I entertained considerable doubts; but, after all, I then pronounced the opinion respecting them, which upon the fullest reflection I entertained. These doubts, whatever they were, have not been strengthened by the arguments since had. On the contrary I must say, that I have since felt

far greater difficulties in supporting the opposite conclusions. And on the whole, I wish now to say, that I feel no inclination to change those opinions. As to the points, which had been ruled by my brethren on other circuits, and which I adopted from that just comity, which belongs to their learning and ability, and which has long been adopted as a fit rule to govern me in my circuits, since I know of no higher authority except that of the supreme court of the United States, I shall continue to adhere to their doctrine, as I have not the presumption to suppose my own judgment entitled to more weight than theirs.

There are a few grounds only, upon which I shall deem it necessary to add any thing beyond what was suggested at the trial. In the first place, as to the supposed surprise by new evidence on the part of the defendant, not known to him at the time of the trial. Several answers may be justly given to this suggestion, but I shall limit myself to two. The first is, that, by reasonable diligence, the information might have been obtained; the second is, that it was, in point of fact, within the reach of the party before the trial was concluded. I ought to add, that every person, who violates a patent, is bound, before he does so, to know that he puts himself to the peril of establishing a good defence, and he has no right to violate it, and then to seek indulgence from the court to find out some possible ground or some probable evidence to support him in his acts.

In respect to another objection, viz. that the court was bound to state what in point of law the invention claimed by the patentee was, I agree, that this is generally true, so far as the construction of the words of the patent, and specification is concerned. But then this doctrine is to be received with qualifications, and sub modo, as the very opinion of Mr. Baron Parke, cited by the counsel, in the case of Neilson v. Harford, Webster, Pat. Cas. 295, 370, abundantly shows; and the jury are to judge of the meaning of words of art, and technical phrases, in commerce and manufactures, and of the surrounding circumstances, which may materially affect, enlarge or control the meaning of the words of the patent and specification. But I do not proceed upon this ground. The court did explicitly give to the jury its construction of the patent in the present case, and that was, that it was for an improved machine. But then it was necessarily open to the jury to say, what part or parts of this improved machine were new; in other words, what parts and combinations of parts in the same were the invention of the patentee, and what were known before. If the defendant did not infringe the whole of the improved machine, that is, by making or using one entirely identical; yet if he did make and use a substantial part thereof, which was exclusively the invention of the patentee, and distinguishable from the other parts of the machine, that would be an infringement of the patent according to our law. This was not a matter of mere law, but involved matter of fact, and left it open to the jury to say, what upon the whole evidence connected with the patent and specification was the extent of the plaintiff's invention. Did the plaintiff invent the aggregate or combination only incorporated in the machine? Or did he invent certain parts also of the machine distinguishable from the rest, which were unknown before? It was to this part of the case, which seems to have been misunderstood by counsel, that the language referred to in the charge was addressed, when the court said: "If you (the jury) should be of opinion, that the original machine is composed of parts, all of which were known before, and that Woodworth's invention was a mere aggregate or combination of those parts, to which the carriage was indispensable, you will find for the defendant. But if, on the contrary, you think, that the defendant uses parts of Woodworth's real invention, or if his machine is but an improvement on the original, and not substantially and essentially different from it, the verdict should be for the plaintiffs."

The next ground, which has been most elaborately argued, is, indeed, to a point, confessedly merely technical and aside from the real merits. It is, that the assignment under which the plaintiffs claim, does not convey to them a territorial or sectional right under the patent in the sense of the patent act of 1836, c. 357, and the subsequent acts. I say, that this is purely technical, and aside from the merits, and would involve a mere question of costs, since it was admitted at the trial, that, by agreement between the parties, it was arranged that the name of the patentee or other proper party might be substituted, if the court thought the objection valid. To allow this objection now to prevail, if upon the merits the case were otherwise unobjectionable, would be in effect, therefore, to turn the parties round to a new suit, upon a ground that is not entitled to any favor, and stands upon the very limits strictissimi juris. So far as the law goes, the party is entitled to it; but certainly not beyond that.

Let us now proceed to consider the language of the instrument or indenture of assignment of the 2d January, 1843. It is difficult to make the whole force of the argument understood, without citing at large some of the clauses, which I shall accordingly refer to as before the court. The indenture, after reciting, that for certain considerations, therein stated, the patentee "hath agreed to license and empower parties of the second part (the plaintiffs) to construct and use, and to license others to construct and use, fifty of the said patented machines, within the counties of Suffolk, and Norfolk, and in the towns of Charlestown, Cambridge, West Cambridge, Watertown, Medford, and Malden and Rockbottom village, in the county of Middlesex, in the state of Massachusetts; in such manner, nevertheless, that the license

and authority so granted shall stand and be as security unto the party of the first part (the patentee), and his assigns, for the payment of each and all of the said promissory notes" (the consideration money), proceeds to say: "First, the party of the first part (the patentee) does hereby license and empower the parties of the second part (the plaintiffs and their executors and administrators) to construct and use fifty of the said patented machines within the territory aforesaid; and also within the same territory to license and empower other person or persons to construct and use one or more of the said patented machines during the whole period for which the said letters patent have been granted; but the whole number of machines by the parties of the second part (the plaintiffs), and by all persons empowered by them, constructed and used during the said period in the said territory, shall not at any one time exceed the said number of fifty machines." Then follows a proviso, providing for a sale of the right granted to the plaintiffs, in case of a default in the payment of the notes given for the consideration-money. I do not know, that any thing very important can be gathered from it, to assist our inquiries upon the present occasion, unless it be, that it speaks in one place of the sale of "all the right, title and interest which are in any way granted unto" the plaintiffs; and, in another place, that, upon the sale, the patentee may, in the names of the plaintiffs or their assigns, "convey and assure the same to the purchaser, and thereupon all license, power and authority" of the plaintiffs and their assigns, &c., "shall cease." If the language of this proviso is to have any distinct effect, with reference to the point before the court, it is, that it is explanatory of the preceding clause, and shows that the words "right, title and interest granted," and "license, power and authority," were used by the parties as precise equivalents. Then comes the second clause, by which the party of the first part (the patentee), and the party of the third part (Wilson), covenant with the plaintiffs, that they will institute suits at law, and in equity, against any and all persons, who shall infringe upon the patent aforesaid, within the territory aforesaid, during the period of two years from the date of the indenture, at their own expense; and after deducting the expenses of the suits, &c., to pay over the damages recovered to the plaintiffs. The third clause may be passed over as not important. The fourth clause then provides, and the plaintiffs covenant with the patentee and Wilson, that they will at all times, during the said term of two years, suffer and permit the patentee and Wilson to use their names in all such suits as may be commenced as aforesaid, and that they will aid and assist them (the patentee and Wilson) to procure the necessary evidence to sustain such suits when commenced. The fifth clause contains a covenant by the patentee with the plaintiffs, "that he will not license and empower any person or persons to use any of the aforesaid machines within the territory before named during the said term of seven years for which the said letters patent have been extended. But nothing herein contained shall be so construed as to prevent the party of the first part (the patentee) from constructing or licensing the construction of the said machines to be used elsewhere than in the territory aforesaid."

Such are the most material parts of the indenture, which are necessary to be brought directly under review in the present discussion. The whole argument of the defendant's counsel turns upon this, that the instrument amounts, not to a grant of a sectional right of the patent in a particular territory, but as merely a license to construct and use fifty machines within the prescribed territory. There is no magic in particular words; but we must understand them, as they stand and are used in the particular instrument; and in searching for the true interpretation, we must look to all the provisions of the instrument, and give such effect to it, as its obvious objects and designs require, without nicely weighing the precise force of single words. Much stress has been laid upon the words "license and empower" in this instrument; as though they imported something different from "grant." There is no doubt, that the words may be used in contradistinction to "grant;" but it by no means follows, that they are or must naturally or necessarily be so construed. In a broad and general sense, in common parlance, we use the words indiscriminately. We say, that a license or power is granted to do so and so; and no one ever perceives any impropriety in the language. A mere license, properly so speaking, passeth no interest in the thing, but only makes an action lawful, which without it would have been unlawful. But if it passeth an interest therein, then it is no longer a mere license, but a grant. So the law is laid down in Thomas v. Sorrell, Vaughan, 351. See, also, Warren v. Arthur, 2 Mod. 317. In Brooke's Abridg., "License," pl. 19, it is laid down, that if a man license one to enter into his land and occupy it for a year, &c., it is a lease, and should be so pleaded, and not as a license. And for this he cites 5 Hen. VII. 1, which, upon examination, I find fully supports the proposition, if indeed it were possible to entertain a doubt upon the point. S. P., Hall v. Seabright, 2 Keb. 561; 1 Mod. 14; 1 Sid. 428. Now, in the present case, there can be no doubt, that the instrument did not convey a mere license, but a license coupled with an interest in the machines, and in the patent right itself, so far as concerned these machines. So that there is nothing in the language, which in any manner restricts the interpretation; and we are at full liberty to

construe the words "license and empower" to mean a grant, if that will effectuate the true intent and apparent objects of the parties. Now, what were the true intent and objects of the parties in the present instrument? They were, in my judgment, to give the exclusive right, for the purpose of profit, to construct and use the patented machines, and with them the exclusive right to the patent itself, as an appropriate incident, within the prescribed territorial limits. This is made clear by the covenant on the part of the patentee, that he will not license and empower any other person to use the same machines, within the same territory, during the whole period of the running of the patent right under the patent. Then comes the proviso, that nothing in the instrument shall be so construed as to prevent the patentee from constructing or licensing the construction of the said machine to be used elsewhere than in the prescribed territory. It is suggested, that this proviso shows, that it was the intent of the parties to allow the patentee, and any other persons licensed by him, to construct machines within that territory, to be used elsewhere, which is a right inconsistent with the supposition, that the patent right had passed to the plaintiffs. I confess, that upon a close examination of the language, I entertain great doubts, if this is to be deduced as a very clear inference from the language used. The word "elsewhere," in its actual connection, is susceptible of being applied, as well to the construction, as the use of the machine elsewhere, and thus to be deemed a mere cautionary provision, very proper in cases of this sort, to prevent misinterpretation. And if the other parts of the instrument would justly lead to the conclusion, that the patent right was intended to be exclusively granted to the plaintiffs within the prescribed territory, I should not scruple, ut res magis valeat, quam pereat, to adopt it.

But assuming the true interpretation of the words to be, as the defendant contends, it by no means leads to the conclusion for which it is urged. Even upon his construction, the patentee, or his licensees, could not use or sell for use any machines within the territory, if they could construct them there. Now, the right to use the machines is as much a part of the patent, as the right to construct them; and supposing the patent right to be, in contemplation of law, an entirety, then we should have a case, in which the intent of all the parties, upon the very face of the instrument, would be utterly defeated, and the instrument itself become a nullity, or neither party would have any right whatsoever against third persons under the patent, for any violation thereof. The patentee intended to convey to the plaintiffs and their assigns, the sole and exclusive right to use the machines constructed by them, within the territory, and to reserve to himself and his licensees at most only a concurrent right to construct machines, but not to use them within the territory, so that nothing was intended to be reserved to the patentee but a naked concurrent right to construct, and to the plaintiffs a similar right to construct, with the full and exclusive use of all the machines constructed by them within the territory. If by law such an intent cannot be carried into effect, because the patent is, as to all the operative rights granted therein, "the full and exclusive right and liberty of making, using, and vending to others to be used, the invention," entire and indivisible, then, as has been suggested, the instrument is a mere nullity. If, on the other hand, it is an operative instrument, then, as the exclusive use of the machines within the territory has passed to the plaintiffs, the patentee can maintain no suit for any violation thereof, therein, for he has no residuary right to such use; and the plaintiffs can maintain no suit for such violation, according to the argument of the defendant, because they are not assignees of the entirety of any territorial right. I confess, that if I were driven to make a choice under such difficulties—in order to escape from such consequences, going manifestly to defeat all the proper purposes of the patent acts—I should rather construe these acts distributively, and say, that the patent right ought not to be deemed an entirety, but to be divisible, so as to permit a grant of the exclusive right to construct to one person, to use to another, and to vend to another.

But I am not driven to make any such choice. On the contrary, a construction of the instrument perfectly consistent with its terms and intent and objects, taking all the clauses together, may be adopted, which shall give full effect to every part thereof. Suppose the instrument had in terms declared, that the patentee granted the exclusive right of the patent within the territory to the plaintiffs, but the plaintiffs were still to permit and allow the patentee and his assigns to construct machines within that territory, to be used and sold elsewhere, there could be no difficulty, in law, in giving full effect to such a provision. The patent right would pass to the plaintiffs within the territory, and the patentee and his assigns would still be entitled, as licensees under the plaintiffs, to construct machines, without infringing the grant, within the territory. Now, this is precisely what, in my judgment, the parties intended in this case to do, and what, taking all the clauses together, they have actually done. In the first place, the grant, for so I call it, was not a mere personal naked license to the plaintiffs; but it was intended to be an assignable interest. The plaintiffs were to construct and use, and to license others to construct and use, machines within the territory. They might assign their whole right to all the machines, or to any one or more of them. Suppose a man should sell a horse to another, and the buyer were to agree, that the seller should have the privilege to use the horse once a week, as his occasions may require, would not the exclu-

sive property in the horse pass to the buyer? Suppose a person should buy of another a loom for weaving, and he should agree, that the seller might weave certain cloth in it, would not the sale convey the entire title to the loom to the buyer? Suppose a person should buy a corn-mill of another, and should agree at the same time, that the seller might grind his own corn therein, would not the entire title to the mill pass? I put these cases, because they stand upon a strong analogy, and show that there is nothing unreasonable or repugnant in giving such constructions to instruments of this nature.

In the next place, if there was any violation of the patent right within the territory, in whose name was the suit contemplated to be brought? Plainly, as the fourth clause, already referred to, shows, in the name of the plaintiffs, and yet at the expense of the patentee; and the plaintiffs were to receive all the damages recovered, after deducting the costs and expenses of the suits. Now, this very clause is decisive to show, that all the parties contemplated, that the patentee had parted with all his patent right within the territory, and that it was exclusively vested in the plaintiffs. If that was the intent—the true and sincere intent, what is there in the law which prevents this court from giving full effect to it? But it is said, that the parties acted under a mistake of the law on this subject. But how does that appear? It is assuming the very matter in controversy, and assuming it, when, upon the interpretation of the instrument itself, already suggested, there was no mistake of law at all. It is clear, that the parties intended no mistake of law, and we are not at liberty to defeat their intentions by assuming, that one did exist.

The very proviso already commented on, corroborates the views already taken by the court. If the parties did not intend, that the plaintiffs should have the exclusive right to the patent within the territory, but meant, merely, that the plaintiffs should possess a limited license therein, the proviso, so sedulously incorporated into the fifth clause, was utterly useless and unnecessary. But, if the plaintiffs were to have such an exclusive right, then the proviso may have a very just, and, in one view, a very important operation. Upon the construction contended for by the defendant, it secures a license to the patentee, to construct machines within the territory, although not to use them or vend them there. In the other aspect, it excludes any conclusion, that the patentee did not "elsewhere" retain his full and exclusive right and liberty to make, use, and vend any machines, whatsoever, under the patent.

But it is suggested, that the limitation of the right, granted to fifty machines, shows, that the patentee contemplated a license for that number only, and not an exclusive grant of the patent to construct and use machines within the territory. I profess not to feel the force of this, as an independent, or cogent objection. It is a circumstance, in the case, fit to be weighed. But it is, by no means, one, that is, in itself, entitled to very grave consideration. The limitation of the number of machines, to be made or used under a patent, is not inconsistent with the grant of an exclusive right in the patent, within a particular territory. It is a matter of policy, or convenience, or profit, to be judged of by the parties, as to its effects upon the value of the patent right, out of that particular territory. Suppose a patentee should sell an undivided moiety of his patent to another person, and should agree with him, that neither of them should erect more than a given number of machines; so that the market should not be unduly glutted with them, either for use or sale; or suppose that the patentee should sell the exclusive right of his patent to A., in six of the United States, to B. in six other states, and to C. in six other states, retaining the remaining states to himself, and he and they should mutually agree not to make or use, or vend, more than a fixed number of the patented machines in any one state, what would there be in such an agreement inconsistent with the exclusive right of each within his prescribed circuit of states? I profess to be unable to perceive any legal objection to such an agreement, or to its legal operation, as an exclusive grant of the patent, within the prescribed states. There is, or at least may be, a wide difference between the right to a thing, and the unrestricted exercise of that right, under a grant. A man may purchase a house in fee, and yet he may limit himself, as to his mode of enjoyment thereof; as, for example, he may covenant not to carry on a particular trade there, or not to let it for a tavern, or not to let it in parts to more than four families at the same time. The house is still in his exclusive ownership, although he should thus qualify the general rights, ordinarily incident to that ownership. The limitation of the number of machines in this case, was, at least, as far as we can gather from the nature and apparent objects of the instrument, not designed to prevent an exclusive patent right within the territory, but to exclude an injurious competition to the patentee, elsewhere. If the plaintiffs were at liberty to construct and use as many machines, as they pleased, within the prescribed territory, the value of the patent right, to the patentee, in all the adjacent and neighboring territory, might be materially impaired, if not totally extinguished. The limitation, then, was designed, not to change the nature of the right, but to limit its exercise. It was not to reduce it from a grant to a mere license, but to limit the extent of the actual exercise of the right granted. It is not, properly speaking, an exception of a part out of the thing granted, ejusdem generis; but it is a restriction upon the mode and extent of using it. There are many other suggestions, which might be made upon the true character and interpretation of this instrument, and various other expositions have been relied on, at the argument, upon which I forbear to comment, because

they do not appear to me materially to alter, or control those, which have been already considered. I do not say, that the interpretation of this instrument is free from all doubt. But, that, which approves itself best to my judgment, is that, which has been already stated. The opposite conclusion could not, in my judgment, be arrived at, without encountering more difficulties—some of which strike me to be almost insuperable. On the whole, therefore, I hold, that the interpretation given to the instrument at the trial was the true one, and it has not been shown to be erroneous.

For the reasons already given on the other points, as well as on this point, the motion for a new trial must be overruled, and judgment pass upon the verdict for the plaintiffs. I have the less hesitation in coming to this conclusion, because the present trial is not absolutely final; and the merits of the case may be fully considered in the bill in equity, and carried for a final decision to the supreme court.

Upon the other motion for an injunction, founded on the bill in equity, it is not necessary to say much. The injunction is asked for, upon the ground of long possession, the renewal of the patent, and the legal effect of the trial at law. In respect to the possession, the case is certainly very strong. The original patentee (Woodworth) went to his grave in full possession of it, if not undisturbed and undisputed, as to his title to the invention patented, at least without any successful impeachment of it. The patent has been renewed, since his decease, by the board of commissioners, after full examination and deliberation, in favor of his administrator. I think, too, that it was clearly established at the recent trial, that Woodworth was the true and original inventor of the machine patented, and it was so found by the jury. Indeed, the only question, upon the merits, was, whether the defendant used the patent machine, or one substantially different from it. Upon that, as a question of fact, there was a considerable conflict of evidence. But the jury found a verdict upon that point, also, for the plaintiff, and, as it appears to me, according to the preponderance of the evidence. The defendant has established no title in himself, or in any other person, to use the patented invention; and he has failed in his defence, that he did not violate it. The doctrine laid down by Lord Eldon, in Hill v. Thompson, 3 Mer. 622, is, in my judgment, the true doctrine, and is indispensable to the repose of titles, and the security of patentees. It is this,—that where a patent has been granted, and an exclusive possession, of some duration, under it, the court will interpose its injunction, without putting the patentee previously to establish the validity of his patent by an action at law. But where the patent is but of yesterday (meaning, that it is recent), and upon an application being made for an injunction, it is endeavored to be shown, in opposition to it, that there is no good specification,—or otherwise, that the patent ought not to have been granted, the court will not, upon its own notions, respecting the matter in dispute, act upon the presumed validity or invalidity of the patent, without the right having been ascertained, by a previous trial at law; and will send the patentee to law, and oblige him to establish the validity of his patent, in a court of law, before it will grant him the benefit of an injunction. Correctly considered, there is nothing in Lord Cottenham's judgment, in Collard v. Allison, 4 Mylne & C. 487, which in any manner impugns or shakes this doctrine. In that case, a new trial at law had been granted, and therefore his lordship held the legal title of the parties, as still undecided. I have, myself, in former cases, adopted Lord Eldon's doctrine, and, especially, in the case of Ames's paper manufacturing patent, which was, at the time, most strenuously contested upon various grounds, and, especially, upon the ground, that the invention was not new. Yet the jury having, after a great conflict of evidence, established the validity of Ames's patent, an injunction was granted. I shall, therefore, direct an injunction to issue, and to remain, until the hearing of the cause, or the further order of the court.

[For other cases involving this patent, see note to Bickness v. Todd, Case No. 1,389.]

WASHBURN (NEEDHAM v.). See Case No. 10,082.

WASHBURN v. PENNSYLVANIA INS. CO. See Case No. 17,212.

Case No. 17,215.

WASHBURN v. UNION FIRE INS. CO.

[Detroit Post and Tribune. Nov. 8, 1879.]

Circuit Court, E. D. Michigan. Nov. 7, 1879.

FIRE INSURANCE—CAUSE OF LOSS—EXPLOSION AT FIRE.

The case of C. C. Washburn against the Union Fire Insurance Company in the United States circuit court yesterday resulted in a verdict for the Washburn Mills at Minneapolis, destroyed by an explosion nearly two years ago. There was a clause in the policy exempting the company from liability from loss by explosion. Plaintiff claimed that the mills were on fire before the explosion, and that the explosion was caused by fire. Judge BROWN submitted to the jury the question whether or not fire other than the ordinary fires or lights in the mill caused the explosion. They found that there was such fire, and that therefore the exemption in the policy did not apply. There were some 80 policies on the mills and contents, and other suits are pending.

[Cited in Washburn v. Miami Valley Ins. Co., 2 Fed. 639.]

[This was an action by Cadwallader C. Washburn against the Union Fire Insurance Company on a policy of insurance. The trial resulted in a verdict for plaintiff for $1,650.50. No opinion filed.]

Case No. 17,216.

WASHBURN v. WESTERN INS. CO.

[9 Ins. Law J. 424.] [1]

Circuit Court, S. D. Ohio. Oct. Term, 1879.

FIRE INSURANCE—CONSTRUCTION OF POLICY—EXPLOSION OF FLOUR DUST.

1. The policy insured the building and machinery of a flouring mill in Minnesota, which was destroyed through the force of an explosion in connection with fire. It was alleged by the defendant that the explosion resulted from flour dust fired by a spark or flame from a lamp, and that the fire was caused by the explosion, while the plaintiff insisted that a fire preceded and caused the explosion. The policy contained the following condition: "The company shall not be liable for fire caused by invasion, insurrection, riot, civil commotion, or military or usurped power; nor for loss by lightning unless fire ensue, and then for loss by fire only; nor for loss by fire or otherwise resulting from the explosion of steam boilers, or gunpowder or other explosive substances; nor for loss of any kind consequent upon the fall of a building herein insured, or containing property covered (except the same be a result of fire); and all insurance under this policy on it or its contents shall, in such cases, immediately cease and determine." *Held*, that if the explosion was caused by a fire, although the explosion contributed in a large degree to the destruction, fire was the proximate cause and the policy was liable, but if the explosion resulted from a spark or lamp and caused the destruction in whole or in part, and the fire resulted from the explosion, the policy was exempt.

2. Any specially inflammable or hazardous condition due to the presence of flour dust must be presumed to be known to the insurers if an accident of the business.

[Action at law upon a policy of fire insurance.]

Abstract of charge to jury by SWING, District Judge:

This condition by the terms of the policy is a part and parcel of the policy, and the policy is a general one of indemnity against loss by fire; but the condition excepts loss which may result from lightning unless fire ensue, or loss by fire which originated from explosion of steam boilers, or from the explosion of gunpowder, or from the explosion of any other explosive substance. So that loss by fire created and brought into existence from any other cause whatever, no matter what, is expressly provided for by the terms of this policy. That is, so far as the question of fire is concerned. But there is another exception in this policy in connection with it, and that is that the policy shall not extend to any loss to the party which may result, not from fire, but which may result in other ways from either of these,—a loss which is caused by lightning, from the explosion of steam boilers, from the explosion of gunpowder, or from the explosion of other substances. The insurance company had a right to make these exceptions as a part of its contract, and they are not repugnant to the general purpose and object of the contract; so that in this case this condition must be regarded as a part and parcel of this contract as much as though it were on the face of the contract.

I don't think it necessary, gentlemen of the jury, in this case to go into any extended discussion of the relation of cause and effect, or of the philosophical division or subdivision of causes and the relations to each other and of their ultimate relation to the effect produced. Such a scientific and philosophical disquisition would result in no valuable purpose in enabling you to discharge your duty in this particular case. Interesting as they are to scientists, and valuable as they are, and necessarily so in many cases, this is not a case or a time to indulge in anything of that character, even if we had the disposition or ability to do so. But from the cases reported in 7 Wall. [74 U. S.] 44 [Insurance Co. v. Tweed]; 11 Pet. [36 U. S.] 213 [Waters v. Merchants Louisville Ins. Co.]; 94 U. S. 469 [Milwaukee & St. P. Ry. Co. v. Kellogg]; 95 U. S. 117 [Insurance Co. v. Boon],—one proposition of the law of force and the philosophy of force, and the philosophy of cause and effect is clearly and conclusively established, and that is this: that the proximate cause—the cause to which the result must be attributed—is not necessarily at all times the cause nearest the result which has been accomplished, but that it may be the originating cause; in other words, it may be a cause which has set other causes in motion, which, by their unsevered and continued action with each other, has produced the effect. In this case, if there was a fire, and it produced an explosion, and that explosion contributed in a very large degree to the destruction of the property insured, the fire nevertheless would be the proximate cause, and would be the agent to which the result must be attributed,—the cause which produced the effect. On the other hand, if the destruction of this property was produced by the explosion of any combustible or explosive substance; if that was the cause which threw it down, and if the fire resulted from that which caused its ultimate destruction, or the destruction of any part of it, and that explosion was occasioned by a spark or by a flame from a candle or lamp,—then the explosion would be the proximate cause which produced the result, and the plaintiff in this case would not be entitled to recover at the hands of the defendant. So that the whole question for you to determine under the instructions which I have given you is one purely of fact,—whether there was in this mill a fire, and from the result of that fire an explosion ensued by which this property was destroyed. The defendant, by its contract, agreed to indemnify the plaintiff against damage or loss from fire to the building and machinery of a flour mill, and the policy directly designates such property as specially hazardous. Whatever was, therefore, necessarily connected with the building and machinery and their uses in the manufacture of flour, or necessarily growing out of and resulting from such use, by which the property would be rendered more liable to fire than ordinary property, must be held to have been in the contemplation of the defendant at the time of the issuing of the policy, and it must be held to have contracted in direct reference thereto. Therefore, if in the

[1] [Reprinted by permission.]

case of a building and machinery used in the manufacture of flour, the building would become filled with flour dust, which by its character would be highly inflammable, and if, under such circumstances, a fire broke out in the mill, and by its rapid progress and heat brought the dust and the air in such a condition and in such relations to each other as to make them explosive, and they were by such fire exploded, the loss would be a loss by fire within the terms and meaning of this policy, and the defendant would be liable for it. As a matter of course, the plaintiff must satisfy you by a preponderance of evidence that there was a loss by fire, applying it to the particulars in the case. The plaintiff must satisfy you by the preponderance of the evidence that a fire existed in the mill, and it is for you to determine from all the facts and circumstances of the case where the preponderance of the evidence lies. If, taking all the facts and circumstances in the case together, the preponderance of the evidence satisfies you that such a fire did exist, and that it produced the explosion, then the defendant is responsible to the plaintiff under the rules which I have given you. As to the extent of the responsibility, if there was a total loss of the property,—that is, a total loss of the building and a total loss of the machinery,—as a matter of course the defendant would be liable to the full amount of the policy of insurance, with interest from sixty days from the date at which the proofs of loss were furnished.

Verdict for plaintiff.

Case No. 17,217.

WASHBURN & MOEN MANUF'G CO. v. HAISH.

[9 Biss. 141;[1] 18 O. G. 465; 4 Ban. & A. 571.]

Circuit Court, N. D. Illinois. Oct. 14, 1879.

USE OF ANOTHER'S PATENT MARK—SUIT FOR INJUNCTION—VALIDITY OF PATENT.

1. A person has no right to mark his goods with any words or terms indicating that they are manufactured under a patent which he does not own and has no right to use, and the courts will restrain him from such action.

[Cited in Adee v. Peck, 39 Fed. 211.]

2. And in such case the defendant will not be allowed to defend by denying the validity of the patent.

In equity. Bill for injunction.

Coburn & Thacher, for complainant.

I. V. Randall, for defendant.

BLODGETT, District Judge. The bill in this case charges that complainant is owner of a patent for an improvement in barbed wire for fencing purposes, No. 74,379, issued by the United States to Michael Kelly, dated the 11th day of February, 1868, and re-issued on the 8th day of February, 1876; that defendant, Jacob Haish, under the name of Jacob Haish, J. Haish & Co. and Jacob Haish & Co., who is a manufacturer of barbed wire for fencing purposes, has issued circulars and used tags and marks and put upon packages of barbed fence wire words and terms stating that the wire manufactured and sold by him is made under said re-issued patent, and also that he is owner of one-half of said re-issued patent, to the great detriment of complainant's business. Complainant prays injunction restraining defendant from issuing any circulars or using any words on packages indicating that his goods are manufactured under said re-issued patent.

Defendant admits the issue of said circulars and the use of tags and markings, substantially as charged in the bill, and also admits that he is not the owner of said re-issued patent, and alleges that he is the owner of certain patents for barbed wire, under which he manufactures, and that he marks his goods with words showing that they are made under his said patents. He further alleges that said re-issued patent is void, and that complainant has no right to the protection thereof. I am very clear that the defendant has no right, upon the admitted facts in the case, to mark his goods with any words or terms indicating that they are manufactured under complainant's patent. He has the right, and it is his duty, to mark his goods with his own patent mark; but this does not give him the right to put upon the goods any indicia showing that they are made under another man's patent or a patent which he does not own and has no right to use. Several reasons occur to me why he should not be allowed to do this. In the first place, the owner of a patent has the right to regulate the quality of goods bearing the patent mark. The value of a patent to its owner may largely depend upon the quality of goods manufactured under it. By manufacturing and selling a poor article purporting to be made under complainant's patent the value of the patent itself may be seriously impaired and the complainant damaged. In the second place, the public would be imposed upon and led to believe that they were purchasing a genuine article made by the patentee or under his patent. This reason applies the more forcibly because the law makes it the duty of a patentee, or those manufacturing goods under a patent, to mark his goods with the word "patented," with the date of the patent; and persons purchasing such goods with the belief that they were made and vended by the patentee, or those acting under his license, might be liable for an action of infringement by the owner of the patent; and, thirdly, such an act is a direct violation of the property interest which the law vests in the owner of a patent. No man has the right to violate this right of property any more than he has to trespass on another's land or other tangible property. Nor can the defendant question the validity of this patent in this collateral way.

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

If the patent is not valid, defendant has no right to impose upon the public by marking his goods with terms indicating that they are protected by a patent. He cannot be allowed to use that to which complainant has at least the exclusive prima facie right and then defend himself by denying the validity of the patent. Again, the effect of defendant's admitted acts is to call in question the complainant's title to this re-issued patent. He is in effect guilty of a libel upon the complainant's title by asserting that he is the owner of half the patent, and this may work great injury to the complainant. Whether complainant can recover the damages in this action which it may have sustained by these admitted acts of the defendant is not now in question. The only relief at present invoked is the prevention of future damage to complainant, and to this extent, it seems to me, a case is made out for injunction.

An injunction will be issued restraining defendant, his agents, attorneys, servants and associates from marking any barbed fence wire or packages of barbed fence wire with any words or letters indicating that said wire is manufactured, either in whole or part, under or pursuant to the said re-issued patent No. 6,902.

[For another case involving this patent, see Washburn & Moen Manuf'g Co. v. Haish, 4 Fed. 900, 7 Fed. 906.]

Case No. 17,218.

WASHBURN & M. MANUF'G CO. v. HAWKEYE STEEL-BAR FENCE CO.

[Cited in Washburn & Moen Manuf'g Co. v. Cincinnati Barb Wire Fence Co., 42 Fed. 678. Nowhere reported; opinion not now accessible.]

WASHBURNE (HAWES v.). See Case No. 6,242.

WASHBURNE (LOVEJOY v.). See Case No. 8,550.

Case No. 17,219.

WASHING MACH. CO. v. EARLE.

[3 Wall. Jr. 320;[1] 2 Fish. Pat. Cas. 203; 18 Leg. Int. 348.]

Circuit Court, E. D. Pennsylvania. Nov. Term, 1861.

DISINTEGRATION OF PATENT RIGHTS — GRANTS TO DIFFERENT PERSONS.

1. A patentee may hold a close monopoly of his right, and if he does so, the court will restrain by injunction any persons using it. Or he may grant out his entire right. But he cannot divide his right into parts, and grant to one man the right to use it in its connection with or application to one class of subjects, and to another man the right to use it in its connection with or application to another class, to such an extent as that purchasers from any of these persons may not use the fabric purchased exactly as they like, and if they please in violation of what he has supposed were rights not granted by him.

[Cited in Hill v. Whitcomb, Case No. 6,502; American Cotton-Tie Co. v. Simmons, Id. 293; American Cotton-Tie Supply Co. v. Bullard, Id. 294; Holiday v. Mattheson, 24 Fed. 186.]

2. Ex. Gr. Goodyear, the patentee of vulcanized India rubber, might have prevented any person from using his fabric for any purpose. But if he grants to A. the exclusive right to use it to make "wringers" only, and to B. the right to make "tubes" only, A. cannot restrain C., who has bought tubes from B., from converting them into "wringers," by any process whatever that he, C., pleases. Neither can Goodyear.

This was a bill for injunction; the case being as follows: Goodyear was the patentee of what is known as vulcanized India rubber; an invention of undoubted originality, and which had been applied by him to a vast number of useful purposes. Among these were the following: (1) Making "wringers" for the different kinds of washing machines, now extensively used in hotels, public laundries, &c.; the office of these "wringers" being to press water, starch or other liquid mixture out of clothes, after they had been washed. (2) Making hose, pipe and tube; now used extensively for carrying water to fires, gardens, streets, mills, &c.; though used for many other purposes, as to convey sound, &c. Not having great capital of his own, Mr. Goodyear, or persons who had bought his patent, had parcelled out the invention among many licensees; granting to one person the right to use it for one purpose and to another the right to use it for another. To the complainants in this case, the washing machine company, he had granted the exclusive use of it in its application "to or in combination with all wringing, washing and starching machines," while to a company, called the Boston Belting Company, he had granted the use of it for making "hose, pipe and tube," and "no further;" the hose, pipe and tube described in one part of this deed of license being described in another, as "conduit hose—pipe and tube." That part of the washing machines above referred to as "wringers," were in fact iron shafts covered with India rubber. "The rubber"—to use the language of one of the workmen, "is constructed in rolls of a certain length, with an opening through the whole length for the metallic shaft, but much smaller than the shaft, so that the rubber, when the iron shaft is forced through it, being thick, gripes and clings to it, and turns with it, instead of turning upon it; thus wringing the clothes as they are passed between the two rollers. The smallness of the aperture through the rubber, and the consequent force and closeness with which it clings to the iron, makes the shaft and the rubber, in effect, one entire solid roll." The Boston Belting Company, whose right to make and sell "hose, pipe and tube," was not disputed, did not attempt to make "wringers." They made hose, pipe and tube alone. But a firm named Colley & Co., who had a patent of their own for mak-

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

ing washing machines, bought this hose, pipe or tube, and out of it they made "wringers" for their washing machines, by cutting the hose into short pieces, running iron shafts through the pieces and fastening them to the iron with cement. The result was that the firm of Colley & Co. made wringers out of the thinner hose much like those which the washing machine company could out of the thick rubber expressly prepared for the purpose; good enough at any rate to undersell the washing machine company, who were bound to pay to Goodyear three cents a pound for the right of using vulcanized rubber in making wringers, while the belting company had the privilege of making hose for two. The washing machine company now filed this bill, Goodyear being co-complainant, against certain agents or vendees of Colley & Co., praying a preliminary injunction against the sale of any washing machines of which the wringers were made by the use of hose.

Mr. Jenks, for complainant, cited great numbers of dictionaries of the English language, from Johnson down to Webster, and dictionaries of science, both Latin, French and English, to prove that each of the words "hose," "pipe," and "tube," meant essentially the same thing, and but one thing; st. a long hollow body, generally and in common parlance, cylindrical, and in the nature of a conduit for fluid; though neither of these qualities was of the essence of pipes or tubes. They might, he admitted, be of any substance, clay, wood, glass or what not, but that they should be hollow, and not solid, was of the essence of hose, pipes and tubes alike; and this point he abundantly made out on the authorities which he cited, with great research and learning. This being so, he admitted that as long as the fabrics of the Boston Belting Company were used for any purpose for which hose, pipes or tubes could, in their proper nature, be used—that is to say, so long as they were left hollow and as conduits, whether for water, air, light, steam or any other substance or element capable of transmission through them—neither Goodyear, Colley & Co., nor the washing machine company, nor any one else could complain. But here was an abuse; they take tubes, and permanently filling them up with an iron axis larger than the hollow of the pipe, and so stretching them, make them solid bodies. The case states that in the wringers of all washing machines, "the shaft and the rubber form, in effect, one entire solid roll." Can a man purchase one kind of patented articles, cut them up—in fact destroy their identity and nature—and then use the fragments in a way never contemplated in regard to the whole thing while in a perfect state, and in a way which directly interferes with the reserved rights of the patentee, or with those to whom he has granted them? In the present case the expression is, "conduit hose, pipe and tube," which shows plainly that the words "hose, pipe and tube," were used in their strict sense, as pipes or channels for the conveyance of fluid.

Mr. Gifford, for defendant.

The use of vulcanized rubber for making conduit, hose, pipe or tubing, was conveyed by the strongest terms; there is no restriction upon the use of them; and therefore the grant carries the right to use them for any purpose to which they are applicable. The grant conveys the right for conduit. The word conduit is a noun, and is defined by lexicographers to be "a conducting pipe or tube." The conveyance, therefore, does not stop with granting a right to conducting pipe, but after doing that, by the well-selected term "conduit," it goes on and conveys also the right to hose, pipe and tubing; showing that the intention was to convey the right to that form of rubber for all the uses to which it is applicable. The complainants, to avoid this result, are driven to the necessity of distorting the language by a violation of common rules of grammar, and calling the word "conduit" an adjective which in English is a noun, and was never anything else. But the complainants contend that the rollers in the wringing machines are not tubes; let us look at that.

1st. The complainants substitute in their treatment of the subject the aggregate thing, to wit: the roller in which the tube is used, and then ask whether such aggregate thing is a tube. A wagon is not a wheel, but a wheel was used in its construction, and such was a proper use of the wheel, and it is none the less a wheel because it forms a part of the wagon. So with a roller of the wringing machines. It cannot be called a tube in the aggregate, but nevertheless a tube was used in the construction of it, and does not cease to be a tube because it forms a part of the roller.

2d. A tube is cylindrical, and that is the form which is required in the wringing machines. It has this form before being used in that machine, and it retains that form when in and a part of it.

3d. A tube has a caliber, and a caliber is indispensable to put the iron rod through in its use in the wringing machine, as much as it would be to conduct water.

4th. It is therefore plain that the use of a tube or pipe to put the iron rod through to make a roller, is a direct and proper use of it, employing all the functions of a tube, and continuing to employ them, and without those functions no such use could be made of it.

5th. The roller is composed of the tube of rubber and the rod of iron, and neither, after their union, ceases to be what it was before. The rod of iron is still a rod of iron, and the rubber tube is still a rubber tube, and in the aggregate they are a rod of iron through a rubber tube. When the man makes the roller, by putting the rod of iron through the tube, he is simply using, and in a useful and proper way, a rubber tube, and no other form of rubber would answer his purpose. He is not

destroying the tube and using the material of it for some other purpose; on the contrary, he is using the tube by filling it with iron, which is as legitimate a use as if he were to fill it with water.

But the complainants say that in using the tube as a part of the roller, the tube is more or less stretched. If this be so, then it is simply a stretched tube. The tube is not destroyed. If filled with water it might be stretched; but who would contend that for that reason it had ceased to be a tube? Where a party has a license to make and sell an article of a certain form and function, if the purchaser, instead of using that form and function, destroys such form and function, and uses the material, to wit, the vulcanized rubber, to make a rubber article of a different form and function, and for which the form of the article purchased was not adapted, a very different question arises from any question in this case, and one which, it is submitted, is not necessary for the court to trouble itself with in deciding this case. To illustrate. If a man were to purchase India rubber boots of a party having a license only to use vulcanized rubber for boots, and after so purchasing them, instead of using the function of a boot, were to destroy that function by cutting them up in strips and using them for springs, or to make shirred goods out of, the question then would be, whether he would have a right to destroy the licensed form and function of the rubber instead of using that form and function, and to make some other form of a rubber article out of the material. But in this case there is no such question; the tubular form of the rubber is not destroyed, but it is used, and necessarily used, and continued in use; and such form and function is indispensable for the use to which it is applied.

GRIER, Circuit Justice. The right of the Boston Belting Company to manufacture pipes or tubes is not disputed. They pay a certain tariff per pound for the right to use the patented process: the material thus manufactured by them belongs to them, and not to Goodyear. Any covenant between them and him that they will not manufacture certain articles, may be valid as between the parties, but it does not run with the rubber, like a covenant on land. Colley & Co., when they purchased their tubes are absolute owners of them, and may convert them into rolls for wringers to their washing machines, or put them to any other use. They might have bought belting or overshoes, or any other article made by the licensees of Goodyear, and converted the material to any purpose that suited them. I may purchase a tobacco pipe made of this material, but I am not bound to smoke with it, and may convert it into an inkstand. The agreement between the licensees that A. shall make all the pipes, and B. all the inkstands, gives neither of them a right to the interference of a chancellor to compel me to smoke with my pipe, or to put ink alone in my inkstand. They cannot oblige me to use, in subservience to their arrangements, that which has become my property.

But, say the complainants, although it is true that a "tube" is defined to be a hollow cylinder, yet it is generally used to convey water, and is called a water pipe. In addition, the Boston Belting Co. pay a tariff of but two cents; whereas, the complaining corporation pay three cents, and therefore ought to have a monopoly of making rollers. The perfect answer to this is, that the complainants have no patent or exclusive monopoly of making rollers of vulcanized rubber. Goodyear, by virtue of his patent, might have manufactured it all himself, and sold it for such price as he could get; but his patent gives him no power to control the use which persons who purchase may make of it. Vulcanized rubber may be applied to a thousand purposes, from a tube to a steam engine, but this patent gives no power to the patentee to parcel out his one monopoly into a thousand sub-monopolies. He may make any covenant he pleases with his licensees, and by that means may dispose of his special licenses to great profit, but he cannot compel the public to notice or regard such agreements, or the right conferred or reserved by them. If his licensees do not perform their agreements, his remedy is by action against them on his covenants, and not by recourse to a chancellor to restrain third persons who have purchased vulcanized rubber from his licensees from using it, when it is theirs, for any purpose they please.

The bill does not complain that the machines sold by defendants are made out of rubber purchased from one who has pirated the patented process, but that the manufacturer who made them did not buy them from the complaining corporations on whom Goodyear assumes to have the power of conferring a monopoly to apply his rubber to that purpose. But the patent conferred no such power on him or them. Every person who pays the patentee for a license to use his process becomes the owner of the product, and may sell it to whom he pleases, or apply it to any purpose, unless he bind himself by covenants to restrict his right of making and vending certain articles that may interfere with the special business of some other licensees. The contrivance of the patentee to destroy competition may be valid, but the covenant binds only the parties to it. If a stranger purchase the product from one licensed to use the process, he need look no further, and may use it for his own purposes, without inquiring for or regarding any private agreement of licensees not to compete with one another.

In conclusion, the right of the Boston Belting Company to use the process in their manufacture of belting, packing, hose, pipe and tubing, is admitted. Consequently that company may sell their manufactures to whom they please, without inquiring the purpose of

the purchaser, or imposing any condition on him as to how he shall use his own property.

As a corollary from these propositions, it follows that Colley & Co. may convert any of these articles, when purchased by them, into rollers for their wringing machines, without infringing the rights of the complainants, whose arrangements to create a monopoly cannot affect the right of Colley & Co. to do as they please with that which is their own. Injunction refused, with costs.

[For other cases involving this patent, see note to Goodyear v. Railroads, Case No. 5,563.]

Case No. 17,220.

The WASHINGTON.

[3 Blatchf. 276.] [1]

Circuit Court, S. D. New York. May 22, 1855.[2]

COLLISION OF STEAMBOATS—INEXPERIENCED PILOT —PRESUMPTIONS.

1. The general rule of navigation is, that where two steamboats are approaching each other in opposite directions, it is the duty of each to port her helm, and pass on the right.

[Cited in The B. B. Saunders, 19 Fed. 122.]

2. Where the person who acted as pilot of a steamboat, was not a pilot by profession or occupation, and had never undertaken to pilot any other steamboat, and was engaged by her as a cooper, and not as a pilot, and a collision occurred between such steamboat and another steamboat: *Held*, that the presumption was against his discreet and proper management of his vessel, at and previously to the accident.

[Cited in The Milwaukee, Case No. 9,626.]

3. Owners of vessels are not only bound to have a full complement of men and officers on board, and responsible for their faithful discharge of their duty, but they are also under obligations to have men of competent experience and skill to perform that duty intelligibly and understandingly, under all circumstances and in all emergencies.

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

This was a libel in rem, filed in the district court by the owners of the steamboat Peter Crary against the steamboat Washington, to recover damages for a collision which occurred in the North river opposite pier No. 6. After a decree in the district court in favor of the libellants [Case No. 17,223], the claimant appealed to this court.

Dennis McMahon, for libellants.

Washington Q. Morton and William J. Haskett, for claimant.

NELSON, Circuit Justice. The Peter Crary had come out of the East river and was on her way up the North river to her berth at the foot of Harrison street. The Washington had left the dock at the foot of Jay street, and was passing down the river, on her course to the East river. The bows of the Washington struck the Peter Crary on her larboard side, some six or seven feet abaft her stem, nearly head on, doing considerable damage.

The real controversy among the witnesses in the case is, as to which vessel, under the circumstances, was entitled to pass inside of the other, that is, next to the piers along the margin of the river. It was a calm, bright night, and there must have been gross negligence or mismanagement on one side or the other.

The Peter Crary starts with the benefit of the general rule of navigation in her favor in the controversy, namely, that where two steamboats are approaching each other in opposite directions, it is the duty of each to port her helm and pass on the right. The Peter Crary having pursued that course, the burden lies on the Washington to make out a state of circumstances that required the Peter Crary to depart from that rule, and go to the left.

This defence is attempted, and it is sought to be shown, that the Peter Crary, after having come around the Battery, bore off into the river, and continued on that course till within a short distance of the Washington, which was coming down near the docks, and then suddenly took a rank sheer across her track, making a collision inevitable. If this view could be maintained, the defence would be complete. But, unfortunately for the Washington, the weight of the evidence is the other way; namely, that the Peter Crary was coming up the river, if not inside of the course of the Washington, at least as near the range of the piers as she was. The collision took place nearly opposite pier No. 6, and, according to the testimony of Burnham, a man on the Telegraph, which lay at pier No. 4, the Peter Crary was within twenty feet of him when she passed there. He is a disinterested witness, and supports the evidence of Brasier on the Peter Crary, who came up from below just before the accident, and who says that the Washington was then west of and heading in towards them, when a length or a length and a half off.

The truth of the case is, as is apparent from the proofs, that the collision was occasioned by the incompetency of Decker, the pilot of the Washington. He was totally unfit to have the charge or management of a vessel, in the difficult navigation of this harbor, among the crowd of vessels thronging both rivers. He was not a pilot by profession or occupation, and admits that he never undertook to pilot a steamboat except on board of the Washington; and he was there engaged as a cooper, and not as pilot. Being thus inexperienced and unskilled, the presumptions are all against the discreet and proper management of his vessel before and at the time of the accident. Owners of vessels are not only bound to have a full complement of men and officers on board, and responsible for their faithful discharge of their duty, but they are also under obligations to have men of competent experience and skill to perform that duty intelligibly and understandingly, under all circumstances, and in all emergencies. And they will find their own interest, as well as that of the public, promoted by a rigorous ex-

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

[2] [Affirming Case No. 17,223.]

action of this measure of responsibility. Any additional sum paid as a compensation for the services of competent and skilful men, will be more than refunded by indemnity against loss and damage occasioned by the errors and mistakes of the incompetent.

I am satisfied that the decree of the court below is right, and should be affirmed.

Case No. 17,221.

The WASHINGTON.

[4 Blatchf. 101.] [1]

Circuit Court, S. D. New York. Sept. 25, 1857.[2]

FORFEITURE OF VESSEL — VIOLATION OF REVENUE LAWS—DEFECTIVE LIBEL.

1. A libel of information against a vessel, to procure her forfeiture for a violation of the revenue laws, must aver that she has been seized for the offence, and that the seizure still subsists.

2. The seizure is a jurisdictional fact, and the absence from the libel of any averment of such seizure is a defect of which advantage may be taken at any stage of the cause.

3. Libel dismissed, for want of such averment.

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

This was a libel of information, filed in rem, by the United States, in the district court, against the steamship Washington, to procure her forfeiture for a violation of the revenue laws. The Ocean Steam Navigation Company intervened, as claimants of the vessel, and excepted to the libel, on the ground that it contained no averment that the vessel was seized within the Southern district of New York, or was arrested on the high seas and brought into this district, and that it did not show any cause of action within the jurisdiction of the court. On the hearing of the exceptions to the libel, the district court (Judge Ingersoll) held that the court had jurisdiction, and overruled the exceptions, giving leave to the claimants to answer. An answer was put in, denying the facts alleged in the libel as ground of forfeiture, and also insisting that the court had no jurisdiction of the case. To this answer there was a replication. On the trial of the issue of fact thus joined, the district court (Judge Hall) held, that it had no jurisdiction, for the want of proper averments in the libel, of the seizure of the vessel within the district, as required to give jurisdiction, giving leave, however, to the proctor for the libellants to amend the libel in the respects held defective. The proctor refused to amend, and an absolute decree dismissing the libel was entered. [Case No. 17,222.] The libellants appealed from that decree.

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

[2] [Affirming Case No. 17,222.]

Philip J. Joachimssen, Asst. Dist. Atty., for libellants.

Francis B. Cutting, for claimants.

NELSON, Circuit Justice. The libel contains no averment whatever of the seizure of the vessel for a violation of the revenue laws, the proctor for the libellants relying altogether upon the seizure by the marshal upon the warrant.

In the case of The Ann, 9 Cranch [13 U. S.] 289, it was held, that if a seizure by a collector under the revenue laws be abandoned, and the property be restored before the libel or information is filed and allowed, the district court has no jurisdiction of the cause. The court say, that the jurisdiction is given to the court of the district, not where the offence was committed, but where the seizure was made; and, further, that it follows from this, that before judicial cognizance can attach upon a forfeiture in rem under the statute, there must be a seizure, for, until the seizure, it is impossible to ascertain what is the competent forum to hear and determine the cause, and that it must be a good subsisting seizure at the time when the libel or information is filed. See, also, The Abby [Case No. 14]; The Merino, 9 Wheat. [22 U. S.] 391; Ben. Adm. p. 171, § 303, and cases there cited; rule 22 in admiralty of supreme court.

The seizure being a jurisdictional fact, necessary to give to the court below cognizance of the cause, and no such fact having been averred, it is well settled that advantage may be taken of the defect at any stage of the proceedings. The district court was, therefore, right in dismissing the libel for this reason. Decree affirmed.

Case No. 17,222.

The WASHINGTON.

[17 Law Reporter, 497.]

District Court, S. D. New York. 1855.[1]

REVENUE LAWS — DEMURRER TO LIBEL — FORFEITURE OF VESSEL FOR SMUGGLING—NECESSITY OF PRIOR SEIZURE.

1. To authorize any district court of the United States to adjudicate upon a cause of forfeiture of a ship, such ship must be within the jurisdictional limits of the court which is called upon to act, and subject to, and within the reach and under the control of, the process of such court. And such ship must be taken possession of, or seized by the process of the court. And to give such court jurisdiction to adjudicate upon the cause of forfeiture, the first seizure or taking possession, by some one having legal authority, must be made within the limits of the district in which the court is established, before such court can adjudicate upon such cause of forfeiture, unless the first seizure is made upon the high seas, in which case the ship must be brought within such limits.

2. By "seizure," in the 9th section of the act of congress of 1799 (1 Stat. 76), is meant any taking possession of the thing forfeited by virtue of a warrant, or other legal authority, for the purpose of enabling the proper court to

[1] [Affirmed in Case No. 17,221.]

inquire into, and to adjudicate upon, the cause of forfeiture.

3. It is necessary that there should be a seizure before the court can adjudicate upon the cause of forfeiture. And a seizure by the marshal, upon a warrant issued by the court, is sufficient to enable the court so to adjudicate, unless there has been a prior legal seizure in some other district, or a seizure on the high seas, and the property brought into some other district. A seizure by a custom-house officer is not an essential prerequisite to give the court authority judicially to inquire into the cause of forfeiture. A seizure by the marshal, under his warrant of seizure, is sufficient. Sed vide The Silver Spring [Case No. 12,858].

4. Where some of the counts in a libel for a forfeiture under the 50th section of the act of 1799 (1 Stat. 665) alleged the value of the goods unladen to be less than four hundred dollars, such counts were *held* insufficient.

In admiralty.

Mr. Joachimson, for the United States.

Owen, Betts & Vose, for claimants.

INGERSOLL, District Judge. This libel is filed to enforce a forfeiture claimed to have been incurred by the steamship Washington, by a violation of the fiftieth section of the act of congress regulating the collection of duties on imports and tonnage, approved the 2d of March, 1799. Upon the filing of the libel a warrant of seizure issued, directed to the marshal, by virtue of which he, within the limits of his district, attached the ship, and the same is now holden to respond to the charges in the libel set forth. There are two exceptions taken to the libel; one going to the whole of it, and the other going to particular portions of it. In one it is claimed that the libel is wholly insufficient, and that the court has no jurisdiction of the same, in the other that certain counts in the libel contained are insufficient, and show no cause of forfeiture of the ship. I will consider these exceptions in the order above set forth.

By the fiftieth section of the act of congress of the 2d of March, 1799 (1 Stat. 665), upon which the libel is founded, it is provided that no goods brought in any ship from a foreign port shall be unladen without a permit from the collector and naval officer; and if any such goods shall be so unladen, they shall be forfeited, and may be seized by any of the officers of the customs. And when the value thereof, according to the highest market price of the same at the port or district where landed, shall amount to $400, the vessel, her tackle, apparel and furniture, shall be subject to like forfeiture and seizure. By the 9th section of the judiciary act of 1799 (1 Stat. 76), it is provided that the district courts of the United States shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of imports, navigation, or trade, of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas.

In the libel it is represented to the court that the steamship Washington, at the city of New York, within the Southern district of New York, on waters navigable from the sea by vessels of ten or more tons burden, and within the jurisdiction of this court, in consequence of certain acts therein set forth, and committed at the port of New York, had become forfeited to the United States. And the prayer of the libel is, in substance, that she may, in such Southern district of New York, be seized by virtue of a warrant in the libel prayed for, in order that it may by the court be judicially determined whether such forfeiture has been incurred. There is no allegation in the libel that the ship had been seized by any custom-house officer, or by any other person invested with legal authority. The prayer, in substance, is, that she may be seized by virtue of a warrant issued by the court, and held to answer the charges in the libel contained. And, in pursuance of that prayer, a warrant of seizure was issued by the court, directed to the marshal, by virtue of which he (the marshal), within the limits of his district, took the possession and custody of the ship.

The exception taken is, that, prior to the filing of the libel, the ship had not been seized by any one having legal authority to seize; that prior to that time she had not been taken possession of by any one having legal authority to take possession of her; that although sufficient facts are set forth in the libel to cause a forfeiture of the ship, that forfeiture cannot be enforced, for the reason that, for that forfeiture, the ship, prior to the filing of the libel, had not been seized by any custom-house officer; that unless there was such a seizure, or taking possession of the ship, prior to the filing of the libel, by some one having legal authority, the court has no legal power to act, either in granting a warrant to seize, or in adjudicating upon the question of forfeiture after such warrant of seizure shall have been issued and served; that a seizure under such process, when there has been no prior seizure without process, is void, conferring no right; and giving the court which issues the process, and under and by virtue of which the seizure or taking possession is had, no power to judicially investigate the cause of forfeiture in the libel set forth. It is very clear, that where a sufficient cause of forfeiture exists against a ship, that cause of forfeiture cannot be judicially investigated and adjudicated upon by every district court in the United States. To authorize any district court to adjudicate upon such cause of forfeiture, such ship must be within the jurisdictional limits of the court which is called upon to act, and subject to and within the reach and under the control of the process of such court; and such ship must be taken possession of or seized by the process of the court. And to give such court jurisdiction to adjudicate upon the cause of forfeiture, the first seizure or taking possession, by some one having legal authority, must be made within the limits of the district in which the court

is established, before such court can adjudicate upon such cause of forfeiture, unless the first seizure is made upon the high seas, in which case the ship must be brought within such limits. The decisions upon this question are full and satisfactory. The Abby [Case No. 14]; Keene v. U. S., 5 Cranch [9 U. S.] 304; The Little Ann [Case No. 8,397]; The Octavia [Id. 10,422].

It being thus established, where the seizure or taking possession of the ship by legal authority is not upon the high seas, there must be a seizure or taking possession by legal authority, and a right to make such seizure within the jurisdictional limits of the court, before the court can adjudicate upon the cause of forfeiture, and that that seizure must be the first seizure; the question is presented, What is a sufficient seizure of the ship to enable the court to inquire into and adjudicate upon the question of forfeiture? When a custom-house officer seizes under the power given him by the 50th section of the act of 1799, he only does it for the purpose of holding the property seized until it can be taken possession of by the marshal, by virtue of the warrant of seizure which issues upon the filing of the libel. When the marshal seizes by virtue of the warrant which issues, then the possession of the custom-house officer is divested, and the marshal takes possession by virtue of his warrant of seizure. Ex parte Hoyt, 13 Pet. [38 U. S.] 279. If, as has been contended by the respondents, the right of the court to adjudicate is dependent upon a prior act of seizure by a custom-house officer, then if, for any cause, congress should take away the right of a custom-house officer to seize, which he now has by virtue of the 50th section of the act of 1799, so that the section above referred to should provide only that the ship for the causes in such section mentioned, should be forfeited to the United States, it would follow, in such an event, that no proceedings could be had before any court to enforce such forfeiture. By seizure, in the 9th section of the act of congress, of 1799, mentioned, is meant any taking possession of the thing forfeited by virtue of a warrant, or other legal authority, for the purpose of enabling the proper court to inquire into and to adjudicate upon the cause of forfeiture. By the court's ordering a warrant of seizure to issue, it does not adjudicate upon the question of forfeiture. By so doing, it only takes a step to enable it so to adjudicate.

The supreme court of the United States, in the case of Ex parte Hoyt, 13 Pet. [38 U. S.] 279, speaks of the act of the marshal in taking possession of the property libelled, under and by virtue of the warrant of attachment, as a seizure of the property: "As soon as the marshal seizes the same goods, under the proper process of his court," &c. And Judge Livingston, in the case of The Little Ann [supra], remarks, "That (in that case) it is not necessary to inquire whether a libel may not in some cases be filed, without a previous seizure, because a seizure is here stated, which it is admitted was not within this district nor on the high seas;" thereby strongly intimating that it could. The only object of a seizure by a custom-house officer is, that the property may be taken possession of, or seized by the marshal, under and by virtue of the process issued by the court. It is necessary that there should be a seizure before the court can adjudicate upon the cause of forfeiture. And a seizure by the marshal, upon a warrant issued by the court, is sufficient to enable the court so to adjudicate, unless there has been a prior legal seizure in some other district, or a seizure on the high seas, and the property brought into some other district. A seizure by a custom-house officer is not an essential prerequisite, to give the court authority judicially to inquire into the cause of forfeiture. A seizure by the marshal under his warrant of seizure is sufficient. I come to this conclusion the more readily, as it seems to have been a common practice among the district attorneys for this district to frame libels for forfeitures, without alleging any prior seizure by a custom-house officer.

The other exception is to the sufficiency of certain counts in the libel contained. By the fiftieth section of the act of 1799, the ship is not forfeited, unless the goods unladen without a permit are of the value of four hundred dollars. In some of the counts of the libel the value of the goods unladen is said to be of a less value than four hundred dollars. Such counts of the libel therefore, as allege the value of the goods unladen to be less than four hundred dollars, must be adjudged to be insufficient. The exception as to such counts is well taken.

The judgment of the court, therefore, is, that the court has jurisdiction of the case; that the libel is sufficient, except those counts thereof in which it is alleged that the value of the goods unladen was less than four hundred dollars, and that such counts be adjudged to be insufficient.

[The case was subsequently taken on appeal to the circuit court, where the decree was affirmed. Case No. 17,221.]

Case No. 17,223.

The WASHINGTON.

[12 N. Y. Leg. Obs. 163.]

District Court, S. D. New York. June, 1854.[1]

COLLISION — PRESUMPTION OF NEGLIGENCE — BOAT NOT PROPERLY MANNED.

1. In cases of collision between steamboats, the one being properly officered and manned, and the other not, where there is doubt on the evidence, such doubt is construed against the vessel not properly officered and manned, where it appears that her engine was not reversed until upon the point of collision.

2. Such presumption of negligence must be explained by satisfactory testimony; and where the evidence as to the course of the two ves-

[1] [Affirmed in Case No. 17,220.]

sels the moment before the collision was balanced, the court referred to and was governed by the evidence of a disinterested by-stander looking upon the occurrence.

3. Steamboats meeting each other in parallel courses, and going in opposite directions, must each take the right, passing each other's larboard sides.

Tho steamboat Peter Crary, owned by the libellants, came in collision in the harbor of New York, on the evening of Oct. 17th, 1853, about 200 feet outside of piers Nos. 5 and 6, in the North river, with the steamboat Washington, by which the Crary was seriously injured, and, to recover the damages occasioned to her thereby, this suit was brought. The weather was calm and pleasant, with a gentle breeze, and the tide was flood; the evening was clear and moon light, and the channel unobstructed. The Crary was bound up the river to her berth, and the Washington was going round into the East river. Both vessels were tow-boats. The libellants were, one of them the pilot, and the other the engineer, of the Peter Crary, and were both experienced in their business. The pilot of the Washington had never taken charge of a boat as pilot until about a week before the collision, having been previously a cooper, but for some months had occasionally taken the wheel under the superintendence of the pilot. The engineer of the Washington was also of questionable competency; the engine, however, was not in his charge at the time of the collision. The libellants allege that after rounding the battery, the Crary took a straight course up the river about 150 feet outside of the piers, and that the Washington was further out, or at least as far. That the Crary steered to the right according to the law, but that the Washington steered in to the left, and struck the Crary on the larboard side, about six feet aft of the stem. The claimants averred that the Crary was coming up the river outside of the Washington, and suddenly turned in towards the piers across the Washington's bows, and that after that nothing could have been done on the part of the Washington to avoid the collision. The engine of the Washington was stopped, but not reversed, while that of the Crary was both stopped and reversed.

D. McMahon, for libellants.
W. Q. Morton, for claimants.

INGERSOLL, District Judge. On the evening of the 17th day of October, 1853, the steamboat Peter Crary, owned by the libellants, and the steamboat Washington, came in collision in the harbor of New York, by which the Peter Crary received very serious injury. The place where the collision happened was in the North river, about opposite a point between piers No. 5 and No. 6, and from one to two hundred feet outside of the piers. At the time, the Peter Crary was proceeding from Williamsburgh, and was bound up the river to a berth at the foot of Harrison street, on the North river. The Washington was proceeding down the river, from a pier up the river, at the foot of Jay street, and was bound to the East river. The collision took place between seven and eight o'clock. The weather was calm and pleasant; there was but a gentle breeze; the tide was on the flood, and the evening was clear and moonlight. The navigation of the boats was not interfered with, or impeded or interrupted by other vessels. The channel was clear, and objects for a considerable distance could be distinctly seen by those who had charge of each boat, if they were attentive to their duty; and there is no claim that the movements of either boat was not under the control of those who had charge of it. It follows, then, very conclusively, that the collision was occasioned by the fault of some one; that it was not produced by some inevitable accident, or by the fault of any third party. This is admitted, and each charges the fault upon the other; and the question is, upon which boat is such fault justly chargeable?

Both boats were used for towing barges and other water craft in and about the harbor of New York, though at the time of the collision they were not so engaged. The Peter Crary had for her pilot Philip W. Rockfellow, one of the libellants, he being one of the owners of the boat. He was an experienced pilot, prudent and careful, competent and trustworthy, and at the time of the collision was at his post, at the wheel, in the pilot-house. The engineer was Mr. Ray, one of the other libellants, and also a part owner of the boat; he was a skilful and competent engineer, experienced in his business, prudent and careful. At the time of the collision he was at his post in the engine room, attending to his duties. The pilot of the Washington was a Mr. Lewis Duker; he had never taken charge of any boat as a pilot, or acted as an assistant pilot, until the 10th day of October, just a week before the collision; his occupation for some considerable period before that date had been that of a cooper, in the employ of the owners of the Washington. He continued to act as her pilot until some time in the month of the following December, when he ceased to be so employed. Since that time he has been doing nothing. For a few months previous to the 10th of October, and when he had no duties to perform on board the boat, he had, while on board of her, occasionally, with the permission of the pilot, and while he was standing by to superintend him, taken the wheel, with a view to qualify himself as a pilot; but at the time of the collision he was not so qualified, and was not competent to the duties required of a pilot of a boat navigating the waters of the harbor of New York. He had not the necessary skill, the necessary experience, the necessary nautical knowledge, required of a faithful pilot. The engineer of the Washington was a man by the name of George; he had acted as engineer only for a short time; a few months before he was a fireman of the boat; from the evidence given, his competency may well be doubted; at the time of the collision, he was not at his post; he had left it, and gone on deck, and

placed the engine in charge of an individual who was not attached to the boat, but who was an engineer in the sugar-house of the owners of the boat, and who, at the time, was on board the boat returning to his home. The bows of the Washington came in collision with the Peter Crary in her larboard quarter, about six or seven feet abaft her stern, by which about twenty feet of the Crary, from her deck to her water-line, was cut away, and she was greatly damaged. The Washington received but comparatively little injury; when the boats struck, the engine of the Crary was reversed; her bells, a short time before, having been rung to slow stop and back, in quick succession, and answered and obeyed by the engineer as they were rung. The engine of the Washington was not in motion; her bells to slow and stop had been rung a moment before the collision, and answered by the one having charge of the engine, as they were rung; her bells to back were not rung, and her engine was not reversed.

Upon these facts, there being nothing else in the case, the legal presumption of law would follow, that the fault was on the part of the Washington. She was not properly officered; she was not under the control of a proper pilot; the owners of the Washington were in fault in this respect. No such fault is imputable to the Crary. The Washington, therefore, must be holden responsible for the damage which the libellants have sustained, unless the respondents can, by evidence, remove the legal presumption which follows from the above recited facts; and the question is, does the evidence produced remove that legal presumption?

The claim of the libellants is, that after the Crary rounded the Battery, she took a straight course up the North river, and about one hundred or one hundred and fifty feet westerly of the piers, and in shore of the Washington, bound to her place of destination; that the Washington in her course down the river, was farther out from the piers; or, at all events, as far out as was the Crary; that to avoid any collision the Crary sheered to the right, as it was by law her duty to do; that by the mismanagement of the pilot of the Washington, the Washington sheered to the left, and struck the Crary in the way that has been described.

The claim of the respondents is, that, as the Washington was proceeding down the river, and before she arrived at the point where the collision took place, the Crary was seen by the pilot of the Washington rounding the Battery; that after she had rounded the Battery, she took a course across the river towards Jersey City, then a course directly up the river, and further west than was the course of the Washington; that the Crary suddenly turned her head due east, and directly towards the piers, and across the bows of the Washington; that after such change of course was discovered by the pilot of the Washington, by no movement on the part of the Washington could a collision be avoided; that, in order to avoid it, the Washington ported her helm, slowed and stopped her engines, and that the collision took place without any fault on her part. As in most cases of this kind, the testimony of witnesses on board the two boats is very contradictory. As the presumption of law is from the facts as before found, that the Washington was in fault, it is the duty of the respondents, by clear proof, to remove that presumption; otherwise, it will remain. No such clear proof is brought forward. The libellants have produced two witnesses who were on board the Crary, to wit, the second engineer and one of the firemen, and also the individual who, at the time of the collision, was at the engine of the Washington. The pilot of the Crary and the chief engineer could not be examined by the libellants as witnesses, as they were the parties libellants. The respondents have introduced two witnesses who were on board the Washington, to wit, the pilot and another witness, who, at the time, was on board, but who had nothing to do with the management of the boat, but was in the employ of the owners of the Washington as a carman, and was a nephew to one of the owners. The weight of this evidence is in support of the claim as made by the libellants. Indeed, I cannot see how the collision could have taken place in the manner that it did if the position of the boats, a short time before the collision took place, as it respects distances and courses, was as is stated by the pilot of the Washington. In some material points that pilot is contradicted by facts, about which there can be no serious dispute. He states that when the collision took place, the Washington was heading outwardly from the piers; that he had put the helm aport. The evidence is perfectly satisfactory, that when the collision took place, the Washington was heading, according to the claim of the libellants, in towards the piers; that she had starboarded her helm. And a disinterested witness on board the Telegraph, then lying at pier No. 4, by his testimony fully supports the claim of the libellants, and is in direct conflict with that of the respondents.

The respondents have not, therefore, by clear and satisfactory proof, removed the legal presumption which exists against the Washington from the facts, as before recited. Indeed, the proof goes to establish and confirm that legal presumption. The finding of the court is, that the collision was occasioned by the fault of the Washington, and that no fault is attributable to those who had charge of the navigation of the Crary. The decree, therefore, is, that the libellants do recover the damage which they have sustained in consequence of the collision, and that it be referred to a commissioner to ascertain and report what that damage is.

[Upon an appeal to the circuit court, the decree was affirmed. Case No. 17,220.]

WASHINGTON (BANK OF THE UNITED STATES v.). See Case No. 940.

Case No. 17,224.

WASHINGTON v. BARBER.

[5 Cranch, C. C. 157.] [1]

Circuit Court, District of Columbia. March Term, 1837.

MUNICIPAL CORPORATIONS — LIVERY STABLE LICENSE—VOLUNTARY PAYMENTS.

1. The corporation of Washington has no right to require a keeper of a livery stable to take, and pay for, a license to keep the same; but if it be taken and paid for, and enjoyed, the money paid for it cannot be recovered back.

2. Semble, that money paid under ignorance of the law cannot be recovered back.

This was an appeal from the judgment of the justice of the peace, by which the appellee recovered of the corporation $40, which the appellee had paid for two years' license to keep a livery stable, issued in conformity with the provisions of the by-law of the 28th October, 1831.

Mr. Dandridge, for the appellee, cited Moses v. Macferlan, 2 Burrows, 1005; Bize v. Dickason, 1 Term R. 285; Smith v. Bromley, 2 Doug. 696, note; Hunt v. Rousmanier, 8 Wheat. [21 U. S.] 174, 211; Morris v. Tarin, 1 Dall. [1 U. S.] 147, 148; Lowry v. Bourdieu, 2 Doug. 471; Farmer v. Arundel, 2 W. Bl. 824, 825; Bilbie v. Lumley, 2 East, 469; Union Bank v. Bank of United States, 3 Mass. 74; Pearson v. Lord, 6 Mass. 81; Hunt v. Rousmanier, 1 Pet. [26 U. S.] 15; Garland v. Salem Bank, 9 Mass. 408; Browning v. Morris, Cowp. 790; Haven v. Foster, 9 Pick. 112; Lammott v. Bowly, 6 Har. & J. 524.

Mr. Bradley, contra, cited Bilbie v. Lumley, 2 East, 469; Knibbs v. Hall, 1 Esp. 84; Taylor v. Hare, 1 Bos. & P. (N. R.) 260; Brown v. M'Kinally, 1 Esp. 279; Marriott v. Hampton, 2 Esp. 546; Potter v. Benniss, 1 Johns. 515; Hall v. Shultz, 4 Johns. 240; Lyon v. Richmond, 2 Johns. Ch. 51, 60; Shotwell v. Murray, 1 Johns. Ch. 512.

CRANCH, Chief Judge. This is an appeal from the judgment of a justice of the peace, upon a warrant to recover back $40 paid by Barber to the corporation of Washington for license to keep a livery stable for two years, at $20 a year, under the by-law of the said corporation of the 28th October, 1831, upon the ground that the charter of the city did not authorize the corporation to require a license for keeping a livery stable; and that the by-law was void, and the money for the license wrongfully demanded and received by the corporation. The judgment of the justice was for the appellee. It is now admitted that the by-law was void, the corporation having mistaken their powers in that respect; but it is contended that the appellee cannot recover back the money paid: 1. Because the appellee paid it under a mutual mistake of the law only, and not of any fact; and a mistake of the law is no ground of recovery. 2. Because the appellee had the benefit of the license for the two years, which in his own judgment was worth the money, or he would not have paid it; and therefore he has no right, ex æquo et bono, to recover it back. 3. Because he paid it voluntarily when he had a good defence at law.

Being of the opinion that the second ground of defence is conclusive against the appellee, I do not think it necessary to decide upon the first or third. The case of Taylor v. Hare, 1 Bos. & P. (N. R.) 260, was very similar to the present. A patentee, believing himself to be the inventor, had permitted the plaintiff to use the inventions, for several years, at £100 a year, which the plaintiff paid; but, discovering that the defendant was not the inventor, he refused to pay any longer, and brought his action to recover back the money he had paid. Sir James Mansfield, C. J., said: "It is not pretended that any action, like the present, has ever been known. In this case, two persons, equally innocent, made a bargain about the use of a patent, the defendant supposing himself to be in possession of a valuable patent right, and the plaintiff supposing the same thing. Under these circumstances, the latter agrees to pay the former for the use of the invention; and he has the use of it. Non constat, what advantage he made of it; for anything that appears, he may have made considerable profit." "How then can we say that the plaintiff ought to recover back all that he has paid? I think there must be judgment for the defendant." Heath, J.: "There never has been a case, and there never will be, in which a plaintiff, having received benefit from a thing which has afterwards been recovered from him, has been allowed to maintain an action for the consideration originally paid. We cannot take an account here of the profits. It might as well be said that if a man lease land, and the lessee pay rent, and afterwards be evicted, that he shall recover back the rent, though he has taken the fruits of the land." Roake, J.: "I am of the same opinion." Chambre, J.: "The plaintiff has had the enjoyment of what he stipulated for, and in this action the court ought not to interfere, unless there be something ex æquo et bono which shows that the defendant ought to refund. Here both parties have been mistaken; the defendant has thrown away his money in obtaining a patent for his own invention; not so the plaintiff, for he has had the use of another person's invention for his money." "I am therefore of the opinion that the judgment of the nonsuit should be entered." If it be said that in this case of Taylor v. Hare the mistake was of the facts, and not of the law, it is so much the stronger; for then the plaintiff might have recovered, but for the enjoyment which he had of the thing. That enjoyment, then, is of itself a bar to the plaintiff's recovery.

So, in the present case, the appellee has had

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

the benefit of his license for two years, and, no doubt, made a profit equivalent to the money which he paid for it. The license was granted, and the money paid, under a mutual mistake of their legal rights, and I think the appellant may keep the money with a good conscience. The question whether money paid under a mistake of the law only, but with a knowledge or the means of knowledge of all the facts, can be recovered back, may not yet, perhaps, be fully settled; but the prevailing opinion in modern cases seems to be against it.

Thus Chitty (on Bills, 236) says: "It is now clearly established that even a mere promise to pay, made after notice of the laches of the holder, would be binding; though the party making it misapprehended the law." In Lowry v. Bourdieu, 2 Doug. 471, Buller, J., said: "There was no fraud on the part of the underwriters, nor any mistake in matter of fact. If the law was mistaken, the rule applies, 'Ignorantia juris non excusat.'" In Bilbie v. Lumley, 2 East, 470, Lord Ellenborough asked the plaintiff's counsel "whether he could state any case where, if a party paid money to another voluntarily, with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law?" No answer being given, he continued: "The case of Chatfield v. Paxton is the only one I ever heard of, where Lord Kenyon, at nisi prius, intimated something of that sort. But when it was, afterwards, brought before this court, on a motion for a new trial, there were some other circumstances of fact relied upon; and it was so doubtful, at last, on what precise ground the case turned, that it was not reported. Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case." In Stephens v. Lynch, 12 East, 38, the court considered the cases of Chatfield v. Paxton, B. R. Michaelmas, 39, c. 3, and Bize v. Dickason, as having proceeded on a mistake of the facts; "but here," says the court, "the defendant made the promise with the full knowledge of the circumstances, three months after the bill had been dishonored, and could not now defend himself upon the ground of his ignorance of the law when he made the promise." In Brisbane v. Davis, 5 Taunt. 151, Gibbs, J., said: "We must take this payment to have been made under a demand of right; and I think that when a man demands money of another as a matter of right, and the other with the full knowledge of the facts upon which the demand is founded, has paid a sum of money, he cannot recover back the sum he has so voluntarily paid. If we were to hold otherwise, I think many inconveniences may arise. There are many doubtful questions of law. When they arise the defendant has an option either to litigate the question, or to submit to the demand and pay the money. I think that, by submitting to the demand, he that pays the money gives it to the person to whom he pays it, and thus closes the transaction between them. He who receives it has a right to consider it his without dispute. He spends it, in confidence that it is his; and it would be most mischievous and unjust if he who has acquiesced in the right, by such voluntary payment, should be at liberty at any time within the statute of limitations to rip up the matter and recover back the money." "I am aware that cases were cited at the bar in which were dicta that sums paid under a mistake of the law might be recovered back, though paid with the knowledge of the facts; but there are none of the cases which may not be supported on much sounder ground." Mr. Justice Gibbs then reviews the cases of Farmer v. Arundel, 2 W. Bl. 825; Lowry v. Bourdieu, 2 Doug. 471; Bize v. Dickason, 1 Term R. 285; Chatfield v. Paxton, B. R. Michaelmas, 39, c. 3, mentioned in Bilbie v. Lumley, 2 East, 471; Bilbie v. Lumley, 2 East, 469; and Herbert v. Champion, 1 Camp. 134; and says, in conclusion, "I think, on principle, that money which is paid to a man who claims it as his right, with a knowledge of all the facts, cannot be recovered back." Heath, J., and Mansfield, C. J., concurred in opinion that plaintiff could not recover. Chambre, J., dissented.

In Haven v. Foster, 9 Pick. 128, Morton, J., in delivering the opinion of the court, said: "In all civil and criminal proceedings, every man is presumed to know the law of the land; and whenever it is a man's duty to acquaint himself with facts he shall be presumed to know them." In Hunt v. Rousmanier, 1 Pet. [26 U. S.] 15, Mr. Justice Washington, in delivering the opinion of the court, says, "The question then is, ought the court to grant the relief that is asked for upon the ground of mistake arising from any ignorance of the law?" "We hold the general rule to be, that a mistake of this character is not a ground of reforming a deed founded on such a mistake; and, whatever exceptions there may be to this rule, they are not only few in number, but they may be found to have something peculiar in their characters." Again, in page 16, he says, "The cases in which the general rule had been adhered to are, many of them, of a character which strongly tests the principle upon which the rule itself is founded. Two or three only need be referred to. If the obligee in a joint bond by two or more, agree with one of the obligors to relieve him of his obligation, and does accordingly execute a release, by which all the obligors are discharged at law, equity will not afford relief against this legal consequence, although the release was given under a manifest misapprehension of the legal effect of it in relation to the other obligors. So, in the case of Worrall v. Jacob, 3 Mer. 271, where a person having a power of appointment and revocation, and, under a mistaken supposition that a deed might be altered or revoked, although no power of revocation had been reserved, executed the power of appointment without reserving a power of revo-

cation, the court refused to relieve against the mistake. The case of Lord Irnham v. Child, 1 Brown, Ch. 92, is a very strong one in support of the general rule, and closely resembles the present in most of the material circumstances attending it. The object of the suit was to set up a clause containing a power of redemption, in a deed granting an annuity, which, it was said, had been agreed upon by the parties, but which, after deliberation, was excluded by consent, from a mistaken opinion that it would render the contract usurious. The court, notwithstanding the omission, manifestly proceeding upon a misapprehension of the parties as to the law, refused to relieve by establishing the rejected clause."

It is evident, that the court, in this case of Hunt v. Rousmanier, was embarrassed by its opinion, given when the case was before them, in 1823 (8 Wheat. [21 U. S.] 174), when Marshall, C. J., in delivering the opinion of the court, said, in page 216: "We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief;" and therefore Mr. Justice Washington was obliged to say: "It is not the intention of the court, in the case now under consideration, to lay it down that there may not be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law. But we mean to say that where the parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension, and the insufficiency of such security, in consequence of a subsequent event, not foreseen perhaps, or thought of, direct a new security, of a different character, to be given, or decree that to be done which the parties supposed would be effected by the instrument which was finally agreed upon." "The agreement has been fully executed, and the only complaint is that the agreement itself was founded upon a misapprehension of the law, and the prayer is to be relieved from the consequence of such mistake." The decree dismissing the bill was affirmed with costs.

In Shotwell v. Murray, 1 Johns. Ch. 516, Chancellor Kent says again: "Every man is to be charged, at his peril, with a knowledge of the law. There is no other principle that is safe or practicable in the common intercourse of mankind."

If these cases do not establish the principle that a mistake of law cannot be rectified, either at law or in equity, they, at least, satisfy my mind upon the subject; and I must say that upon this ground, also, the appellee is not entitled to recover. I am therefore of the opinion that the judgment ought to be reversed, with costs.

The other judges concurred. Judgment reversed, with costs.

WASHINGTON (BARNEY v.). See Case No. 1,033.

WASHINGTON (BOSWELL v.). See Case No. 1,684.

WASHINGTON (BOTELOR v.). See Case No. 1,685.

WASHINGTON (CAREY v.). See Case No. 2,404.

Case No. 17,225.

WASHINGTON v. CASANAVE.

[5 Cranch, C. C. 500.] [1]

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

LICENSE TAX — KEEPER OF WOOD-YARD — CORPORATE POWERS.

A keeper of a wood-yard in Washington is a retailer, within the meaning of that clause in the charter which authorizes the corporation "to provide for licensing, taxing, and regulating auctions, retailers, ordinaries, and taverns, hackney carriages," &c.

Appeal from the judgment of a justice of the peace, rendered against the corporation of Washington upon a warrant for the penalty of $50, "for that he the said Peter Casanave did, on the 2d day of September, 1838, keep a wood and coal-yard in the said city of Washington, to sell and barter firewood and coal, and did sell and barter firewood and coal, at retail, in the said city, without first obtaining a license so to do, contrary to the act or acts of the said mayor, &c., on that subject made and provided."

This prosecution was founded on the by-law of the 28th of July, 1831, entitled "An act to provide a revenue for the canal fund," by which it is enacted, "that from and after the 1st day of August next, it shall not be lawful for any person or persons to sell or barter lumber, firewood, or coal; to sell or barter bricks; to sell or barter porter, ale, or beer; to keep a livery-stable; or to trade or traffic in slaves, within the limits of this corporation, without first obtaining a license therefor, as hereinafter provided for, from the mayor, (who is hereby authorized to issue the same, to be and remain in force for one year;) for each of which the following taxes shall be paid at the time of taking out the same, to wit: For a license to keep a lumber-yard, and to sell and barter firewood, $40. For a license to keep a wood-yard, and to sell and barter firewood, $20. For a license to keep a coal-yard, and to sell and barter coal, $15. For a license to keep a brick-yard, and to sell and barter bricks, $30. For a license to keep a wood and lumber-yard, to sell and barter firewood and lumber, $50. For a license to keep a wood and coal-yard, to sell and barter firewood and coal, $40. For a license to keep a lumber, wood, and coal-yard, to sell and barter lumber, firewood, and coal, $60. For a license to sell or barter porter, ale, and

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

beer, brewed within the District of Columbia, in quantities not less than one barrel, or thirty-one and an half gallons, $50; and for a license to sell or barter porter, ale, and beer, not brewed in the District of Columbia, in addition to any other license obtained from this corporation, $25. For a license to keep a livery-stable, $20. For a license to trade or traffic in slaves for profit, whether as agent or otherwise, $400. And every person who shall sell or barter at retail, trade, traffic, or keep, as aforesaid, without first obtaining a license therefor, shall forfeit and pay for each and every offence, a sum of not less than $20, nor more than $50, to be recovered and disposed of as other fines are."

Mr. Hoban, for defendant, (the appellee,) contended that the corporation had no power, under their charter, to tax anything but property; not mere trades or professions, which could not be assessed, and the taxes of which would be subject to no limit. That such taxes are derogatory to common right, and inconsistent with the general law of the land. That the by-law does not profess to be passed under the power to license retailers, for it affects wholesale dealers as well as retailers; and a man who should sell wood or coal by wholesale would be as much liable to the penalty as one who should sell firewood by the foot and coal by the peck. The keeper of a livery-stable cannot, in any sense of the word, be called a retailer; so the trafficker in slaves, who collects them individually or in small numbers, and sells them by cargo, cannot be called a retailer, and yet he would be liable to the penalty of the by-law. The same observation applies to the licenses granted under the by-law of the 28th of October, 1831, to confectioners, and the venders of hats, boots, and shoes, hardware, perfumery, medicines, jewelry, and watches, dry goods, and china, glass, and crockery ware, the penalty is not for retailing, but for selling, whether by wholesale or retail. He also contended that the word "retailers" in the charter applied only to retailers of spirituous liquors.

Mr. Bradley, contra, contended that the corporation derived their power to tax the keeper of a wood-yard from their power "to provide for the inspection of lumber and other building materials, and for the appointment of inspectors," and "to provide for the appointment of appraisers and measurers of builders' work and materials, and also of wood, coal, grain, and lumber," contained in the 7th and 8th sections of the charter of 1820; for the corporation cannot exercise their power of inspection and control over these matters without the power of granting licenses. He also contended that the keeper of a woodyard is a "retailer," and, as such, liable to be taxed and regulated.

THE COURT, being of that opinion, reversed the judgment of the justice of the peace, and rendered judgment for the lowest penalty, viz., $20.

CRANCH, Chief Judge, dissented, and repeated the substance of his opinion before given in the cases of Carey v. Washington [Case No. 2,404], in November, 1836, and of Washington v. Barber [Id. 17,224], in August, 1837.

WASHINGTON (CLARK v.). See Case No. 2,839.

Case No. 17,226.

WASHINGTON v. COOLY.

[4 Cranch, C. C. 103.] [1]

Circuit Court, District of Columbia. Dec. Term, 1830.

SETTING UP FARO-TABLE—SUFFICIENCY OF WARRANT.

A warrant upon the by-law of the city of Washington, of January 12, 1830 (section 1), for setting up a faro-table, must state it to be "for the purpose of gaming for money."

Appeal from the judgment of a justice of the peace for a fine of $50 for setting up "a table called faro, upon which cards were played."

Mr. Coxe, for defendant [Azariah Cooly], objected that the warrant did not charge any offence under the by-law, because the purpose or intent of setting up the table is not stated therein. The words of the by-law are, that "no E. O. A. B. C., L. S. D., faro, rolly-bolly, shuffle-board, equality-table, or other device, to be used with cards, balls, dice, coin, or money, or any other game of hazard, (except the game of billiards, upon licensed billiard-tables,) for the purpose of playing or gaming for money, or any thing in lieu thereof, shall be set up, kept, or exhibited in any part of this city, under the penalty of fifty dollars for every day," &c.

Mr. Ashton, contra. The justice of the peace is to proceed according to the right and equity of the matter; and the court is not to regard mere matter of form. The intent may be inferred from the use actually made of it. If the intent had been alleged in the warrant, and he could disprove that intent, he would be acquitted. The words, "for the purpose of gaming for money," are only applicable to the words "or any other device," and not to the word "faro," the setting up of which is prohibited, although not set up with any such intent.

THE COURT, upon motion (THRUSTON, Circuit Judge, absent), quashed the warrant, because it did not set forth the intent which constitutes an essential part of the offence, under the by-law.

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

WASHINGTON (COSTIN v.). See Case No. 3,266.

Case No. 17,227.

WASHINGTON v. DAWSON.

[1 Hayw. & H. 236.] [1]

Circuit Court, District of Columbia. April 7, 1846.

JUSTICE OF THE PEACE — ATTACHMENT FOR CONTEMPT.

Under Act Md. 1791, c. 68, § 8, an attachment for contempt can be issued against a witness who refuses to obey a summons issued by a justice of the peace.

Attachment for contempt.

In this case John T. Wright was summoned to attend before justice of the peace John D. Clark and disobeyed the summons, whereupon the justice issued an attachment against Wright on the day of trial. It was issued under Act Md. 1791, c. 68, § 8,[2] returnable before the circuit court now in session. John T. Wright was brought before the court by John W. Dexter, the constable to whom the attachment was directed.

Mr. Bradley, attorney for the corporation, said it was exceedingly desirable that the court should make a decision with reference to the present case that would settle the point, as many witnesses summoned to give testimony before the justices had refused to attend, under the idea that they were not legally bound to obey the summons.

The Honorable Judges MORSELL and DUNLOP concurred in the opinion expressed at the bar; that the practice should be established, and witnesses should know that it was their duty to yield obedience to the summons of the constituted authorities.

THE COURT concurred in these remarks, fined the witness one dollar, and required him to pay the costs of the attachment.

WASHINGTON (DELANY v.). See Case No. 3,755.

WASHINGTON (DIXON v.). See Case No. 3,935.

WASHINGTON, The (DOUGLASS v.). See Case No. 4,033.

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

[2] Act 1791, c. 68, § 8: Where witnesses do not attend according to summons, the justice before whom such witness ought to have attended shall enforce obedience to his process by attachment of contempt, to be returnable before the justices of the next county court, who shall take cognizance thereof and shall at their discretion fine the offender any sum not exceeding 20s. current money for every such offence, to be applied towards the county charge. 1 Herty's Laws Md. p. 488; Thomp. Dig. 260.

Case No. 17,228.

WASHINGTON v. EATON.

[4 Cranch, C. C. 352.] [1]

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

CORPORATION OF WASHINGTON—VALIDITY OF BY-LAW—USE OF FIRE-ARMS—JUSTICE OF THE PEACE—APPEAL.

1. An appeal to the circuit court of the District of Columbia, for the county of Washington, lies from the judgment of a justice of the peace, for the penalty of a by-law of the corporation of Washington.

2. A justice of the peace, for the county of Washington, has jurisdiction of offences against the by-laws of the corporation of Washington, although the amount of the penalty be discretionary, within certain limits.

3. That discretion does not deprive the party of his right of appeal.

4. The power given by congress to the corporation of Washington, to pass by-laws for the government of the city, is not a delegation of the power of exclusive legislation given to congress by the constitution of the United States.

5. The power given by the charter to the corporation "to prevent and remove nuisances," and "to provide for the prevention and extinguishment of fires," authorized the corporation to pass the by-law of the 30th of March, 1813, against any person who shall "fire or shoot a gun, pistol, or other fire-arm, idly, or for sport or amusement, within 250 yards of any dwelling-house," or within certain limits therein described.

6. A qui tam action will not lie for the penalty of that by-law. It is not necessary that the order for the appeal should be given under the corporate seal.

[Cited in W. U. Tel. Co. v. Scircle, 103 Ind. 229, 2 N. E. 605.]

7. It is not necessary that the justice who takes cognizance of the case, should be one of those appointed under the 6th section of the by-law of November 8, 1830.

8. It is not necessary that it should appear upon the proceedings before the justice, that the by-law had been published five days in some newspaper, by authority of the corporation.

9. The ten-days notice required by the 7th section of the act of congress of March 1, 1823 [3 Stat. 743], was for the benefit of the appellant, not of the appellee.

This was an appeal from the judgment of a justice of the peace for the county of Washington, in favor of the appellee [John H. Eaton] upon a warrant for the penalty of ten dollars for firing a pistol, "idly and for sport and amusement," within certain limits prohibited by the by-law of the corporation of Washington of the 30th of March, 1813.

Mr. Eaton, in proper person, moved the court to dismiss the appeal, and contended that this was a criminal prosecution, of which the justice had no cognizance; his jurisdiction being limited to civil cases of debt or contract. That the penalty being discretionary, namely, not less than five, nor more than ten dollars for each offence, no action of debt will lie for it,

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

because there was no certain debt upon which to found the action. That he was entitled to ten days' notice of the judgment in his favor, before the commencement of this term, or he was not bound to answer; according to the seventh section of the act of congress of March 1, 1823 (3 Stat. 743), extending the jurisdiction of the justices of the peace. That the appeal was ordered by the mayor only; but the order ought to have been under the corporate seal. That congress had no authority to give the corporation power to make by-laws. That congress are to exercise exclusive legislation, and could not delegate any part of it; but if they could, the corporation can exercise only the part delegated; and no power has been given to the corporation to prevent firing pistols in the city. That the distribution of the penalty, when recovered, is uncertain. It is given to the corporation and the informer. It should have been a qui tam action. That where the discretion of the justice is to be exercised, there can be no appeal; his judgment is conclusive. 1 Paley, Summary Convictions, 268. That it does not appear by the record that Mr. Waters, the justice who took cognizance of the case, was one of the justices designated according to the provisions of the by-law of November 8, 1830, as magistrates to enforce the by-laws; and that it does not appear by the record that the by-law had been published five days before the offence.

R. S. Coxe, for the corporation, as to the exclusive legislation, referred to the "Federalist." As to the power to prohibit the discharge of fire-arms, idly, and for amusement, in the streets, &c., it is included in the power "to prevent and remove nuisances," and "to prevent and extinguish fires." This is not a criminal prosecution; it is a civil action of debt for a penalty. It is not necessary that the amount should be ascertained before the commencement of the suit. Debt will lie for a penalty to be ascertained by a jury or by a judge. Bullard v. Bell [Case No. 2,121]; U. S. v. Colt [Id. 14,839]; Pemberton v. Shelton, Cro. Jac. 498; U. S. v. Lyman [Case No 15,647]; Smith v. Jackson [Id. 13,064]. The appeal lies, although the penalty is to be imposed according to the discretion of the justice. The decision of the justice is conclusive as to the amount of the penalty, if within the limits of the law; but if he refuses to give judgment for any fine, or beyond the limits prescribed, it is error, and his judgment may be reviewed. If an appeal lies, this court has all the power which the justice had. It was not necessary that the mayor should have given the order to appeal, much less that it should be under the corporate seal. The attorney for the corporation had a right to appeal. As to the designation of the magistrates to enforce the by-laws, the by-law of November 8, 1830, is only directory; it does not deprive the other justices of their concurrent jurisdiction. It is not necessary that it should appear in the record that the justice was one of the designated justices, or that the by-law had been published five days before the offence. A qui tam action is a statutory action. It is not a common-law right by which any man may sue for the king. It cannot be maintained unless expressly given by statute. But when it is given, the king may sue alone, unless the statute limits the remedy to a qui tam action. It will not lie by the corporation and an informer.

Mr. Kane, of New York, in reply. The discretion is given to the justice alone. This court cannot execute it. The general principle is, that no appeal lies from the discretion of an inferior court. It is only upon mandamus that the discretion of the inferior court can be questioned. Cates v. Knight, 3 Term R. 442. Appeal only lies in cases of debt or civil demand. The by-law does not give an appeal. Boothe v. Georgetown [Case No. 1,651], in this court, at October term, 1823, and Howard v. U. S. [Id. 6,763].

CRANCH, Chief Judge, delivered the opinion of the court, as follows (THRUSTON, Circuit Judge, dissenting):

Appeal from a justice of the peace who had given judgment against the corporation upon a warrant issued against the appellee for a penalty of ten dollars for firing a pistol, idly, and for sport and amusement, within certain limits in the city of Washington, contrary to the by-law of the 30th of March, 1813, which declares, that "the person so firing or shooting, shall forfeit and pay a fine not exceeding ten dollars, nor less than five dollars, at the discretion of any justice of the peace resident within this city; one third whereof shall be for the use of the city; one third for the use of the constable, and the remaining third for the use of the informer," &c. A motion has been made by the defendant to dismiss the appeal, upon the ground that no appeal lies in such a case.

1. It is said that this is a criminal prosecution, and that no appeal lies unless it be expressly given by some statute. But this is a suit for a penalty, given by a by-law of the corporation of Washington, enacted under the authority of its charter, which authorizes the recovery by suit before a justice of the peace, "as in all other cases of small debts." By the seventh section of the first charter of 1802 (2 Stat. 195), which was continued in force by the acts of the 24th of February, 1804 (Id. 254), and 28th of February, 1820 (3 Stat. 543), until the 15th of May, 1820, when the present charter was granted, it is enacted, "that all fines, penalties, and forfeitures imposed by the corporation of the city of Washington, if not exceeding twenty dollars, shall be recovered before a single magistrate, as small debts are by law recoverable; and if such fines, penalties, and forfeitures, exceed the sum of twenty dollars, the same shall be recovered by action of debt in the district court of Columbia for the county of Washington, in the name of the corporation, and for the use of the city of Washington." Although the act of 1802 is repealed by the act of the 15th of May, 1820 (3 Stat. 583), which constitutes the present charter, yet it is evi-

dent that the legislature intended that the former mode of recovering fines and penalties under the by-laws of the corporation, should remain. For, by the ninth section of the new charter it is enacted, that "in all cases where suit shall be brought before a justice of the peace for any fine or penalty arising or incurred for a breach of any law or ordinance of the corporation, execution shall and may be issued, as in all other cases of small debts." It is clear that the legislature considered a fine or penalty incurred for a breach of a by-law of the corporation, as a small debt, and treated it as such, so far as regards the mode of recovery. They have not considered it as a criminal prosecution, but have clothed it entirely in a civil vesture, associated it with other small debts, and given the same course of procedure for its recovery. The justice of the peace has the same jurisdiction of a suit for the penalty of a by-law as of a suit for any other debt. He takes it subject to the same right of appeal. The law makes no distinction between them. It is true, that the act of congress of the 1st of March, 1823 (3 Stat. 743), extending the jurisdiction of justices of the peace to cases of $50 value, only speaks of debt and damages; and of debtor and creditor, and has been construed to refer only to cases of contract; but it is not that act which gives jurisdiction in the present case, although it gives the mode of procedure. The jurisdiction is given by the charter. In all cases in which the justice has jurisdiction, if the value exceed $5, the act of 1823, gives a right of appeal; and it is not material from what source the justice derived his jurisdiction. From 1802, (the date of the first charter,) until the present time, the penalties arising under the by-laws of the corporation, have been recovered before a justice of the peace, and appeals to this court have been constantly allowed and sustained.

2. But, it is said, that in this case the penalty was uncertain; it might be any thing between five and ten dollars, and therefore it was not a debt; and cases were cited to show that debt would not lie for an uncertain sum. Those cases, however, go entirely upon the form of action, to wit, whether it should be an action of debt, or an action of assumpsit. But in proceedings before a justice of the peace, those technical distinctions do not exist, and the question whether the form of action should be debt or assumpsit, cannot arise. The uncertainty of the sum to be recovered, is no objection to the recovery in some form of action. Upon a suit brought for $10, the corporation may recover $5, or any intermediate sum which the justice, in his discretion, may adjudge; and an action of debt would lie for it, although the sum to be recovered should be uncertain at the commencement of the suit, and to be ascertained only by the verdict of the jury, or the discretion of the judge. It is true, that in an action of debt, the plaintiff must demand a certain sum; but he may recover less than he demands, as in the case of Pemberton v. Shelton, Cro. Jac. 498, cited in the argument, where an action of debt was brought for £33, the alleged treble value of tithes which the defendant had failed to set out according to law. The words of the statute of 2 & 3 Edw. VI. c. 13, which gave the penalty were, "under the pain of forfeiture of treble value of the tithes so taken or carried away," without stating in what manner, or by what form of action it should be recovered. After verdict for the plaintiff for twenty shillings, the defendant moved in arrest of judgment, that the plaintiff had not demanded enough; for by his own showing in his declaration, the value of the tithes not set out was £11 8d., and the treble value, therefore, was £33 2s., but the plaintiff had demanded only £33, without showing satisfaction of the two shillings. But it was not allowed, "for all the court held it was well enough," and said, "when the demand is of no sum certain, nor what he should recover in certainty, but only so much as shall be given by the jury, although he varies from the first valuation, it is not material; for he shall not recover according to his demand in the declaration, but according to the verdict; wherefore it was adjudged for the plaintiff." So also in the case of U. S. v. Colt [Case No. 14,839], Judge Washington says: "Thus stands the doctrine in relation to the action of debt on contracts; and if debt will lie on a contract where the sum demanded is uncertain, it would seem to follow that it would lie for a penalty given by statute, which is uncertain and dependent upon the amount to be assessed by a jury, for when they have assessed it, the sum so fixed, becomes the amount of the penalty so given." And, in speaking of the case of Pemberton v. Shelton, he says: "It cannot be said that this doctrine was laid down in consequence of the court considering this as a statutory action, to which it was necessary to accommodate the recovery, by changing general principles of law applicable to other cases, for it will appear, by reference to the statute, that it prescribes no remedy for enforcing the penalty; and that debt was brought, upon the common-law principle, that where a statute gives a penalty, debt may be brought to recover it." Debt, therefore, may be brought for a penalty given by a statute, although it be uncertain; and an uncertain penalty, given by a statute, is a debt.

3. But it has been said that the by-law gives a discretion to the justice of the peace, and to him alone; and that where the inferior court has a discretion, error will not lie. This may be true in regard to writs of error at common law; but in appeals, which bring up the whole case, law and fact, as in proceedings under the civil law, where the cause is to be heard de novo, and the parties have a right in the appellate court, "non allegata allegare, et non probata probare," the case is otherwise. There the appellate court stands in the place of the inferior court, and has all the power which the inferior court had. Such is the case in the ecclesiastical courts, courts of chancery, and courts of admiralty. Appeals from justices of the peace, resemble appeals under the

civil law, and have always been considered here, as bringing up the whole cause to be tried again de novo. The by-law, no doubt, intended that the court that tried the cause should exercise the discretion which it gave, and it could not deprive this court of its appellate jurisdiction, by giving a discretion to the inferior tribunal. It could neither give nor take away jurisdiction from the justice of the peace, or from this court, for both derive their power and jurisdiction from an authority paramount to that of the corporation.

4. It has also been suggested that, by the constitution of the United Sates, congress, and congress alone have the right to legislate for this District; that it is a power which cannot be delegated; and that the legislative power granted by congress to the corporation of Washington, is a delegation of that power of exclusive legislation, which, by the constitution, is vested in congress alone. If this doctrine be correct, then is congress, at once, deprived of one of its most important legislative powers; that of granting charters to corporations aggregate within the District; for it is, by common law, incident to every corporation aggregate to make by-laws for the government of its own members. 10 Coke, 30, 31; Bac. Abr. "Corporation," D. But those by-laws extend only to those members, and such as voluntarily place themselves within the jurisdiction of the corporation. They do not extend to any other part of the District. They make no part of the legislation over the District. It is not, therefore, a delegation of the power of exclusive legislation.

5. But, it is said, that if congress had a right to grant this charter, and to give the corporation the legislative power it contains, yet that power is limited to the specific objects designated in the charter, and that the discharge of fire-arms in the city, is not one of those specific objects; and therefore the by-law is not warranted by the charter, and is void. Among the powers specifically granted to the corporation, are the "power and authority to prevent and remove nuisances;" "to provide for the prevention and extinguishment of fires;" and "to pass all laws which shall be deemed necessary and proper for carrying into execution the powers vested, by this act, in the said corporation or its officers." Nothing could be a greater nuisance to the inhabitants of the city, than the discharge of fire-arms, idly, and for sport or amusement in the streets, or near their dwelling-houses, if practised to an unlimited extent. To prevent that nuisance, the corporation had no other means than to prohibit such a discharge. The discharge of fire-arms near a stable, or other combustible matter, might set fire to it, and endanger the lives and property of the citizens, and its prohibition might be justified by the authority to prevent fires. The means of carrying into execution the specific powers granted, are left to the discretion of the corporation. This by-law, therefore, was warranted by the charter.

6. It has also been suggested that this ought to have been a qui tam action, because the by-law says, "one third whereof" (that, is, of the penalty) shall be for the use of the city; one third for the use of the constable, and the remaining third for the use of the informer, or to the trustees of the poor, for the use and benefit of the poor of this corporation, in case the informer declines accepting the same. It might be a sufficient answer to this objection, to say, that in a qui tam action, the plaintiff always sues for the king, or sovereign, and himself; and not for another subject or citizen and himself; nor for a body politic, other than the king, and himself. If a penalty be given to be divided among several persons, (subjects or citizens,) one cannot maintain an action for himself and the others, unless such right be expressly given by statute. If the informer should bring a qui tam action, in this case, he would have to declare that he sued as well for the corporation of Washington and for the constable, or for the trustees of the poor, as for himself, for no part of the penalty goes to the United States. No such qui tam action has yet been maintained; certainly not in this court. But Hawkins (book 2, c. 26, § 17), says that an information, or action qui tam, will not lie "unless the whole or part of the penalty be expressly given to him who will sue for it; for otherwise it goes to the king, and nothing can be demanded by the party. But where the statute gives any part of the penalty to him who will sue for it by action or information, &c. I take it to be settled at this day, that any one may bring such action or information and lay his demand tam pro domino rege quam pro seipso." This by-law does not give any part of this penalty to any person who will sue for it. It only declares to whose use it shall be applied after it has been recovered in the usual manner; and provides that if the informer "declines accepting" his third, it shall go to the trustees of the poor. The expression "declines accepting" implies an offer, which implies a previous recovery. If the informer were the person to sue for it, the language would have been, "declines suing," and not "declines accepting." A qui tam action, therefore, was not the proper remedy.

7. It has been contended also that this appeal should be dismissed because it has not been ordered under the corporate seal, but only under the direction of the mayor. The doctrine, that a corporation can do nothing but under its corporate seal, has long been exploded. There are many acts which it may do by its agents under the authority of its by-laws. This appeal was taken by the attorney at law of the corporation, who was duly appointed by the mayor, under the by-law of June 30th, 1824, creating the office; and which by-law was authorized by the seventh section of the charter which gives the corporation power to provide for the appointment of such officers as may be necessary to execute the laws of the corporation. And by

the third section of the charter which authorizes and requires the mayor to nominate, and, with the consent of the board of aldermen, to appoint to all offices under the corporation, except commissioners of election. By the by-law of the 30th of June, 1824, it is made the duty of the attorney, "to defend the interests of the corporation in all suits instituted by or against the corporation." He had a right, and it was part of his duty to take this appeal, if he believed that the interests of the corporation required it. The appeal is therefore correctly taken, without any special order under the corporate seal.

8. It is also objected that Mr. Waters who issued the warrant and tried the cause below, had no jurisdiction because it does not appear upon the proceedings that he was one of the justices of the peace selected in the manner designated by the sixth section of the by-law of the 8th of November, 1830, to issue warrants for offences against the by-laws of the corporation. That by-law, however, is only directory to the officers concerned in the prosecution of offences against those by-laws, and cannot deprive a justice of the peace of a jurisdiction given to him by a paramount authority. But however that may be, it is not a good ground for dismissing the appeal, that the selection does not appear upon the proceedings before the justice. It is a fact which may be proved here if necessary.

9. It is also objected that it does not appear on the proceedings that the by-law had been published five days in some newspaper of the city, by authority of the corporation, according to the fifth section of the by-law of the 8th of November, 1830. But it is not necessary that the fact should appear upon the proceedings of the justice. As the cause is before this court upon an appeal which brings up the whole cause, to be tried de novo, that fact may now be proved here if capable of proof; or possibly, after a lapse of twenty years, and the publication of it in books and pamphlets, the publication of it in a newspaper may be presumed; and perhaps the by-law of November 8th, 1830, was intended to apply only to by-laws subsequently enacted. At all events it is no ground for dismissing the appeal, that that fact does not appear upon the proceedings. Upon none of the grounds stated, therefore, can this court dismiss the appeal.

After the above opinion was delivered Mr. Eaton observed that the court had omitted to notice one objection upon which he relied, namely, that he had not had ten days' notice of the judgment in his favor before the sitting of this court; and he contended that he was entitled to such notice, by the seventh section of the act of the 1st of March, 1823, extending the jurisdiction of justices of the peace.

THE COURT answered, that the reason why the court had not noticed it was that they did not exactly understand the purport of his objection. Mr. Eaton then explained his objection, as above.

But THE COURT said that the provision in the clause of the seventh section of the act referred to, was evidently made for the benefit of the appellant, not of the appellee; and was merely to prevent the original defendant's appeal from being dismissed because not brought up to the term next after the rendition of the judgment, if he had not notice of such judgment ten days at least before that term. That section does not require that the party in whose favor a judgment is rendered by the justice, should have ten days' notice of such judgment in any case.

THRUSTON, Circuit Judge, dissenting, delivered the following opinion: On an appeal from the judgment of the magistrate, in favor of the defendant. The case was as follows: John H. Eaton was charged, before Waters, a magistrate of the county of Washington, with firing a gun, or pistol, or other fire-arm within certain limits in the city of Washington, against the provisions of an ordinance of the corporation which subjects the offender to a fine, not less than five nor more than ten dollars, at the discretion of the magistrate. The magistrate gave judgment, after hearing the case, in favor of the defendant, Eaton; and upon this judgment the corporation have appealed to this court.

The defendant, in support of the judgment of the magistrate, has submitted to the court the following considerations: (1) That the appeal ought to be dismissed, because the magistrate was not one of those selected by the corporation for the trial of cases in which they were parties. (2) Because the appeal was not ordered by the corporate body in their corporate character, but by the mayor, J. P. Van Ness. (3) Because this court has no appellate jurisdiction in the case of fines and pecuniary mulcts. (4) If this court has jurisdiction generally where the fine is certain and fixed, they have none where the quantum of fine is uncertain, but dependent on the arbitrium of the magistrate between a minimum and a maximum limit.

As to the first point, "that the magistrate was not one of those selected by the corporate authorities according to the provisions of the ordinance for the hearing of cases of this sort." This objection is not valid; because every justice of the peace has equal power and jurisdiction, and the corporation have no right to disfranchise any justice of the peace, or to invest any of them with exclusive privileges which may not be enjoyed by any other magistrate. That the corporation may, for their convenience, and because of the greater trust and confidence they may repose in some justices over others, require of their police officers to have the corporation cases brought before certain justices of their selection, may be proper; but this is a matter which only relates to the corporation and those officers. If the officers disobey this in-

junction, it is competent for the corporation, perhaps, to dismiss them as corporate officers; but the jurisdiction of justices of the peace is derived, not from the corporation, but from the laws of the United States; and any justice of the peace is as competent to entertain jurisdiction of pecuniary mulcts, within certain limits, as any other justices; and it is not error, if any other than those selected by the corporation take cognizance of the offence.

Secondly. "The appeal was not ordered by the corporate authorities, but by the mayor." There is nothing in this objection. The appeal is not in the name or in behalf of the mayor, but of the corporation in their corporate style and character. It is true, the mayor directed the appeal in behalf of the corporation; and this he might do as their agent, and ministerial officer, and they, by their attorney in court, have ratified and avowed his act. Surely it would be requiring too much, that by a solemn resolution of the board they should have authorized this appeal, and further solemnized it by affixing thereto their corporate seal. We have never questioned the authority of any attorney of this court, nor required proof of his substitution, or representative power, when his name is marked on the docket, and no one appears to question his right to represent the party for whom he professes to act. I have never known an instance in which this court have ever required an attorney, admitted to practise therein, to produce his warrant to represent any party to a suit therein. The confidence reposed in the bar, and the comity due to them in the relations in which they stand towards the bench, forbid this scrutiny. It would be tolerated only where the party, whom the attorney professes to represent, should disavow the doings of the attorney.

As to the third objection, "this court has no appellate jurisdiction in the case of fines and pecuniary mulcts." Here, indeed, is a matter of grave consideration. I know of no appellate power in this court from the judgment of a justice of the peace, but what is given by the statute. "The act of March 1, 1823 (3 Stat. 743), for extending the jurisdiction of single magistrates," which empowers such magistrate to take cognizance of cases as far as $50, describes precisely the cases in which such justice may exercise jurisdiction. The cases there enumerated, most clearly, in my opinion, are those of a civil character only, because it speaks of the debtor, "his executors and administrators;" because it authorizes the justice to give interest on the judgment, &c.; because it exempts females, and males over seventy from arrest, imprisonment, and execution. In the seventh section of the act, an appeal from the judgment of the magistrate is given to this court in all cases where the judgment is for a sum over five dollars. Now, as it is inconsistent with the character of a pecuniary fine that executors and administrators should be liable for it, or interest charged on the judgment for it; and against reason that females, or men over seventy should be exempted from the penalties for violating a penal law, I take it for granted that this first section, prescribing the jurisdiction of justice of the peace, was intended, and is by necessary construction, limited to cases of a civil character only. Then, when the right of appeal was given by the said seventh section to this court from the judgment of a magistrate, is not that appeal only from judgments rendered under the powers given to the magistrate by the preceding section; and is it not clear that those powers were limited to cases of a civil character only? Cases where executors and administrators might be charged; where interest might be computed and taxed; where sex and age were exempted from arrests and imprisonments on the judgments, which is utterly inconsistent with any of the characteristics of a criminal law; for who ever heard of exemptions in favor of age or sex from the animadversions of a criminal statute? yet, notwithstanding this clear restriction of our appellate jurisdiction to cases of a civil character, yet, we have undertaken to exercise it in criminal cases, and thus, by nice and rigid application of the rules of pleading, to defeat and prostrate the guards and securities of society derived from the denunciations of the law by inspecting the warrants and doings of justices of the peace, trying them by the touchstone of technical criticism, and reversing their decisions on grounds, at least, doubtful, and which must inevitably lead to the annihilation of the whole city police; and how have we usurped this fatal power thus to loosen the bands which bind society together, to give this triumphant victory to the wicked, to trample with impunity on all the rights, the peace, and comfort of the more orderly and better disposed portion of society. By a forced and gross perversion of terms, by considering a penalty a pecuniary mulct for a certain offence, as a debt. How can this be? What gives a magistrate jurisdiction when he issues a warrant against an offender for the violation of a penal statute? Surely, at the time the warrant issues there is no debt subsisting; the debt is not the foundation of the warrant, but the consequence of conviction; non constat, at that time, that the party will be convicted. What does the accused come to defend? A debt? No; against the commission of an act forbidden by law. There is not a word about debt in the whole proceeding, except for form's sake, in the warrant. The whole question is, did you, or did you not, commit the offence? If the justice decides affirmatively, then indeed the penalty follows—a pecuniary mulct. On an appeal, then, what does this court examine? Whether the accused owes the money or not? No; whether he has committed the offence or not. Where do we get the power to try a question of this sort? Is it because in the warrant the justice has, in conformity with some general directory provision in the charter of the corporation, charged the offense as a debt? Suppose the form of the warrant changed, and

it were to charge the defendant specifically with the real truth, that he had violated the law by shooting, &c., against the form of the ordinance in such case made and provided, as in offences indictable in this court where the special offence is set out; then, not being a debt, there would be no appeal. Now, by the statute of Maryland, justices are invested with jurisdiction over misdemeanors where the penalty does not exceed £5 by way of action of debt; but their jurisdiction was final, and there was no appeal from their judgments.

But we claim a right of entertaining an appeal from the judgments of magistrates in cases of violations of penal ordinances of the corporation entirely, as I understand from the expressions in the charter of the corporation, "authorizing penalties to be recovered, and executions to issue for them as in cases of small debts." Does this give an appellate jurisdiction to this court? The form of proceeding for the recovery of these penalties does not necessarily invest them with all the character and properties of debts purely civil; for I have endeavored to show the absurdity resulting from such a construction, and that the appellate jurisdiction given us by the statute can be commensurate only with the original jurisdiction given by the same statute to the justices, and that it would be most absurd and unreasonable that penalties for municipal offences should be embraced in the statute, from the incongruity subsisting between pecuniary mulcts and debts of a purely civil nature. By the Maryland law, no appeal was allowable from the judgment of a magistrate in the case of fines and penalties, for by the act of 1791, c. 68, for the speedy recovery of small debts out of court, &c., &c., the jurisdiction of the justices as well as that of the county courts by appeal from their judgments, was confined to cases strictly civil in their nature; "to debts or sums of money due on contract, or damages for the non-delivery of grain or other articles," excluding debts, (if they may be so called,) incurred by transgressing penal laws. If there be any statute of Maryland allowing appeals in cases of misdemeanors, I am not aware of it. And so in our statute, to debts where interest might be taxed, executors and administrators made liable, and age and sex were exempted from imprisonment; in such cases only does the statute authorize an appeal; and pecuniary mulcts cannot, without violating every principle which characterizes them, be brought within the scope of the statute; therefore their recovery is provided for by the aforesaid clause of the charter, making them "recoverable as other small debts," &c., so that it appears that the state was satisfied to leave the exclusive jurisdiction over small offences, to the small extent of five dollars' penalty, to the magistrate. In this existing state of things, the congress pass the aforesaid act, "for extending," &c. Surely if they meant to invest this court with power to revise the proceedings of justices under corporation ordinances imposing penalties, they would have used terms more congenial with the matter. A long established law is not to be annulled by farfetched implications, or a subsequent statute, when any sensible interpretation of the statute utterly repudiates such implications. Surely they never meant that if a man, sentenced to pay a penalty, should die before it was levied, that his executors or administrators should be charged with it; surely not, that the judgment for the penalty should carry interest; and certainly not, to exempt pauper vagrants and abandoned profligates of any age or sex from the only coercive power over them, that of imprisonment and arrest, when they incurred the penalty, and possessed no means of paying it. See the consequences: a woman, or a man over seventy, may riot in the violation of every penal ordinance, may set at defiance the whole police of the city, if there be no breach of the peace. This is really more deference than was ever paid to age or sex in any country. This court, at least, has not been quite so indulgent to the ladies, as some recent convictions, and not very lenient sentences, prove. But we claim appellate jurisdiction of such cases from the expressions, "in all cases where," &c., in the section authorizing appeals from the judgments of single magistrates; now, that word "all," can, I think, only apply to the enumerated cases in the first section; the appellate jurisdiction can be commensurate only with the given original jurisdiction, and that, I have endeavored to show, embraces civil cases only. But the word "debt" is used in the warrant. It is called a plea of debt; and hence our claim to entertain an appeal in the case. But this form was given by the Maryland statute, and has probably been continued without much reason ever since; and because of this anomalous form of proceeding, by calling it an action of debt, does it necessarily involve all the incidents of debt? Certainly a debt created by statute is available against executors and administrators; a penalty is not. It carries interest per se; a penalty does not. In short, there is no rational construction of the statute "for extending," &c., either from the words, or meaning, or purport of the clause giving and defining the cases in which a justice may exercise original jurisdiction, as well as those granting appeals to this court from their decisions, that can justify this court in entertaining appeals from the judgments of justices, under penal statutes and ordinances; and this is greatly strengthened by the strange consequences that must result from such an exercise of jurisdiction. As far as I can discern, there is no such appeal allowable; it was so in Maryland; and as there are no express words, nor rational construction of the statute which has changed the law, I am compelled to say that the jurisdiction of the magistrates in cases of penal statutes and ordinances is exclusive and beyond our control, as much as our jurisdiction is final and beyond the control of the supreme court in criminal cases. Whether it be a wise provision of the law I know not. If it be thought not so, the congress is competent, and they only, to change it. I am of opinion, however, that if we deter-

mine to exercise appellate jurisdiction in such cases, and do not relax somewhat of that severity and legal scrutiny in regard to the doings of justices, we shall have no criminal law worth having. It has been ruled, and not yet overruled by the court, that a criminal of any the most aggravated offence, who has been bailed, and forfeited his recognizance, is clear of the crime. That criminals sentenced to imprisonment and fine for misdemeanors, can be entitled to the bounds; and for a fine only can be released under the insolvent laws. Having hitherto exercised this now disputed appellate jurisdiction, the warrants of magistrates have been examined with the most rigid legal criticism because the magistrates had not framed their warrants with all the exactness of indictments, and their judgments have been reversed, and that wholesome police, so essential to the well-being of our citizens, paralyzed; mittimuses are looked into with the eyes of special pleaders; and, in a recent case, a man was discharged because, having incurred a penalty and being unable to pay it, and having for such inability been committed to the workhouse, the mittimus neglected to state that he was a man of color, although, when brought before the court, he was evidently so; and although the offence could only be committed by a man of color, and it was sufficiently set out, in the mittimus, in every respect, except the words "man of color." We believed the mittimus, then, that he, by possibility, might not be a man of color, against the evidence of our own eyes. But here it was urged, and in all cases where we had heard appeals in such cases, the old maxim, "It is a penal statute, and must be construed strictly," but where the question is jurisdiction or no jurisdiction, it is quite a civil affair; "nothing but an action of debt," and being so we have jurisdiction by the statute. If it be a civil matter, how came we to apply the strict rules of criminal pleading to cases of a civil character only? This seems to be blowing hot and cold with the same breath; to get jurisdiction, the case is merely one of debt, a civil matter altogether; when we get it before us we pounce upon it with all the stern severity and criticism of criminal pleadings, utterly disregarding the directions of the statute that we are to decide according to law, justice, and equity, which I take to be clearly indicative of an intention in the legislature to authorize the court to relax the strict rules of construction in regard to warrants for pecuniary mulcts, if they be really purely civil in their character, if there be enough, though not set out in technical form, in the warrant, to inform the defendant of the offence with which he is charged, or otherwise we disregard entirely the emphatic and important words, justice and equity, and the more especially as it may be supposed to have been in the contemplation of the legislature, that the warrants from which appeals are taken to this court are devised by justices of the peace who are not lawyers by profession, nor skilled in the subtleties of special pleading. I have done with this objection; and if there be a doubt in the mind of any on this point, I think there can be but little as to the validity of the last objection, namely, "That if this court has jurisdiction generally where the fine is certain and fixed, they have none when the quantum of fine is uncertain, and depends on the discretion of the magistrate between a minimum and a maximum limit."

I need say nothing of the argument, that it is a settled principle, that, from the judgment of a court in the exercise of a discretionary power, there is no appeal, which I thought had great force in it; nor of the argument of the counsel for the corporation, that, inasmuch as the magistrate dismissed the warrant, and exercised, consequently, no arbitrium, that, as the case would be taken up, de novo, in this court, this court was competent, if they reversed the justice's decision, to assess the fine. It is true, if we were to take up the case, and hear the evidence, we might be of opinion that the justice did wrong, and that he ought to have given judgment for the corporation; but, when we had done so, and come to the point of assessing the fine, we should be at fault. Notwithstanding the Proteus character assumed for prosecutions for pecuniary penalties, I consider them as belonging to the criminal side of the court, as real penal statutes, whether animadverting on mala in se, or mala prohibita, and the defendant entitled to all the privileges given by the statute; and one is, that the fine shall be assessed by the justice, at his discretion, and not by this court, at theirs. Suppose, now, after reversing the magistrate's decision, we come to the consideration of assessing it, where shall we fix it; at the minimum, the maximum, or between the two? Neither of the two latter, because the law has given this power to another and not to us; does it follow, because the law has given it to one, it can be exercised by three others? The defendant has a right to have his exclusive judge, as to that point; well, it may be said, we may safely fix it at the minimum term; the defendant could have nothing to complain of there; but the law would, for it contemplated something more—a higher assessment—a greater fine; we must take the whole power of the justice, or none; we cannot execute half a law, because we cannot get at the other half; all the range between five and ten dollars is barred against us.

For these reasons, I am for affirming the judgment.

Case No. 17,229.

WASHINGTON v. FOWLER.

[4 Cranch, C. C. 458.] [1]

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

COMPETENCY OF WITNESS.

A witness is not incompetent because he feels himself bound in honor to indemnify the party

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

who calls him as a witness in case the judgment should be against him, if he has made no promise to indemnify him, nor is bound in law so to do.

Debt on the auctioneer's bond of Moses Poor, the defendant being his surety. Judgment having been rendered against Mr. Poor, and the defendant having given him a release, the defendant called him as a witness, and upon cross-examination he answered that he felt bound in honor to indemnify the defendant if judgment should go against him, but had not promised or in any manner bound himself so to do. Whereupon the plaintiff's counsel objected, and contended that the testimony of Mr. Poor should be rejected as incompetent on account of that honorable feeling.

But THE COURT (nem. con.), upon the authority in 4 Starkie, 746, overruled the objection.

See, also, Corporation of Washington v. Webb, at November term, 1834, S. P. (not reported).

WASHINGTON (FRANCE v.). See Case No. 5,028.

WASHINGTON (FRIEND v.). See Case No. 5,121.

WASHINGTON (GIBB v.). See Case No. 5,380.

WASHINGTON (HALL v.). See Case No. 5,953.

WASHINGTON (HALLIHAN v.). See Case No. 5,962.

WASHINGTON (HILL v.). See Case No. 6,501.

WASHINGTON (JENNINGS v.). See Case No. 7,284.

WASHINGTON (JOHNSON v.). See Case No. 7,420.

WASHINGTON (KENNEDY v.). See Case No. 7,708.

Case No. 17,230.

WASHINGTON v. LASKY.

[5 Cranch, C. C. 381.] [1]

Circuit Court, District of Columbia. Nov. Term, 1837.

CORPORATION OF WASHINGTON—CHARTER POWERS.

The corporation of Washington, under its charter, has power to prohibit ordinary keepers to sell spirituous liquors to free colored persons.

Appeal from the judgment of Mr. Coote, a justice of the peace, who nonsuited the corporation in an action of debt for a penalty of twenty dollars; "for that the said Lucy Lasky, the keeper of a tavern or ordinary, in the third ward, at the city of Washington, did sell, or permit to be sold, spirituous liquors to slaves or other persons of color, on Sundays, and other days, between sunset and sunrise on the 4th instant, and at divers other times, contrary to the act or acts of the said mayor, &c., on that subject made and provided." By the by-law of November 5, 1832, § 8 (Rothwell, 263), it is enacted, "That all keepers of ordinaries or taverns, shall be, and they are hereby prohibited from selling spirituous liquors to slaves, or other persons of color, on Sundays, and other days between sunset and sunrise; and any keeper of a tavern or ordinary, who shall sell, or permit to be sold, any spirituous liquors, in violation of this prohibition, shall, on conviction for the first offence, be fined twenty dollars; and for the second offence, forfeit his license, which shall be annulled by the mayor."

CRANCH, Chief Judge. The question submitted, as I understand it, is, whether under the power given by the 7th section of the charter of 1820, to provide for licensing, taxing, and regulating ordinaries and taverns, the corporation can prohibit licensed tavern-keepers to sell spirituous liquors to free colored persons, there being no like prohibition to sell to white persons, to wit: Can the corporation, in this respect, lawfully discriminate between white and colored persons? I am of opinion that, under the power to provide for licensing, taxing, and regulating ordinaries and taverns, the corporation has power to prohibit the sale of spirituous liquors to colored persons of all descriptions, free or bond, young or old, or to minors, apprentices, servants, hack-drivers, porters, &c., whether white or colored.

MORSELL, Circuit Judge, concurred; but for the informality and uncertainty of the charge in the warrant,

THE COURT (THRUSTON, Circuit Judge, absent) affirmed the judgment.

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

WASHINGTON (LEVY COURT OF WASHINGTON COUNTY v.). See Case No. 8,306.

Case No. 17,231.

WASHINGTON v. LYNCH.

[5 Cranch, C. C. 498.] [1]

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

CORPORATION OF WASHINGTON—CHARTER POWERS—LICENSE ON DOGS—SUFFICIENCY OF WARRANT.

1. The corporation of Washington, under its authority to prevent nuisances, may prohibit the keeping of a dog in the city without a license, and may require money to be paid for the license.

2. A warrant is too vague and uncertain which charges that the defendant "did on or about the 20th of July inst., own, harbor, or keep a female of the dog kind in Washington

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

City, in the county aforesaid, without having a license therefor, contrary to the act or acts of the mayor, &c. on that subject made and provided."

Appeal from the judgment of a justice of the peace, who non-pros'd the corporation, upon a warrant for a penalty of $20, "for that he, the said John Lynch, did, on or about the 20th of July instant, own, harbor, or keep a female of the dog kind in Washington City, in the county aforesaid, without having a license therefor, contrary to the act or acts of the said mayor, &c., on that subject made and provided." This prosecution is supposed to have been founded upon the by-law of the corporation of Washington, approved April 1, 1820, entitled "An act imposing an annual tax on dogs, and for other purposes, and repealing all other acts on that subject;" by the first section of which it is enacted, "that a tax shall be levied and collected, of one dollar each per annum, on all male animals of the dog kind; and of five dollars each, per annum, on all female animals of the dog kind, to be paid by the owners thereof, respectively, into the hands of the register for the use of the corporation." And by the second section it is enacted, "that it shall be the duty of every person residing in the city of Washington, and owning or possessing any animal of the dog kind, to enter such with the register, on or before the first day of January, annually, and to pay the tax hereby imposed; and it shall be the duty of the register to make regular entries, describing the dog or dogs so entered, and to give a license to such person or persons, on payment of the tax; which license shall authorize him, her, or them, to keep such dog or dogs until the first day of January in the ensuing year; and any person or persons who shall own, possess, harbor, or conceal any animal of the dog kind within the city, and shall fail to pay the tax and obtain the license as aforesaid, shall, for every such neglect or offence, forfeit and pay the sum of five dollars," (not twenty dollars, as stated in the warrant.)

Mr. Carlisle, for appellee, contended that the corporation has no power to tax dogs, because they are not property, as this court has decided in the case of ———— at ——, and as the judge of the criminal court also decided, at the last term of that court in this county. By the charter of 1820, the corporation has power only "to lay and collect taxes upon the real and personal property" within the city. It is true that it has power to "prevent and remove nuisances," but not to license them. Dogs are not in the list of things which, by the charter, the corporation may "license, tax, and regulate." The corporation has no power to require a penalty for not paying the tax; they have only power to lay and collect the tax. But there must be a judgment of conviction before they can recover the penalty, and the conviction must be averred in the warrant to recover the debt.

Mr. Bradley, contra. Under the power to prevent nuisances, the corporation has a right to prevent, or restrain, or regulate the keeping of dogs in the city; for, although the keeping of a single dog may not, of itself, be a nuisance, yet the number kept may altogether amount to a nuisance, to prevent which the corporation may impose upon the keepers such terms and conditions, that few would be disposed to keep them; by which means the nuisance may be prevented, while, at the same time, the corporation may obtain some revenue from the sale of the licenses.

THE COURT (nem. con.) was of opinion, that under the power to prevent nuisances, the corporation had power to limit the number of dogs by requiring the owners to obtain license by payment of a tax. But the warrant being too vague and uncertain, the judgment was affirmed, with costs.

WASHINGTON (McCOY v.). See Case No. 8,731.

WASHINGTON (McCUE v.). See Case No. 8,735.

WASHINGTON (McGUNNINGLE v.). See Case No. 8,818.

WASHINGTON (MANDEVILLE v.). See Case No.. 9,017.

WASHINGTON, The (MARINERS v.). See Case No. 9,086.

WASHINGTON (OWNER v.). See Case No. 10,635.

WASHINGTON (PANCOST v.). See Case No. 10,706.

WASHINGTON (PATTEN v.). See Case No. 10,813.

WASHINGTON, The (POOLE v.). See Case No. 11,271.

Case No. 17,232.

The WASHINGTON v. The SALUDA.

[3 U. S. Law Int. 249.]

District Court, D. South Carolina. April 27, 1831.

PILOTS IN CHARLESTON HARBOR—KNOWLEDGE OF DANGERS IN CROSSING BAR—RIGHT TO SALVAGE.

[1. It is the duty of pilots for the port of Charleston, S. C., to be thoroughly acquainted with the bar at the mouth of the harbor, and all its difficulties and dangers. It would seem that, from experience and information, they should be able to judge, from the state of the wind and weather, whether it is practicable, at a given time, to cross the bar with a vessel of given draught, and whether there would probably be danger of thumping on account of swells.]

[2. A pilot who is part owner of a pilot boat should not be allowed, on the ground of public policy, to recover salvage for towing in a vessel which received an injury by thumping on the bar while going out of the harbor under his charge as a pilot.]

[This was a libel by the owners of the pilot boat Washington against the ship Saluda to recover salvage.]

Petigru & Cruger, for libellants.
Legare & Egleston, for respondent.

BY THE COURT. The libellants in this case claim a compensation, by way of salvage, for towing into port the packet ship Saluda, which was prevented from prosecuting her voyage by injuries which she suffered by frequently striking on the bar in crossing it. The case is novel, extraordinary, and without precedent in this court. On the 25th ult. one of the libellants, a branch pilot, and part owner of the pilot boat Washington, took charge of the Saluda, for the purpose of piloting her to sea. The following witnesses, all pilots of this port, were examined for the libellants, viz.: Mr. Mullins, Mr. Albrit, Mr. Delaney, and Mr. Lee. They proved that the pilot, James Copes, one of the libellants, attempted to cross the bar, in the Saluda, after about three hours and a half flood. They further deposed that there was usually on the bar, at high water, about 16½ and 17 feet. The ship Saluda drew 11 or 11½ feet water, and they concurred in the opinion that when she was carried out there was water enough, if it had not been for the great swell, of which they could have no knowledge until they were on the bar. It did not appear from any of the testimony what proportion of the 6 feet which the tide usually rises, was on the bar at 3½ hours flood, when the Saluda crossed. The probability is that at the time of her crossing there were about 14 or 14½ feet water. A minute detail of the evidence is not deemed necessary.

The following points were established: That vessels very frequently struck on the bar in going out; one of the witnesses thought that at least 6 out of 8 thumped in crossing the bar. 2d, that the bar at high water usually had 16½ or 17 feet. 3d, that, when the Saluda crossed, there was water enough to carry her over safely, if it had not been for a swell on the bar. 4th, that the pilots had been frequently compensated in similar cases, in some as far as $500. And, lastly, that they had never known a vessel of the draught of water of the Saluda, to strike on crossing the bar at high water.

The court will consider and decide this case on the grounds of law, justice, and policy, arising from the positions and facts just stated. The witnesses all testified that it was a common thing for vessels to thump on the bar in going out. The cases which occurred on that day go very far to verify their assertion. The brig Wilson, drawing about 12 feet water, struck in going out, lost her rudder, and was brought back for repair. The Robert Morris, which crossed the bar about three-quarters of an hour before the Saluda, also struck. It seems reasonable to inquire why these three vessels, the Wilson, the Robert Morris, and the Saluda, with no greater draught of water than 11 or 12 feet, should have struck on a bar, which at high tide usually had upon it 16½ or 17 feet water. What was the answer given by the witnesses to this natural inquiry? Why, that there was a heavy sea running on the bar, and that, on the occasional subsidence of the swell, the depth of water became two or three feet less. The court is quite willing to believe that such is the fact, but will it, ought it, to exculpate the pilot in case of accident? What are the duties of a pilot, and what is the knowledge which he ought to possess to qualify him for the faithful performance of that duty? I cannot be mistaken in saying that he should be intimately acquainted with the channels, with the bar, and all its difficulties and dangers. The trust confided to him is a high and responsible one, involving the lives and property of the citizens, and demanding all his care, caution, and vigilance. The witnesses say that they could not know of the swell on the bar until they were upon it. The court would ask whether the past experience of a pilot ought not to give him the information (arising from the state of the wind and weather) of the condition of the bar, and the practicability of crossing it with safety; or whether, being doubtful on this head, he ought not either to have sent his pilot boat ahead to reconnoitre the ground, or waited until high water, when the witnesses all agree that no accident could have happened. I see nothing impossible in such a proceeding; nay, it seems to me to have been the course which prudence and duty called for. The court cannot conclude the remarks on this head without observing that to the injuries which may be sustained from this cause of heavily laden vessels thumping on the bar in going out, perhaps on a long voyage, may be attributed their frequent loss at sea.

Another fact established by the libellants' own witnesses, which has just been adverted to, seems to settle this question. They all swear that they never knew a vessel of the Saluda's draught strike on the bar at high water. With this knowledge, which all the pilots possessed, why attempt to cross the bar before high water, when it is in evidence that by doing so six out of eight vessels thump (in their language) on the bar, and frequently have to return for repair, to the great delay and injury of commerce?

It is universally known that, when the pilot is in possession of the ship, he has the absolute and undisputed command of her. The destiny of the ship is in his hands, and he is bound to exercise that authority with the judgment and skill which belong to that important station. He is answerable, and ought to be so, for the safety of the ship in all ordinary circumstances; like common carriers, he can only be relieved, in case of damage or loss, by showing that the causes producing it were beyond his control, arising from the act of God, or a vis major of the elements. Can this claim then be supported by justice? My previous reasoning has sufficiently answered this question. A word or two, in conclusion, as to the policy which ought to govern this case. Suppose such claims were countenanced in this court, what would be the probable consequences which would follow? Evidently a serious interruption to commerce, and a strong temptation to pilots to perform

their duty negligently. It would be holding out a reward to them to do so. Would not their interest be materially affected by such a practice in this court? Most assuredly. Instead of their pilotage, which is intended as a compensation for skill, experience. and fidelity, they would not only receive that, but, as one of the witnesses swore, $400 or $500 for their errors or negligence. I mean to impute no improper motives to the pilots of Charleston, but I consider myself bound, from a sense of duty, to say that they ought not to be so tempted. This court will hold out no such temptation.

The court has been told, by way of inducement, that usage has sanctioned such claims; that arbitrators have frequently awarded compensation in cases like the present. Such decisions have no authority here. If it is a usage, it ought to be abolished,—"malus usus," &c. On the grounds, therefore, of law, justice, and policy, this libel must be dismissed, with costs.

WASHINGTON (SHANKLAND v.). See Case No. 12,703.

Case No. 17,233.

WASHINGTON v. STROTHER.

[2 Cranch, C. C. 542.] [1]

Circuit Court, District of Columbia. Dec. Term, 1824.

KEEPING FARO TABLE — SEPARATE PROSECUTIONS.

Under the by-law of the corporation of Washington of the 16th of August, 1809, a person who suffers and permits a faro table to be set up and kept in his house is liable to a separate prosecution for every day he shall so have suffered and permitted it to be set up and kept.

This was an appeal from the judgment of a justice of the peace for the county of Washington, who had non-prossed the corporation of Washington upon five separate warrants issued against the appellee for suffering and permitting a faro table to be set up and kept in his house on five several days, viz., the 1st, 2d, 3d, 24th, and 25th of December, 1823. The three warrants, for the first three days, were all issued on the 29th of December, 1823, returnable on the 2d of January, 1824; that for the 25th of December was issued on the 2d of January, 1824, returnable on the same day; and that for the 24th of December was issued on the 5th of January, and returnable on the same day. On the 10th of June, 1824, the justice non-prossed them all, with costs against the corporation, who appealed from the judgments. Upon hearing of the appeals, the facts were fully proved, as alleged in the warrants respectively. By the 2d section of the by-law of the corporation, of the 16th of August, 1809, it is enacted, that "if any person" "shall permit any" "faro table" "to be set up, kept, or played, in his or her house," &c., he or she "shall incur the penalty of twenty dollars for every day, or less time, that the same is so kept up and maintained; to be recovered before a single magistrate; one half whereof shall go to the informer, and the other for the use of the city council."

A doubt was suggested at the bar, whether the party could be prosecuted separately, for any number of days on which he continued to keep and maintain the faro table prior to the issuing of the first warrant, or whether it was not one continued offence up to the time of prosecution, as this court had decided, in Alexandria, in regard to the retailing of spirituous liquors, in the cases of Virginia v. Smith [Case No. 16,966], and U. S. v. Gordon [Id. 15,233 and 15,234]. See, also, Marriott v. Shaw, Comyn, 274.

Mr. Wallach, for the corporation, contended that each day's keeping constituted a separate and distinct offence. Brooke v. Milliken, 3 Term R. 509; Crepps v. Burden, Cowp. 640.

THE COURT (CRANCH, Chief Judge, not concurring) ordered the judgments to be reversed, with costs, and judgment to be entered against the appellee, for twenty dollars and costs in each case.

CRANCH, Chief Judge, wished for time to look into the authorities, and was inclined to be of opinion that all the time of keeping the faro table, before the first conviction, constituted but one offence, and that the amount of the penalty was to be regulated by the number of days' keeping, at the rate of twenty dollars a day.

WASHINGTON (THORNTON v.). See Case No. 14,001.

WASHINGTON (TOOLE v.). See Case No. 14,097a.

Case No. 17,234.

WASHINGTON v. TOWNSEND.

[3 Cranch, C. C. 653.] [1]

Circuit Court, District of Columbia. Dec. Term, 1829.

CORPORATION OF WASHINGTON—BY-LAW.

No penalty was prescribed by the by-law of 19th July, 1804, against hawkers and pedlars, for not taking out a license. The by-law is not correctly stated in Burch's Digest (p. 102).

This was an appeal from the judgment of a justice of the peace, who had non prossed the corporation, upon a warrant for $20 fine [against L. K. Townsend] for not taking out a hawker's and pedlar's license, under the 9th section of the by-law of July 19, 1804, entitled, "An act requiring annual licenses to be taken out by ordinary or tavern keepers, retailers, and hawkers or pedlars." The first and second sections relate to tavern-keepers, requiring them to take out license, and give bond with two sureties. The third, fourth, and fifth sections require retailers of wines, and spirituous liquors also to take out license,

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

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

and give bond with sureties. The sixth section requires the register. on the direction of the mayor, to make out the licenses. The seventh exempts those whose licenses have not expired from taking a new license until their old ones have expired. Then comes the eighth section: in these words: "And be it enacted, that for every infraction of the provisions of this act, there shall be paid, by the person committing the same, or his sureties, the sum of twenty dollars." It is then enacted by the ninth section: "That persons usually denominated hawkers and pedlars, carrying goods, wares, and merchandise from place to place in the city, shall take out annual license therefor, for which shall be paid $35 each license; and the said hawkers and pedlars shall be bound to exhibit to any officer of the corporation, at all times when thereto required or demanded, the license obtained as aforesaid." The tenth section makes it the duty of the register to grant licenses in the absence of the mayor; and the eleventh section repeals so much of former acts as comes within the purview of this.

Mr. Burch, in his Digest (page 102), has inserted these words: "That if any hawker or pedlar shall be found selling as aforesaid, without a license, or shall refuse or fail to show his license when required so to do, he shall, for every day he shall be found so selling, or for every refusal or failure as aforesaid, forfeit and pay the sum of $20." Act July 19, 1804. No such provision has been found in that or any other act of the corporation.

THE COURT affirmed the judgment with costs.

WASHINGTON, The (ULARY v.). See Case No. 14,323.

WASHINGTON (UNITED STATES v.). See Case No. 16,646.

Case No. 17,235.

WASHINGTON v. WALKER.

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

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

COLLECTOR OF TAXES — LIABILITY ON BOND — ARREARAGES COLLECTED.

The collector of city taxes who was appointed and gave bond in June, 1816, and resigned in October, 1816, was liable upon that bond for all collections of taxes made by him after the date of the bond, and before his resignation, although such collection consisted of arrearages of taxes due in former years.

Debt on a collector's bond. There were several breaches assigned in not paying over the money collected. The bond was dated in June, 1816, and the defendant resigned his office in October, 1816, before the tax list of that year had been delivered to him. He had been collector for several preceding years.

Mr. Law and Mr. Key, for plaintiffs, contended that, as the defendant had been collector in preceding years, his sureties in this bond are liable for collections made in former years.

But THE COURT (MORSELL, Circuit Judge, contra) decided that the defendant is liable upon this bond, dated in June, 1816, for all collections of taxes made by him, after the date of the bond, and before his resignation in October, 1816, although such collections consisted of arrearages of taxes due in former years, the by-law of 1812 having expressly made it the duty of every new collector to collect such arrearages; and, as the defendant was collector of the preceding year, it was not necessary that he should have been furnished by the register with a new list of arrearages, because the defendant must have himself known what the arrearages were.

THRUSTON, Circuit Judge, was of opinion that this bond covers all moneys in the defendant's hands at any time after its date.

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

WASHINGTON (WARD v.). See Case No. 17,163.

Case No. 17,236.

WASHINGTON et al. v. WASHINGTON et al.

[3 Cranch, C. C. 77.] [1]

Circuit Court, District of Columbia. April Term, 1827.[2]

PAYMENT OF LEGACY — ASSIGNMENT OF BOND — EFFECT.

A legatee under the will of General George Washington received by assignment from the executors, on account of his legacy, a bond and mortgage taken by them from a purchaser of the estate, which bond was for a sum larger than the legacy. The assignee covenanted not to hold the executors liable upon their assignment, and to pay back the surplus, and to indemnify and save harmless the executors from any damage by reason of the assignment. The obligor became insolvent, and the sales of the mortgaged property did not produce the amount of the legacy;—held, that the estate of General Washington was not liable under the 41st section of the act of Virginia, of December 13, 1792, to make good to the legatee the deficiency; and upon a cross-bill he was held liable to the executors for the amount in which the assigned debt exceeded the legacy.

This was an amicable suit brought by certain residuary legatees [Lawrence A. Washington and others] under the will of General George Washington of Mount Vernon, to enable the executors to settle the estate. There was also a cross-bill filed by the executors against some of those residuary legatees who had purchased at the sales of the property, or had otherwise received more than the value of their respective legacies. The original bill by the legatees against the executors, which is principally in the handwriting of the late

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

[2] [Reversed in 1 How. (42 U. S.) 14.]

Mr. Justice Bushrod Washington, one of the acting executors, states, "that General George Washington departed this life some time in the year 1799, having first duly made and published his last will and testament, bearing date the 9th of July, 1799, whereby, among other things he devised all the rest and residue of his estate, real and personal, not before disposed of by the said will to be sold by his executors, and the money arising therefrom to be divided into twenty-three equal parts, and applied as follows, to wit: to William A. Washington," &c., &c., naming the several legatees. The bill states further, that a considerable part of the western lands which was susceptible of partition, as also other parts of the personal property, were divided among the said devisees in specie according to the proportions stated in the will. That the residue of the estate real and personal, a small part excepted, was sold by the two acting executors, the said Bushrod Washington and Lawrence Lewis, but to what amount the complainants are ignorant. They admit that considerable payments have been made to them by the executors, but they charge that a large sum still remains to be distributed, which the acting executors refuse to pay without the sanction of a court of equity. The bill then sets forth the names of all the residuary legatees and their assignees, and the personal representatives of such as had died; prays that the defendants may render an account of the sales of the property, and of the assets which have come to their hands, or which are still to be collected; and that the amount to which the complainants are respectively entitled may be ascertained, and that the defendants may be decreed to pay the same. The defendants answered, admitting the facts stated in the bill, and submitting to account, &c. By consent, the cause was referred to a master commissioner, to state and report an account, &c. Upon his report it appeared that the only case of difficulty was that of Thomas Hammond, who, as one of the residuary legatees, in right of his wife, was entitled to one whole share, that is, $1/23$ of the amount of the sales of the property, which share was $5,179.09. Before this amount was ascertained, the executors assigned to him a mortgage, given to the executors by Burdett Ashton, Jr., (who was also entitled to $\frac{2}{3}$ of a share,) to secure a debt of $9,410.20; which sum was supposed, after deducting Ashton's $\frac{2}{3}$ of a share, to be more than sufficient to pay the share due to Hammond, who accordingly gave the executors a mortgage upon his lands, to secure the refunding of the surplus; in which mortgage he covenanted to pay the same, and to indemnify and save harmless the executors from any damage, by reason of the assignment. There was, also, upon the assignment to Hammond of Ashton's mortgage, a memorandum, that the executors were not to be held liable as assignors. The property mortgaged by Ashton was sold under a decree of foreclosure, and did not produce enough to pay the legacies of Ashton and Hammond; whereupon Hammond claimed to have the deficiency made up by the estate of General Washington, under the 41st section of the Virginia act of the 13th of December, 1792, which obliges the executors to sell perishable articles, and authorizes them to take bonds and security from the purchasers; "and if more be sold than will pay the debts and expenses, the executor or administrator may assign the bonds, for the surplus, to those entitled to the estate, and be discharged as to so much; and if, after such assignment, the obligor becomes insolvent, so as the money be lost, without the fault or neglect of the assignee, then such loss shall be made good to the assignee out of the decedent's estate."

CRANCH, Chief Judge. The master commissioner, (A. Moore,) in his report, has referred to the court the claim of Thomas Hammond, in right of his wife, to $1/23$ of the residuum of General Washington's estate. In the fifth article of his will he desires that all the residue of his estate, real and personal, may be sold by his executors, (if it cannot be equally and satisfactorily divided,) and the money divided into twenty-three equal parts, of which Mrs. Hammond was entitled to $1/23$, and Burdett Ashton to $\frac{2}{3}$ of $1/23$. A share was $5,179.05. Burdett Ashton had purchased at the sale to the amount of $9,410.20, and was entitled to a credit of his $\frac{2}{3}$ of $1/23$, which was not then ascertained, but afterwards appeared to amount to $3,452.70. He gave a mortgage on the 12th of March, 1805, for the whole amount of his purchase, $9,410.20; which, after deducting from it his $\frac{2}{3}$ of $1/23$, was supposed to be more than sufficient to pay Mrs. Hammond's share. The executors, on the 11th of March, 1806, assigned to Hammond, Burdett Ashton's debt and mortgage; and, on the same day, took from Hammond a mortgage to refund to the executors the surplus, after deducting Hammond's share from the balance of Ashton's debt, thus assigned to Hammond.

Upon or under the assignment of Ashton's mortgage was written a memorandum, that the executors were not to be made personally liable in any respect, or on any pretence whatever, for or by reason of that assignment; and that Burdett Ashton was to have credit for his proportion of $5,179.05, (being the share of each legatee,) as well as for his sister's proportion; and one of the conditions of Hammond's mortgage was, that he should indemnify and save harmless the executors, against all claims, demands, or damages whatsoever, on account or by reason of the assignment and transfer of the aforesaid debt to him, the said Thomas Hammond, and to refund in case he should be liable so to do. He covenanted, also, to the same effect. The property mortgaged by Ashton

was sold under a decree, and produced only $3,908.46.

The debt of Ashton was.....	$9,410 20
He had a right to retain.....	3,452 70
The real amount of Ashton's debt was	$5,957 50
Hammond's claim was.....	5,179 05
The amount secured to the executors by Hammond's mortgage was.....	$ 778 45

This sum of $778.45 then was, by the terms of the mortgage, to be absolutely paid by Hammond to the executors, whether Ashton became insolvent or not, or whether the land produced more or less than Hammond's claim. Such was his covenant. We therefore think that he could not have had recourse to the executors, even if he had not expressly exonerated them.

But it is said that the estate is not exonerated, although the executors are; and that the estate is liable, as assignor of Ashton's debt, under the equity of the 41st section of the statute of Virginia, of December 13, 1792, (P. & P. Rev. Code, 165,) which compels the distributees to take the specific bonds of purchasers of the personal estate, when sold because perishable; in which case, if the bonds are not good, they are to be made good out of the estate. It is admitted that the present case is not within the letter of the statute, and we think it is not within its spirit; for here the debt of Ashton was voluntarily received in payment. Hammond was not obliged to receive it. We think that General Washington's estate is not bound to make it good, and that the executors may recover from Hammond the difference between Ashton's debt and Hammond's share of the estate.

MORSELL, Circuit Judge, concurred. THRUSTON, Circuit Judge, not having heard the argument, gave no opinion.

A decree was afterwards rendered in conformity with this opinion.

Reversed by the supreme court, in 1843. 1 How. [42 U. S.] 14.

Case No. 17,237.

WASHINGTON v. WEBB.

[Cited in Washington v. Fowler, Case No. 17,229. Nowhere reported; opinion not now accessible.]

Case No. 17,238.

WASHINGTON v. WHEAT.

[1 Cranch, C. C. 410.] [1]

Circuit Court, District of Columbia. June Term, 1807.

CORPORATE BY-LAW—BURNING BRICKS.

Burning bricks in a clamp is not a violation of a by-law, making it penal to burn bricks in a kiln.

Debt for penalty of one hundred dollars under a by-law of the corporation of 20th September, 1803, for using a brickkiln without license. The evidence was, that Wheat had agreed with one Weeding that Weeding should make and burn fifteen thousand bricks, to be delivered to Wheat, when burnt. That Weeding made the bricks and burnt them in a clamp, and not in a kiln.

THE COURT directed the jury that if they believed the facts to be so, the defendant had committed no offence under the by-law. That it was no offence, under the by-law, to burn bricks in a clamp.

Case No. 17,239.

WASHINGTON v. WHEATON.

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

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

CORPORATE BY-LAW—LICENSING OF HACKNEY-COACHES.

The corporation of Washington had authority, under the charter of 1802 (section 7), to pass a by-law to regulate and license hackney-coaches.

Appeal from the judgment of William Thornton, a justice of the peace, in an action of debt for penalty of the by-law, for running hacks without license, contrary to the by-law (chapter 9).

THE COURT instructed the jury that the corporation had a right and power under their charter of 3d May, 1802, § 7 (2 Stat. 197), to make such a by-law, and that it was necessary for the defendant to show an actual license.

WASHINGTON (WHELAN v.). See Case No. 17,503.

WASHINGTON (WHITE v.). See Case No. 17,560.

Case No. 17,240.

WASHINGTON v. WILSON.

[2 Cranch, C. C. 153.] [1]

Circuit Court, District of Columbia. Nov. Term, 1818.

PERSONAL PROPERTY—TRANSFER OF LEGAL TITLE—LOSS OF SLAVE—ACTION FOR DAMAGES—EVIDENCE.

1. A bill of sale of personal property is valid, between the parties, to transfer the legal title, although the possession and the beneficial interest remain with the vendor.

2. An action upon the case will lie for the loss of the plaintiff's slave, although the defendant wrongfully and unlawfully acquired and kept possession of the slave.

3. In an action upon the statute of Virginia (pages 192, 374) for carrying away the plaintiff's slave, evidence will not be permitted to be given that the slave had hired himself as a free man to another master of a vessel in a previous voyage.

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

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This was an action upon the case for the value of a slave of the plaintiff [Thomas L. Washington], carried away as a seaman by the defendant [William Wilson], and lost.

THE COURT (THRUSTON, Circuit Judge, absent) instructed the jury, in effect, that a bill of sale, under seal, from Sarah Washington to the plaintiff, transferred the legal title to the plaintiff, although the possession and beneficial interest were in Mrs. Washington, and that the plaintiff might recover in his name for her use.

THE COURT also refused to suffer evidence to be given that the slave hired himself as a free man to another master of a vessel in a previous voyage, the action being given by the act of Virginia (pages 192, 374), in the cases described in the act.

THE COURT also decided that the plaintiff could maintain this form of action (case) although the defendant had wrongfully and unlawfully acquired and kept possession of the slave without the permission or consent of the plaintiff.

Verdict for the plaintiff, $400 damages; the slave being supposed to be worth $800.

Case No. 17,241.

WASHINGTON v. YOUNG.

BRENT et al. v. DAVIS.

[2 Cranch, C. C. 632.] [1]

Circuit Court, District of Columbia. Jan. 10, 1826.

LOTTERY MANAGERS—SUIT ON BOND.

The holders of tickets in the Washington lottery have no right to sue the managers upon the bond given by them to the corporation of Washington, without the leave of the corporation; nor to sue the contractor for the lottery, on his bond given to the managers, without their consent.

[These were suits by the corporation of Washington, for the use of the holder of ticket No. 1,037, against Moses Young's administrator; and by Brent and others against Gideon Davis.] These causes, in which the judgment of this court had been reversed in the supreme court of the United States in January term, 1825, were sent down to this court by mandate, setting aside the verdict and proceedings up to the declaration.

Mr. Jones, for defendants, now moved this court to dismiss these suits, according to intimation given in the opinion of the supreme court in 10 Wheat. [23 U. S.] 410; that court having decided that the holders of the tickets had no right to use the names of the corporation and the managers without their leave. This motion is made in behalf of the corporation of Washington and of the managers, as well as of Gideon Davis.

Mr. Key, contra. The bonds were given for the benefit of the public; and any person interested has a right to sue upon them. They are like the bonds of an auctioneer. As no objection was made until after verdict and judgment, and the causes have been carried up to the supreme court by writ of error, and sent down again by mandate, and no special order of the corporation to make this motion is shown, the assent of the corporation to the suits is to be presumed.

THE COURT (THRUSTON, Circuit Judge, not having heard the argument, gave no opinion) were of opinion that the plaintiffs had a right to dismiss their suits, and ordered them to be dismissed.

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

WASHINGTON, The GEORGE. See Case No. 4,100.

WASHINGTON, The MARTHA. See Case Nos. 1,513 and 9,148.

WASHINGTON, The MARY. See Case No. 9,229.

WASHINGTON, The MARY, v. AYRES. See Case No. 9,229.

WASHINGTON COUNTY (DURANT v.). See Case No. 4,191.

WASHINGTON FIRE & MARINE INS. CO. (TIDMARSH v.). See Case No. 14,024.

Case No. 17,242.

WASHINGTON IMP. CO. v. KANSAS PAC. RY. CO.

[5 Dill. 489.] [1]

Circuit Court, D. Kansas. 1879.

REMOVAL OF CAUSES — ACT OF MARCH 3D, 1875 — CIVIL SUIT AT LAW—MANDAMUS PROCEEDING — REGISTRATION OF TRANSFER OF STOCK.

A proceeding by mandamus in the state court, under the statutes of Kansas (Gen. St. 1868, p. 766), to compel the defendant company to register the transfer of certificates of stock held by the plaintiff, is a "suit of a civil nature at law," within the meaning of the removal act of March 3d, 1875 [18 Stat. 470], and, upon proper application, may be transferred to the circuit court of the United States.

[Cited in Erwin v. Walsh, 27 Fed. 581; People v. Colorado Cent. R. Co., 42 Fed. 640.]

On motion to remand cause to the state court. This was a proceeding by mandamus brought in the state court pursuant to the state statutes (Gen. St. Kan. c. 80, p. 766). The object was to compel the defendant company to register the transfer of certain certificates of shares therein of which the plaintiff corporation alleges itself to be the owner; and the plaintiff also prays damages for the wrongful refusal of the defendant to make or allow such registration. The plaintiff is a corporation created by the state of Pennsylvania; the defendant by the state of Kansas. The defendant filed in the state court a petition and bond, in apt form and in proper time, for the removal of the cause to this court. The plaintiff moves to remand the same to the state court.

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

Crozier & Stillings, for the motion.
Mr. Usher, contra.

MILLER, Circuit Justice (orally). This motion must be denied. This is a "suit of a civil nature at law" within the meaning of the act of congress of March 3d, 1875. The statutes of Kansas so treat it, both in the procedure and the judgment to be rendered. Gen. St. 1868, p. 766. It was substantially so held by this court in a case whose judgment was affirmed last winter by the supreme court, in which it was decided that the judgment in mandamus had the conclusiveness of judgments in other cases as to matters directly involved and determined. Block v. Commissioners, 99 U. S. 686. This litigation relates to property rights, and the controversy is a suit within the language, purpose, and policy of the removal act. The writ of mandamus in such cases as this does not retain its prerogative character, and this is really a civil proceeding to determine the rights of the parties in respect to property. It is my individual judgment that the words "suit of a civil nature at law" do not relate to the form of the suit or proceeding so much as to its substance and nature, and are not to be taken in the restricted sense of being limited to a common law action strictly, but rather in contradistinction from suits in admiralty, in equity, and proceedings of a criminal nature. The present proceeding is, therefore, a suit at law within the meaning of the removal act. The supreme court, in cases familiar to the bar, has defined the word "suit," and has not placed any narrow construction upon it. A condemnation proceeding in the exercise of the right of eminent domain, where the controversy had assumed the shape of an adversary proceeding in respect to the measure of compensation, and was pending in the state court, was held by the circuit court for Minnesota,—Patterson v. Mississippi & R. R. Boom Co. [Case No. 10,829],—and on error by the supreme court (98 U. S. 403), to be removable from the state to the federal court. The motion to remand is denied. Motion denied.

WASHINGTON INS. CO. (HALE v.). See Case No. 5,916.

Case No. 17,242a.

The WASHINGTON IRVING.

[5 Betts' D. C. MS. 77.]

District Court, S. D. New York. June 17, 1845.

ADMIRALTY — JURISDICTION — COLLISION WITHIN BODY OF COUNTRY—DECREE FOR DAMAGES.

[Cited in Camden & A. Transp. Co. v. The Lotty, Case No. 2,337a, to the point that admiralty courts will take cognizance of cases of collision within harbors and upon rivers where the tide ebbs and flows, although within the body of a country.]

[This was a libel by John Burge against the steamboat Washington Irving.]

This cause having been heard on the pleadings and proofs and arguments of counsel, and the premises being fully considered; and it appearing to the court that the steamboat Washington Irving in the pleadings mentioned, at the time the sloop William Wallace in the pleadings mentioned, came about with intent to enter into her berth at pier No. 9 in the North river in the harbor of New York, saw the manoeuver and movement of the said sloop, and well understood the object thereof; and it further appearing to the court, that the said steamboat was then about opposite pier No. 1 or 2 in said North river, going directly up the river, about 100 yards off from the docks, or piers, and at a speed of from 10 to 12 miles the hour; and it further appearing to the court that the said sloop after she came about dropped her main sail, and ran towards her berth from 60 to 80 yards, going at first at the rate of two or three miles the hour, and at the end of that distance having nearly or quite lost her headway; and it further appearing to the court that the said steamboat, at the time the said sloop so came about, and her direction and intention thus made known, had time and means to avoid a collision with her, either by instantly stopping the machinery of said boat and then working the same backwards, or by steering out into the river so as to pass under the stern of the said sloop, or by running nearer in to the wharves and passing under her bow; and it further appearing to the court that the said sloop after danger of a collision with the said steamboat, was apprehended, had no means at her command to avoid the same, her headway being nearly lost, and the wind in her then condition and situation, not aiding her to escape such collision; and it further appearing to the court that the steamboat struck the said sloop, near her bows, doing her great injury and causing her to sink shortly thereafter: It is considered by the court that such collision was occasioned by the fault or negligence of those having the command and management of the said steamboat, and was not produced by or owing to any fault or misconduct on the part of those having the command and management of the said sloop. Wherefore it is adjudged and decreed that the libellant recover his damages by means of the premises, and that the said steamboat, her tackle and apparel, be condemned for satisfaction thereof. And it is further ordered that it be referred to the clerk of this court to ascertain and compute the damages sustained by the libellant from the injury so done to the said sloop, and the cargo on board owned by the libellant, and that, on the hearing before the clerk, each party be at liberty to use the proofs taken on the hearing of the cause in court, and produce such further proofs as may be competent and pertinent. And it is ordered that the clerk report in the premises with all convenient speed.

Case No. 17,243.

The WASHINGTON IRVING.

[Abb. Adm. 336; [1] 7 N. Y. Leg. Obs. 4.]

District Court, S. D. New York. Nov. 14, 1848.

COLLISION — STEAMBOAT AND SAILING VESSEL — EVIDENCE—DEVIATION FROM ANSWER.

1. A collision occurred in the day time, between a sailing vessel sailing on her starboard tack, on a flood tide, and a steamboat; for which a libel was filed on the part of the vessel. *Held*, that it was incumbent on the steamboat to show some improper act or omission on the part of the sailing vessel, causing the collision, or it would be presumed that the steamboat neglected to use those precautions to avoid collision which the law required her to exercise.

[Cited in Dunstan v. Kirkland, Case No. 4,181.]

2. In order to protect the steamboat, such excuse must be set forth clearly in the answer of the claimants, and must be proved as laid.

3. When a steamer and sailing vessel, proceeding in opposite directions, are approaching each other on courses which may lead to a collision, the steamer cannot be excused for holding her way, upon the hypothesis and belief that the sailing vessel cannot with safety to herself keep her tack, but must go about or come into the wind before they meet.

[Cited in Haight v. Bird, 26 Fed. 541.]

4. The law casts upon the steamer the obligation of using effectively and promptly the extraordinary means she possesses to prevent a collision.

[Cited in The James Bowen, Case No. 7,192.]

5. Where the defence in the answer, in a cause of collision between a schooner and a steamboat, rested on faults imputed to the schooner in holding her course across the bows of the steamer under circumstances in which it was her duty to have gone about; and the defence set up by the proofs rested upon faults committed on the part of the schooner in an attempt to come about abruptly, and falling off or drifting in the attempt, against the steamer, —*held*, that the latter defence was a deviation from the answer; and that under the pleadings the claimants were not entitled to the benefit of it.

This was a libel in rem, by Joseph Odell, owner of the schooner Superior, against the steamboat Washington Irving, to recover damages for a collision between the two vessels.

William Jay Haskett and W. Q. Morton, for libellant.

J. W. C. Leveridge, for claimant.

BETTS, District Judge. The collision upon which this action is founded occurred in Hell Gate, near the Westchester shore of the East river, in the day time. The libellant's schooner was sailing eastward on a flood tide into the Sound, and the steamboat was running to New York, crowding close in by the shore of Ward's Island, in slack water, or what was regarded an eddy of the tide. The wind was N. E., and the schooner on her starboard tack from the Pot Rock across toward Negro Point, and in plain view of the steamboat. The starboard side of the schooner and bow of the steamer came in collision.

Under these circumstances it is manifestly incumbent on the steamer to show some improper act or omission on the part of the schooner causing the collision, or it must be presumed that the steamer neglected to use, in due time, the means at her command, and which the law required her to employ to avoid it.

The exculpatory defence must be pleaded specifically in the answer, and must be proved as laid, in order to protect the claimant.

In comparing the pleadings and proofs on this point, they are found not to harmonize, and the difference is essential in its character. The answer charges the whole fault to the schooner, and to have consisted in holding upon her starboard tack, into an eddy and across the bows of the steamer, when her true navigation was to have gone about, as, had she cleared the bows of the steamer, there would not have been room for the schooner to pass or lie between the steamer and the land; and further, by holding that course into the eddy tide, all control of her direction would be lost to her. Upon the assumption of the facts, the argument is cogent, that the pilot of the steamer had no reason to expect the schooner would undertake a movement so hazardous to herself, if not impracticable, and was not bound to take precautions against it, and rightfully continued on the course, which was the proper one, had the schooner been managed according to the usual and safe method of navigation under like circumstances.

There are important assumptions in this line of defence which are not confirmed by the proofs. First, that the steamer was at the time in an eddy out of the tide, where, for that reason, the schooner could not be expected to venture, as, without aid of the tide, she would not have sufficient steerage way to be worked about on the other tack before reaching the shore; and, second, that there was not space between the steamboat and the shore to afford the schooner means of escape from bilging if she could be got past the bows of the steamer.

The officers of the steamboat had a right to act upon the presumption that the schooner would not be intentionally run in dangerous proximity to the shore, or to a point where she must become disabled or embarrassed in tacking by a loss or change of the current. But if these impediments to her course were not palpable and inevitable, the steamboat had no right to anticipate any

[1] [Reported by Abbott Brothers.]

variation of her course by the schooner, and was bound to regulate her proceedings so as to leave the schooner free to be navigated according to the judgment of her master and pilot. They were entitled to determine, at their discretion, the advantage or prudence of continuing her tack beyond the true tide, and even to what might seem to the officers of the steamer a dangerous proximity to the land.

The law, under circumstances of uncertainty or doubt in respect to these particulars, imposed on the officers of the steamboat the duty of taking timely precaution to secure the sailing vessel the free exercise of the discretion of her master in the choice of her course, and the expedients to be adopted in case he should encounter dangers in pursuing it. Had both vessels been under sail, the schooner being close-hauled, was entitled to run out her tack, or hold it so long as she deemed proper, if the opposite vessel was running free, and this privilege was still broader in respect to a steamer. Her pilot had no right to speculate upon the purpose or duty of the schooner, but, possessing the means and ample time, it devolved upon him to have avoided all hazard of collision by stopping and backing her engine, or starboarding her helm and bearing off into the river, leaving space for the schooner to extricate herself in any manner she might elect.

But these various grounds and assumptions of defence are no way sustained by the proofs produced on the part of the claimant. They are wholly inapplicable to it. The scope and bearing of his testimony is to show that the collision was occasioned by an improper manœuvre of the schooner in luffing up into the wind so as to shake her sails, and thus misleading the pilot of the steamer by indicating the intention to bear off on the larboard tack, and then abruptly veering back upon her former course, when she had approached so near to the steamer that it was no longer in the power of her pilot to go astern of the schooner, or to prevent the latter being blown or drifted against the stern of the steamer.

This line of defence is not within the answer; it is a vital departure from it. It seeks to make an issue on merits outside the allegations of the pleadings. This the law and practice of the court will not permit to be done.

In my opinion, the claimant entirely fails supporting the allegations of his answer, if they could be deemed in law an adequate justification of the acts of the steamer in the transaction complained of, and that the libellant is entitled to a decree condemning the steamer in the damages sustained by the schooner from the collision. It will be referred to a commissioner to ascertain and report those damages to the court. Decree accordingly.

Case No. 17,244.

The WASHINGTON IRVING.

[2 Ben. 318;[1] 7 Int. Rev. Rec. 109.]

District Court, E. D. New York. March, 1868.

LIEN — FOREIGN VESSEL — DELAY OF PAYMENT — CREDIT OF OWNER — PAYMENT BY DRAFT.

1. The fact, that a vessel which is repaired or supplied, is not in her home port, in the absence of other circumstances, makes a case of apparent necessity for the credit of the vessel.

[Cited in Harney v. The Sydney L. Wright, Id. 6,082a.]

2. This apparent necessity may be dispelled by proof of other circumstances, showing that the necessity for the credit did not exist, and did not appear to the material man to exist, at the time of his employment.

[Cited in Berwind v. Schultz, 25 Fed. 917.]

3. An agreement for delay of payment, in most cases, is additional evidence of the existence of an apparent necessity for the credit of the vessel.

4. An agreement to do the work on the personal credit of an agent of the vessel, would be sufficient to defeat the claim of the material man against the vessel.

5. The existence of such an agreement is a fact which must be clearly proved.

6. Where the agent of a vessel, some months after repairs were done on her, and after part payment, gave a draft on a third party for the remainder, which was never paid or accepted, and was surrendered on the trial, *held*, that that did not amount to payment, nor did it go to show that the agreement for the work looked to the personal credit of the agent alone.

In admiralty.

Emerson, Goodrich & Wheeler, for libellants.

Beebe, Dean & Donohue, for claimants.

BENEDICT, District Judge. This is an action to recover a bill of repairs furnished by the libellant, Young Tall, in Baltimore, to a vessel foreign to that port, for the amount of which a lien is claimed by the libellant to have been created under the maritime law; while the claimant insists that no such lien exists. Since the decisions of Mr. Justice Nelson, in the recent cases of The James Guy [Case No. 7,196], and The Neversink [Id. 10,133], it must be considered that any doubts which may have arisen as to the law, applicable to the demands of material men against foreign vessels, no longer exist. Those decisions put a construction upon the opinion of the supreme court, in the case of Pratt v. Reed [19 How. (60 U. S.) 359], which restores the law to its ancient, and, as was supposed, well-settled ground. Whether, then, a lien has been created in any particular instance depends upon the circumstances of the case, as they appear in evidence. If it appear that the vessel was in apparent need of the repairs for her employment or preservation, and if she was foreign to the port where the necessity was supplied, then, in the absence of contradictory circumstances, the maritime law presumes a necessity for the credit

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

of the vessel, from the fact that she was at the time in a foreign port. The fact that the vessel was not in her home port, in the absence of other circumstances, makes a case of apparent necessity for the credit of the vessel. Thus Story, J., says, in The Jerusalem [Case No. 7,294]: "It will be recollected that this is a foreign vessel, and that, by the general maritime law, every contract of the master for supplies and repairs imports a hypothecation." So, also, Curtis, J., in the case of Smith v. The Eastern Railroad [Id. 13,039], says, speaking of a vessel in a foreign port: "Under the maritime law, materials and supplies are presumed to be furnished on the credit of the vessel and owners until the contrary is proved." This apparent necessity, which springs from the fact that the vessel is in a foreign port, may, however, in all cases, be dispelled by proof of other circumstances, showing that the necessity for the credit did not exist, and did not appear to exist to the material man, at the time of his employment. Applying this rule of the maritime law to the present case, it is manifest that facts sufficient to create a lien are proved—if their effect be not overthrown by the other circumstances in proof—for the necessity of the repairs is shown, and it is conceded that the vessel when in Baltimore, was in a foreign port. The question of the case, then, is, whether the other facts averred in the answer, and proved by the evidence, are sufficient to warrant a conclusion upon the whole case, that it was apparent to the libellant, at the time of his employment, that there was no necessity for the credit of the vessel, or if such apparent necessity existed, credit was not given to the vessel. Turning then to the answer, it is found to aver, as matter of defence, that, by the agreement upon which the repairs were furnished, they were to be furnished upon the personal and individual credit of George Olney, and were to be furnished upon a credit of sixty days. As to the fact of an agreement for delay of payment, the proof is not very satisfactory, consisting, as it does, of the statement of Olney, which is contradicted by the libellant, and which, if taken as stated, hardly makes out any definite agreement for delay. But conceding that there was such an agreement, it does not tend to show the absence of an apparent necessity for the credit of the vessel, nor that such credit was not given, but the contrary, for Olney was a non-resident, and, as he himself says, in doubtful circumstances; the owner (Mott) was not present, nor, so far as was made known, had he funds in Baltimore to be applied to the payment of this bill, while Olney, also, was without money in hand, so applicable, as appears from his asking time, and his promises to pay as soon as he could get money from Washington. If it was the understanding that this vessel, which was in Baltimore temporarily, was to be surrendered by the libellant, and a delay of sixty days given for payment, it seems quite clear that the necessity for the credit of the vessel was not only apparent, but actual. An agreement for delay of payment, in most cases, is additional evidence of the existence of an apparent necessity for the credit of the vessel. "The truth is, that the maritime law presupposes a credit given, a delay of payment, an intentional postponement of the right to enforce the claim, in rem, at the same time that it creates the lien." Story, J., The Nestor [Case No. 10,126]. See, also, The Eliza Jane [Id. 4,363]. But the answer further sets up the existence of an agreement between George Olney and the libellant, whereby the repairs in question were to be furnished upon the personal and individual credit of Olney, and not upon the credit of the vessel. Such an agreement, if proved, would be sufficient to defeat the claim of the libellant, and the existence of such an agreement is a fact which must be clearly proved. Newberry v. The Fashion [Id. 10,143]. I see nothing in the attending circumstances which tends to prove the existence of such an agreement, and the decision of the point must rest, for the most part, upon the evidence given by Olney and the libellant. Upon this question the testimony of the libellant is most positive. He declares that he did the work upon the credit of the boat; that he would not have done the work upon the credit of Olney, and that he made no contract with Olney. The testimony of Olney upon this subject, when examined, appears by no means equally clear; in fact, he nowhere says definitely that the work was bargained for upon his personal credit, while Mr. Mott, the owner, testifies that he gave Olney instructions to draw on him for any repairs on the boat, and that he himself paid $2,500 or $3,000 on her account. It does not seem probable that Olney, under such circumstances, would have assumed upon himself the exclusive responsibility for the work, for it nowhere appears in evidence that, as between Olney and Mott, Olney was to bear the expense of the repairs. Mott was the owner then, and is the claimant now. He testifies: "I gave Olney instructions to draw on me for any repairs on her," and he does not pretend that the repairs were not for his account. The work was charged to the vessel, and to use the language of Mr. Justice Nelson, in the case of The Prospect [Id. 11,443], September, 1854, "There is nothing in the proofs to rebut or disprove the presumption of law, arising out of the transaction, that the credit was given to the vessel. The burden lay upon the respondent to show affirmatively that it was given—not to the ship, but to the owner." See, also, The City of New York [Id. 2,758], Nelson, J., October, 1854. As to the further fact averred in the answer, that the bill has been paid by draft, the evidence is, that some months after the work was completed, and after $800 had been paid on account, Olney gave his draft on one Healy for the balance, which was never paid, nor, as appears, accepted, and which is now surrendered. This does not amount to payment, nor does it go to show that the agreement for the work looked to the personal credit of Olney alone. Indeed, the draft, mentioning

as it does upon its face the vessel, may be considered some evidence that the credit of the steamer was then considered a part of the transaction. My conclusion, therefore, is, that the libellants are entitled to recover the sum of $708.37, being the balance due upon the bill, with interest.

Case No. 17,245.

The WASHINGTON IRVING.

[2 Ben. 323; [1] 8 Int. Rev. Rec. 3.]

District Court, E. D. New York. March, 1868.

LIEN FOR SUPPLIES—DOMESTIC VESSEL—PLEADING.

1. In an action against a vessel for supplies furnished to her in a foreign port, where the libel alleged that they were furnished on her credit, and the answer denied that they were furnished on the request of the owner, or the credit of the vessel, and averred that the owner was in good credit in the foreign port: *Held*, that the admission that the vessel was in a foreign port, was an admission of an apparent necessity for the credit of the vessel.

2. On the pleadings, the only question was, whether the supplies were furnished.

This is an action for supplies furnished by Bentley C. Bibb, the libellant, to the steamboat Washington Irving. The libel alleged that the supplies were necessary for the vessel; that they were furnished at the request of the owner in Baltimore, to which port the vessel was foreign, and that they were furnished upon the credit of the vessel. The answer admitted that the vessel was a foreign vessel, and denied that the supplies were furnished upon the request of the owner, or upon the credit of the vessel; it also averred that the owner was a person in good credit in Baltimore.

Emerson, Goodrich & Wheeler, for libellant.

Beebe, Dean & Donohue, for claimant.

BENEDICT, District Judge. The pleadings in this case called upon the libellant to prove no more than the fact that the supplies were furnished, for the existence of an apparent necessity for the credit of the vessel is admitted, by the admission of the fact that the vessel was in a foreign port. Where there is such an apparent necessity, the maritime law presumes that the credit of the vessel was relied on. The necessity of the repairs being proved, as has been done, the libellant is accordingly entitled to a decree, unless the facts set up in answer and proved are sufficient to repel the presumption of the maritime law. The answer in this case, when examined, is found to aver no such facts. Its only averments in defence are, that the owner of the vessel was well known and in good credit in the place where the supplies were furnished, and that the libellant had been for many months selling upon credit supplies to the vessel. There is no averment that the owner was present when the supplies were contracted for, or that his responsibility was known to the libellant, and relied on to the exclusion of the credit of the vessel, or that the supplies were furnished upon the personal credit of the owner, or of any other person. This case might, therefore, be disposed of upon the ground that, under the pleadings, the only question in dispute was the fact that supplies were furnished. But the facts proved outside of the pleadings do not amount to a defence. They are, for the most part, similar to the facts proved in the case of Young Tall against this same vessel (The Washington Irving [Case No. 17,244]), and are not sufficient to warrant a finding that the transaction was other than the ordinary case of supplying the necessities of a foreign vessel. The decree must accordingly be for the libellant for the amount of the bill, with interest.

See the case of the Grapeshot [9 Wall (76 U. S.) 129], decided on March 14, 1870.

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

Case No. 17,246.

In re WASHINGTON MARINE INS. CO.

[2 Ben. 292; [1] 2 N. B. R. 648.]

District Court, S. D. New York. March, 1868.

BANKRUPTCY LAW—INSOLVENT CORPORATION—SERVICE OF ORDER.

1. Where a corporation was organized under the laws of the state of New York, and, in a proceeding instituted by the attorney general of the state, and restraining the company and its officers from exercising any of its corporate powers, was declared insolvent, and an order dissolving it and appointing a receiver was made by the supreme court of the state, and the receiver took possession of the property of the company, and thereupon a petition in involuntary bankruptcy was filed: *Held*, that the service of the order to show cause must be made by publication.

2. The company had suffered its property to be taken on legal process, with intent to defeat the operation of the bankruptcy act [of 1867 (14 Stat. 517)].

This was a proceeding in involuntary bankruptcy against The Washington Marine Insurance Company, a corporation, incorporated under the laws of the state of New York. On the 26th of October, 1867, upon the petition of the attorney general of the state of New York, the supreme court of the state of New York, for the city and county of New York, made an order dissolving the company, and appointed Cornelius K. Garrison receiver, and restraining the company and all its officers and agents from exercising any of the corporate powers or franchises of the company, and from disposing of any of its property and effects except to the said receiver. Under this order, the said receiver took possession of the office, books, and property of the company on the same day, and

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

thereafter continued in possession of them, and had done various acts in the winding up of its affairs. On the 9th of March, 1868, a petition for adjudication of bankruptcy was filed in this court against the company, by the Ocean Insurance Company of Portland, Me., alleging, as the act of bankruptcy, that the Washington Company had suffered its property to be taken on legal process with intent to defeat the operation of the bankruptcy act, and showing, by depositions, that the Washington Company had suffered all of its property to be taken possession of under the order appointing a receiver. Upon the petition, an order was granted by this court requiring the Washington Company and the receiver to show cause why the company should not be adjudged bankrupt, and ordering that service of the petition and order be made upon the officers of the company and the receiver. The order was returnable on the 15th of March, on which day the usual proof of service was made.

F. C. Nye and T. A. Jenckes, for Ocean Insurance Company, petitioning creditor.

E. R. Meade, W. F. Allen, and C. A. Seward, for receiver.

THE COURT (BLATCHFORD, District Judge), held, after argument on the part of the petitioning creditors and the receiver, that the bankruptcy act applied to the case of the Washington Marine Insurance Company, but that it was a case where the debtor proceeded against could not be found on account of the dissolution. Service of the order to show cause was, therefore, ordered to be made by publication, and the return day was adjourned to the 21st of March. On that day, on due proof of service of the order to show cause by publication, and in default of an appearance by the company, the court declared the Washington Marine Insurance Company bankrupt, and issued process accordingly.

Case No. 17,246a.

WASHINGTON MEDALION PEN CO. v. ESTERBROOK.

[MS.]

Circuit Court, S. D. New York. 1869.

INFRINGEMENT OF TRADE-MARK.

[Cited in 2 Morgan, Lit. p. 252, to the propositions that "the principle which governs all cases of trade-marks, undoubtedly is that no one is permitted to appropriate the benefit of another's reputation," and that "a trade-mark * * * has come to signify anything that has become in time adopted as the prima facie means of detecting the goods, wares, or properties of certain proprietors."]

The exact holding of the cases is stated by Mr. Morgan to be as follows: "The shape, style, and general contour of a steel pen, and the method of packing the same in small boxes of a certain shape and size, and these again in other larger ones of a certain shape and size, which boxes were covered with paper lithographed with certain devices, and lines of printing of certain directions and styles of letters, have been held to be, what is perhaps the best and most comprehensive term which can be used,—colorable imitations of each other,—and these form infringements upon the jus in rem of a trade-mark."

Case No. 17,247.

WASHINGTON MILLS v. RUSSELL.

[Holmes, 245;[1] 18 Int. Rev. Rec. 203.]

Circuit Court, D. Massachusetts. Aug., 1873.

IMPLIED REPEAL OF STATUTE—IMPORTS OF WOOL.

By the sixth section of the act of March 3, 1865 (13 Stat. 493), an additional duty of ten per cent. was imposed on certain wools imported from certain places. The first section of the act of March 2, 1867 (14 Stat. 559), provided that from and after the passage of the act, "in lieu of the duties now imposed by law," certain specified duties should be assessed on all unmanufactured wool, &c., "imported from foreign countries." *Held*, that the former act was repealed by the act of 1867; and that after the passage of the latter, only the duty specified in it could be assessed on imported wool.

This was an action against [Thomas Russell] the collector of Boston to recover certain duties exacted by him on imported wools, and paid by the plaintiff under protest. The case was heard by the court on an agreed statement of facts.

Charles Levi Woodbury, for plaintiff.

F. W. Hurd, for defendant.

SHEPLEY, Circuit Judge. The Washington Mills imported into Boston from Liverpool, one hundred and sixteen bales wool by steamship Batavia, Jan. 27, 1871; twenty-three bales by steamship Parthia, Feb. 27, 1871; fifty-seven bales by steamship Batavia, March 13, 1871; sixty-eight bales by steamship Tripoli, March 30, 1871. The wool was produced in Australia. It was invoiced, and was of less value than thirty-two cents per pound at the last port whence it was exported to the United States. The collector exacted upon all this wool, as duty, ten cents per pound and eleven per cent ad valorem, and an additional duty of ten per cent ad valorem, on the ground that it was "of the growth or produce of countries east of the Cape of Good Hope." Plaintiff protested against the payment of this additional duty; and also appealed to the secretary of the treasury, who sustained the collector. This action was seasonably brought, in conformity with law, to recover the additional duties thus paid.

The sixth section of the act of March 3, 1865 (13 Stat. 493), provides "that there shall hereafter be collected and paid on all goods, wares, and merchandise of the growth or produce of countries east of the Cape of Good Hope (except raw cotton, and raw silk as reeled from the cocoon, or not further advanced than tram, thrown, or organzine), when imported from places west of the Cape of Good Hope, a duty

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of ten per centum ad valorem, in addition to the duties imposed on any such article when imported directly from the place or places of their growth or production." A similar provision existed in the act of 1864, § 18 (13 Stat. 216), with the distinction that raw cotton only was excepted.

Prior to the act of March 2, 1867 (14 Stat. 559), the duties on wool had been assessed on its value at the last port whence exported to the United States, and on wool above a certain value an ad valorem duty was assessed in addition to the specific duty. Wool was then also subject to the additional duty of ten per cent ad valorem when it was the produce of countries east of the Cape of Good Hope, and imported from places west of the Cape of Good Hope. The act of 1867 greatly increased the duties on wool. It did not do this by imposing additional duties, by name, which should have the quality of being added to duties provided for by former acts and to be ascertained in former modes, but it repealed all prior modes of ascertainment, and substituted an entirely new mode of classification of the wool and ascertainment of the duty. It divided all wools, hair of the alpaca, goat, and other like animals, for the purpose of fixing the duties to be charged thereon, into three classes: First, clothing-wool; second, combing-wools; third, carpet-wool and other similar wools. This classification was made on the basis of the breed of the sheep as known to wool growers and manufacturers, as will be seen by the statute description of "class one," under which the wool in question is classed; "clothing-wool, that is to say, merino, mestiza, metz, or metis wools, or other wools of merino blood, immediate or remote; down clothing-wools, and wools of like character with any of the preceding, including such as have been heretofore usually imported into the United States from Buenos Ayres, New Zealand, Australia, Cape of Good Hope, Russia, Great Britain, Canada, and elsewhere, and also including all wools not hereafter described or designated in classes two and three."

The first section of the act of 1867 provides "that from and after the passage of this act, in lieu of the duties now imposed by law on the articles mentioned and embraced in this section, there shall be levied, collected, and paid on all unmanufactured wool, hair of the alpaca, goat, and other like animals, imported from foreign countries, the duties hereinafter provided."

The expression "in lieu of the present duties," or "in lieu of the duties now imposed by law," is an expression frequently used in revenue statutes when the intention of congress is to repeal the duties previously in force and to substitute new rates of duty. No language could more clearly express the intent of congress; and these terms have come to be considered the peculiarly apt words of revenue repeal. In the case of Gossler v. Goodrich [Case No. 5,631], May term, 1867, before Justice Clifford and Judge Lowell, the court say, in allusion to the use of the same terms in a revenue statute, "Terms more explicit and comprehensive could not be employed, and the provision neither contains any exception, nor admits of any, without the necessity of resorting to positive legislation." This is not a case where the rules respecting repeals of a statute by implication are applicable, or can be invoked, to aid in the interpretation of the statute. The repeal of the former act is not by implication, but by express terms of repeal. Had the act of March 2, 1867, simply imposed an additional rate of duty, or provided a new mode of ascertainment of value, without any express words of repeal, the ten per cent discriminating duty provided for by the act of 1865, being a part of the general revenue system, and not positively repugnant to the new enactment, would undoubtedly have continued in force as applicable to wool imported under the conditions described in the sixth section of that act. But when the act of 1867 provided a new tariff of duties on wool "imported from foreign countries" "in lieu of the duties now" (before that time) "imposed by law," it expressly repealed the discriminating as well as the other duties then imposed. A similar policy in relation to wool is continued in force by the third section of the act of June 6, 1872 (17 Stat. 232), which, re-enacting the ten per cent discriminating duty on goods produced east of the Cape, when imported from places west of it, expressly excepts "wool" from its operation. In the opinion of the court the discriminating duties were illegally exacted. Judgment is to be entered for the plaintiff for the amount paid, four thousand one hundred and seventy dollars and forty cents, with interest in gold, and costs. Judgment accordingly.

WASHINGTON MILLS (UNITED STATES v.). See Case No. 16,647.

Case No. 17,248.

WASKERN et al. v. DIAMOND.

[Hempst. 701.] [1]

Circuit Court, D. Arkansas. April, 1855.

VALIDITY OF DEPOSITION—NAMES OF PARTIES.

1. In a deposition taken under the act of congress of 1789 [1 Stat. 88], if the names of any of the parties do not appear in the caption or some part of the deposition, it is a fatal objection to it. The names of all the parties must appear.

2. Cases as to depositions cited in note.

[This was an action of detinue by James M. Waskern and others against Eli T. Diamond, as executor of Dennis Griffin, deceased.]

P. Trapnall, for plaintiff.

S. H. Hempstead and A. Pike, for defendant.

DANIEL, Circuit Justice, said it appeared the depositions of George S. Yerger and

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

T. B. Case, offered by the defendant, had been taken, under the act of congress of 1789 (1 Stat. 88), ex parte, on account of the residence of the witnesses more than one hundred miles from the place of trial, and that the names of three of the plaintiffs did not appear in the caption or any part of the depositions. He said great strictness had always been required in depositions taken under that act, and he thought this omission fatal. He held that it was necessary to specify the names of all the parties to the suit in the caption or some part of the depositions, to the end that it might appear on their face that the testimony was taken in the same suit. The depositions were rejected; but it appearing that they were material, the court on the application of defendant granted a continuance, and gave him leave to retake the depositions. Depositions rejected.

NOTE. If the name of one of the defendants be omitted in the caption of the deposition, it cannot be read in evidence in the cause. Smith v. Coleman [Case No. 13,029]; Brown v. Piatt [Id. 2,026]. In the caption of a deposition, all parties, both plaintiffs and defendants, must be individually and correctly named. Haskins v. Smith, 17 Vt. 263. The caption of a deposition taken by a plaintiff must state the names of all the defendants. Swift v. Cobb, 10 Vt. 282. The caption should be correct in naming the suit; but where from the facts there can be no uncertainty as to the case, the deposition should be admitted. Buckingham v. Burgess [Case No. 2,088]. In Allen v. Blunt [Id. 217], it was said to be doubtful whether a caption is not insufficient, by describing the action as against one, when it was against two, and so entered and defended, though with service since only on one. A mistake in the name of the plaintiff or defendant, referring to him as plaintiff or defendant, the name being truly stated in the title, is no ground for rejecting a deposition. Voce v. Lawrence [Id. 16,979]. The authority to take testimony under the act of congress has always been construed strictly, and therefore it is necessary to establish that all the requisitions of the law have been complied with before such testimony is admissible. Bell v. Morrison, 1 Pet. [26 U. S.] 351; Harris v. Wall, 7 How. [48 U. S.] 704, 705; The Thomas v. U. S. [Case No. 13,919]. The authority conferred on the magistrate by the act is special, and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof. Harris v. Wall, 7 How. [48 U. S.] 705. The certificate of the magistrate is good evidence of the facts stated therein, so as to entitle the deposition to be read, if all the necessary facts are there sufficiently disclosed. Bell v. Morrison, 1 Pet. [26 U. S.] 355; Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 617. A deposition cannot be rejected because it does not appear that the commissioner had been sworn. Commissioners are officers appointed by the courts of the United States, and their official acts are prima facie valid. Hoyt v. Hammeken, 14 How. [55 U. S.] 349, 350. Prima facie the officer is to be presumed de facto and de jure, such as he, by his official act, describes himself to be. This is according to universal practice in taking depositions authorized by statute, unless the statute itself indicates the evidence, that shall accompany the act showing its authority. The act of 1789 requires no such authentication; and if upon the face of the certificate it appears that the person before whom the deposition was taken, was an officer authorized by the act of congress to take the same, it is all that can be required in the first instance. Ruggles v. Bucknor [Case No. 12,115]; Fowler v. Merrill, 11 How. [52 U. S.] 375. The officer taking the deposition is presumed to know the residence of the party entitled to notice, and if he certifies that the adverse party or attorney is not within one hundred miles, that is prima facie sufficient to dispense with notice. But the certificate may be controverted by parol proof with regard to stated facts, of which the magistrate is not supposed to have official knowledge; and therefore if it be proved that the adverse party or attorney, did actually live within one hundred miles, or was temporarily within that distance to the knowledge of the magistrate, and might have been served with notice, the effect would be to set aside the deposition. Dick v. Runnels, 5 How. [46 U. S.] 9. A notice left at the residence of either would be good. Id. The judge of the probate court of Mississippi, the same being a court of record and having a seal, is the judge of a county court, within the meaning of the act of 1789, and one of the officers authorized to take depositions. Fowler v. Merrill, 11 How. [52 U. S.] 393. A judge of a county court having power to administer oaths, may do so in any county in the state. Voce v. Lawrence [supra]. As to requisites of act of congress, see Harris v. Wall, 7 How. [48 U. S.] 704, 705. As the deposition must be reduced to writing by the magistrate or the deponent in his presence, it is almost superfluous to observe that it will be a fatal objection if the depositions be written by a party to the suit or his agent, counsel, or attorney. The law for wise and obvious reasons forbids it; because to allow it, would be to place it in the power of an adroit counsel, to give a coloring and effect to the statement of a witness not intended by the witness himself, and which he may not be able to discover at the time. As to depositions under act of congress, see Russell v. Ashley [Case No. 12,150]; Merrill v. Dawson [Id. 9,469]; Rainer v. Haynes [Id. 11,536]; Marstin v. McRea [Id. 9,141].

Case No. 17,249.

The WASP.

[1 Gall. 140.] [1]

Circuit Court, D. Massachusetts. May Term, 1812.

FORFEITURE OF VESSEL—INTERDICTED PORTS.

A vessel sailing to an interdicted port, unless by permission of the president, on the public service, was liable to forfeiture, under the 3d section of the act of June 28, 1809, c. 9 [2 Stat. 550]. Under the same act British ports were permitted ports.

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

[This was a libel against the brig Wasp, Foxwell Cutts and others, claimants. The case was brought in the district court for the violation of the act of congress of June 28, 1809, and the vessel was condemned. Case unreported.]

G. Blake, for the United States.

R. G. Amory, for claimants.

STORY, Circuit Justice. The libel contains two counts, founded on the 3d section of the act of 28th June, 1809, c. 9. The first count alleges, that the brig departed from Charleston in South Carolina, with a

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

cargo, to an interdicted port, to wit, Liverpool in Great Britain, without a clearance for said port. The second count alleges that the brig departed from said Charleston, with a cargo on board, for a permitted port, to wit, Liverpool in Great Britain, without giving bond as required by the act aforesaid. It appears, that on the 16th of March, 1810, the brig, having a full cargo of cotton on board, cleared out from Charleston, South Carolina, bound for Boston; and after her departure, proceeded to Liverpool, and there discharged her cargo. The only testimony in the case is the mate's, and he alleges no distress of weather, or other excuse, for the voyage to Liverpool; I must therefore take it for true, that the original destination was for Liverpool. It is contended on behalf of the claimants, that Liverpool was, by virtue of the president's proclamation of 9th August, 1809, an interdicted port, and consequently there could be no forfeiture under the 3d section for such a voyage. Now admitting that Liverpool was an interdicted port, I incline to think that on a careful examination of the 3d section it will be found to cover the case. That section prohibits the departure of any vessels to an interdicted port, except such as by the president's permission should proceed thereto on the public service; and also prohibits the departure for a permitted port, without giving bonds not to proceed to an interdicted port during the voyage. Then comes a declaratory clause, that "if any ship or vessel shall, contrary to the provisions of this section, depart from any port of the United States, without clearance, or without having given bond in the manner above mentioned, such ship or vessel, together with her cargo shall be wholly forfeited," &c. Now it seems to me, that a departure on a voyage "without clearance," in this section, must mean a clearance for the foreign voyage, on which the vessel is destined; and if it be a foreign voyage to an interdicted port, it is contrary to the provisions of the section, unless authorized by the president of the United States. But by the decision of this court in the case of The Orono [Case No. 10,585], it is established, that the proclamation of the 9th August, 1809, did not revive the non-intercourse as to Great Britain, and consequently Liverpool, at the time of the sailing of the brig, was a permitted port. Not having given bond, as the act required, the brig must therefore be condemned.

Decree affirmed, with costs.

WASS v. The CALIFORNIA. See Cases Nos. 2,312 and 2,313.

WASS (ROFF v.). See Cases Nos. 11,999 and 12,000.

WASSELL (DUPAS v.). See Case No. 4,182.

WASSELL (PIKE v.). See Case No. 11,164.

W. A. SUMNER. See Case No. 4,288.

WATAGA, The (DENNISON v.). See Case No. 3,799.

Case No. 17,250.

The WATCHFUL.

[Brown, Adm. 469.] [1]

District Court, E. D. Michigan. Feb., 1874.

GENERAL AVERAGE—LOSS OF DECK LOAD.

Where by the bill of lading it is agreed that a portion of the cargo shall be carried on deck, the vessel must contribute for the loss of the deck load by jettison.

[Cited in The May & Eva, 6 Fed. 629; The John H. Cannon, 51 Fed. 47.]

On exceptions to the libel of the Frankfort Iron Company for general average. October 23d, 1871, libellant shipped on board the schooner Watchful, at Frankfort, Michigan, 160 tons of iron ore for Detroit. By the bill of lading it was provided that twenty-five tons of the ore should be carried on the deck. The schooner proceeded on her voyage with twenty-five tons of ore stowed on deck accordingly, and when on Lake Huron, off Saginaw Bay, she encountered a storm, on account of which she was obliged to throw the deck load overboard for the safety of the vessel, and the same was wholly lost. The schooner arrived at Detroit in safety, and the balance of the ore was delivered to the consignee and the freight paid. There is no question but that the jettison was necessary, nor but that the loss of the ore, under the circumstances, would constitute a claim for general average, but for the fact that it was stowed on deck.

Mr. John Atkinson, for the exceptions.

The libel seeks to hold the vessel on two grounds: First, that by the custom of her trade; and, second, by express agreement in the bill of lading, it was provided that the iron jettisoned should be carried on deck. Where an agreement is express and unambiguous, custom cannot be shown. The object of usage is to interpret the language of contracts, in the absence of express stipulations, or when the meaning is equivocal and obscure. 1 Greenl. Ev. § 292; 2 Bouv. Dict. 615; The Reeside [Case No. 11,657]. See, also, Taylor v. Briggs, 2 Car. & P. 525; Smith v. Wilson, 3 Barn. & Adol. 728; Hone v. Mutual Safety Ins. Co., 1 Sandf. (S. C.) 137; Ware v. Hayward Rubber Co., 3 Allen, 84; Symonds v. Lloyd, 6 C. B. (N. S.) 691; Winn v. Chamberlin, 32 Vt. 318; The Milwaukee Belle [Case No. 9,627]; Sayward v. Stevens, 3 Gray, 103. If these cases are law, the libellant is remitted to its contract alone for relief. Under the English law, until the case of Gould v. Oliver, 4 Bing. N. C. 134, arose, it was a well recognized rule that no contribution could be had for goods carried on

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

deck by the owner's consent. Lown. Gen. Av. 45; 1 Pars. Mar. Law, 185, 307. The case of Lawrence v. Minturn, 17 How. [58 U. S.] 100, has no bearing upon the question in this case. Smith v. Wright, 1 Caines, 43, is directly in point. See, also, Dorsey v. Smith, 4 La. 211; Hampton v. The Thaddeus, 4 Mart. (La.) 582; Cram v. Aiken, 13 Me. 229; Sproat v. Donnell, 26 Me. 185. The Milwaukee Belle [supra] is decisive of the case at bar. In this case the contract was express, but no custom was proved. The doctrine upon which these cases rest seems to be that where the shipper consents to have his goods laden on deck, it is, of course, at reduced freights, in return for which he runs the risk of having his goods jettisoned without compensation. 3 Kent, Comm. 240; Lenox v. United Ins. Co., 3 Johns. Cas. 178; Dodge v. Bartol, 5 Greenl. 286. In the English cases, beside the custom to carry on deck, another custom was shown, that such goods were carried at the risk of the owner, and upon this evidence the more recent cases seem to have turned. Gould v. Oliver, 2 Man. & G. 208; Lown. Gen. Av. 42; Miller v. Tetherington, 6 Hurl. & N. 278; Johnson v. Chapman, 19 C. B. (N. S.) 563; Cory v. Robinson and Miller v. Chapple, cited in Lown. Gen. Av. 42.

H. B. Brown, contra.

The jettison of a deck load has been held to give no claim to contribution solely because of the ancient rule of the maritime law that goods shall not be carried on deck. 2 Pars. Mar. Ins. 218; Mar. Ord. of France, tit. 8, § 13. Wherever, by contract or custom, goods are carried on deck, the vessel must contribute for their loss. "Cessante ratione cessat ipsa lex." 2 Pars. Mar. Ins. 219, 221, 223, 224; Gould v. Oliver, 4 Bing. N. C. 134; Brown v. Cornwell, 1 Root, 60; Toledo Ins. Co. v. Speares, 16 Ind. 52; Milward v. Hibbert, 3 Q. B. 120; Dix. Av. 32; Dix. Ins. 87. The decision in Smith v. Wright, 1 Caines, 43, was placed upon the ground that there was a usage proven against the allowance of such average. If goods are stowed on deck without the consent of the shipper, and are lost, the vessel is liable for their full value. The Waldo [Case No. 17,056]. See 1 Pars. Shipp. 352. It is conceded that where goods are carried on deck under a contract between the master and shipper, this would not render the innocent owners of goods stowed in the hold liable to contribute for their loss unless a custom to carry on deck was proved, of which the owners of goods in the hold might be presumed to be cognizant. Some of the cases apparently against have taken this distinction. In Rogers v. Mechanics' Ins. Co. [Case No. 12,016], Judge Story held that blubber stowed on deck was not covered by insurance, but was to be contributed for. In the case of Lawrence v. Minturn, 17 How. [58 U. S.] 100, the supreme court expressly disclaims any intention of passing upon the right of contribution. Page 115. The case of Johnson v. Chapman, 19 C. B. (N. S.) 563, is decisive of the point at issue. See, also, The Delaware, 14 Wall. [81 U. S.] 579, 598, 604; Harris v. Moody, 4 Bosw. 210; s. c., 30 N. Y. 266. The English and continental law is fully discussed in Lown. Gen. Av. 40–50, 28. Where by the custom of France small craft engaged in the coasting trade (petit cabotage) carry goods upon deck, they are contributed for in case of loss. Valin, Droit de la Marine, lib. 2, tit. 1, art. 12; Caumont Dictionnaire de Droit Maritime, 405, 728.

LONGYEAR, District Judge. It is an ancient and general rule that no portion of the cargo is allowed to be carried on deck, for the reason that it renders the ship more unmanageable in a storm, and involves a liability to be jettisoned, which would not exist if stowed under deck. By that rule, carrying cargo on deck is a fault on account of which, in case of loss by jettison, the vessel is liable, not for contribution or general average, but for the entire loss. 1 Pars. Shipp. & Adm. 352, and cases there cited. There are, however, exceptions to the rule, and it has been held not to apply, 1. Where, in a particular trade, or under certain circumstances, it is the custom to carry goods on deck. 2. When so carried by consent of the shipper. 3. In the case of steam vessels. Id. 352–359, and notes. In all these cases, it is said, the vessel is not liable for the entire loss, because the carrying of the goods on deck cannot be attributed as a fault, but if liable at all, it is for contribution, or general average merely. As to liability to contribution under the case first stated—that of carrying goods on deck according to usage—there has been much controversy in the courts and considerable contrariety of decision. I shall, however, pass this by for the present, for the reason that the case falls clearly within the second case stated, the ore having been carried on deck by the express consent and agreement of the master of the schooner and the libellant. As the Watchful was a sailing vessel, we have nothing to do with the third case stated. Being carried on deck was undoubtedly the cause of the necessity for the jettison; at least such is the presumption; and being so carried was no less a fault because by consent, as to all persons interested not parties or privies to the agreement. The vessel, and her owner and master, must however be held to be bound by the agreement, and as between them and the shipper the fault must be held to have been waived. As to them, therefore, the fact of the ore being carried on deck instead of under deck, must be held to be out of the question. Any other rule would make the shipper run the entire risk in a matter in regard to which the benefits are mutual, which would be unjust. The shipper, by his consent, waives all claim to entire compensation in case of the jettison of the goods. The master, by taking the goods

on board as freight, assumes for the vessel all the ordinary relations between ship and cargo, among which is the liability to contribution in case of loss by jettison. The only variation from the general rule wrought by the agreement of the shipper, that the goods may be carried on deck, is that, in case of loss by jettison, the vessel shall not be liable for the entire loss, a variation wholly in favor of the owners. Mr. Parsons, in his work on Shipping and Admiralty (volume 1, p. 357), says: "The owner of the ship of course knew that the goods were carried on deck, for we should say, on this point, that the knowledge of his master was his knowledge,"—citing The Paragon [Case No. 10,708] and The Rebecca [Id. 11,619]; "and," he adds, "if it was not right to carry them there, the ship was as much in fault as the shipper, and we know not why the ship should not contribute for their loss, if saved by their jettison." And Mr. Lowndes, in his work on General Average, p. 43, in laying down and remarking upon the rule as established in England in the leading case of Gould v. Oliver, 4 Bing. N. C. 134, and 2 Man. & G. 208, says: "Whenever, as very generally was the case, a provision for the carrying of a deck load is inserted in the charter party, the jettison of such deck load is replaced by a contribution between the shipowner and the owner of the deck load. This contribution is adjusted precisely in the same manner as a general average would be, but is called by a different name. It is called a 'general contribution.' Payment of 'general contribution' is enforced from no one who has not by express contract made himself a party to the stowage on deck. * * * The principle of these adjustments is that, as between assenting parties to such stowage, the deck must be taken to be a proper place for carrying cargo, and what is thrown from thence is to be treated as if it had been below deck; but as regards all parties who have not assented, the old rule remains in force, and for them there is no general average for deck-load jettison."

These views are peculiarly applicable to the present case, and they have my full concurrence. In Lawrence v. Minturn, 17 How. [58 U. S.] 100, the supreme court (page 114) cite approvingly the following from the opinion of the court in Gould v. Oliver, supra: "Now, when the loading on deck has taken place with the consent of the merchant, it is obvious that no remedy against the shipowner or master, for a wrongful loading of the goods on deck, can exist. The foreign authorities are, indeed, express on that point; and the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasions the loss, leads to the same conclusion." But at page 115 the court say: "His right to contribution is not involved in this case;" thus recognizing a distinction between the shipper's right to compensation for the entire loss, and his right to contribution in case of jettison of goods carried on deck by his consent, and that the determination of the former does not necessarily determine the latter under the same state of facts. And well may it be so, for, as before remarked, while it would be clearly unjust that the ship should bear the entire loss, where it occurs by the mutual fault of shipper and master, it would be equally unjust that the shipper should bear the entire loss under the same circumstances, the risk having been for the mutual benefit of both. In the one case no recovery can be had, because it must be based upon a mutual wrong. In the other it can be had because it is based upon a mutual risk for a mutual benefit. In the former the action is for a tort, and in its nature ex delicto. In the latter it is based upon the contract of affreightment, and is in its nature ex contractu. Dupont de Nemours v. Vance, 19 How. [60 U. S.] 168; Lown. Gen. Av. 43, 44; 2 Pars. Mar. Ins. 218, 224. In the case of The Milwaukee Belle [Case No. 9,627], the facts of which were very much like those of the present case, decided in the district court for Wisconsin, in 1870, the learned judge seemed to have lost sight of the foregoing distinctions, and he dismissed the libel on the authority of Lawrence v. Minturn, supra, giving for his principal reason, that the libellants, by knowingly shipping the goods on deck, had thereby consented "that the vessel might thereby be rendered less manageable, and more liable to labor in a storm." But the master was equally consenting, and, the sacrifice being for the salvation of the vessel, why should not that which was thus saved contribute to make up the loss thus made necessary by mutual consent?

Counsel on both sides in this case exhibited a commendable zeal in the preparation and argument of the question involved, and referred the court to and remarked upon a large number of authorities, ancient and modern, and in which nearly every phase of the general question of a shipper's right to general average, or contribution for loss by jettison of deck-load cargo, is discussed. The court has derived much aid from their able and enlightened presentation of the question. It is to be observed, however, that most of the authorities cited bear upon the right as based upon custom or locality, or both, and but very few of them upon the right as based upon express agreement, as in the present case. It would nevertheless have been a pleasure to trace those authorities down to the present time, and note how the courts have become gradually more and more liberal in their views, and disposed to decide each case upon its own peculiar merits, rather than by any rigid, unbending rule. But it would have been extending this opinion to an unwarrantable length, and was unnecessary to a decision of the present case. Exceptions overruled.

Case No. 17,251.

The WATCHMAN.

[1 Ware (232), 233.] [1]

District Court, D. Maine. April 19, 1832.

COMPETENCY OF WITNESS—PROOF OF INTEREST—ASSIGNMENT BY INSOLVENT—EFFECT IN ANOTHER STATE—FRAUD AS TO CREDITORS.

1. When a witness is objected to on the ground of interest, the party which makes the objection, may support it either by examining the witness himself on the voir dire, or by other independent evidence; but he cannot employ both these methods. If he chooses the former, the objection may be removed by the testimony of the witness himself. But if the interest of the witness is proved by evidence aliunde, this proof must be overcome by proof independent of the testimony of the witness.

2. By the law of Maine, a general assignment by an insolvent debtor, who has his domicil in another jurisdiction, of all his property to trustees for the benefit of his creditors, will not protect his property, found in that state, from the attachment of a creditor resident there. But this rule applies only to property which is found within the jurisdiction of the state at the time of the assignment, and does not extend to property which is casually brought within the state after it has become vested in the assignees.

[Cited in Towne v. Smith, Case No. 14,115; Perry Manuf'g Co. v. Brown, Id. 11,015; Betton v. Valentine, Id. 1,370.]

[Cited in Felch v. Bugbee, 48 Me. 19.]

3. An assignment by an insolvent debtor of all his property to trustees, in trust for the benefit of such of his creditors as should become parties to the assignment and release their debts, and after paying such creditors, in further trust, to pay over the surplus to himself, is void as against dissenting creditors; the legal operation of such an assignment being to delay and defraud creditors.

[Cited in Howell v. Edgar, 3 Scam. 420.]

[4. Cited in Thurber v. The Fannie, Case No. 14,014, to the point that admiralty has jurisdiction of petitory as well as possessory actions, and has often been called upon to adjudicate upon the title to ships.]

The material facts in this case are, that on the 15th of July, 1829, Tobias Lord was owner of one third part of the brig Watchman, and being then in insolvent circumstances, made an assignment of all his property, including his share in this brig, to Francis Watts and S. C. Pray, in trust, to sell and dispose of the same, and to pay such of his creditors as should become parties to the deed in the third part, in the order in which they are named in a schedule annexed to the assignment, and after paying them, to pay over the surplus to him, the assignor. There is a condition in the assignment, that all creditors who become parties to it thereby released the assignor from all further claim of their demand. There are also covenants, on the part of Lord, to make further assurances to the assignees. In pursuance of these covenants, on the 3d of August following, Lord conveyed his third part of the Watchman by a regular bill of sale. The vessel was registered in Boston, the place of residence of the assignor, and was at sea at the time of the assignment, and also at the time of the execution of the bill of sale. She arrived at Kennebunk port, in Maine, on the 7th of August, and on the same day was attached at the suit of D. W. Lord, as the property of Tobias Lord. The agent of the assignees went on board and demanded possession of her on the 8th. Some time after this, on the petition of the part owners of the two thirds, she was delivered to them by a decree of this court, on their filing a bond for her safe return, and sent on a foreign voyage. The assignees joined the other owners in the voyage, paying their share of the outfits, and taking their share of the return profit. D. W. Lord prosecuted his suit against Tobias Lord to judgment, and the Watchman, having returned to Kennebunk, was seized on his execution by the deputy marshal, and sold, and delivered 13th November, 1831, to William Lord. Before this time, that is, on the 14th October, 1830, the assignees sold the third which had been assigned to them, to G. & I. Lord, the libellants. This libel was brought to recover the possession of the vessel, and to have the sale by the deputy marshal, on D. W. Lord's execution, declared void.

The claimant put in a plea to the jurisdiction, which was argued and overruled by the court at a former day of the term, and it came on to be argued upon its merits. It was learnedly and elaborately argued by F. O. W. Watts and Mr. Greenleaf, for the libellants, and Mr. Shepley, for the respondents.

The counsel for the libellants quoted Richards v. Dutch, 8 Mass. 506; Portland Bank v. Stacey, 4 Mass. 661; Wheeler v. Sumner [Case No. 17,501]; D'Wolf v. Harris [Id. 4,221]; Badlam v. Tucker, 1 Pick. 396; 2 Brown, Civ. Law, 132; Ingraham v. Wheeler, 6 Conn. 277; Abb. Shipp. 12, note; 2 Kent, Comm. 394; 3 Kent, Comm. 96, 364; Atkinson v. Maling, 2 Term R. 462; Halsey v. Fairbanks [Case No. 5,964]; Joy v. Sears, 9 Pick. 4; Howland v. Harris [Case No. 6,794]; Marbury v. Brooks, 11 Wheat. [24 U. S.] 99, note a; Holmes v. Remsen, 4 Johns. Ch. 460; 20 Johns. 229; Pearpoint v. Graham, [Case No. 10,877]; Andrews v. Ludlow, 5 Pick. 28; Emerson v. Knower, 8 Pick. 63; Fox v. Adams, 5 Greenl. 245; Canal Bank v. Cox, 6 Greenl. 395; 2 Paige, 419.

The counsel for the respondents quoted Goodwin v. Jones, 3 Mass. 517; Boston v. Boylston, 4 Mass. 324; Richards v. Dutch, 8 Mass. 515; Dawes v. Boylston, 9 Mass. 350; Stevens v. Gaylord, 11 Mass. 269; Dawes v. Head, 3 Pick. 128; Harrison v. Sterry, 5 Cranch [9 U. S.] 289; Meeker v. Wilson [Case No. 9,392]; Ingraham v. Geyer, 13 Mass. 146; Fox v. Adams, 5 Greenl. 245; Widgery v. Haskell, 5 Mass. 144; Harris v. Sumner, 2 Pick. 129; Seaving v. Brinkerhoff, 5 Johns. Ch. 329; Hyslop v. Clarke, 14

[1] [Reported by Hon. Ashur Ware, District Judge.]

Johns. 459; Austin v. Bell, 20 Johns. 442; Burd v. Smith, 4 Dall. [4 U. S.] 76; Halsey v. Fairbanks [Case No. 5,964]; Borden v. Sumner, 4 Pick. 267; Monte Allegre, 9 Wheat. [22 U. S.] 616.

WARE, District Judge. The libellants derive their title from the assignment of Tobias Lord. If that assignment, and the bill of sale of the 3d of August, gave a good and indefeasible title to Watts and Pray, the assignees, they made one equally good to the libellants, and they must be considered as the legal and rightful owners of the share of the vessel that is now in controversy. If this court has jurisdiction over the subject-matter in dispute between the parties, that is, if it has jurisdiction to decide which is the rightful owner, it is not denied that the court may order the possession to be delivered to the party which has the right of property. And this depends entirely on the effect and validity of the assignment of T. Lord.

There were several preliminary questions raised and discussed at the argument which must be disposed of before we can arrive at the merits of the case. In the first place, it is contended that the execution of the assignment is not proved by competent evidence.

The deposition of R. C. Waterston and George Callender, two of the attesting witnesses, were offered to prove the deed. The deposition of Callender is objected to on the ground of interest, as proved by the deed itself, he having signed it as a creditor of the third part. In his deposition, he states that he has released his interest; and further, that though he became a party to the deed under the belief at the time that he was a creditor, on an examination of his account he ascertained that there was then nothing due to him from Lord. He had, therefore, no interest. The general rule is, that when a witness is objected to on the ground of interest, the party who makes the objection may sustain it either by examining the witness himself on the voir dire, or by other independent evidence. He cannot adopt both methods, but is confined to one. If he chooses the former, the objection may be answered by the testimony of the witness himself. But if the party making the objection prove the interest by evidence aliunde, this proof must be overcome by evidence independent of the testimony of the witness himself. For his interest having been proved by evidence independent of his own examination, until this proof is overcome by counter-proof, he cannot be examined at all. Murray v. Marsh, Phil. Ev. 101, 102, 2 Hayw. [N. C.] 290; Mifflin v. Bingham, Peak, Ev. 186; [Mifflin v. Bingham] 1 Dall. [1 U. S.] 272; Bridge v. Wellington, 1 Mass. 219.

As the proof of interest arises from the deed, I am inclined to think, notwithstanding he testifies that he never had, in point of fact, any interest in the deed, that the release ought to be produced. But if the deposition of Callender be rejected, I think the deed is sufficiently proved by Waterston. He witnessed the execution of it by the parties of the first and second part, and of part of those of the third part, and this, without proving the execution by all the creditors, is sufficient to bring the deed into the case.

A question was also made, whether, on the whole evidence, it is satisfactorily proved that the bill of sale, by T. Lord to Watts & Pray, was executed as early as the 3d of August. The testimony appears to me to leave no reasonable doubt of that fact.

It is further argued, that there was no consideration for the bill of sale. This was made in pursuance of the covenant for further assurances in the assignment, and to carry that into full effect. If there is a good consideration for the assignment, there is, therefore, a sufficient consideration for the bill of sale.

Having disposed of these preliminary questions, we come to the case on its merits. Two questions have been raised, and learnedly argued at the bar. The first relates to the effect and operation of the assignment, supposing it to be good and valid in law. The second calls in question its validity, on the alleged ground that it is fraudulent as against creditors.

On the first point, it is contended that the assignor being a citizen of Massachusetts, and the assignment being for the benefit of creditors, the law of Maine will not allow to the assignment such an effect as would withdraw the property of the debtor from the attachment of a creditor residing there. The principle, as I understand it, is, that the assignment of an insolvent debtor, having his domicil in a foreign jurisdiction, is valid to transfer his property lying in Maine;—that the property vests in the assignees, liable, however, to be divested by the attachment of a creditor who has his domicil in Maine. In support of this principle, the counsel for the respondents relies on the decisions of courts in this country, in relation to foreign administrators, in regard to the operation of foreign bankrupt laws, and also on decisions on the effect of assignments of insolvent debtors having their domicil in a foreign jurisdiction.

It is a well settled principle of law, that an administrator cannot, by virtue of an authority derived from a foreign jurisdiction, intermeddle with the property of the deceased person, on whose estate he administers, situated in another state. To do this, he must be clothed with authority, by the laws of the state within which he proposes to act. His right to represent the deceased, which he derives from the law, is conceded only where the authority of the law, from which he derives his right, is admitted. It is then said that the property being reduced

into his possession by virtue of an authority derived from the local law, the same law will retain enough of the fund to satisfy all creditors living within that jurisdiction, and transmit the surplus only to be distributed under the law of the deceased's domicil. Though some of the cases support the doctrine to this extent, it cannot be said, when stated in these general terms, to be a settled principle of American jurisprudence. The subject was learnedly and ably discussed by the court in the case of Dawes v. Head, 3 Pick. 128, and a strong disposition was shown to introduce an important qualification into the rule.

It is also a principle which may be considered as thoroughly incorporated into the jurisprudence of this country, that a foreign bankrupt law cannot operate a transfer to his assignees, of the property of a bankrupt situated in this country. Harrison v. Sterry, 5 Cranch [9 U. S.] 289; 2 Kent, Comm. 330. The opposite doctrine has been supported by the high authority of Chancellor Kent (4 Johns. Ch. 460). But the decision in that case stands alone. 9 Pick. 315. All the other authorities are the other way. The doctrine is stated in the form of a maxim, by Chief Justice Marshall in Harrison v. Sterry, and it seems to me to stand on a broad principle of universal law, too well established, in the jurisprudence of all nations, to be called in question. It rests on the general principle of the independence of nations. No principle can be more incontrovertible than this, that every nation has the exclusive legislative and judicial authority within its own territorial limits. A state which admits that the laws or the judgments of the judicial tribunals of any other power can control its own laws, and the judgments of its own courts, within its own jurisdiction, makes, to that extent, a surrender of its independence. It is on this principle that the judgments of courts have no authority beyond their own jurisdiction (10 Toull. Droit Civile Francais, No. 76–93), and that administrators cannot represent the deceased beyond the jurisdiction from which they derive their authority. If in some instances the assignees of a foreign bankrupt have been permitted to represent the bankrupt, this has been an indulgence, and has never been permitted to the prejudice of the citizen of the jurisdiction, by which it has been allowed. The practice of sending home the effects of a deceased person to be distributed under the law of his domicil, is not in derogation of this principle. This is a rule of the jus gentium, adopted by the municipal law of all countries. But it is equally well settled that real property descends according to the law of the place where it is situated, and not by the law of the deceased person's domicil. 2 Kent, Comm. 344.

The case, however, of a voluntary assignment by an insolvent debtor domiciled in another jurisdiction, involves different principles from those which govern foreign administrations, judgments, and bankruptcies. In the latter cases, it is the law which operates the transfer, in the former it is the will of the party. If it be admitted as a universal principle of the jus gentium that the public power of every nation is confined within its own territorial limits, and expires when it passes them, it is a principle equally well established that the owner has the disposing power over his own property, wherever it is situated. A contract clothed with the solemnities required by the law of the place where it is made, is valid everywhere, provided it is not repugnant to the principle of the independence of nations, and does not derive its efficacy from the public power. 2 Kent, Comm. 364; 10 Toull. Droit Civile Francais, No. 79, note. Without the acknowledgment of this principle, commerce could not be carried on between individuals of different nations; it is admitted, therefore, in the jurisprudence of all civilized communities. But where a contract is sought to be enforced in a different jurisdiction from that where it is made, and the law superadds a virtue to the contract beyond what is expressed by the act of the party, it will withhold a remedy for that part of the obligation which flows from the public power, while it will enforce that which proceeds from the will of the party. This distinction may be illustrated by an example from the law of France. A contract made before a notary, and clothed with certain solemnities, gives to the creditor an hypothecary interest in the property of the party bound, but if entered into with these formalities in a foreign country and before a foreign notary, it will create no lien on the property of the debtor, because the hypothecation flows, not directly from the act of the party, but from the concurrence of the public power or public will with the private will of the debtor. 10 Toull. No. 74. The law separates that which is derived from the public power from that which comes from the will of the party. It preserves the one and annuls the other, holding the party to be personally bound by his contract, but his property free from the lien. Tried by this principle, if the assignment of the debtor in the present case is valid in Massachusetts, it is valid everywhere, and operated a transfer of his property wherever situated. For the transfer was made by the simple will of the owner, and not by virtue of the public power, as in the case of a bankruptcy.

But the counsel for the respondent contends that the principle is received with this qualification, that the assignment shall not be supported to the prejudice of creditors who have their domicil in the state where the property is found. This qualification is supported, and may be considered as incorporated into the jurisprudence of Maine by the decision in the case of Fox v. Adams, 5 Greenl. 245. The judgment of the court in that case is placed on this precise ground, so clearly and distinctly that it must be considered as settling the local law. In reply, it is argued that this rule of

defensive or protective jurisprudence is strictly local, and though adopted by the local courts, is not binding on the courts of the Union; that these courts may rightfully, in commercial questions, where it is so important that the law should be uniform, consider all citizens of the United States as living under one jurisdiction. Whatever weight this argument might otherwise have, it seems to be answered in this case by the decision of the court of Massachusetts, in Ingraham v. Geyer, 13 Mass. 146, by which the same principle is established as the law of that state.

Another objection is, that the facts do not bring this case within the principle established by the decisions which have been relied upon. The assignment was made on the 15th of July, and the further assurance by the bill of sale, on the 3d of August. By these acts the property became vested in the assignees, liable only to be devested by the attachment of a creditor on the neglect of the assignees to take possession within a reasonable time after the arrival of the vessel in this country, she being at that time at sea. She arrived at Kennebunk on the 7th of August, and the agent of the assignees took possession on the 8th. It has not been pretended that there was any unreasonable delay here imputable to the assignees. The property became, therefore, vested in them before it arrived in this state. In the cases of Ingraham v. Geyer, and Fox v. Adams, the property attached was within the jurisdiction at the time of the assignment. To hold that property which is already vested in the assignees, may, when it casually comes within another jurisdiction, be devested by the attachment of a dissenting creditor, would be extending the operation of this principle further than it has yet been carried. For it is to be borne in mind that Boston was the home port of the brig where she was registered, so that her coming into Kennebunk must be considered as merely casual in the course of her business, and not a return to her home. It does not appear to me that this rule of local law, admitting it to be well established, applies to such a case. As these decisions constitute not so properly a rule of law as an exception to a rule, he that would avail himself of the benefit of the exception must bring his case strictly within its terms, or the court must enlarge the exception to take in his case. To extend the principle of these decisions, so as to cover the facts in the present case, would lead to much embarrassment which would not be compensated by any equivalent advantage. It is allowing the domestic creditor's priority a sufficient scope to enable him to defeat the transfer as to all property found within the jurisdiction at the time when the assignment is made. If the assignment of T. Lord and the bill of sale afterwards made were good and valid, to transfer the title of this vessel against a creditor, not a party to the assignment, residing in Massachusetts, I think they ought to be held valid to protect the vessel against the attachment of a dissenting creditor residing in this state.

This brings us to the second point made in the argument; whether the assignment is wholly void as against creditors who do not assent to it, but choose to pursue their separate remedies for their separate rights. I should have been well satisfied to have avoided giving an opinion on a question, upon which the most enlightened tribunals of the country have apparently arrived at opposite conclusions, and on which the most learned judges have hesitated and paused in a painful suspense and conflict of doubt. But the question has been learnedly argued at the bar, and, in the view that I have taken of the case, it necessarily presents itself for decision. I feel it as a most sensible relief, that my judgment will be reviewed by the appellate tribunal.

By this assignment, Tobias Lord transfers all his property to his assignees in trust, first, to pay such of his creditors as should become parties to the assignment in the order in which they are classed in a schedule annexed to the deed; —secondly, after paying these creditors, to pay the surplus to himself. The creditors who became parties to the assignment agree, in consideration of the provision made for them in the assignment, to release Lord from their respective debts. The release is incorporated into the deed, so that the creditors are not permitted to take any benefit from the assignment without discharging their debtor, whatever may be the grade they hold in the preferences.

The counsel for the libellant contends that the current of authorities sustains the validity of such an assignment, and particularly that it is valid in the state of Massachusetts, where it was made. In the case of Halsey v. Fairbanks [Case No. 5,964], the circuit court, after a learned and elaborate review of the authorities, came, with some hesitation, to this conclusion. The learned judge who pronounced the opinion said, that "he yielded to what seemed to be the tone of the authorities." But in that case, the court puts its decision wholly on the ground that such is the local law of Massachusetts, and intimates too clearly to admit of doubt, that if the local law were not apparently settled, but the question was entirely open, the general principles of law would have led to a different result. The case of Borden v. Sumner, 4 Pick. 265, was argued before the supreme court of the state, in the same month when Halsey v. Fairbanks [supra] was decided. The assignment contained a similar condition. The court sustained the plaintiff's action on a different ground; but this question was argued by the counsel, and the court, in giving their opinion, say, "that they think this point has never been decided in that state, and that they reserve themselves on that important question until it shall be directly presented." This decision, having been made after that of Halsey v. Fairbanks was known to the profession, merits the most deliberate attention. The circuit court had inferred this principle not so much from the authoritative decisions of the courts as from the silent acquiescence of the public; not that it has been clearly settled

or distinctly recognized by the judicial tribunals, but that it had slowly ripened into a rule of the common law of the state by usage and custom. When the supreme court of the state, with this decision before them, go out of their way to express themselves in these monitory terms on a question which it was not necessary to decide, it cannot be considered as any thing less than a caution to the profession and to the public not to trust too implicitly to a practice, which to whatever extent it may have insinuated itself into the usages of the community, was yet to be subjected to the severe and rigorous scrutiny of law.

But it may be doubted whether this question is to be governed solely by the law of the place where the contract is made. The assignment is assailed on the ground of fraud, and what is fraud in one place is fraud in another. The rules of fair and honest dealing are not local but of universal obligation and binding everywhere. Cases between parties living under different jurisdictions, where there is an allegation of fraud, it would seem, ought to be governed not by any local rules of law, but by those general rules which find a place in every system of just and equitable jurisprudence. That national comity, which holds a contract, which is valid under the law of the place where it is made, valid everywhere, cannot justly be extended to protect a contract questioned on the ground of fraud.

But looking to the general and not the local law, we do not find this question settled by any general and uniform course of decisions. By the law, as it is expounded by the courts of New York, it seems very clear that such a condition will render the assignment void (Hyslop v. Clarke, 14 Johns. 459; Austin v. Bell, 20 Johns. 442; Seaving v. Brinkerhoff, 5 Johns. Ch. 329), while the reverse has been held in Pennsylvania (Lippincott v. Barker, 2 Bin. 174; Pearpoint v. Graham [Case No. 10,877]). In this state, though the case of Canal Bank v. Cox, 6 Greenl. 395, looks very strongly like supporting the validity of such a condition, it is, as I understand, still considered as an open question. The case of Beach v. Viles, 2 Pet. [27 U. S.] 675, before the supreme court of the United States, was a case of an assignment impeached on the ground of fraud, and one of the grounds on which it was impeached was that it contained this clause of release. The decision went on a different ground, and the court avoided this question as one of doubt and difficulty.

If the authorities leave the question in suspense, the elements of a decision must be drawn from the general and acknowledged principles of law, as applied to the provisions of the instrument. A conveyance made for the purpose of hindering, delaying, or defrauding creditors in the recovery of their debts, is universally held to be void at common law. The statutes of 13 and 27 Elizabeth, are considered to be merely declaratory, or in affirmance of the preëxisting law. 2 Kent, Comm. 505. It is an attempt on the part of the debtor to avoid the performance of his contracts according to their terms. An attempt to lock up his property from his creditors, so that they can never reach it to enforce payment but on such terms as he chooses to prescribe, would be so manifest an effort to defraud them, that two opinions could not be entertained on the subject. A conveyance of his property to trustees, which would keep it under cover and withdrawn from the reach of his creditors for a definite period, as for three, or five, or ten years, unless they would accede to such terms in favor of himself as he should dictate, would constitute another clear case, on which the mind could not hesitate. By following the same course of reasoning it seems just as clear that a transfer by the debtor of his property, which in its effect would delay the creditors' remedy against his estate for an indefinite period, unless they would consent to accept a less sum that their whole debt in satisfaction, or consent to discharge the debtor on different terms from those borne in their contracts, is a conveyance made to delay or defraud creditors. The object of such a conveyance is to coerce the creditor to discharge the debtor from his contract, without his fulfilling its obligations.

It may be said that every conveyance in trust for creditors interposes a delay, and necessarily retards them in the prosecution of their remedies. This may be admitted to be strictly true. But when a debtor abandons his whole property unconditionally to his creditors, and directs it to be equally and fairly distributed as far as it will go to extinguish his obligations, if a temporary check is interposed to the creditors' remedies, it is only for the purpose of doing equal and impartial justice to all, as far as his means will enable him. If any creditor complains, the ground of his complaint must be that he is deprived of the opportunity of securing his whole debt at the expense of other creditors equally meritorious. He is prevented from making use of an advantage against other creditors, not from enforcing his rights against the debtor himself. The law also allows the debtor a further power. It authorizes him to prefer one creditor to another, though equally meritorious. The creditor who is postponed cannot avoid the conveyance, because he may take what the favored creditors leave for him, and still pursue his remedy for what remains, against the debtor. Whatever judgment may be pronounced in the forum of conscience on these preferences between creditors of equal merit, and entitled, on the common principles of equity to equal favor, they are protected and held valid in the forum of law. The debtor may prefer one creditor to another without assigning any other reason than his own pleasure, and his preference will be sustained; but he cannot prefer himself to a creditor, nor can he compel a creditor to receive in satisfaction for his debt any thing short of the full amount due. Any act of a debtor, of which this would be the effect, if the act were carried into execution according to its intent, is unlawful.

Let us then try the present assignment by these principles. Tobias Lord transferred his whole property to Watts and Pray, in trust, for the purpose, first, of paying such creditors as should become parties to the deed in the order of preference established by the assignment. Thus far it is admitted that he had a right to go. He had a right to lock up his property against any one creditor, for the benefit of all, and he had a right to determine the order in which his creditors should be paid out of the trust fund. 2. After paying these creditors, a further trust is created to pay over the residue, not to his other creditors who decline assenting to the conditions of the conveyance, but to himself. In this assignment, therefore, he prefers himself to a dissenting creditor. It is true that the creditor may pursue this property in the debtor's hands when it returns there, but in the mean time his remedy has been delayed. He had always a right to this surplus, but it has been kept from him, and he has been delayed until all the trusts in the deed have been executed. To maintain the validity of such an assignment, we must maintain the proposition that a debtor may, by a conveyance in trust for creditors, keep from the reach of a dissenting creditor property of an indefinite amount, for an indefinite period of time, under a reservation in his own favor. Nor is this all, the creditor is not permitted to take any thing under the assignment, nor the chance of any thing, unless, for the consideration of this possibility, he discharges his whole debt. Such a conveyance, with such a condition, appears to me to be a manifest attempt to coerce the creditors to discharge the obligation on other terms than those expressed in the contract. Such appears to me to be the purpose and intention of the conveyance, and no argument is required to prove such an intent illegal.

It is proper to remark that the respondent has not attempted to impeach this assignment by evidence dehors the instrument. He relies on the evidence to be found in its own terms; and when the validity of an instrument is questioned on the ground of fraud apparent on its face, the question whether it is fraudulent or not must be determined by a fair interpretation of its own provisions. It is a question of pure legal construction. We must collect from its terms what is to be its operation, and what is its intent. Is it lawful to be carried into complete execution, according to the intent of the assignor, as that intent is discovered from a just interpretation of the terms of the assignment? This is the true test. If thus carried into execution, it would hinder, delay, or defraud the creditors—this is considered as the legal intent of the assignor. This is unlawful, and the act is therefore void, for it is this legal intent to which the law looks. It is no answer of this objection of a fraudulent intent that the law will not permit the debtor to carry his whole plan completely into effect; that the creditor may have another remedy, for which he is not indebted to the debtor but to the law. The law operates on the intent, and where the illegality of the intent is apparent on the face of the instrument, it declares the act void.

This is the doctrine of that part of the opinion of the court in the case of Halsey v. Fairbanks, in which the question is examined upon the general principles of law, independent of the local usage of Massachusetts. "I am aware that it may be said," and I am now repeating the words of the learned judge who pronounced the opinion, "that the property may be reached by a trustee process, so that it cannot be absolutely locked up from his creditors. But the question can never be whether a remedy exists for the creditor, but whether the debtor has not endeavored fraudulently to delay or defeat them." In another part of the opinion, the court returns upon this doctrine, and announces it in the most distinct and forcible terms: "The question is not, I repeat it, and cannot be, whether there may not be some remedy for the creditors to intercept the surplus, but whether the intent, apparent on the deed itself, be not to coerce them to a settlement by embarrassing or delaying their remedy. Such an intent is of itself illegal." After the most careful examination that I have been able to give to the subject, it appears to me that the doctrine of that case rests on a firm and solid foundation, and that the arguments of the court are conclusive.

If this assignment, on a fair construction of its terms, is a conveyance made to delay or defraud the creditors, then only a defeasible title was gained by the assignees, liable to be vacated on a seizure by legal process by a dissenting creditor. Whatever, therefore, was the title which they acquired in this vessel, it was not one which protected the property from the attachment of D. W. Lord; and the assignees could give no better title than they received. It continued the property of Tobias Lord, to answer the demands of creditors not parties to the assignment, and the sale on the execution conveyed a good title to the claimant. The libel is therefore dismissed with costs.

NOTE. This case was carried by appeal to the circuit court, but was settled by the parties before it came to a hearing. The right of the admiralty to entertain jurisdiction over possessory actions, that is, when the right of possession is in controversy, has never been questioned. It has always been familiarly exercised by the high court of admiralty in England, and by all the admiralty courts of the United States, and it was said by Sir William Scott, in the case of The Aurora, 3 C. Rob. Adm. 136, that "formerly it was held, for a long time, and down to no very distant period, to be within the jurisdiction of this court to pronounce for the title of ships on questions of ownership." And even since the court of admiralty, to use the very significant language of that eminent judge,

"has been informed by the other courts" that this is a matter which belongs exclusively to them, when the question of ownership arises in a possessory action, and the possession has been gained by force or violence, or by fraud manifest on the face of the transaction, the court does not hesitate to pronounce on the title; but where a course of transactions involving fraud is objected to, the court declines entering on the question. And if it proceed at all originally on a question of title, it considers itself as bound to move within very narrow limits. The Pitt, 1 Hagg. Adm. 240. It is evident, from the language of Lord Stowell, that in declining jurisdiction over the question of title, so far as he has declined it, he has bowed to the authority of the common law courts, and not to their reasons. In the case of The Tilton [Case No. 14,054], the jurisdiction of the court over petitory actions, in which the right of property is in controversy, as well as over possessory actions, is vindicated by reasoning which appears to be entirely satisfactory. Indeed it is difficult to see upon what just distinction it can be upheld in one case and denied in the other. The question of title will often arise in a suit for the possession, and when it does, why should not the court decide it; why should the title be litigated in one court, and the possession in another? The admiralty courts of the United States have not considered themselves as precluded from pronouncing upon the question of ownership. The Tilton [supra].

But though the admiralty has jurisdiction to pronounce on the question of title, grave doubts have been entertained whether it is bound or ought to take jurisdiction, when the question of title is involved and complicated with other matters that are not properly within the jurisdiction of the court. It appears that in England the court holds itself competent, and will decide a question of ownership in some cases, but declines to take jurisdiction where the title is involved in complicated transactions. It seems therefore to be a question to the discretion of the court whether it will pronounce upon the question of title in a given case; that it has the authority and will exercise it when the question is presented in a proper case, but that it cannot be charged with a denial of justice if it declines to take cognizance of a case which it deems more fit to be litigated in another forum, and leaves the party to his remedy in the other courts. The courts of admiralty in this country do not confine themselves within so narrow limits as those to which the court of admiralty in England is restricted by the common law courts, in entertaining jurisdiction over questions of ownership. But still it is thought that when a question of title to a vessel is connected with other questions not of a maritime nature, and not properly cognizable in the admiralty, that the court ought to decline the jurisdiction and leave the party to his remedy in the other courts.

WATCHMAN, The (BENJAMIN v.). See Case No. 1,305.

WATERBOROUGH (UNITED STATES v.). See Case No. 16,648.

Case No. 17,252.

WATERBURY et al. v. LAREDO et al.

[3 Woods, 371.] [1]

Circuit Court, W. D. Texas. Nov. Term, 1879.

REMOVAL OF CAUSES — ASSIGNMENT TO NONRESIDENT.

Where a contract between citizens of the same state—even though the contract is neither a promissory note, negotiable by the same merchant, nor a bill of exchange—has been assigned by one of the parties to the same to a citizen of another state, who has brought suit thereon in a court of the state of which the defendant is a citizen, the suit may be removed to the United States circuit court of the proper district by virtue of the act of March 3, 1875 (18 Stat. 470).

[Cited in Rosenblatt v. Reliance Lumber Co., 18 Fed. 707.]

From the transcript of the record filed in this case, it appeared that the suit was brought in the district court of Webb county, Texas, on October 10, 1878. The cause of action arose out of certain contracts alleged to have been made by and between Edmund J. Davis and the city of Laredo, by virtue of which the latter, as was claimed, became indebted to the former. It further appeared that Davis was a citizen of the state of Texas, and that he had transferred and assigned to Waterbury & Co., citizens of the state of New York, all his rights and interests, legal and equitable, growing out of said contracts. The defendants were all citizens of the state of Texas. At the October term, 1879, of said district court (which was the first term at which the suit could be tried), the plaintiffs filed their petition, alleging that they were citizens of the state of New York, and praying a removal of the case into the proper circuit court of the United States. On their giving the necessary bond, the district court of Webb county ordered the removal of the case to this court, and the record of the proceedings of the state court was filed here on November 3, 1879. The defendants thereupon moved the United States circuit court to remand the cause on the ground that this court had no jurisdiction over it, resulting from the fact that the plaintiffs were assignees of a chose in action from Davis, who, being a citizen of Texas, could not himself have brought this suit in the circuit court of the United States.

Jacob Waelder, for the motion.

Edmund J. Davis, contra.

DUVAL, District Judge. This case has been removed here under the provisions of the act of congress of March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes." 18 Stat. 470. Section 1 of the act of 1875 provides, among other things: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states," etc. The original cognizance, however, given by this section is subject to the following limitation:

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

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange." By section 11 of the judiciary act of 1789 (1 Stat. 73) the exception was confined to "foreign bills of exchange." That the indebtedness of the city of Laredo to Davis, growing out of the alleged contracts, is a chose in action, there is no doubt. It is equally clear that Davis himself, being a citizen of the state of Texas, could not have sued the defendants, citizens of the same state, in the circuit court of the United States, nor could the plaintiffs, as his assignees, have done so. In either case the original jurisdiction, or the power to take cognizance of such a suit, if commenced in the circuit court, would have been wanting, under the limitation quoted above. But the question now is, whether, if the case has been removed into this court, as provided for and allowed by the act of March 3, 1875, the jurisdiction to hear and determine it does not attach? The case Bushnell v. Kennedy, decided by the supreme court of the United States in 1869 (9 Wall. [76 U. S.] 387), was one from which it appears that the cause of action was an indebtedness of Bushnell, a citizen of the state of Connecticut, to Mills & Frisby, who are citizens of Louisiana, and that it was a chose in action. Mills & Frisby assigned all their claim to Kennedy & Co., also citizens of Louisiana, who sued Bushnell in the third district court of New Orleans, by whom the case was removed into the circuit court of the United States for the district of Louisiana. The circuit court remanded the case to the state court, for want of jurisdiction. The supreme court of the United States held that this was an error—that while the circuit court would not have had original cognizance of the case, had the suit been commenced therein, by reason of the limitation contained in the eleventh section of the judiciary act of 1787, that still, as Bushnell had the right, under the twelfth section of the same act (he being the defendant and a citizen of Connecticut), to remove the case, this removal gave the circuit court jurisdiction. The case of City of Lexington v. Butler, 14 Wall. [81 U. S.] 282, was one of removal from a state court, under the provisions of the act of congress of 1867. But it fully recognizes and sustains the principle established in the case of Bushnell v. Kennedy, supra. In fact, it directly refers to that case as removing all doubt upon the subject. Mr. Justice Clifford, in delivering the opinion of the court, says: "Suits may properly be removed from a state court, into the circuit court, in cases where the jurisdiction of the circuit court, if the suit had been originally commenced there, could not have been sustained, as the twelfth section of the judiciary act does not contain any such restriction as that in the eleventh section of the act defining the original jurisdiction of the circuit courts." So, in like manner, the second section of the act of 1875, supra, contains no such restriction as is found in the first section. It provides that "in any suit of a civil nature, at law or in equity, brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and in which there shall be a controversy between citizens of different states, either party may remove the same into the proper circuit court of the United States." Judge Dillon, in a recent treatise on "Removal of causes from state to federal courts," says: "It should be borne in mind that, in cases removed from the state courts, the jurisdiction of the circuit court is dependent upon the act under which the suit is removed, and not upon the legislation which confers jurisdiction upon that court in cases originally brought therein; and therefore the restrictions on the jurisdiction in the eleventh section of the judiciary act have no application to cases removed under the twelfth section of that act." And so, I apprehend that the restrictions on the jurisdiction of the circuit court contained in the first section of the act of 1875, have no application to cases removed under the provisions of the second and third sections of the same act. See, also, Barclay v. Levee Commissioner [Case No. 977]; Gaines v. Fuentes, 92 U. S. 10. It seems to me that, under the decisions cited, this court has jurisdiction to hear and determine the cause in question. The motion to remand is refused.

Case No. 17,253.

WATERBURY v. MYRICK.

[Blatchf. & H. 34.] [1]

District Court, S. D. New York. Feb. 6, 1828.

RECOVERY OF SALVAGE—ACTION AGAINST CO-SALVOR—PROCEEDING IN REM—MARITIME CONTRACT—ADMIRALTY JURISDICTION.

1. An action will lie in rem, to recover a salvage compensation against the proceeds of salved property converted into specie, provided the same action would lie against the property itself.

[Cited in Studley v. Baker, Case No. 13,559.]

2. The owner of a vessel which is employed in a salvage service may recover compensation for such employment out of the salved property, either as a co-salvor, by uniting with the officers and crew of the salving vessel in the suit, or by bringing it himself in his own right, in case they refuse or neglect to join.

3. An action in personam will lie by one salvor against a co-salvor, to recover a proportionate share of the salvage compensation, when the whole is received by the latter, and he withholds the share of the former.

[Cited in Gates v. Johnson, Case No. 5,268; McConnochie v. Kerr, 9 Fed. 51; McMullin v. Blackburn, 59 Fed. 178.]

4. An action in rem will not lie against money earned by a ship-master and supercargo as a salvor, whilst in the general employ of the libellant as owner of the vessel and cargo.

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

5. The owner of a salving vessel is admitted to share in the salvage reward solely on the ground of the risk and damage to which his property is or may be subjected, and consequently he can come in as a co-salvor only where his vessel has been the direct means of rendering the service for which salvage is awarded.

6. Where a ship-master did not use the vessel of the libellant, but pledged funds belonging to the libellant and others to procure another vessel in which the salvage service was effected: *Held*, that the libellant could not proceed in rem against the salvage money as a co-salvor.

7. Where, in an action in rem by an owner of a vessel, to recover a share of the salvage money earned by the master in saving a cargo of a wrecked vessel, it appeared that the cargo was saved, not from the vessel wrecked, but from an island on which it had been landed by her passengers, and that the salvage was not awarded by a competent court, and there was no evidence to show the principles or rates on which it was adjusted: *Held*, that the libellant was not entitled to proceed in rem as a co-salvor.

8. Where a master was instructed, in his home port, to sell a cargo at the port of destination according to his judgment, and he landed the cargo there and proceeded to dispose of it on shore: *Held*, that this was not a maritime contract cognizable in an admiralty court.

[Cited in Peck v. Laughlin, Case No. 10,890.]

9. Where a master, so employed, abandoned the sale of the cargo in order to effect a salvage service in a vessel procured by pledging the proceeds of the cargo: *Held*, that this was a breach of contract, for which no action lay in a court of admiralty.

[Cited in Cunningham v. Hall, Case No. 3,481.]

This was a libel both in rem and in personam. It alleged that the schooner Abigail, of which the libellant was sole owner, sailed from New-York on the 5th of December, 1826, bound for Tuxpan, in Mexico, with a cargo of goods on board, belonging in part to the libellant [Ebenezer Waterbury] and in part to others, and arrived there in the latter part of the same month; that the respondent [James Myrick] was master of the Abigail, and also consignee of her entire cargo, part of which was there disposed of for $3,800; that soon after the arrival of the schooner at Tuxpan, and before the cargo was all sold, news was received there of the wreck of the brig Greek, with a valuable cargo on board, in the Mexican seas; that the respondent thereupon, abandoning the schooner to the care of the mate alone, and suspending the prosecution of the affairs of his vessel and cargo, proceeded upon a salvage expedition with her crew, having procured a small vessel for that purpose by pledging the funds of the libellant; that, with the vessel so procured, and by the aid of the crew of the libellant's schooner, and during the suspension of the libellant's affairs, the respondent succeeded in saving a part of the cargo of the Greek, to the value of $13,000, and in delivering the same at Vera Cruz, subject to his claim thereon for salvage, which was afterwards awarded, to the amount of 56 per cent., or $7,312, the greater part of which was received by the respondent; that, by reason of the respondent's delay and neglect, the Abigail became unseaworthy, and her value, namely, $1,500, was lost, or nearly so, to the libellant; and that the respondent, in April, 1827, had shipped to New-York a bag of dollars, and afterwards the further sum of $1,800, parts of the said salvage by him received. The libel prayed that the said moneys might be seized and the claimants thereof be cited to appear, and that the respondent might be arrested and held to answer, and that the claim of the libellant might be satisfied out of the salvage moneys and otherwise.

The answer of the respondent alleged that previous to sailing he received a letter of instructions from the agent of the libellant, which was signed also by the libellant himself, authorizing him to sell the cargo of the Abigail at Tuxpan, but leaving the management of the affair to his judgment, with directions to acquaint himself with the trade, prospects, &c., of Tuxpan, and further authorizing him to sell the schooner, should a suitable opportunity occur, and also requesting him to make some exertions to dispose of her. The answer further alleged that other parties besides the libellant consigned goods by the Abigail to the respondent, which other consignors, it was claimed, ought to be made parties to the suit; that the respondent, not being able to dispose of the cargo at public sale, deemed it most for the interest of all concerned to sell it at retail, and accordingly hired a store and proceeded so to do; but that, before the cargo was sold, information was received at Tuxpan of the wreck of the Greek, with passengers on board, at the Triangle Islands, in the Mexican seas, from the mate of that vessel, who had been despatched, with one of the crew and a passenger, to procure relief, and who applied to the respondent for that purpose; that the respondent endeavored to procure relief from the commandant of Tuxpan, but without success, and thereupon hired a small schooner of sixteen tons, and deposited with the alcalde of Tuxpan, as security, $1,000, belonging in part to the libellant, in part to the other consignors, and a considerable part to himself on account of commissions and services; that he left the Abigail in charge of the mate and two men, and the store in charge of a Spanish clerk, by whom the residue of the cargo was sold; that he did not take with him any of the crew of the Abigail, with the exception of one boy, and did not go upon a salvage expedition, or with any other intention than that of saving the lives of those on board the Greek; that, on the 22d of February, he came in sight of the Greek, and discovered that her passengers were landed upon an island two or three miles from the reef where the brig lay, the master and crew having escaped in the long-boat; that he took from the island these passengers, with

their provisions and a small portion of the cargo which could be conveniently carried, and, without making an attempt to approach the brig herself, started the same day to return to Tuxpan; that he was driven by contrary winds to Vera Cruz, and there reported himself to the American consul, and preferred a claim for salvage, and that 56 per cent. of the value of the cargo was awarded to him by referees, to whom the matter was referred by a competent court; that the cargo saved from the Greek amounted to $13,333, but that the salvage moneys received, after deducting expenses, amounted to $5,065 97 only; that of this sum $2,171 50 were awarded to the owner of the salving vessel; that the cost of repairs, and other expenses and losses, as set forth in a schedule annexed to the answer, reduced the amount of salvage received by the respondent to $1,791 12; that, on his return to Tuxpan, he found the Abigail unseaworthy, and in a leaky condition, as she had been during the voyage, and her bottom worm-eaten, as he believed, and that she soon after sunk in consequence; that thereupon he caused her to be surveyed by the commandant of the port and others, by whom she was pronounced unseaworthy; that he afterwards caused her to be surveyed a second time by other parties, one of whom was a carpenter, and they reported that she could not be repaired for a sum less than her value, whereupon he caused her to be sold at auction for $500; and that there existed in Tuxpan no tribunal to which resort could be had to procure a more formal condemnation.

The letter of instructions to the respondent, referred to in the answer, was given in evidence, and also a paper purporting to be a copy of an authentic document, to the effect that Captain James Myrick had appeared before the second constitutional magistrate of Vera Cruz, and demanded salvage for saving part of the cargo of the brig Greek, and that, there being no law in that country relating to salvage, two arbitrators were appointed, who reported one in favor of 50 per cent., and the other of from 50 to 60 per cent., and that thereupon the magistrate above-named granted 56 per cent., to which the arbitrators and all parties agreed, and that the paper was accordingly signed by the magistrate and all the parties. All the other important facts are stated in the opinion of the court.

Daniel Lord, Jr., for libellant.

I. The respondent was the servant of the libellant, being employed not only as shipmaster, but as general servant for the entire adventure, and the libellant, as his master, was entitled to all his time and services, and therefore to his present earnings, namely, the specie arrested in this action. Hart v. Aldridge, Cowp. 54; Blake v. Lanyon, 6 Term R. 221; Co. Litt. 117a, Harg. note. By bringing a suit for the thing earned, the libellant waived the tort, and assented to the service, so that it became a service rendered by his servant, with his assent, and without any waiver of his right to the earnings. Lightly v. Clouston, 1 Taunt. 112. In regard to the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, where the apprentice's share of a salvage remuneration was decreed to himself alone, it is to be observed, 1st. That the ship-owners were compensated out of the earnings of the apprentice; 2dly. That the exposure was of life, and not merely a rendering of services; 3dly. That the master is spoken of as having been already sufficiently compensated.

II. The libellant, if not entitled to all the specie, as master of the respondent, was at least entitled to a part as a co-salvor. The grounds on which ship-owners receive a share of salvage are, 1st. The risk to which their property is exposed; 2dly. Motives of public policy, that they may permit their masters to render salvage services; and, 3dly. Because their property is the instrumentality by which the salvage is effected. The Haase, 1 C. Rob. Adm. 286; The Amor Parentum, Id. 303; The San Bernardo, Id. 178; Taylor v. The Cato [Case No. 13,786]; The Mary Ford, 3 Dall. [3. U. S.] 188; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240. (1) In this case the property of the libellant was risked, and his funds were pledged. The privity between the respondent and the libellant was closer than that between the respondent and the other consignors, and the funds should be presumed to be the libellant's rather than theirs. Kemp v. Coughtry, 11 Johns. 107. The respondent himself had no interest in the funds, because the sales were not completed and his commissions were not earned. And other property of the libellant was risked, namely, the Abigail herself, she having been left in the care of others, in violation of the trust reposed in the respondent, and having been lost in consequence of such neglect. Moreover, other interests of the libellant were jeopardized, the custody and sale of the cargo having been entrusted to strangers, and no attempt having been made to explore the market and resources of Tuxpan, or to sell the Abigail, according to the letter of instructions. (2) A liberal allowance should be made to the libellant on principles of public policy, that ship-owners may be induced to throw no obstacles in the way of their masters engaging in such enterprises. (3) The salving vessel could not have been procured at Tuxpan without the pledge of the libellant's funds, so that they were the instrumentality by which the salvage was effected. All the grounds upon which salvage is granted to owners of vessels exist in this case to entitle the libellant to salvage.

III. The question is one of distribution of salvage earned by the respondent at sea, in his capacity of ship-master; and salvage and its incidents are exclusively of admiralty jurisdiction. The Cato [supra]; Brevoor v. The Fair American [Case No. 1,847]; Bond v. The Cora

[Id. 1,620, 1,621]; Mahoon v. The Glocester [Id. 8,970]; Rowe v. The Brig [Id. 12,093].

IV. The other consignors were mere freighters, and should not be made parties unless they see fit to appear and intervene.

V. The award of salvage at Vera Cruz cannot be regarded by the court. At all events, that award cannot affect the rights of the libellant as a co-salvor, but is only good as against the former owner of the property saved.

Theodore Sedgwick, for claimant and respondent.

BETTS, District Judge. The competency of this court, as a court of admiralty, to entertain this action, will not be made a point of decision, although that question was largely discussed by counsel on the hearing. It is not a point specifically in issue, no exception having been taken by the pleadings to the jurisdiction of the court, and the case not being one of sufficient doubt to induce the court to hesitate in taking jurisdiction in the matter.

In disposing of the case, I shall assume, (1) That the action in rem will lie by the owner of the Adelaide against the specie attached, provided it would lie against the merchandise saved from the cargo of the brig Greek. (2) That the owner of a vessel which is employed in a salvage service may recover compensation for such employment, as a co-salvor, out of the salved property, either by uniting with the officers and crew of the salving vessel in the suit, or by bringing it himself in his own right, in case they refuse or neglect to join. (3) That an action in personam will lie by one salvor against a co-salvor, to recover a proportionate share of the salvage compensation, when the whole is received by the latter, and he withholds the share of the former. The remaining points which demand consideration relate, first, to the action in rem, and, secondly, to the action in personam.

(1) Does the libellant make out a salvage interest belonging to him in the specie attached in this action? It is only in the capacity of co-salvor that he can proceed against this specie. To support an action in rem the libellant must show a proprietary interest in the money itself, as the produce of or substitute for property belonging to him. The action cannot be maintained on the ground that the relation of master and servant subsisted between the parties. It is true the libellant has sustained an injury by the conduct of the respondent, who was both master of the vessel and consignee of her cargo, of which the libellant was also part owner. The nature of the transaction between the parties required of the respondent strict attention and fidelity in the sale of the cargo, the business being entrusted to his personal judgment and discretion. Yet, during the time he was bound to render all his services to the libellant and to the other consignors, he withdrew himself from that service, and earned $1,800 in a different employment. However praiseworthy his motive may have been, if his object was to rescue lives or property in peril, he cannot justify himself by that motive in abandoning his trust, and devoting his personal services and the money of the libellant to an expedition resulting in his own profit. This abandonment of his trust, does not, however, give the libellant authority to proceed against the moneys attached. In the first place, the money was obtained by the respondent on his claim for services as a salvor. These services are personal and hazardous, and are compensated upon other considerations than those of time and labor bestowed in rendering them, though these are important elements in fixing the amount. Even if the libellant could show a right to the proceeds of the ordinary services of the respondent, outside of his duty as master, he could not claim the extraordinary rewards which the respondent might receive for meritorious acts of bravery or charity. This was the principle of the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, 262, 270, where it was held that a master of a ship could not claim the salvage money which his apprentice had earned, but that it belonged to the apprentice himself, notwithstanding the right of his master to his time and ordinary earnings. Besides, the right of the libellant to the personal services of the respondent must be measured by the contract, direct or implied, between them, and that cannot be construed to give him a right to specific moneys gained by the respondent otherwise than in his capacity of master of the schooner and consignee of her cargo. Nor could the libellant attach such earnings by admiralty process, upon an equitable claim to participate in them, without showing a legal title in himself to those proceeds. Accordingly, if the contract is violated, the redress of the libellant is by action for damages for the breach; or, if he may waive the tort, and regard the abstraction of his funds as money had and received by the respondent, or borrowed by him, he can have no higher remedy for such right than the ordinary action at law to recover it back, and in neither case has he a privilege to arrest the money and hold that answerable in kind.

The libellant, then, can proceed in rem only by making out a salvage interest in the specie attached. The salvage interest claimed by him is not acquired in the ordinary way, by the use of his vessel in the enterprise, and in aid of the salvage service rendered by the master and by the men in his employment. The libellant's vessel was left in port, and the respondent obtained one belonging in Tuxpan, in which the adventure was carried out. He used for this purpose

$1,000, which belonged in part to the libellant, but not wholly, for it was the proceeds, but in what proportions is not shown, of the outward cargo shipped by various owners, and entrusted to the master to sell.

The maritime law empowers a master to employ, in a salvage service, a vessel under his command, and to put at hazard the interests of her owner; and it is for this reason only, that, upon considerations of general policy, the owner is indemnified for the risk to which his property is exposed, by being, as it were, novated as co-salvor. The owner's claim to participate in the salvage reward rests always upon the risk and damage to which his property is or may be exposed, and on no other ground. Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, 242; The Mary Ford, 3 Dall. [3 U. S.] 188; Bond v. The Cora [Case No. 1,621]. But, in this case, the respondent was not, as master of the brig, authorized by the maritime law to devote the funds in his hands to these objects. It was a wrongful disposition of the money by the respondent, and does not import a voluntary contribution of it by the libellant; and, if the libellant may waive the tort, the money so used would not constitute the libellant a co-salvor. To this it may be added, that the funds so employed were not committed to the respondent for the uses of the voyage, but came into his hands abroad, as consignee of the cargo. Strictly speaking, salvage is the reward of those who engage in the salvage service, and is participated in only by those who actually effect the rescue. The San Bernardo, 1 C. Rob. Adm. 178. The owner of the vessel is admitted to participate in the reward by courts of admiralty, upon equitable considerations, both that the vessel is usually an efficient instrument in the service, and because of the risk to which their property may be thus subjected. But the principle on which others than actual salvors are permitted to share in the salvage reward stops there. The libellant could not have sustained an action, as a salvor, against the merchandise saved from the brig Greek, and therefore he cannot, in that capacity, proceed against this specie.

These are impediments to an action in rem, which are not removed by any recognised principle of maritime law. The libellant claims, however, that though his vessel was not employed by the respondent in earning the salvage reward, yet his money was employed to procure another vessel for that purpose, and that the money may therefore be regarded as the salving instrument. If it be an admissible principle in the law of salvage that the owner of a vessel may come in with a claim for a proportion of the reward earned by his master in a salvage service, upon the ground that the master was enabled to render the service by using the owner's money, though the owner's vessel was not employed, still, in this case, there is the further objection that it does not appear that the respondent acted in his character of master of the Adelaide. On the contrary, his representative capacity, if any, was that of consignee and agent of all the shippers of the cargo; and accordingly the libellant fails to establish the important element in a salvage claim, to wit, that the money arrested is the earnings made by his property employed for the service by the respondent, whilst acting as his master. Besides, in this case, there is no certain salvage reward proved to have been received by the respondent. The cargo of the Greek was not rescued at sea, nor taken from the ship in a perishing condition. It was found landed on one of the Triangle Islands, and was removed from that place by the respondent to Vera Cruz. I lay out of view what purports to be the order of the second constitutional magistrate of Vera Cruz. That order is accompanied by no evidence of the competency of the magistrate to exercise admiralty powers, or that a suit was instituted, or any judicial proceeding had in the case. Cheriot v. Foussat, 3 Bin. 220, 250; Robinson v. Jones, 8 Mass. 536. The paper can be regarded, if evidence at all, as no more than an adjustment, assented to by the parties named therein; and the case stands as if the compensation had been paid by agreement, without the interposition of any judicial authority. There is, accordingly, no record evidence that the respondent is in possession of moneys legally awarded to him as salvage, so that a co-salvor could make common title to share in them. The respondent came into possession of the money, not by the decree of a maritime court for a salvage service, but by a private arbitrament, and his compensation must be considered as awarded in part for the relief afforded the company of the Greek, but no means are furnished in the proofs for judging to what degree. If the pleadings in the case were such as to permit the trial of the questions of salvage and of the amount of compensation due to the respondent, all the meritorious parties are not before the court, nor is there evidence to justify the court in presuming that the services rendered to the property brought to Vera Cruz by the respondent merited a reward of $1,800. Considering the question of salvage compensation as an open one in the case, the court is not enabled to say whether five hundred dollars, or even one hundred dollars, would not be an adequate reward for all that was done for the benefit of the property out of which this sum of money was detained, much less to pronounce that sum to be a fixed amount of which the libellant may demand a share in proportion to the amount of his money and the value of the time of his captain employed in obtaining it.

Again, there is ground upon which to raise a more serious objection to any right to salvage in this case. The pleadings are not framed on either side to meet it, nor has the testimony put the court in possession of facts enabling it to pass understandingly upon the point as

to whether the property brought by the respondent from the island to Vera Cruz was legally subject to a salvage charge. I have already stated that no evidence is furnished that it was declared to be so by a maritime tribunal. The libellant can make no color of title to this specie as a co-salvor, without satisfactory proofs that it is salvage money, and as such subject to his equitable lien. It would be a question for decision, whether the cargo brought into Vera Cruz could be proceeded against and condemned by a maritime court for a salvage compensation. It had been rescued from the wrecked vessel, and carried ashore by the passengers, without the respondent's aid or participation; and, if it was subject to a salvage charge, that prima facie would attach to it in favor of those who rescued it from the sea, and not in favor of those who merely transported it afterwards to a proper place for sale.

In my opinion, either of the views above suggested is sufficient to free this money from liability to arrest by the libellant in the present action, and I therefore decide that he has not shown himself entitled to proceed in rem against it.

There is a stronger show of right to sustain this action in personam against the respendent, on the ground that he abandoned wrongfully the vessel and business entrusted to him by the libellant and others, and went upon a sea expedition, out of which he realized large profits. There is an impressive equity in the demand of the libellant, that the respondent should not be allowed to desert his trust to secure a personal advantage, without being made to respond for the damages caused thereby; and there is force in the argument that he violated a maritime contract, and committed a maritime tort, by his abandonment of the vessel and of his command. I have been disposed to think that this court was the proper forum in which to seek a remedy for the wrongful act, and that the contract entered into by the respondent was of a maritime character. I am in no way disposed to submit to the narrow doctrines of the English courts of law, which fix at this day the boundaries of admiralty jurisdiction. I shall always endeavor to uphold that jurisdiction in the measure which is allotted to it by the constitution and laws of the federal government, and to sustain the action of this court up to the limits recognised by our own national policy and laws.

The engagement entered into by the respondent to superintend the sale of the cargo on shore at Tuxpan comes within the actual claim of jurisdiction for courts of admiralty made by the civil lawyers, Zouch and Godolphin, and in the ancient sea laws. Judge Winchester selects out of the long enumeration by Zouch of subjects of admiralty jurisdiction, the following: "Whatever is of a maritime nature, either by way of navigation upon the seas, or negotiation at or beyond the sea, in the way of marine trade or commerce." Stevens v. The Sandwich [Case No. 13,409]. Yet, I do not feel satisfied that the employment in question, whether regarded as resting upon contract or upon abandonment admitted to be a wrongful neglect of duty, was of a quality to afford foundation for an action in an admiralty court. It is a fundamental principle touching the powers of those courts, that the subject matter offered to their cognizance must be of a maritime character, in order to their exercise of jurisdiction over a case or a cause of action not arising upon the high seas. De Lovio v. Boit [Id. 3,776]; Plummer v. Webb [Id. 11,233]; The Mary, [Id. 9,187]. And, in the present case, the libel must make a case resting upon a contract of the respondent having relation to his acts and undertakings as master of the schooner, or to services at sea outside of his duties as such master, or to some tortious act prejudicial to the libellant committed by him at sea.

The allegation of the libel that the respondent abandoned the Adelaide, and went upon a salvage expedition, taking with him part of her crew, if sufficient to bring the case within the jurisdiction of this court, either as a wrongful act in respect to the vessel, or a breach of his obligation to her owner, is not supported by the proofs. The letter of instructions from the ship's husband, approved by the libellant, clothed the respondent with a large discretion in conducting the voyage, in respect to both the vessel and her cargo. He was intrusted with almost an absolute discretion, as to the latter, to make sale of it in the manner most advantageous, in his judgment, to the owners. He was also charged, rather emphatically, to sell the vessel if practicable. This broad discretion was granted him, because the shippers were ignorant of the population, wants or resources of the port of destination. In the execution of these powers, the respondent landed the cargo at Tuxpan, hired a store, and undertook to dispose of the cargo on land himself, by wholesale and retail. Whilst so engaged in the town, he left that employment, and entered upon the adventure in question. The respondent, then, was away from the schooner, acting as storekeeper and salesman, on shore, by the authority of the libellant. In my opinion, the breach of this duty and of his implied contract to devote himself wholly to the service and interests of the owners of the cargo, supplies no cause of action in this court. The contract to become consignee and salesman of the cargo is not maritime in its character. It was purely an engagement on land, to be executed on land. His duty and responsibility under it are not to be distinguished from what would have been those of a resident merchant of Tuxpan who had been made consignee of the cargo. A consignee who takes his appointment at the port of departure, and carries it with the goods across the ocean to the port of destination, is under no more of a maritime contract in respect to the consignment than if he were appointed in the place of sale. The engagement to sell a

cargo at the port of destination is of like nature with a contract to purchase one at the place of departure, and that manifestly is not now recognised in law as pertaining to admiralty cognizance. A contract between consignor and consignee is no more a subject of maritime jurisdiction in favor of the former than of the latter. The remedy of both parties lies in a court of common law. To that tribunal the libellant would have been obliged to resort for redress, had the same cause of action arisen against a resident merchant of Tuxpan, or even against a supercargo sent with the goods, with power to sell them in Mexico.

Then, as to the supposed tortious conduct of the respondent in abandoning the Adelaide and taking with him a part of her crew, it is to be borne in mind that there is no satisfactory evidence that his being away from the vessel was a dereliction of duty or a breach of his implied obligation as master. His absence was not only permitted but enjoined upon him by his instructions, if he considered it best for the interest of the shippers of the cargo. To make it a breach of duty, or a tort, to employ two of the men away from the vessel for his private profit, it should appear that the schooner was prejudiced by the act, or that some interest of the libellant was neglected, to his damage. But it is not proved that the loss or deterioration of the schooner was owing to any act or omission of the respondent. If any damage is to be implied, it would be merely nominal, because the vessel must necessarily have remained in port until her cargo was disposed of, and, from the evidence which has been put in, though imperfect, it would appear that the state of the winds and the draught of water at the bar of the harbor would have prevented her going to sea during the time her master was absent. There is no positive evidence as to the condition of the vessel, but, from her sinking so suddenly in consequence of the injury to her bottom by worms, it is to be inferred that she was not seaworthy. The ultimate loss is very probably attributable to the course taken by the master to make sale of the cargo. But whatever error of judgment he may have committed, there was in that no violation of his duty or of any contract. Nor, for the reasons above stated, would the taking the two boys from the vessel, in the manner and at the time it was done by the respondent, afford any cause of action against him because of any actual injury to the libellant.

Upon the whole case, I do not think that the libellant is entitled to maintain his action in this court. The action in personam, however, bears so much more the aspect of one belonging to a maritime court than the one in rem, that if the suit were brought against the respondent alone, I should hesitate to impose costs on the libellant. But, as he has made the gravamen of his action the right to maintain it in rem against the specie, and has failed on the merits in that, I think the decree must follow the usual course, and carry costs to the successful party. Libel dismissed, with costs.

Case No. 17,254.

WATERBURY BRASS CO. v. MILLER et al.

[9 Blatchf. 77; 5 Fish. Pat. Cas. 48; Merw. Pat. Inv. 106.] [1]

Circuit Court, D. Connecticut. Sept. 19, 1871.

INFRINGEMENT OF PATENT—KETTLE MAKING MACHINE—SPECIFICATIONS AND CLAIM.

1. The two re-issued letters patent granted to the Waterbury Brass Company, May 24th, 1870, as assignees of Hiram W. Hayden, the inventor, one for an "improvement in machine for making kettles," and the other for an "improvement in brass kettles," are valid.

2. The first named patent is for a machine, and the other patent is for the product of the process wrought by such machine, the machine and the process being described in the same terms in each.

3. The plaintiff's machine consisted of an engine lathe, a form, a clamp and other devices, and an adjustable tool-carriage, sustaining and guiding a burnishing or spinning tool in a definite, prescribed path, pressing the tool against the disk of metal operated upon, the tool carriage being moved by a screw connected by a gear wheel with the power moving the lathe. The defendant's machine was, in substance, in all respects, like the plaintiff's, except that the tool-carriage was moved by a rod connected with a cam acted on by a gear wheel actuated through a crank by the hand of a workman: *Held*, that this was not an essential difference.

[Cited in Kirby v. Dodge & Stevenson Manuf'g Co., Case No. 7,838; Westinghouse v. New York Air-Brake Co., 59 Fed. 598.]

4. The words, "substantially as described and shown," in the claim of the patent, *held* to relate only to material features of the combination specified, to be ascertained by considering the purpose of the machine, and what are the elements of the combination which constitute its distinctive character, and are effective in producing the peculiar result for which the contrivance is made.

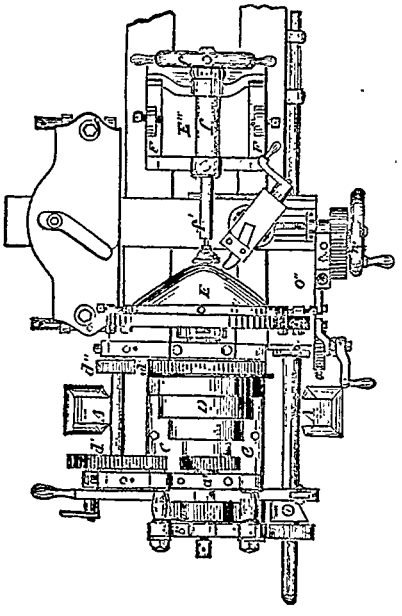
5. Where the specification of a patent for a product fully describes the machine, and the process by which the product is produced, such patent may be good, even though the same specification, annexed to a patent for the machine, may not fully secure the patentee against the use of his actual invention, because of a defect in the claim of the latter patent.

[2] [Final hearing on pleadings and proofs. Suit brought [against Edward Miller & Co. and Edward Miller] upon letters patent for "improvement in machine for making brass kettles," granted to Hiram W. Hayden, December 16, 1851; extended for seven years, from December 16, 1865; reissued February 13, 1866; and reissued again, in two divisions, May 24, 1870—one for an "improvement in machine for making brass kettles," and the other for an "improvement in brass kettles." A former trial under the original patent will be found in the report of Waterbury Brass Co. v. New York & B. Brass Co.

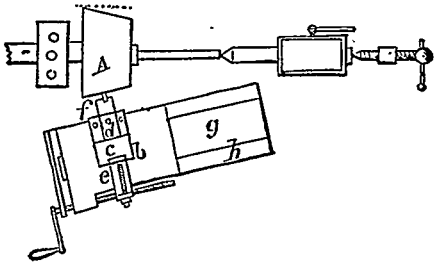
[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 77, and the statement is from 5 Fish. Pat. Cas. 48. Merw. Pat. Inv. 106, contains only a partial report.]

[2] [From 5 Fish. Pat. Cas. 48.]

[Case No. 17,256]. A description of the invention, together with the claims in controversy, will be found in the opinion of the court.



[The above engraving represents a plan or top view of the Hayden machine. E is a kettle blank, partially formed, arranged upon a form, supported by a mandrel, and held in position by a spindle, f'. Form is given to the blank by a burnishing tool, so arranged as to follow a prescribed path, corresponding to the side of the former. This tool is connected by a system of shafting and gearing to the mandrel, which carries the former so that the movement of the tool is automatic.



[This engraving represents a portion of the Japy machine, showing a former, A, revolving upon a mandrel; a burnishing tool, f, provided with gearing, whereby it is compelled to move in a prescribed path. Motion is given to this tool by the hand of the operator, by means of a crank, and it is not automatically coupled to the mandrel. In this respect, the defendants' machine also differed from that of Hayden.][2]

[2] [From 5 Fish. Pat. Cas. 48.]

E. W. Stoughton and C. M. Keller, for complainants.

J. S. Beach, B. F. Thurston, and S. S. Fisher, for defendants.

WOODRUFF, Circuit Judge. The bill of complaint herein is filed to restrain the defendants from infringing two re-issued patents granted to the complainant as assignee of Hiram W. Hayden—one for an "improvement in machine for making kettles," the other for an "improvement in brass kettles"—and for an account of the gains and profits hitherto made by the defendants by their alleged infringements. The defence contained in the answer of the defendants, and relied upon on the trial, consists in a denial that Hayden was the first inventor of the patented machine, or the kettle produced thereby, and, second, a denial that the defendants have infringed the patents.

It is not necessary to state the history of the complainant's patents, further than to say, that, on the 16th of December, 1851, letters patent were issued to Hayden for what he claims to have invented, which were afterwards extended for seven years, and subsequent surrenders and re-issues were made, upon the last of which the re-issued patents were granted to his assignee, on the 24th of May, 1870, which are relied upon in this suit.

The re-issued patent for an "improvement in brass kettles," in its specification, sets out a process of making kettles upon a machine described in the very terms and details employed to describe the machine which is the subject of the other patent; that is to say, one patent describes a machine and mode of making a kettle, and other similar articles, and the other patent claims, as the invention of Hayden: "(1.) A kettle, or other similar metallic article, or vessel, made from a single sheet, or flat disk, or blank, of metal, stretched and compressed, so as to extend the sheet into its ultimate form, by the process substantially as herein set forth; (2.) A kettle, or other similar metallic article, or vessel, having its greatest thickness at the bottom, and thinned, or gradually reduced in thickness, towards the top, by the process substantially as set forth." Hence, one patent is for a machine, described and operated as set forth in its specification. The other is for a product of the process, substantially as set forth in both.

Whether the product patent has been infringed, or can be infringed, by the defendants, without, at the same time, infringing the patent for the machine, may, perhaps, be a question of interest to the parties. It was asserted, and substantially assumed, by the counsel for the defendants, on the trial, that it could not. It may not be necessary to consider that question. If deemed material, some observations will be hereafter made on that subject. Assuming, for the present, that the questions between the par-

ties are identical under each of the complainant's patents, as the machine and process of making kettles, and other articles, are described in precisely the same terms in each, and that neither is infringed unless both are infringed, it will be sufficient to describe the machine and its operation in very general terms.

For the purpose of bringing into view the questions to be decided in this case, the machine may be generally described as of two parts, each having, in the process of making a kettle, distinct offices or functions. 1st. An engine lathe, with its mandrel made to revolve by ordinary pulleys and gearing, and its mandrel foot or spindle pointed, to sustain the subject of the operation when clamped to the mandrel, or a chuck attached thereto, and made to revolve therewith. This differs in no material respect from an ordinary cutting lathe, although supplementary devices are added, to adapt it to the particular service intended, such as, a form or pattern, (in the shape of the interior of the article to be produced,) made fast to the mandrel and to revolve with it—a clamp, adapted to the office of pressing the material upon the form, which also revolves with the form and on the point or end of the spindle—and an arrangement at the lower end of the lathe, by which the spindle is readily drawn back when it is desired to remove the kettle, &c. 2d. A burnishing or spinning tool and tool carriage, secured to the frame of the lathe, consisting of a burnishing or spinning tool, (either rigid, like an ordinary tool, or a roller, with a beveled rounded edge, held at the end of an adjustable arm,) and a carriage therefor, set upon slides, so adjustable, and so guided when adjusted, that the tool is sustained and guided in a precise path, prescribed for it before motion is given to the machine, the path being such, that the tool will, when moved, travel along and in near proximity to the form set upon the mandrel, as above described. It will be readily seen, that, by these two parts of the machine, provision is made—First, for inserting in a lathe a circular disk or blank of metal, clamping it firmly against a form, and causing it, together with such form, to revolve with rapidity; and, second, a burnishing or spinning tool, adjustable, so that it may set firmly against the disk, at or near its centre, and, if moved, it is mechanically guided along and in near proximity to the bottom and side of the form.

So far, nothing is described which produces the desired result. The lathe may be set in motion, and the disk or blank will revolve. The tool impinges on the disk near its centre, and the friction may produce some impression on the small circle, at the point of contact. But that is all. The material is in proper position, a form is in contact therewith, to communicate the desired shape, the tool is impinging on the disk near its centre, and a path is prescribed in which it must, if moved, inevitably travel, and, so travelling, it will spin or stretch the disk upon the form to the precise shape thereof, and, at the same time, reduce its circumference at its upper or outer edge; or, in other words, it will spin the metal to the size and form desired. Motion of the tool is, therefore, alone wanting to the operation; and this motion is, in the machine described by the specification in the complainant's patent, taken, by gear wheels and pinions, from the wheels or pulleys of the revolving lathe. These wheels and pinions act upon a screw connected with the tool carriage, which will move it forward or backward, but with such arrangement of devices, that, as already stated, the tool must move in its prescribed path. By these means, the machine, being set in motion, spins the disk to the form inserted in the machine, and, by a succession of forms, to any shape desired, the slides of the tool carriage and path of the tool being readjusted with every change of form. This statement does not give the details of the machine, and it may not be sufficient to give a full comprehension of its operation. But I think it sufficient to bring into view the questions in contest, and, with some other details which may be suggested in the further discussion, to make the device intelligible.

The machine, in all its details, being described, and its complete operation stated, the specification annexed to what is called the machine patent, proceeds to state the claims:—"What is claimed as new, and the invention of the said Hiram W. Hayden, is as follows: (1) The application of a rotary metallic form or mold, or successive forms or molds, in combination with a proper tool or tools, roller or rollers, sustained, moved and directed in a proper path, by competent mechanical means, for the purpose of operating on a disk, blank, or plate of metal, so as to reduce it gradually from the centre to the edge, at the same time forming it with straight sides, by successive stages, into a complete kettle, or into any similar articles to the forming of which this apparatus can be applied, substantially as described and shown." The second claim relates to the peculiar arrangement for withdrawing or moving the spindle, to facilitate the removal of the kettle, which is not claimed to be infringed, and need not be further noticed.

1st. It was not questioned, on the trial, that the complainant's machine is useful. Prior to Hayden's invention, kettles and like articles had never been produced by machinery. With especial reference to brass kettles, the manner of producing by machinery, introduced by Hayden, wrought an entire revolution in the manufacture. Small articles of thin metal had long been spun on a lathe, the spinning tool being held, guided and forced against the metal by the hand of the workman, sometimes aided by making the handle of the tool a lever, by a pin on the tool rest of the lathe, but the power of the workman was inadequate to apply the tool to thick disks or portions of metal, with force sufficient to spin kettles of suitable size

and strength for most ordinary uses. Such kettles were produced by hammering, or by forcing plates or disks of metal into dies, and, to some extent, by stamping successively into various dies, gradually approximating the form desired, and, intermediate the stampings, burnishing the partially formed kettle upon a form. The defendants, however, on the trial herein, relied, as above stated, upon their allegations that Hayden was not the first inventor, and that they have not infringed his patent. They have proved, that the art of spinning metals is ancient. They produced one or more witnesses, who made small articles of brass, such as "binnacle bowls," parts of lamps and lanterns, &c., before the invention of Hayden, by spinning the sheets or disks of metal, or burnishing to a form on a lathe, the spinning or burnishing tool being held in the hand, guided thereby, and applied by the power of the workman to the revolving metal, to reduce it to the required form. Holtzapffel's work, on "Turning and Mechanical Manipulation," was also produced, in which the "spinning" of metals on a lathe, or "burnishing to form," is described, the tool, however, being directed, guided and applied by the power of the workman, aided by a pin in the lathe rest, as a fulcrum, to increase the pressure of the tool upon the metal.

These proofs fall far short of establishing that Hayden's machine was not new. In neither case was the tool sustained, guided, directed or applied by mechanism; it was not forced against the metal by the power of the machine; and it travelled, not in a path definitely and accurately prescribed, in which it was held by the mechanical devices employed, but it moved on or along the metal in such direction, and in such relation thereto, as the strength and skill of the workman might avail to give to it. Whether it produced, even in the small articles which were thus made, a uniform thickness, or a gradually diminished thickness, or an irregularity in this respect, depended on the skill and ability of the workman, and not on any mechanism contrived to secure the result desired in this respect. Hayden, on the other hand, by his adjustable slides and guides, made the path of the tool even and certain, producing if he desired, a thickness of the sides of the kettles, &c., manufactured, diminishing upwards from the angle at the bottom, effecting as the complainant alleges, an important and obviously useful result, especially in the kettles produced, much more perfectly, at least, than had ever before been attained in their manufacture, namely, that they were thick at the bottom, and at the angle, where thickness and strength were important, and diminished in thickness up the sides and at the top, where lightness was desirable.

The defendants also produced a patent, granted in England, dated February 3d, 1846, to T. F. Griffith, for "stamping and shaping metal." It must suffice to say of this, that the invention, so far as it has any possible relevancy, consisted, as described by the patentee, of an improvement in the form of dies used when shaping sheet metal by stamping, by which improvement the metal, in all parts, will more nearly retain the thickness of the original sheet metal from which the vessel or article is raised by stamping; and, also, in improving the process of manufacture, by changing the shape, intermediate the successive stampings, by burnishing it upon, and to the shape of, a form, by the ordinary burnisher. It is entirely manifest, from this statement, and, more distinctly, from other parts of his specification, that spinning the metal, to extend it, was no part of his design. He repudiates that, as a disadvantage, which his process avoids, and, in order to do this, he uses a disk of a diameter about equal to the diameter of the upright vessel added to its depth. His process is a combination of stamping and burnishing. He invented no machine for the burnishing, and claims none; and, although, in the burnishing which he describes, he changes the form of the article to fit the form inserted therein, and that may involve, in some slight degree, the spinning of the metal, he neither claimed, nor did, in fact, extend the metal by spinning it, so as to extend and make thin the sides, employing a disk of much smaller radius than the length of the completed vessel measured from the top to the centre of the bottom, nor does he describe or claim to have invented any machine whatever, by which any spinning or burnishing can be done.

On the question of the novelty of the invention of Hayden, the defendants put in evidence another patent, which assumed the appearance of much importance. It was granted in France, under date of December 4th, 1835, to Messieurs Japy, brothers, for "une machine à rétreindre et à planer," which was translated by one of the witnesses, "a machine to spin and smooth;" and, also, an addition, or supplement, to such patent, which was granted under date of June 26th, 1838—both long prior to the invention of Hayden. Under the direction of one of the expert witnesses, the defendants had caused to be constructed a machine which, in most of its features, was strikingly like Hayden's machine, but, in the particular which, on the question of infringement hereafter to be considered, constitutes the difference between the Hayden machine and those the defendants make and use, conforming to the latter. Whereupon, the defendants claim, that the Hayden machine was not new in any of the features in which their machines are like it, Japy, brothers, having anticipated it by their machine, in 1835; and that, in any particulars in which the Hayden machine differs substantially from the Japy machine, the defendants have not copied it—in short, that the machines which the defendants use are, in substance, the Japy machine, invented long before Hayden made any invention. The machine constructed under the direction of the expert, and claimed to conform to the Japy patent, was produced on the trial, and was there set in operation. A disk of sheet brass

was inserted, and it was reduced, by the tool, to substantially the same form as is produced by the Hayden machine. The question, therefore, whether the machine described in the Japy patent was, in fact, so far like the Hayden machine, as to anticipate his invention, is of great importance, should it appear, in the further consideration of the case, that the machines used by the defendants are infringements of the Hayden patent.

On that question, I observe, first: It is entirely plain, upon a careful examination of the Japy patent, specification and drawings, that no idea of spinning the metal, to reduce it to the desired form, ever occurred to the Messieurs Japy, either in the making or use of their machine, or when they described it and the manner of constructing articles therewith. They formed the article sought to be produced by successive stamping in dies or collars, until, according to their express declaration, "the desired height of the sides is produced," and "it is finished in regard to shape, when it leaves the last collar." This process of stamping to a completed form is described in detail, and illustrated in the drawings, and the difference between the mode patented in the addition or supplement to the patent, and that at first employed by them, with the superiority of their new mode of stamping, are distinctly pointed out. This advantage consisted in raising the sides of the vessel, by using, first, a stamp and die or collar much larger than the diameter of the vessel to be produced, and raising a rim or very short portion of the side; then, by a stamp and die a little smaller, raising the side a little higher, and so on, through six or seven successive stampings, with stamps diminishing in size, but larger than the bottom of the vessel, until the last stamping, when a die and stamp of the size and form of the finished vessel was used. By this means, the metal at the angle of the bottom was bent but once, and was, therefore, less weakened, and less liable to be torn, broken, or made thin, than in former modes, where each successive blow, in the gradual raising of the sides by stamping, brought each bending and each concussion upon the metal at that precise angle. The vessel, thus completed in form, was inserted in a lathe, and upon a form which corresponded with the interior of the vessel, (called, in the original, "un emprunt,") attached to the mandrel, and, by the application of a tool or tools, while revolving, the bottom and sides were made smooth, the angle at the bottom was slightly rounded, and wrinkles and other inequalities were pressed to an even or polished surface. No suggestion of spinning or of burnishing is found in the description, and it is palpable that neither of them was effected in the operation. Neither the tool used, nor the process detailed, nor the power of the machine, was adapted to the making of kettles as described by Hayden, the lathe process being in truth a smoothing process, and nothing more.

The vessel having already received its form, it is obvious, that, if the process of spinning were applied to its bottom, its diameter would at once be enlarged, so that it would no longer fit its counterpart ("emprunt") on which it was supported; and, consequently, when the pressure of the finishing tool was applied at the angle, there would be no interior support between which and the tool the rounding process would be smoothly effected. So, also, if spinning was applied to the sides, they would be extended, and the form or shape of the vessel would be correspondingly changed, contrary to the distinctly declared purpose and intent of the patentees.

Besides this, the tool was not adapted to spinning. For the bottom, a roller was used, of a thickness greater than its radius, and, on its outer circumference or face, rounded to a half circle, the bottom only requiring to be passed over lightly, to polish it, since the stamping produced no wrinkles or irregularities therein. For the angle, another roller was used, of like size, having its outer circumference or face hollowed out, so as to round off, by pressure, the angle at the bottom. For the side, a third roller, of like size, was used, having its outer circumference or face flat and straight, like the surface of a short cylinder, one of the edges being slightly rounded, so as, in its movement along the side, to slide readily over or upon the wrinkles or other inequalities to be smoothed. Neither of these rollers was like an ordinary burnisher, or like the spinning tool used by Hayden. Pressed firmly against the revolving vessel, they smoothed its surface, and their effect is aptly described by the patentees by the word "planer"—to smooth or planish.

The tool used to round the angle, being adjusted and pressed against the vessel, required no other motion; but the tools for the bottom and sides, sustained in carriages adapted to slide in a path parallel with the surface to be smoothed, were moved by means of a screw passing through the tool carriage in the like parallel, (or a cog wheel acting thereon with a similar result,) and terminating, at the outer end, by a crank turned by the hand of the workman, who thereby moved the tool faster or slower, backward or forward, at his pleasure. Though each tool was fixed to a separate carriage, the mechanical principle of each was the same, and they could be applied successively to the same lathe or each to a separate lathe, as convenience and economy of the time of the workman might make most advantageous. It is this application of the tool to the article produced, while such article is placed upon its counterpart, and made to revolve, and the use, for that purpose, of the adjustable sliding-tool carriage, with a set screw to press the tool or roller against the metal, which constitutes the likeness of the machine to the machine of Hayden. But I am decided in my conclusion, already stated, that spinning the metal was not the intent or purpose of the machine, and that no such conception was in the mind of the patentees, nor was the machine adapted to produce that effect. Possibly, the pressure upon the metal might very slightly en-

large it, the operation being, in a degree, like passing metal between two pressure rollers; but this effect, if produced, was not desired or sought, but constituted an imperfection, rather than an advantage, to the perfect operation. It cannot be denied that this device for smoothing the kettle, already complete in form, would be very suggestive to an ingenious mind already conversant with the art of hand spinning on a lathe. It was a near approach to a device for spinning by a machine; but I think it clear that it stopped short of it.

It is earnestly insisted, that, although Japy, brothers, did not conceive the idea of spinning the metal by the machine, it is enough for the defendants to show, that the machine which they invented had capacity to spin in the very manner of Hayden's; and that Hayden acquired no right as an inventor, by making substantially the same machine and putting it to a new and more beneficial use, namely, to spinning the metal into the desired form, although Japy, brothers, were wholly ignorant that any such capacity could be attributed to it. What I have already said expresses quite distinctly my conviction, that their machine had, in truth, no such capacity, or, certainly, not in any such degree as made it useful, as Hayden's machine is useful, for spinning metals.

On the trial, some importance was attached to the title given by Japy, brothers, to their invention, "une machine à rétreindre et à planer," as in conflict with the conclusion above expressed. A translation of their patent was produced, made by one of the witnesses, no doubt in entire good faith, in which the above words were translated, in one place, "a machine to spin and smooth," and, in another, "a machine for spinning and smoothing." The translator, however, with entire frankness, explained, that the word "rétreindre" did not, by its own mere force, mean, "to spin," but that, when used in connection with words indicating the employment of the lathe in stretching or extending metals, the whole, as, for example, "rétreindre à la tour," (to raise on or by a lathe,) meant the process of spinning. When, therefore, on a perusal of the Japy patent, he observed that a lathe was used in a portion of the operation, he assumed that this title of the patent imported "rétreindre à la tour," although those words were not used. An examination of the whole patent shows, that this conception of the translator was a mistake. The word "rétreindre" refers simply to the process of raising the sides, and that was done in dies or collars, and not on the lathe. In the supplement to the patent the word is used, and it is solely applied to the "raising" by punches and collars. In short, the word "rétreindre," in the title, is used to designate the process of raising by punches and collars or dies, and "planer" to the lathe process, namely, to smooth or planish. The terms employed by the patentees, therefore, are in no conflict with the conclusion stated, but tend rather to confirm it.

The defendants rely, further, on their alleged practical demonstration, made on the trial, that the Japy machine had capacity to spin metals, including kettles, whether Japy, brothers, knew it or not, and that, when so used, it was substantially the same, in principle, structure and operation, as the machine of Hayden, except in the particular hereafter to be noticed, in which, also, the machines of the defendants differ from Hayden's. The machine which they had caused to be constructed, and which they produced as an example of the Japy machine, did, undoubtedly, reduce, on a small scale, a disk of metal to the form of a kettle, by compressing it upon a series of forms like those used by Hayden; but I was not then satisfied, and further examination and reflection have strengthened my doubt, that such machine, constructed and operated as it was, did, in fact, in a just sense, spin the metal to the desired form. It did unquestionably extend the metal, and conform it to the shape of the form on which it was compressed, it may, in a slight degree, have spun the metal, but the extension of the metal was mainly by pressure, as if the metal were between two rollers, pressed with great force thereon while in revolution. This would be the effect of pressing a short revolving cylinder strongly against the revolving metal, sustained by the revolving form on which it was placed. It may not be easy to define with precision how, in that process called spinning, the atoms or particles of metal are made to move upon each other, so as to assume a new aggregate form; but, in the product of the machine exhibited on the trial, the surface of the metal was not moved, it was compressed, the inner and outer surfaces being brought nearer together, as in the process of rolling metals. Witnesses testified that it did spin, some of them that it spinned imperfectly, imputing the effect, so far as it was entitled to be called spinning, to a change in the form or position of the tool, used by Japy, made to bear on the surface of the metal.

I do not find it necessary to suggest any bad faith in the defendants, or in the expert under whose direction this machine was constructed, by imputing to them an intentional exhibition of a machine, as the Japy machine, which differed substantially therefrom, or of conducting an operation therewith differing materially from the operation of which the Japy machine was capable. They have failed to satisfy me that the machine which they did produce and set in operation is, as a practicable thing, useful for spinning metals, or even that it is capable, without modification, of spinning metals of the thickness required for the large vessels produced by Hayden's machine.

In confirmation of the suggestion that it was not by spinning, but by pressure, as between the two rollers of a rolling mill, that the extension of the metal was effected, it was a fact worthy of notice, as distinguishing the machine produced from the Japy machine, that the defendants added to the tool carriage of Japy, brothers, a powerful standard or post, containing a set screw, to hold the revolving tool or

short cylinder more strongly upon the metal to be extended. For the purposes for which the Japy machine was used, to wit, to smooth the surface, comparatively slight force was requisite. When the machine was sought to be applied to a new use, this supplemental device, or some other equivalent thereto, was necessary.

It might be added, that the product of the operation of the machine produced was less perfect than the similar product of the Hayden machine. The wrinkles caused by forcing the larger circumference of the disk upon the form were imperfectly removed, and, I think, there should be no hesitation in saying that an inspection of the two products shows that the machine of Hayden produces a different as well as a more complete result.

It was a pertinent and quite plausible suggestion of the counsel for the complainant, that the inventor of a machine should be presumed to know not merely its purpose, but its capacity; that, when the product sought was in great demand, the art of spinning upon a lathe well known, the best mode of producing kettles and like articles the subject of attention and study, the objections to the process of stamping known and appreciated, the fact that an inventor of a machine, contrived expressly for the making of such articles, should have made a machine, and had no suspicion that it could raise the disk which he used to the required form by spinning, is no slight evidence that it had no such capacity; that the wisdom which comes to an alleged infringer after another inventor has perfected a similar machine by which the operation can be usefully performed, is not to destroy the claim to an original invention; and that an alleged example of a machine claimed to produce an effect which the original never did produce, and which its inventor never claimed for it, is to be looked upon with some distrust of its actual likeness to such original.

A doubt was created by the proofs, whether so much of the extension of the metal as could be imputed to spinning, in the operation of the machine produced, was not due to a slight change in the form of the tool or cylindrical roller used by Japy, brothers, and to a setting thereof in contact with the metal obliquely in a small degree, so that the corner pressed against the same. These changes would conform the action of the tool more nearly to that of the Hayden machine. It is not essential that I should go further than to say, that such doubt reasonably exists, upon the whole evidence. It is sufficient, that, upon all the proofs, and, especially, for the reasons I have stated, I am convinced that the invention of Japy, brothers, had neither design, purpose, nor capacity to effect the results produced by Hayden's machine; and it is, therefore, upon all the grounds which are above suggested, not established that Hayden was not the first inventor of the machine described in the complainant's patent. It is hardly necessary to add, that the burden rested on the defendants to establish this, if they rely on want of novelty as a defence, as the patent itself is prima facie evidence that Hayden was such first inventor.

2d. The second ground of defence does not depend so much upon any disputed question of fact, as upon the proper construction and legal effect of the patents granted to the complainant for the inventions of Hayden. The defendants deny that they have infringed the patents. To make the foundation of this denial intelligible, the two principal parts of the Hayden machine have been already described, namely, an ordinary engine lathe, with a form attached to the mandrel, a clamp attached to the spindle, and other devices to facilitate the operation, which have been sufficiently referred to; and, second, an adjustable tool carriage, sustaining and guiding a burnishing or spinning tool in a definite prescribed path, pressing the tool against the disk of metal operated upon. To the actual working of the machine, it is essential that, when the form and disk of metal are revolved in the lathe, the tool should also be moved in its prescribed path, as already, with some particularity, stated. The patentee, in the specification, describes the Hayden machine as self-acting. The tool carriage is moved by a screw acting upon the tool carriage. As the screw is turned one way or the other, the carriage, and, of course, the tool sustained and guided thereby, is drawn in the desired direction along the face of the metal to be operated upon, in proper proximity to the form on the mandrel, and, for this purpose, this screw is connected, by a gear wheel, with the power which moves the lathe, so that both move together and by the same power.

The difference between this arrangement and that employed by the defendants in the machines claimed to be infringements of the complainant's patent, which is chiefly relied upon, is this—the rod which moves the tool carriage in the defendants' machine, is connected with a cam turned by a gear wheel, and a crank moved by the hand of the workman, instead of a screw and gear wheel acted on by the power which turns the lathe. The lathe, the form, the clamp, and their adaptations to this particular service, are substantially the same. The tool carriage, tool post, and tool are substantially the same. The tool is sustained, guided and directed by slides and guides, differing in some details, but, for the purposes of this question, substantially the same. The tool is pressed against the revolving disk by a set screw, in the same manner. And the path in which the tool must travel is definitely prescribed by an adjustment of the slides and guides in the same manner, in substance, as in the Hayden machine. The tool is made to move, in the Hayden machine, by a screw acting on the tool carriage for that purpose; in the other, it is made to move by a cam. In Hayden's machine, the screw is turned by the power of the machine, acting through a gear wheel; in the machine con-

structed and used by the defendants, the cam is turned by a crank, or crank wheel, moved by the hand of the workman, acting through a gear wheel on the cam. Hereupon, two questions may be propounded—first, Does this difference relieve the defendants from the charge of appropriating the invention of Hayden? and, second, Is their machine an infringement of the letters patent? The latter is the important question here; for it was correctly insisted by the counsel for the defendants, that it might be true that Hayden was the first inventor of the patented machine, and the defendants might have appropriated the product of his inventive skill, and might be in the actual use of his invention, and yet the letters patent granted for his invention may be, and the defendants insist, that the letters patent, or the specification and claim, are, in fact, expressed in such terms, and are thereby so restricted in their legal effect, that the patent itself is not infringed.

Where no patent is granted, the invention, however novel, ingenious or useful, may be used by any one; and, when a patent is granted, the patentee must stand by his patent. He gains no exclusive right except for such a machine as his patent describes and secures, though it may be far less broad or comprehensive than his actual invention. That the defendants' machines are within the actual invention of Hayden, seems to me to admit of no doubt. Its scope and its substance were the application of mechanism to the process of spinning metals to form, so as to produce a result theretofore never attained by mechanical means. The mechanical instruments, their arrangement, and their adaptation to the result were devised —brought into their proper relations. The requisite motion of the parts of the machinery was fully conceived. It was thenceforth in no wise essential to any principle involved in the invention, by what means motion was communicated to the machine, or either of the parts. It was only necessary to the successful operation of the machine, and to the certain production of the desired result, that the parts of the machine should move at the same time; that the lathe should revolve, with the form and the disk clamped thereon; and that the tool should also move in the path mechanically prescribed thereto. In the principle of the machine, or of its operation, it made not the slightest difference whether the lathe and the tool carriage were acted upon by the same power, whether the movement of the tool carriage was taken from the pulleys of the lathe, or from other belts and pulleys driven by the same engine, whether the movement of the lathe was by the power of one engine and the movement of the tool carriage by the power of another. It sufficed if there was power applied adequate to move both, from whatever source derived. The source of power was no part of the invention. The means of producing motion in the lathe were the ordinary means, by belt, pulleys or equivalent instrumentalities. The specific means of moving the tool carriage was the screw. Any mechanical means of moving the tool, under the sustaining, guiding and directing influence of the devices for those purposes, would have been within the just scope of Hayden's invention. Movement, under pressure against the disk, and in the definite path prescribed to it, was the only essential, the substitution of one motor for another being a change only, without a substantial difference in the substance of the invention. One mode of producing the motion might be better than another; a party might improve upon any mode suggested by Hayden, and might patent his improvement; but, the substance of Hayden's invention would still consist in his machine, however set in motion by power adequate to its operation.

It, however, remains to consider, next, whether the defendants infringe the patents actually granted to the complainant. What is claimed in the specification as the invention of Hayden, has already above been recited, and it is equally descriptive of the defendants' machines, unless the application of power derived from man, instead of the revolving lathe pulleys, constitutes a substantial difference, as that term is used in the law of patents.

Their machine or device consists of the application of a rotary metallic form or mold, or successive forms or molds, in combination with a proper tool or tools, roller or rollers, sustained, moved and directed in a proper path by competent mechanical means, for the purpose of operating on a disk, blank, or plate of metal, so as to reduce it gradually from the centre to the edge, at the same time forming it with straight sides, by successive stages, into a complete kettle, or into any similar articles to the forming of which such an apparatus can be applied; and, so far, this is precisely what is claimed, and I think, shown, to be Hayden's invention. The claim in the patent is, the application of these instrumentalities, "substantially as described and shown" in the preceding specification; and the defendants insist that the terms of the claim so limit the operation of the patent, that the manner in which the defendants employ these instrumentalities is without the patent, and that they do not use them "substantially as described and shown," because they do not draw the power which moves the tool carriage from the engine which moves the lathe, but supply it by the hand of the workman, through a crank. The argument of the defendants' counsel did not present the point in the bald terms just stated, but I think that, when applied to the case in hand, that is its true expression.

In one of these machines, the turning and reversing of the screw moves the tool car-

riage and tool forward and backward in its prescribed path; in the other, the turning and reversing the cam does the same. In both, the motion is communicated through a gear wheel, the power that turns the lathe acting thereon in one case, and the power of the workman, through a crank, in the other. It was not claimed, on the trial, that the mechanical means for producing the actual movement of the carriage and tool were not substantially the same. It could not, with propriety, be so claimed. The proof was that they were the same, or precisely equivalent, excepting only that the power applied was drawn from a different source.

It is true, that the specification describes the Hayden machine as automatic; and such is the effect of connecting the tool carriage with the power that turns the lathe. But this is merely incidental. It is in no sense essential to the machine, as an operative instrument to spin the mental and produce the article desired. It was necessary that the patentee should describe the means he employed to effect the process, and he has done so. But it was not of the essence of the invention, or of the means employed to apply it to use, that it should be automatic. Connecting the tool carriage with another power producing like motion, would be precisely equivalent, producing the same precise operation of the effective parts of the machine, and the same precise effect upon the disk of metal to be converted into the kettle, or other article. Many of the observations already made concerning the scope and essential features of the actual invention are pertinent to this point.

The positions assumed in behalf of the defendants, and most ably and ingeniously urged upon my attention, lead to this—Where a patentee describes a completed machine, however complicated, novel and useful in its combinations, and effective in those parts which alone have any peculiar influence in producing the article to be manufactured, but describes his machine as receiving motion through a gear wheel, from a shaft common to the entire machine, any other party may construct and use a machine in precise likeness thereto, if he omits the connection of such gear wheel with the shaft, and substitutes a crank, to be turned by extraneous means. I cannot regard this as the effect of the words of the claim, "substantially as described and shown." They relate only to material features of the combination specified, and these are to be ascertained by considering the object or purpose of the machine, and what are the elements of the combination which create its distinctive character, and are effective in producing the peculiar result for which the contrivance is made. When these are ascertained, whatever embraces those elements, in the same combination, is an infringement. Those elements so combined constitute the machine patented, and "substantially as described and shown" is satisfied when another machine embodies those elements, thus combined. In this, the machine is complete, within the just and proper construction of the patent, before it is set in motion, and the source from which power to move it is derived is wholly immaterial; and, therefore, the instrument, out of the many ordinarily used to communicate the motion, that is, connect the power to the machine, is, also, immaterial. It is no distinctive feature of the machine. Any instrument adapted to receive the power, whether crank, pulley, cog wheel, or screw, is equivalent, in such a case. The particular instrument which the patentee uses is not an essential feature, in the subject of the patent.

The defendants insist that no part of the complainant's machine was new, that that machine, and all of Hayden's invention, consisted of a combination of old elements, and they, therefore, invoke the principle, perfectly well settled and familiar, that, where a patent is granted for a mere combination of old devices to produce a new result, such a patent is not infringed by one who produces the same result without using all the devices which are included in the combination patented. Prouty v. Ruggles, 16 Pet. [41 U. S.] 336, 341; Vance v. Campbell, 1 Black [66 U. S.] 427; Eames v. Godfrey, 1 Wall. [68 U. S.] 78, 79; Byam v. Farr [Case No. 2,264]; Foster v. Moore [Id. 4,978]; Doubleday v. Bracheo [Id. 4,018]; Bliss v. Haight [Id. 1,548].

In any proposed application of this principle, it should be borne in mind, that, in a certain sense, nearly all new machines are but combinations of old devices, that is to say, they do, or may, combine frames, bolts, screws and nuts, rods and pulleys, cranks and wheels, levers and pins, nails and boards, and, as the case may be, various other and more complicated devices, none of which, regarded singly or separately, are new; and yet the machine formed by the combination is new, as a structure, new in its operation, and new in the effect produced. The patent, in such case, is not for a mere combination, under the rule above referred to; and another machine, having the like construction, operation and effect, in all that constitutes the principle of the machine, and the efficient means of its operation, is an infringement of the patent, notwithstanding it may be moved by a less number of wheels, or be held together by a less number of clamps, screws or nails, bolts or keys, and notwithstanding drum and pulley may be substituted for cog wheels or other gear, or bolts for screws and nuts, or like changes be made in other devices employed to construct the machine. Such machine, notwithstanding such changes, is substantially the same, in its patentable characteristics, and would be within the terms of the specification, "substantially as described."

This is true, in my opinion, of the machines used by the defendants, in their relation to the complainant's patents. They appropriate its essential features, and employ the same process to which the metal is subjected in the manufacture. The complainant's patent is

not strictly for a combination, but, rather, for a machine, or a process wrought by a machine. Like all machines, it is constructed by combining elements or details. In its distinctive features, as a machine for the purposes described in the claim, and as a process of making kettles, it has been copied by the defendants. In the very particular which was claimed to distinguish their machine, namely, an arrangement for the movement by and under the control of the workman, its structure is within the description of the complainant's patent. The tool is moved, as well as guided and directed, by mechanical means. The power alone is different. It may be true that there is an advantage in having the motion of the tool under the control of the workman. Witnesses so testified. Whether such advantage countervails the convenience and labor-saving of the power of the engine, is not very material; but if, in this respect, the device used by the defendants is an improvement, it cannot justify the use, in substance, of the complainant's machine.

Another observation, not essential to my views, is, if I have not misunderstood the structure and operation of the Hayden machine, quite significant, in showing a more complete likeness between the two than has hitherto been assumed. Although the Hayden machine may be operated automatically, it is not true that the motion of the tool is not under the control of the workman and by his hand. It was claimed that this feature in the defendants' machine was not only an advantage in enabling the workman to linger upon parts of the metal which might be found to require longer spinning, but that this was a distinctive peculiarity. Unless I have misunderstood the construction of the Hayden machine, that, also, is furnished with a lever under the hand of the workman, by means of which he can, at any moment, by disconnecting the gear, arrest the forward motion of the spinning tool, and so spin longer in any place where it is found necessary. In practice, my observation constrains me to doubt the practical importance of this feature, but, as matter of mechanical arrangement and capacity, it may not be unworthy of notice.

In the course of the trial, a fact was stated, in respect to which the expert witnesses differed, which, it was suggested, might affect the determination of the case. It was this—that the sliding-tool carriage, in the defendants' machine, does not move the tool in a perfectly straight line, but in a line very slightly curved, by reason of which the sides of the defendants' kettles are, in a barely perceptible degree, thinner at about half the distance from the bottom, than at the top. The degree will depend upon the length of the longitudinal arm of the slide, and the height of the side of the article to be made. Such a thinning of the side is not a result of the process desired or desirable. It is, at most, an imperfection in the particular kind of sliding carriage which the defendants employ. Without entering into a detailed explanation, or occupying further time in the discussion of the point, it must suffice to say, that this circumstance does not render the defendants' machine no infringement. It embodies the principle, process, and substantial means which the Hayden machine embodies, and operates substantially in the same way, though, it may be, less perfectly.

I am aware, that I have been led to a discussion, in this case, of most unreasonable length; and, yet, there are some other considerations, on both sides, which might be suggested. I trust that, in my deliberations, I have not overlooked any which are material to the result, whether here stated, or not. The importance of the case to the parties, the learning, skill, and ardor exhibited by the respective counsel, the interesting nature of the questions, some desire, on my part, that parties should be assured that the case is not decided without careful examination and deliberation, and that the precise grounds of decision may be fully exhibited, and especially, the want of time, (when other cases, already argued, demand my attention,) to rewrite and abbreviate the opinion, must explain, if it do not excuse, so great prolixity.

I purposed adding some observations on the proposition of the defendants, that, if they have not infringed the patent for the machine, they cannot be held to have infringed the patent for the product, or the kettle, &c. The conclusion reached upon the other branch of the case renders this, now, unnecessary. I desire, however, for the present, not to be taken to assent to the proposition, in this case, even though I should express no dissent. A patent may be good for a product, although no patent has been obtained for the machine or process by which it is produced. So, a patent may be good for a product, even though the inventor has received a patent for the machine or process, which, by reason of imperfection in the specification and claim, fails to cover the whole invention. Where the patent for a product is accompanied by a specification which does, in fact, describe the machine and process, so as fully to satisfy the requirements of the law, and enable any one of proper skill in the arts, to produce the article patented, by the means described, the patent for the product may be good, even though the same specification, annexed to a patent for the machine, might not fully secure the patentee against the use of his actual invention, because the claim was narrower than the invention, or because the claim was too broad, or was otherwise imperfect and ineffectual. In such case, the patent for the product might, possibly, be infringed, although no action could be maintained, based on the patent for the machine.

The complainant is entitled to a decree for an injunction and account, as prayed in the bill of complaint.

[For another case involving this patent, see Waterbury Brass Co. v. New York & B. Brass Co., Case No. 17,256.]

Case No. 17,255.

WATERBURY BRASS CO. v. NEW YORK & B. BRASS CO.

[See Case No. 17,256.]

Case No. 17,256.

WATERBURY BRASS CO. v. NEW YORK & B. BRASS CO.

[3 Fish. Pat. Cas. 43.] [1]

Circuit Court, S. D. New York. Dec., 1858.

INFRINGEMENT OF PATENT—EVIDENCE—SIMILARITY OF RESULTS — SUBSTITUTION OF PASSIVE AGENCY—TESTIMONY OF EXPERTS.

1. In an action for the infringement of letters patent, the question is: Do the defendants infringe upon any grant of right secured to the plaintiff by the patent?—not whether they have infringed on all the grants of right secured by the patent—but whether they have infringed upon any one of them.

2. Patents are to be liberally construed; they should not be subjected to too rigid an interpretation. This is a rule of law, and if it were not, and were not regarded, but very few patents would be of any avail.

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

3. The grant under letters patent to H. W. Hayden, dated December 16, 1851, was valid and required invention, provided the means used, in the manner specified, to accomplish the result, were new and useful.

4. Where the defendants had a patent in which they referred to the patent of plaintiffs, and disclaimed those parts of their invention which were found in plaintiffs' patent: *Held*, that this was an admission of the validity of plaintiffs' patent.

5. It is a safe source of testimony, which can be relied upon with some degree of certainty, in order to ascertain whether the same means are used, to look at the result produced by the means used. Like means, provided the machine is in perfect order, will, in a measure, produce like results.

6. If the patented means were new, and the defendants have used them, they have infringed although they may have used another device, not patented by the plaintiffs, by which the result is accomplished in a more perfect and satisfactory manner.

7. If the defendants substitute for something in the plaintiffs' machine, a passive agency which performs no useful object, in addition to the agency employed by the plaintiffs, such substitution of a passive agency would not alter the character of the plaintiffs' machine; and, if without the substitute of such passive agency the patent of the plaintiffs would be violated, it would also be violated after such passive agency had been substituted.

8. The testimony of experts is useful to show the operation of devices; but when experts undertake to tell what the patent is for, they assume the duty of the court, and when they undertake to say what is or is not a violation of the patent, they not only assume the duty of the court but of the jury.

This was an action on the case, tried before Judge Ingersoll and a jury, to recover damages for the alleged infringement of letters patent [No. 8,589] for "machinery for making kettles and articles of like character, from discs of metal," granted to Hiram W. Hayden, December 16, 1851 [reissued May 24, 1870 (Nos. 3,995, 3,996)], and assigned to plaintiffs.

The disclaimer and claims of the patent were as follows:

"I do not claim any of the gear-wheels or pinions, nor their arrangement, except as hereinafter set forth, some of these being common in ordinary lathes; but I do claim as new, and desire to secure by letters patent of the United States:

"First. The application of a metallic form or mold, or successive forms or molds in combination with a proper tool or tools, roller or rollers, sustained, moved, and directed in a proper path by mechanical means, for the purpose of operating on a disc, blank, or plate of metal, so as to reduce it gradually from the center to the edge, at the same time forming it with straight sides, by successive stages, into a complete kettle, or into any similar articles, to the forming of which this apparatus can be applied, substantially as described and shown.

"Second. The construction of the mandrel, f, 3, part of which is cylindrical and part fitted with a short screw of the hand-wheel f, 2, so that great pressure may be made at the point desired, while at the same time the mandrel can be easily and quickly moved through a long distance, for the purposes and as described and shown."

G. W. Parsons, N. J. Buell, and E. W. Stoughton, for plaintiffs.

Charles M. Keller and George Gifford, for defendants.

INGERSOLL, District Judge (charging jury). This is a suit brought by the plaintiffs, as assignees of a patent which was originally granted to Hiram W. Hayden, in which they seek to recover damages of the defendants for infringing upon the rights secured by that patent. Where a patent is valid, the rights secured by that patent are as much secured to the patentee as the right which you have to the houses in which you live, and which are made your property by the deeds you have in your possession; and they are as much to be protected as any other right to any other species of property. If the patent is valid, it secures to the patentee rights which should be protected; and the one right should be no more protected than the other. In a case of this kind, the rule of law is, that he who discovers that a certain useful result will be produced in any art, machine, or manufacture, by the use of certain means, is entitled to a patent for it, provided he specifies the means he uses, in a manner so clear and exact that any one skilled in the science or art to which it appertains, can, by the means he specifies, without any addition to or subtraction from them, produce precisely the result described. If

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

this can be done, then the patent granted to him confers on him the exclusive right to the use of the means he describes to produce the result or effect specified.

The plaintiffs claim that Hiram W. Hayden discovered that a certain useful result could be produced, namely: the forming out of a disc, blank, or plate of metal, a complete kettle, or any similar article so that it should be gradually reduced from the center to the edge, at the same time forming it in straight sides by successive stages, and to be produced by the use of means in the specification set forth. The means were: "The application of a rotary metallic form, or mold, or a succession of forms or molds, in combination with a proper tool or tools, roller or rollers, sustained, moved, and directed in a proper path, by competent mechanical means;" and the mechanical means is described by which this combination will produce this useful result. If Hayden did really make this discovery, and if he has in his specification pointed out the means he thus uses, in a manner so clear and exact that any one skilled in the business to which it appertains, can, by the means described, to wit: the application of a rotary metallic form or mold, or a succession of forms or molds, in combination with a proper tool or tools, roller or rollers, sustained, moved, and directed in a proper path, by competent mechanical means, produce the result of a complete kettle or similar articles by operating on a disc, blank, or plate of metal, so as to reduce it gradually from the center to the edge, at the same time forming it with straight sides by successive stages, substantially as described and shown in the specification—he was by the patent which he obtained, entitled to the exclusive right to the use of these means, in the manner stated, to produce such result, and the plaintiffs, as assignees of all the right which Hayden had to the patent, are entitled to the exclusive use of these means, substantially in the manner set forth; and any one who uses the means specified to produce such a result, infringes upon the right secured by the patent, and is subject to pay the damages which the plaintiffs may have sustained by such infringement.

There are four questions, and only four, which are presented for consideration in this case; and it is necessary that these several questions should be kept distinctly in your minds, in order that you may be enabled to arrive at a correct conclusion. These four questions are: First. What does the patent purport to grant? Second. Was the grant a valid grant of right? Third. Do the defendants infringe upon any grant of right secured by the patent of the plaintiffs—not whether they have infringed on all the grants of right secured to the plaintiffs by the patent, but whether they have infringed on any one of them? Fourth. If they have, what damages have the plaintiffs sustained by such infringement of their rights on the part of the defendants?

The first is a question of law, to be determined by the court. The three other questions are to be determined by the jury. They are questions of fact, and in determining them, it should be borne in mind that patents are to be liberally construed—that they should not be subjected to too rigid an interpretation. That is a rule of law, and if it were not a rule of law, and not regarded, but very few patents would be of any avail.

The first question, then, gentlemen of the jury, being a question of law, is for the court to determine, and of course the jury will take the law as it is laid down by the court, because it is the peculiar province of the court to determine questions of law, and it is the peculiar province of the jury to determine questions of fact. The patent does not grant the several parts or any part of the machinery by which the combination claimed is called into action, and made to perform the duty it accomplishes; but what has been granted has already been indicated. The patent is for the application of a metallic form or mold, or a succession of forms or molds, in combination with a proper tool or tools, roller or rollers, sustained, moved, and directed in a proper path by competent mechanical means, for the purpose of operating on a disc, blank, or plate of metal, so as to reduce this disc, blank, or plate of metal gradually from the center to the edge, at the same time forming it with straight sides, by successive stages into a complete kettle or any other similar article.

This includes the whole patent or grant of right. There is nothing else in it, and in considering the questions of fact, the jury will bear in mind that this is the whole patent or grant of right.

The second question is—and it is a question of fact for the jury to determine—was this grant a valid grant of right? In other words, was the grant of the combination of the means described "sustained, moved, and directed" in the manner specified, a valid grant of right? It was, gentlemen, and required invention, provided the means used in the manner specified to accomplish the result, were new and useful. It is admitted that the result produced was highly useful, and that the combination of means used in the manner specified does produce this highly useful result. To show its use, it is only necessary to bear in mind that some years before the invention of Hayden, the only mode of making kettles was by the hammering process. Subsequently, another process, that of swedging kettles or the stamping process, was produced, and by these two modes were kettles principally manufactured. But at the present day the kettles formed by these two processes are entirely out of the market, and have been so completely superseded by those formed substantially in the manner specified by these means, that hammered kettles are now almost unknown. The usefulness of the invention is thus admitted.

It is therefore only necessary for you to inquire upon this branch of the case: Was the combination of these means new? The patent when produced in evidence is prima facie evidence that such is the case—that these means producing this result were new. When an application is made for a patent, it is submitted to the commissioner of patents; his skill and judgment are brought to bear upon the subject, and when he grants the patent it is prima facie evidence that the means granted are new, and produce a useful result. That evidence, of itself, is sufficient for a court or a jury to determine the question of novelty and usefulness, unless there be counteracting evidence introduced to rebut that prima facie evidence which the patent thus affords; and this should be borne in mind throughout the trial.

The plaintiffs also insist that there is not only this to show that the patent was new and useful, but they say that the defendants themselves, in the very patent which they submit to prove that they had the right to do what they have done, admit that it was new. That is the patent of Cannon, and in making his claim, he distinctly expresses himself in this manner: "I distinctly disclaim those parts of my invention which are found in Hayden's patent aforesaid;" thus admitting and consenting that this patent to Hayden was a valid patent. In addition to that, gentlemen, witnesses have been introduced to you who testified that before this invention of Hayden, these means were not used to accomplish this result, so far as their knowledge extended upon the subject. There are various sources of evidence which a party can draw upon in a patent case, to show that an invention was not new at the time it was made. If it can be shown that it was described in any publication prior to the discovery, no matter where that publication is, whether it be in Europe or America, if it is the identical thing described in such publication, then the party owning the patent can not successfully claim any valid right under it. But there is in this case no such evidence as that. No book has been produced to show to you or to the court, that this invention, if it was an invention, has been published in any book either in Europe or America. The testimony relied upon to prove this point is, that this invention is identical with that known as the Bullard invention or machine. It is for you to determine whether such is the fact—whether the means employed in that machine are substantially the same as those described by the plaintiffs, operate in substantially the same manner, and produce substantially the same result.

As I have already remarked, it is admitted that the means used in the plaintiffs' patent, in the manner stated, were useful; and it must be further admitted that they were new, unless the same combination, producing the same or a similar result, is to be found in the Bullard machine. The plaintiffs' device is, the tool, in combination with the former, to form and make the shapes of vessels. If I understand the Bullard machine, the tool did not aid in making the shape, but in smoothing and finishing the vessel after the shape had been made, without the aid of the tool. The plaintiffs' device was in reducing a disc, blank, or plate of metal, by the operation of the tool, in combination with a former, reducing it from the center to the edge, at the same time forming it with straight lines, by successive stages, into a complete kettle, or any similar article. I think it is admitted, and if it is not, it is a question of fact for you to determine, that in the Bullard machine the operation of the tool in combination with a former, never did reduce the disc, blank, or plate of metal from the center to the edge, or reduce such disc, blank, or plate of metal in any way. If I understand the machine of Bullard, the disc, blank, or plate of metal was held by the clamps, and while thus held in those clamps, by the aid of the former, it was made into shape; and while it was thus being formed into shape, the tool was not brought into operation; that after it was thus made into shape, it being, in the first stages of the operation, held by the clamps, so that it could not then be enlarged, the tool went over it for the purpose of performing the office which it did perform, namely, that of smoothing or finishing the basin. It is my impression—and if I am incorrect, it is for you to determine—that the evidence is that it was never designed to do this in combination with a former, and that Bullard had no idea when he was operating the machine, that the tool used by him would, in combination with a former, gradually reduce a disc, blank, or plate of metal from the center to the edge, or in any other way. He reduced, shaped, or formed it, prior to the operation of the tool, by the swedging or stretching operation, and by the instrumentalities which he used with the aid of the former, it was turned into shape; and it was after this operation, if I understand it, that the tool was used, the mallet being employed where it was necessary, to remove the wrinkles—to give it a perfect finish. As I apprehend it, it never did, by the aid of the tool in combination with the former, reduce a disc, blank, or plate of metal gradually from the center to the edge, so as to make any similar article to a kettle, but it reduced it in other ways, without this combination. Nor am I aware that any witness (and if I am wrong here you will correct me, for you are the exclusive judges of fact), has sworn or pretended that that machine would do this: that is, reduce a disc, blank, or plate of metal by the joint operation of the former and the tool in the way in which it was there used. After you have examined that operation, you are to determine whether that Bullard machine is identical with that of the plaintiffs or not; and it is for you to say whether the devices in the Bullard machine, acting in combination, which never did and never could produce, by the means stated, the useful result produced by the patent, is a combination of the same means which does produce such useful result.

It is a safe source of testimony, which can

be relied upon with some degree of certainty, in order to ascertain whether the same means are used, to look at the result produced by the means used. Like means, provided the machine is in perfect order, will, in a measure, produce like results. And if like results can not be produced by two separate devices, it is good evidence for the jury to consider, in coming to a conclusion as to whether like means were used; because, as a general rule, like results are produced by like means; and if like results are not produced by two separate devices, it is fair for the jury to infer that the means may not be alike in kind or character.

If, therefore, gentlemen, you determine that the combination of means patented to the plaintiffs was new, then you will turn your attention to another question, namely, whether the defendants have infringed upon the rights so secured by the patent. If these means were new, and if the defendants have used the means secured by the plaintiffs' patent, they have infringed, although they may have used another device not patented by the plaintiffs, by which the result is accomplished in a more perfect and satisfactory manner. It is not material, gentlemen, for you to determine how useful this new device of the defendants was. Be it more useful or be it less useful, although they have a patent for it, they can not, by using the means patented, use the means patented to the plaintiffs, provided the plaintiffs' patent was valid. For, gentlemen, it is a well-established rule, that if a patent is granted to one man for any machine or combination, and then a patent is granted to another man for an improvement upon that machine or that combination, that such patent which the second man obtained can not be used, if by its use the first patent is infringed.

Then the plaintiffs, on this part of the case, claim that although these defendants may have used means which may be an improvement, still they, by the use of those means, use the patent of the plaintiffs. The defendants, gentlemen, claim under what is called the Cannon patent; and they say that what they do is by virtue of the means specified in this patent; and, gentlemen, it is for you to determine whether or not the patentee designed, when he took out this patent, to have his machine to be in aid of the plaintiffs' machine or independent of it; and that you are to determine from the patent itself. In various parts of it the patentee speaks of the plaintiffs' patent. He says the machinery which he uses "consists of a lathe provided with a series of forms which are screwed one at a time in proper succession to a rotary mandrel, up to the face of which the plate of metal of which the vessel is to be formed is held by a poppet-head, while the tool is brought into operation by means of the mechanism of the sliding-rest to which it is rigidly screwed, so as to be moved and directed entirely by the mechanically produced movement of the sliding-rest." This is the description of the patentee. In practice he says that he found great disadvantages result from the movement and direction of the tool entirely by the mechanically produced movement of the slidjng-rest.

And then, further on: "These improvements," that is, his own improvements, "consist chiefly in controlling the pressure of the tool, and partly directing its movements, by hand, while the balance of it is directed by machinery, while it is sustained and moved by the mechanical means, by attaching it to a lever which is arranged upon a fulcrum or sliding-rest, or its equivalent, having a mechanical movement nearly such as is required for the tool to produce the desired shape, provided the form were infallibly true and all parts of the metal of uniform character, said lever to be operated by a workman," etc.

Then, in another part: "In the process of forming kettles by this machine, the principle of moving and conducting the tool mechanically is applied as far as consistent with the production of good work, and no further."

It is claimed, gentlemen, that it is admitted by Cannon, under whom the defendants claim to act, that in some measure the tool is applied, so far as consistent with the production of good work, mechanically. In determining this question, gentlemen, whether the defendants use the means patented to Hayden, you will bear in mind what I have already said, that if they use these means with something in addition to improve them, they can not use the improvement, although patented to them, provided they use the means patented to the plaintiffs. In determining this question, the jury will bear in mind that in order to establish an infringement, it is unnecessary that the devices used by the defendants should be an exact copy of the devices of the plaintiffs, that the machine of the defendants should be literally and exactly like the plaintiffs'. All that is required is, that the devices of the defendants should be substantially like the devices patented to the plaintiffs, although they may use another device which improves the devices patented to the plaintiffs; and I may say if any other rule were to be adopted than this, that all that is required is that the devices of the defendants should be substantially like the devices patented to the plaintiffs, it would be better in my judgment to repeal the whole of the patent laws of the United States. I have granted many injunctions, during the time I have been upon the bench, to restrain the infringements of patents; but if this rule that I have stated were not the rule to be accepted, I could never, consistently with my duties, again grant an injunction; and I should feel now bound to dissolve all the injunctions I have ever granted, provided this rule were not correct.

There must be a substantial adoption of the devices. As I said before, gentlemen, the plaintiffs claim that in this patent of Cannon there is an admission that the mechanical means do in part direct, and if in part, though it may be in a small measure, directed by hand, the patent would be violated.

The defendants claim, gentlemen, that if in the plaintiffs' machine the pin is taken out, which, after the adjustment, holds the tool so that it will run up in the proper direction, that it ceases to be the plaintiffs' machine, and if for that device, the pin, a hand, or any human agency is substituted, so that the tool will run up precisely as it would if the pin had been in it, that after such substitution it is a different device, and not the invention of the plaintiffs as patented. If I am wrong in that, the counsel will correct me: I understood him so. Perhaps you can discover the difference between the cases I state; it is difficult for me to discover any. It does not depend upon the amount of force which that pin overcomes. It may be large or it may be small; if the pin is in it, it is the plaintiffs' device; but if any human agency keeps it still, it is not substantially the patent of the plaintiffs. In other words, if the pin of metal be taken out and a pin of flesh put in, it changes the device patented to the plaintiffs. As I said before, there must be some substantial difference, and if there is no substantial difference, the two are identical. And as I have previously said, if the plaintiffs' device is involved in that of the defendants, and if the defendants, in the use of what may be an improvement, adopt the device of the plaintiffs, there will be in that case an infringement. If the defendants, gentlemen, substitute, for something in the plaintiffs' machine, a passive agency which performs no useful object, in addition to the agency employed by the plaintiffs, such substitution of a passive agency would not alter the character of the plaintiffs' machine; and if without the substitution of such passive agency, the patent of the plaintiffs would be violated, it would also be violated after such passive agency had been substituted.

And I will state to you, gentlemen, although my impression is that I have given the same idea before, that if the hand-operation only aids the mechanical means of the plaintiffs at times in directing the tool, such aiding at times, the mechanical means in directing, being at the other times in full operation, will not exempt the defendants as infringers upon the rights of the plaintiffs.

Experts, gentlemen, have been introduced before you, who have given their opinion one way or the other. The testimony of experts is useful to show the operation of devices; indeed, very essential; but when experts undertake to tell what the patent is for, they assume the duty of the court; and when they undertake to say what is or is not a violation of the patent, they not only assume the duty of the court, but of the jury.

In conclusion, I will state to you, if the defendants substantially adopt the devices of the plaintiffs' patent to accomplish a certain useful result, the defendants are violators of the rights secured by the patent.

The only other question is a question of damages, which is entirely for the jury to determine. One element in coming to the question of damages is, gentlemen, the difference in cost in manufacture between the manufacture by the hammering process or the stamping process and the process adopted by the plaintiffs. Another element is the difference in the value of the article made after it has gone through these processes. If the article made is more valuable when made by the process of the plaintiffs than when made by the process of stamping or hammering, that difference in value is also a proper element, together with the difference of cost, for you to consider in coming to the damages which the plaintiffs have sustained. The amount which has been manufactured by the defendants is admitted to be about forty-three thousand pounds. This is all I have to say to you. You will determine the case as you think the evidence warrants.

Verdict for plaintiffs—damages five cents per pound.

[For another case involving this patent, see Waterbury Brass Co. v. Miller, Case No. 17,254.]

WATER COMMISSIONERS OF DETROIT (FARRINGTON v.). See Case No. 4,687.

Case No. 17,257.

The WATERLOO.

[Blatchf. & H. 114.] [1]

District Court, S. D. New York. Feb., 1830.

ENTRY BY DERELICT VESSEL—CLOSED PORT—FORFEITURE—PAYMENT OF DUTIES—RATES OF SALVAGE.

1. The acts of April 18th, 1818, and May 15th, 1820 (3 Stat. 432, 602), which provide that the ports of the United States shall be closed against every British vessel coming from a port closed against vessels of the United States, and that every vessel so excluded, which shall enter a port of the United States, shall be forfeited, applies only to a voluntary entry by the act of the owner or master of the vessel, or of their agents.

[Cited in The Cargo ex Lady Essex, 39 Fed. 767.]

2. An entry by a derelict vessel, brought in by salvors, without the consent of her owner or master, or of their agents, does not work her forfeiture under those acts.

[Cited in U. S. v. Curtis, 16 Fed. 189; Merritt v. One Package of Merchandise, 30 Fed. 197; The Cargo ex Lady Essex, 39 Fed. 767.]

3. A suit cannot be sustained in admiralty in rem, to enforce the payment of duties to the United States.

[Cited in U. S. v. Five Hundred Boxes of Pipe, Case No. 15,116.]

4. Goods saved from a wreck and brought within the United States, are subject to import duties, under the acts of congress of April 20th, 1818, and March 1st, 1823 (3 Stat. 433, 729).

5. Whether they would be so at common law, quere.

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

6. The nature of salvage considered, and the principles regulating its amount enumerated.

[Cited in The Galaxy, Case No. 5,186; The John Wurts, Id. 7,434; The Neto, 15 Fed. 821.]

7. The practice of calling in seafaring men to assist the judgment of the court, has never been sanctioned in this country.

8. The rate of salvage in cases of derelict is seldom more than one-half of the net proceeds of the property saved. Two-thirds of the whole proceeds have sometimes been allowed, but the whole proceeds are never allowed unless their amount is so small that less would be an inadequate compensation.

[Cited in The Carl Schurz, Case No. 2,414.]

9. In awarding salvage upon a foreign vessel, courts in this country will regard the rates of allowance in the courts of the owner's country.

10. Import duties upon wrecked property are to be paid out of the gross proceeds, before deducting salvage, and are not to be charged exclusively on the owner's share of the salvage.

11. The relative claims of the actual salvors, and of the owners of the salving vessel and of its cargo, considered.

[Cited in The Comanche v. Coast Wrecking Co., 8 Wall. (75 U. S.) 473; The Persian Monarch, 23 Fed. 823; Compagnie Commerciale de Transport v. Charente S. S. Co., 60 Fed. 926.]

12. The duties of a master and of his crew in relation to saving derelict property, considered.

13. In this case, two-thirds of the proceeds of the property saved, after deducting the import duties, was given to the salvors. Two-thirds of the salvage was awarded to the owners of the salving vessel and of its cargo, and the remaining one-third was divided equally among the salvors, the master receiving no more than was received by each of the crew, and by a passenger who did duty as a sailor. Costs were decreed out of the proceeds in court, after deducting salvage.

[Cited in Markham v. Simpson, 22 Fed. 745.]

The ship Waterloo, of London, was discovered, on the 27th of August, 1828, by the brig Merced, in latitude 34° N., longitude 75° W., abandoned at sea. The Merced was bound from Havana to Cadiz, but, leaving her course, she, with great difficulty and danger, towed the Waterloo into the harbor of New-York, where they arrived on the 12th of September. The ship and cargo were thereupon libelled, on the 16th of September, by Peter Harmony, the owner, and Eliphalet Kingsbury, the master, of the brig, in behalf of themselves and of all others concerned, to secure the payment of salvage. Against this libel, three claims and answers were interposed. The first was by the district attorney of the United States, and claimed that the ship was forfeited to the United States, under the 1st section of the act of April 18th, 1818 (3 Stat. 432), which enacts, that from and after the 30th day of September (1818), the ports of the United States shall be and remain closed against every vessel owned, wholly or in part, by a subject or subjects of his Britannic majesty, coming or arriving from any port or place in a colony or territory of his Britannic majesty, that is or shall be, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States; and, that every such vessel, so excluded from the ports of the United States, that shall enter or attempt to enter the same in violation of the act, shall, with her tackle, apparel and furniture, together with her cargo on board such vessel, be forfeited to the United States. The answer alleged, that the Waterloo was owned by British subjects, and came from a port that was, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States, to wit, from Annatto Bay, in Jamaica, and entered the harbor of New-York in violation of the act, whereby she, her tackle, &c., and cargo became forfeited to the United States. The answer also claimed, that if the Waterloo and her cargo were not forfeited for the cause above stated, her cargo was subject to duties, and prayed a decree accordingly. The second claim and answer were interposed by the British vice-consul, in behalf of the unknown owners, praying a sale of the vessel and cargo, and that the proceeds, after payment of salvage to the libellants, might be decreed to be paid to the claimant. The third claim and answer were interposed by George and Henry Barclay, as agents for the underwriters at Lloyd's, in London, and for insurers at Liverpool and Glasgow, in behalf of whomsoever of their principals it might concern, praying that the balance of the proceeds of the sale of the ship and cargo, after deducting salvage, &c., might be detained by the court a reasonable time, until the rights of their principals could be ascertained. They also alleged that they had bonded the duties, and paid charges and expenses, and prayed that they might be decreed to be paid out of the proceeds. On the 6th of October, a venditioni exponas was issued to the marshal, returnable on the 19th. The ship and her cargo were sold for $39,262.19, which sum was deposited in court.

On the 15th of October, a second libel was filed by the district attorney against the ship, and also an information against her cargo, claiming a forfeiture of the same for a violation of the act of April 18th, 1818, and of the supplementary act of May 15th, 1820 (3 Stat. 432, 602). Separate claims and answers were filed by all the other parties, denying that any forfeiture was incurred, and alleging the substance of their former pleadings. On the 11th of November, by the consent of all parties, an order issued to the marshal to pay to the collector the duties upon the ship and cargo, amounting to nearly $22,000. The evidence in the case consisted of the depositions of the crew of the Merced, and of Captain Driscoll, master of the Orient, who had boarded the Waterloo before the Merced came up, but abandoned her, thinking it impossible to get her into any port. He stated that Bermuda was the nearest place, but that it would have been

about as hazardous to have taken the Waterloo there, as it was to take her to New-York. The difficulty and danger of reaching New-York with her were described by the crew of the Merced to have been very great. The other facts in the case are sufficiently set forth in the opinion of the court.

James A. Hamilton, Dist. Atty., for the United States.
Francis B. Cutting, for Kingsbury.
David B. Ogden, for Harmony.
William Betts, for the Barclays.
Hamilton Wilkes, for the British vice-consul.

BETTS, District Judge. The two claims of the United States, first to a forfeiture of the ship and of her cargo, or secondly, to a satisfaction of the duties charged upon them, will be first disposed of. The argument on the part of the United States is, that the ship and her cargo being British property, and coming last from a port closed to the United States, their entry here is made against the direct terms of the statute, and that, as congress have not made an exception of any description of cases, this property must incur the forfeiture declared by the act. The court cannot accede to this interpretation and application of the statute. There are certain principles inherent in penal legislation, which necessarily qualify or restrain its enactments, whether they are expressed in terms or not. When the violation of a law is supposed, it is always intended that there is a free agent, acting voluntarily. Courts will, accordingly, in the construction and execution of penal laws, supply those exceptions or qualifications which are presumed to be within the contemplation of the legislature as always accompanying such enactments. The William Gray [Case No. 17,694]; Sheppard v. Gosnold, Vaughan, 159, 169; Reeves, Shipp. 203-207. Although, therefore, the entry of the vessel and of her cargo are interdicted, and the forfeiture is imposed upon both, yet this form of enactment is to be understood to signify a voluntary navigation of the ship into our waters. Any other construction would lead to the revolting conclusion, that a vessel and cargo cast as wrecks upon our shores, might nevertheless be forfeited for sheltering themselves in a port closed against them by the policy of trade. This would be to constitute a man's calamities his offence, and to convert the acts of God into causes of punishment and confiscation.

It is, however, contended, that if the statute has regard to voluntary entries, that made by the Waterloo in this case was entirely so; and that nothing can excuse her having been brought into a port of the United States, unless she is shown to have been brought there from absolute necessity. The proofs undoubtedly show that, in the state of the wind, New-York was the most convenient port to make with the wreck. But Bermuda was much nearer, and it is by no means evident that any greater hazard would have been encountered in taking her to that island. New-York was clearly the port of choice, and not of necessity, as it was determined to bring the wreck here when she was taken possession of, many hundred miles distant; and, if a port strictly of necessity had been sought, no doubt the effort would have been made to run into Norfolk, or even Bermuda. Under these circumstances, it is insisted, that if a case of urgent and compulsive necessity might have protected the entry, no such case existed, and that bringing this vessel and her cargo here must be taken to have been a voluntary and designed importation. There is force in these suggestions, and they would undoubtedly be conclusive if the original ship's company of the Waterloo, or any person entitled to represent her owners, had concurred in the act. But it is to be borne in mind, that the Waterloo, when found, was deserted by her crew, and was brought into the United States by the salvors, at their own instance, without the concurrence or knowledge of the owners or of their agents. To condemn the vessel for this cause, would be to render the owners responsible for the acts of others having no authority under or connection with them. The supreme court have repudiated, in strong language, a construction of our revenue laws which would thus punish one man for the offences of another, over whom he could have no control. Peisch v. Ware, 4 Cranch [8 U. S.] 347, 365. The doctrine is carried out and applied, in a variety of instances, to the exemption of property which would be forfeited if it had been placed in the predicament in which it is found, by the act of those who were entrusted with it by the owner, or who would have to bear themselves the consequences of their own misconduct. The Bello Corrunnes, 6 Wheat. [19 U. S.] 152; 651 Chests of Tea v. U. S. [Case No. 12,916]; s. c., 12 Wheat. [25 U. S.] 486. With regard to the owner of the ship and cargo, it would, therefore, make no difference whether they were navigated into an inhibited port as derelicts, by strangers and salvors, or were cast upon our coasts by tempests and saved as wrecks from the sea. The law of confiscation and forfeiture would not touch them in either case.

Neither can a suit be sustained in the court of admiralty against the ship, or an information against her cargo, to enforce the payment of duties (U. S. v. Three Hundred and Fifty Chests of Tea, 12 Wheat. [25 U. S.] 486), because the jurisdiction of this court in rem, in revenue cases, embraces only seizures for forfeitures under the laws of impost, navigation and trade, as conferred by the 9th section of the judiciary act of 1789 (1 Stat. 76). The prosecutions on the part of the United States are accordingly both dismissed.

The question was raised and discussed at large by all parties, whether this cargo was subject to duties. In strictness of law, they were concluded upon this point. The parties had directly or impliedly assented to

the order previously made in the case by the court, by which payment of those duties was directed, and such assent would undoubtedly preclude them from afterwards calling in question the correctness of the decree. The Concord, 9 Cranch [13 U. S.] 387. Still, as it may be desirable to the parties to review on appeal all the proceedings in this court, and to be put in possession of the views which have governed its decisions, and, as no formal opinion was delivered when that order was made, it may be proper, at this time, to state summarily the reasons which influenced that decision. No doubt, according to the construction of the English laws of impost, wrecked property was originally exempted from the payment of duties. 1 Moll. 392; Sheppard v. Gosnold, Vaughan, 159, 164; Com. Dig. "Trade," C, 3. This was upon the common law notion, that wrecked property belonged to the king, and that the king was not chargeable with customs, as they were, in supposition of law, paid to himself, and he would not take a small part, by way of duty, out of that which was all his own. 1 Moll. 392. Lord Chief Justice Vaughan further suggests, that goods cast upon shore as wreck could not be deemed to be imported as merchandise, and to be embraced by the statutes relative to customs. Sheppard v. Gosnold, Vaughan, 159, 164. This consideration influenced the decision of the king's bench, in Courtney v. Bower, 1 Ld. Raym. 501, and, no doubt, in a degree, led to some of the suggestions thrown out by the court in Peisch v. Ware, 4 Cranch [8 U. S.] 347. Whether the decisions in England should not be limited to cases of wreck at common law, where the goods are thrown on shore by the sea, would only become a material inquiry in case we were to be governed in this matter by the common law rule. The statute of 5 Geo. I., c. 11, has since placed wrecked goods, in respect to duties, upon the same footing with goods regularly imported, and I think that the acts of congress substantially accomplish the same end here. Judge Winchester, who has left behind him a high reputation as a learned and discerning judge, very distinctly intimates his opinion, that goods saved from a wreck at sea, and imported into this country, are not chargeable with duties. Mason v. The Blaireau, 2 Cranch [6 U. S.] 240; Peisch v. Ware, 4 Cranch [8 U. S.] 354, note. The courts above, in reviewing his decision in the case of The Blaireau, did not touch that particular point. The proposition was advanced arguendo by counsel in the subsequent case of Peisch v. Ware, 4 Cranch [8 U. S.] 347, but the decision of that case did not necessarily lead to the consideration of the general proposition, and it was not adverted to by the court. The court decided, that goods wrecked and brought into our ports are not liable to forfeiture for not having been regularly entered in conformity to the revenue laws. Manifestly, it might often be impossible for strangers bringing property in, as wreck, to comply with the requisitions of the custom-house in making a regular and perfect entry of the goods; and, therefore, it would be a most harsh application of the provisions of those laws, to condemn the property for that cause. Whether, if the question rested upon the construction of the revenue laws, the principle would not extend further, and exempt such property from liability to duties, I do not think it indispensable now to determine, as, in my judgment, the 15th section of the act of April 20th, 1818 (3 Stat. 437), reënacted by the 21st section of the act of March 1st, 1823 (3 Stat. 736), removes the formal difficulty of making entry, and places goods saved from wreck upon the same footing as if imported in a regular course of trade. By providing that before goods taken from a wreck shall be admitted to entry, they shall be appraised, the manifest implication of the act is, that they are to pay duties; and, without pursuing the discussion upon general principles, which, in my opinion, would lead to the same conclusion, I shall declare that this ship and her cargo have been rightfully charged with duties. If there is a seeming harshness in drawing a revenue from property so situated, either in respect to the English owner or to the salvors, it is worthy of remembrance that a like rule would be applied to American property taken under similar circumstances into a British port. Pope, Merch. Guide, 82, 338.

The inquiry next in order is the amount of compensation to be awarded to the salvors. There is no evidence before the court that the owner of the Merced is not also owner of her entire cargo. In the distribution of salvage money, he will be treated as such. The salvors, then, as between themselves, will stand in two classes: 1st. The owner of the Merced; 2d. Her master and crew. Although these parties unite in the action against the ship and her cargo, and have a common interest in the amount to be recovered, yet, in the ultimate division of that amount, their interests are separate, if not hostile, to each other.

The main question is, how much salvage shall be allowed? It is obvious that the vicissitudes of nautical pursuits must have brought this inquiry frequently before the courts. It has been the subject of adjudication from the earliest history of judicial proceedings. But, as each case comes clothed with variant circumstances, it has been thought impracticable to establish general rules which may with justness be applied to all cases. The want of fixed principles of compensation is the source of serious perplexity to courts and of uncertainty to parties in interest. There are marked fluctuations in allowances, where the cases would seem to require no discrimination. This occurs not only between different tribunals, but the books supply us many instances in which enlightened and cautious judges will reward, at

one time, with a liberal hand, services which, at another, are compensated sparingly. These diversities arise from the effort of the law to have each cause, in salvage claims, disposed of upon its own particular merits, and, with this view, the whole matter is referred to the discretion of the court which acts in the cause. Yet, probably, nowhere can judicial discretion be less intelligently and satisfactorily exercised than in matters of salvage. The judge must weigh facts, and estimate probabilities, of the true import or bearing of which he will generally, from his education and pursuits in life, be less competent to form correct opinions than in almost any other branch of his duties. This would be so, if he could be an eye-witness to every occurrence in the case, as he could but imperfectly estimate risks and services so foreign from his own habits and experience. He has not, however, the satisfaction of knowing that he is called upon to judge of facts as they actually occurred. He must gather the information on which he acts from those who have every inducement to conceal or discolor parts of the transaction, and who would be usually restrained by no fear of contradiction or exposure. Inflamed representations of perils and sufferings must accordingly be expected, particularly when addressed to one who would rather be inclined to apprehend dangers in situations and exposures with which he is not familiar, and thus to liberally value services devoted to the rescue of property in that condition. The English court of admiralty has endeavored to obviate this pressing inconvenience by calling to its aid seafaring men, who can properly appreciate the facts presented, and advise the court to such judgment as the nature of the case may require. This mode of procedure has never been sanctioned in this country. There are, however, certain general considerations which enter into the estimate made by courts of the services to be rewarded—as, 1st. The situation of the salvors, and their conduct and exposures; and with these is properly connected a regard to the value of the ship and cargo employed by them in effecting the salvage; 2d. The situation of the property saved, and the probabilities of its preservation without the assistance of the salvors; and 3d. A liberal public policy, which, on the one hand, holds out encouragements to mariners to aid in the preservation of property, by securing to them generous rewards, and, on the other, exercises a jealous and vigilant protection over the ship-owner and merchant, to shield them from exorbitant demands. It is through influences so important and conflicting that courts are to ascertain and settle the rate of reward, without having any more definite criterion fixed by the law to guide and correct their deliberations. There can be no surprise, therefore, at the different results to which men of equal justness of purpose arrive, nor that the books should abound with cases filled with learning on this subject, yet leading to no plain, practical results. It is unnecessary to rehearse the doctrines that have been advanced and the decisions that have been made, as they do not profess to fix an exact standard or measure of compensation, or to do more than offer suggestions and arguments which may be usefully consulted in future cases. The English and American authorities, which discuss this topic most instructively, are collected in Judge Story's late edition of Abbott on Shipping.

The tendency of a preponderance of the decisions is, manifestly, to consider one-half of the nett proceeds the ultimatum of salvage to be allowed in cases of derelict. L'Esperance, 1 Dod. 46, 49; Rowe v. The Brig [Case No. 12,093]; Concklin v. The Harmony [Id. 3,089]; Morehouse v. The Jefferson [Id. 9,793]. Still, two-thirds of the whole proceeds have been allowed. The Jonge Bastiaan, 5 C. Rob. Adm. 322. And the decisions of the English admiralty will have more consideration in the present case, as our courts, in awarding salvage for the preservation of the property of foreigners, have regard to the rates of allowance which obtain in the courts of the owner's country, it being the policy of our tribunals to observe, in this respect, a rule of reciprocity. Armroyd v. Williams [Case No. 538]; Mason v. The Blaireau, 2 Cranch [6 U. S.] 240. The claims of the libellants in this case, if allowed, would absorb the whole proceeds of the ship and cargo. This the courts will not sanction, except in cases where the property saved is so small in value as to be necessarily all required to cover charges and make any compensation to the salvors. The doctrine of salvage derives its support from the consideration, that however munificent the reward may be to the salvor, something, a residuum, is still secured to the owner. His rights are not to be deemed derelict. One of the most satisfactory reasons for allowing a discretion to the courts in this respect is, that they can reward not only according to the merit of the services, but also in proportion to the amount saved. I have met with no instance in which the whole amount saved, and an amount equal to what was preserved in this case, has been all of it taken from the owner. Courts, in so doing, would be reinstating the rule of nature, or rather of barbarism, in devoting to the first finder whatever property the exigencies of the owner had wrested from him or compelled him to desert.

The main effort of the libellants' counsel has been to throw the whole of the duties on the owners, and leave the salvors the same degree of compensation that would be allowed if the gross proceeds of the property represented its nett avails. Without pursuing the train of reasoning which has satisfied my mind that there is no just ground for exonerating the salvors from sharing in the charge of duties, it will be enough to say, that nothing more can be considered saved in this case, out of which the salvors may be rewarded, than what remains after satisfaction of the duties. Whether that proportion goes to the government, as the price for the enjoyment of the salved property, or perishes at sea, the residue is all that the exertions of the salvors have placed at the

disposition of the court. Concklin v. The Harmony [supra]. [2]

The duties were nearly $22,000, which exceeded one-half of the gross proceeds of the ship and cargo. The remainder composes the sum which is now to be distributed between the salvors and the owners. The court has no doubt that the owners should be required to disburse a large proportion of this. In respect to them, the salvage was of the most meritorious order. Independent of the evidence of the salvors, the testimony is full and satisfactory, that the Waterloo, when fallen in with, was in the most perilous situation. Captain Driscoll thought that any attempt to save her would be hopeless. She lay in a rough sea, at a great distance from any port, nearly dismantled. It was scarcely possible to board her, on account of the noxious and stifling air in her hold and cabin. She was rapidly sinking, having then made about twelve feet of water, and the wind at the time was blowing heavily. The crew had abandoned the wreck three days before, as being then in a desperate condition, and, no doubt, but for the intervention of the salvors, the vessel and her cargo would all have perished in a very few hours. This, therefore, as it respects the owners, shows that their property was rescued from dangers which must immediately have been fatal to it, and against which no premium short of its value would have obtained for them an indemnity. Nor could this have been done without great exposure, and the most energetic exertions on the part of the salvors. These circumstances—the desperate situation of property, and the personal danger incurred by the salvors—are always recognised as demanding a liberal award of salvage. Admitting the perils and intrepidity of the ship's crew to be extravagantly exaggerated, in the relation given by themselves, yet there is extrinsic evidence enough to satisfy the court that the wreck could not have been brought into port without uncommon exertions and perseverance and no small degree of hazard to their lives. The Waterloo was not in a condition to be navigated by herself, nor could the Merced, with safety, have spared hands enough to man her. Cables were accordingly passed to her from the Merced, and she was towed in, a sufficient number of men being put on board to work the pumps, and do the labor indispensably necessary to keep the wreck afloat. This, it is stated, is always a dangerous proceeding, and, in vessels of the relative size of these (the Waterloo being about double the burthen of the Merced), must be attended with the most imminent risk. When Captain Driscoll, of the Orient, parted company with them, the wind was high and squally, and from fourteen to fifteen days were consumed before the wreck made land. Connecting with these facts the relation given by all the libellants, on their examination, that the weather continued tempestuous during the whole time, and that they encountered three severe storms, and it must be manifest that efforts of dauntless courage and constancy must have been put forth to secure this property. There is, then, a manifest propriety in charging the owners liberally, in proportion to the value so rescued; and I shall decree that two-thirds of the gross amount, after the deduction of duties, be paid to the salvors.

The manner in which this sum shall be distributed between the owner of the Merced and her master and crew, will next be investigated. Upon this branch of the case the testimony of the libellants may be received with less distrust, for, in so far as it proves that unceasing and extraordinary exertions were necessary on their part to save their own vessel and the wreck, it magnifies, in the same proportion, the importance of the Merced to the success of the enterprise. The toil and the peril were the crew's, but they had nothing else in jeopardy. The owner of the Merced had in risk upon the adventure a vessel and cargo, worth nearly double the wreck and her cargo, and that vessel was the essential instrument by which the salvage was made, and without which, in the crippled condition of the Waterloo, it could not have been effected. In this point of view, the claims of the respective parties upon the fund would seem to stand nearly in equilibrio; and probably the master and crew would accede to the propriety of an equal division. The court cannot, however, on this inquiry, lose sight of the situation in which the master and crew of the Merced stood in relation to her owner. He in no respect assented to this undertaking. It is not pretended that any discretionary power was given by him to use his vessel and cargo for purposes of this character. The master and crew took upon themselves to employ his property in an enterprise for their own profit. If successful, they expected to reap a rich reward; and, if otherwise, and their own vessel should be lost, they would run no other risk than that of their personal safety. They were in charge of property valued at about $72,000, the whole of which was put in most imminent hazard by this act. The insurances upon the vessel, cargo and freight were all forfeited by the deviation made to rescue the wreck. Nor does the case stand relieved by the consideration that the libellants were impelled by the loftier motive of saving human life. It was, on their part, a mere enterprise for securing wrecked property, with a view to their own emolument. These remarks apply to the

[2] In The Jubilee, decided in 1826, but not reported until 1840 (3 Hagg. Adm. 43, note), in a very meritorious case, the court awarded two-thirds as salvage, and ordered sufficient property to be sold to pay salvage and expenses, duty free. But a sale of cargo, duty free, in respect to salvage, is no longer allowed. 4 & 5 Wm. IV. c. 89, § 4. It would seem, therefore, that salvors would now pay duties on their share, or, which is the same thing, that salvage would be awarded out of what remains after duties on the gross amount are paid.

whole crew. The service was not enforced upon the seamen by the orders of their superior. The master had no authority, as they well knew, to exact it. He did not assume to do so. The crew were convened and fully consulted, and, after well considering the matter, gave their consent to the undertaking. With an earnest anxiety to encourage all efforts founded in humane motives, or tending to lessen the misfortunes of those whose property is abandoned at sea, courts cannot overlook the paramount duty of a ship's company to avoid every act which may unnecessarily lead to an exposure, to injury and loss, of the vessel and cargo committed to their charge. The interests of commerce exact the strictest fidelity from mariners in the performance of the trusts reposed in them. Their whole skill must be devoted to the service, and they well know that they have no right to depart from this duty, except under the influence of a controlling necessity. Had the deviation in this instance been made with a view to save life, I should adopt the sentiment of an eminent judge,—Bond v. The Cora [Case No. 1,621],—and say, that I would not be the first to decide that such deviation should compromit any right of the owner or freighter. Yet, when no such motive incites to the act, and no justification for a deviation exists, I cannot think that the interests of commercial navigation would be subserved by placing in the way of sailors temptations to abandon their immediate duty, in pursuit of enterprises and adventures of salvage. If the court should encourage seamen to put in imminent peril property worth $72,000, with a view to rescue $40,000 found derelict, it could not forbid their risking an Indiaman or a Guarda Costa, of ten times that value, for an object of still less importance. It is apprehended that the promulgation of such a doctrine would tend to unsettle the fidelity of seamen, and work measureless mischief to the security of navigation and trade. Whatever, then, the merits of the service may have been in relation to the owners of the Waterloo, the preceding observations indicate the opinion of the court that the crew of the Merced stand in a much less meritorious light, upon their claims, in competition with those of the owner of that vessel. If their dereliction of duty detracts so greatly from the reward they might otherwise receive, the consideration ought to have a still more important influence in the case of the master. He not only encouraged and instigated the crew to a breach of duty, but, on his own part, more directly betrayed the confidence of his employer, and violated his obligation to his vessel. He put his vessel and her valuable cargo to an excessive and most improvident risk; and he must also have been conscious that this abandonment of the business in which he was employed, to engage in another so incompatible with the safe fulfilment of his instructions, might have prejudiced his owner to many times the amount of all which could be realized in salvage. It is well known to every intelligent ship-master, that his failure to execute the charge imposed upon him will usually affect his principal not only to the extent of the shipment, but that a series of mercantile arrangements is usually framed upon a voyage, which may be disconcerted, to the ruin of his owner. The master of the Merced had no right, in judging of the probable advantage his owner might derive from the salvage of the wreck, to estimate only the possibility of the entire loss of the brig and of her cargo in the adventure, but he should also have contemplated the consequences to his owner, if he failed to realize his funds in a European port, where they were destined, and would undoubtedly be anticipated. The bearing this might have upon his owner's credit and fortune, ought not to have been lost sight of by the master, who was relied upon to fulfil those expectations. If these considerations were too remote and contingent to be objects of attention at the time the master decided to undertake this rescue, he ought at least to have been certain, that if the enterprise should result unfortunately, and his own vessel be lost, his owner would be indemnified to that extent. Yet, disregarding this plain dictate of prudence, he embarked in a project which destroyed the protection of any insurance his owner might have had, and substituted nothing in its place beyond his own personal responsibility. This is not shown to have been of any value. Although this extraordinary disregard of obligations to their owner by the master and seamen might perhaps justify the court in withholding all compensation from them personally, and transferring the whole salvage to the owner of the Merced, as his indemnity for the loss of the voyage, yet I am rather inclined to admit them to a moderate participation in the salvage, and shall therefore decree the payment of one-third part to them and two-thirds to the owner.[3]

I shall not discriminate, in the distribution of the salvage among the ship's company, between the master and the common sailors. If the superior experience and seamanship of the master were most serviceable in securing the ultimate safety of both vessels, so the dereliction of duty on his part was more inexcusable than that of his associates. Without his approbation, they could not

[3] In no previously reported case does more than one-half seem to have been allowed to the owner of the salving vessel. In The Henry Ewbank [Case No. 6,376], Concklin v. The Harmony [Id. 3,089], The Cora [Cases Nos. 1,620 and 1,621], and Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, 269, one-third was given to the owner. In Taylor v. The Cato [Case No. 13,786], The Cumberland [Id. 3,470], The Waterloo, 2 Dod. 433, 443, and The Columbia, 3 Hagg. Adm. 428, 431, one-half was given to the owner.

have abandoned the voyage in which they were engaged, to enter upon this undertaking, and there is no reason to suppose that, unless persuaded by him, they would have attempted or desired to do so. Besides, he chose, in order to secure his prize, to level himself to the situation of his crew. His witnesses testify, that he so weakened the force of the Merced as to be obliged himself to go aloft and to do the duty of a common sailor in all other respects, and he also imposed the like service upon the cook. The court, therefore, deems it proper to mark this case, by allotting to the master only the compensation of a common seaman, and to the sailors such reward as will barely show that the court does not disregard the bravery and perseverance with which they devoted themselves to the preservation of both vessels after they had embarked in the enterprise. Had these high qualities been displayed in a case free from the improprieties that accompanied this undertaking, the court would have felt great satisfaction in bestowing upon them the most liberal reward. If the master had been the owner of the Merced, or if she had been of very trifling value compared with the wreck, the court would have experienced the sincerest gratification in compensating him and his crew according to their respective merits in planning and prosecuting the salvage service.

The reasons which have led the court to the conclusion now adopted are already sufficiently detailed. It only remains to add, that there appears, from the proofs, to be no occasion for making a distinction in the apportionment of the salvage amongst the seamen. Each was required to do all that his strength would admit, on board of both vessels. I shall accordingly decree that the one-third part of the salvage be divided among the ship's company (including the passenger who performed the duty of a sailor with the others), share and share alike. Out of the residue of the proceeds in court, after deducting salvage, the clerk will pay the taxed costs of the libellants in their suit, and also in their answers and claims to the actions on the part of the United States, and the taxed costs and disbursements of the marshal, and the taxed costs of the clerk. The British consul having properly interfered to protect the interests of British subjects who might be interested, his taxed costs are also to be satisfied; and, it being made to appear to the court, that those interested in the Waterloo and her cargo have since sanctioned the steps taken by the Messrs. Barclays in behalf of the British underwriters, the clerk will further pay the taxed costs of those parties. The residue of the fund will remain in court, to abide its further order, on the application of those who may be entitled to it. Decree accordingly.

WATERMAN (COCHRANE v.). See Case No. 2,929.

WATERMAN (McCALLON v.). See Case No. 8,675.

Case No. 17,258.

WATERMAN v. MERRILL.

[2 Abb. U. S. 478, note.] [1]

Circuit Court, E. D. Michigan. June Term, 1870.

EQUITY—AMENDMENT OF ANSWER—MISTAKE.

[The court will not allow the theory of defense set up by the original answer to be changed in several important particulars merely on the ground that defendant filed the answer under a mistake, when no new facts are alleged, and there is no request to have a single fact in the bill changed.]

[In equity. On motion to amend the answer on the ground of mistake.]

LONGYEAR, District Judge, after stating the facts, and the rules of the court relating to pleadings, proceeded: "It will be observed that the proposition to amend is based exclusively upon the ground of mistake in points of law. Notwithstanding some dicta of the courts to the contrary, the rule seems to be well settled that amendments will not generally be permitted to be made where the application is based solely on the ground that the defendant, at the time he put in his answer, was acting under a mistake in point of law; and not on the ground of a fact having been incorrectly stated. Mr. Barbour (1 Ch. Prac. 164) goes so far to say 'the court has never permitted amendments to be made' under such circumstances; and Mr. Story (Eq. Pl. § 897) says, 'A distinction has also been made between the admission of a fact and the admission of a consequence in law or in equity.' I will not go so far, however, as to hold, that in no case would an amendment be allowed to be made in the admission of a legal or equitable consequence. Take a case of newly discovered facts, or of a mistake in the facts, in which such facts or such mistake would change the entire legal and equitable aspects of the case. Upon an amendment being allowed to the answer setting up such new facts, or correcting such mistake, the court would no doubt at the same time allow an amendment as to the admission of such legal and equitable consequences. But in the case at bar, without asking to have a single fact in the bill changed, or a single new fact alleged, the court is asked for leave to change the theory of defense set up and admitted by the original answer, in several important particulars. I do not think a case can be found in which this has been allowed to be done."

[This case was originally published in 2 Abb. U. S. 478, as a note to Hoover v. Reilly, Case No. 6,677.]

[1] [Report by Benj. Vaughn Abbott, Esq., and here reprinted by permission.]

Case No. 17,259.

WATERMAN v. MORGAN et al.

[N. Y. Times, Jan. 7, 1856.]

District Court, S. D. New York. 1856.

ADMIRALTY DECREE—EXCEPTIONS TO COMMISSIONER'S REPORT.

[The decree cannot be attacked by exceptions to the commissioner's report thereunder.]

[Libel by Robert H. Waterman against Charles Morgan and others. Heard on exceptions to the commissioner's report.]

Mr. Butler, for libelant.

Mr. Sherwood, for respondents.

HELD BY THE COURT [BETTS, District Judge]: That the decree cannot be impeached by means of exceptions to the report. That the commissioner is bound to conform to the decree, and all errors in that must be rectified by rehearing on appeal. That the commissioner has properly estimated the proofs and made the proper charges and credits in the cause. Exceptions overruled, and report confirmed, with costs.

Case No. 17,260.

WATERMAN v. THOMSON et al.

[2 Fish. Pat. Cas. 461; Merw. Pat. Inv. 664.] [1]

Circuit Court, S. D. New York. Dec., 1863.

PATENTS FOR INVENTIONS—USE BY PRIOR INVENTOR.

1. It is not necessary that a prior inventor should have worked the process with the same degree of skill and success as the patentee afterward attained. It is sufficient if he performed the operation substantially upon the method which the plaintiff claims, and that he did it with that degree of success which demonstrated its usefulness.

[Cited in Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 131.]

2. If the prior inventor merely made an experiment and failed, abandoning his contrivance because it would not work, then it is of no account. But the mere fact that he ceased to use it because he had no further occasion to do so, is, of itself, of no importance.

3. Where several prior inventions are offered in evidence to defeat a patent, the jury should agree on each separately, and, in order to find a verdict for the defendants, on any one of them, they must agree on that one.

This was an action on the case [by Henry Waterman against William S. Thomson and Charles H. Thomson], tried by Judge SHIPMAN and a jury, to recover damages for the infringement of letters patent [No. 21,286], for an "improvement in tempering wire and steel," granted to plaintiff, August 24, 1858. [Reissued Feb. 14, 1865, No. 1,874.] The claim of this patent was as follows: "The process of hardening steel wire, or thin steel, in long sections, being kept under a longitudinal strain by means of the wheels D D; while passing through the fire in the furnace C, the guide H, to conduct the wire directly from the fire into the hardening bath, in combination with such hardening bath, as specified."

George D. Sargeant and Charles M. Keller, for plaintiff.

Pennington, Sullivan & Harrison and George Gifford, for defendants.

SHIPMAN, District Judge (charging jury). It is the duty of the court to submit to you the rules of law which you are to apply to this case. This I will do very briefly.

The first legal question which is presented to us, is that which relates to the construction of the patent itself. What does it purport to secure to the plaintiff—a process, or a machine?

For the purposes of this case, I charge you, pro forma, that the patent purports to grant to the plaintiff the exclusive right to the process of hardening steel wire, and thin strips of thin steel, in long sections under tension, by means of the simple mechanism or machine, a model of which the plaintiff has presented to you, and the operation of which the witnesses have explained. This is denominated, by the counsel for the plaintiff, a "mechanical process," and it covers the peculiar method which the mechanism carries out, and any mechanism which is equivalent to that described in the patent, and illustrated by the model which works this process, is an infringement of the plaintiff's rights, provided he was the original and first inventor. When I speak of an equivalent mechanism, I mean one substantially like the plaintiff's, operating in substantially the same way.

The plaintiff insists that he was the original and first inventor of this process, and his patent is prima facie evidence that he was the original and first inventor. By prima facie evidence, I mean evidence which is sufficient to make out the case and sustain the patent, providing there was no countervailing evidence.

But the defendants deny that the plaintiff was the original and first inventor, and have offered evidence to disprove his claim.

This brings us to a series of important facts upon which the jury must pass, in coming to a verdict. I will call your attention to these facts, in the order in which you may find it convenient to consider them.

First. The defendants insist that Ely used this same process, which the plaintiff claims is covered by his patent, long before the date of the plaintiff's invention, and that Ely worked this process by substantially the same mechanism, operating substantially in the same way as that of the plaintiff. Here the burden of proof is on the defendants.

Now, if the jury are satisfied that Ely did work this process substantially as he has described on this trial, at the time he states, then the defendants are entitled to a verdict.

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 664, contains only a partial report.]

By working this process, I mean successfully working it, by performing substantially the same thing as the plaintiff performs with his machine, in substantially the same manner. It is not necessary that Ely's wire should have been flat; the process applies to round as well as flat wire. It is not necessary that he should have used his wire for skirts, or that any one should have done so; nor is it necessary that he should have worked the process with the same degree of skill and success as the plaintiff has attained. It is sufficient if he performed the operation of hardening his wire substantially upon the method which the plaintiff claims, and that he did it with that degree of success which demonstrated its usefulness. If he merely made an experiment and failed, abandoning his contrivance because it would not work, then it is of no account. But the mere fact that he ceased to use it because he had no further occasion to do so, is, of itself, of no importance. Now, the evidence on this point is already familiar to the jury; it rests mainly on the testimony of Mr. Ely. He has been before you, and presented an explanation in words, aided by his model of the method or process which he used. You saw him, noted his manner, and you alone must determine whether or not he is entitled to credit. If you are satisfied that he is entitled to belief, and find that his method and mechanism, though the latter was somewhat rudely constructed, were successfully and substantially like those of the plaintiff, and had not been forgotten by him, then the defendants are entitled to a verdict, and you need inquire no further.

If the jury do not find that the defendants are entitled to a verdict, on the ground that Ely anticipated the invention of the plaintiff, when the evidence is tried by the rules I have laid down, then they will inquire further—

Second. As to the process stated by Gibbs. You will apply the same rules to the evidence on this point that I have submitted in connection with Ely's alleged invention, and if you find that, in accordance with these rules, Gibbs anticipated the plaintiff's invention, then the defendants will be entitled to a verdict, and you need inquire no further.

If you are satisfied that Gibbs did not anticipate the invention of the plaintiff, then you will inquire—

Third. Whether Quilet did so. The same rules of law must be applied to the evidence touching Quilet's method and machine as those which I have stated you are to apply to those of Ely and Gibbs. If you find that Quilet has anticipated the invention of the plaintiff, then the defendants are entitled to a verdict. But if you do not so find, then you will inquire—

Fourth. Whether Mr. Clark, of Northampton, worked this process, claimed by the plaintiff, at the date he names, by hardening steel wire successfully in the tinning machine; and if he did, you will find your verdict for the defendants. If you find this point also against the defendants, then you will inquire—

Fifth. Whether Washburn's method and machine anticipated the plaintiff's invention; if it did, when tried by the rules already given, then the defendants are entitled to a verdict.

If you shall find that neither Ely, nor Gibbs, nor Quilet, nor Clark, nor Washburn, anticipated this invention, and worked this process as here described, before the plaintiff did, then the plaintiff is entitled to a verdict, and to such damages as he has proved to you he has sustained, and no more.

In passing upon the several processes and machines of Ely, Gibbs, Quilet, Clark, and Washburn, the jury should agree upon each separately, and in order to find a verdict for the defendants, on any one of them, they must agree on that one.

This is an important case to both parties, and is to be determined by the facts as they appear in proof and address themselves to the understanding of the jury. They will render such a verdict as, in their judgment, the evidence calls for, without reference to the consequences to either party.

[For another case involving this patent, see Waterman v. Wallace, Case No. 17,261.]

Case No. 17,261.

WATERMAN v. WALLACE et al.

[13 Blatchf. 128; 2 Ban. & A. 126.] [1]

Circuit Court, D. Connecticut. Sept. 22, 1875.

ASSIGNMENT OF PATENT — EXTENSION OF TERM — EFFECT—CONSTRUCTION OF DEED—DECLARATIONS OF GRANTEE.

1. An assignment recited the granting of a patent to H., the assignor, and its reissue, and that K. "is desirous of acquiring all my right, title and interest therein, in accordance with the terms and conditions of a certain deed of trust executed by him," and then conveyed to K., in trust, "all my right, title and interest of, in and to the aforesaid reissued letters patent and the invention thereby secured." Afterwards, K. gave a license to W., which recited that both of the patents, and the invention secured thereby, had been assigned, in trust, to K., "for and during the unexpired term for which the same have been granted, and for and during any and all terms to which they or either of them may be extended," and then granted to W. a license under both of the patents, "the same to be exercised during the unexpired terms for which the said patents are granted, and may be hereafter extended." Afterwards, the patent was extended: *Held*, that the license to W. expired with the original term of the patent.

2. K. obtained, by the assignment to him, only the interest of H. for the original term.

3. An assignment of "the invention," after a patent has been issued, without any other language to indicate the intention of the parties, does not import a conveyance of the right to an extended term.

4. The written declaration of a trustee, in a conveyance to a third person, of property which had been previously conveyed to the trustee by his cestui que trust, cannot be used against the latter, to determine the intent of both parties in making the original conveyance, and to show the extent of the interest which the cestui que trust intended to convey thereby.

[1] [Reported by Hon. Samuel Blatchford, District Judge; reprinted in 2 Ban. & A. 126; and here republished by permission.]

In equity.

Charles F. Blake, for plaintiff.

John S. Beach and William B. Wooster, for defendants.

SHIPMAN, District Judge. Letters patent of the United States for an improvement in "tempering wire and steel" were granted to Henry Waterman, on August 24th, 1858, were reissued on February 14th, 1865, and, on August 20th, 1872, were extended for seven years from the expiration of the original term. On September 1st, 1865, said Waterman assigned the "reissued letters patent, and the invention thereby secured" to Charles M. Keller. The assignment is as follows: "Whereas, I, Henry Waterman, of Brooklyn, in the state of New York, did obtain letters patent of the United States, bearing date August 24th, 1858, for improvements in hardening steel wire, which said letters patent were reissued to me on the 14th day of February, 1865; and whereas Charles M. Keller, of the city, county and state of New York, is desirous of acquiring all my right, title and interest therein, in accordance with the terms and conditions of a certain deed of trust executed by him, dated the 1st day of September, 1865—now this indenture witnesseth, that, for and in consideration of the sum of one dollar to me paid, and of the faithful performance, by said Keller, of the terms and conditions in said deed mentioned, I have assigned, sold and set over, in trust, and do hereby assign, sell and set over, in trust, all my right, title and interest of, in and to the aforesaid reissued letters patent, and the invention thereby secured. In witness whereof, I have hereunto set my hand and seal, this 1st day of September, 1865. Henry Waterman. (L. S.)" On November 1st, 1865, Mr. Keller licensed the defendants to use the patented improvement. The portion of the license which is material to the present case, is as follows: "Whereas both of the said patents, and the invention secured thereby, were, on the 1st day of September, 1865, assigned, in trust, to the party of the first part, for and during the unexpired terms for which the same have been granted, and for and during any and all terms to which they or either of them may be extended, * * * the party of the first part has agreed to, and by these presents does, grant severally to each of the before recited parties and their successors, the right, privilege or license, under both of the said patents, to harden and temper hoop skirt and other steel wire, the same to be exercised during the unexpired terms for which the said patents are granted, and may be hereafter extended, on the terms and conditions hereinafter specified."

The bill, praying for an injunction and an account, was filed January 13th, 1873. The defendants [Wallace & Sons and others] admit, in their answer, that they are using the patented process, and rely solely upon the license from Mr. Keller. The only question in this case, which has been tried upon the pleadings alone, is, whether the defendants' license expired with the original term of the patent, It is manifest, that the deed of Mr. Keller purported to give a license during the extended term, and declared that he had title to the invention during any extension which might be granted. It is not denied by the complainant, that, if Mr. Keller had such title, the defendants now have a valid and continuing license; but the complainant insists, that the assignee, having obtained merely the interest of the patentee during the original term, could grant nothing beyond the expiration of that term. "No one, in general, can sell personal property, and convey a valid title to it, unless he is the owner, or lawfully represents the owner. Nemo dat quod non habet." Mitchell v. Hawley, 16 Wall. [83 U. S.] 550. What, then, was the extent or duration of Mr. Keller's interest in the invention? "An assignment of an interest in an invention secured by letters patent is a contract, and, like all other contracts, is to be construed so as to carry out the intention of the parties to it. It is well settled, that the title of an inventor to obtain an extension may be the subject of a contract of sale, and the inquiry is, whether the instrument of sale employed in this case did secure to the purchaser an interest not merely in the original letters patent, but in any subsequent extension of them." "There is no artificial rule in construing a contract, and effect, if possible, is to be given to every part of it, in order to ascertain the meaning of parties to it." Nicolson Pavement Co. v. Jenkins, 14 Wall. [81 U. S.] 456. It seems, also, to be the settled law in the construction of contracts of the character which is now under consideration, that a sale of "the invention" does not necessarily carry with it the exclusive right for the extended term, but, "where an inventor has, in terms, sold to another person a part of his invention, he has done that which is quite consistent with an intent to have that other person participate in all the rights which he, as inventor, can acquire by law." If, from the whole conveyance, or from a cotemporaneous written instrument which has been executed by the parties in relation to the assignment, and in connection therewith, the court can discover that they intended to convey an interest in the invention for the extended term, a construction in accordance with the apparent intention will readily be given to the contract. This intention of the parties is ascertained, "not so much by reason of any superior force in the term 'invention,' as by other clauses which point to the extent and duration of the interest which was designed to be vested in the grantee." Clum v. Brewer [Case No. 2,909]; Curt. Pat. § 208; Ruggles v. Eddy [Id. 12,117]; Mowry v. Grand St. & N. R. Co. [Id. 9,893]; Nicolson Pavement Co. v. Jenkins, cited supra.

The deed to Mr. Keller, after reciting, that, whereas the grantor obtained letters patent, a description of which is given, and whereas the grantee is desirous of acquiring all the grantor's right, title and interest therein, i. e., in the letters patent, assigns to the grantee "all my right, title and interest in and to the afore-

said reissued letters patent, and the invention thereby secured." There is no habendum clause in the deed, which may make more evident the intention of the parties, and the language of the deed of trust which was executed by Mr. Keller is not contained in the bill or answer. The recitals in the assignment indicate that the conveyance of the reissued letters patent only was intended, and there is nothing in the deed to show that any other intention existed, unless it is to be found in the words "and the invention thereby secured." Until it is authoritatively decided that a conveyance of the letters patent and of the invention is, of itself, a conveyance of the inchoate right of the inventor to an extension, I am constrained to hold, in conformity with the weight of authority as it now exists, that an assignment of the invention, after a patent has been issued, without any other language to indicate the intention of the parties, does not import a conveyance of the right to an extended term. I do not understand that the supreme court, in Nicolson Pavement Co. v. Jenkins, 14 Wall. [81 U. S.] 452, intended to assert, that an assignment of the invention merely, conveyed the interest of the inventor to an extension. On the other hand, "that decision assumes, that an assignment of the invention, without words importing an intention to convey a present and a future interest, will not pass the right to an extension." Mowry v. Grand St. & N. R. Co. [supra].

It is claimed, that the license from Mr. Keller to the defendants clearly shows the construction which he placed upon the assignment soon after it was executed, and is of weight in ascertaining the intention of the parties to the deed. The claim is not made, that an assignee of a patent can, by his subsequent deed to a third person, be able to enlarge the construction which would otherwise be given to the original conveyance, but, it is contended, that, as Mr. Keller was trustee for the complainant, he became, in a certain sense, the representative or agent of the patentee, and that the patentee is bound by the declarations of the trustee. It cannot, however, be admitted, that the written declarations of a trustee, in a conveyance to a third person, of property which had previously been conveyed to the trustee by his cestui que trust, can be used against the latter, to determine the intent of both parties in making the original conveyance, and to show the extent of the interest which the cestui que trust intended to convey by his deed. Parol evidence of the declarations of both parties is not admissible to vary the legal effect of the assignment. Ruggles v. Eddy, cited supra. Neither can the written and solemn declarations of the grantee alone, subsequent to the deed, be permitted to enlarge the grant in his favor.

Although I am inclined to believe that there is a hardship in the position in which the defendants are placed, I am of opinion that it is a hardship from which they cannot be relieved under the present state of the decisions, unless the deed of trust which Mr. Keller executed and the patentee accepted, and which is referred to in the assignment, shows that it was the intent of the grantor to convey to Mr. Keller the extended term.

Let there be a decree for an injunction and an account.

[For another case involving this patent, see Waterman v. Thomson, Case No. 17,260.]

WATERMAN (WILLIAMS v.). See Case No. 17,745.

WATERS (BOWEN v.). See Case No. 1,725.

Case No. 17,262.

WATERS v. BUSSARD et al.

[2 Cranch, C. C. 226.] [1]

Circuit Court, District of Columbia. April Term, 1821.

SET OFF—DEBT DUE ONE DEFENDANT.

A debt due by the plaintiff to one of two joint defendants, cannot be set off against the joint debt to the plaintiff.

Debt upon a sealed bill. Plea, payment, and an account in bar.

The defendants [J. R. Bussard and Daniel Bussard] offered to set off an account of J. R. Bussard against the plaintiff for medical services.

Mr. Caldwell, for plaintiff.

H. H. Chapman, for defendants.

THE COURT (CRANCH, Chief Judge, doubting) refused to allow the account to be given in evidence.

Case No. 17,263.

WATERS v. BUTLER.

[4 Cranch, C. C. 371.] [1]

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

SALE UNDER DEED OF TRUST—NOTICE TO GRANTOR TO QUIT.

1. A purchaser, under a deed of trust, need not give notice to quit, before bringing ejectment against the grantor of the trust-deed.

2. Notice to quit is not necessary where the relation of landlord and tenant does not exist.

3. If, by the terms of the deed of trust, the grantor is to retain the possession until a sale should be made under the deed, his tenancy ceases upon the sale, and no notice to quit is necessary.

Ejectment [by Waters' and Scott's lessee] for a city lot sold to the plaintiff's lessor by the trustee under a deed of trust from the defendant [William Butler] to secure a debt due by him to the plaintiff's lessor.

Mr. Marbury, for the defendant. The verbal notice to quit, given by Mr. Fendall, was less than three months. A mortgagor in possession is entitled to notice; but here,

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

also, was a covenant that the grantor should retain possession until a sale should become necessary according to the terms of the deed of trust. This is not under a decree of foreclosure, which severs the privity of contract between mortgagor and mortgagee.

Mr. Wallach, contra. There the relation of landlord and tenant does not exist; and where the defendant claims to hold in fee, notice is not necessary. But the notice is sufficient. The time is not material. Notice is not necessary where the relation of landlord and tenant does not exist. 1 Wheat. Selw. 585; Jackson v. Chase, 2 Johns. 84; Jackson v. Fuller, 4 Johns. 215; Jackson v. Deyo, 3 Johns. 422; 13 Johns. 106; 2 Johns. 353.

THE COURT (MORSELL, Circuit Judge, doubting) refused to instruct the jury, that three months notice to quit was necessary; being of opinion that no notice was necessary, because the relation of landlord and tenant did not exist, and that, if it did, the tenancy was only until a sale should become necessary, and ended when the sale was made. The end of the tenancy was certain, because it could be rendered certain.

Verdict for the plaintiff.

Case No. 17,264.

WATERS v. CAMPBELL.

[4 Sawy. 121; 9 Chi. Leg. News, 99; 15 Alb. Law J. 16.] [1]

Circuit Court, D. Oregon. Nov. 24, 1876.

ALASKA—HOW FAR INDIAN COUNTRY—LICENSE TO TRADE—REPEAL OF STATUTE.

1. Alaska is not "Indian country" in the technical sense of that phrase, only so far as the introduction and disposition of spirituous liquors is concerned; and, subject to this restraint, it is open to occupation and trade generally.

[Cited in U. S. v. Williams, 2 Fed. 62; Kie v. U. S., 27 Fed. 352.]

2. There is no law of the United States requiring persons to be licensed to trade in Alaska, even with the Indians.

3. The provision of the general appropriation act of March 3, 1873 (17 Stat. 530), extending sections 20 and 21 of the Indian intercourse act of June 30, 1834 [4 Stat. 729], over Alaska, being local in its character, was not repealed by the repealing clause of section 1954 of the Revised Statutes.

4. The proviso in section 1954 of the Revised Statutes should be placed at the end of it, and not in the middle of the second clause of it, as now printed.

[Cited in Eyre v. Harmon, 92 Cal. 585, 28 Pac. 780.]

This was an action [by Hugh Waters against James B. Campbell] for false imprisonment. It was commenced on June 27, 1876, in the state circuit court for the county of Clatsop, and subsequently, upon the petition of the defendant, removed to this court.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 15 Alb. Law J. 16, contains only a partial report.]

W. W. Page and Hugh T. Bingham, for plaintiff.

W. W. Upton and Rufus Mallory, for defendant.

DEADY, District Judge. The complaint herein alleges that the plaintiff, on and before September 18, 1874, "was residing and doing a lawful business, trading in goods, wares and merchandise, at Fort Wrangle, in the territory of Alaska," and that the defendant, being then and there a resident of Sitka, in said territory, "maliciously, and without probable cause or lawful authority," arrested the plaintiff and kept him in custody at said Wrangle and Sitka until December 24, 1874, when he caused said plaintiff to be removed from said Territory to this port, in custody, thereby wrongfully imprisoning the plaintiff for the period of one hundred and eighteen days.

The defendant demurs to the complaint, because it does not state facts sufficient to constitute a cause of action. Upon the argument of the demurrer the only cause assigned was that as it appeared from the complaint that the plaintiff was engaged as a trader in Alaska it should also appear therefrom that he was at the time duly licensed as an Indian trader therein; and that, this fact not being alleged, it followed that the plaintiff was wrongfully in the country, and therefore cannot maintain an action for the alleged false imprisonment.

The demurrer is overruled. The argument in support of it assumes that the defendant at the date of the imprisonment was a military officer of the United States, having authority to arrest and remove the plaintiff from Alaska, upon the ground that the latter was engaged in trading with the Indians therein contrary to law.

But it does not appear that the defendant is or was a person having authority to arrest or imprison any one in Alaska, or that he acted in the premises otherwise than as a private citizen. In fact, the demurrer admits the allegation of the complaint, that the arrest was made without authority or probable cause.

But even assuming, as the argument for the demurrer did, that it appears that the defendant was an officer of the United States army in command in Alaska at the time of the imprisonment, still the demurrer is not well taken.

It does not appear from the complaint that the defendant was trading with the Indians in Alaska. There are other people than Indians in Alaska with whom he might trade. The country is not occluded, but is open to occupation by any one who may choose to go there, subject to certain restraints concerning the introduction and disposition of spirituous liquors.

Alaska is not "Indian country" in the technical sense of that term any further than congress has made it so. U. S. v. Seveloff

[Case No. 16,252]. Section 1 of the Alaska act of July 27, 1868 (15 Stat. 240; Rev. St. § 1954), having been amended by the general appropriation act of March 3, 1873 (17 Stat. 530), so as to extend over the territory of Alaska (sections 20 and 21 of the Indian intercourse act of June 30, 1834 [4 Stat. 732]), said territory, so far as the introduction and disposition of spirituous liquors is concerned, was thereby made "Indian country." In re Carr [Case No. 2,432]. Subject to this restriction, the country seems to be open to occupation and trade, even with Indians. The provisions of the intercourse act of 1834 (section 2129 et seq. of the Revised Statutes) which prohibit trading with the Indians in the Indian country, except under a license from a superintendent or agent of Indian affairs, are local in their character; and not having been specially extended over Alaska, as sections 20 and 21 aforesaid were, are, therefore, not in force there.

There is even some question whether said sections 20 and 21 are in force there since the enactment of the Revised Statutes. Chapter 3 of title 23 aforesaid, of the Revised Statutes, does not contain section 1 of Alaska act, as amended by the general appropriation act aforesaid, of March 3, 1873, but only as originally enacted, and therefore the provisions extending sections 20 and 21 of the Indian intercourse act over Alaska are not contained in the Revised Statutes. The Revised Statutes were passed June 22, 1874; but the revision not having been brought down further than December 1, 1873, they were postponed in effect to all acts passed after that date.

Section 5596 of the Revised Statutes provides: "All acts of congress passed prior to said first day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general or permanent in their nature; provided, that the incorporation into said revision of any general or permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local or temporary character, shall not repeal or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of congress passed prior to said last-named day, no part of which are embraced in said revision, shall not be affected or changed by its enactment."

A mere glance at this section shows that there is a blunder in its composition or printing. After a somewhat careful examination and analysis of it, I think it was intended to be arranged and read thus: Let the proviso end with these words at the beginning of the third line from the bottom of the section, "shall remain in force," and then place it at the end of the section, instead of in the middle of the second clause thereof, as it now appears to be. The second clause will then read, "all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general or permanent in their nature, and all acts of congress passed prior to said last-named day, no part of which are embraced in such revision, shall not be affected or changed by its enactment."

By the first clause of this section, the general appropriation act of March 3, 1873, including the clause extending sections 20 and 21 aforesaid over Alaska, is repealed, because a portion of the same is embraced in section 1954 "of said revision." But the proviso to the section excepts from the operation of this clause "any provision of a private, local or temporary character" contained in such appropriation act. The provision extending sections 20 and 21 of the Indian intercourse act over Alaska is local in its character, and therefore not repealed by this repealing clause. The same effect may be produced by the second clause of the section, because it exempts from the operation of the repealing clause all parts of the acts of congress not contained in the revision and not being general or permanent in their nature. The demurrer is overruled.

[For opinion on defendant's motion for a new trial, see Case No. 17,265.]

Case No. 17,265.

WATERS v. CAMPBELL.

[5 Sawy. 17; 10 Chi. Leg. News, 68; 4 Law & Eq. Rep. 616.] [1]

Circuit Court, D. Oregon. Sept. 3, 1877.

ARREST BY MILITARY FORCE — TRIAL BY CIVIL AUTHORITIES—INDIAN INTERCOURSE ACT.

1. A person arrested by military force for the violation of section twenty or twenty-one of the Indian intercourse act of June 30, 1834 (4 Stat. 732), is not a military prisoner subject to the articles of war, but a citizen charged with a non-military crime, and must be removed for trial by the civil authorities within five days from his arrest or discharge; and his detention thereafter under any circumstances is unlawful.

2. A person under arrest as above stated may be confined in the military prison, but he cannot be lawfully required to labor or perform any duty other than taking care of his person.

Motion for new trial, for error in the charge of the court and excessive damages in the verdict.

This action was brought to recover damages for the alleged false imprisonment of the plaintiff [Hugh Waters] by the defendant [James B. Campbell] in Alaska, for the period of one hundred and thirteen days following September 18, 1874. It was commenced on

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 4 Law & Eq. Rep. 616, contains only a partial report.]

June 27, 1876, in the circuit court of the state for the county of Clatsop; and on August 8, thereafter, was removed by the defendant to this court. [For opinion overruling demurrer, see Case No. 17,264.]

On the trial it appeared that the defendant at the time of the alleged false imprisonment was an officer in the army of the United States, and in command of the military post at Sitka in Alaska; that on August 31, 1874, Gen. J. C. Davis, then commanding the department of the Columbia, ordered the defendant to send a detachment of soldiers under a commissioned officer to Wrangel, in Alaska, "to co-operate with the deputy collector of internal revenue in breaking up the illicit traffic in liquors" at that place, with directions that all persons arrested should be taken to Sitka and "dealt with according to law;" the officer executing this order was referred for his guidance in the premises to the act of March 15, 1864 (13 Stat. 29), amending section 20 of the Indian intercourse act of June 30, 1834 (4 Stat. 732), and also section 21 of the latter, as well as the act of March 3, 1873 (17 Stat. 530), extending said sections 20 and 21 over the territory of Alaska; that on September 14, 1874, the defendant ordered Lieut. Dyer to proceed to Wrangel on the steamer bound for Portland, Oregon, and execute the order of Gen. Davis; that on September 18, said Dyer arrested the plaintiff and others at Wrangel as persons found engaged there in introducing spirituous liquors into the country contrary to said section 20, and sent them under guard, on October 22, to Sitka, upon the steamer going from Portland to that place, where they arrived on October 24, and remained in custody until December 24; that the defendant refused to send the plaintiff to Portland for trial on the return trip of the steamer that conveyed him to Sitka, but sent him there as soon thereafter as he could, where he arrived on January 5, 1875, and was discharged by the United States commissioner on January 9 following; that the only mode of communication during this period between Sitka and Wrangel and Portland, Oregon, was by means of the mail steamer which made monthly trips between Portland and Sitka; that while the plaintiff was detained at Sitka, he was confined in the guard-house with military culprits and compelled to perform the labor usually imposed upon such persons.

Section 20 aforesaid prohibits the introduction of spirituous liquors into Alaska, without the order of the war department, under the penalty of fine and imprisonment. By sections 2150, 2151 of the Revised Statutes, compiled from sections 21 and 23 of the aforesaid intercourse act, the military force of the United States may be employed, under such regulations as the president may direct, to arrest persons in the Indian country, and convey them to the civil authority for trial; but "no person apprehended by military force" in such case "shall be detained longer than five days after arrest and before removal;" and "all officers and soldiers who may have any such person in custody shall treat him with all the humanity which the circumstances will permit." The act of March 3, 1873, aforesaid, is a part of the civil appropriation act of that date, by which the Alaska act of July 27, 1868, was amended, so as to extend over the territory of that name sections 20 and 21 aforesaid, and thereby make it "Indian country." The cause was tried in June, 1877, before the district judge, with a jury, and a verdict found for the plaintiff for three thousand five hundred dollars.

Among others, the following instructions were given to the jury: "The defendant is not responsible for the arrest and imprisonment of the plaintiff at Wrangel, unless he personally directed it to be done. In detailing Lieutenant Dyer to proceed to Wrangel and execute the order from General J. C. Davis, the commander of the department, the defendant did not direct or make himself responsible for the arrest or imprisonment of any one. In so doing he but performed his duty. If in the execution of this order Dyer arrested the plaintiff at Wrangel, and imprisoned him there, the defendant is not responsible for it. But if, as has been testified by the witness John A. Carr, the defendant went further and personally directed Dyer to arrest and imprison the plaintiff, then he is responsible for it. * * * The defendant is responsible for the imprisonment and treatment of the plaintiff while at Sitka, the port under his immediate command. This he admits and justifies. The defendant was authorized to arrest the plaintiff if he had probable cause to believe that he was guilty of introducing spirituous liquors into Alaska contrary to section 20 of the Indian intercourse act of May, 1834—that is, without the sanction of the war department. The official report of Major Rodney, made in August, after an inspection of the plaintiff's premises at Wrangel, and the affidavits of John Vierria and J. M. Edgar, taken by Dyer at that place, contains probable cause for the arrest. The facts stated in these writings show that the plaintiff was engaged in the violation of this law. But the defendant was bound to commence the removal of the plaintiff for trial by the civil authorities within five days from the time he took him into custody, and therefore the imprisonment of the plaintiff at Sitka became false and unlawful after that period. It is maintained by counsel that under article 69 of the articles of war, which reads: 'Any officer who presumes, without proper authority, to release any person committed to his charge, or suffers any person so committed to escape, shall be punished as a court-martial may direct,' the defendant was directed to keep the plaintiff in custody at Sitka, until directed by the commander of the department to dispose of him otherwise. But in my judgment this article of war is not ap-

plicable to the plaintiff. For although arrested by military force he was not a military prisoner—not a part of the army of the United States, and therefore not subject to the articles of war. In taking the plaintiff into custody, the defendant was acting as a civil officer in enforcing an act of congress against a citizen. This act provided what disposition should be made of the prisoner. He was not arrested for a military crime nor to be tried by the military authority. The military force was used to accomplish his arrest, because there were no civil officers in the territory, but the act authorizing his arrest also required that he should be removed for trial by the civil authority within five days therefrom. The order of General Davis under which this arrest was made was evidently prepared with this act in view, for it not only refers to it, but provides that 'All persons arrested will be taken to Sitka, and dealt with according to law.' If it was impossible for the defendant to commence the removal of plaintiff for trial by the civil authority within five days from the time he received him into his custody, there was no alternative but to discharge him. His power over the plaintiff under this arrest was gone and thereafter the imprisonment became illegal. This question was considered in the district court in the case In re Carr [Case No. 2,432]. In that case Carr was brought from Sitka on a habeas corpus and discharged upon the ground that he had been detained by this defendant more than five days after his arrest there. In deciding the question the court said: 'The petitioner having been detained over five days, indeed nearly ninety, before any attempt was made to remove him for trial by the civil authorities, his detention thereafter became unlawful and unauthorized. The statute is peremptory upon the subject, and with good reason—"Provided, that no person, apprehended by military force as aforesaid, shall be detained longer than five days after the arrest and before the removal." If the removal cannot be commenced in that time the prisoner must be discharged. It was supposed by congress, as this proviso manifests, that these arrests would often be made at remote and out of the way places, where the prisoner would be comparatively helpless, without access to counsel or friends, and if the officer whose custody he was in was to be the judge of when he would, or conveniently could, remove him to the civil authorities for trial, it might sometimes happen that the detention would be continued captiously or maliciously, and the imprisonment become grossly oppressive.' In Barclay v. Goodale [Id. 972] (August 17, 1872), sitting in this court, I held, after able argument and full consideration of the premises, that the defendant, who had arrested the plaintiff upon a similar charge and detained him more than five days before removal, because he had no sufficient means wherewith to do otherwise, was liable for false imprisonment. But the plaintiff was not falsely imprisoned from December 24, 1874, until January 9, 1875, while he was being removed to this place for trial under the order of the defendant. The defendant having probable cause to take the plaintiff into custody on October 24, when he arrived at Sitka from Wrangel, had the same cause to rearrest him on December 24. I think, therefore, the order under which the plaintiff was finally conveyed here should, in justice to the defendant, be regarded in the light of a new arrest, and the imprisonment under it lawful. In making up your verdict, then, you start with the undisputed fact that the defendant falsely, wrongfully, imprisoned the plaintiff from October 29 to December 24, 1874, a period of fifty-six days. * * * The plaintiff being entitled to recover, the amount of your verdict must depend upon the injury which he has sustained, and the motives which influenced the defendant. In estimating the direct injury to the plaintiff you will take into consideration his station in life, calling, the value of his time, and the like. You will also consider whether the defendant acted from good motives, under a mistake as to the law, or whether he acted wantonly or from malice. In the former case you should confine the damages to the actual loss or injury which the plaintiff appears to have suffered, while in the latter you may and should go farther and fix the damages accordingly. The plaintiff being a non-military person, a citizen merely under arrest upon the charge of having committed a non-military crime, ought not to have been compelled to work during his confinement or to perform any duty unless it was to take care of his person. The plaintiff has given evidence, including his own testimony, tending to show that he was harshly and inhumanly treated; that he was compelled to work at times and under circumstances that would be improper even in the case of a soldier committed to the guard-house as a punishment for an offense. It is admitted by the defense that the plaintiff was required to do fatigue duty about the post in common with the soldiers confined in the guard-house with him, but not otherwise. The evidence offered by the defendant tends to prove that the plaintiff was treated humanely and kindly, and was not required to work or perform any duty other than might properly be required of a soldier under like circumstances. It is for you to judge between these conflicting statements. But in any event, it was wrong to require the plaintiff to work at all while in custody awaiting trial; and that fact should be considered by you in estimating the damages."

W. W. Page, H. T. Bingham, and G. W. Yocum, for plaintiff.

W. Upton and Rufus Mallory, for defendant.

Before FIELD, Circuit Justice, and DEADY, District Judge.

FIELD, Circuit Justice. We think there was no error in the charge of the court, and that the law of the case was delivered to the jury correctly. But we think the damages found by the jury excessive, and there must be a new trial on that ground, unless the plaintiff consents to remit one thousand five hundred dollars of the verdict.

The plaintiff, consenting accordingly, had judgment for two thousand dollars.

WATERS (DIXON v.). See Case No. 3,936.

WATERS (EDDS v.). See Case No. 4,275.

WATERS (HAZEL v.). See Cases Nos. 6,283, 6,284.

Case No. 17,266.

WATERS v. MERCHANTS' LOUISVILLE INS. CO.

[1 McLean, 275.] [1]

Circuit Court, D. Kentucky. Nov. Term, 1836.

FIRE INSURANCE—POLICY ON VESSEL—NEGLIGENCE OF OFFICERS—BARRATRY.

1. Where fire is one of the enumerated risks in a policy on a steamboat, &c. a loss by fire will charge the underwriters, though occasioned by the negligence of the officers or crew.

[Cited in National Ins. Co. v. Webster, 83 Ill. 472.]

2. If the negligence be so gross as to authorize the presumption of fraud, which would constitute barratry, the underwriters are not liable, unless the policy expressly insures against barratry.

3. A policy against fire on land, will, in the event of loss, hold the underwriters liable, though the fire was the result of negligence by servants and others.

4. And the same rule of construction should be applied to marine policies.

5. The rule of construction is of general interest, as it refers as well to our foreign, as our internal commerce, and it should be uniform.

At law.

Mr. Guthrie, for plaintiff.

Mr. Crittenden, for defendants.

McLEAN, Circuit Justice. This action is brought on a policy of insurance underwritten by the Merchants' Louisville Insurance Company, which insured to the plaintiff, "lost or not lost, in the sum of six thousand dollars, on the steamboat Lioness, engine, tackle and furniture, to navigate the western waters, usually navigated by steamboats, particularly from New Orleans to Natchitoches on Red river, or elsewhere, the Missouri and Upper Mississippi excepted, (Captain [William] Waters having the privilege of placing competent masters in command, at any time, six thousand dollars being insured at New Albany, Indiana,) whereof William Waters is at present master; beginning the adventure upon the said steamboat, from the 12th of September, 1832, at twelve o'clock, meridian, and to continue and endure until the 12th of September, 1833, at twelve o'clock, meridian, (twelve months.) The policy provided that "it shall be lawful for the said steamboat, during said time, to proceed to, touch and stay at any point or points, place or places, if thereunto obliged by stress of weather, or other unavoidable accidents, also, at the usual landings for wood and refreshments, and for discharging freight and passengers, without prejudice to this insurance." "Touching the adventures and perils which the aforesaid insurance company is contented to bear; they are, of the rivers, fire, enemies, pirates, assailing thieves, and all other losses and misfortunes, which shall come to hurt, detriment, or damages of the said steamboat, engine, tackle and furniture, according to the true intent and meaning of this policy." The declaration alleged that the said steamboat Lioness, her engine, tackle, and furniture, after the execution of said policy, and before its termination, to wit, on the 19th of May, 1833, on Red river, about one hundred miles below the mouth of Bon Dieu river, whilst she was on her voyage from New Orleans to Natchitoches, Louisiana, on Red river, were, by the adventures and perils of fire and the river, exploded, sunk to the bottom of Red river aforesaid, and utterly destroyed; so as to cause and make it a total loss." Several pleas have been filed alleging that the Lioness was loaded in part with gun powder, and that the officers and crew at the time of the explosion of the vessel so negligently, unskilfully and carelessly conducted themselves, in managing the vessel, and in carrying a lighted candle or lamp in the hold of the vessel, where the powder was stowed, as to communicate fire to the powder, which caused the explosion and loss of the vessel. To these pleas the plaintiff demurred, and the defendants joined in demurrer.

The pleadings in this case present the question whether the defendants are liable on the policy, for a loss of the vessel through the negligence of the officers and crew. There is no insurance in the policy against barratry, but the negligence alleged in the pleas does not amount to barratry. Barratry is an act committed by the master or mariners of a ship, for some unlawful or fraudulent purpose, contrary to their duty to their owner, whereby the latter sustains an injury. It follows from the terms of this definition, that barratry cannot be committed by a master who is owner for the voyage, because he cannot commit a fraud against himself. In this case Waters, the assured, appears to be the owner. But, independent of this consideration, there is no such negligence alleged in any of the pleas that amounts to fraud, and this is necessary to constitute barratry. Until within a few years, actions on policies of insurance were rarely brought in the west. Indeed before the introduction of steam on our waters, such contracts were rarely, if ever, entered into. A policy of insurance is a special contract, subject to those rules of con-

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

struction which have been long settled in commercial countries, and of which all who make such contracts are presumed to have notice. It is said they are to be liberally construed to effectuate the intention of the parties. And in this respect, there may have been some deviation from the rigid rules which are applicable to other special contracts. It is believed that the precise point raised in this case, has not been settled in this country or in England.

The question whether negligence of the officers and crew, shall, in case of loss, discharge the underwriters, where barratry has been insured against, has often been raised and decided in both countries. In the case of Grim v. Phoenix Ins. Co., 13 Johns. 451, the court decided, that negligence which did not amount to barratry, where barratry was insured against, did not excuse the underwriters. And this decision has been followed up by the supreme court of Ohio, and by all the other state tribunals.

The question however is one of general and national importance, as it is intimately connected with our foreign as well as our internal commerce, and the rule should be uniform and analogous to other questions of insurance which have been long settled. In the case of Busk v. Royal Exchange Assur. Co., 2 Barn. & Ald. 73, the court decided that, where barratry was insured against, negligence would not excuse the underwriters; and in the argument they laid much stress on the fact, that the undertaking against barratry, must necessarily include minor faults. And upon this ground the American authorities have generally proceeded. And the inference would seem to arise from the course of argument in the cases decided, that if barratry had not been insured against, the insurers would not have been liable for a loss, by the negligence of the crew. But the attention of the court was not drawn, necessarily, to that point; and it would be extremely dangerous, from the general language used by courts in reference to a particular point, to infer an authority against a position not involved in the case. The supreme court of Ohio, it is stated at the bar, have decided recently that negligence in the officers and crew will excuse the underwriters from liability in case of loss, where there is no insurance against barratry. Not being favored with a perusal of the opinion of the court, the reasons which influenced their decision are not known. It is presumed, however, that they have followed the strong intimations in the New York decisions, that to charge the insurers for negligence, the policy must cover barratry.

It has been long settled in England and in this country, that a policy against fire on land, covers the negligence of servants. A liability short of this would render land policies of little value; for a fire rarely occurs which may not be traced to some negligence or inattention of servants or others. This is peculiarly the case in the country, where the building insured does not stand connected with other buildings. [Columbia Ins. Co. v. Lawrence] 10 Pet. [35 U. S.] 517, 518. Fire is the risk insured against, and the building is destroyed by fire. Now the underwriters in a land policy are liable, though it be proved that the fire occurred through negligence. Fire was the proximate, negligence the remote cause of the loss. And why should not the same construction be given to a marine insurance? The language of both policies in regard to the risk of fire, is precisely the same; and why should insurers be held liable, on a land policy, and excused from liability, on the same state of facts, on a marine policy. Fire is the proximate cause in both cases, and negligence the remote cause in both. Why then should the rule of construction be different? As before remarked, the construction of the land policy has been settled in this country and in England, and should not this lead to the application of the same rule of construction, under the same circumstances, to marine policies? The question of negligence, as applicable to the latter policies, remains open, and should be decided by the analogies of the law and reasons of the case. Now all analogy would seem to require that two instruments of the same nature, clothed in the same language, and intended for the same purpose, the one on land, and the other on water, should receive the same construction. And as the rule of construction has been settled on the land policy, it would seem to follow as a matter of course, that the same construction should be given to the marine policy. And the construction given is sustained by reason and propriety. It is within the very language of the instrument, and to hold that negligence shall secure from liability in the one case and not in the other, involves the most palpable inconsistency. In favor of this distinction there is no analogy and no direct decision. The only authority known, if indeed loose expressions of judges made in reference to another point, can be called authority, is found in the adjudications referred to. Cases where the judges hold that insurance against barratry will cover negligence, and seem to place great stress on the fact that the policy covers barratry. But they did not decide, nor was the point involved in any of the cases, that the underwriters would not be liable for a loss, by one of the enumerated risks, though negligence was the remote cause of it. Where there has been fraud or design in the loss which would amount to barratry, the insurers would not be liable, unless the policy contains an express insurance against barratry. And in a land policy the insurers are not liable, if the assured are guilty of fraud or design in the destruction of the building.

In [Columbia Ins. Co. v. Lawrence] 10 Pet. [35 U. S.] 517, above referred to, the supreme court say: "The next question is, whether a loss by fire, occasioned by the fault and negligence of the assured, their servants and agents, but without fraud or design on their part; is a loss for which the underwriters are liable. In regard to marine insurance, this was formerly a question much vexed in the English and American courts. But in England the point

was completely settled in Busk v. Royal Exchange Assur. Co., 2 Barn. & Ald. 82, upon the general ground, that causa proxima, non remota, spectatur; and therefore that a loss whose proximate cause is one of the enumerated risks in the policy, is chargeable to the underwriters; although the remote cause may be traced to the negligence of the master and mariners. Although in the policy in that case, the risk of barratry was also assured by the underwriters; yet it is manifest that the opinion of the court proceeded on the broad and general ground. The same doctrine was afterwards affirmed in Walker v. Maitland, 5 Barn. & Ald. 171, and Bishop v. Pentland, 7 Barn. & C. 219, and is now deemed incontrovertibly established. The same doctrine was fully discussed and adopted by this court in the case of Patapsco Ins. Co. v. Coulter, 3 Pet. [28 U. S.] 222." This, it is true, is not an adjudication on the point, as it was not involved in the case, but it may be considered as a strong intimation of the view of the court on the question now under examination; and as it is reasonable and analogous to the rule well established in construing land policies, it is entitled to great weight.

From these views, the defendants cannot be excused from the negligence of the officers or crew of the Lioness; and both the judges concur in this result; but as the question is new and important, at the suggestion of the counsel, the judges will certify to the supreme court, the following points:

1. Does the policy cover a loss of the boat by fire caused by the barratry of the master and crew?

2. Does the policy cover a loss of the boat by fire caused by the negligence, carelessness, or unskilfulness of the master and crew of the boat or any of them?

3. Is the allegation of the defendants in their pleas, or either of them, to the effect that the fire, by which the boat was lost, was lost by the carelessness or the neglect or unskilful conduct of the master and crew, a defence to this action?

4. Are the said pleas, or either of them, sufficient?

The circuit court entertained no doubt, that if the plea had been skilfully drawn, which alleged that gun-powder constituted a part of the cargo; that such an article was not usually conveyed on steamboats, and that by its transportation the risk was greatly increased, all of which was unknown to the underwriters, they would have been excused from liability, provided, the facts thus alleged had been admitted.

To the points certified the supreme court answered, that the policy does not cover barratry. That it does cover a loss of the boat by fire caused by negligence. That the pleas in this respect are not a defence to the action, and that the matters set out in them constitute no bar. [See 11 Pet. (36 U. S.) 213.]

On the return of the cause to the circuit court, a judgment for the plaintiff was entered.

WATERS (MOORE v.). See Case No. 9,780.

Case No. 17,267.

WATERS v. MUTUAL LIFE INS. CO.

[2 N. J. Law J. 81; 7 Reporter, 456; 8 Ins. Law J. 336.] [1]

Circuit Court, D. New Jersey. Feb. 8, 1879.

NEW TRIAL—WEIGHT OF EVIDENCE.

A mere difference of opinion as to the weight and effect of the evidence is not sufficient to justify the court in setting aside a verdict.

On motion for new trial.

C. Parker, for the motion.

E. C. Harris and T. N. McCarter, contra.

McKENNAN, Circuit Judge. If the court had been called upon to determine this case without the intervention of a jury, its finding upon the evidence submitted would not have been concurrent with that of the jury. But that is not enough to make it the duty of the court to set aside the verdict. In other words, a mere difference of opinion as to the weight and effect of the evidence is not sufficient to justify the court in thus interfering with the verdict. Every intendment must be made in its favor as the decision of a tribunal upon which the law devolves the special responsibility of determining the credibility of witnesses and the import of evidence in its tendency to establish or disprove any fact which it is the duty of a jury to find. Hence a verdict will not be disturbed unless it is plainly unwarranted by the evidence of which it purports to be the result, by any favorable construction of it.

I cannot affirm that there was such a degree of insufficiency of the evidence in this case; nor have I time to state in detail the reasons for this conclusion. There was evidence to show that the assured was a man of exceptional temperament and eccentric character. He frequently fell into moods, which were not induced by any apparently adequate or rational cause, when he lost his self-control, and was altogether unlike his former self, and from which he sought relief in attempts upon his life. These attempts were made under circumstances which indicated some form of mental disturbance involving incapacity of self-control, because he was no sooner confronted with the imminent consequences of his own act than he manifested an earnest desire to be saved from them, and willingly submitted to the employment of the necessary means to that end. Is it an unanswerable hypothesis, then, that on such occasions his will was dethroned, and that he acted under an impulse which he, at the time, was unable to resist? His business life was a failure, and in this was exemplified his peculiar, unpractical character. At last he embarked in an enterprise from which he expect-

[1] [7 Reporter, 456, and 8 Ins. Law J. 336, contain only partial reports.]

ed most favorable results, indeed upon which he seems to have staked his final hope of changing his condition and of acquiring the fortune which had so long eluded his pursuit. This hope was suddenly blasted, and, on the same evening when this disappointment occurred, he had an angry altercation with his wife and son. During the same night he committed suicide. May not these circumstances have produced a recurrence of the irrational mood if which his previous conduct had shown him to be so susceptible, and have left him with a subverted will, powerless to resist an impulse to do what, in the last letter written by him, he said he "hated and despised?" I cannot say that such an inference is unwarrantable, although it is the result of an interpretation of the evidence most favorable to the verdict. But I am bound to adopt it, and hence the motion for a new trial must be denied, and judgment upon the verdict ordered to be entered.

WATERS (PELTON v.). See Case No. 10,913.

WATERS (STANBACK v.). See Case No. 13,284.

WATERS (STODDERT v.). See Case No. 13,472.

WATERS (WRIGHT v.). See Case No. 18,100.

WATERSON (SOHN v.). See Case No. 13,161.

WATERTOWN (PERELES v.). See Case No. 10,980.

WATERTOWN (PERKINS v.). See Case No. 10,991.

Case No. 17,268.

The WATER WITCH.

[Blatchf. Pr. Cas. 300.] [1]

District Court, S. D. New York. Dec., 1862.

VIOLATION OF BLOCKADE.

Vessel and cargo condemned as enemy property, and for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. This vessel was captured August 23, 1862, off Aransas Bay, Texas, by the yacht Corypheus, a tender to the United States bark Arthur, and was libelled in this court November 24, 1862. On the return of the attachment of the vessel and cargo, December 16, due proceedings were taken by the libellants for obtaining a decree by default against both, because of the failure of any party to intervene and defend. The ship's papers and the preparatory proofs were submitted to the court, and a final decree of condemnation was thereupon prayed by the libellants. Only one witness, the master of the vessel, was brought into this port and examined by the prize commissioners. The master, by his affidavit, excuses the non-production of the remainder of the captured crew, because they were all Spanish and Portuguese subjects, as they informed him, and had been taken out of prison in Havana, and impressed into service on board the prize, and it was regarded as imprudent and dangerous to send them with the vessel into this port. They were, accordingly, left at Pensacola. The master of the vessel, Thomas B. King, testifies that he resides in Texas with his family, has been a resident for seventeen years of that state, and was a citizen of that state before the Rebellion. He claims to be a subject of Great Britain. He asserts that he owns the vessel and cargo; that she was bound from Havana to Matamoras, on the Rio Grande; and that she was not intentionally pursuing a course wide of that port when arrested. The place of capture was but two or three miles from land, near the mouth of Aransas Harbor, and one hundred and twenty or one hundred and thirty miles from Matamoras. She was seized because she was suspected of attempting to evade the blockade. Her lading was salt, rope, drugs, soda, potash, skins, and one hundred and fifty kegs of powder. She was bought by the master about eighteen months before her capture, and was conveyed to him by a bill of sale, in Galveston, by William Johnson, a resident there. He obtained a provisional register for the vessel in his own name (as of the state of Texas, in the United States of America), at Kingston, Jamaica, May 27, 1862. He knew all about the war, and supposed that the ports of Texas were blockaded. He had sailed the vessel out of the blockaded port, with a cargo, to Havana, in February previous. He went out of Galveston with her in the night, and in a fog. The frigate Santee was then blockading the port. He had a lady passenger on board from Havana to Aransas and Galveston when he was seized. The papers are exceedingly confused, and seem to include references to various voyages, without any distinctness or discrimination, but they and the proofs abundantly establish the hostile character of the vessel and cargo, and also the design and attempt of the owner of both to violate the blockade existing at the port where she was arrested.

Let there be a decree of condemnation and forfeiture of vessel and cargo.

[1] [Reported by Samuel Blatchford, Esq.]

WATER WITCH, The (BROWER v.). See Case No. 1,971.

WATHEN (BOWMAN v.). See Case No. 1,740.

Case No. 17,269.

Ex parte WATKINS.

[See Case No. 16,650.]

WATKINS, Ex parte. See Case No. 10,902.

WATKINS (CARROLL v.). See Case No. 2,457.

WATKINS (COX v.). See Case No. 3,307.

WATKINS (UNITED STATES v.). See Cases Nos. 16,649 and 16,650.

Case No. 17,270.

In re WATROUS et al.

[14 N. B. R. 258; 3 N. Y. Wkly. Dig. 180.] [1]

District Court, E. D. Michigan. May 13, 1876.

BANKRUPTCY—PROOF OF DEBT—EVIDENCE OF AGENT.

Proof of debt may be made by an agent who has had exclusive charge and control of the same, and knows personally all the facts required to be sworn to in proving it, the creditor himself having no personal knowledge of the facts.

[In the matter of Martin Watrous, Albert W. Watrous, and Chauncey L. Watrous, bankrupts.]

The register certified that Mr. John Ward appeared and offered to prove, by his own oath, a secured claim against said estate, in favor of Miss Mary E. Barnard, of Springfield, Vermont. It is not claimed that Miss Barnard is absent from the United States, nor that she is prevented from testifying. The ground on which Mr. Ward rests his competency to prove the claim he states as follows: "That he made a loan of money for the creditor, from which the debt accrued, and took a mortgage from the bankrupt Martin Watrous, to secure the same, and that he has had exclusive charge and control of the debt, and knows personally all the facts required to be sworn to in proving it; and that the creditor has no personal knowledge of the same, and cannot swear to them otherwise than on information and belief." The register declined to take the proof offered, and, on Mr. Ward's request, certified the questions arising thereon into court for determination.

By HOVEY K. CLARKE, Register in Bankruptcy:

The only question in this case, as it appears to me, is whether there be anything in the facts, as presented, which will take it out of the principle approved by this court in Re Whyte [Case No. 17,606]. In that case it was held that the superior knowledge of an agent to his principal, as to facts to be sworn to, was no reason for excusing the principal from making his statement on oath, as required by the bankrupt act [of 1867 (14 Stat. 517)]. The reasons for this are fully stated in the report of that case, and need not here be repeated.

It is insisted, however, that as the statute requires the claimant to testify "of his own knowledge" (section 5078), so, when he lacks the requisite personal knowledge of the facts to be stated, he is not within the requirement of the statute, and, in that case, he may prove his claim by any one having competent knowledge. But the knowledge here required is not merely that of facts which would sustain an action at common law. The deposition must set forth all the particulars which in Re Whyte [supra], are called "the condition of the claim at the time of proof." Now, it may be true that in this case Mr. Ward's knowledge is superior to that of his client, as to whom the money was loaned, what security was taken for it, and whether any payments have been made to him; but her knowledge is superior to his whether the money loaned was hers, whether any payments have been made to her, and whether she has received any other security.

It is enough to say that the facts do not present a case of entire ignorance of all particulars required to be shown on the part of the principal, and of competent knowledge of all such particulars on the part of the agent. I do not overlook the fact that Mr. Ward states that "he knows personally all the facts required to be sworn to in proving" the claim. I think he must be mistaken in this. He certainly is, unless I am mistaken as to what is necessary to be stated in a proof of debt. "Knowledge" is not an ambiguous term, and when a professional gentleman undertakes to swear to "personal knowledge," it cannot be that he includes in his offer facts that may be known to another person and not to himself. In this case the knowledge of the agent extends only to the loaning of the money, and the security taken for it, and if it were sufficient, as at common law, to prove a prima facie case, to be conclusive unless overcome by a defense, the deposition of the agent would serve that purpose; but it is not. There must be proof of a continuing indebtedness at the date of the bankruptcy, and of its amount then. It is not to be assumed, without proof, that the principal has absolutely surrendered all power over his own property. It may be true that the statement of the principal to the agent that there have been no transactions which affect the claim, would justify an agent in making oath to the necessary facts. But an agent swearing to "hearsay" from his principal, is certainly as objectionable as a principal swearing to hearsay from his agent; and that—statements of principals sworn to on information and belief—I understand to be the objection to such a construction of the statute as will compel principals in all cases to make oath in support of their claims, except in the two cases provided for by the statute. It may be conceded that the facts of this case make it highly probable there is nothing within the knowledge of the principal which will in any way qualify or contradict those which are within the knowledge of the agent. But I do not see upon what principle a distinction can be made which will admit a proof in this case to be made by Mr. Ward, which will not relieve a large

[1] [Reprinted from 14 N. B. R. 258, by permission. 3 N. Y. Wkly. Dig. 180, contains only a partial report.]

class of creditors, as stated in Re Whyte, from the necessity of making oath in person, as required by the statute.

All of which is respectfully submitted.

BROWN, District Judge. By Rev. St. § 5078, proof of debt "shall be made by the claimant testifying of his own knowledge, unless he is absent from the United States, or prevented by some other good cause from testifying, in which case the demand may be verified by the attorney or authorized agent of the claimant, testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge." General order 34 provides that when the deposition is made by an agent, the reason the deposition is not made by the claimant in person must be stated. The section above referred to evidently contemplates that the claimant in deposing to the debt must testify "of his own knowledge," and, upon general principles of law, the existence of a debt must be proved by some one having personal knowledge of the fact. In this case, as it appears that the creditor has no personal knowledge of the debt in question, the deposition of her attorney would be necessary, at least to supplement her own; but if the creditor is absolutely ignorant of the existence of the debt, and the agent has personal knowledge of all the facts necessary to make proof of it, I see no reason to require the deposition of the principal. Better "cause from testifying," within the language of the section, can hardly be imagined than entire ignorance of the matters required to be sworn to. I assume, in this connection, that the attorney is able to swear to the present existence of the debt, either from recent admissions of the bankrupt, or otherwise, and to negative the idea that payment has been made. I agree with the register, that there must be proof of a continuing indebtedness at the date of the bankruptcy, and of its amount.

It is not perceived that a rule, which will relieve a large class of creditors from the necessity of making oath in person, as required by the statute, is any objection to such ruling, if it conduces to the convenience of business, and does not invite the commission of frauds. By section 5083, "when a claim is presented for proof before the election of an assignee, and the register entertains doubt of its validity, or the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen." By section 5081, "the court may, on application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering, or who has made proof of a claim, * * * and reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake." These provisions are deemed adequate to protect the estate against the proof of fraudulent claims.

The authorities upon this point are not numerous, but I find none which conflicts with the position here taken. In the Case of Whyte [Case No. 17,606], it was held that the fact that the agent was better acquainted with the facts than his principal, did not render his deposition alone admissible as proof. No reason was given in that case for proof of debt by the agent, except the fact that the creditor was absent in the state of Ohio, and the agent had a power of attorney from his principal, authorizing him to transact any business on his behalf. It will readily be seen that the ruling in that case does not control the one at bar, as it appeared that the principal had knowledge of the facts necessary to be set forth in the deposition. In the case of McKinsey v. Harding [Id. 8,866], the assignees moved to strike out certain proofs made by an attorney, because he did not show any reason why the creditor could not have made the deposition in person; that the attorney did not testify to the best of his knowledge, information, or belief, nor did he set forth his means of knowledge as to said claims. The court held that the informality in the proof objected to did not avail, for the reason that the witness had sworn positively of his own knowledge. This case goes much further than we are required to hold in the one under consideration; and I should hesitate to follow it, if the question were directly presented. In the case of In re Barnes [Id. 1,012], the learned judge for the district of Massachusetts, in speaking of causes from testifying, observes: "If an attorney be acquainted with the facts of his own knowledge, it has been held that he may testify without proving the creditor is absent, etc.; but I am speaking of one who proposes to depose only upon information and belief. The law requires the oath of some person having knowledge, and the creditor himself is presumed to have it; and, unless he is absent, or in some way prevented from testifying, no one can do so for him, unless it be a person having actual knowledge."

Under the English bankrupt law (general rule 68), "the affidavit may be made by the principal, or by any agent, or any clerk, or other person in his employment; but if the affidavit is made by an agent or clerk, it shall state that he is authorized by the creditor to make the affidavit, and that it is within his own knowledge that the debt was incurred for the consideration stated, and that to the best of his knowledge and belief the debt still remains unpaid and unsatisfied." Although, of course, this rule has no direct bearing upon the administration of our own bankruptcy system, it may be entitled to some weight in determining the correctness or propriety of a proposed practice. If the register is satisfied from an inspection of the deposition that the agent has personal knowledge of the contracting of the debt, and its continued existence at the date of the bankruptcy proceedings, and

that the creditor has no knowledge of these facts, and can only swear to them on information and belief, and there are no suspicious circumstances connected with the claim, I think he ought to receive and file the deposition.

Case No. 17,271.

In re WATSON.

[2 N. B. R. 570 (Quarto, 174);[1] 2 Am. Law T. Rep. Bankr. 93.]

District Court, N. D. Ohio. 1869.

HOMESTEAD EXEMPTION — ALLOTMENT TO BANKRUPT—EFFECT.

Where a creditor objected to the exemption of homestead pursuant to the laws of Ohio, as exceeding in value the amount therein limited, *held*, that the bankrupt by the allotment of the assignee did not take a fee-simple, but only a qualified estate in the homestead, with reversion in the assignee. The homestead ordered to be sold subject to the estate of the bankrupt, all surplus in value above that estate to be paid into the general fund.

[Cited in Re McKenna, 9 Fed. 36.]

Watson was adjudged bankrupt, December 19th, 1868, and William Waterman duly appointed assignee on the 15th of January, 1869. On the 9th of March, 1869, the said assignee set off to the bankrupt as a homestead to which he was entitled under the laws of the state of Ohio, certain real estate situate in the town of Berea, Cuyahoga county, Ohio. One of the creditors of said bankrupt, Henry Carman, excepted to the homestead exemption as allowed by the assignee. The parties thereupon appeared before Register Keith, and filed affidavits in support of and against the exceptions, but it appearing that questions of law and fact would arise upon the issue, a motion was made to adjourn the matter to the district court for its decision.

SHERMAN, District Judge. The evidence offered relates chiefly to the value of the real estate set off as a homestead, and is very conflicting, and the question it seeks to settle may be well determined by another mode. Quite a number of competent and intelligent witnesses swear, that the property is not worth over five hundred dollars, while an equal number of witnesses, fully as reliable, and as much entitled to credit, swear that it is worth from one thousand to fifteen hundred dollars. The proof is clear that the bankrupt is in such condition, as regards family, &c., that he is entitled to the exemption of a homestead as provided by the laws of Ohio. I am unwilling to decide from the evidence adduced in the premises, whether the property set off to him by the assignee, does or does not exceed the amount limited by the law, and, therefore, I deem it proper that the property be offered at public sale by the assignees, subject to all the claims or rights the bankrupt has to it, as being exempt from sale under the homestead laws of Ohio. And if the property at such sale bring an amount exceeding five hundred dollars, such excess to be assets in the hands of the assignee for distribution among the creditors. But I am here met by the claim of the bankrupt, that such exemption and setting off of the property as a homestead, confers upon and vests in him a title in fee-simple to the property so set off. This, I think, is a proposition wholly untenable. The exemption laws of Ohio provide that certain articles of personal property shall not be taken in execution or sold; the language used is: "Exempt from execution and sale." The same laws provide that a certain amount of real estate used as a homestead, shall not be sold on execution; the language used is: "Exempt from sale on execution." In the case of personal property, it is exempt from levy or sale, and remains the property of the debtor, free to use, control, or dispose of it in an absolute manner. In the case of real estate, it is exempt only from sale on execution. It may be levied upon by virtue of an execution, and such levy will remain good, and a valid lien. If the property used and exempt as a homestead, is of a larger yearly value than forty dollars, and is indivisible, the debtor pays the creditor the surplus as rent. It is, therefore, clear to my mind, that the debtor does not acquire, in the homestead so set off to him, a fee-simple absolute title, but he possesses only a qualified right, a right to possess and occupy it, so long as he uses it as a homestead for his family, and otherwise complies with the provisions of the statute. It is a personal right for the benefit of himself and family, and when he or they leave the property and cease to occupy it as a homestead, the lien acquired by the judgment and levy, which was suspended by the operation of the statute, is revived, and again operates, and the property may be sold under the execution, free from the incumbrance of the homestead exemption. It is a right of possession personal to the debtor, and does not run with the land, and a sale by him would not convey any right to the purchaser.

I can find no decision in the Ohio courts on the construction to be placed on this statute. On a similar statute in New York there are two decisions (26 and 38 Barb.) sustaining the above views. I therefore hold and rule that the bankrupt, Watson, should possess the rights to use and occupy the premises in question, that the homestead laws of Ohio confer upon him; that the remainder or reversion in said property, after those rights are ended, belongs to his creditors; and that, by the assignment, the remainder or reversion is now vested in the assignee. It is therefore ordered that such remainder or reversion be ordered for sale on the premises by the assignee, at public auction, after giving due notice, subject only to, and reserving to said bankrupt, all the rights and privileges incident to his homestead interest therein; the proceeds of such sale to be put into the general fund.

[1] [Reprinted from 2 N. B. R. 570 (Quarto, 174), by permission.]

Case No. 17,272.

In re WATSON.

[4 N. B. R. 613 (Quarto, 197).] [1]

District Court, E. D. Missouri. 1871.

BANKRUPTCY PROCEEDINGS — JURISDICTION — RESIDENCE OF DEBTOR.

1. The debtor, being a resident of St. Louis with his family, bought a stock of goods in Montana in July, 1869; went to Montana in August, 1869, leaving his family in St. Louis; remained in Montana, except a few weeks, when on a business trip to St. Louis, until June, 1870; a petition in bankruptcy was filed against him in the Eastern district of Missouri, July 8th, 1870. *Held*, that Montana was his place of residence within the meaning of the bankrupt act [of 1867 (14 Stat. 517)], during the six months preceding the filing of the petition; the word "residence" in section 11 not being synonymous with the word "domicile."

[Cited in Ward v. Blake Manuf'g Co., 56 Fed. 440.]

[See In re Belcher, Case No. 1,237.]

2. Petition dismissed for want of jurisdiction.

[Cited in Ward v. Blake Manuf'g Co., 56 Fed. 440.]

TREAT, District Judge. On the 8th day of July, 1870, a petition with proofs was filed, to have defendant adjudicated a bankrupt, under section 39 of the bankrupt act. From the evidence offered it is clear that he had committed one or more of the acts of bankruptcy charged. The case, however, must turn on a jurisdictional question. On the 1st of July, 1869, defendant purchased of Kintzing, in St. Louis, a stock of goods, etc., in Montana, for seventeen thousand dollars, giving his notes therefor. Then he proceeded to New York, bought goods to be shipped for the purpose of replenishing the Montana store, to the amount of ten thousand dollars, paying only one thousand dollars cash. He also bought on credit goods in St. Louis to the same end. He was a married man, with four children, residing in St. Louis. In August, 1869, he left St. Louis for Montana, without his family, intending, as he swears, to reside permanently in that territory. After reaching that place, and attending to his business there for a few weeks, he visited St. Louis on business matters, connected with his Montana affairs, and returned to Montana about January, 1870. His commercial paper had, to some extent, matured, without payment, and towards the middle of February suits by attachment were brought against him in Montana, and his property seized thereunder. He continued in that territory, with reference to his business there, until the middle of June, when he returned to St. Louis, where, in less than a month, this proceeding under section 39 of the bankrupt act was commenced.

The questions pertaining to citizenship, domicile, and residence, with reference to the terms of that act, have been presented. What are the elements of "citizenship," the court, in this case, is not required to decide. "Domicile," as defined by jurists, and as settled by the United States supreme court, depending in part on the animus of the person, is not a proposition involved in the construction of this statute. Congress, in its wisdom, has chosen to exact that applications in bankruptcy shall be made "in the judicial district in which such debtor has resided, or carried on business, for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months," the petition to set forth his place of residence, etc. In this case the debtor had resided actually, excepting during the short time he visited St. Louis on his Montana business, for more than ten months in Montana, and had carried on business as a merchant solely in that territory. There his property was situated and had been seized on attachment. True, he had not removed his family to Montana, although it had been his intention to do so. It is unnecessary to discuss the presumptions as to domicile arising from that fact; for the bankrupt act, it is clear, uses the term "residence," specifically as contradistinguished from "domicile," so as to free cases under it from the difficult and embarrassing presumptions and circumstances upon which the distinctions between "domicile" and "residence" rest. The debtor's residence was, during the preceding ten months, in Montana, and his sole place of business was there. His property, and the suits brought against him—indeed, all that could be beneficially reached by proceedings in bankruptcy—have reference to what was there, or being done there.

This case furnishes an apt illustration of the rule fixed by congress. If the debtor could be declared bankrupt by this court, and his estate adjudicated here, then every effective step with reference thereto would have to be taken by his assignee in Montana, involving not only the care of his property, all of which is there situated, but also the conduct of defenses in suits there pending, and the dissolution of attachments in the territorial courts. If the debtor was adjudicated bankrupt in that territory, all matters connected with the administration of his estate could be more conveniently and satisfactorily adjusted there. But the pure legal question is, whether the term "residence" is synonymous with "domicile," as used in the bankrupt act, or whether that term is used in its accurate legal sense, and is to be so applied. On that point, this court has no doubt. The proceedings in bankruptcy should be instituted with reference to the actual residence of the party, or his place of business. His domicile may be in a remote state, and yet he may be residing and carrying on business here; and if his creditors are compelled to ascertain where his domicile is, with the vague basis of the animus revertendi, or animus manendi, before securing their rights in the premises, they will necessarily be remitted to doubts and uncertainties, instead of open, visible, and positive facts. "Residence" is a fact easily ascertained; "domicile" a question difficult of proof. True, the two terms are often used as synonymous, but in law they have distinct meanings.

[1] [Reprinted by permission.]

The vexed questions concerning citizenship, domicile, and residence, under the United States constitution, so far as the respective states of the Union are concerned—with respect to which there are many conflicting views in decisions of courts and among commentators—are easy of solution in the light of elemental principles; but congress, as if ex industria, designing to escape that region of dispute, used a legal term about which there is no difficulty, either as to its accurate meaning, or as to the facilities of proof connected with it. The "residence" of the debtor was in Montana during all of the previous ten months, except the last few weeks, and the petition in bankruptcy should have been filed there. Hence this court dismisses the petition for want of jurisdiction.

Case No. 17,273.

In re WATSON et al.

[1 Wkly. Notes Cas. 86.]

District Court, E. D. Pennsylvania. Oct. 14, 1874.

BANKRUPTCY—APPLICATION FOR DISCHARGE.

Application for leave to file petition for discharge under the amendatory bankrupt act of June 23, 1874 [18 Stat. 178]. The petitioners were adjudged bankrupt on the 28th of February, 1872. No application for discharge was made until the present motion. The bankrupts had been unable to obtain the assent of a majority in number and value of their creditors, and their assets did not amount to 50 per cent. of their indebtedness.

John A. Burton, for motion, argued: That, under the 29th section of the bankrupt act [of 1867 (14 Stat. 531)], when the application for discharge cannot be made until six months after adjudication, it is not imperative that it should be made within one year, and cited In re Greenfield [Cases Nos. 5,774 and 5,775]; In re Pierson [Case No. 11,154]; In re Vorbeck [Id. 17,002]. That, even where there were no debts or assets, the delay to apply, after the expiration of one year, might be explained by affidavit. In re Canaday [Id. 2,377]; In re Donaldson [Id. 3,982]. 2nd. That the 9th section of the amendatory act of June 23, 1874, applied to all pending cases of involuntary bankruptcy, whether the adjudication had been made more than a year previous to its passage or not, and notwithstanding no application had been made for a discharge, and cited In re King [Case No. 7,781]; In re Griffiths [Id. 5,825]; In re Perkins [Id. 10,983]; Cong. Rec. June 17, 1874, p. 60; Ex parte Lane, 3 Metc. (Mass.) 213; Eastman v. Hillard, 7 Metc. (Mass.) 425.

THE COURT referred the petition to the register for report in regard to all the facts of the case, refusing to allow the petition to be filed till report received, in view of the fact that there was no opposing counsel.

[See Case No. 17,274 and 17,275.]

Case No. 17,274.

In re WATSON et al.

[1 Wkly. Notes Cas. 334.]

District Court, E. D. Pennsylvania. March 31, 1875.

BANKRUPTCY — DELAY IN APPLICATION FOR DISCHARGE—PETITION FOR REVISION.

The bankrupts had heretofore applied for their discharge, under the circumstances reported [Case No. 17,273], and their petition was then referred to the register to report the facts. Vide loc. cit.

The register now reported that he was of opinion that the delay in application of bankrupts for their discharge was sufficiently accounted for to warrant the issuance of the usual orders upon such application; that the issuing of such orders could not prejudice the right of any creditor or person interested to object to the discharge on the ground of delay; and that upon the hearing on said orders the question could be more fully and perhaps more appropriately considered.

THE COURT refused to confirm the report of register, and dismissed the application for leave to file petition, but allowed a petition for revision to be filed in the circuit court. See section 2, Bankrupt Act [of 1867 (14 Stat. 517)].

[For subsequent proceedings, see Case No. 17,275.]

Case No. 17,275.

In re WATSON et al.

[1 Law & Eq. Rep. 371;[1] 2 Wkly. Notes Cas. 356.]

Circuit Court, E. D. Pennsylvania. 1876.

PETITION FOR DISCHARGE — LIMIT — CREDITORS — STAY.

Time within which a petition for a discharge may be filed.

Petition for review. The petitioners were adjudged bankrupts in February, 1872. No application for discharge was made until October, 1874. The bankrupts had been unable to obtain the assent of a majority in number and value of their creditors, and their assets did not amount to 50 per cent. of their indebtedness. The district court referred the petition to the register for report in regard to the facts in the case, and refused to allow the petition to be filed until the report was received, as no opposing counsel was present. The register subsequently reported, that he was of the opinion that the delay in the application of the bankrupts for their discharge, was sufficiently

[1] [Reprinted from 1 Law & Eq. Rep. 371, by permission.]

accounted for to warrant the issuing of the usual orders upon said application; that the issuing of such orders could not prejudice the right of any creditor; and that upon hearing, the question could be more fully considered. The court dismissed the application for leave to file the petition, refusing to confirm the report of the register, but allowed a petition for revision to be filed in the circuit court. [See Cases Nos. 17,273 and 17,274.] The petition for review having accordingly been filed, the case came on to be argued.

[John A. Burton, for petitioner, cited In re Greenfield [Cases Nos. 5,774 and 5,775]; In re Canaday [Case No. 2,377]; In re Von Beck [Id. 16,993]; In re Donaldson [Id. 3,982]; In re W. Pierson [Id. 11,153.] [2]

McKENNAN, Circuit Judge, said that he could not come to the conclusion arrived at by Blatchford, J., in Re Greenfield's Estate [Case No. 5,774]. The language of section 29 of the bankrupt act of 1867 [14 Stat. 531] seemed clearly to imply that the limitation of one year, within which the petition to discharge might be presented, extended to both branches of the alternative.

The petition for review was dismissed, and the cause remanded to the United States district court; which court subsequently allowed the petition to be filed, and granted a rule to show cause, and instructed the bankrupts to insert in the published notices that proceedings would be stayed upon objection of creditors. No creditor having made objection, the rule was made absolute, and the bankrupts finally discharged.

WATSON v. The ANGELINA. See Case No. 7,967.

Case No. 17,276.

WATSON v. BAYLEY.

[2 Cranch, C. C. 67.] [1]

Circuit Court, District of Columbia. Dec. Term, 1812.

EVIDENCE—GAMING DEBT.

The statute of gaming may be given in evidence, upon non assumpsit, without notice.

Assumpsit against the maker of a promissory note.

Upon non assumpsit the defendant offered to prove that the note was given for money won at play.

THE COURT (FITZHUGH, Circuit Judge, absent,) permitted the evidence to be given, without notice.

[2] [From 2 Wkly. Notes Cas. 356.]

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

Case No. 17,277.

WATSON v. BLADEN.

[4 Wash. C. C. 580; [1] 1 Robb. Pat. Cas. 510.]

Circuit Court, E. D. Pennsylvania. April Term, 1826.

PATENT FOR INVENTION—USE OF MACHINE.

1. Using a machine with a view to an experiment to test its value, is a using within the sixth section of the patent act.

2. A patent which covers the discovery of another that had been in use, is too broad; and therefore void.

[Cited in Byam v. Bullard, Case No. 2,262; Yoder v. Mills, 25 Fed. 821.]

This was an action for the infringement of a patent granted to E. Treadwell, for an improvement in forming and piercing bread, called by him "a cracker or biscuit finisher." The specification describes the different parts of the machine, amongst which are the circular cutters, the piercers, and the clearers, which cut, pierce, and clear the biscuit at one operation. The plaintiff claims, as assignee of Treadwell, all his right and title to the said invention, so far as the same applies to the city and county of Philadelphia, and to all other cities and towns on the river Delaware, from Chester to Easton, and to Wilmington and Newcastle. Plea, the general issue, with notice of special matter.

The plaintiff proved that the defendant used a machine precisely the same in principle with the one for which he had obtained his patent, and that the invention was highly useful. The defendant, under his notice, gave evidence to show that the plaintiff prepared a drawing of the machine which he contemplated having made, and employed one Tobias Martin, an ingenious and skilful mechanic, to construct it. This person, whose deposition was read, deposed that, after making a model according to the description given by Treadwell, it was found not to answer the intended purpose. That he suggested to Treadwell many improvements and alterations, which, being adopted, rendered the machine effectual. He does not, however, state, with any degree of precision, what were the particular parts which were embodied in the machine in consequence of his suggestions, but he states that he considers himself as being the original inventor, although he knew of Treadwell's intention to take out a patent, and made no objection. The defendant also produced in court a machine, constructed by one Peter Christian, many years prior to Treadwell's patent and invention, for cutting, piercing, and clearing the biscuit at one operation, which all the witnesses skilled in the art declared was in no respect different in principle from Treadwell's; although, being designed to be used by hands,

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

whereas the plaintiff's was fixed in a frame and worked by a lever power, it was not preferable to the old mode of making biscuit by hand, and was in fact of little or no value. It was further proved that biscuit was made with this machine in Christian's public bakery, to the extent of perhaps half a barrel of flour. This was done for an experiment. It was found not to answer as well as was expected, and was thrown aside.

The ground principally relied upon by the plaintiff's counsel to get clear of Christian's discovery, was, that his machine was never used except for an experiment, which is not the kind of use meant by the sixth section of the patent law. He cited the case of Boulton v. Bull, 2 H. Bl. 470; Bedford v. Hunt [Case No. 1,217]; [Evans v. Eaton] 3 Wheat. [16 U. S.] 481, 514; 1 Holt, N. P. 58; 3 Inst. 184.

The defendant insisted that the patent was void, (1) Because it covers Martin's discoveries, in part, at least. Sterns v. Barrett [Case No. 13,337]. (2) It is not a new invention; Christian's having been discovered and used anterior to Treadwell's discovery. Woodcock v. Parker [Id. 17,971]. Gray v. James [Id. 5,718]. And lastly, because it is too broad, by including all the essential parts of Christian's machine.

C. J. Ingersoll, for plaintiff.
Mr. M'Ilvaine, for defendant.

WASHINGTON, Circuit Justice (charging jury). There are three objections made by the defendant's counsel to Treadwell's invention, either of which is sufficient to entitle the defendant to a verdict, if the facts are found by the jury to be in his favour. The first is, that Treadwell was not the inventor of the machine patented, or of the whole of its essential parts. If he was, then secondly, that he was not the original inventor. And lastly, that the patent includes all the essential parts of Christian's machine, and not merely an improvement of that machine.

1. Treadwell is asserted not to be the inventor of the whole of the machine for which he has obtained a patent; because it is proved by Martin, that some, at least, of the essential parts of it were discovered by him, and were introduced into it upon his suggestions. The deposition of this witness is certainly very obscure in designating those parts of the machine of which he asserts himself to have been the inventor, and it is therefore to be regretted that his attendance here for the purpose of being examined before the jury could not have been obtained. It is all important to ascertain what those parts were, and this the jury must endeavour to do upon an attentive perusal of his deposition after their retirement. All that remains for me to do is to lay down a few general rules for their government. If they should be satisfied that the whole, or any of the essential parts and principles of the machine were invented by Martin, and introduced into the machine upon his suggestion, the whole patent is void. But if this does not appear, or if they should be satisfied from the testimony of the man, that he merely suggested some alterations in the form or proportions of the machine, as designed by Treadwell, this will not be sufficient to deprive Treadwell of the merit of the invention, or affect the validity of his patent; nor would it be, as to such alterations, a discovery which would entitle Martin to take out a patent for them. If a contrary doctrine were to be maintained, very few, if any patents could be upheld, unless in those cases where the inventor is also the mechanician who constructs the machine. His genius may be equal to the task of conceiving all the principles, as well as the general structure and form of the machine. But he may be unacquainted with the use of tools, and be quite unable to anticipate in what manner the contemplated form of any particular part of the machine may affect its operation, until the work is in progress, and the materiality of form can then be practically discerned. That some alteration of the contemplated form or proportions should be found necessary, would be, in most instances to be expected; and who so likely to perceive the necessity of it, and to suggest it as the workman who is engaged in constructing the machine? But if such suggestions are sufficient to invalidate the patent, few patents would stand the test of such a principle. This point was decided by this court at the last term in the case of Pennock v. Dialogue [Case No. 10,941], and was not objected to, that I know of.

2. The next objection to the patent is, that Treadwell was not the original inventor of this machine, but that it was invented and used by Peter Christian, anterior to the patent and discovery of Treadwell. That Christian's machine was invented many years prior to Treadwell's, is proved by uncontradicted testimony, and is not denied by the plaintiff's counsel. That it possesses all the essential parts and principles of Treadwell's machine, the cutters, piercers and clearers, is manifest by comparing the two together; besides which, the fact is proved by all the witnesses. Used with no other than hand power, it is proved, and admitted, not to answer the purpose of a labour saving machine. But the same objection lies against Treadwell's machine, should the same power be applied, and that the inventor contemplated the application of that power, as well as the lever, as now used, is expressly stated in his specification. The plaintiff's counsel has pronounced Christian's machine to be positively worthless. I can only observe that this censure would be very unbecoming in Treadwell, who has incorporated all its essential parts into the machine for which he has obtained a patent. But the point mainly relied upon by the plaintiff's counsel is, that no evidence is given that Christian's machine was ever used within the true meaning of that expression in the patent act. It is admitted that an experiment was made with it, but this, it is argued, was not

such a using as the act intends. It surely cannot be denied that the act of making crackers with it amounted to a using of it according to the common and accepted meaning of that phrase; and I am quite at a loss to imagine how this meaning can be varied by the particular motive which induced the inventor so to employ the machine. I can discover nothing in the patent act which will authorise the court to depart from the ordinary meaning of this expression, and to declare that a machine which is put into operation for the sole purpose (if such be the case) of trying its practical utility, is not used within the meaning and intent of the sixth section of that act. The plaintiff's counsel relied in some measure upon certain expressions of the judges in the two cases of Boulton v. Bull, 2 H. Bl. 463, and Bedford v. Hunt [Case No. 1,217]. But so far as any satisfactory inference can be drawn from those expressions, in its application to the particular point under consideration; it strikes me to be unfavourable to the construction contended for. They manifestly contrast the confining of the invention to the closet of the inventor and a mere speculative invention, with putting it into use, practice, or operation; and not the putting of it in practice for the purpose of an experiment, with any other purpose whatever. Upon the whole, I am of opinion, that the experiment of this machine made by Christian, in the year 1807, amounted to a using of it within the true meaning of the sixth section of the patent act.

3. If Christian's machine was invented and used prior to the discovery of Treadwell, then his patent is void, because it covers all the essential parts of Christian's machine, without which it could not operate at all to produce the intended result. The rule of law, that where the patent embraces the discovery of another person, it is void; is too well established to be now controverted; nor was it controverted by the plaintiff's counsel, who candidly admitted, that if Christian's machine was used, he could not maintain the validity of Treadwell's patent.

The jury found a verdict without leaving the room, and the plaintiff suffered a nonsuit.

[For another case involving this patent, see Case No. 14,154.]

Case No. 17,278.

WATSON v. BONDURANT et al.

[2 Woods, 166; 3 Cent. Law J. 398.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1875.

REMOVAL TO STATE COURT — JUDGMENT OF STATE COURT—RESTRAINING EXECUTION.

Where a citizen of one state filed a petition in a court of the state of which he was a citizen, against a citizen of another state, to restrain the execution of a judgment obtained in the state court by the latter against the former, such cause was removable to the federal court under the act of March 3, 1875, notwithstanding the fact, that the federal courts were prohibited by section 720, Rev. St., from granting an injunction to stay proceedings in a state court.

[Cited in Pratt v. Albright, 9 Fed. 639.]

In equity. Heard upon motion to dissolve injunction. The case was commenced in the district court for the parish of Tensas, and was removed to this court under the act of March 3, 1875, being the "Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts and for other purposes." 18 Stat. 470. The case belonged to the equity side of the court. The defendant [Ella F. Bondurant] having recovered in the parish court a judgment against Albert Bondurant, John Bondurant and Horace Bondurant, which was declared to be executory and ordered to be executed on certain lands, in the judgment specifically described, a fieri facias was issued on said judgment and put in the hands of the sheriff of Tensas parish, who was about to execute the same by seizing and selling the property described in the judgment, when the complainant in this action [Frank Watson], claiming to be the owner and in possession of the said lands, filed his petition in the district court of the parish, praying an injunction to restrain the plaintiffs in the judgment, and the sheriff from seizing and selling the said property on the writ of fieri facias aforesaid. The state court allowed the injunction, and the defendant being, as she claimed, a citizen of Mississippi, and the complainant a citizen of Louisiana, removed the cause to this court and moved to dissolve the injunction allowed by the state court. This motion was met by the objection, that the cause was improvidently removed to this court, and, therefore, this court had no jurisdiction to dissolve the injunction or take any other order in the case except to remand it to the state court.

Samuel R. Walker and C. L. Walker, for the motion.

E. T. Merrick, contra.

[The following authorities, among others, were cited, viz.: Rev. St. § 720; Bank v. Turnbill, 16 Wall. [83 U. S.] 190; Freeman v. How, 24 How. [65 U. S.] 450; Buck v. Colbath, 3 Wall. [70 U. S.] 341; Taylor v. Corry, 20 How. [61 U. S.] 584; Watson v. Jones, 13 Wall. [80 U. S.] 719, 720; Rector v. Ashley, 6 Wall. [73 U. S.] 142; Riggs v. Johnson Co., Id. 187; Supervisors v. Durant, 9 Wall. [76 U. S.] 418; Diggs v. Wolcott, 4 Cranch [8 U. S.] 179; French v. Hay, 22 Wall. [89 U. S.] 234, 253.] [2]

WOODS, Circuit Judge. The main controversy arising on this motion is, whether the case is one which can be properly removed from the state court to this court. The de-

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission. 3 Cent. Law J. 398, contains only a partial report.]

[2] [From 3 Cent. Law J. 398.]

fendant appears very clearly to be a citizen of the state of Mississippi, and the complainant a citizen of the state of Louisiana. The case is a suit of a civil nature and of equitable cognizance. It therefore falls expressly within the terms of section 2 of the act of March 3, 1875. But counsel for the complainant say, that the purpose of the suit being to procure the allowance of an injunction to stay proceedings in a state court, it does not belong to the class of cases that can be removed, because a court of the United States is forbidden by section 720, revised statutes, to grant such an injunction. As the act of March 3, 1875, is broad enough to embrace this case, providing as it does in section 4, that all injunctions had in the suit before its removal shall remain in full force and effect until dissolved or modified by the court to which the suit shall be removed, and as the act makes no exception of cases brought in a state court to enjoin proceedings in a state court, and, finally, as the act of 1875 is subsequent in date to the revised statutes, I am of opinion, that the case is one properly removeable, and that it has been properly removed into this court. I am not, however, as yet satisfied that the injunction ought to be dissolved. The ground on which the dissolution is urged is, in effect, that the petition does not make a case for the writ of injunction. It seems to me, that the averments of the petition, uncontradicted as they are by this motion, are sufficient to show that the fieri facias ought to be enjoined. I will, therefore, suspend action on the motion until the defendant either answers the bill or makes such further showing as will justify the court in granting the motion.

Case No. 17,279.

WATSON v. CITIZENS' SAV. BANK.

[2 Hughes, 200;[1] 11 N. B. R. 161.]

Circuit Court, D. South Carolina. 1874.

INSOLVENT CORPORATION—PROCEEDINGS IN BANKRUPTCY—EFFECT ON STATE COURT JURISDICTION—COUNTY.

1. The court, in construing the amendment of the bankruptcy act, passed February 13, 1873 (section 5123, Rev. St. U. S. [17 Stat. 436]), declaring that where proceedings have been commenced in a state court against a corporation prior to commencement of proceedings in bankruptcy against the same corporation, any order made by the state court agreeably to the state law for the ratable distribution or payment of any dividend of assets to creditors while such state court shall remain actually or constructively in possession or control of the assets of such corporation shall be deemed valid, notwithstanding proceedings in bankruptcy may have been commenced and be pending against such company, *held*, that the jurisdiction of the United States court in bankruptcy is an exclusive jurisdiction.

2. Although the state courts have jurisdiction under their statutes to settle and arrange the affairs and distribute the assets of an insolvent corporation, their jurisdiction is at an end the moment the corporation is adjudged a bankrupt by the United States district court.

3. The act of congress of February 13, 1873, relates only to such orders respecting the ratable distribution of assets or payment of dividends as the state court may have passed prior to the commencement of proceedings in bankruptcy.

4. No question of comity between courts can arise under the act of congress of February 13, 1873, as the question is one of jurisdiction and not of comity.[2]

In bankruptcy.

The summons and complaint of John L. Watson, the affidavit thereto, the order of State Judge Carpenter, and the proof of service of said papers, all bear date November 22d, 1873. The order of Judge Carpenter calls upon the bank to show cause why a receiver should not be appointed, and "that in the meantime, the defendant, its officers and agents, be restrained from paying out the funds, or otherwise disposing of the property and effects of the said corporation." On being served with these papers, the bank at once retained the services of the appellant, and Messrs. Haskell, Bachman, and Youmans, to defend said action, and to advise the bank as to the proper course to be pursued; and paid them moderate and reasonable fees for their services. In pursuance of the advice of these attorneys, on the 29th November, 1873, the bank filed its petition in bankruptcy, and on 1st December, 1873, it was adjudged a bankrupt by Judge Bryan, of the United States district court; and on the same day, "all the property of every kind soever" was ordered to be surrendered to the register, and by him kept until the appointment of an assignee. On the 9th December, 1873, Judge Carpenter adjudged that the proceedings in bankruptcy did not oust the jurisdiction of his court, and "5th. That the next step taken in the administration of the assets of said bank is necessarily the return of said assets to the custody of this court." Upon this declaration of an intention to interfere with the possession by the register of the property of the bank, the United States district court, on the 10th December, 1873, issued an order of injunction, "that the said John L. Watson, and all other creditors of said bankrupt, their agents and attorneys, and any and all persons whomsoever, be, and they and each of them are hereby restrained and enjoined from intermeddling or in any wise interfering with the property and assets of said bankrupt, or with the possession, custody, and control of said property and assets by

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

[2] This decision was rendered before the enactment of the Revised Statutes of the United States of June 22, 1874, which for the first time enacted the express words (section 711): "The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states. * * * Sixth, of all matters and proceedings in bankruptcy."

the register of this court, or any other officer or appointee of this court, into whose hands the aforesaid property and assets may be transferred." On the 13th December, 1873, Judge Carpenter issued a rule upon the six attorneys of the bank to show cause why they should not be attached for a contempt of his court. On the 17th December, 1873, the plaintiff, Watson, filed a petition in the United States circuit court, for the purpose of reviewing the proceedings had in the district court, and having all the orders made by the latter court set aside, and the assets restored to the custody of the state court.

Mr. Trescot, for the petitioners, contended that the bankrupt court had no authority to issue an injunction, except up to the time of the adjudication in bankruptcy; that suit having been commenced in the state court previous to the commencement of the proceedings in bankruptcy, under the amendment of 1873 of the bankrupt law, the case should remain in the state court.

C. D. Melton, on the same side, contended that while the United States courts had frequently enjoined proceedings in the state court, yet in all these cases the injunctions had been issued to restrain creditors from establishing separate liens or judgments, exclusive of and without regard to the rights of the other creditors. In this case, however, the creditor had no such object in view. He only desired under the state laws to procure an equitable administration of the assets of the insolvent debtor.

James H. Rion, for the defendants, claimed that the suit in the state court was actually a proceeding in involuntary bankruptcy, and the administration of bankruptcy property belongs to the United States court. In this case no receiver had been appointed by the state court yet, and the United States district court could, therefore, with perfect propriety, assert its jurisdiction, without being reduced to the necessity of dispossessing a receiver appointed by another court. The object and intent of the bankrupt law was to place the administration of the assets of a bankrupt's estate within the control of the bankrupt court, and the passage of the law superseded or suspended all state insolvent laws. The action of the state court must yield to the paramount authority of the United States court. It was clearly laid down in all the authorities that the United States court had full power to suspend or control all proceedings in a state court against a bankrupt or his estate. This suspension or control could properly be effected by an injunction, as had been done in this case.

A. G. Magrath, in reply, urged that the order of Judge Bryan was in direct violation of the order of the state court, and was granted without notice to the petitioners, who had instituted the proceeding in the state court. If the circuit court of the state had jurisdiction in this case in limine, the jurisdiction continued to the end of the suit.

BOND, Circuit Judge. This cause having been presented and argued on the last days of the term, we are allowed no time to file an opinion in writing, and will only state briefly the conclusions to which we have come, and which we think are decisive of the case:

First. We are of the opinion that the jurisdiction of the United States courts in bankruptcy is an exclusive jurisdiction.

Second. That although the state courts have jurisdiction, under their statutes, to settle and arrange the affairs and distribute the assets of an insolvent corporation, their jurisdiction is at an end the moment the corporation is adjudicated a bankrupt by the district court; and in this respect we can see no difference between the proceedings of a state court under a particular statute relating to insolvent corporations, and its proceedings under its general powers as a court of equity to wind up the affairs of an insolvent corporation.

Third. That we are of the opinion that the act of congress of February 13th, 1873, applies only to such orders relating to the ratable distribution or payment of dividends as the state courts may have passed prior to the commencement of proceeding in the district courts, or prior to its adjudication in bankruptcy, for the ratable distribution or payment of dividends.

It seems to the court plain, also, that no question of comity between courts can arise in this case, for, aside from the numerous decisions quoted in argument, determining the exclusive jurisdiction of the United States court in bankruptcy, the act of February 13th, 1873, renders the matter certain; for congress would never have directed the bankrupt court to obey any orders passed by a state court prior to its decree in bankruptcy, if the bankrupt court could take no jurisdiction of an insolvent corporation's affairs, after bill filed in a state court, to wind up their affairs. In this case there has been no order of a state court respecting payment or distribution. There has been no receiver appointed to take possession of the effects of the insolvent corporation. The court has required the officers of the company to remain in possession and make no transfer. They have not so made transfer; the transfer was by operation of law, upon the application for the benefit of the provisions of the bankrupt act, to the district court. We do not think a state court can, by any process, prevent a party from applying to the district court for the benefit of the provisions of the bankrupt law. We think the objection that the injunction against Watson, a creditor of the bankrupt, was improvidently issued, because he was not a party to the petition in bankruptcy, is not well taken. All the creditors of a bank-

rupt are parties to the proceedings, especially so far as an order for the preservation of the assets is concerned. For these and other reasons, which we have not time to note, much less to enlarge upon, this petition must be dismissed.

[For another report of this proceeding, see Case No. 2,735.]

Case No. 17,280.

WATSON et al. v. CUNNINGHAM et al.

[4 Fish. Pat. Cas. 528; 19 Pittsb. Leg. J. 142; Merw. Pat. Inv. 432; 3 Pittsb. Rep. 366.] [1]

Circuit Court, W. D. Pennsylvania. May, 1871.

PATENTS FOR INVENTIONS—ORIGINAL COMBINATION—FRUIT JARS.

1. A combination is to be regarded as a unit, and if all its essential elements have not before been embodied and employed together, it is to be taken as an original invention.

2. A combination, all the elements of which are old, is patentable if a new or improved result is thereby obtained; and a combination, all the elements of which, except a single one, have been before used together, is also the subject of a patent.

3. The patentee claimed a metal cap, provided with projections or supporting lugs, in combination with a wire fastener, an India rubber ring or gasket, and a jar, the whole constructed and operating substantially as and for the purpose specified; and it appeared that, in his jar, the pressure of the fastener was upon the circumference of the cover only. Prior jars had been made and used with a shoulder bed, on which an India rubber gasket rested, and with a metal cap which was pressed upon the gasket and held down with a wire yoke, but without the feature of exclusive circumferential pressure. *Held*, that such jars did not anticipate the patented combination.

This was a bill in equity, filed [by Mark W. Watson, John McM. King, and John H. McKelvey, partners as William McCully & Co.] to restrain the defendants [W. Cunningham, D. Ihmsen, R. Cunningham, and D. O. Cunningham, partners as Cunninghams & Ihmsen], from infringing letters patent for "improvement in fruit jars," granted to D. Irving Holcomb, December 14, 1869, and assigned to complainants. The claim of the patent was as follows: "The metal cap D, provided with the projections or supporting lugs d d, in combination with fastener E, ring C, and jar A, the whole constructed and operating substantially as and for the purpose specified."

William Bakewell, for complainants.
R. B. Carnahan, for defendants.

McKENNAN, Circuit Judge. The complainants are the exclusive assignees of D. Irving Holcomb, to whom letters patent No. 97,920, dated December 14, 1869, for "an improvement in fruit jars," was granted. Their bill alleges an infringement by the respondents of these letters, and prays for an injunction and an account. In their answer, the respondents admit that, from about August 1, 1868, they made and manufactured fruit jars, in all essential features of construction and combination like the fruit jar patented to Daniel Irving Holcomb, including the metallic cap and the mode of applying it to the jar (except that they have a groove instead of a flat surface for the reception of the India rubber ring), as claimed in said patent, but they deny that said Holcomb originated the invention described in the patent. The only question to be considered, then, involves the novelty of the alleged invention.

The claim in the patent is for a metal cap, provided with projections or supporting lugs, in combination with a wire fastener, an India rubber ring or gasket, and a jar, the whole constructed and operating substantially as and for the purpose specified. In the specification, the mode of constructing and combining the several elements thus stated in the claim is fully explained. A fruit jar of glass or other material is made with a wide, flat surface, or shoulder-bed, to receive a flat rubber ring or gasket, which encircles an upright projection forming the mouth of the jar. Upon this projection is made to fit a thin metal cover with a flanged rim, which rests on the rubber gasket. On the opposite sides of the circumference of this cap are ridges or elevations in its surface, with a slight depression in the middle of each of them, on which a wire yoke, to hold the cover down, is designed to rest and to be kept in place. This yoke is bent at its extremities, and is made to fit tightly on the shoulder of the jar, so as to cause a downward pressure on the cap. The function of the ridges is to furnish a bearing for the wire fastener, and at the same time to hold it in its place. While, therefore, the fastener rests only on these elevations, there is no central pressure on the cover, by which the springing of the flange might be caused, and the air thus be allowed to pass between it and the rubber. The pressure is concentrated upon the circumference of the cover directly over the flange, and thereby a closer contact with the gasket is produced and maintained, and the air more effectually excluded. This is the distinguishing merit of the invention.

Facility and cheapness of manufacture, susceptibility of repeated use, and air-tightness are the most valuable qualities of a fruit-preserving jar. Any vessel, then, which most conspicuously embodies these properties, is best adapted to public use, and to supply what may be regarded as almost a domestic necessity. This extended and growing want, the patentee seems to have successfully met. For, by taking a vessel of easy manufacture and of moderate cost, he has applied to it a method of sealing it, of

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 432, contains only a partial report.]

remarkable simplicity and cheapness, and of apparent efficacy, and has rendered it susceptible of use for an indefinite period. If his method is new, there can be no doubt, then, of its patentable merit.

In the light of the proofs in the case, the novelty of the invention is as clear as its utility is obvious. It is satisfactorily proved, that the patentee had fully conceived the abstract idea of his invention as early as January, 1868, and that in April of that year, he embodied it in the form of a model in wood, as completely and exactly as he described it afterward in his specification. In all the preserving vessels in use, before that time, which have been exhibited in evidence, the devices employed to exclude the air are different in operation from that indicated by the patentee. The nearest approximation to his invention appears in those jars constructed with a shoulder, upon which an India rubber gasket rests, with a thin metal cover pressed down on it by a wire yoke, and with elevations or lugs operating only to prevent the lateral displacement of the yoke. But they lack the distinguishing device used by the patentee, by which the bearing of the fastener is only on the periphery of the cover, and its downward pressure is thus certainly concentrated upon the whole circumference of the flange. Differing in this essential feature, for it is obvious that the sealing mechanism is thereby made more effective, and an improved result obtained, they are distinguishable from the patentee's invention by the omission of one of the most important constituents of the combination therein embodied.

It is scarcely necessary to support this conclusion by a restatement of the familiar principle that a combination, all the elements of which are old, is patentable, if a new or improved result is thereby obtained, or that a combination, all the elements of which, except a single one, have been before used together, is also the subject of a patent. The whole combination is to be regarded as a unit, and if all its essential elements have not before been embodied and employed together, it is to be taken as an original invention.

While, therefore, it is apparent that fruit-preserving jars were made and in use before, with a shoulder-bed on which an India rubber gasket rested, and with a metal cap which was pressed upon the gasket and held down by a wire yoke, yet it does not appear that the patentee's device to secure more effectual sealing—the vital function of the whole mechanism—by exclusive circumferential pressure, was employed in any of them. His claim, then, for a combination, of which this device constitutes an essential and valuable part, embodies a new and original invention, and is entitled to protection against infringement.

A decree will accordingly be entered for an injunction and an account.

Case No. 17,281.

WATSON et al. v. DOBBINS.

[Brunner, Col. Cas. 233; [1] Cooke, 359.]

Circuit Court, D. Tennessee. 1813.

REGISTRATION OF DEED.

Registration of a deed in the county in which one of several grantees resides is not sufficient in North Carolina under the act of 1788.

The plaintiffs [Watson & McIver] relied on a grant to Martin Armstrong from the state of North Carolina, and a deed from him by his attorney in fact, to one of the lessors of the plaintiff, dated in February, 1797. This deed was proved and registered in Davidson county, in 1798, and afterwards registered, to wit, in 1812, in the county of Giles, where the land lies. At the date of this deed and the first probate and registration thereof, the land lay in the Indian boundary. Watson, to whom the deed was made, resided in North Carolina, east of the Cumberland Mountain. The defendant claimed under a deed from Martin Armstrong, dated in the year 1802, to the heirs of Alexander Dobbins. It was proved in July, 1804, before the county court of Davidson, and in September following was registered in the same county. In 1811, after the commencement of this suit, but before the last registration of the deed to Watson, the deed under which the defendant claimed was also registered in the county of Giles. Proof was introduced going to show that at the date and first registration of the deed, David Dobbins, one of the heirs of Alexander Dobbins, resided in Davidson county.

Mr. Dickinson, for plaintiffs.

Whiteside & Cooke, for defendant.

BY THE COURT. The registration of the deed from Armstrong to Watson, in Davidson county, was certainly illegal; but the subsequent registration in Giles was well enough, and will confer upon the grantee a legal title to the land conveyed by the deed, to take effect from the date, unless the deed to the heirs of Dobbins, which has in the mean time been executed and registered, can be made to prevent it. The act of 1807, which revives the right of registering deeds situated similar to this of Watson's, expressly secures the right of subsequent purchasers and creditors, where they have caused their deeds to be registered in the time and manner prescribed by law. Under the provisions of this act, and those of a similar import of a subsequent date, if the registration of the defendant's deed in Davidson county be good, in consequence of the residence of one of the grantees in that county, as it was registered in proper time, the defendant will be entitled to recover. The act of 1788, c. 24, § 5, declares that all lands entered in the office of John Arm-

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

strong, west of Cumberland Mountain, may be registered in the county in which the proprietor of said land may reside. In this case there are several grantees, some of whom were, at the date of the first probate and registration, residents of North Carolina; one only lived in Davidson. The court are, therefore, inclined to the opinion that the registration was not sufficient in the county of Davidson, and the grantees have not attempted a registration under any law but that of 1788.

Case No. 17,282.

WATSON v. DUNLAP.

[2 Cranch, C. C. 14.] [1]

Circuit Court. District of Columbia. Nov. Term, 1810.

PROMISE OF FEME COVERT—CONSIDERATION—PLEADING AND PROOF.

1. The promise of a feme covert is void, and her subsequent promise when sole, without a new consideration, is also void.

2. A promise in writing without consideration is void; but the burden of want of consideration is on the defendant.

3. The plaintiff cannot give evidence of a consideration different from that alleged in the declaration.

Assumpsit, to pay for money advanced by the plaintiff to the defendant's son by her first husband.

J. D. Simms, for defendant [Eliza Dunlap], prayed the court to instruct the jury that the first assumpsit being made while under coverture was void (1 Strange, 94), and that the subsequent assumpsit while sole, was void for want of consideration.

Mr. Youngs, for plaintiff, contended that the promise being in writing, it was not necessary that there should be a consideration. 3 Call, 114. The court cannot alter the words of a statute, if they are positive; if not ambiguous, there is no room for construction. The statute of frauds only requires the promise to be in writing, not the whole agreement. Violett v. Patton, 5 Cranch [9 U. S.] 142.

THE COURT was of opinion, 1st, that there must be a consideration, although the promise be in writing. Rann v. Hughes, 7 Term R. 350; Wain v. Warlters, 5 East, 11. But the burden of proof is on the defendant to show the nature of the consideration, or that there was none. 2d, that the advance of money to her son while she was covert, did not create such a moral obligation upon the defendant as is a sufficient consideration to support her actual assumpsit in writing.

THE COURT also refused to permit evidence of a consideration different from that assigned in the declaration. Non pros.

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

Case No. 17,283.

WATSON v. HALL.

[2 Cranch, C. C. 154.] [1]

Circuit Court, District of Columbia. Nov. Term, 1818.

DEED TO INSOLVENT TRUSTEE.

The common printed form of the deed from an insolvent debtor to his trustee under the insolvent act is sufficiently certain to convey to the trustee a title to slaves.

Case, for enticing away slaves Harry and Pris. The plaintiff was trustee of Thomas G. Slye's effects under the insolvent act of the District of Columbia.

Mr. Taylor, for defendant, objected that the deed was too general, and contained no description of the property sufficiently certain to a common intent. The words are: "All my property, real, personal, and mixed, and all my rights, claims, and credits, of what kind or nature soever they may be," "to have and to hold the same to him the said J. W., as trustee as aforesaid, according to the true intent and meaning of the law in such case made and provided, and for no other."

THE COURT (CRANCH, Chief Judge, doubting) decided that the deed was sufficiently certain to pass the title of the slaves to the plaintiff.

WATSON (HIGGINS v.). See Case No. 6,470.

Case No. 17,284.

WATSON et al. v. INSURANCE CO. OF NORTH AMERICA.

[2 Wash. C. C. 152.] [2]

Circuit Court, D. Pennsylvania. April Term, 1808.

MARINE INSURANCE—SURVEY OF VESSEL—EFFECT OF CONDEMNATION.

1. The report of a survey, made upon an examination of a vessel for the purpose of ascertaining her situation after a disaster in a foreign port, is not evidence of the facts stated in it; but only that such survey was made.

2. The condemnation of a vessel, upon a report of the surveyors, that many of her timbers were unsound and rotten, and that in her strained and shattered condition, and from the want of proper docks at the place for repairing her, her repairs would cost more than she was worth, is not a condemnation which will excuse the underwriters from liability under the clause in the policy, which declares, that if the vessel should be condemned, as unsound or rotten, the underwriters should not be liable.

Action [by Watson & Hudson] on two policies, one on the Anna Maria, at and from Cadiz

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

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

to Antwerp, valued at 12,000 dollars; and the other on the freight of said vessel, on the same voyage, valued at 6,000 dollars. Shortly after leaving Cadiz, the vessel met with many gales, which caused her to strain, and make much water; and after consulting the officers, and with the advice of the ship-carpenter, she put back, and got to Gibraltar, where, still experiencing bad weather, she stranded. The captain petitioned the admiralty court at Gibraltar for a survey, which was had; and the report was, that upon examination, many of her timbers, which are particularly mentioned, were found to be unsound and rotten; and that in the shattered and strained situation of the vessel, and the want of proper docks there for repairing her, the repairs would cost more than the vessel was worth; and therefore they recommended that she should be sold. On this report, the captain petitioned the court, that a sale should be ordered for the reasons mentioned in the report. The order was accordingly given, and the vessel was sold.

The question of fact turned upon the seaworthiness of the vessel, when the risk commenced; and testimony was given, with a view to prove that she was strong, staunch, and sound, when she sailed from New-York for Cadiz. Upon this point, the question was, whether the report of the surveyor was evidence of the facts contained in it, or only evidence that a survey was made, and an order of sale awarded; and to prove that the report is evidence of the facts stated in it, Mr. Rawle, for plaintiff, read Park, 406.

BY THE COURT. The report is not evidence of the facts stated in it; but only that a survey took place.

The point of law raised, by Ingersoll & Hopkinson, for defendants, was, that under that clause in the policy, which declares, that if the vessel should be condemned as unsound, or rotten, the underwriters should not be liable, this condemnation was conclusive upon the parties; and on this ground, they moved for a nonsuit.

Mr. Rawle, for plaintiff, relied upon the case of Wilson v. Marine Ins. Co. of Alexandria, 3 Cranch [7 U. S.] 187; and the unreasonableness of the construction contended for by the defendants' counsel.

WASHINGTON, Circuit Justice. We can only understand the meaning of contracts, by the language which the parties have used; and that must govern the construction, unless decisions have been made, by which a fixed meaning has been given to these expressions. In this case, no adjudication, to our knowledge, has ever been given on this clause. The case from 3 Cranch [supra] is altogether unlike it; for although the same clause was resorted to in the policy in that case, still no opinion was given as to its construction. The plea was, that the vessel was not seaworthy at the time the risk commenced; and the defendants offered the report of the surveyors, which did not declare the vessel to be unsound or rotten, as evidence that she was not seaworthy when she sailed. The supreme court were of opinion that the report, referring to the time when the survey was made, was not evidence of the vessel not being seaworthy when the risk commenced; but no question arose, or in that case could arise, as to the conclusiveness of the condemnation. In this case, the question is not confined, by the pleadings, to the want of seaworthiness when the risk commenced, but whether she was condemned as being unsound or rotten. Had she been condemned for this cause, it would have been conclusive under this clause of the policy, which is too plainly and unambiguously worded, to admit of two interpretations. But, in this case, the surveyors do not report that the vessel was unsound or rotten; but they state, that some of her timbers were so, and in consequence of her strained and shattered situation, and the difficulty of repairing her, they advise a sale, and the sale is ordered for these reasons; but not because the vessel was rotten, for no such fact is reported. There seems to be good reason for the parties really meaning what the expressions in this clause so clearly import. The vessel may be condemned for a variety of reasons, which imply nothing against the want of seaworthiness when the risk commenced; as for injuries sustained by stress of weather, or from other causes, on the voyage. In this case, therefore, the condemnation is to have no effect. But if she be condemned, as being unsound or rotten, this can so seldom occur, unless she was so when she sailed, that the parties are willing to consider this circumstance, if established by a regular survey and condemnation, as evidence of the fact of want of seaworthiness when she sailed, without going into other proof, which it is always difficult to procure. Very long voyages may furnish an exception to this reasoning; but in general it is a good one, and the parties adopt it.

[For proceedings on a subsequent trial, see Cases Nos. 17,285 and 17,286.]

Case No. 17,285.

WATSON et al. v. INSURANCE CO. OF NORTH AMERICA.

[2 Wash. C. C. 480.] [1]

Circuit Court, D. Pennsylvania. Jan., 1811.

MARINE INSURANCE—SEAWORTHINESS OF VESSEL—CERTIFICATE OF SURVEY.

1. If the certificate of the survey of a vessel be read for the purpose of proving that a survey and condemnation of the vessel had taken place, and to prove no other fact stated in it, the party who, for this purpose only, gave it in evidence, will not be thereby prevented from im-

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

peaching the credit of the surveyors, whose depositions have been read.

2. It is sufficient, on a question of seaworthiness, if the vessel was fit to perform the voyage insured, as to ordinary perils—the underwriters are bound as to extraordinary perils.

[Cited in The Orient, 16 Fed. 916; The Sintram, 64 Fed. 886.]

3. If the insured lay a rational ground for the disability of the vessel, by proving severe gales during the voyage, and seaworthiness on a preceding voyage, the burthen of the proof of the want of seaworthiness lies on the insurer.

[Cited in The Orient, 16 Fed. 916.]

4. Aliter, when a disability happens from stress of weather, without any sufficient cause.

This case was again tried (see Watson v. Insurance Co. of North America [Case No. 17,284]), and turned upon the question of seaworthiness. Upon the opening, the plaintiffs' counsel read the survey and condemnation at Gibraltar, after stating to the jury that he did so merely to show that a survey and condemnation had taken place, but not as evidence of any fact stated in it. The defendants, since the last trial, obtained and gave in evidence the deposition of one of the surveyors, which stated the case in respect to the unsoundness of the vessel at Gibraltar, very unfavourably to the plaintiffs. To meet this evidence, the plaintiffs offered the deposition of the captain, to contradict the statements of the surveyor, and to impeach his credit. This was objected to, on the ground that the plaintiffs, having read the report of this very surveyor, had made it their evidence, which they could not afterwards impeach.

BY THE COURT. The plaintiffs have not read the survey, as evidence of any fact; and in their opening, disclaimed all intention of considering the surveyor as a witness for them of a single fact, but the contrary. The principle, therefore, which is opposed to the evidence now offered, does not apply.

In the charge, it was stated to the jury, that the question for their decision was, whether this vessel, at the time when the risk commenced, was sufficiently tight, staunch, strong, and well found, to perform the voyage insured, from Cadiz to Antwerp, and to encounter the ordinary perils of that voyage; the underwriters taking upon themselves the risk of extraordinary perils. In considering the evidence of seaworthiness, where a rational ground is laid, as in this case, for the disability of the vessel to perform the voyage, by proof of severe gales to which she was exposed on the voyage; and more especially where, as in this case, the former condition of the vessel, for the two preceding years, is proved to be that of a sound and seaworthy vessel; the burthen of the proof is thrown upon the underwriters, to prove satisfactorily to the jury, that she was not seaworthy, and sufficiently strong to perform the voyage — otherwise, where a disability happens, without any sufficient cause, from stress of weather. With these observations, the question was left to the jury.

2. THE COURT stated to the jury, that they were not to regard the survey as proving any of the facts stated in it; and directed them, at the request of the parties, that if they thought the vessel seaworthy, to find for the plaintiffs, with the value of the vessel, subject to the opinion of the court on a point reserved.

Verdict for plaintiffs, value 15,000 dollars, subject, &c.

[For opinion on the question reserved, see Case No. 17,286.]

Case No. 17,286.

WATSON et al. v. INSURANCE CO. OF NORTH AMERICA.

[3 Wash. C. C. 1.][1]

Circuit Court, D. Pennsylvania. April Term, 1811.

MARINE INSURANCE—ACTION ON POLICY—DAMAGES—BOTTOMRY BOND—VALUED POLICY.

1. The plaintiffs insured $12,000 on the Anna Maria, from Cadiz to Antwerp, by a valued policy; and the vessel having put into Gibraltar in distress, the captain executed a bottomry bond, which was dated a few days before the policy was made. The jury found the real value of the Anna Maria to be $15,000, and left to the court the question, whether the amount of the bottomry bond should be deducted from the agreed value in the policy, or the real value. The court held, that the deduction should be made from the real value, as found by the jury.

[Cited in Force v. Providence Washington Ins. Co., 35 Fed. 771; The Fern Holme, 46 Fed. 124; O'Brien v. Miller, 67 Fed. 612.]

2. A valued policy is in general conclusive, both as to the value of the property, and of the interest that valuation is sufficient to cover; the agreed value being a fixed standard, by which to ascertain the measure of the promised indemnity; but this ceases to be obligatory, if from any circumstances it fails to afford such standard—as where the loss is partial, or the property has, by fraud or accident, been greatly overrated.

3. Difference between the form of policies of insurance in the United States and in England, as to double insurances.

The only question reserved by the jury for the opinion of the court, was, whether the amount of a bottomry bond, executed by the captain, without the knowledge of the plaintiff, beyond sea, a few days before this policy was made, is to be deducted from the 12,000 dollars, the agreed value in the policy, or from the 15,000 dollars, the real value found by the jury?

[For prior proceedings, see Cases Nos. 17,284 and 17,285.]

WASHINGTON, Circuit Justice. The object of the insured, as well as of the under-

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

writer, is indemnity against loss to the value of the interest of the former in the subject insured. The value of this interest may be agreed by the parties, or if not so, the insured must prove it. This agreement is in general conclusive between the parties to the policy, not of the value of the property at risk, but of the interest which that valuation is sufficient to cover; for the owner may insure different portions of his entire interest with different sets of underwriters, and may after all leave a residuum, of which he stands himself the insurer.

The agreed value being intended, by both parties, to fix a just standard by which to ascertain the measure of the promised indemnity, it of course ceases to be obligatory, if, from any circumstance, it fails to furnish such standard. This happens in every instance where only a partial loss has happened, or where the property has been greatly overvalued. But it is not because of fraud in the overvaluation, that the policy is opened; for if it happen by accident, as by a part only of an expected cargo being put at risk, the insurer is not bound by the agreed value. A double insurance does not necessarily imply an overinsurance, because the aggregate of the sums subscribed may fall short of the real value; and according to the custom of merchants in England, the loss is to be made up proportionally by the different sets of underwriters: but the form of the policies of this city, and probably of most of the cities of the United States, has prescribed a different rule; and it is believed, that by a fair construction of the contract which creates this rule, the present question may be decided.

The agreement is, that if any prior assurance of the same property has been made, the assurers in this policy shall be answerable, only, for so much as the amount of such prior assurance may be deficient towards fully covering the premises insured. Here, the existence of a prior insurance is presumed and admitted; and the second insurer binds himself to make good any deficiency in the first policy towards a full indemnification, so far as his subscription goes. True, it may be said, the second insurer promises a full indemnification, but the measure of that indemnity is the value agreed by the parties, where such an agreement is made. But how can this possibly be? The insured most unqestionably intends to secure an indemnity to the amount stipulated in the second policy, in addition to that secured by the first; and the second insurer, by admitting the possible existence of a prior policy, consents to fulfil that intention, so far as it may be necessary to cover the property insured to the extent of his subscription. But, notwithstanding this, the rule contended for by the defendants in this case, is calculated to deprive the assured of his expected indemnity, by so much as the sum first insured amounts to, should it be less than the value agreed in the second policy—and to render the second policy absolutely null and void, in case the sum first insured should exceed the sum so agreed in the second policy: that is to say, the second insurer is to be understood as declaring, that although his whole subscription may be necessary, in addition to the sum first insured, fully to indemnify the insured, and therefore he pledges himself to that extent, still he will not go to that extent, and in fact will not pay a farthing, if the insured is entitled to receive from the first underwriter a greater sum than the value agreed upon between them, however inadequate that may be to cover the property insured. If ever a rule was contended for, which more palpably violates the obvious and declared intention of both parties to a contract, it is not now recollected by the court. But it may be asked, why does the insured agree upon the value of the interest at risk, where he has previously insured the same property, unless it is his intention to be governed by that value? The answer is, that a prior insurance may have been effected abroad, and still more probably, a bottomry bond given, without his certainly knowing the fact. It is as probable that a loss may be partial as total, and yet he agrees to the value, although he knows that in the former case the value will stand for nothing. In the present case, it is agreed that the plaintiffs were ignorant of this bottomry bond, which accounts for the form in which this insurance was made.

Upon the whole, it is the opinion of the court, that the clause in the policy which has been stated and examined, amounts to an agreement to open the policy, in case a bottomry bond has been given, or a prior insurance made; and that the amount of the bottomry bond, or of a prior insurance, is to be taken out of the real value.

Case No. 17,287.

WATSON v. LEMAR.

[Betts' Scr. Bk. 85.]

District Court, D. South Carolina. 1842.

BANKRUPTCY PROCEEDING — POWERS OF DISTRICT COURT—LIEN OF LANDLORD—ENFORCEMENT.

[1. The United States district court has power to fully administer the bankrupt act.]

[2. The lien given a landlord for rent already due by the law of South Carolina is undisturbed by a decree declaring the tenant a bankrupt.]

[3. The creditors cannot object to the enforcement of such a lien on the ground that it will sacrifice the tenant's goods.]

[4. The landlord's right to enforce the lien is not affected by the fact that he was preferred in a voluntary assignment by the tenant, and that he has expressed a willingness that the assignee should sell, and pay him his rent.]

In bankruptcy. Watson, Crews & Co. filed their petition, claiming that Lemar & Addy, should be declared bankrupts, and on the next day Mordecai Cohen distrained the goods of Lemar & Addy for rent due him. The petitioning creditors thereupon filed a

bill for an injunction against a sale under the landlord's distress, until a decree of bankruptcy, and an assignee could be appointed, to contest the landlord's right, or take steps for an advantageous sale of the debtor's property for the benefit of all concerned.

GILCHRIST, District Judge, ruled the following points:

1. That the district court of the United States, sitting as a court of bankruptcy, has all necessary chancery powers and jurisdiction for full administration of the bankrupt act.

2. That a landlord levying, before a decree in bankruptcy, for rent due before such decree, has a lien, under the statute of Anne, of force in this state, on the property of his tenant, and such lien is undisturbed by the bankrupt act.

3. That the apprehension of the petitioning creditors that a sale under the landlord's distress warrant will cause a sacrifice to the tenant's goods to the injury of the other creditors furnishes no ground to enjoin the landlord's proceedings.

4. That the facts that the landlord was a preferred creditor for his rent under a voluntary assignment of his tenant, and that he had expressed his willingness (without personally accepting the deed of assignment) that the assignee should sell, and pay him his rent, did not impair his legal remedy.

WATSON (PETERSON v.). See Case No. 11,037.

WATSON v. REYNOLDS. See Cases Nos. 17,274, 17,275.

Case No. 17,288.

WATSON v. The ROSE.

[1 Pet. Adm. 132.] [1]

District Court, D. Pennsylvania. 1806.

AMERICAN SEAMAN — IMPRESSMENT BY FOREIGN VESSEL—RIGHT TO WAGES.

[1. A mariner on a neutral vessel, carried off by captors on the arrest of the ship for adjudication, participates in the general circumstances of all the crew as to the fate of the ship, and if she is discharged by the court of the captor he is entitled to his wages.]

[2. A sailor on a neutral vessel, who is impressed, while the ship is permitted to proceed, cannot recover his wages from the vessel unless he thereafter rejoins her.]

[Cited in Hanson v. Rowell, Case No. 6,043.]

The libellant [James Watson], being a citizen of the United States, and one of the crew of an American vessel, was impressed by a British cruizer; and the ship permitted to proceed on her voyage. The case was opened with a view to obtain wages for the voyage, under principles settled in this court, relating to mariners taken and carried off by force, out of vessels taken and retaken and proceeding to their ports of destination, and earning freight.

BY THE COURT. I have never extended any decision so far as to reach this case, when unconnected with other circumstances. I think it would be stretching the principle to an extreme. This practice of impressing our seamen, has been often and ably discussed, in other departments of our government; and I am under no necessity to enlarge upon it. Seamen, really American citizens, are not legally amenable to this outrage, and tyrannical exercise of belligerent force. But mariners, in neutral ships, are lawfully subject to be carried in by belligerents, for adjudication, in cases warranted by treaties, or the laws of nations. The person of a mariner belonging to a belligerent nation, is, as a member of that nation, subject to capture by his enemy.[2] But one of a neutral country is not liable to restraint, except where his case relates to, and is connected with, the ship, in which he is found. I know that some instances may be cited, of seamen carried off by pirates, or sea rovers, which may be deemed to bear on this question.[3] But I endeavour, as far as practicable, and consistently with general principles, to put every case on its own circumstances. A mariner of a neutral vessel, carried off by captors, on the arrest of the ship for adjudication, participates in the general circumstances of all the crew, as to the fate of the ship; and this as a member of the crew. See Hart v. The Littlejohn [Case No. 6,153]. If she is discharged by the court of the captor, he, in common with others, has the advantage of saving his wages; though the neutral merchant incurs both loss, expense and inconvenience, by a casualty to which he is liable, as part of the terms on which he enjoys his trade. The separating the crew, by carrying off one or more seamen, is an injury to the neutral merchant, who is thereby reduced to the necessity, if his vessel is released, of hiring other seamen to complete his crew. But, the neutral seaman, abstracted by this unjustifiable act of power, should lose none of those rights, to which he is entitled as a partaker in the fate of the ship; though, after separation, further outrage should be added, by compelling him to serve in a belligerent ship. It lies with the merchant, to charge, in his account of damages against the captors, the extra expense occasioned by the dispersion of his crew. But one impressed, where the ship is permitted to proceed, is personally wronged; and the more so, by being prevented from fully executing his contract, and unjustifiably detached from the

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

[2] [See note at end of case.]

[3] The better opinion of writers, on this subject, seems to be, that if a seaman is carried off by a pirate, as a hostage for the release of the ship and crew, his wages and ransom must be paid. But if forcibly and unconditionally taken, his case stands on separate grounds, and his contract is interrupted, though jurists are not generally agreed on this point.

benefits, common to the rest of the crew. He must rely, whatever may be the result, on the protection due to him by his government, for the redress he is entitled to, as well for losses sustained, as personal injuries so unwarrantably suffered. The unlawful impressment is an injury done to him, specially and individually; and has no ingredients common to all the crew.

There will often arise some anomalous occurrences, form what general rule we may. In one or two instances, I have decreed wages for the voyage, where sailors were carried off from a ship being arrested, with intent to send her in for adjudication, but those left on board regained her, resumed her former course, and she arrived at her port of original destination, and earned her freight. It was alleged, that extra payment had been made to those who brought in the ship. But principles cannot fluctuate with the debit and credit sides of accounts. They must be general; and special cases, not clearly marked with distinct character, must yield to them. The tints of distinction in these instances, from the general class of cases, governed by the principles before stated, were not sufficiently strong, to form exceptions to the general rule. In a former case, where a seaman was impressed, and the vessel permitted to proceed, I decreed wages for the voyage; because the seaman, after a short detention, rejoined his own ship, and performed his duty during the remainder of the voyage. Such temporary interruptions should have no more effect on entire contracts, than short detentions, on insurances; which are not affected when a ship, being for a time in jeopardy, but speedily restored to safety, arrives at her intended port. Wages for the voyage were also decreed to a mariner who had been impressed, escaped, and followed the ship; and overtaking her at a port in the course of her voyage, tendered himself as ready to re-enter, and perform his contract, but was refused. I have pursued this principle uniformly. If seamen are separated by the vis major, and it is, at any time during the voyage, in their power to rejoin the crew, and they do not, I have refused wages thereafter. Where they comply with this obligation so far as they can, by following the ship and offering to re-enter, but are refused, I consider this tender and refusal, according to the maritime laws, a restoration to their contract. So also of sailors having committed faults, repenting and tendering their services and amends in reasonable time. The wise policy of maritime laws, looks farther than cupidity permits individuals to see, when their immediate interests render them regardless of general advantages. These laws enjoin liberality to relieve their misfortunes, and toleration for the faults of seamen. However much these are morally to be deplored, and should be repressed and discouraged, they produce necessities in mariners, which compel a perseverance in their occupation, without an intermission. Thoughtful, calculating men, though anxious, as mariners generally are, to get, without their propensities to dissipate, both their time and their money, would either never undertake, or soon abandon, the subjection, hardships, vicissitudes, and dangers of a maritime life.

The system of maritime laws is, in its combinations, just; and calculated by the experience and wisdom of ages, for the support and prosperity of commerce. Few, even of the most eminent common lawyers study this system in all its relations. They view only particular parts, as they are occasionally employed in them. The branch of it, relating to mariner's contracts—on which Photier (Photier, Louages des Matelots), among others, has given us a most valuable discussion—has been peculiarly, and by those who have classed it among the inferior grades of jurisprudence, too fastidiously, neglected. It is not then surprising, that others should form partial and erroneous judgments (and these not seldom excited by immediate interest) on this complicated subject; which will be found, even to those much travelled in other departments of law, a new, and unexplored region. It is much to be regretted, that more attention is not paid to this essential requisite, in both legal and commercial education, in a country rising to the first rank of capacity for naval, and in the actual enjoyment of commercial, importance. On a careful investigation, it is questionable whether it will be found, that our laws, loosely and obscurely worded, have introduced salutary alterations. Like intended improvements on the common law, they leave the system mutilated; and, with a very few exceptions, the worse for attempts at reformation. The framers of maritime laws, knowing that seamen are, by the nature of their employment, subject to peculiar failings and vices, the offspring of unpolished manners and hardy, rude, and fearless habits, have calculated their codes for reformation, where practicable, and for punishment, where this cannot be effected. Heavy forfeitures, pecuniary mulcts, and corporal inflictions (many now obsolete and disused) are to be found in those laws, frequent and severe. But, where these can be balanced by indulgences and encouragements, they are always enjoined; to the end that this vocation may not be rendered odious and forbidding; so as to deter the subjects or citizens of commercial states, from entering into an occupation so radically necessary, and all-important, to the commerce, and only sure defence, of commercial countries.

[NOTE. Respecting the statement of the court in this case that the "person of a mariner belonging to a belligerent nation, is, as a member of that nation, subject to capture by his enemy," the following annotation is reprinted from 2 Pet. Adm. 476:]

"This position was taken to be generally agreed, because universally followed in practice by belligerent nations, from the earliest to the most modern periods of military and naval history. Practical precedents contradictory to it would give pleasure to every friend to man-

kind. None have more uniformly warranted this assertion, than the two great and powerful rivals, whose emulation, ambition and endless conflicts have, from remote times to this day, incessantly agitated every quarter of the globe. One of them has recently promulgated opinions to the contrary; and adopted a practice for the accomplishment of his new theory, so unpromising, that it violates all its principles. France at no time has intermitted the practice generally; nor has it been confined to capturing and restraining the liberty of a subject of her enemy. The French directory, by a decree, March 2d, 1797, ordained, that an American seaman found on board of a British ship, though impressed into the service (for this point was not suffered to be investigated), should be treated as a pirate. Thus subjecting an innocent neutral to capital punishment by one enemy, when he was the victim to the violence and aggression of the other. Restraints on, and violence to, unarmed individuals of their enemies, found on land or on the sea, are without number, and are not confined to revolutionary periods. By an ordinance of France recently practiced upon, though promulgated in 1744, a subject of an enemy is not only considered (according to the principles and effect of that law) as liable to capture in any ship, but if a vessel is commanded by him, she is confiscable as prize, though the property do not belong to a belligerent. American crews have lately been captured, and ships and cargoes burnt and destroyed, not for attempts to enter blockaded ports, or being engaged in illicit commerce, but on the high seas, when pursuing fair and blameless enterprizes, lest, per chance, the progress and situation of a French squadron should be discovered. See [Howland v. The Lavinia, Case No. 6,797], and, among numerous other authorities, 4 C. Rob. Adm. 143, 144, 145, for the English opinion as to prisoners of war taken in private ships; and in a case of one of their own subjects. Their practice has, for ages, authorized this opinion, as it respects their enemies: nor have neutrals been spared, when their objects required violence, or temporary restraints. It has been generally the policy, as it was deemed the interest of England to embarrass, as it has been that of France to encourage, neutral commerce; though some occasional exceptions may be found, in the conduct of both nations. The changes produced in this eventful period, are so far beyond expectancy or calculation, that, if, in former times, they could have been predicted, they would have been called the dreams of chivalry and romance. A revolution in principles long settled, would not be more unlooked for and improbable. While there is a contest for ascendency, between the sceptre formed from a conqueror's baton, on the land, and the trident predominant on the ocean, it does not seem probable that commercial halcyon days on the sea, or the millennium of peace and security on the land, will soon arrive. The practice which gave rise to the assertion I incidentally made, is therefore likely to continue. Principles are seldom to be tested or proved, by the professions of jealous and contending nations, whose actions are regulated more by policy and power (and sometimes by general or partial inferiority) than abstract, however commendable, opinions of humanity or justice. No solid and safe dependence can be placed on principles, either as they respect the freedom of persons, or the rights and security of property, as we have recently seen them avowed, when present convenience, precarious power, and instable policy, excite their promulgation. Our nation, though now profiting by commerce growing out of the deadly feuds which distract and ruin that of other trading nations, should beware of seduction into any principles, which however convenient and lucrative they may now be, may hereafter, if the state of things changes with us from neutrality to war, be highly injurious, and rebound upon ourselves. Azuni had not anticipated the present avowed opinions of the ruler of his favorite nation, on all the points assumed in a late imperial declaration. He has frequently indulged speculations and visions upon some of the subjects of it; yet his opinions are, in many important instances, directly opposed to it, though he is generally the eulogist and zealous advocate of France. He has treated more at large, and systematically, on the rights and obligations of neutrality, than most other writers. His work is among the most modern treatises, on the momentous topics, to which our interests and safety attract our attention. On these accounts (though in some of his opinions I do not concur) I have often referred to it: and not from any preference of it to the productions of other respectable writers. The publication of it in our language, is also enriched with learned and valuable notes, and citations of authorities, both by the author, and the American translator. Those of the latter are interesting, as they refer to circumstances and doctrines affecting our own country, and its laws and regulations, as well as in its interior government, as those which apply to our exterior relations."

WATSON (SMITH v.). See Case No. 13,124.

WATSON (STAFFORD v.). See Case No. 13,276.

Case No. 17,289.

WATSON v. SUMMERS.

[1 Cranch, C. C. 200.] [1]

Circuit Court, District of Columbia. Nov. Term, 1804.

APPEARANCE-BAIL—EFFECT OF DISCHARGE.

A discharge of the appearance-bail, arrested upon a joint ca. sa. against him and his principal, does not release the principal.

Injunction. Motion to dissolve. The equity relied upon was, that upon a joint judgment at law against Watson, and Jesse Simms his appearance-bail, Simms had been taken upon a joint ca. sa. against him and Watson, and discharged by the plaintiff at law, Summers. Injunction dissolved. See 10 Vin. Abr. 578, (new Ed.) tit. "Execution" (C. a.), which cites Higgen's Case, Cro. Jac. 320. If a man has one execution against the bail he shall never have execution after against the principal, for he has made his election by the first execution. So if the principal be in execution he cannot take the bail. See Walker v. Alder, Styles, 117, and Price v. Goodrick, Id. 387. But, says Viner, if the bail be taken in execution in B. R. and pays part, yet, if the bail be let at large, execution may be against the principal afterwards; and this is the constant practice of the court; and it seems that Higgen's Case, Cro. Jac. 320, is to be intended where the bail were in custody. Felgate v. Mole, 1 Sid. 107; Clarke v. Clement, 6 Term R. 525. One of two joint defendants discharged on ca. sa. by plaintiff, the other cannot be taken. Hayling v. Mullhall, 2 W. Bl. 1235; Freeman v. Freeman, Cro. Jac. 549. Execu-

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

tion issued against the bail, yet the plaintiff may charge the principal, unless it be shown that he was satisfied by the execution against the bail. Whiteacres v. Hamkinson, Cro. Car. 75. Two are jointly and severally bound, and judgment had against one. In debt against the other, he pleaded that the first being in execution on a ca. sa. the sheriff voluntarily let him go at large; but adjudged that the creditor may take out execution against the other; for execution without satisfaction is no bar, though the sheriff suffered him to escape voluntarily, so as plaintiff is entitled to an action against the sheriff. But if he let him go by license of the creditor, then the other had been discharged, and it might have been pleaded.

WATSON (SUMMERS v.). See Case No. 13,605.

Case No. 17,290.

WATSON et al. v. TAPSCOT.

[Cited in Addison v. Duckett, Case No. 77. Nowhere reported; opinion not now accessible.]

WATSON (THOMAS v.). See Case No. 13,913.

WATSON (UNITED STATES v.). See Cases Nos. 16,651 and 16,652.

WATSON (WILSON v.). See Case No. 17,847.

WATSON, The THOMAS. See Case No. 13,933.

Case No. 17,291.

WATT v. POTTER.

[2 Mason, 77.] [1]

Circuit Court, D. Rhode Island. June Term, 1820.

TROVER—EVIDENCE OF CONVERSION—MASTER OF VESSEL—AUTHORITY—PARTIAL SALE OF CARGO — DAMAGES FOR CONVERSION — DEDUCTION OF DUTIES.

1. In trover, a mere demand and refusal is not in all cases evidence of a conversion. Where the demand is made by an agent, and the refusal is for defect of authority in the agent, or for a refusal to show his authority, it is not evidence of a conversion. Aliter where there is no request to see the authority, and the refusal to deliver the property turns on other distinct grounds.

[Cited in Louisville & N. R. Co. v. Lawson, 88 Ky. 500, 11 S. W. 511; Page v. Crosby, 24 Pick. 216.]

2. A master of a ship loaded on freight, and having no consignment of the cargo, has no right to pledge or sell any part of the cargo at an intermediate port, short of the port of destination, except for necessary repairs and expenses, to enable him to perform the voyage. If he break up the voyage at an intermediate port, he has no authority to sell any part of the cargo to pay for advances to him to repair the ship for a new voyage, or to pay seamen's wages.

3. Where goods are landed at such intermediate port, upon the ground of necessity, for the purpose of being re-exported, (they being prohibited by law from importation) on payment of duties, and they are there tortiously converted, the wrong doer has no right to a deduction from the damages, of the amount of the duties which would have become payable on the goods, if regularly imported, but the rule of damages is the market value of the goods at the time of the conversion.

[Cited in Bourne v. Ashley, Case No. 1,699.]

[Cited in Dent v. Chiles, 5 Stew. (Ala.) 383; Ripley v. Davis, 15 Mich. 80; Salt River Canal Co. v. Hickey (Ariz.) 36 Pac. 172; Walker v. Borland, 21 Mo. 292.]

Trover for two hundred and three hogsheads of rum. The plaintiff [Robert Watt], a merchant of Jamaica, in March, 1819, shipped under a charter party on board of the British brig Fame, of Liverpool (James Handy, master), a large quantity of rum, on a voyage to Quebec, in Canada, consigned to Messrs. Ervin, M'Knight & Co. of that place, for sale. The brig, by the charter party, was to go from Jamaica to Quebec, and thence to return to Jamaica. The charter party stipulated for the payment of the freight of the outward voyage in advance, to the amount of £400 sterling. The vessel, after sailing on the voyage, put into Charleston in South-Carolina, in distress, and after undergoing repairs there, resumed her voyage, and afterwards put into Newport, Rhode-Island, under the same pretence. Here the master acting, as was suggested, with fraudulent intentions, broke up the voyage, procured a survey of the brig, and under this survey, which was without the sanction of any public authority, she was reported unseaworthy, and as such was sold for a trifling sum at public auction, and bought in by the defendant [Robinson] Potter, as he suggested, for the master, and soon afterwards she was refitted by the master, and sailed under his command on a new voyage to Wilmington in North-Carolina. On her arrival at Newport, as the importation of goods from a British colony, in a British ship, was prohibited by the late act of congress, the cargo was landed and warehoused under the authority and keys of the government, in the warehouse of the defendant, whom the master appointed his agent, and to whom he consigned the vessel and cargo, without the knowledge of the owners. The defendant acted as the agent and adviser of the master in all the subsequent proceedings. After wards, on the 3d of August, 1819, the master procured an entry at the custom-house, of part of the cargo, and among other things, of 36 puncheons of rum, a part of the plaintiff's shipment, for the purpose of paying the alleged expenses out of the proceeds, after deducting the duties due thereon. This portion of the cargo so entered, was afterwards sold at public auction, and the nett proceeds, after all deductions, amounting to about $2,900, came into the hands of the defendant, who made advances from time to time, to

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

the master, as he required them. The master, on his arrival at Newport, applied to Mr. Gilpin for assistance and advice, who aided him in procuring the rum to be entered for sale, and advised with him from time to time. The residue of the cargo which remained unsold, being principally the 200 hogsheads of rum now sued for, was, on the departure of the master with the brig, left in the custody of Potter, and in his warehouse under the locks of the government, with a written authority to detain the same for the payment of $688, alleged to be then due to the defendant, for advances; and with directions to Potter to sell so much as might be necessary for that purpose. Potter also claimed a right to detain them until paid a sum for demurrage, which the master claimed, as well as a further sum due to himself, amounting in the whole, with the $688, to about $1,500. Mr. Gilpin afterwards entertaining doubts of the correctness of the transactions of the master, sent sometime in 1819, information of the facts to the consignees at Quebec, and received authority from them to act as their agent and the agent of the plaintiff in the business. He also received in February and March, 1820, letters from the plaintiff confirming his agency. He was expressly authorized, among other things, to demand the rum of the defendant, and to pay any charges which justly were due him, and for which the rum was liable. Mr. Gilpin accordingly on the 27th of March, 1820, made a demand of the 203 puncheons of rum now in controversy of the defendant, who declined delivering it up, unless the whole demand, amounting to about $1,500, was paid to him. Mr. Gilpin did not at this time produce his authority, nor did the defendant require it, but he stated that he was authorized by letters from the consignees and the plaintiff; but the controversy turning on the refusal to deliver the rum unless the whole account of the defendant was paid, and Mr. Gilpin declining to pay it, unless it was referred to some gentlemen to determine its reasonableness, the letters were not produced, and the defendant treated them very lightly, as of no consequence. Afterwards the defendant went to New-York, leaving an agent at Newport with instructions not to deliver the rum unless Mr. Gilpin had sufficient authority, and paid the whole of the account claimed by him. After this, and before the action was brought, Mr. Gilpin called on Potter's agent, showed him a certificate from the custom-house, yielding up the custody of the rum for the purpose of its being exported, and tendered him $800, in payment of all accounts due to the defendant, and demanded the rum; this he did, not admitting that sum to be due, but stating that he made the tender merely to end a disagreeable business. He did not show his instructions or authority, nor did the defendant's agent ask for them; but the latter offered to deliver the rum if the whole amount of $1,500 was paid, otherwise he refused to deliver it. The present action was then brought. At the trial, no account of the items of disbursements or advances was produced by the defendant, to show how the first balance of $688 arose, or for what purposes the money was advanced. But it was admitted that the net proceeds of the rum sold after deducting duties and charges, were about $2,900. It appeared, however, that a part of the advances were made for the master's and mariners' wages, and for the brig's repairs. The defendant, at the time of the advances, knew that the master was not consignee of the cargo, and was his adviser and friend as to all his transactions.

Hazard & Searle, for plaintiff.
Robbins & Hunter, for defendant.

STORY, Circuit Justice (after summing up the facts). The first question is, whether there has been a conversion in this case. This is a question of fact to be judged of by the jury under all the circumstances. A demand and refusal to deliver is not of itself a conversion; but it is evidence from which a jury may presume a conversion. Where a demand is made by an agent, and the party refuses to deliver to the agent, either because he has no authority, or declines to produce it, such a refusal under such circumstances, is not even evidence of a conversion, for every person in possession of property, has a right to retain it, until it is demanded by some person having, and if required, producing competent authority to demand it. I agree, therefore, to the authorities cited at the bar on this point, and admit their entire correctness. Esp. N. P. 590, cites 2 Bulst. 312; Solomons v. Dawes, 1 Esp. 83. But if the refusal do not turn upon the supposed want of authority, if the party waives any inquiry into the authority, or admits its sufficiency, and puts his refusal upon another distinct ground, which cannot in point of law be supported, there the refusal under such circumstances, is presumptive evidence of a conversion. If, for instance, the party puts his refusal upon the ground, that the property is his own, or that he has a lien upon it, and such claim is unfounded; or if his objection to a delivery be frivolous or fraudulent, there he cannot shelter himself from the legal presumption of a conversion, which his unjust refusal authorizes. Whoever undertakes tortiously to deal with the property of another as his own, or tortiously detains it from the owner, is in contemplation of law, guilty of a conversion of it.

These principles may be easily applied to the present case. It is not now disputed that Mr. Gilpin, as agent of the plaintiff, had full authority to demand the property. If then he tendered a sum to the defendant more than sufficient to pay all the just

claims, which he had against the property, and if the defendant was well satisfied of the existence of Gilpin's authority, and in fact waived any particular examination of it, claiming to retain the property upon other distinct grounds, which cannot in point of law be sustained, his refusal to deliver the property to Gilpin, is, under such circumstances, evidence of a conversion of the property.

This leads us to a consideration of the claims set up by the defendant. The principles of law applicable to these claims do not involve any real difficulty. Hardy, the master, was not the consignee of any part of the cargo, and had no other control over the cargo, than what belonged to him in his character as master. The brig was bound to Quebec, in Canada, and under the stipulations of the charter party, the cargo was there to be delivered to the consignees. Hardy, as master, had a right in the course of the voyage, in case of necessity, and to enable him to complete the voyage, to hypothecate the vessel or cargo, or to sell a part of the latter, for the payment of any necessary expenses incurred in any port into which the vessel might put in distress. The Gratitudine, 3 C. Rob. Adm. 240. If, therefore, it became necessary to repair the vessel at Newport, in order to proceed on the voyage, I have no doubt that the master might, upon the failure of all other means to obtain money, sell a part of the cargo for this purpose. But if, on the other hand, there was no intention to prosecute the voyage; if it were totally abandoned, either fraudulently or fairly, I do exceedingly doubt, if the master had any authority whatsoever to sell any part of the cargo for the payment of any expenses, except such as grew out of the circumstances of the cargo itself. It was not a sale for the benefit of the cargo, nor connected with the interests of the voyage; and the law has not invested him with any authority to my knowledge, under such circumstances, to apply one man's property to another man's use. But I dwell the less on this point, because the present suit is not brought to contest the sale already made of part of the cargo, or the application of the proceeds. It is brought only for the residue of the cargo yet remaining in the hands of the defendant. In the present case the master absolutely broke up the voyage at Newport, fraudulently, as it is contended, and certainly with much apparent reason, though I do not meddle much with that question. He procured the brig to be condemned by surveyors of his own voluntary appointment, and sold her at public auction for a paltry sum, as utterly unseaworthy. She was bought in, either for himself or for Potter, the defendant, and then refitted; and afterwards she proceeded upon a new enterprise to Wilmington, in North-Carolina. In what manner and for what purposes the proceeds of the cargo, which was sold, were applied, is unknown to the court, for the defendant has not chosen to submit to us any account whatsoever of his proceedings in this respect. It does however appear, that the master and seamen's wages for the voyage, as far as due, were paid out of the proceeds, as well as the repairs made upon the brig. Now the master certainly had no right to apply the proceeds of the cargo to the payment of his own or the seamen's wages, or to the disbursements and expenses of a new voyage, with which the plaintiff had no connexion. And if he fraudulently broke up the voyage at Newport, there is not a pretence to say, that he had any legitimate authority over the cargo, beyond that of providing for its safe custody. Now the defendant, as the agent of the master, could not place himself in a better situation than his principal. He was perfectly conusant of all the facts, and was the adviser of the master; and if he chose to make advances to the master, under such circumstances, knowing him not to be consignee of the cargo, it was at his own peril. The master could not give him any lien or security on the cargo for such advances, unless he could have sold or hypothecated a part of the goods for the same purpose; and we have already seen that he can do so only in cases of necessity in the course and for the accomplishment of the voyage. It is incumbent, therefore, on the defendant, to show what the advances were, and for what purposes made, and further to establish that the case was such in point of necessity, that the master might properly pledge the cargo for such advances. If he fail to show the necessity of such advances; or if he has been fully paid by the proceeds already in his hands, all that he could justly claim, as against the plaintiff; or lastly, if the sum tendered to him exceeded all that was rightfully his due, then the refusal to deliver the 203 hogsheads of rum was tortious, and the plaintiff may well maintain the present action. The defendant cannot set up a lien on the rum, which the master had no legal right to create. The case, indeed, would warrant me in holding still stronger doctrines; but I am persuaded that these are sufficient for its decision.

Another question has been made at the bar, whether the rum, though in the defendant's warehouse, being under the locks of the government, and in its custody, this action can be maintained against the defendant, it not being in his possession at the time of the demand and refusal. But I am of opinion, that this question does not in fact arise in this case. Previous to the ultimate demand, the government had expressly relinquished all control and custody of the rum; and this was made known to the defendant's agent. The defendant himself not only claimed at all times to be rightfully possessed of the property, subject to

the rights of the government, but actually claimed a lien on it to a considerable extent, founded on this possession. He never relinquished this possession, and it does not under these circumstances lie in his mouth to deny his possession for one purpose, and assert it for another.

The last question is, what is the rule by which the damages, if the plaintiff be entitled to recover, are to be assessed. I am of opinion, that the true rule is the value of the property at the market price, at the time of the conversion. The defendant claims to have a deduction made of the amount of duties which would accrue on the rum if regularly imported. At first, I inclined to think this deduction was reasonable, but on reflection, I have changed my opinion. No duties have been paid upon the rum, no duties are by law payable, for the rum was prohibited from importation from Jamaica, in a British vessel, by the recent act of congress. Act April 18, 1818, c. 65 [3 Story's Laws, 1677; 3 Stat. 432, c. 70]. The defendant never gave any bonds for the payment of duties, and is in no shape liable to pay them. The rum was landed for re-exportation, and the plaintiff was desirous, with the consent of government, of re-exporting it. But the defendant has wrongfully prevented the re-exportation. What right, then, can the defendant have to an allowance for duties which he has never paid, and is not liable to pay? What reason is there, that the plaintiff should suffer a loss, which has been occasioned by a tortious conversion of the defendant? In my judgment, it does not lie in the mouth of a wrong doer to set up such a claim. The duties may never yet become payable; and but for the wrongful act of the defendant, would not become payable; and if any loss be sustained, it should be borne by the party, through whose instrumentality it has occurred, and not by an innocent shipper.

Verdict for the plaintiff, for the full value of the rum, without deducting duties.

Case No. 17,292.

WATT v. UNITED STATES.

[15 Blatchf. 29.] [1]

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

CUSTOMS DUTIES—SUIT TO RECOVER—DECISION OF COLLECTOR—APPEAL.

1. Under section 14 of the act of June 30, 1864 (13 Stat. 214), now section 2931 of the Revised Statutes, respecting the decision of a collector of customs as to the rate and amount of duties on imported goods, the appeal to the secretary of the treasury, there provided for, to be available for the purposes of a review of the decision of the collector, must be taken after such an ascertainment and liquidation of the duties as would be final and conclusive if no appeal should be taken.

[Cited in U. S. v. Phelps, Case No. 16,039; Chase v. U. S., 9 Fed. 883; U. S. v. Campbell, 10 Fed. 818; U. S. v. Earnshaw, 12 Fed. 286; U. S. v. Leng, 18 Fed. 21; U. S. v. M'Dowell, 21 Fed. 564.]

2. In a suit by the United States to recover duties as liquidated, proof of an appeal before the liquidation cannot affect the operation of the liquidation, nor can proof of a protest, unless followed by an appeal taken after the liquidation.

[Cited in U. S. v. Campbell, 10 Fed. 819; U. S. v. Cobb, 11 Fed. 79; U. S. v. Schlesinger, 14 Fed. 685; same case on appeal, 120 U. S. 113, 7 Sup. Ct. 445; U. S. v. Earnshaw, 45 Fed. 783.]

3. A judgment will not be reversed for a refusal to admit evidence offered, unless it appears affirmatively, that, if admitted, it would tend to prove a material fact in the cause.

4. Under the above statute, the decision of the collector is final and conclusive against all persons interested, upon the questions necessarily decided, and, in a suit for the duties, it is not necessary for the United States to show that the collector adopted the proper rate and amount of duties, nor can the defendant impeach the liquidation by showing irregularities in the mode of appraisement.

[Cited in Davies v. Miller, 130 U. S. 290, 9 Sup. Ct. 562.]

5. The case of U. S. v. Cousinery [Case No. 14,878], approved, and the case of Clinkenbeard v. U. S., 21 Wall. [88 U. S.] 65, explained and distinguished.

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

[This was an action by the United States against James S. Watt to recover certain duties on imported goods. The judgment in the district court was rendered in favor of the plaintiffs (case unreported), and the defendant brought error.]

Edward Hartley, for plaintiff in error.
Stewart L. Woodford, U. S. Dist. Atty.

WAITE, Circuit Justice. This was an action brought to recover a balance due the United States for duties ascertained and liquidated, March 23d, 1876, by the collector of customs in New York, upon a quantity of granite imported November 12th, 1872. The United States, in support of the action, showed that the property, upon its importation, was entered at the custom house as granite; that the customs appraisers found and returned it to be "wrought granite;" that the entered value was $1,907.07, upon which a duty, at the rate of 20 per centum ad valorem, was assessed by the collector and paid by the importer upon entry; that three appraisements had been made—the first by the regular appraisers, and endorsed on the invoice; the second, dated December 20th, 1872, by the general appraiser and a merchant appraiser, to which was appended the oath of the merchant appraiser, also dated December 20th, 1872, to inspect and appraise the goods; and the third by the same appraisers, dated March 27th, 1874, but not accompanied

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

by any oath of the merchant appraiser; that, by the last appraisement, the property was valued at $2,152, which was $205, and more than ten per cent., in excess of the entered value; and that, upon this appraisement, the collector liquidated the entry by charging 20 per cent. ad valorem upon the excess of $205, and a penal duty of twenty per cent. upon the entire appraised value, making a total of $471.40. For this amount a judgment was asked.

The defendant then offered to show, by evidence, that he had protested twice, to wit, November 13th, 1872, and September 27th, 1873, against the collector's decision as to the rate and amount of duties to be charged; that he had duly, and more than ninety days before the commencement of this action, appealed thereon to the secretary of the treasury; and that, among other specific objections, set up in said protests and appeals, was one that the goods were granite and were monumental stone, and so specifically dutiable by law at $1.50 per ton, at the time of the importation. He also offered to prove that an action duly brought, to recover the excess between the rate of $1.50 per ton and the rate of 20 per cent. ad valorem, collected on the entry, to wit, $365.25, was still pending in this court. To the introduction of this testimony the United States objected and the objection was sustained. The defendant then "offered to show, by testimony, that no decision had ever been made by the secretary of the treasury upon a specific protest and appeal, duly taken by him on said entry, wherein he claimed that, the duty on the goods being by law at a specific rate, viz., $1.50 per ton, the value was immaterial for duty purposes, and, consequently, the penal duty could not apply." To the introduction of this evidence a like objection was made and sustained. The defendant then "offered testimony tending to show that there was no actual inspection of the goods in controversy by the appraising officers in connection with their aforesaid appraisements, and that due protest and appeal in this respect had been made by him." This testimony was also ruled out, upon like objection.

The evidence being closed, the court instructed the jury that, as the material facts proved by the United States were undisputed, they should bring in a verdict in favor of the plaintiffs for the amount claimed, with interest, which was accordingly done and a judgment regularly entered. Exceptions were in due time taken to each of the rulings of the court, and the case is here for review, upon assignments of error presenting for consideration each of the questions decided below.

By section 14 of the act of June 30, 1864 (13 Stat. 214), re-enacted in section 2931 of the Revised Statutes, it is provided, that the decision of the collector of customs, as to the rate and amount of duties to be paid on goods, wares and merchandise imported, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, &c., shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, give notice in writing to the collector, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the secretary of the treasury, whose decision on such appeal shall be final and conclusive; and such goods, &c., shall be liable to duty accordingly, unless suit shall be brought, within ninety days after the decision of the secretary of the treasury on such appeal, for any duties which shall have been paid, before the date of such decision, upon such goods, &c., or within ninety days after a payment made after the decision. No such suit can be maintained at all before the decision of the secretary, unless the decision is delayed for more than ninety days, in case of an entry at a port east of the Rocky Mountains, or more than five months, in case of an entry west of those mountains.

The appeal to the secretary of the treasury, provided for in this statute, to be available for the purposes of a review of the decision of the collector, must be taken after such an "ascertainment and liquidation" of the duties as would be final and conclusive if no appeal should be taken. The secretary cannot be called upon until after the final disposition of the matter by the collector. He is not required to act upon the rulings of that officer from time to time, as they are made, while "ascertaining and liquidating," but only after the work of the collector has been fully completed.

In the present case, the final liquidation was not perfected until March 23d, 1876. Proof of appeals before that time, therefore, was inadmissible, as they would be premature and could not, of themselves, affect the operation of the liquidation upon which the suit was brought.

A protest, or notice of dissatisfaction to the collector, is of no avail unless followed by a valid appeal. Consequently, proof of protests, without an appeal after the liquidation, was inadmissible.

As to the protest and appeal embraced in the second offer, it is sufficient to say, there is nothing to show that the appeal which remained undecided was taken after March 23d, 1876. If it was not, the testimony was properly excluded. If it was, the offer should have included that statement. A judgment will not be reversed for a refusal of the court to admit evidence offered, unless it appears affirmatively, that, if admitted, it would tend to prove a material fact in the cause. It is not enough that the evidence offered might have related to an appeal taken after the liquidation. Before the court can be charged

with error in excluding it, the record should show affirmatively that it did have that relation. Such is not the case here.

This brings up for consideration the only remaining questions, which are, whether the United States were bound, in this action, to go behind the liquidation by the collector, and show that the rate and amount of duties were such as the law required the defendant to pay, or whether, if the liquidation was sufficient to make a prima facie case for the government, the defendant could impeach it by showing that the appraisers failed to perform their duty when appraising the goods. The language of the statute is clear and explicit, to the effect, that the decision of the collector shall be final and conclusive against all persons interested, as to the rate and amount of duties to be paid, unless the appeal is taken. No room is left for construction. The provision is not that no suit shall be maintained to recover back money paid under the decision, until the appeal is taken and acted upon, or the specified time for such action has elapsed, but that the decision itself shall be final and conclusive against all persons interested, upon the questions necessarily decided. This subject was so fully and ably discussed by the learned circuit judge of this circuit, while he was the district judge for this district, in the case of U. S. v. Cousinery [Case No. 14,878], that it would be a useless task to endeavor to elaborate it further. It is contended, however, that the supreme court, in Clinkenbeard v. U. S., 21 Wall. [88 U. S.] 65, has, in effect, overruled Cousinery's Case. I do not so understand it. That was an action upon a distiller's bond, to recover a capacity tax assessed for an entire month, under the internal revenue law, and it was decided that evidence was admissible to show, by way of defence, that, through an omission on the part of the government, the distiller was prevented from operating the distillery for the first four days for which this tax was assessed, and that the distillery was inactive four days more from an accident, and in charge of government officers, as provided by law in such cases. But, under the internal revenue law, there is no provision making the assessment of such a tax by the commissioner final and conclusive. No suit can be maintained to recover back money paid upon taxes erroneously or illegally assessed or collected, until after an appeal to the commissioner of internal revenue, and his decision thereon, unless the decision is delayed more than six months from the date of the appeal (Act July 13, 1866, § 19; 14 Stat. 152, now section 3226, Rev. St.); but there is nothing which makes the assessment conclusive as to the amount due, except for the purposes of collection in the summary way provided by the statute. There is, therefore, a marked difference between the customs revenue laws and the internal revenue laws, in this particular, and it may well be held, that, in an action for the recovery of customs duties, the liquidation of the collector is conclusive, while in an action to recover a capacity tax assessed against a distillery, under the internal revenue laws, the determination of the commissioner whose duty it is to make the assessment, is not. Certainly, the last of these propositions is all that was decided in Clinkenbeard's Case.

Judgment affirmed.

WATTERSTON (BANK OF UNITED STATES v.). See Case No. 941.

WATTLES (DRAPER v.). See Case No. 4,073.

Case No. 17,293.

In re WATTS.

[3 Ben. 166;[1] 2 N. B. R. 447 (Quarto, 145); 2 Am. Law T. Rep. Bankr. 74.]

District Court, S. D. New York. March 10, 1869.

BANKRUPTCY PROCEEDING—AMENDMENT OF SCHEDULES—OPPOSITION TO DISCHARGE.

1. Where, on the examination of the bankrupt, a certain lease appeared to be the property of the bankrupt, which was not mentioned in the schedules attached to the bankrupt's petition, and he thereupon applied for leave to amend the schedules in that particular: *Held*, that the application for leave to amend was an ex parte one, which no creditor had any right to oppose.

[Cited in Re Blaisdell, Case No. 1,488; Re Heller, Id. 6,339.]

2. The allowance of such an amendment could not conclude any creditor from availing himself of any ground of opposition to the discharge which he would have had if the amendment had not been allowed.

[Cited in Re Heller, Case No. 6,339.]

In this case, during the examination of the bankrupt [Henry H. Watts] before the register, evidence was given of a lease, of which it appeared that he was the owner, and which had not been mentioned in the schedules attached to the bankrupt's petition. The bankrupt thereupon applied to the register, on a petition excusing the omission, for leave to amend his schedules, by inserting the lease as a part of his assets. The creditors opposed the application, on the ground that they proposed to avail themselves of the omission, as a ground of opposing the bankrupt's discharge. The register, doubting whether the application was, in fact, an ex parte application, on which he could properly pass, certified the question to the court.

By I. T. WILLIAMS, Register:

[I hereby certify, that in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings: Mr. Edwin James appeared for the bankrupt, and Mr. Joseph Gutman appeared for Messrs. Vetterlein & Sons, creditors of the said bankrupt. The bankrupt applies for leave to amend his said schedules by setting

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

forth a certain lease of which he was owner at the time of filing his petition. The attorney for creditors, Mr. Gutman, appears and objects to the allowance of said amendment. The facts, as they appeared before me, are as follows: The creditors aforesaid entered upon an examination of the bankrupt before me, in the course of which the lease in question appeared to be the property of the bankrupt, and to be of very considerable value. I was about making an order allowing the amendment, but without prejudice to the right of the creditor to oppose the discharge upon the ground of its omission from the original schedules, when it occurred to me that my order might be in contravention of the provisions of the fourth section of the act [of 1867 (14 Stat. 519)]; and that I ought to certify the question to the court. The doubt I have is, whether it is, notwithstanding the opposition of the creditors, in fact an ex parte application, and hence one upon which a register may pass. It is clear that if a creditor has such a standing in the court that he may in all cases interpose objections to the acts of the register, he may thereby render the powers of the register utterly nugatory and unavailing. It would seem to be only in those cases where an "issue" such as the law recognizes as "an issue of fact and law" is raised and contested, that the register is required to trouble the judge and put the parties to the expense of certifying the matter to the court. Your honor's decision of the point is respectfully solicited.] [2]

BLATCHFORD, District Judge. Under section 26, and general order number 7, the register has power, under general order number 5, to allow a petitioning bankrupt to amend his schedules, on complying with general order number 33. The application is an ex parte one, of which no notice is necessary. No creditor has a right to oppose any such application, and, therefore, no issue of fact or law, within section 4, can be raised or contested in regard to it, to be decided by the judge. If a register improperly refuses an application to amend, the bankrupt can, under section 6, take the opinion of the judge, on a certificate from the register, on the question.

In this case, the allowance of the amendment cannot in any manner prejudice the right of the creditors to oppose the discharge of the bankrupt for his having omitted the matter in question from his original schedules. The order of the register, allowing the amendment, in no manner concludes the creditor on the point, as the creditor is no party to the proceeding, so as to be estopped by the order from availing himself of any ground of opposition to a discharge which he would have had in the absence of the order.' Still, if the case be a proper one for allowing the amendment in question, it is proper for the register to allow it, in terms, without prejudice to the right of the creditor to oppose the discharge upon the ground of the omission of the matter from the original schedules.

[2] [From 2 N. B. R. 447 (Quarto, 145).]

Case No. 17,294.

WATTS v. PHOENIX MUT. LIFE INS. CO.

[16 Blatchf. 228.] [1]

Circuit Court, E. D. New York. April 30, 1879.

LIFE INSURANCE — ISSUE OF PAID-UP POLICY — FORM—ACTION BY INSURED—DAMAGES.

1. A policy issued by a mutual life insurance company insured, in consideration of ten annual premiums to be paid, the life of W., in the sum of $1,000, to be paid to him at the age of 40, or to his mother and sister, equally, if he should die before arriving at that age. The policy provided, that, if, after the payment of two premiums, the policy should cease because of the nonpayment of premiums, the company would, on the surrender to it of the policy, issue a new policy for the value acquired under the old one, subject to any notes given for premiums, without subjecting the assured to any subsequent charge, except annual interest, in advance, on all premium notes remaining unpaid. W. paid the premium for nine years, in cash. For the rest he gave four notes, still outstanding, on which he had paid the interest annually. He wishing to surrender the policy and take a new one for the value acquired under the old one, the company tendered to him a new policy, which he refused. Subsequently, he tendered to the company, for signature, a written policy, differing in form from the printed form used by the company, but the same, in legal effect, as the policy which he had refused. The company refused to sign the written policy, because it was not its regular printed form. W. had, before tendering the written policy, applied to the company, without success, for a printed form. W. then, before attaining the age of 40, sued the company, seeking to recover, as damages for not issuing the new policy, the premiums for the nine years: *Held*, that the defendant had no right to object to signing the written policy because it was not its printed blank, unless it tendered a policy made by using such blank.

2. *Held*, also, that the plaintiff could recover more than nominal damages only in an action in which his mother and sister were co-plaintiffs; that the contract was not rescinded; that proof of the amount paid in premiums was no proof of damage; and that the recovery could be only for nominal damages.

At law.

E. & W. G. Cooke, for plaintiff.

James S. Stearns, for defendant.

BENEDICT, District Judge. This action was tried before the court by consent. It is brought to recover damages for the breach of a contract of insurance upon the life of the plaintiff, James R. Watts.

The defendant, by its policy, agreed, in consideration of $103.20 paid by Catherine Ann and Mary Watts, (mother and sister,) and of the annual payment of a like amount until he shall have paid ten full years' premiums, to assure the plaintiff's life in the amount of $1,000, and to pay that amount to him on the 28th day of February, 1883, when he shall have attained the age of 40

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

years, or, should he die previous to attaining that age, to Catherine Ann and Mary Watts, equally. The policy contained this further provision: "It being understood and agreed, that, if, after the receipt by this company of not less than two or more annual premiums, this policy should cease in consequence of the non-payment of premiums, then, upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for the value acquired under the old one, subject to any notes that may have been received on account of premiums, * * * without subjecting the assured to any subsequent charge, except the interest annually, in advance, on all premium notes remaining unpaid on this policy." The plaintiff paid the premiums, as agreed, for nine years, in cash. For the remaining part he gave four notes, still outstanding, upon which he has paid the interest annually. In May, 1877, the plaintiff determined to surrender the policy and take a new policy for the value acquired under the old one, in accordance with the provisions above quoted. A dispute arose as to whether the defendant had the right to insert in such new policy a provision that the policy should be forfeited by the failure to pay, when due, the annual interest on the outstanding notes that had been given for part of the premiums. The defendant tendered a policy containing such a clause, which the plaintiff at first refused to accept. Subsequently, he concluded to waive his objection, and tendered to the defendant, for signature, a policy drawn out in writing, which, while differing somewhat in form from the printed form used by the defendant, was the same, in legal effect, as the policy first tendered by the defendant and rejected by the plaintiff. The defendant refused to sign the written policy, in the following language: "As we have a regular printed form, upon which we issue all paid ups, it would be neither fair nor consistent to make an exception in your case." It appeared in evidence, that, prior to tendering the written policy, the plaintiff had applied to the defendant, without success, for one of their printed forms, stating that he desired it, to enable him to tender a policy for their signature. Upon the refusal to sign the written policy, the plaintiff brought this suit, wherein he seeks to recover, as damages for a breach of the agreement to issue a new policy for the value acquired under the old one, the full amount of the premiums for the nine years, including that portion paid in cash and the part for which his notes are still outstanding. The question discussed by counsel, whether the policy tendered in the first instance by the defendant was a compliance with the contract contained in the original policy, does not require to be decided on this occasion, for the reason, that the refusal of the defendants to execute the written policy subsequently tendered by the plaintiff for their signature, was, in legal effect, a refusal to deliver any new policy at all. It was not unreasonable for the defendant to prefer to sign a policy according to its printed form, but, when the plaintiff presented for execution a policy to which the defendant could make no other objection than that it was not one of its regular printed forms filled up, it was incumbent on the defendant, if it preferred to use its own blank, to fill up such a blank and give it to the plaintiff, in lieu of the written one he had sent to it for signature; and this the more because the plaintiff had applied to it for a printed blank and had been refused. The defendant contented itself with refusing to execute the written policy and returned it to the plaintiff unexecuted. This action was, in legal effect, a refusal to issue any new policy, and constituted a breach of the provision above quoted from the old policy.

But, the objection is taken to any recovery herein, because the action is brought in the name of the plaintiff, without joining the mother and sister, to whom, in case of death, the amount insured was to be paid. This objection appears to be fatal. It is a general rule, that, on a life policy in the ordinary form, where the money to become due upon the death of the insured is payable to a certain person named as beneficiary, the policy and money payable upon the death belongs, from the time of the delivery of the policy, to the person designated to receive the money, and he alone can maintain an action upon the policy. Martin v. Franklin Ins. Co., 9 Vroom [38 N. J. Law] 140. The present policy differs from the ordinary policy only in this—that, in case the insured shall live to attain the age of 40 years, the money is then to be paid to him. But, the mother and sister are none the less beneficiaries under the policy; and the agreement in the policy, to issue a new policy in place of the old one, wherein the mother and sister were to be beneficiaries as in the old one, is an agreement with them as well as with the person whose life is insured. It follows, that, in any action to recover damages for the breach of that agreement, the mother and sister should be joined as parties plaintiff. If this be otherwise, still the plaintiff can only recover nominal damages.

The plaintiff claims to recover back the premiums paid, upon the theory that the contract is rescinded. But, this contract has been in force, and acted upon by the parties, for nine years, during which time the life of the plaintiff has been insured and the defendant has been subject to the risk. It is impossible, therefore, to put the parties back in their original position, and there can be no rescission of the contract. The case made by the plaintiff is that of a

breach by the defendant of a contract partly executed; and it was not enough to prove the breach charged. There must, also, be proof of the damage sustained. The case is wholly bare of such proof. There is evidence of the amount paid in premiums, but this evidence furnishes no basis from which to compute the actual loss resulting from the failure to obtain the new policy provided for in the contract sued on. In the absence of any evidence from which the damage can be arrived at, the recovery must be limited to nominal damages.

WATTS (SUYDAM v.). See Case No. 13,658.

WATTS (UNION PAC. R. CO. v.). See Case No. 14,385.

WATTS (UNITED STATES v.). See Case No. 16,653.

Case No. 17,295.

WATTS et al. v. WADDLE et al.

[1 McLean, 200.] [1]

Circuit Court, D. Ohio. Dec., 1833.[2]

CONTRACT TO CONVEY LAND — TIME OF PERFORMANCE—PENDING LITIGATION—SPECIFIC PERFORMANCE — PARTIES TO DECREE — DEED BY COMMISSIONER—EFFECT.

1. A contract to convey a certain tract of land so soon as a suit then pending for the title shall be decided, gives to the party that agrees to convey all the time necessary to close the litigation in all the forms it may assume.

2. Unforeseen circumstances and embarrassments may excuse the performance, at the day, if the party act in good faith.

3. The husbands of femes covert, where the title is sought through the wife, must be made parties, or the title decreed will be defective.

4. And so where there is a dower interest outstanding.

5. The decree of title in one state to lands in another state cannot operate so as to vest the legal title.

[Cited in Lindley v. O'Reilly, 50 N. J. Law, 642, 15 Atl. 382.]

6. The court will never compel a party, under a contract for a good and operative title, to receive one that is defective.

[Cited in Tiffin v. Shawhan, 43 Ohio St. 184, 1 N. E. 585.]

7. The statute which gives effect to a deed executed without the state, if made in pursuance of the law of the country, refers to deeds of the party.

8. A decree in Kentucky, for the conveyance of land in Ohio, though executed by a commissioner, under the statute, in pursuance of the decree can give no title.

[Cited in Pulliam v. Pulliam, 10 Fed. 47.]

In equity.

Mr. Creighton and Mr. Bond, for complainants.

Mr. Leonard, for defendants.

McLEAN, Circuit Justice. The object of this bill is the specific execution of a contract of sale of certain outlots and other land near the town of Chillicothe, between John Watts and William Lamb. Watts bound himself to make to Lamb a general warrantee deed by the 1st February, 1816, "or as soon as a final decree should be rendered in the circuit court of the United States, in a suit against Nathaniel Massie and others. At the time of the contract Lamb, or his assignee, [William] Waddle, was in possession of the land. The suit against Massie, which is referred to in the contract, was brought to carry into effect a decree of the circuit court of the United States, for the district of Kentucky, and which had been affirmed by the supreme court, in which Massie was decreed to convey to Watts all the land covered by a survey of O'Neal's entry, No. 509, although within entries Nos. 503 and 2462, amounting to 1000 acres; and Watts was required to convey 1000 acres which were within the calls of entry 509. These conveyances do not appear to have been executed or either of them. In 1818 Watts obtained a final decree in the circuit court of Ohio, against Massie for the land in controversy. Lamb was also a defendant in this suit. This decree was appealed to the supreme court, which affirmed the decree of the circuit court. It was discovered that no patent had issued to Massie for the land, and on application, a patent was issued to Watts the 1st March, 1826. But a patent was issued to the heirs of Powell the 4th November, 1818, on entry 503, which covered a part of the same land. Lamb assigned the contract to Waddle who, in 1824 brought an action against Watts, on the contract for damages, and at July term, 1826, recovered a judgment for seven thousand seven hundred and forty-five dollars and fifty cents. On the 3rd July before the judgment, Watts tendered a deed to Waddle for the land, which he refused to receive. Watts then filed this bill which prays for an injunction, and for general relief.

It is insisted that under the circumstances, the court should enjoin the judgment at law, and compel the defendant to accept of the deed tendered. The delays which have occurred, it is said, are not chargeable to Watts, but to circumstances beyond his control; and which he did not foresee and could not anticipate. That he has acted in good faith and with reasonable diligence, in using legal means to obtain a title; and that he tendered a conveyance under the contract as soon as he had the power to execute it. Fraud is not justly imputable to the complainant, nor does he seem to have been guilty of any serious laches in the prosecution of suits to coerce a title When the contract was entered into, Lamb knew, and indeed it was substantially stated in the contract, that the complainant expected to receive the legal title, through the final decree in the suit then pending against Massie and others. And when it was discovered that the legal title was not vested in Massie, and that no patent had issued on the entry and survey under which he claimed, the complain-

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

[2] [Modified in 6 Pet. (31 U. S.) 389.]

ant obtained the patent in his own name. But a patent to Powell's heirs had been previously issued on a different entry and survey; which covered a considerable part of the land specified in the contract. To divest this legal right Watts instituted a suit against Powell's heirs in the circuit court of the United States, for the district of Kentucky; and obtained a final decree against them for the land. Under the authority of this decree and of the statute of Kentucky, a commissioner, appointed by the court, executed a conveyance, in behalf of Powell's heirs, for the land, in the fall of 1826. And it is contended, though not satisfactorily proved, that after this decree Watts again tendered a deed to Waddle. Although many years elapsed from the date of the contract, to the tender of the deed, yet the delay is accounted for by the embarrassed state of the title; and the litigation in which Watts was consequently involved; and we are inclined to think, that a sufficient excuse for the delay is found for him in these circumstances.

But it is insisted, if the delay shall be accounted for and excused, there are essential defects in the title tendered. If this objection be well founded, it must be decisive of the present case. For a court of chancery will not compel a party, under a contract for a good and operative deed, to receive one that is essentially defective. The objections urged against this title are: 1. That a suit is now pending in the general court of Kentucky, by one Henry Banks, who asserts a right to the warrant under which Watts claims. 2. That the decree against Powell's heirs is defective, it being against femes covert whose husbands are not made parties to the bill, and that the dower of the widow of Powell, who is still living, has never been divested. 3. That the decree against Powell's heirs does not give a legal title to Watts.

The bill filed by Henry Banks in the general court of Kentucky, in which he sets up a right to the warrant on which the entry claimed by Watts was made, and which he alleges was fraudulently transferred to Watts, who had full knowledge of his claim, appears to be still pending in that court. Both parties have been negligent in bringing the case to a hearing. The process having been served on Watts, the general court have jurisdiction of the case, and may enforce their decree in personam. It is difficult for this court, therefore, in an enquiry respecting the embarrassments on this title to disregard the pendency of this suit, or to say that the facts asserted in the bill, uncontradicted as they stand, do not cast a shade upon the right of Watts.

The second objection seems also to be well taken. The husbands of the femes covert referred to are not made parties in the case against Powell's heirs; and consequently their interests could not be prejudiced by the decree. Nor does this decree impair or in any way affect injuriously, any right which the widow of Powell may have in the premises.

But the third objection, that the decree of the court in Kentucky does not vest in Watts the legal title, is conclusive. No decree of a court in a foreign jurisdiction, can operate as a conveyance of land in Ohio. The mode by which real estate must be transferred, either by act of the parties or by operation of law, is fixed by the laws of the respective states. By the statute of Ohio, a decree is made to operate as a conveyance; but this refers, exclusively, to her own tribunals. Under the decree in Kentucky, a commissioner conveyed in behalf of Powell's heirs; and it is insisted that this is tantamount to a conveyance executed by the heirs themselves. This may be the effect of the conveyance in Kentucky; and if the land attempted to be conveyed, had been situated in that state, the deed of the commissioner would have transferred the title, as fully and completely as it was vested in the heirs. This act of the commissioner is essentially connected with the decree, and constitutes a part of it. The commissioner is appointed by the court, and his acts, to be valid, must have the express sanction of the court. This statute of Kentucky can have no greater effect on title in another state, than the statute of Ohio, which provides that the decree itself shall operate as a conveyance. They are only different modes by which the same object is attained; and their operation, as it regards title, is limited to the jurisdiction in which the power is exercised. The statute of Ohio, which makes a deed executed according to the laws of the state in which it is made, good and effectual to convey land in this state, refers exclusively to conveyances executed by the party. It can have no application, as contended, to a deed executed by a commissioner under a decree, as in this case.

These defects in the deed tendered are so radical, as to render it as a legal conveyance, inoperative. And on this ground the bill of the complainants must be dismissed with costs.

This decree was affirmed, as to the specific execution of the contract, on an appeal to the supreme court; but that court considered that the representatives of the complainant, Watts, having deceased, were entitled to certain rents and profits under the general prayer for relief, although this claim was not asserted in the circuit court; and the decree was so far opened as to admit a compensation for the rents and profits. 6 Pet. [31 U. S.] 389.

WATTS (WAGNER v.). See Case No. 17,040.

Case No. 17,296.

WATTSON et al. v. MARKS et al.

[2 Am. Law Reg. 157; 5 Pa. Law J. Rep. 254.]

District Court, E. D. Pennsylvania. 1854.

OWNERS OF VESSEL—LIMITATION OF LIABILITY—CONTRACT OF AFFREIGHTMENT—DESTRUCTION OF VESSEL — PAYMENT OF INSURANCE.

1. The 2d section of the act of congress of March 3, 1851 [9 Stat. 635], "To limit the liability of ship-owners, &c.," does not make the

absence of the "note in writing," required by the statute, a discharge of the ship-owner's liability on a contract of affreightment, where the true character and value of the enumerated articles have been fairly and clearly set down in the bill of lading, whether before or after the actual shipment; nor, it seems, where such character and value were in fact unknown to the parties.

2. Under the 3d section of this act, the personal liability of the ship-owners on a contract of affreightment ceases upon a total destruction of the vessel and loss of freight, before the completion of her voyage, though the actual damage to or loss of the goods to be carried, as in the case of theft, has taken place prior to the time of the destruction of the vessel.

[Cited in Norwich & N. Y. Transp. Co. v. Wright, 13 Wall. (80 U. S.) 127.]

[Disapproved in Walker v. Boston & H. Ins. Co., 14 Gray, 305.]

3. The limitation of liability of the ship-owner, by this section, is not affected by the fact that the vessel has been insured, and the insurance has been paid or become payable.

[This was a libel by Thomas Wattson & Sons against James Marks and others upon a contract of affreightment.]

Geo. M. Wharton, for libellants.

Mr. Waln and St. G. T. Campbell, for respondents.

KANE, District Judge. The respondents were owners, and Marks one of their number, was master of the steamship Union, which was engaged in June, 1851, in the business of transporting merchandise and passengers between California and the Isthmus. While she was so engaged, one J. B. Thomas shipped on board of her a quantity of gold-dust, belonging to the libellants, taking a bill of lading in the following words:

PACIFIC STEAMSHIP "UNION."

Marks and Numbers, or Address.	Gross Weight. Avoirdupois			Said to contain	Value.
	lb.	oz.	dwt		
Thos. Wattson & Sons, Philadelphia.	30	2	00	375 ounces of gold dust.	6,063 47

Freight through to New York, 2 per cent., - $121 27
Primage, 5 per cent., - 6 06

$127 33

Rec'd Payment,
J. W. Raymond, Agent,
Per H. Ovington.

Shipped in good order and well conditioned, by J. B. Thomas, on board the Pacific Steamship "Union," whereof James Marks is commander, now lying off the port of San Francisco, and bound for Panama,—one package—packages weighing, gross, thirty pounds two ounces, and said to contain three hundred and seventy-five ounces of gold-dust, equivalent to six thousand and sixty-three dollars and forty-seven cents, but actual contents unknown, and being marked and numbered as per margin, to be carried and conveyed upon said steamer (with leave to tranship to any other steamers, and to touch at port or ports) unto the port of Panama, from thence to be transported by Zachrisson, Nelson & Co., shipper's agents, across the Isthmus of Panama to the Port of Chagres, and from thence (with like leave to touch and tranship,) by steamer or steamers unto the Port of New York, and there in like good order and condition, the acts of God, enemies, pirates, robbers, thieves, fire, accident to and from machinery, boilers and steam, and the dangers of the seas, roads and rivers, of what nature and kind soever, excepted,) to be delivered unto Thomas Wattson & Sons, of Philadelphia, or his or their assigns, he or they paying freight for the same, two per cent., with five per cent. primage.

The transit on the Isthmus being at the shipper's risk, except for negligence.

In witness whereof, the commander or purser of said Steamer hath signed five bills of lading, all of this tenor and date, one whereof being accomplished, the others are to stand void.

Dated in San Francisco this thirtieth day of June, 1851.

James Marks,
Commander of the Steamship "Union."

On the fifth of July following, the Union while pursuing the voyage mentioned in the bill of lading, was wrecked on the coast of California; and at some time, either shortly before or after she struck, the package of gold-dust belonging to the libellants, was broken open, and its contents made way with by some person or persons unknown. The libel charges that this loss occurred in consequence of the "negligence, fraud, unfaithfulness and malversation of the defendants, their officers, servants and agents, and not by reason of any of the causes or acts mentioned as exceptions in the bill of lading." It is admitted that, in ordinary cases, when the contract of shipment and the delivery by the shipper have been proved, the burden is cast on the respondents of excusing the non-delivery at the port of destination, and that he must do this by proof that shall refer the loss to some one or more of the excepted risks. But it is said, that in this case, the contract was not defined, and ascertained according to the provisions of the act of congress of the 3d of March, 1851, and that the terms of that act forbid the libellants recovering in this proceeding, without regard to the asserted merits of their claim. The act referred to is the act "to limit the liability of ship-owners, &c." (Chapter 43 of 31st Cong., 2d Sess. [9 Stat. 635]), the second section of which reads thus: "And be it further enacted, that if any shipper of gold, gold-dust, &c., shall lade the same on board a vessel, without at the time of such lading, giving to the master, agent, or owners of the vessel, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master or owners shall not be liable, as carriers thereof, in any form or manner."

Upon the phraseology of this section it is agreed, that a carrier is not bound by the terms of his bill of lading to a shipper of gold-dust, unless it be shown that the shipper, at the time of lading, gave the note in writing, which the section speaks of. The position is a broad one, and in my judgment as dangerous as it is broad. It asserts a general proposition, that there can be no recovery against a carrier, where the conditions of the section have not been complied with; that the words of the act shall be taken literally, and that without any question of merits, however clear may be the breach of the carrier's contract, there can

be no recourse against him "in any form or manner," unless the shippers have given him the note in writing, at the time of the lading. It thus assumes that the statute may be legitimately interpreted, so as to shield, if not sanction fraud; for nothing, surely, can be more unconscientious, than that a carrier, obtaining the possession of a shipper's goods, under an engagement made with full and exact knowledge of its terms and import as well as object, and receiving in advance the consideration for which he stipulated, shall relieve himself from accountability, for loss, destruction or embezzlement of the goods, by an appeal to the words of the statute. It goes further than this, in its application to the present case. It holds for nothing, the defendant's admission upon our record of the terms of their contract, (see article 3 of answers,) and their acknowledgment that the contract was fully executed by the other party, that the freight was paid and accepted, and that the goods were delivered by the shipper and received on board by the carrier, in accordance with the terms of the bill of lading: either of which the acknowledgment of record, or the full performance on one side of a well defined contract, would take a case out of the statute of frauds, according to the sternest interpretation of that statute.

It was rightfully conceded on the argument, that with reference to this question, it is unimportant whether the contents were unknown to the carrier or not, nor whether they were truly represented by the shipper. They would have been equally unknown to the carrier, whether the note was given in writing or by parol; and he might, in either case, have called for proof that the representation was true. The note contemplated by the statute, would have been nothing more than the shipper's assertion in writing to the carrier, of the same facts, which the carrier, in this case, has admitted to be true, by his writing in the margin of the bill; namely, that the package he had received for carriage, was said by the shipper to contain a certain quantity of gold-dust. The question is not of integrity of representation by the shipper, or of his fidelity in the performance of all his engagements towards the carrier, but whether admitting the shipper to have framed and performed his contract in all good faith, he can call on the carrier to show that he also has performed his contract, or why he has not. In other cases that are supposeable, the extravagance of the interpretation which the defendants contend for, would be still more evident. Suppose the "true character and value" to be unknown to both parties, as was the fact with many of the earlier shipments from California, and not notified in writing, because unknown; or suppose the note in writing, to be given not "at the time of lading," but before or afterwards; would it be right to hold the contract of lading ineffective against the carrier, because the statute had not been, or could not be literally complied with? Such cannot be the true reading of the act of congress. It was made to "limit the liability of shipowners," not to destroy it. Its object was to enforce fair dealing, to let both parties know what they were contracting about, what one was to carry, and what the other ought rightfully to pay. If this object is effected by the concurrent acts of the parties, it seems to me that the statute is satisfied. If the shipper took care that the "true character and value," or what he and the carrier believed to be the true character and value, was fairly and clearly set down on the bill of lading, and there has been from the first no misapprehension of fact on either side, I cannot think it important to inquire whether the entry on the bill was preceded by a written note, or whether the entry was in fact made at or before or after the time of lading. I shall therefore hold, until I am otherwise instructed, that where the contract of carriage has been clearly defined in all its particulars by the parties themselves, and there is no imputation of either fraud or mistake against the shipper, but he has fully executed his side of the contract, the other party shall not relieve himself from its performance, by alleging that there has been a want of literal conformity to the provisions of this section. In other words, I will hold the carrier estopped from denying the liability which he has expressed in his bill of lading, if I find in that instrument a substantial, but clear recognition of all the facts which the statute required him to be apprised of. I give the act of congress this interpretation the more willingly, because I cannot believe it was intended to destroy the commercial value of the bill of lading, in the large class of transactions to which the section applies, and to reverse the long established policy of the law, by requiring parol proof as the condition of validating a written contract. For if it be true, that the note in writing must have preceded the entry on the bill; if it must have been given by the shipper, and to the shipowner or his agent; if it must have expressed the true character and value, then the shipper before he can lawfully reclaim his goods, or recover damages for the spoliation of them, must be prepared with proofs, in pais, of all those facts. The bill of lading ceases to be negotiable—its language no longer declares its import.

I might limit the interpretation of this section without, perhaps, changing its operation on the present case, by a reference to some of the words of the act, which were not remarked on, otherwise than incidentally, in the argument. The negation of liability on the part of the shipowners is, after all, not absolute: the section speaks only of a liability "as carriers," leaving the liability under less special contract of bailment unchanged. But I prefer giving a distinct ex-

pression to the opinions I have formed upon the general phraseology of the act. I hold, that on this bill of lading, the shipowners are liable, even as carriers. But I apprehend, that in the case before me, this liability is a barren one. The 3d and 4th sections of the act of congress restrict the owner's liability to "the amount or value of the interest in the vessel and the freight then pending." It is conceded that the steamship Union was totally lost by the disaster which has given rise to this suit; but it is said, that the spoliation of the gold-dust preceded the loss of the ship, and that the measure of the defendant's liability therefore, is her value before the wreck took place. I do not think the evidence sustains the assertion. We do not know exactly the time at which the gold-dust was stolen. It had, beyond all doubt, been removed from the locker, in which it was stored on board, before the captain left the vessel after the wreck. The purser tells us, he passed out all that the locker contained. The box was not missed, however, until the rest of the treasure had been carried ashore, and it was not until twenty-four hours afterwards that it was found broken open, and on board. To my mind, it is reasonably clear, that the box was purloined on its way from the locker to the boat, and was then secreted on board until the next day presented an opportunity for opening it. It could hardly have been stolen before the confusion of the wreck. It was accessible till then, only to two persons, the captain and the stewardess, either of whom, if disposed to rob, might have taken half a million as easily as a thousand dollars worth, and who would either have kept their plunder in its original package-form, to make its removal and secretion easier, or else have thrown the box, which was the badge of ownership, overboard. All the circumstances favor the idea, that the loss would not have taken place if the ship had not gone ashore, and they refer it, I think, with every aspect of probability to the rapacity of third persons, stimulated and screened from detection by the general alarm.

But whether the robbery preceded or followed the moment of wreck, or was contemporaneous with it, is, in my judgment, of no importance. We may, perhaps, gather the meaning of our statute on this branch of the question, from the general maritime law. Whatever may have been the law of the continent in times very long gone by, when the magister, and the exercisor, and the navientarius, and the dominus navis, were sometimes one and sometimes distinct, and when the liabilities of ownership were more or less dependent on the capacity which one or the other of these titles implied, it is certain that since the ordinance of 1681, and even long before, the owners have been liable for the captain's acts to the extent of their interest in the ship and freight, but no further. The exceptions to the universality of this limitation, were of English parentage, and referred themselves directly to the policy of the old common law of that island. The wiser rule of the continent was adopted for Great Britain, in the 7th year of George 2d, some half a century after the ordinance of the French king had defined the commercial usage of the rest of the world. (Judge Washington, in The Seneca.) From the English statute, or rather through it, the provisions which are found in our act of congress, have been derived at second or third hands.

It has been a subject of discussion among some of the French commentators, whether the subsequent loss of the vessel, or its surrender by the owners, released them from the legitimately made contracts of the captain. See Valin, lib. 2, tit. 8, art. 2; Emerigon, Contr. Gr. c. 4, § 11; Poth. Obl. 4511; 1 Boul. P. Dr. Com. 270, &c. But I am not aware that such a question has ever arisen, where the claim to charge the owners was founded on the master's delict or want of skill. At least it may be regarded as settled now, that the owner's liability for the delicts and quasi-delicts of the master, ceases upon a surrender of the vessel with her freight, and does not survive her destruction. See the authors above cited, and 1 Pard. Droit. Commer. pt. 4, tit. 2, c. 3, § 2. The only opinion I have met with, seemingly at variance with this, may be derived from the language of Judge Story, in Pope v. Nickerson [Case No. 11,274]. "Suppose," he says, when speaking of the limited liability of the shipowner, "suppose after the right of action has attached, the ship perishes: that will not affect the right of recovery of the shipper in a case of tort, and a fortiori, it will not in a case of contract, made by the master, by and under the authority of the owners." This doctrine is fully sustained by the cases of Dobree v. Schroder, 6 Sim. 291, 2 Myln. & C. 489, and Wilson v. Dickson, 2 Barn. & Ald. 2. It might be sufficient to remark, that the learned judge was commenting on a statute of Massachusetts, which differed materially from the general law maritime, and from our act of congress, in that it seeems to have made no provision for a surrender of the ship and freight, and thus, as the judge says, left the remedy to be strictly in personam; and that, besides this, the position assumed by him was not necessary, nor perhaps even directly involved in the case he was considering. But I have not found in the cases he refers to, a clear affirmation of the principle for which he invokes them, if that principle is to be extended in its application to the case before me. Dobree v. Schroder turned upon the question whether, where the vessel had made freight once or more after the delict, and had been deteriorated by ordinary wear, her value was to be ascertained at the time of suit brought, or at the time when the right of action accrued; and the case of Wilson v. Dickson was one of collision, in which the defendant's vessel

survived the delict, and was not lost till some time after the right of action had accrued. The first was not a case of total loss: the second, being one of tort and in personam, the right of action attached instanter, and could not be varied by subsequent circumstances. Not so, the liability of a carrier, for goods lost or purloined. He may find them again before the voyage ends, or reclaim them from the thief in time to make delivery in conformity to the terms of his bill of lading. There is no liability, in his case, if the shipper gets his goods according to the contract of carriage; nor can the shipper complain of accident or wreck, though the goods are transhipped in consequence, if they come to him in time and in good order. The right of action against the carrier therefore, unlike that which grows out of a collision, does not accrue till the end of the voyage, or the lapse of a reasonable time for the delivery of the cargo.

It is impossible, however, to give effect to the 4th section of the act of congress, unless we suppose that, in cases of affreightment at least, the measure of his ability is the value of the vessel and freight at the time of suit brought. That section provides, that where the whole value of the vessel and her freight for the voyage shall not be sufficient to make compensation for the losses which the shippers have sustained by the embezzlement, loss, or destruction of their goods, the owner of the vessel may take appropriate proceedings in any court for the purpose of apportioning the amount of his liability among the parties entitled; and that upon the transfer of his interest, in the vessel and freight, to a trustee named by the court, all claims and proceedings against the owner shall cease. How can this "transfer of his interest" pass more than he has at the time? Yet, upon such a present transfer, all claims and proceedings against the owner are to cease;—"claims and proceedings to cease"—implying, clearly, that such proceedings against him may be actually pending at the time of the transfer. The terms of this section may be said to be inapplicable to the case of a total loss, where there remains nothing to transfer; but as both sections relate to the same liability, the 4th giving effect to that which was declared by the 3d, the import of the 3d section becomes altogether clear, namely, that the owner shall not be personally liable, where he has no longer any interest in the ship or her freight. It never could be the purpose of congress, that he who has lost a part of his investment, should be relieved from his liabilities, while his equally innocent neighbor remains bound, because he has lost all.

The policy of our own law is happily explained by Emerigon in his remarks on the corresponding law of France. "The owner's liability," he says, "for the captain's acts, is rather a liability in rem than in personam (nulle que personelle.) While the voyage is in progress, the captain may take up moneys on bottomry, or pledge the apparel of the ship, or even sell his cargo. But this is all. His legal authority does not go beyond the limits of the ship under his command, the ship confided to his administration. He cannot involve the general estate of his owners, unless they have specially authorized him to do so. In the absence of special authority, there is no personal recourse against the owners, unless they elect to retain their interest in the ship; if the ship perishes, or they release their interest in it, they cease to be answerable." Emer. Contr. a la Gr. c. 4, § 11. "And such," says Boulay-Paty, "was the maritime law of the Middle Ages; as appears by the Consulado, c. 33 and 236, Cleirac, Riviéres, art. 15, Kurricke, Stat. of Hamburg, Grotius, and numerous other authors on this title of the law." "And this too," he says, "is the more equitable, inasmuch as the owner is at such a distance from his captain, as to make it impossible to overlook him or even communicate with him. The exposure of the owner's ship and freight to loss, not to speak of the goods he may, himself, have put on board, is quite interest enough to ensure his selection of a reliable captain." 1 Dr. Com. Mar. 269. He expands the same idea some pages further on. After reasserting that the captain's acts and delicts cannot involve his owners beyond the ship and freight, and that they may absolve themselves altogether, by surrendering these interests, he says (page 286): "The owners entrust to the captain's administration only a certain value, that of their ship. To authorize the captain to make them debtors beyond this value, would be to place the fortune of the owners at the mercy of an agent purely special. The ownership of vessels would be altogether too hazardous, if such a power as this were vested in the captain, often a captain not even chosen by the owners; for we know that in the course of a voyage, and in certain cases, the captain may delegate his powers to another, or an unknown person may be appointed by the magistrate to replace the one who was commissioned by the owners." Recognizing, then, the liability of the owners upon a contract of carriage like this, I am of opinion, also, that such liability is at an end, upon the total destruction of the vessel and loss of freight before the completion of the voyage. Nor is there any thing, as it strikes me, in the circumstance that the vessel was insured, and that a loss has been paid on her, or is still payable. The limit of the liability, the subject matter of the surrender in discharge of it, was the "value and amount of the owner's interest." If the vessel has ceased to exist, if the wreck was complete, and there is no longer property in her or in her remains for any one, the owner's interest is gone. He has nothing to surrender. There is not a word in the act about the insurance moneys, which he has received or might claim. These

are not his interest in the vessel. The policy of insurance is a distinct independent subject of property. No equity attaches upon the proceeds of it in favor of third persons, unless there be some contract, agreement, or trust, to that effect. Ellis, Ins. 81. The assignment of a ship passes no interest in an outstanding policy. The fire insurance policy on a house is a merely personal contract, and it passes even in equity to the executor, not the heir. Mildmay v. Holgham, 3 Ves. 472. A mortgagee has no claim upon its proceeds. Vernon v. Smith, 5 Barn. & Ald. 1. And as the marine policy is a merely personal contract between the insurer and the assured, so the rights of action, which flow from it in case of loss, are strictly personal also. It is not, it never was an interest in the thing insured. In a case of total loss, the rights of the assured to recover by force of it, spring up and have their being only from the moment when his interest in the thing expired.

But if even the vessel had continued to exist in specie, the total loss being constructive only, and made so by abandonment to the underwriters, the law, as it seems to me, would be the same. The underwriters could take no more under an abandonment and cession than the assured had at the time of loss. The ship, in their hands, would be liable still, and primarily, for wages, for salvage, also, for maritime loans, for repairs and supplies furnished abroad, and on hypothecations, implied by the contract of affreightment. The surrender or transfer, contemplated by the act of congress, affects the underwriters no more than did the implied hypothecation, out of which it grows, and for which it can hardly be said to be substituted. Such a transfer is merely the formalization of a trust existing before, a trust now to be administered by the court, instead of the shipowner, an act of law, or under legal sanction, which passes the legal title out of the owner, but leaves the creditors of the vessel in the same plight against her as before. The abandonment is of the residuary interest of the shipowner, of the surplus, if there be any, after payment of all the charges on the ship and freight. Such is the conclusion of Boulay-Paty, after a well-reasoned train of remarks on the same question, under the Code Civile, 1 Dr. Com. Mer. 293. He begins by marking the distinction between the nature and effects of an abandonment to insurers, (delaissement,) and those of a surrender (abandon) by the shipowner to the use of the shippers: "By the abandonment," he says, "the ownership of the thing insured passes to the underwriters, who share it among them pro rata, whether there be loss or profit in the result. The surrender, on the other hand, has a different effect. It is simply a declaration by the owner of the ship, that he no longer asserts any control over the property, but passes it to the shipper, that he may seek payment from it, and not from the owner personally. But, differing in this from the underwriters, the shipper has not become an owner. He can only pay himself his debt; he cannot derive a profit from the surrender. In a word, there is the same difference between them as between an owner and a creditor having a privilegium or hypothecation. The surrender is a renunciation of ownership of the vessel, having for its only object the relief of the owner from the debts which encumber the thing, not a transmission of the ownership to others. It is of the same sort with the act of an heir, when he renounces the inheritance to avoid paying the encumbrances upon it; or the purchaser of mortgaged premises, who gives them up rather than stand liable to the mortgagee; or the debtor, who makes a cession as a bankrupt. The abandonment to the insurers is very different from this. It is an absolute turning over of the thing, for which they are to pay the price; which makes them owners of the thing, and subjects them to all the charges of ownership, unless they prefer surrendering it in their turn. This distinction meets all the objections that can be made. They are all resolved by the different natures of the abandonment and the surrender; the former of which makes an owner, the latter only a creditor of the thing. By the abandonment to the insurers, as they become owners under it, they stand charged with the debts which encumbered the thing before, and which still adhere to it; while the surrender to creditors has no other effect than a declaration that the former owner of the thing asserts no right over it any longer, and that the creditors must seek it, in whose hands soever it may be, to get payment from it. It follows that the shipowner may, by such a surrender, turn over the shipper against the insurers, who have become, by the abandonment, owners of ship and freight, and thus make abandonment and surrender both. The abandonment will not on that account be partial; for the shipowner, though bound to convey the entire thing, to wit, the ship with its freight, is not on that account bound to clear it of the debts with which the acts of the captain have encumbered it during his administration. Such debts are a natural charge upon the thing, diminishing its value, but not hindering its integral transfer, subject to the charge." Returning again, after some paragraphs, to the same subject, he says, (page 297:) "The product of the insurance is the consideration (prix) of the premium which the shipowner has paid to insure her. This premium is not pledged (affectée à garantie) for the obligations of the captain: the law pledges only the ship and freight; consequently the shippers have no right upon the insurance moneys. They do not in general represent the ship, but become, when the ship is lost, the basis of a direct personal action in favor of the assured."

I have found a single line in Pardessus, which does not consist with this doctrine of Boulay-Paty. It forms part of the section I have quoted before. Referring to the surrender by a shipowner, which relieves him from personal liability, he says: "It follows, that if

the ship has been insured, the owner should surrender his rights against the underwriters." He does not expand the position beyond the words I have quoted, and does not sustain it either by argument or authority. The reasoning of Boulay-Paty, who wrote afterwards, seems to me unanswerable; and it is borne out by the established policy of commercial institutions. It would discourage insurances, were we to deny to the shipowner the benefit of the contract for which he has paid his premium. It would discriminate to the disadvantage of the small capitalist, who must insure with third persons, in favor of the millionaire, whose extended means allow him to stand his own underwriter, and who, not receiving the amount of loss from third persons, would not be called on to pay it over to the shipper; or to the disadvantage of the prudent, in favor of the reckless. What matters it to the shipper, whether the ship was insured by the owner himself or by a third party? What right can he claim in the one case more than in the other? He did not in either case contribute towards the premium of insurance; it added nothing to the freight he engaged to pay; he never stipulated that the ship should be insured at all, nor inquired whether it was so. He gave credit, when he shipped, to the vessel; she became hypothecated to him as she stood; the owner's liability was measured by her value. What has he to do with the other contracts of the owner, whether made afterwards or before? What right has he to expect that the fruits of them shall be superadded to the only security for which he bargained? Besides, the hypothecation between ship and cargo is reciprocal. Each is bound to the other; and both, I suppose, should be bound alike, and with the same incidents. If the owner's policy on the ship is to enure to the indemnity of the shipper of cargo, must not the shipper's insurance on his goods be pledged for the payment of freight, and be taxed accordingly, where the freight has been otherwise lost by a peril of the seas? But it is unnecessary to follow out this train of remark. If it were never so desirable to turn over the policy on the ship to the profit or indemnity of the shipper of cargo, and if it were not of all things the easiest to cover up the fact that such an insurance was in existence, a simple restriction of the assignable quality of the instrument, such as we find in our policies against fire, would make the effort futile. A single line of memorandum would do the business. I cannot hold, therefore, the amount whatever it may be, that has been paid or that may be payable by the insurers, as a part of the defendants' interest in the ship and her freight. The result is, that there can be no recovery against the owners as such.

As to the individual liability of Captain Marks. I have only to say, that it is not a question on these pleadings. As the master of the ship, however ably and faithfully he may have borne himself in circumstances of singular embarrassment and difficulty, I am not prepared to affirm that, as a carrier, he has brought himself within the exceptions of his bill of lading. But the only issue I am called on to decide is between the shippers and the owners as such. My decree must be for the defendants.

Decree for defendants, with costs.

Case No. 17,297.

The WAVE.

[Blatchf. & H. 235; [1] 7 N. Y. Leg. Obs. 97.]

District Court, S. D. New York. April, 1831.[2]

COURTS OF ADMIRALTY—JURISDICTION—TIDE WATERS WITHIN STATE—SALVAGE BY PILOT.

1. Courts of admiralty in the United States have jurisdiction over claims for salvage upon waters within the ebb and flow of the tide, though within the body of a state.

[Cited in A Raft of Spars, Case No. 11,529.]

2. A pilot is under no legal obligation to take charge of a vessel in distress, unless her condition be such as to require pilotage services.

3. Courts of admiralty have jurisdiction of suits for pilotage.

4. If a pilot goes beyond the duty imposed upon him by law, and renders meritorious services to a vessel in distress, he becomes a salvor, and may sue in admiralty for salvage, though the service be performed upon pilotage ground.

[Cited in Flanders v. Tripp, Case No. 4,854; The James P. Donaldson, 19 Fed. 272.]

In admiralty. This was a libel for salvage, filed by the owners and crew of the pilot-boat Gazette, against the schooner Wave. The facts were these: The Wave left her moorings at the wharf in New-York on the 2d of February, 1831, with intent to go to sea. A pilot, (one of the libellants,) had been on board of her after she was ready for sea; but, as she was locked in by ice, and there appeared to be no chance of her getting out soon, he left her, with an understanding that he would return when he was wanted. A signal was afterwards hoisted by the Wave for a pilot, but, a sudden opening of the ice around her occurring, she put out without waiting for a pilot, keeping the signal up. The signal was soon hauled down, the master thinking his mate a competent pilot in the harbor. Near Bedlow's Island, a pilot-boat was spoken coming up, and an inquiry was made, from on board the Wave, about the ice below. No pilot was asked for. In the lower bay, the Wave was found to have sprung a leak, and to be making water rapidly. The master ordered a signal for a pilot to be made. Immediately afterwards it was run down, and a signal of distress was hoisted. Guns were also fired. The schooner was then brought to anchor in three and a half fathoms of water, about a mile from Sandy Hook beach. She was fast filling. The

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

[2] [Reversed in Case No. 17,300.]

crew were exhausted by their exertions, two of them were spitting blood, and, in despair of being able to keep the schooner afloat much longer, they had brought their baggage on deck, and loosened the boat, with a view of making their escape. The pilot-boat of the libellants, when the signal of distress was first observed, was outside the Hook, from three to five miles from the Wave. She immediately made efforts to reach the Wave, but, the tide being ebb, and the wind being strong ahead, she could not reach her under about an hour and a half. When within hail, the inquiry was made from the pilot-boat, as to what was wanted. The master of the Wave said, that his vessel was sinking, and he wanted assistance. Hyer, one of the libellants, boarded her, and, ascertaining her situation, sent back his small boat for more men, and soon after ordered the pilot-boat to be brought alongside of her. Hyer was a branch pilot. He had on board the Gazette, with him, two deputy pilots, three apprentices and a cook. When he went on board the schooner, the master surrendered possession of her to him. The testimony as to the expressions used was not clear or entirely consistent. Some of the witnesses understood that the schooner was delivered up to him absolutely, and others that she was surrendered to him as pilot.

[We can probably arrive at a more satisfactory understanding of what was contemplated at the time by adverting to what was actually done on both sides than by weighing the recollection of different witnesses against each other, for the purpose of fixing upon the exact language used between the parties. Besides, a mere repetition of the words spoken by no means invariably communicates the acceptation of those using or hearing them at the time; and we should repose still less confidence in an attempt to state the precise expressions used at a moment of great agitation and excitement.] [3]

The facts, however, were, that Hyer immediately assumed the entire command on board the schooner. He ordered her hatches to be broken open, shifted the cargo aft to raise her bows, placed a strong relief at the pumps, sent hands forward in a small boat to check the leak by securing a tarpaulin and a board over it, unloaded part of the cargo of the Wave, and loaded the pilot-boat with it, and, when the schooner was so far lightened and freed from water as to be navigable, towed the Wave, by the Gazette to Prince's Bay, where she was anchored and repaired. She was afterwards taken to New-York by his orders exclusively, and it appeared that in taking her to Prince's Bay, and during the time she was anchored there, and in bringing her afterwards to New-York, her master did not exercise any authority or claim any command. After the Wave was taken to New-York, upon a refusal by her owners to make such compensation for their services as the libellants demanded, they brought the present action. The other facts necessary to the understanding of the case are contained in the opinion of the court.

Aaron Burr, for libellants.
Robert Sedgwick, for claimant.

BETTS, District Judge. The first objection to the recovery of the libellants rests upon the proposition, that the courts of admiralty of the United States cannot take jurisdiction over civil causes of a maritime character arising within the territorial limits of a state. It will be unimportant, in considering this proposition, to inquire whether the cause of action in this case arose within the limits of this state, or those of New-Jersey; for, if the objection is valid, it excludes the jurisdiction of this court in either event. Assuming that the services rendered by the libellants would, if rendered on the high seas, have entitled them to salvage, the point is narrowed to the single inquiry, whether the jurisdiction of the court over a subject matter properly belonging to it, is destroyed because the cause of action arose upon waters within the boundaries of a state. The question is one of great magnitude; for, if the doctrine of the claimant's counsel is correct, courts of admiralty have no jurisdiction within the bays, harbors and inlets with which our vast range of coast is indented, other than what is expressly given by statute in revenue and criminal cases, and all civil causes of a maritime character, which have their origin in those places, fall exclusively under the jurisdiction of the states within whose territorial limits those waters flow.

The argument is founded upon general principles alone. No decision of any state court, claiming such jurisdiction, is referred to, nor am I aware of any decision of any court in this country which supports the doctrine. There is, unquestionably, a great contrariety of opinion in our courts regarding the character and extent of the admiralty jurisdiction. But that difference has respect to the subject matter over which the jurisdiction may be exercised, rather than to the place where the question arises, and will, therefore, be more appropriately considered hereafter.

Although, generally, the question of the jurisdiction of courts of admiralty is determined by the subject matter of the controversy (Menetone v. Gibbons, 3 Term R. 267), yet, in many instances, the locus in quo is a most material particular (The General Smith, 4 Wheat. [17 U. S.] 438). As, if an act be performed on the high seas, the place may, of itself, confer jurisdiction. But it is contended, upon the doctrines of the courts of common law in England, that the admiralty jurisdiction is limited to matters occurring upon the high seas. Without tracing minutely the rise and extent of that doctrine

[3] [From 7 N. Y. Leg. Obs. 97.]

in England, it is sufficient, on this branch of the case, to observe, that it has always been a contested point between the court of admiralty and the courts of law (Zouch, 1-51, 122; 1 Sir Leo. Jenkins, 76; 6 Hall, Law J. 568; The Appollo, 1 Hagg. Adm. 306; 312; 4 Inst. 134; Prynne's Animad. 75 et seq.); and that, in the end, the common law judges have conceded that admiralty may have a concurrent jurisdiction as to place, in bays, harbors, &c., within the ebb and flow of the tide, where ships of war float (Bruce's Case, 2 Leach, 1093). Besides, whether the rule has limits or not in England, our courts regard the decisions of the English common law courts in respect to the jurisdiction of the admiralty as of little or no authority. De Lovio v. Boit [Case No. 3,776]; The Jerusalem [Id. 7,294]. And this particular point appears to be put at rest by decisions of the highest character and authority in this country, which recognise a like jurisdiction of the admiralty in bays, harbors, &c., where the tide ebbs and flows, and on the high seas. The high court of appeals in Pennsylvania, previous to the adoption of the constitution, recognised the admiralty jurisdiction as embracing the waters of the Delaware opposite the city of Philadelphia. Montgomery v. Henry, 1 Dall. [1 U. S.] 49. Judge Bee took cognizance of a salvage case in Charleston Harbor, respecting goods cast on shore, notwithstanding there was a state law in force in regard to wrecks, which applied to the case. Stevens v. Bales of Cotton [Case No. 13,366]. The supreme court sustained a libel for salvage on the Delaware Bay near the town of Lewes. Peisch v. Ware, 4 Cranch [8 U. S.] 347. [So, at a later date, salvage has been allowed for services on board a vessel at anchor in Hampton Roads. Le Tigre [Case No. 8,281].[4] The admiralty takes jurisdiction, also, of claims for seamen's wages, when a part of the service is on tide waters. The Thomas Jefferson, 10 Wheat. [23 U. S.] 428. In all cases of tort and revenue falling within the cognizance of admiralty, tide waters have been considered, equally with the high seas, as places where that jurisdiction could be exercised. It was decided by the supreme court, soon after its organization, that violations of the revenue laws in the waters of our bays, harbors, &c., were, in their nature, cases of admiralty jurisdiction. La Vengeance, 3 Dall. [3 U. S.] 297. That court has been invoked, on various occasions, to review that decision, but it has always been sustained to the fullest extent. U. S. v. The Sally, 2 Cranch [6 U. S.] 406; U. S. v. The Betsey, 4 Cranch [8 U. S.] 443; Whelan v. U. S., 7 Cranch [11 U. S.] 112; The Octavia, 1 Wheat. [14 U. S.] 20; The Sarah, 8 Cranch [12 U. S.] 391. The cause of prosecution in the case of La Vengeance occurred at about the same place where the Wave anchored, within the waters of Sandy Hook. Judge Story investigated the subject at an early period in his judicial career, with great sagacity and depth of research, and demonstrated the legitimate jurisdiction of the admiralty over waters within the ebb and flow of the tide. De Lovio v. Boit [supra]. And, after a lapse of fifteen years, that learned judge avowed his adherence, in substance, to the doctrines he had before laid down. The Tilton [Case No. 14,054]. The circumstance relied upon, that the cause of action in the present case arose within the limits of a state, would, therefore, not exclude the jurisdiction of this court over the subject. The supreme court has decided, that the cession of cases of admiralty and maritime jurisdiction by the constitution is no cession of the waters upon which those cases may arise. The waters themselves remain the territory of the state within which they lie. U. S. v. Bevans, 3 Wheat. [16 U. S.] 388. Whatever relation, therefore, this jurisdiction may have to locality, it does not require to support it, that the sovereignty over the place should be in the United States, or out of a particular state. It is, in this respect, of the same character as the jurisdiction conferred upon the federal judiciary, over "all cases affecting ambassadors, other public ministers and consuls," which must be exercised without regard to territorial limits or jurisdiction. It seems to me, also, that suits in admiralty by material men come within the same principle. The cause of action in such cases always arises within the territory of a state; yet, the admiralty has unquestionable cognizance of them upon tide waters. The Jerusalem [supra]; The General Smith, 4 Wheat. [17 U. S.] 438. And even with respect to actions by seamen for wages, between joint owners for the possession and management of vessels, and upon hypothecations, the entire cause of action may have its origin and termination within a state. So far as place is taken into contemplation in determining whether admiralty can have cognizance of causes of civil and maritime jurisdiction, the single consideration seems to be, whether they have relation to transactions on sea or tide waters. The Thomas Jefferson, 10 Wheat. [23 U. S.] 428.

The second objection to the jurisdiction of the court has reference to the capacity of the parties. It is denied that pilots can maintain suits here for any services they may render. This objection embraces two propositions: (1.) That pilots cannot be salvors; (2.) That a court of admiralty cannot take cognizance of claims by pilots for even the pilotage compensations allowed them by law.

(1) The first branch of this objection must undoubtedly be intended to be limited to situations where the pilot might be required to perform the duties of his office, and not to apply whenever he might chance to navigate the high seas. The libellants, or some of them, were appointed to pilot vessels from New-York to sea, and from sea to New-York, by the way of Sandy Hook. It will, therefore, probably not be denied, that if they had rendered services on board a vessel off Charleston Harbor, or at any place remote from Sandy Hook, they might, not-

[4] [From 7 N. Y. Leg. Obs. 97.]

withstanding their commission as pilots, claim as salvors in that behalf. The objection is understood to be, that pilots cannot be salvors in places where they may be bound to act as pilots. No case has been cited in which this specific doctrine is advanced. But it is deduced from the assumption that the libellants, as public officers, were bound, ex officio, to perform the services rendered in this case. I shall hereafter advert more particularly to this position, in considering what duties were imposed on them virtute officii; and, unless the disqualification set up against them is found to result from the character and obligations of their appointment, there would seem to be no foundation for it in law or principle. The principles of the maritime law would certainly apply no more strongly in excluding pilots from becoming salvors, than it would to the ship's company of the vessel saved, it being their duty to render all practicable aid to the vessel to which they belong. And yet, at this day, it is incontrovertibly settled, that seamen may be rewarded as salvors, for services in the preservation of their own ship. Mason v. The Blaireau, 2 Cranch [6 U. S.] 269; The Two Catherines [Case No. 14,288]. So, also, the men of a king's ship, whose specific duty it is to protect and succor merchant vessels, are entitled to recover salvage for extraordinary exertions in saving a vessel or cargo. The Mary Ann, 1 Hagg. Adm. 158.

Not only has the counsel for the claimant failed to produce any direct authority in support of the doctrine for which he contends, but it does not appear that the objection has ever been raised in the English court of admiralty; or, if it has been, the principles upon which that court proceeded have completely discountenanced and overruled it. Godolphin, 45-50, 166, 183; Zouch, 50. In the case of The Joseph Harvey, 1 C. Rob. Adm. 306, before Sir William Scott, in April, 1799, the judge observes: "It is allowed the court may, in cases of pilotage, as well as of salvage, direct a proper remuneration to be made. It may be, in an extraordinary case, difficult to distinguish a case of pilotage from a case of salvage, properly so called; for it is possible that the safe conduct of a ship into a port, under circumstances of extreme danger and personal exertion, may exalt a pilotage service into something of a salvage service." In that case, pilots claimed salvage. They boarded a vessel off Dover Castle, which had a signal up for a pilot, and wished to go into the Downs. When spoken, the answer was, that the vessel wanted a pilot; and, there being strong proof of malconduct on the part of the pilot, and the testimony given by him, as to the distress of the vessel, being contradicted, the court refused him any compensation. The question, however, was directly before the court, whether salvage could be claimed by a pilot under such circumstances, and no doubt seems to have been entertained that it could be. Another case is cited by the reporter, in which, there being no misconduct of the pilots, a liberal salvage was awarded by the court. It was the case of a salvage service on the coast by a pilot-boat which went out to the assistance of a vessel in distress. The court awarded salvage, with strong language in support of the claim. "It is expedient," the judge remarks, "for the security of navigation, that persons of this description, ready on the water, and fearless of danger, should be encouraged to go out for the assistance of vessels in distress." The Sarah, 1 C. Rob. Adm. 312, note.

So, also, the courts in this country have recognised the same doctrine. In the case of Dulany v. The Peragio [Case No. 4,123], in the district court of South Carolina, the libellant claimed salvage. He was a pilot, and boarded the vessel while she was at anchor at Bull's Inlet. She had been injured in a storm, and had lost her masts, &c., but the crew had rigged a jury-mast, and the vessel was tight and sufficiently provisioned. The libellant towed her into Charleston Harbor. Judge Bee decided that it was not a case for salvage, but that the pilot should be allowed $200 above his pilotage, and the costs of suit. No doubt was suggested of the authority of the court to give salvage to a pilot. The case of Hand v. The Elvira [Id. 6,015], decided by Judge Hopkinson in the Pennsylvania district, in April, 1829, upon facts extremely like those in the case last cited, except that the vessel was not found at anchor, was also a claim for salvage by pilots. The libellants, when they boarded the vessel, were cruising in their vocation on board their pilot-boat; and the question was raised and discussed by counsel, whether the pilots could be salvors in the case. The judge declared that he had no difficulty upon this point, and adopted the sentiment of Sir William Scott—that circumstances may occur exalting a pilotage into a salvage service—and allowed salvage in the cause. The district court of South Carolina takes cognizance of claims by pilots for salvage. Salvage has been recently allowed by that court for piloting a vessel out of Charleston Harbor, without any question as to the jurisdiction of the court. The Washington v. The Saluda [Case No. 17,232], April, 1831. I am, therefore, satisfied that, by the maritime law, pilots may be remunerated as salvors, even in cases where they may be, at the same time, acting in the capacity of pilots. Whether the statute has prescribed a different rule with respect to the pilots of this port, will be more particularly considered hereafter.

(2) If this court can justly entertain jurisdiction of this cause, it would be authorized, upon the pleadings before it, if the service is proved to be only a pilotage service, to award the libellants a compensation as pi-

lots, should it decide that they could recover nothing more. The general objection, therefore, raises the question, whether pilots can sue for and recover pilotage fees in a court of admiralty.

Inquiries into the legitimate jurisdiction of courts of admiralty are amongst the most perplexed questions of our jurisprudence. No standard is established by which this questio vexata can be determined with exactness. By the constitution, the power of the federal judiciary extends to all cases of admiralty and maritime jurisdiction; and, by the act of congress of September 24th, 1789 (1 Stat. 73, 77), the district courts have exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction. But neither the constitution nor the statute defines what that jurisdiction comprehends, nor do they indicate the sources from which principles may be drawn limiting or explaining it. A subsequent act, passed May 8th, 1792 (1 Stat. 275, 276), provides, that the forms and modes of proceeding in suits of admiralty and maritime jurisdiction shall be according to the principles, rules and usages which belong to courts of admiralty as contra-distinguished from courts of common law. This act has been construed not to have reference to all courts of admiralty, but to those of England and this country alone (Manro v. Almeida, 10 Wheat. [23 U. S.] 490); and, although the same case interprets the act to have relation to the practice of the court only, and not to its jurisdiction, yet a strong implication would arise that congress contemplated that a court of admiralty in this country derived the principles regulating its jurisdiction, and those which were to govern its practice, from one and the same source. If it be admitted, however, that we are to regard the jurisdiction of the admiralty in England as that which is to determine the character and extent of the jurisdiction of our courts, yet a great difficulty still remains, to ascertain what period in the history of that jurisdiction we are to select, and whether we are to model our judicature, in this behalf, in conformity to the ancient functions of the English admiralty, or limit it to the powers which that court exercised at the Revolution. [Two very recent decisions in the United States supreme court have settled the admiralty jurisdiction of the United States courts. It is substantially as laid down in this case. [License Cases] 5 How. (46 U. S.) 541; [New Jersey Steam Nav. Co. v. Merchants' Bank of Boston]; 6 How. (47 U. S.) 344.] [5] Nor can the authority which that court exercised at any given period of its existence be now defined with certainty. The evidences of its jurisdiction are far from being clear or satisfactory. By the civilians, an almost unlimited extent was claimed for it, whilst the common law lawyers generally considered its legitimate authority as very restricted and unimportant. The history of the foundation of the court is no longer extant. The reasons and purposes which led to its establishment are to be implied only from the objects the court was found to subserve. The theory of British polity supposes the monarch to be the fountain of all judicial authority. In the earlier ages of the government, and, indeed, after the constitution had attained to some degree of symmetry, the judicial power was either exercised in person by the king, or was conferred by him at discretion upon such tribunals as he might designate. The court of the admiral (with those of the marshal and constable) was undoubtedly called into being as an instrument by which the royal prerogative, in relation to matters dehors the kingdom, could be most conveniently exercised. The admiralty court was probably instituted with limitations and restrictions now lost to juridical history. But it would soon be discerned that the court was adapted, by the celerity of its action and its ready subserviency to the will of the monarch, to enlarge and strengthen his powers; and that consideration would lead him, from time to time, to encourage its cognizance of subjects of a purely municipal character. The readiness of the lord high admiral, or of his surrogate, to amplify his jurisdiction, would also conduce to draw under his cognizance matters occurring within the kingdom, whether wholly territorial, or mingling with transactions on the high seas and abroad appertaining appropriately to the tribunal. How long and to what extent this domestic and municipal jurisdiction of the admiralty was exercised, cannot now be ascertained; but there is abundant evidence that it was exceedingly comprehensive and diversified. Zouch, 14, 50; Godolphin, passim. Almost the earliest notice furnished by history of the existence of the court consists in details of the strenuous efforts made to subdue and bound its authority in relation to matters of an internal and municipal character. The acts of 13 and 15 Richard II. were passed for that purpose, the one directing that the admiral shall only meddle with things done upon the sea, and the other, that he shall not take cognizance of contracts, pleas and quarrels, and other things arising within the bodies of counties, nor of wrecks. But, although these statutes designate certain matters with which the admiral shall not meddle, neither of them assumes to define the legitimate objects and limits of his jurisdiction. An active controversy subsisted for ages afterwards between the courts of common law and the admiralty court, upon the claims of jurisdiction. The king was appealed to, as the fountain and arbiter of the powers of all the courts. He commanded a mutual adjustment of the disputed point by the respective judges; but, although the arrangement was solemnly consummated on paper, it was never observed, and the common law courts proceeded, by gradual advances, until they nearly extinguished all procedures in the admiralty. Except as a prize court, it now exercises, in fact, in England, but a meagre and stinted authority, compared with

[5] [From 7 N. Y. Leg. Obs. 97.]

the powers it once wielded. Yet it is believed that, to this day, the admiralty court does not accede to the justness of the restrictions imposed upon its jurisdiction. The Hercules, 2 Dod. Adm. 371; The Apollo, 1 Hagg. Adm. 312. Let it, therefore, be established, that we are to resort to the English admiralty for the principles and usages which shall govern the proceedings of our own courts of that denomination, and it is manifest that difficulties of serious magnitude lie in the way of any practical and available use of the criterion. It still remains to be settled, to what period or era of the court we shall direct our attention, and how we shall ascertain what authority then properly appertained to the court.

The learning in relation to the history of the English admiralty, its just jurisdiction, the claims of the common law courts in contravention of it, and the principles upon which the admiralty and maritime jurisdiction conferred by the constitution of the United States should be exercised, are collected and systematized in various authorities, a general reference to which will be sufficient to bring into view the doctrines which have prevailed on these topics. Introduction to Hall, Adm. Prac.; Introduction to Serg. Const. Law (2d Ed.); Dup. Jur. Append.; De Lovio v. Boit [Case No. 3,776]; 1 Kent, Comm. 353; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 106, note; Ramsay v. Allegre, 12 Wheat. [25 U. S.] 614, opinion of Johnson, J., and note; The Tilton [Case No. 14,054]; 6 Dane, Abr. 355; Zouch, 14; Godolphin, c. 4; Exton, Adm. Jur. passim; 4 Inst. 134; 12 Coke, 79; 1 Beawes, Lex. Merc. (by Chitty) 400; Prynne, Animad. 75. The general position which the courts of this country seem disposed to maintain is, that admiralty will take cognizance of subjects of controversy of a maritime character. The Jerusalem [Case No. 7,294].

The piloting a vessel to and from sea would seem to be peculiarly a service of a maritime character. I do not find that the right to recover compensation for such a service, by a suit in admiralty, has ever before been called in question; or that the manner in which the pilot was commissioned, or whether or not the local law supplied him a more convenient remedy has been allowed to affect his right to resort to this court. No doubt seems ever to have been suggested by the court or the bar in England, that pilots might recover their fees in admiralty, except for services on navigable rivers (The Eleanor, 6 C. Rob. Adm. 39; Abb. Shipp., Ed. 1829, pt. 2, c. 5), although such suits are common (The Joseph Harvey, 1 C. Rob. Adm. 306; The Benjamin Franklin, 6 C. Rob. Adm. 350; The Nelson, Id. 227; The Leander, Edw. Adm. 35] [6]); and notwithstanding a summary remedy, by attachment of the vessel, is furnished them by statute. So, like suits have been sustained in our own courts. The Anne [Case No. 412]; Le Tigre [Id. 8,281]; Trump v. The Thomas [Case No. 14,206]; 1 Wes. R. 568].[6] Judge Story remarks, in the case of The Anne, that admiralty has, upon principle, a rightful jurisdiction, as well in personam as in rem, over claims for pilotage for services performed on, from or to the sea; and he expresses his extreme doubt of the correctness of the decisions of the English common law courts, that no suit lay in admiralty, in favor of a pilot, for services on a navigable river within the body of a county. And it is to be remarked, that neither did the statute of Massachusetts, nor does the existing one of this state, prescribe the manner of recovering the compensation of pilots, or furnish any extraordinary facilities in their behalf. It would seem, therefore, to result, that though commissioned under a state law, the pilot may have recourse to any remedy adapted to the nature of his right, and I shall unhesitatingly hold that this action is maintainable in admiralty, whether the libellants claim compensation as salvors, or for pilotage fees. The mode in which the amount of such fees is to be assessed or ascertained, may be determined by the local law, without affecting the remedy in this court. The action of the court in regard to matters clearly within its jurisdiction by the general principles of the maritime code, may be limited to the enforcement of the existing municipal law. The Robert Fulton [Case No. 11,890].

It is not necessary now to inquire whether the state courts have concurrent jurisdiction with the admiralty for the recovery of pilotage fees, inasmuch as no exclusive or specific remedy is prescribed by the state act. Yet, if the case is, in its nature, one of admiralty and maritime jurisdiction, there is great weight of authority for the conclusion, that the jurisdiction of this court is exclusive of that of state tribunals, whether conferred upon them by the laws of the state or by acts of congress. Martin v. Hunter's Lessee, 1 Wheat. [14 U. S.] 337; American Ins. Co. v. Canter, 1 Pet. [26 U. S.] 511, 546; 1 Kent, Comm. 377; Serg. Const. Law, c. 21; Cohens v. Virginia, 6 Wheat. [19 U. S.] 397; Houston v. Moore, 5 Wheat. [18 U. S.] 27, opinions of Johnson and Story, JJ.; Dup. Jur. 90; Rawle, Const. 191. In American Ins. Co. v. Canter, 1 Pet. [26 U. S.] 511, 546, which was a case of somewhat kindred features to the present one, Chief Justice Marshall says, that "admiralty jurisdiction can be exercised in the states, in those courts only which are established in pursuance of the third article of the constitution." This would deny to congress the power of authorizing any state tribunal, as such, to take cognizance of cases of admiralty jurisdiction; much more would it militate against the right of any state to exercise such power, of its own authority. Nor does this doctrine infringe upon that laid down in various decisions, particularly with respect to criminal offences, that there may be a capacity in the United States judiciary, by the terms of the constitution, to exercise a jurisdiction which must, nevertheless, lie dormant because congress has not designated the offence, or the manner in which the court shall act upon it (U. S. v. Bevans, 3 Wheat.

[6] [From 7 N. Y. Leg. Obs. 97.]

[16 U. S.] 336; U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76), because the aid of an authorization by congress is not deemed necessary to perfect the jurisdiction of the court in civil causes of admiralty and maritime jurisdiction (Jennings v. Carson, 4 Cranch [8 U. S.] 2).

The third and last general objection to this action is, that by the laws of the state of New York, under which the libellants were commissioned, they were bound to render the services performed by them, and can only be compensated therefor conformably to the provisions of the state law. This objection rests upon two propositions—that a public officer is bound to perform all the duties of his office, for the compensation appointed by law for such services, and can claim nothing beyond such stated compensation; and that, the mode in which his compensation is to be ascertained being fixed by law, he can avail himself of no other mode of determining the amount.

The first position is well founded in reason, and is, no doubt, sustained by the general principles of law. It has been applied by an eminent judge in denying salvage in a case where an individual derived extraordinary benefit from the services of a public officer. The officer, being in the execution of the duties of his office, happened to render meritorious service to property in peril, and afterwards libelled it for salvage. Judge Washington decided, that he could not sustain the claim. Le Tigre [supra]. The language of the court would, however, seem to imply that if the direct object of the officer had been to preserve the property, he might have been entitled to salvage for such special service, notwithstanding his official authority over, or connection with, the subject.

In order to apply this rule of law to the case before the court, it is necessary to ascertain with precision the nature and extent of the duties imposed upon the libellants by their offices of pilots, and how far they are to be regarded as acting, in this behalf, as public officers. Pilots, in maritime law, are persons taken on board at a particular place, for the purpose of conducting a ship through a river, road or channel, or from or into port. Abb. Shipp. (Ed. 1829), 148; Jac. Sea Laws, 125, 127. In this capacity, they have the entire command of the vessel in her navigation whilst she is under weigh, and in selecting the place and determining the manner of bringing her to anchor. But the pilot is subordinate to the master in all other respects. The latter has the control of the vessel and crew, and is to be obeyed as to the designation and disposal of her, and the time of making sail and coming to. Abb. Shipp. (Ed. 1829) 226. The authority of the pilot being limited, then, by the law maritime, to the navigation of the vessel, his duties and responsibilities as pilot would, accordingly, be bounded by the same limitations. If any further duty was imposed upon the libellants in the present case, it must have been by some provision of positive law. This will lead us into an inquiry as to the situation in which this subject has been placed by statute.

From the year 1731, a statute has been in force in this state in relation to the pilots of this port. The colonial law was re-enacted by the state legislature, after its independency, and has continued, in substance, the same to the present day. Slight variations have occasionally been introduced as the acts passed under review, but nothing essentially changing the general features of the system. 1 Liv. & Smith's Laws N. Y. 200; 5 Geo. II. c. 565; 2 Van Schaack's Laws N. Y. 433; 4 Geo. III. cc. 1, 214; 1 Jones & Varick's Laws N. Y. 120; 6 Webster & Skinner's Laws N. Y. 277. So, also, the other maritime states had, previous to the federal constitution, adopted provisions regulating pilots within their respective territorial jurisdictions. The main purport of the various acts was to provide for the appointment of competent pilots, to declare the manner in which their services should be performed, and to fix their compensation, and, in some instances, the mode of its recovery. To obviate all questions as to the effect of the state laws after the United States government went into operation, congress, at its first session, passed the act of August 7th, 1789 (1 Stat. 53, 54), by which it was enacted, "that all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress." The power of congress to adopt, in this manner, the prospective legislation of the states, need not be questioned in the present case, because, the state statutes then and now in force being essentially the same, it is unimportant which is regarded as the rule of decision. The state act of February 19, 1819 (Sess. Laws 1819, p. 11), would, according to the terms of the act of congress, be the one now in force. At all events, it is the one set up by the claimants as prescribing the duties pilots are to perform virtute officii, and as debarring these libellants from all other recompense than that given by the statute. The general duties of this class of pilots, so far as they are defined by that statute, are, to pilot vessels from New-York to sea, and from sea to New-York, by the way of Sandy Hook; to keep and maintain in the piloting service to and from the port of New-York by the way of Sandy Hook, not less than five good and sufficient pilot-boats; and to exhibit their printed instructions to masters of vessels when they board them, and govern themselves by those instructions. The 9th section of the act empowers the board of wardens to adopt such rules as it may deem proper for the government of pilots, and to revoke or amend them at discretion.

A body of rules, adopted by the wardens on the 16th of April, 1819, was offered in evidence; but, as they were revoked by subsequent rules adopted on the 19th of June, 1819, they cannot be regarded as applicable to this case, further than as they may aid in the interpretation of those now in force. The fourth rule of June, 1819, provides, that "vessels that approach the coast in distress shall have the preference of others, and pilots are required to go on board such a vessel appearing in distress and in want of a pilot, in the first instance, and render her every service or assistance in their power." The 19th section of the statute enacts, "that the master, owner or consignee of any ship or vessel appearing in distress and in want of a pilot on the coast, shall pay unto such branch pilot, or deputy pilot, who shall have exerted himself for the preservation of such ship or vessel, such sum for extra services as the said master, owner or consignee and pilot can agree upon; and, in case no such agreement can be made, the board of wardens shall determine what is a reasonable reward, and the sum so determined by them shall be paid in manner aforesaid." It would seem very manifest that the legislature, in the provisions of the above section, and the wardens, in the rule promulgated by them, contemplated no other than mere pilot services. The expressions are aptly selected to convey that meaning; and there is nothing in the language used, or in the subject matter, from which an intention may be inferred to embrace other cases than those in which the professional assistance of the pilot is wanted. Had the legislature intended to constitute the pilots wreckers also, a very different form of expression would have been proper and necessary. The pilots are required to go on board of vessels in distress and wanting a pilot. If the vessels are in predicaments where a pilot, as such, can be of no service to them, the case has not occurred which is pointed out by the rule or by the statute, in which the pilot is compelled, ex officio, to go to their aid, whatever may be their distress. It appears to me, that no other construction can be given to the rule or to the statute, consistently with the plain import of their language and with the purpose they were designed to answer, than to limit their operation to cases where the skill and experience of the pilot are required in the immediate duties of his office. A vessel on shore, or wrecked, or so disabled as not to be navigable, would stand in no need of the officers created by this law, or of the peculiar skill which they are appointed to exercise. Any able-bodied mariner would be as serviceable to her as a pilot. So, in the present case, if the Wave had sailed with a pilot on board, and had met this disaster, she would have needed the relief which the libellants afforded her, no less on account of having such pilot; and yet no one will contend, that when a vessel is already provided with a competent pilot, the law makes it the duty of any other pilot to go on board of her. Besides, the pilot is not required, by law, to take with him his boat's crew, or any person, to assist in manning or navigating a vessel in distress; nor is he bound to employ his boat in her aid, further than to put him on board. We are not discussing the obligations of humanity, but the extent and character of the duties which are enjoined upon pilots by virtue of their offices. The statute requires the boats to be kept in the piloting service. That service manifestly is, to cruise between points where pilots are put on board and taken off from vessels, prepared to furnish pilots to vessels coming in, and to take them from those going to sea. It would be foreign from that service to lade the boats with wrecked goods, or send them into port with the cargoes of vessels requiring to be lightened; and the special duty to which pilots are appointed, and for the performance of which they are to supply boats, must be abandoned, to enable them to engage in that of wreckers. If the true construction of the law and of the regulations obliges a pilot-boat's whole company, together with the boat, to be devoted to the relief of a vessel situated as the Wave was, then this duty must be discharged, although, at the same time, other vessels should appear off the coast wanting pilots, and such vessels must be left to the peril of their situation, whatever may be the consequences. This is not the view I take of the law. In my judgment, no pilot service was performed in this case; and, if the libellants had neglected vessels coming in and wanting them, to undertake the saving of the Wave and her cargo, they would have forfeited their commissions, and probably been personally subjected to damages. I think that the law and the regulations, so far from enjoining on pilots this species of service, are so framed as to be clear of doubt that nothing beyond the skill and exertions of the individual pilot put on board a vessel, are provided for or contemplated. When not neglecting the specific duties of his office, a pilot may engage in a salvage service, and he stands, in respect to it, upon the same footing as other mariners.

There are other considerations which conduce to prove that the present case is not embraced within the purview of the state law. It is extremely doubtful whether the libellants, if they had done nothing on board this vessel but as pilots, could charge or receive pilotage for bringing her back to New-York. The second proviso to the 22d section of the state statute is, "that no pilotage whatever shall be demanded or received by any such pilot, for any such ship or vessel coming into the said port of New-York, unless such pilot shall take charge of such ship or vessel to the southward of the upper middle ground, and such vessel be at least of the burthen of seventy tons, unless such vessel shall make the usual signal for a pilot," &c. Now, although the court should judicially

take notice of the topography of New-York bay, and decide that this vessel was to the southward of the upper middle ground, yet she was making no signal for a pilot, nor was she coming into this port, nor is there any evidence that she was of seventy tons burthen.

If this is, upon the facts, not a case in which pilotage fees could be demanded, then, most manifestly, the extra compensation provided for by the 19th section of the state statute would not apply to it, for that is given only where the pilot has exerted himself for the preservation of a vessel wanting a pilot. Whatever may have been the magnitude or value of the services, they would not come within the description of those which the board of wardens is authorized to reward. It will, accordingly, be unnecessary to inquire how far it is competent for a tribunal erected by a state law, to exercise a portion of the admiralty and maritime jurisdiction conferred by the constitution on the judiciary of the United States, or what effect or influence the existence of the board of wardens would have, in ousting the jurisdiction of this court in the recovery of pilot fees, inasmuch as this case is not shown to be one which the state law has given that tribunal authority to dispose of. And, although I entertain no doubt of the authority of this court to afford pilots a remedy for fees, yet in the present posture of this cause, there would be great difficulty in bringing the acts of the libellants within the statute providing fees for pilot service, or within the general principles of maritime law in regard to pilotage.

It is, also, exceedingly doubtful whether any interpretation can be given to the state act, consistently with its general scope and various expressions, which does not limit the extra compensation to be awarded by the wardens, to services rendered to vessels coming on to the coast from abroad. So the wardens understood it, for their instructions apply only to vessels which are out of port and are seeking to enter it.

My opinion upon the whole case is, that this is a case not of pilotage but of salvage service, and that the libellants are entitled to recover salvage for the services rendered the vessel and her cargo, although infra fauces terrae, or on waters within the territorial limits of New-York or New-Jersey. The conduct of the parties on both sides shows, that they did not consider that Hyer and his crew were rendering a pilotage service only.

The only remaining inquiry is—what amount shall be awarded to the libellants? Various considerations are regarded by the court, in exercising its discretion in fixing a salvage compensation. The most prominent are, the peril to which the property was subjected; the means possessed for its rescue; its value; the degree of labor and hazard which the salvors encountered; the value of their property exposed by the undertaking; and the interests of navigation and humanity concerned in holding out liberal encouragements to induce persons to attempt the relief of vessels and their crews in distress. Enough has been before stated, to show that the Wave, when relieved by the libellants, was in a situation of great peril. It was mid-winter, the bay was full of ice, and a heavy wind was blowing. It was also late in the afternoon of the day. There was no vessel, except that of the libellants, any where in sight, and the crew of the Wave testify, that they were already so exhausted by their labors, that they could not have kept their vessel afloat more than an hour and a half longer. It is, however, suggested in some of the proofs, and was much pressed in argument, that the necessity for the interference of the libellants was not so imminent, as the Wave had anchored at so short a distance from shore, that she might have been easily beached, and her cargo and crew probably saved without loss or serious risk. The argument rests upon mere supposition. The ice made out some distance from the shore, and there is no evidence that it could have been penetrated by the Wave, or that she could have touched ground before reaching it. Nor was she in a condition to make the effort. She was waterlogged, and had lost her steerage, and her crew depose that, when she anchored, they dared not bring her on the wind, for fear she would capsize. These facts show, that if she was not entirely unmanageable, it would have been a very dangerous, if not hopeless attempt, to endeavor to run her on shore. But, furthermore, admitting she could have been run aground, we are not only to regard the existing perils which surrounded her, but, how far her condition would probably have been benefitted by that change, ought also to be taken into consideration. The wind was from the northeast through that night, with a heavy fall of snow. The next day and the day after it blew with great violence, so that the Wave required both anchors to secure her in the anchorage to which the libellants had taken her, and where she had the advantage of land shelter. The opinion of some of the witnesses is, that she could not have stood the gale at all in her unsheltered position, if aground, and must have immediately gone to pieces. In such case, both vessel and cargo must have been totally lost, and very little chance would have existed for saving the lives of the crew. The services of the salvors must, accordingly, be deemed meritorious on their part, and of extreme necessity to all interested in the Wave. They were rendered with great promptitude, skill and diligence, so as not only to save the property, but to secure it against the injury it was then incurring. The cargo saved, after all damages deducted, was appraised at $9,537.86, and the vessel at $1,500. Although the claimant was thus benefitted by these services, no serious personal risk or hazard of property was encountered by the libellants. They loaded the pilot-boat, stopped the leak of the Wave, and got both vessels under weigh in about three hours.

During that time, they labored with great activity and good judgment. Every man was employed to the extent of his ability. Some additional fatigue and delay were also incurred in towing the Wave, and in coming to anchor with her once before reaching Prince's Bay, but those services were not attended with any extra hazard of life or property. The pilot-boat was valued at from $2,500 to $3,000. These circumstances show nothing which exalts the salvage in this case to one meriting a prodigal reward. Courts do not look alone at the benefits received by the owner of the property saved. They regard, also, the character of the service, and the degree of compensation which would, under like circumstances, command similar relief. I shall decree that the libellants receive one-tenth part of the value of the vessel and cargo, as appraised. I might feel supported by authority in giving a larger compensation. Lord Stowell allowed a king's ship, for saving a merchantman, one-tenth of ship, cargo and freight. The Mary Ann, 1 Hagg. Adm. 158. Judge Hopkinson allowed above one-ninth of all saved to pilots, where the services were very trivial, and not of indispensable necessity to the vessel. Hand v. The Elvira, before cited. But the value of the property saved in this instance, makes, in my estimation, the compensation to the libellants, if it is fixed at one-tenth, adequate for the services rendered. The share to be allotted to the apprentices is not to be paid to their master, but to them individually. Mason v. The Blaireau, 2 Cranch [6 U. S.] 239, 270. Decree accordingly, with taxed costs to the libellants, and $50 for counsel fees.

NOTE. This case was taken, by appeal, to the circuit court, where the decision of this court was reversed. It is understood that that court held that the danger in which a vessel may be, does not lessen the duty of a pilot to devote himself, as such, to her rescue; that when a vessel is in distress, and is found in that situation by pilots on their cruising ground, it is their duty, as pilots, to bring her into port; that if their services have been extraordinary, they are entitled to extra pilotage therefor, to be determined according to the laws of the state of which the port out of which they cruise is a part; and that the laws of the states in relation to pilots are adopted by congress, and supply the rule of reward to those officers. It was admitted that pilotage was of admiralty jurisdiction, and that pilots might be salvors when they went beyond the duties imposed upon them by the statute under which they acted. [Case No. 17,300.] The points involved in this case have since been before the supreme court of the United States, in the case of Hobart v. Drogan, 10 Pet. [35 U. S.] 108, and the opinion of the district court, as here presented, is believed to be in harmony with the law as now understood.

NOTE [from 7 N. Y. Leg. Obs. 97]. The following decisions, respecting the admiralty jurisdiction of the United States courts, and the rights of pilots as salvors, have been made since the delivery of the above opinion: Waring v. Clark, 5 How. [46 U. S.] 451, 6 How [47 U. S.] 344; Hobart v. Drogan, 10 Pet. [35 U. S.] 108; The General Palmer, 2 Hagg. Adm. 177, 178; The Funchal, 3 Hagg. Adm. 386, note; The Elizabeth, 8 Jur. 365; The Frederick, 1 W. Rob. Adm. 17; The Hebe, 2 W. Rob. Adm. 246; The Cumberland, 9 Jur. 191; The Dosseitei, 10 Jur. 866; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 378.

Case No. 17,298.

The WAVE.

[Blatchf. Pr. Cas. 148.] [1]

District Court, S. D. New York. April, 1862.

CONDEMNATION OF PRIZE—PROCEDURE.

1. Vessel and cargo condemned as enemy property, and for a violation of the blockade.

2. The rules of practice in admiralty are the basis of practice in prize in our national courts.

BETTS, District Judge. This vessel and cargo were captured, as prize, off Boca Chica, and the coast of Texas, on the 1st of February, 1862, by the United States ship-of-war Portsmouth. The vessel was regarded as unfit for a voyage to a Northern port, and remains in possession of the captors. The cargo was transmitted to this port on board the prize steamer Labuan, and the vessel and cargo were here libelled, on the 27th of March, for condemnation as prize. Due service of process of attachment having been made thereon, and no person intervening for the same, default has been prayed for and ordered, and, on the proofs submitted to the court, a decree of condemnation is moved against the vessel and cargo. Prize Rule 24; Dist. Ct. Adm. Rules 35, 184; Sup. Ct. Adm. Rule 46. The rules of practice in admiralty being the basis of the practice in prize in our national courts, and having been ordinarily, in the decisions of this court, referred to summarily as the fundamental authority in that respect, it is deemed appropriate to cite those rules textually: "As soon as may be convenient after the captured property shall have been brought within the jurisdiction of this court a libel may be filed, and a monition shall thereupon be issued, and such proceedings shall be had as are usual in conformity to the practice of this court in cases of vessels, goods, wares, and merchandise seized and forfeited in virtue of any revenue law of the United States." Prize Rule 24, May term, 1861; Ben. Prac. 392. "On proclamation, after due return of process, the libellant shall be entitled to a decree of default or contumacy, according to the nature of the case, and the three proclamations heretofore used are abolished." Dist. Ct. Rules Adm. 1838, rule 35; Ben. Prac. 364. "All rules applicable to the service of, or proceedings in relation to, process in plenary causes in admiralty shall equally apply to process on informations." Dist. Ct. Rules Adm. rule 184; Ben. Prac. 385. "In all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of the said courts, respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty." Sup. Ct. Rules Adm. rule 46; 3 How. 13; 1 Stat. 276, § 2; 5 Stat. 518, § 6.

The schooner belonged to a Confederate state, and sailed on January last, under a rebel flag, from New Orleans. The master and crew were from the same place, and knew that the port

[1] [Reported by Samuel Blatchford, Esq.]

was blockaded by the United States at the time. She sailed from that port for Brazos Santiago, with a cargo of sugar, tobacco, and rice, both vessel and cargo being owned in New Orleans. All the letters on board of the vessel were thrown overboard before her capture, all but one of them being directed to one Kennedy, of Brownsville, and the master was to deliver the cargo according to his directions. The vessel was built at Wilmington, North Carolina, and registered December 26, 1861, at New Orleans, as owned by citizens of that place, in the name of George McGregor, agent of the Calhoun Marine Company. The manifest of the cargo bore the same date, and was in the name of the same marine company, and was sworn to on the same day at the New Orleans custom-house, and the vessel was then cleared for Brownsville, Texas. The proofs are clear that the capture was wholly enemy property, and had intentionally violated the blockade of New Orleans. The retention of the vessel for the use of the government was a matter at the sound discretion of the captors, her value being previously appraised and deposited in court. Upton's Prize Prac. (3d Ed.) 437. Judgment of condemnation is accordingly rendered against the vessel and cargo.

Case No. 17,299.

The WAVE.

[Blatchf. Prize Cas. 329.] [1]

District Court, S. D. New York. Feb. 28, 1863.

PRIZE PROCEEDING—CONDEMNATION OF CARGO—DISCHARGE OF VESSEL.

1. The vessel was, after her capture, appropriated to the use of the United States, and was not sent into port. Her cargo was sent in by another vessel, and was arrested in this suit. None of her company were sent in as witnesses. A person present at the capture was, by order of the court, examined as a witness.

2. Cargo condemned for a violation of the blockade.

3. Vessel discharged for want of legal arrest and prosecution.

BETTS, District Judge. The vessel and cargo above mentioned were captured, as prize, June 27, 1862, in Mississippi Sound, by the United States brig Bohio; and, the vessel not being deemed seaworthy, the captors transmitted the cargo found on board of her to this port for adjudication. On the return of process of attachment against the cargo, September 2, 1862, the United States attorney moved for and obtained a decree by default condemning the same as forfeited. He also, on July 29, applied for and obtained, for cause then shown, an order of the court to examine Dewitt Kells, a person present at the aforesaid capture, but not one of the company of the said prize vessel, as a witness in preparatorio in this suit. That examination was accordingly made by one of the prize commissioners July 31, 1862, and filed September 9 thereafter, and is now submitted to the court, and final judgment of condemnation and forfeiture of the said sloop and her cargo, as prize, is prayed by the United States attorney thereupon. The witness testifies that the capture was made as alleged in the libel; that the prize was immediately thereupon, by the order of Senior Officer Hitchcock, of the Susquehanna, appropriated to the use of the gun-brig Bohio, and was never brought into this port; that the cargo seized was, by order of the said Hitchcock, transported to the prize-steamer Anne, and brought to the city of New York; that the seizure was made because the vessel and cargo were Confederate property, and were bound from Mobile, a blockaded port, to Pascagoula, an enemy's port; that the capture was witnessed by him; that there were only four persons on board of the captured vessel; that they were of a low class, and were not brought to this port; and that Pascagoula was a place then under blockade. No papers were found on board of the captured vessel. The return made by the marshal, on the warrant of attachment, is, that he attached the Wave and her cargo. This, on the proofs, was clearly only so as to the cargo, which was present and within the reach of the process; but the process could be served only symbolically on the sloop, as there is no evidence of an appearance in her behalf, nor is any legal proof furnished for omitting to bring to this port the persons apprehended with the vessel, nor that decree of proof adequate to show that she was enemy property, or had violated the blockade. As to the cargo, that being held under actual custody by the court, the monition issued on such seizure, and legally served, and not replied to, furnishes prima facie evidence of the truth of the allegations made against it by the prosecution. That character of proof is augmented by the testimony of the witness present, that the cargo was captured by the libellants in the act of being transported from one blockaded port to another. The default is adequately sustained thereby, so far as to entitle the libellants to demand the full confiscation of the cargo. The cargo is, accordingly, ordered to be confiscated, and the sloop is acquitted in the suit, for default of legal arrest and prosecution as to her. The case of The Joseph H. Toone [Case No. 7,541], in this court (Oct. term, 1862), is in point, and presents the authorities upon which the decree in that case rested. Let there be a decree for the forfeiture of the cargo, and the discharge of the vessel for want of prosecution.

[1] [Reported by Samuel Blatchford, Esq.]

Case No. 17,300.

The WAVE v. HYER et al.

[2 Paine, 131.] [1]

Circuit Court, S. D. New York.[1, 2]

RIGHT OF PILOT TO SALVAGE—LAWS OF NEW YORK—RECOVERY FOR PILOT'S SERVICES—JURISDICTION OF ADMIRALTY COURT.

1. A salvor is one who, without any particular relation to a vessel in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the vessel.

2. Salvage is not allowed in cases where it would hold out a temptation to a dereliction of duty; and therefore, in general, seamen, pilots and passengers cannot sustain a claim for salvage for the ordinary assistance they may have afforded a vessel in distress, it being no more than their duty; but for extraordinary exertions beyond their duty, such claim has been, by the general maritime law, sometimes, though very rarely, allowed and admitted with extreme caution.

[Cited in The C. D. Bryant, 19 Fed. 605; The C. P. Minch, 61 Fed. 513.]

3. And where the service performed is required by law as a duty, it is a rule admitting of no exception that it cannot be set up as a salvage service.

4. And therefore, where the laws of New York (adopted by congress) make it a part of the official duty of pilots to assist vessels in distress, it was *held* that they were not entitled to salvage for rendering such assistance.

[Cited in Flanders v. Tripp, Case No. 4,854.]

5. The rule of the common law courts of England that a pilot cannot sue in admiralty on a contract for services to be performed on a navigable river, or waters within the body of a county, does not prevail here. Pilotage services partake so much of a maritime character, that under our system and the grant of admiralty and maritime jurisdiction to the district courts, such a suit may be maintained in those courts in the absence of any legislative provision on the subject of pilotage.

[Cited in The California, Case No. 2,312.]

6. But the jurisdiction of the district courts is not exclusive over such cases. There is nothing in the nature of the remedy or of the subject-matter which can take away the jurisdiction of the common law courts. And the saving in the judiciary act of the right to a common law remedy, is a full recognition of a concurrent jurisdiction in those courts of cases which may be denominated admiralty and maritime causes, where they before had such jurisdiction.

7. Nor is the mere grant in the constitution of cases of admiralty and maritime jurisdiction to the courts of the Union necessarily exclusive, nor a denial of the exercise of jurisdiction by the courts of the state in such cases. Congress, however, might, under its power to regulate commerce, establish by law a system of pilotage in ports and harbors, and give its courts exclusive jurisdiction of cases arising under such law.

8. In the state of New York, however, the district courts have no jurisdiction at all over cases of pilotage service; congress has adopted the law of the state regulating pilots, and that law has provided for compensating pilots for both ordinary and extraordinary services of all kinds, and has given to the board of wardens power to decide what such compensation shall be. And congress having adopted the state law previously to the passage of the judiciary act, cases of pilotage service were not embraced in the general obligation of admiralty and maritime jurisdiction to the district courts within the state.

9. The legislature may superadd to the ordinary duties of a pilot any others which it may think proper; and the law of New York having provided for the payment of pilots who should exert themselves for the preservation of vessels appearing in distress and in want of a pilot on the coast, it was *held* that the degree of distress could not change the character of the service, or convert pilots into salvors, so as to give the district court jurisdiction.

10. The schooner Wave, in leaving the port of New York, when nearly opposite the Quarantine Ground, struck a cake of ice which cut a hole in the bottom of the vessel, and when near Sandy Hook she was water-logged and in a sinking condition, and with great difficulty kept above water. She fired guns and made signals for a pilot, and afterwards signals of distress. The pilot-boat Gazette, being about two miles distant, and coming into port, manned and owned by the libellants, who were all pilots of the port, made for the Wave, rendered her all the assistance in their power, stopped her leak, and saved her from sinking or being run ashore. They also transferred a part of her cargo to the pilot boat and brought it to the city, and one of them remained on board the Wave until she reached the city, after three days of troublesome navigation. *Held*, that there was no claim for salvage.

This case came up on appeal from the district court of the United States for the Southern district of New York. It was argued at the May term of this court, and lay over for advisement until the October term. The respondents libelled the Wave, in the court below, for salvage. They were all at the time of the services rendered the Wave, either branch or deputy pilots of the port of New York, duly commissioned under the laws of the state, and, as such, jointly owned the pilot-boat Gazette, for whose services, and those of her crew, the libel to obtain salvage was filed. The Wave sailed from New York on the 2d of February, 1831, bound for Brazos, in Mexico. Previous to this time, the piers and slips had for several days been so blocked up with ice as to prevent vessels from putting to sea, unless by watching a favorable moment. On the 2d, the Wave, having had signals standing the day previously and that day for a pilot, and not being able to get one, although one had been on board of her and promised to return, took advantage of an opening in the ice, got into the stream, and had every prospect of getting safely to sea without one; but when nearly opposite the Quarantine Ground, she ran into a field of ice, and struck a cake which cut a hole in the bottom of the vessel: and when near Sandy Hook, she was water-logged and in a sinking condition, the crew exerting themselves greatly to keep her above water. They fired guns and made signals for a pilot, and afterwards signals of distress, in consequence of which the pilot-boat Gazette, under the command of John Hyer, which was about two miles distant, coming into port, made for the Wave, and soon reached her. Capt. Hyer

[1] [Reported by Elijah Paine, Jr., Esq. Date not given. 2 Paine includes cases decided between 1827 and 1840.]

[2] [Reversing Case No. 17,297.]

and his men (one of whom was the pilot who had that morning been on board the Wave while lying at the wharf, and promised to return and pilot her out, but who did not return) immediately rendered all the assistance in their power to free the vessel and stop her leak, in which they were successful. They also, with the assistance of the crew of the Wave, transferred a part of the cargo of the latter to the pilot boat, and in this condition both vessels returned to the city—the pilot boat directly—but the Wave, with Capt. Hyer on board, having to encounter rough and cold weather, and delay, not reaching the city until the 5th of February. The assistance rendered by the pilots was probably the means of preventing the Wave from sinking or being run on shore, as there was no appearance of any other relief. Capt. Hyer, soon after going on board the Wave, obtained from Capt. Harriman, her master, a document purporting to resign her into the former's charge, and which, it was insisted by the libellants, showed that he did not take charge of her in his character of pilot. The court below decreed the sum of $1,103.78 as salvage, with costs and counsel fees to the libellants. [Case No. 17,297.]

On appeal from this decree, W. Slosson on the part of the owners of the cargo, and E. Paine and A. W. Dodge for the owners of the vessel, contended for the following positions, in opposition to the principles of the decree:

1. That the district court had no jurisdiction of the case, the same having been given, by the laws of the state, exclusively to the wardens of the port of New York, who were to determine the compensation to be allowed to pilots for extraordinary services rendered to vessels in distress (Act Feb. 19th, 1819; 5 Sess. Laws, art. 11, § 19); and that it was impolitic to interfere with the regulations of the state on this subject, which had adopted a complete system for the government and compensation of its pilots, placing them under the control of the board of wardens, which was created principally to have charge of them. That such a supervision was peculiarly necessary over a body of men brought and kept together by law, entrusted with duties so important to commerce and humanity, enjoying certain exclusive privileges, and exposed to the temptation, and having the opportunity of abusing their trust; and that this supervision, given to the wardens, ought to be left entire, and not be interfered with.

2. That congress, under its constitutional power to regulate commerce, had passed a law leaving the regulation of their pilots in port to the several states. That congress could lawfully do this, and was not obliged by the constitution to vest in the courts of the United States jurisdiction over cases which were, by the pilot laws of the state, vested in its own tribunals, although such cases might otherwise have belonged to the admiralty jurisdiction; and that as this law was passed by the same congress as that which passed the judiciary act, giving the district court its admiralty jurisdiction, and only a few weeks before the passage of the judiciary act, it was clear congress did not intend to give that court jurisdiction over pilots, where it was already vested by the state in its own courts.

3. That the pilots in this case had done no more than they were required to do by law—no more than their duty; and that it was an invariable principle that no one could entitle himself to salvage by performing his duty. And that, besides, they were not entitled to compensation on salvage principles, and of course could not sue as salvors.

4. That if this was to be deemed a case of pilotage, however extraordinary the compensation to which the pilots might be entitled, a court of admiralty has no jurisdiction over it, as it occurred within the body of a county; and, being a common law case, the common law courts have exclusive jurisdiction of it.

5. That the libellants, being out in their boat in discharge of their official duties at the time they boarded the Wave, could not, by any agreement with her captain, divest themselves of their official character; and that the attempt to do it was a fraud upon the law. 1 Caines, 104. That the act of the state requires pilots, on boarding a vessel, to exhibit their printed instructions from the wardens, under a penalty of ten dollars; and that this provision was obviously designed to prevent their assuming to act in any other capacity. Section 18.

A. Burr and W. Q. Morton, on behalf of the libellants, controverted these positions, and supported the decree.

THOMPSON, Circuit Justice. The respondents filed a libel in the district court, claiming an allowance as salvors of the schooner Wave and her cargo; and the court, by its decree, allowed as salvage one-tenth of the appraized value of the vessel and cargo to the libellants, amounting to $1,103.78. From this decree an appeal has been taken to this court. Some of the questions involved in the discussion at the bar, as connected with the circumstances of this case, are new, and by no means free of difficulty. In our complicated system of government, questions of jurisdiction must necessarily frequently arise; they are at all times interesting and sometimes doubtful, and minds equally enlightened and equally aiming at correct results, may nevertheless arrive at different conclusions.

It will not be necessary for me, under the view which I have taken of the case, to enter into a particular examination of all the points which have been made and discussed at the bar. I shall confine myself strictly to this case, which requires me only to decide, whether the libellants in the court below, being pilots of the port of New York, appointed under the authority of the state, could, for the services rendered by them, sustain in the district court a claim for salvage.[3]

It is admitted that the libellants are pilots,

[3] [See note at end of case.]

or officers holding some station in the pilotage establishment for the port of New York, and deriving their authority from the laws of the state of New York; and that the whole service was performed within the jurisdiction of the state, and within the range of the pilotage establishment.

The character in which the libellants were acting, is important in no other point of view than for the purpose of deciding what duty was imposed upon them as pilots with respect to this vessel under the circumstances in which she was found; for I apprehend, if they did no more than was their duty to do as pilots, it is very clear they cannot set themselves up as salvors. We have in the case of The Neptune, 1 Hagg. Adm. 227, Lord Stowell's explanation or description of the character of a salvor, which is perhaps as accurate as is anywhere to be found in the books. A salvor, says he, is a person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship; and, therefore, he says, the crew of a ship whose stipulated duty it is to protect that ship through all perils, cannot be considered salvors. He adds, that he will not say a case cannot exist where they might claim as salvors, but they must be very extraordinary circumstances indeed, for the general rule is very strong and inflexible, that they are not permitted to assume that character. They are excluded upon just grounds, although a liberal allowance in meritorious cases is founded in sound policy, as holding out strong inducements to men to exert themselves in the preservation of lives and property about to perish at sea; yet when such allowance is claimed by men who have a duty to discharge in the preservation of such property, great care should be taken not to hold out a temptation to a dereliction of duty. Hence it is, that in general, seamen, pilots and passengers cannot sustain a claim for salvage for the ordinary assistance they may have afforded a vessel in distress, it being no more than their duty; but for extraordinary exertions beyond their duty, such claim has been sometimes, though very rarely, allowed: always, however, accompanied by remarks showing the extreme caution with which such claim is admitted. This is fully exemplified in the case of The Neptune, already referred to, which was a claim of salvage by seamen. And the like language was held by the same judge as applicable to the claim of salvage by a pilot in the case of The Joseph Harvey, 1 C. Rob. Adm. 306. It may be, says he, in an extraordinary case, difficult to distinguish a case of pilotage from a case of salvage, properly so called, for it is possible that the safe conduct of a ship into port, under circumstances of extreme danger and personal exertion, may exalt a pilotage service into something of a salvage service, but in general they are distinguishable enough, and the pilot, though he contributes to the safety of the ship, is not to claim as a legal salvor. So, in the case of Mason v. The Blaireau, 2 Cranch [6 U. S.] 240, in the supreme court of the United States, salvage was allowed a seaman under extraordinary circumstances, where the ship had been abandoned by the master and crew, and the seaman claiming salvage was considered as discharged from his contract as a mariner, and of course had no further duty as such to discharge. The case of Dulany v. The Peragio [Case No. 4,123], decided in South Carolina, contains no doctrine at variance with the view I have taken of the one now before the court, but is in accordance with it in principle. The judge says, this case comes before the court as a case of salvage, but, on a full investigation of the evidence, it does not seem to be altogether such. The pilot took the sloop in tow, and it is admitted some compensation is due over and above the usual rate of pilotage. And as no question of law arose in the case, and he had consulted persons conversant in these matters, none of whom considered it a case of salvage, but all agreed compensation should be allowed, by way of encouragement to pilots to do more than their mere duty, he allowed $200. Here, although it was considered that the pilot did more than was strictly his duty, the court did not consider it a case of salvage.

The rule which governs all these cases is founded upon the soundest principles of justice and public policy, and is fully recognized by Mr. Justice Washington in the case of Le Tigre [Case No. 8,281]. When, says he, the service for which the compensation is claimed by a public officer is required of him by the law virtute officii, or it becomes a duty necessarily connected with his public employment, we can perceive the most obvious reasons why a compensation beyond what the law allows should not be claimed from the owner of the property saved. And he mentions pilots as a class of officers falling within this rule. I am not disposed in the least to call in question the jurisdiction of the district court, as a court of admiralty, over suits for pilotage upon the high seas; nor, in denying the jurisdiction of the district court in this case, is it necessary that I should sustain the doctrine of the common law courts in England as to the jurisdiction of the admiralty; or hold, that if the contract be for services to be performed on a navigable river or waters within the body of a county, no suit will lie in the admiralty in favor of the pilot for such services. 2 Wils. 264. It may be admitted that pilotage services partake so much of a maritime character, that under our system, and the grant of admiralty and maritime jurisdiction to the district courts, those courts, in the absence of any legislative provision on the subject of pilotage, may sustain suits for such services, although performed within the body of a county. But it must be borne in mind that pilotage services are not so exclusively of a maritime character

that common law courts do not take cognizance of suits for such services, even when performed upon the high seas. 2 Bos. & P. 612; 10 Johns. 112; 1 Caines, 105. There is nothing in the nature of the remedy, or the subject-matter, which can take away the jurisdiction of the common law courts. The saving in the judiciary act (section 9) to all suitors the right of a common law remedy, when the common law is competent to give it, is a full recognition of a concurrent jurisdiction in the common law courts, of cases that may be denominated admiralty and maritime causes. And it is certain, as matter of fact, that the state courts take an extensive and heretofore unquestioned cognizance of maritime contracts, and on the ground that they are not cases, strictly and technically speaking, of admiralty jurisdiction. But if the cognizance of the district court over all maritime contracts and causes of action be exclusive, the jurisdiction of the state courts in such cases could not be sustained. 1 Kent, Comm. 351.

Congress, under the power to regulate commerce, might doubtless establish by law a system of pilotage in ports and harbors within the territorial limits of the states, and give to the district courts jurisdiction of all cases arising under such law. But the cession by the states of all cases of admiralty and maritime jurisdiction, cannot be construed into a cession of the waters on which those cases may arise. The jurisdiction of the state, and its right to legislate, is co-extensive with its territory, and is still retained, except so far as it has been ceded to the United States. [U. S. v. Bevans] 3 Wheat. [16 U. S.] 386. Although the constitution of the United States declares that the judicial power of the Union shall extend to all cases of admiralty and maritime jurisdiction, yet the courts of the United States do not exercise criminal jurisdiction over maritime crimes and offences, without legislative authority. The inquiry in such cases is, not what power is given by the constitution to the government of the Union, but how far congress has legislated under that power; and unless the crime is brought within some act of congress, the courts of the United States have declined taking jurisdiction, where the offence was within the cognizance of state courts. [U. S. v. Bevans] 3 Wheat. [16 U. S.] 386; [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 76. This principle has not been adopted, to its full extent, with respect to the civil jurisdiction of the admiralty, and I think ought not to be. I am not, however, prepared to admit that the mere grant of the power to the Union is necessarily exclusive, and a denial of the exercise of the power by the states, until congress acts upon the subject. There are certainly very strong grounds for maintaining that, in those cases where, previous to the formation of the general government, the state tribunals possessed and were in the constant habit of exercising jurisdiction, they may continue to exercise the same where the common law affords a full and adequate remedy. But with respect to the subject of pilotage, congress has acted, and it becomes necessary to inquire, whether in such manner as to affect the jurisdiction of the district court in this case.

The act of congress of the 17th of August, 1789, 1 Story's Laws, p. 33, § 4 [1 Stat. 54],—declares "that all pilots, in bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provisions shall be made by congress." No further provision has been made by congress, and we must look to the state law for the regulation on this subject. The act respecting pilots was passed at the same session of congress, and a few weeks previous to the judiciary act; and congress having legislated specifically on the subject, and having withdrawn it temporarily from the cognizance of the general government, so far as related to pilots in the bays, inlets, rivers, harbors and ports of the United States, it cannot, upon any sound rules of construction, be considered as impliedly embraced in the general delegation of admiralty and maritime jurisdiction to the district court. This act came under the consideration of the supreme court of the United States, in the case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 207. It had been urged at the bar, that this acknowledgment of a concurrent power in the states to regulate the conduct of pilots, was an admission of their concurrent right with congress to regulate commerce with foreign nations and among the states. The court thought this inference was not warranted. The chief justice observed: "Although congress cannot enable a state to legislate, congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulation of pilots in full force in every state. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by congress; but the act, it may be said, is prospective also, and the adoption of laws, to be made in future, presupposes the right in the maker to legislate on the subject. The act unquestionably manifests an intention to leave this subject entirely to the states, until congress should think proper to interpose; but the very enactment of the law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by congress. But this section of the act is confined to pilots within the bays, inlets, rivers, harbors and ports of the United States, which are, of course, in whole or in part, within the limits of some particular state. The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; and the adop-

tion of the state system by congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the states so to apply it of their own authority; but the adoption of the state system being only temporary, until further legislative provision shall be made by congress, shows conclusively an opinion that congress could control the whole subject, and might adopt the system of the states or provide one of its own." Whatever objection there may be to the power of congress to adopt prospectively state legislation on this subject, there can be none with respect to the adoption of the then existing system.

The district court considered the libellants as having a right to sue in that court, whether they claimed compensation as salvors or as pilots. For a century past, there have been in force in the colony and state of New York, laws regulating the duty of pilots in the port of New York; these laws have undergone various revisions and re-enactments, but have continued substantially the same, so far as they relate to the questions presented in this case. There can be no doubt but from the condition in which the Wave was found, and the circumstances under which relief was afforded by the libellants, they are entitled to extra compensation for their services. But this, in my judgment, is provided for by law, and is not to be set up as a claim for salvage. These laws have at all times regulated the compensation or fees of pilots for their ordinary services, and have also provided for extra services rendered to vessels in distress. The last act on this subject was passed in the year 1819. In the nineteenth section it is enacted, "that the master, owner, or consignee of any ship or vessel appearing in distress, and in want of a pilot on the coast, shall pay unto such branch pilot or deputy pilot, who shall have exerted himself for the preservation of such ship or vessel, such sum for extra services as the said master or consignee and pilot can agree upon; and in case no such agreement can be made, the board of wardens shall determine what is a reasonable reward, and the sum so determined by them shall be paid in manner aforesaid." It has been contended that the act contemplated no other than mere pilot services by pilots, in the ordinary discharge of their duties; and reference has been made to Abbott's Treatise on Shipping for the meaning of the term "pilot." The name of pilot or steersman, says he, "is applied either to a particular officer serving on board a ship during the course of a voyage, and having the charge of the helm, and of the ship's route; or to a person taken on board at a particular place for the purpose of conducting a ship through a river road, or channel, or from or into a port." Abb. Shipp. 148. The second class of pilots is the one embracing the appellants; but a mere definition of the term can give but very imperfect information as to the duties of the officer. And this duty, so far as it is implied by the term "steersman," can mean only the ordinary duty of a pilot; but it certainly cannot be maintained that the legislature cannot superadd to that duty any other that may be deemed fit and proper; and we must, therefore, look to the act of the legislature to ascertain the duty of pilots. And I cannot think it the true construction of this section of the act to confine it to the mere navigation of the vessel; when that is the service performed, the fees are regulated and fixed by other parts of the act. But this section provides for extraordinary services to vessels in distress, and for their preservation, and which are expressly called extra services. The degree of distress cannot change the character of the service, or discharge the obligation to render assistance; it serves to regulate the amount of compensation, but cannot convert pilots into salvors. It would be difficult to fix the point at which pilots might withdraw their services as pilots, and set themselves up as salvors; and if practicable, it would be extremely dangerous and repugnant to every sound principle of public policy to admit any such doctrine; it would be holding out strong temptations to pilots to neglect their duty, under the hope and expectation of receiving a greater compensation by way of salvage. Ample provision is made to compensate them for such extra services. The board of wardens is always composed of men peculiarly fitted and qualified to judge of such services. The plain and obvious light, as it seems to me, in which this act views pilots is, that their ordinary duty is to navigate the vessel, and for this one rule of compensation is given. Their extraordinary duty is to assist vessels in distress, and for this another rule of compensation is provided.

If we look through these laws regulating pilots from the earliest period, we find it made a part of their official duty to assist vessels in distress. The neglect or refusal has sometimes been declared a forfeiture of office, sometimes punished by fine. The act of 1775, I believe, is the first which provides for compensation for extra services. Should any objection be supposed to lie against the act of congress adopting prospectively the state regulation on this subject, it cannot affect the present case. There can certainly be no objection to adopting the then existing system; and the act of 1784, which was the law in force in New York when the act of congress was passed, contains substantially the same provision, accompanied with a recital that the provision is made for the encouragement of pilots who shall distinguish themselves by their activity and readiness to aid and assist vessels appearing in distress; and it declares that this extra compensation shall be collected in the same manner as directed by the act for the collection of pilotage, which was before the mayor, or recorder, or alderman, of New York, in a summary manner. By some of these laws, jurisdiction is given, in general terms, to any court having cognizance thereof. If this subject, as is said in the Case of Gibbons and Ogden, has been entirely left to the

superintendence of the states, it cannot, I think, be maintained that the execution of these laws is to be enforced in the courts of the United States; the whole subject must include the remedy. In the case referred to, these laws are classed with the health laws of the states, and those which permit a tonnage duty to be levied for the use of their ports, and many other subjects which, under the powers of the general government, might be withdrawn from the states, but which have been left to their superintendence. 9 Wheat. [22 U. S.] 238.

Giving to the district court jurisdiction of this case as a case of pilotage, would necessarily extend that jurisdiction to all claims for fees for ordinary services. The district court has treated this as a claim for salvage, but at the same time declaring that the libellants could sue in that court for compensation as pilots. It does not become necessary for me, according to my view of this case, to enter into a particular examination of the circumstances under which the libellants afforded assistance and relief to the schooner. Their services were undoubtedly very beneficial, and contributed much to the preservation of the vessel and cargo, and entitles them to a liberal compensation;[4] still, they were only acting in the discharge of their duty imposed upon them by law, and not as mere volunteers. The supreme court of this state in the case of Callagan v. Hallett, 1 Caines, 105, in commenting upon the law of the state relating to pilots, says it makes it the duty of pilots to give all the aid and assistance in their power to any vessel appearing in distress on the coast, and neglect or refusal subjects them to forfeiture of their places.

I do not enter into the merit or extent of the services rendered by the libellants, because I hold that whatever they may have been, these pilots cannot claim compensation as salvors. That admitting cases may exist where pilots, for services upon the high seas, where their duty is prescribed, and to be determined by the general principles of the maritime law, may, in very extraordinary cases, become salvors and claim as such; yet, in the present case, where their duty is prescribed by statute, which, according to my understanding of it, requires of them to render all the aid and assistance in their power to vessels in distress, under all circumstances, they cannot abandon their duty as pilots and become salvors. It may, I believe, be laid down as a rule admitting of no exception, that where the service performed is required by law as a duty, it cannot be set up as a salvage service. I am, accordingly, of opinion that the decree of the district court must be reversed without costs.

NOTE. A pilot, while acting in the strict line of his duty, however he may entitle himself to extraordinary pilotage compensation for extraordinary services, as contradistinguished from ordinary pilotage for ordinary services, cannot be entitled to claim salvage. In this respect he is not distinguished from any other officer, public or private, acting within the appropriate sphere of his duty. But a pilot, as such, is not disabled, in virtue of his office, from becoming a salvor. On the contrary, whenever he performs salvage services beyond the line of his appropriate duties, or under circumstances, to which those duties do not justly attach, he stands in the same relation to the property as any other salvor; that is, with a title to compensation to the extent of the merit of his services, viewed in the light of a liberal public policy. Sir William Scott, in the case of The Joseph Harvey, 1 C. Rob. Adm. 306, speaking upon this subject, where pilots were claiming as salvors, said, "This is a petition praying salvage; and it is said by his majesty's advocate, that it is impossible for these persons to claim salvage, as there is little more than pilotage due; although it is allowed that the court may, in cases of pilotage, as well as of salvage, direct a proper remuneration to be made. It may be, in an extraordinary case, difficult to distinguish a case of pilotage from a case of salvage, properly so called; for it is possible, that the safe conduct of a ship, under circumstances of extreme personal danger and personal exertion, may exalt a pilotage service into something of a salvage service. But, in general, they are distinguishable enough; and the pilot, though he contributes to the safety of a ship, is not to claim as a legal salvor." From this language, it is obvious that the learned judge had in his mind the distinction between extraordinary pilotage services and salvage services, properly so called; the one clearly going beyond the mere line of duty, and the other going merely to the extreme line of duty. In the case of The Aquila, 1 C. Rob. Adm. 37, where a magistrate, acting in discharge of his public duty, demanded to be considered as a salvor, the same learned judge said: "This, however, is certain, that if a magistrate, acting in his public duty, on such an occasion, should go beyond the limits of his official duty in giving extraordinary assistance, he would have an undeniable right to be considered as a salvor." The same principle was fully recognized by Mr. Justice Washington, in the case of Le Tigre [Case No. 8,281], in which, after stating that ordinary official duties were not to be compensated by salvage, he added: "Of this class of cases is that of a pilot, who safely conducts into port a vessel in distress at sea. He acts in the performance of his ordinary duty, imposed upon him by the law and nature of his employment; and he is, therefore, not entitled to salvage, unless in a case, where he goes beyond the ordinary duties attached to his employment." Mr. Justice Thompson, in the case of The Wave, maintains the same doctrine, upon an elaborate review of all the cases. It has been also applied to another very meritorious class of cases, we mean that of seamen, who, in the ordinary course of things, in the performance of their duties, are not allowed to become salvors, whatever may have been the perils or hardships or gallantry of their services in saving the ship and cargo. We say in the ordinary course of things; for extraordinary events may occur in which their connection with the ship may be dissolved de facto, or by operation of law, or they may exceed their proper duty, in which cases they may be permitted

[4] The act for the regulation of pilots and pilotage for the port of New York (Sess. 7, c. 31, §§ 2, 3) makes it the duty of pilots to give all the aid and assistance in their power to any vessel appearing in distress on the coast, and for neglect or refusal subjects them to a fine or forfeiture of their places; but for the encouragement of such pilots who shall distinguish themselves by their activity and readiness to aid vessels in distress, it enacts, that the master or owner of such vessel shall pay to such pilot who shall have exerted himself for the preservation of such vessel, such sum for extra services as the master or owner and such pilot can agree upon; and in case no such agreement can be made, the master and wardens of the port are empowered to ascertain the reasonable reward.

to claim as salvors. Such was the case of the seamen left on board in the case of The Blaireau, 2 Cranch [6 U. S.] 268; and such was the exception alluded to in the case of The Neptune, 1 Hagg. Adm. 226, 237. See 3 Kent, Comm. and lect. 47, p. 199 (1st Ed.); The Two Catherines [Case No. 14,288]; Newman v. Walters, 3 Bos. & P. 612. In this last case, Lord Stowell, after saying that the crew of a ship cannot be considered as salvors, gave what he deemed the definition of a salvor: "What," said he, "is a salvor? A person who, without any particular relation to a ship in distress, proffers useful services, and gives it as a volunteer adventurer without any pre-existing covenant, that connected him with the duty of employing himself for the preservation of that ship." And it must be admitted, that, however harsh the rule may seem to be in its actual application to particular cases, it is well founded in public policy, and strikes at the root of those temptations which might otherwise exist to an alarming extent, to seduce pilots and others to abandon their proper duty, that they might profit by the distresses of the ship, which they are bound to navigate. Lord Tenterden, in his excellent Treatise on Shipping (part 2, p. 148, c. 5, § 1), has defined a pilot to be "a person, taken on board at a particular place, for the purpose of conducting a ship through a river, road or channel, or from or into a port." His duty, therefore, is properly the duty to navigate the ship over and through his pilotage limits, or, as it is commonly called, his pilotage ground. The case, therefore, necessarily presupposes, that the ship is in a condition capable of being navigated; distressed, if you please, and laboring under difficulties, but still capable, in point of crew, equipments and situation, of being navigated. No one ever heard of its being within the scope of the positive duties of a pilot to go to the rescue of a wrecked vessel, and employ himself in saving her or her cargo, when she was wholly unnavigable. That is a duty entirely distinct in its nature, and no more belonging to a pilot than it would be to supply such a vessel with masts or sails, or to employ lighters to discharge her cargo, in order to float her. It is properly a salvage service, involving duties and responsibilities, for which his employment may peculiarly fit him; but yet in no sense included in the duty of navigating the ship. Lord Alvanley, in Newman v. Walters, 3 Bos. & P. 616, puts a case far short of that which is here presented, as a clear case of salvage. "Suppose," said he, "a tempest should arise, while the pilot is on board, and he should go off in a boat to the shore to fetch hands, and should risk his life for the safety of the ship in a manner different from that which his duty required; in such a case, it seems to me that he would be entitled to a compensation in the nature of salvage; and I am glad that Sir William Scott appears to entertain the same opinion."

Case No. 17,301.

The WAVERLY.

[7 Biss. 465; [1] 9 Chi. Leg. News, 372.]

District Court, E. D. Wisconsin. June, 1877.

LIBEL FOR SEAMEN'S WAGES—PRELIMINARY PROCEEDINGS—CUMULATIVE REMEDY.

1. The remedy given to seamen by sections 4546 and 4547, Rev. St. U. S., as preliminary to the filing of a libel for wages, is not exclusive, but cumulative merely.

[Cited in Murray v. Ferry-Boat, 2 Fed. 88; The Edwin Post, 6 Fed. 208; The Frank C. Barker, 19 Fed. 334.]

2. A libel for seaman's wages may be filed, and process for the arrest of a vessel obtained without resort to the preliminary proceedings authorized by said sections.

3. Those sections examined and construed in connection with section 6 of the act of 1790.

4. The common law rule that a statutory remedy which does not negative the remedy at common law is cumulative is applicable to remedies under the maritime law.

In admiralty.

This was a libel for seaman's wages. The libel alleged that about the 5th day of October, 1876, the steamer Waverly was lying at the port of Cleveland, bound on a voyage to Chicago, and thence back to Buffalo; that the master hired libellant to serve on board the steamer as a seaman, at stipulated monthly wages; that libellant signed shipping articles, and in pursuance thereof went on board and entered into the service of the steamer. That about the 7th of October, and while the steamer was at sea, the libellant was, by sickness, rendered unable to perform the duties of a seaman; and on the arrival of the steamer at Milwaukee, to which port some part of her cargo was consigned, being unable to obtain medical treatment on board, he was obliged to leave the vessel; that he demanded his wages from the time of shipping on board up to the time of his arrival in Milwaukee, which the master refused to pay. The libel further alleged that a certain amount was unpaid and due to the libellant, and that the steamer, at the time the libel was filed, had left the port of Milwaukee. To this libel the respondent filed a plea, in which, among other things, it was alleged, that prior to the filing of the libel and the issuing of the monition, the master of the steamer was not summoned by the district judge, or by a justice of the peace, or commissioner of the circuit court, to appear before him and show cause why process should not issue against the steamer.

Babcock & Stone, for libellant.

Cottrill & Cary, for respondents.

DYER, District Judge. The point made in this case is, that inasmuch as the preliminary proceedings authorized by sections 4546 and 4547 of the Revised Statutes, were not taken previous to the filing of the libel, the court has not jurisdiction to proceed with the cause; and the question submitted for decision is, whether in a case touching seamen's wages, it is necessary that this preliminary proceeding, should be taken, before a libel can be filed and monition issued.

The present statute, in relation to these preliminary proceedings, is substantially like the act of 1790.

There are some changes in phraseology, but in substance the provisions of the two statutes are the same.

Section 6 of the act of 1790 (1 Stat. 131, c. 29) provides first: "That every seaman

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

or mariner shall be entitled to demand and receive from the master or commander of the vessel to which he belongs one-third part of the wages which shall be due to him at every port where such ship or vessel shall unlade and deliver her cargo, before the voyage be ended, unless the contrary be expressly stipulated in the contract; and, as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract."

The same clause in substance may be found in section 4530 of the Revised Statutes, the language of that section being: "Every seaman shall be entitled to receive from the master of the vessel to which he belongs, one-third part of the wages which shall be due to him at every port where such vessel shall unlade and deliver her cargo before the voyage is ended, unless the contrary be expressly stipulated in the contract; and as soon as the voyage is ended, and the cargo or ballast is fully discharged at the last port of delivery, he shall be entitled to the wages which shall be then due."

The only material difference between that section and the first clause of the 6th section of the original act is, that the words "according to the contract" after the word "due," at the end of the first clause in section 6, are omitted from section 4530, an omission, however, which is quite inconsequential, because it is evident from an examination of the entire statute that it is treating exclusively of cases where seamen have entered into employment under written contract, and that the case of one who engages in service as a seaman, under agreement not in writing, is not embraced within the provisions of this statute.

Now, following still further the language of section 6 of the act of 1790, we find it there provided, that "if such wages shall not be paid within ten days after such discharge, or, if any dispute shall arise between the master and the seamen or mariners, touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then for any judge or justice of the peace to summon the master of such ship or vessel to appear before him to show cause why process should not issue against such ship or vessel, her tackle, furniture and apparel, according to the course of admiralty courts, to answer for the said wages."

This section then further provides that, "if the master shall neglect to appear, or appearing, shall not show that the wages are paid, or otherwise satisfied or forfeited; and if the matter in dispute shall not forthwith be settled, in such case, the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty process, and thereupon process may issue.

At the end of the section is also this provision: "but nothing herein contained shall prevent any seaman or mariner from having, or maintaining any action at common law for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast."

These provisions of section 6 are incorporated substantially into sections 4546 and 4547 of the present Revised Statutes.

The differences in language are these: Section 4546 begins, "whenever the wages of any seaman are not paid," etc. The language of section 6 in the act of 1790 is, "and if such wages shall not be paid within ten days after such discharge," etc.

This variance is clearly one of phraseology only. The word "such" is used in the 6th section of the original act in that connection, because immediately preceding it, and as part of that section, is the provision which declares when and at what ports a seaman shall be entitled to demand his wages or some share thereof, while in section 4546 of the Revised Statutes, it was necessary that the word "such" should be changed to "the," because the provision in relation to the payment of the wages was in a preceding independent section, (4530).

There are some further differences in the language of these statutes, and I refer to them particularly since upon the argument it was claimed that because of these variances the provisions of the Revised Statutes on the subject should receive a different construction from that heretofore placed upon the act of 1790.

In section 6 of the original act it is provided that "if any dispute shall arise between the master and the seamen or mariners touching the said wages, it shall be lawful," etc.

The language of section 4546, Rev. St., is, if "any dispute arises between the master and the seamen touching wages, the district judge," etc.; the words, "the said" in section 6, of the act of 1790, being omitted from section 4546, of the Revised Statutes, and in this respect it is urged that the present statute is more comprehensive than the original act, and hence should receive a broader construction.

But to what wages does this provision of section 6 refer? Clearly, to wages that have been spoken of in the previous provision of the section, namely, the wages which the seaman is entitled to demand at different ports, and upon the happening of certain events.

Then, to what wages does section 4546 of the Revised Statutes refer? The words "the said" being there omitted it is nevertheless clear that the section refers to such wages as

have been previously spoken of in this chapter (chapter 3, tit. 53, Rev. St.), because it is concerning no other wages that any legislation is attempted. They are wages due to a seaman upon the contract which he has made, and which it is declared by section 4530,—which corresponds, as we have seen, with the first clause of section 6, in the act of 1790—shall be due in certain installments, and at certain times. It is plain, therefore, that in this respect there is no substantial difference between these statutes.

It is to be observed, also, that the language at the end of section 4547, is in substance identical with that at the end of section 6 of the act of 1790.

Again it is insisted that the provisions of the present statute are of broader import than these of section 6, of the act of 1790, because in the latter section the language is that "it shall be lawful for the judge of the district," etc., "to summon the master," etc., while in section 4546 of the Revised Statutes, it is provided that the district judge may summon the master, etc.; and it is contended that the word "may," as thus used, means "must," thus making the language of the section imperative, while that of section 6 of the act of 1790 is confessedly permissive merely. I do not think the statute should be so construed. The language of both statutes in the particular referred to is, under a fair and reasonable construction, equivalent. The change is merely one of words and not of meaning.

I conclude, therefore, upon a comparison of these two statutes, that the only differences in their respective provisions, are purely differences in phraseology; and it has seemed important to determine whether this is so or not, because if they are substantially the same, then the construction which may have been given to the act of 1790, with reference to the question here involved, would be applicable in construing the present existing provisions as contained in the Revised Statutes.

Now as an original question it may be said that there is strong ground for contending that this statute was intended as a limitation upon the right of a seaman to have immediate process from a court of admiralty against a vessel.

Forcible argument may be made in favor of the proposition that it was the intention of congress, in passing that act, to put seamen upon a different footing from that occupied by other parties, who might at once appeal to the maritime law, and obtain immediate process for the arrest of vessels; and there are not wanting cogent reasons which support such an argument.

There are, however, decisions upon the question so direct, and which emanate from sources so eminent that they can hardly be disregarded. One of those decisions is found in the case of The M. W. Wright [Case No. 9,983], and the other in the case of The Wm. Jarvis [Id. 17,697].

It may be considered also in this connection, that it has been long the practice of this court, and the practice of the district courts in other districts, to treat these provisions of the statute to which I have referred, as furnishing rather an optional and cumulative remedy, than one which excludes a seaman from the right, or privilege, in the first instance, to resort to process in admiralty.

In the case of The M. W. Wright, supra, Judge Longyear had occasion to construe section 6 of the act of 1790, and he applied to it the familiar rule of construction, that "where a right or remedy exists at common law, and a statute is passed giving a new remedy without any negative, express or implied, upon the old common law, the party has his election either to sue at common law, or to proceed upon the statute."

This rule, of course is as applicable to remedies under the maritime law, as it is to those under the common law; and upon a consideration of the question it is held in the case cited, that the proceedings authorized by section 6 of the act of 1790, are merely cumulative.

There is no provision, says the court, expressly negativing the old law which gave to a seaman the right to commence suit in rem in the admiralty court, by libel, and arrest of the vessel in the first instance; and the language used in conferring the right to such new proceeding, is certainly very far from implying such negative.

The opinion concludes: "I hold, therefore, that the preliminary proceedings by summons, &c., prescribed by section 6, of the act of 1790, are cumulative, and in addition to the ordinary proceeding by libel according to the admiralty practice, and may be resorted to or not, at the option of the libellant."

In the case of The Wm. Jarvis, supra, Judge Sprague discusses the question at length, and holds that the act is permissive, not imperative; that it gives only a cumulative remedy, and that the judge, or the court, has the power, notwithstanding the statute, to order process against a vessel without previous summons to the master. The question, when simplified, seems to be this—can a seaman, without resorting to this preliminary proceeding, apply to the judge or to the court, and in the first instance, upon such application obtain ordinary admiralty process for the arrest of the vessel, or is the proceeding authorized by the statute exclusive in such a case?

In settling that question I think I must be controlled by the decisions to which reference has been made, and shall therefore hold, that the remedy conferred by this statute is not exclusive, but is cumulative, and that the right of a seaman to usual admiralty process is not dependent upon a previous resort to the preliminary proceeding authorized by sections 4546 and 4547.

Plea overruled, with leave to answer.

WAY (BANK OF WASHINGTON v.). See Case No. 957.

Case No. 17,302.

WAY v. SELBY.

[2 Cranch, C. C. 44.] [1]

Circuit Court, District of Columbia. June Term, 1812.

BAIL.

Affidavit to hold to bail.

N. B. Vanzandt had been discharged under the insolvent act. The account was headed "Martha Selby, Dr. to estate of N. B. Vanzandt." To this was appended an affidavit of Mr. Vanzandt that the account was just and true as stated, and that he had received no part, parcel, security, nor satisfaction therefor, more than the credits given.

F. S. Key, for defendant, moved to appear without bail because there ought to be an affidavit by Way, the trustee, that he had not received the balance.

THE COURT was of that opinion and permitted the defendant to appear without bail.

Case No. 17,303.

WAYNE v. HOLMES.

[1 Bond, 27; [2] 2 Fish. Pat. Cas. 20.]

Circuit Court, S. D. Ohio. April Term, 1856.

PATENTS—SUFFICIENCY OF SPECIFICATIONS—VAGUENESS — INVENTION AND NOVELTY — BURDEN OF PROOF—UNSUCCESSFUL EXPERIMENTS—DAMAGES FOR INFRINGEMENT—WASH-BOARDS.

1. The requirement of the statute, in reference to certainty and definiteness in the directions for constructing a machine for which a patent is sought, has in view two distinct objects. The one is, that the public may know precisely what the invention is; the other, that, upon the expiration of the patent, they may have an unerring guide in the specification or record in the patent office in the construction of the patented machine.

[Cited in Tannage Patent Co. v. Zahn, 66 Fed. 989.]

2. In a patent for an improvement in the manufacture of wash-boards from wood and metal combined, by sharpening the cutting edges of the zinc, or other metal, and incising the edges by pressure into the frame, it is not a material defect in the specification that it does not give the precise angle of the cutting edge, or describe the mode of applying the pressure, or the depth of the incision.

3. If competent mechanics, skilled in the business, testify there would be no difficulty in constructing the machine from the specification and drawing, the assumption of vagueness and uncertainty in the description is repelled, unless it clearly arises from the language used by the patentee.

4. The originality and novelty of the patentee's invention being denied in this case, it is incumbent on the defendant to rebut the presumptions of the patent by proof that it was not the invention of the patentee, or was previously known and in use.

[Cited in Johnson v. McCabe, 37 Ind. 539.]

5. If the jury find that the improvement patented was not new and original with the patentee, the patent is a nullity.

6. Evidence that others, prior to the date of the patentee's application, have made trials and experiments on the principle of his patent, which were not successfully carried out, will not defeat the patent.

7. If the jury are satisfied that the patentee, or the plaintiff as his assignee, has surrendered or abandoned the invention to the public, there can be no recovery for an infringement.

8. If the jury find the patented improvement is new and original, and that the defendant has infringed, their verdict will be the actual damage which the plaintiff, as assignee of the patent has sustained by such infringement; and this is to be ascertained by the number of wash-boards made on this principle, and the increased profit to the defendant arising from the use of the invention.

9. In computing the damages, the jury should exclude from their computations the increased facilities in making wash-boards, due to inventions of machinery since the patent, or its assignment to the plaintiff.

This was an action on the case [by Joseph W. Wayne against James B. Holmes,] tried by Judge Leavitt and a jury, to recover damages for the alleged infringement of letters patent for an improvement in wash-boards, granted to Orin Rice, October 30, 1849, and assigned to plaintiff, January 15, 1851.

The claim of the patent was as follows: "Having thus fully described the nature and effect of my invention, I wish it to be distinctly understood that I do not claim any of the several parts composing a wash-board made of sheet metal and wood; but that which I do claim as my new and useful improvement in the mode of manufacturing such wash-boards, and for which I ask letters patent, is incising with the edges of the sheet metal (prepared and crimped as described), the legs, or the legs and body board by the suitable application of pressure thereto, thereby fitting and attaching the one to the other at one operation, and with a comparatively water-tight joint."

Miner & Oliver and T. Ewing, for plaintiff.

C. D. Coffin, for defendant.

LEAVITT, District Judge (charging jury): This suit is brought to recover damages for an alleged infringement of the exclusive right of the plaintiff to make and vend the improved wash-board, patented to Orin Rice, October 30, 1849, and assigned by Rice to the plaintiff January 15, 1851.

It is not denied by the defendant that he has made and sold these improved wash-boards; but he insists that the patent is invalid; first, on the ground of the uncertainty and insufficiency of the specification affixed to, and constituting a part of, the patent; and, second, that Rice was not the original and first inventor of the improvement patented to him, and that the same was known and in use prior to the date of his application for a patent.

The question arising on the first ground stated is a question of law for the decision of the court. It involves this inquiry, whether the patentee has made known, with sufficient certainty and precision, what his invention is?

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

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

If he has failed to do this, it is clear that his patent can not be sustained, and this action must fail. A patent right is the creature of the statute, and has no validity unless the statute has been substantially complied with. The sixth section of the act of congress of July 4, 1836 [5 Stat. 119], now in force, provides that "before any inventor shall receive a patent for any such new invention or discovery, he shall deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using, and compounding the same, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, or use the same; and in case of any machine, he shall fully explain the principle and the several modes in which he has contemplated the application of that principle, or character, by which it may be distinguished from other inventions."

In his specification, the patentee describes his improvement as follows: "The nature of my invention consists in the mode of manufacturing wash-boards out of metal and wood combined, by so preparing the sheet of zinc, or other metal, that by sharpening two parallel edges, and crimping the sheets from one of these edges to the other, I am enabled, by using pressure, to incise and fasten, to the wooden sides, the sheet thus prepared." In a subsequent part of the specification, the mode of constructing the wash-board is more fully described, in the following words: "The process by which I effect these improvements consists in taking a sheet of zinc, dividing it into strips of the width desired, and sharpening to a cutting edge the sides that are to incise the wooden standard of the frame, and thereby attach the one to the other, when they are properly brought together; so that by the application of pressure, the sheet is buried to a suitable extent, not only fast and firmly to the wood, but so aptly that it forms a water tight joint," etc. And it is also stated, that "the metal and wood being thus exactly and instantly adapted, fitted, and closely joined the one to the other, by machinery expressly prepared for the purpose, the article can be furnished to the market at fifty per cent. less cost." The specification refers to drawings, which accompany it, and which exhibit minutely the different parts of the wash-board, and the method of its construction.

It is objected to this specification, that it does not comply with the requisites of the statute in not stating fully the patented invention, and the mode of the construction of the wash-board. The specific points taken by the counsel for the defendant are, that the specification is defective in not setting out the method of sharpening the edges of the zinc, and the precise angle of the sharpened edge; and also, in not stating the depth of the incision required, or the method of applying the pressure by which the zinc is incised. If it be true, as insisted, that the patentee has failed to describe any material part of the process of making a washboard, on his improved plan, necessary to the full benefit of his invention, and this omission is apparent from the specification, it is fatal to the patent. In giving a construction to this specification, it will be obviously proper that the whole should be taken together; and, if from the entire instrument, the true nature of the improvement, with the mode of carrying it out, is disclosed, it will be deemed to be a substantial compliance with the statute. Another rule is equally obvious, namely, that in the description of the improvement, and the directions for constructing the improved machine, it is not necessary to state those matters, which it is apparent would be proper or indispensable in its structure. This would involve what the statute designates as "unnecessary prolixity," which is to be avoided in a specification. Applying these rules to this specification, I have failed to perceive any such omissions as will invalidate this patent. It is expressly stated that the zinc is to be sharpened to a "cutting edge;" and it was not necessary to describe the process by which the zinc was to be thus cut, or to state the precise angle of the cutting edge. These would suggest themselves readily to any mechanic of ordinary intelligence in the construction of the wash-board. There are many modes by which these ends could be accomplished with equal ease and utility; but no particular mode being claimed as a part of the discovery of the patentee, it was not essential to describe any. The same remark applies to the depth of the incision required. The specification directs that the sharpened edges of the zinc are to be buried to "a suitable extent" in the sides or legs of the board. A mechanic could not fail to know, that for the purpose of self-incision, the sharpened edge must extend but a short distance beyond the board on which the plate of zinc is fixed. It is equally clear, that it was not necessary to describe the precise mode of applying the pressure by which the zinc is forced into the wood, and the different parts of the board fastened together. In the first part of the specification, the patentee says, the use of pressure, to incise and fasten the zinc to the sides, is necessary; and in the directions for making the wash-board, in a subsequent part of the specification, it is distinctly stated, that the application of pressure is needed for this purpose, and reference is made to a machine that might be constructed to accomplish the result. But clearly, it was not necessary to state the precise method of applying this pressure, or the principle in mechanics to be used in its application. Any kind of pressure, applied in any way, would accomplish the desired purpose; and this may well be presumed to have been known to the patentee, or to any mechanic, who might be called on to construct the improved wash-board. I can not see, therefore, that there is any such omission, or vagueness in the specification, apparent on its face, as requires the court to pronounce it a nullity. It is, however, a question for the de-

cision of the jury, upon the evidence before them, whether it describes the mode of constructing the wash-board with such clearness and precision, that a mechanic of reasonable intelligence, and skill in that branch of art, could carry the invention into practice. This is a question of fact, and must be settled by the judgment of persons having practical knowledge in such matters. The requirement of the statute, in reference to certainty and definiteness in the directions for constructing a machine for which a patent is sought, has in view two distinct objects. The first is, that the public may know precisely what the invention is; and the other, that upon the expiration of the patent, they may have an unerring guide in the construction of the patented machine, from the specification on record in the patent office.

Several witnessses have beeen inquired of whether, from the specification and the accompanying drawings, the improved wash-board, patented by Rice, could be constructed? They have all replied affirmatively to this question. One witness, a practical machinist, states that he had no difficulty in making a wash-board from the directions contained in the specification, in connection with the drawings. He says explicitly, that there is no necessity that the specification should state the mode of cutting or sharpening the zinc, or of applying the pressure for the incision of the edges of the zinc. No testimony has been offered by the defendant to prove that there is any difficulty in making the board from the directions given in the specification.

The next inquiry relates to the novelty and originality of this improvement. As already stated, one of the grounds of defense in this case is, that the improvement patented by Rice was not new, but was known and in use before the date of his application for a patent. If this defense is sustained by the evidence, the patent to Rice has no validity, and no one is responsible for the use of the improvement. The statute requires that the patentee should be the original and first inventor. This implies that the improvement patented was the discovery of the patentee, and not borrowed from another; and also that it was not before known or in use. In a word, it must have been original with the patentee, and not known to others. It may be remarked here, that there is a legal presumption in favor of the originality of a patented invention or discovery arising from the patent. As preliminary to its emanation, it is required that the applicant shall make oath that he is the original and, so far as he knows, the first inventor. And, in the absence of evidence to negative this presumption, it will be sufficient to sustain the patent. In the present case, the plaintiff has proved the originality of the invention by Rice, the patentee. Having assigned the patent, he has now no interest in it, and is a competent witness. It is the province of the jury to determine as to the credit due to his evidence. He states that the improvement in the wash-board for which he obtained a patent, was his own invention. And there are some facts in proof, by other witnesses, in relation to his declarations and conduct, anterior to his application for the patent, tending to prove that the invention was original with Rice.

The novelty of the invention presents the more important and difficult question for the decision of the jury. As before intimated, under the patent laws, if the patented invention was known or in use, or something substantially and essentially like it, prior to the application for a patent, the proof of the fact is an answer to an action for an infringement. In such case, the patent is void, and no action can be sustained for its violation. The defendant has introduced several witnesses to prove the prior use and knowledge of wash-boards, made on the self-incising plan, patented by Rice. I shall not detain the jury by referring minutely to the statements of these witnesses. Mr. Gilson testifies that he has been engaged in the business of manufacturing wash-boards, at different places, since the year 1836; and that, as early as 1839, he made them on the plan of incision by mechanical pressure. It is not clear, however, that this witness made any without, at least, the partial use of grooves, in the sides and legs of the board. He also states that, from the low rate at which the boards were made, upon Rice's plan, he was compelled to abandon the business, when they were introduced to the public. Another witness, Barrett, states that he saw wash-boards in the state of Maine, some fifteen years since, made by sharpening the zinc, and forcing it into the sides by means of a clamp. The witness, Janes, testifies in substance that, in 1846, being in the employment of Mr. Babcock, at Cincinnati, he made from six to ten boards by sharpening the edges of the zinc and forcing them in by pressure. In an affidavit made by Janes in 1849, which is admitted in evidence, he states that after leaving Babcock's employment, he made three wash-boards on the same plan, and gives the names of the persons for whom they were made. From the testimony of Mr. Bailey, a witness for the plaintiff, it appears that two of these boards have been found, and, upon examination, it is ascertained they were not made on the plan of self-incision, but that the edges of the zinc were let in by mortises. Janes states in his deposition in this case, and which is before the jury, that he was under a mistake in swearing, in his affidavit, that the three boards made, above referred to, were on the self-incising plan. He, however, repeats the statement that those made by him while in Mr. Babcock's employment were made in this way. The witness, Babcock, corroborates, to some extent, the testimony of Janes, in relation to the boards made for him. He did not see Janes in the act of making the boards, nor did he take them to pieces to ascertain how they were made; but has

no doubt they were made on the self-incising plan. He says he did not like these boards, and no others were made for him in that way. On the part of the plaintiff, it is in evidence, by several witnesses who have dealt for many years extensively in wash-boards, both in the East and in the West, that they never saw or knew of any on the self-incising plan till Rice's were introduced into the market.

Such is the summary of the evidence on the question of the novelty of this invention. It will be for the jury to say which way the scale preponderates. They must be reasonably certain that the invention patented by Rice was known before he applied for a patent, to justify a verdict which will invalidate it. And proof of prior experiments on the principle of this invention, if not carried on to completion, does not make out the fact of prior knowledge or use, within the meaning of the patent laws. The machine or structure alleged to be similar to that patented, must have been so far perfected as to be of practical utility. And if abandoned after experimental trials as useless, a presumption would arise that the alleged invention was not identical with one subsequently patented to another person, the merits and utility of which are proved by its general use and admitted superiority over all others.

Every invention, under our patent laws, must be "useful," as well as original and new. The patent implies that the invention is of some utility, but this may be rebutted by evidence that it is frivolous and of no practical value. In this case, it would seem, from the evidence, there can be no doubt of the utility of the invention. Although simple in its character, and not importing the exercise of a high degree of mechanical or scientific talent, it is nevertheless useful, and within the scope and policy of the patent laws. It is clearly proved that the wash-board, made pursuant to this patent, is superior to any before in use; and for this reason, and on account of the reduced price at which it can be made, it has superseded all others. An intelligent witness has stated that, without the aid of the machine for pressing the zinc into the sides and nailing the boards, patented since the date of Rice's patent, his invention has the advantage over any other in the proportion of twelve to one. The same witness testifies that with the aid of the machine referred to, with steam power, one hundred dozen wash-boards can be made in a day, at an actual cost of one dollar and sixty-eight cents the dozen.

It is proper here to notice, that it is insisted by the defendant's counsel, as a ground of defense in this action, that the plaintiff, as the assignee of the patent, has virtually abandoned all his rights under it, and can not, therefore, recover damages for an infringement. If this position is sustained by the evidence, it is clearly a good defense to this action. The owner of a patent has an undoubted right to surrender it to public use. And if the evidence satisfies the jury that there has been such surrender, the plaintiff can not recover. The evidence on this point is briefly this: That, owing to doubts as to the validity of the patent, a number of persons in Cincinnati were engaged in the manufacture of wash-boards on the plan of Rice's improvement; and that shortly prior to the commencement of this suit, and when it was in contemplation, a meeting was held of all these persons, including the plaintiff. After conference on the subject of the price of the wash-board, an agreement was entered into and signed by all the parties, to the effect that thereafter no one would sell the wash-board below a certain price agreed on, and stated. This agreement was published in one of the city papers. This, it is urged in argument, is a virtual consent, on the part of the plaintiff, that others should make these improved wash-boards, and a waiver of all claims for the infringement of the patent. In reference to the conference and agreement adverted to, the witness, Bailey, states that he was then interested in the patent, with the plaintiff, and was present at the meeting, and a party to the agreement as to prices to be asked for the wash-boards. He testifies that the sole object of the proceeding was to prevent the prices from running down so low as to exclude any profit from the manufacture of the wash-boards; and moreover, it was distinctly stated, and so understood by the parties, that the plaintiff, in signing the paper referred to, waived no right to which he was entitled as the assignee of the patent. If the jury give credit to this testimony, there is clearly nothing in this transaction justifying the conclusion that the plaintiff has abandoned any right or claim which vested in him under the patent.

If the jury find for the plaintiff on the points to which their attention has been directed, it will be their duty to assess such damages as he may be entitled to recover. An infringement of the exclusive right of a patentee, or his assignee, implies a right to sue for and recover damages for the injury. The general rule of damages is the amount of profits made by the person infringing the patent from the unlawful use of the improvement. On the theory of the patent laws, this measures the loss sustained by the owner of the patent. There may be circumstances of aggravation attending the infringement, that will justify a jury in returning damages beyond the amount of profit derived from it; but there are no facts in this case requiring the application of this rule. In the progress of the trial, the plaintiff offered to prove the aggregate of profit made by all the manufacturers of the improved wash-board in violation of his

exclusive right, insisting that the defendant was liable for a pro rata share of this entire profit, but the court excluded this evidence from the jury as not furnishing a proper rule of damages. The jury will therefore take into consideration the evidence of the number of wash-boards made by the defendant, and the profit derived from such manufacture; and this will be the proper basis of their verdict, if they find the plaintiff is entitled to damages. It was insisted by the defendant, that in estimating the amount of the damages, the jury should exclude from their consideration the increased facilities for making the wash-board, due to the machines invented since the date of Rice's patent for pressing and nailing the wash-board. It is in evidence that there are two of these in use, constructed on somewhat different mechanical principles, the effect of which is greatly to expedite the process of manufacturing these wash-boards. The specification connected with Rice's patent expressly refers to a machine to be used for the purpose indicated; and it seems clear, that in estimating the profit to the manufacturer derived from Rice's improvement, reference may be had to the use of such a machine.

The jury found a verdict for the plaintiff, assessing the damages at $500.

[For another case involving this patent, see Wayne v. Winter, Case No. 17,304.]

WAYNE (UNITED STATES v.). See Case No. 16,654.

Case No. 17,304.

WAYNE v. WINTER et al.

[6 McLean, 344.] [1]

Circuit Court, D. Ohio. April Term, 1855.

PATENTS—PROOF OF DATE OF APPLICATION—PATENT-OFFICE RECORDS.

1. Parol evidence is not admissible to show at what time a patent was applied for.

[Cited in U. S. v. Scott, 25 Fed. 473.]

2. The patent-office contains written evidence of the fact, and it must be proved by such evidence.

Mr. Miner, for plaintiff.

Stanberry & McCormick, for defendant.

McLEAN, Circuit Justice. The plaintiff [Joseph W. Wayne] introduced the patent under which he claimed a right to a washing machine, which the defendants [T. Winter and others] were charged with infringing, dated 30th October, 1849. An assignment to the plaintiff by the patentee, on the 15th January, 1851, was shown, and which was recorded in the patent-office in 1853. The face of the wash board was covered with zinc, with numerous elevations, so as to make a rough surface on which the clothes, on being washed, are rubbed. The invention consists in extending the zinc plate with sharpened edges beyond the board on which it was laid, so that the zinc plate extended into the side pieces fastened to the board and made it firm. From the evidence it appears that this wash board had been in use more than two years before the date of the patent, which, it was contended, was a dedication of the improvement to the public. The counsel for the plaintiff offered parol evidence to show when the patent was applied for, but the court overruled the testimony. A non suit was suffered, which was set aside on motion and payment of costs.

[For another case involving this patent, see Wayne v. Holmes, Case No. 17,303.]

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

WAYNE COUNTY (KENNICOTT v.). See Cases Nos. 7,710, 7,711.

WAYNE COUNTY SAV. BANK (LOW v.). See Case No. 8,562.

Case No. 17,305.

The W. C. REDFIELD.

[4 Ben. 227.] [1]

District Court, S. D. New York. June, 1870.

COLLISION ON HUDSON RIVER — STEAMBOAT AND SCHOONER—BEATING OUT TACK—HOLDING VESSEL IN STAYS.

1. A steamboat with two barges in tow, one on each side, and a schooner, were both bound down the Hudson river. The schooner was ahead of the steamer, and was beating down, the wind being about ahead, and the tide ebb. Just below the dock at West Camp, the steamer was on the west side of the river, but nearer the middle than the west shore, and the schooner was a short distance below, going to the westward, on her port tack. The steamer starboarded, so as to go under the stern of the schooner; but the schooner, when she had gone but a short distance beyond the line of the course of the steamboat, and without running as far to the west as she could have done, came about. The steamboat immediately stopped and reversed, but without being able to prevent a collision, by which the schooner was sunk: *Held*, that it was the duty of the steamboat to avoid the schooner, and of the schooner to continue her westward tack as far as was reasonably safe.

[Cited in The Servia, 30 Fed. 507; The Cambusdoon, Id. 710; The A. W. Thompson, 39 Fed. 116. Cited in brief in The Coe F. Young, 49 Fed. 168.]

2. The schooner did not so continue her tack.

3. Even if she did, she was in fault, under the 20th article of the rules for avoiding collisions, in that she was not held in stays long enough to allow the steamboat to pass.

[Cited in The Renovator, 30 Fed. 195.]

In admiralty.

James C. Carter, for libellants.

Robert D. Benedict, for claimants.

BLATCHFORD, District Judge. The libellants, as owners of the schooner Sarah L.

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

Merritt, bring this suit against the steamboat W. C. Redfield, to recover the sum of $5,000, for the damages sustained by them through the sinking of the schooner by means of a collision which took place between the two vessels on the 9th of October, 1867, between five and six o'clock p. m., in the Hudson river, just below the dock at West Camp. Both vessels were bound down the river. The wind was south, and was about ahead to the schooner, and she was beating. The steamboat had two barges lashed to her, one on each side of her, which she was towing. The schooner was ahead of the steamboat. The tide was ebb, or with both vessels. The libel alleges, that the schooner had finished her tack to the westward, and gone about on her tack to the eastward, which was her starboard tack, and was sailing close hauled, when the steamboat struck her on her port side, a little aft of midships, and crushed it in, the bow of the steamboat running up on her deck, and that the steamboat remained in that position until the schooner sank from under her.

The answer sets forth, that the channel, at the place in question, is about three-quarters of a mile wide, and extends close to the west shore; that the steamboat, which was a propeller, was on the west side of the river, but nearer the middle than the west shore; that the schooner stood across the river, and across the line of the direction of the steamboat, to the westward, on her port tack, a short distance below the steamboat; that, as the schooner was so standing across the river, on a course to the westward, the helm of the steamboat was put to starboard, for her to pass under the schooner's stern, which she would have done at a safe distance, if the schooner had run out her tack to the westward; that the schooner, instead thereof, continued on that tack only until she had passed less than her length to the westward of the line of direction of the steamboat and of the barge on the starboard side of the steamboat, and then came about and stood on her starboard tack to the eastward, across the river, and across the bow of the steamboat, from a point so near to the line of direction of the steamboat and of the barges in her tow, and at so short a distance below the steamboat, that, although the steamboat's engine was immediately stopped and backed, on observing the man at the helm of the schooner putting it hard down to come about, the collision followed; that the schooner sank after she had been shoved by the steamboat in toward the shore as far as it was safe for the steamboat to shove her, and after a line had been got ashore from the schooner; that the schooner had abundant unobstructed room in the channel to continue on her tack to the westward for a much greater distance, and to run out her course, and ought to have done so; that her coming about and standing to the eastward before she had run out her tack, was without necessity or justifiable excuse, and not to be expected by those navigating the steamboat; and that the persons navigating the steamboat hailed the man at the schooner's helm, who was the only man on the deck of the schooner, not to put his helm down, or to that effect, on observing that he was doing so to come about.

It was the duty of the steamboat to avoid the schooner, and it was the duty of the schooner to continue, on her tack to the westward, to run, before coming about, as far as was reasonably safe. The case turns upon the question as to whether the schooner came about improperly at the place where she did come about after running to the westward, and whether she might have stood, and ought to have stood, further to the westward, and whether her coming about was a thing not expected, and which could not reasonably have been expected, by the steamboat. It is contended, on the part of the libellants, that the weight of the evidence on these questions, by the preponderance of the witnesses both in number and quality, is greatly with the libellants. There are three classes of witnesses in the case—those who were on the schooner; those who were on the steamboat, or the barges in tow of her; and those who were on shore, or on another schooner below in the river, going down. The witnesses from the shore are two in number, and are witnesses for the libellants. One of them, De Witt, was on the east bank of the river, nearly a mile off from the schooner when she went about from her tack to the westward, and he does not say that he saw her go about, or state where she went about, or how far she stood to the westward. The other witness, McGee, puts himself not far from an eighth of a mile from where the schooner went about, his place of observation being about one hundred yards inland from the edge of the water. But his testimony as to the place where the schooner went about could not have been the result of any particular attention at the time, for he says, that, when he saw the schooner come up in the wind, it did not occur to him that there was any chance of a collision. He says he thinks that the schooner stood in as far as it was safe for her to stand, without grounding, and as far as any vessels do in beating. The witnesses from the other schooner are two in number, her master and her mate, and are witnesses for the libellants. Their schooner was beating down the river ahead of the Sarah L. Merritt. They say that they went about on the west side shortly before the Sarah L. Merritt went about, and about one hundred yards to the windward of the Sarah L. Merritt, and that they were about three hundred yards away from the place of collision. They unite in saying that the Sarah L. Merritt stood as far as was safe to the westward.

There were two persons on the deck of the schooner when she went about—the man at her wheel, and her steward. The former alone has been examined as a witness. He had never been in that part of the Hudson river before this occasion. He had no experience to guide him, and nothing by which to tell how

far he could safely stand to the westward except the general view and the example of the schooner that was ahead. He saw her tack first, he says. There is a flat between the channel and the land on the western side, and the evidence goes to show that there is no reliable guide by which to tell the line of the channel on the west, except to take a range from an object on the land above to one on the land below. The man at the wheel of the schooner had, of course, no knowledge of any such range. He probably tacked when he thought he had stood as far to the westward as the other schooner had stood. The captain of the libellants' schooner and one other of her hands have been examined for the libellants. Both of them were below when the schooner went about, but they were on deck at the time of the collision. Of the two, the captain alone knew anything of the channel. The captain's testimony is very much open to criticism in regard to its general credibility, because of his manifest tendency to exaggeration. This shows itself in his saying that he could see the grass on the flats, as marking the boundary of the channel at the place in question; that there is a reef of rocks putting out from the western bank of the channel, opposite where the schooner tacked, and extending out for ninety feet to the eastward beyond the easterly line of the dock at West Camp; and that he in vain asked the people on the steamboat, after the collision, to shove the schooner upon the bank where the flats slope into the channel on the west side of the river. The man at the wheel of the schooner also justifies his going about where he did, on the ground that he saw the eel-grass in the water, even with the surface of the water, as marking the edge of the channel, and that he stood over to within a length and a half of the grass. As to the grass, the libellants' witness De Witt, who lives on the east shore, opposite the place of collision, and is familiar with the channel, by having fished and sailed about there, says that there is no grass growing on the flats there; and on the whole evidence, on both sides, I am satisfied that there is no grass to be seen there, and no reef extending into the channel. The evidence also shows that, after the collision, the steamboat did shove the schooner same distance towards the west bank, and as far towards it as was possible, in order to prevent her sinking in deep water.

On the part of the steamboat, her master, and her pilot, who was at her wheel at the time, and her engineer, have been examined as witnesses; also the captain of her starboard barge, who was on board of that barge; and the captain of her port barge, who was in the pilot house of the steamboat. The substance of their testimony is, that, when the steamboat was passing down by the West Camp dock, both of the schooners were standing to the westward, below the steamboat, the more southerly one being the nearer one to the west shore, and the more northerly one being the one that the steamboat afterwards struck; that, when that schooner was still to the eastward of the steamboat, and on her tack to the westward, the pilot of the steamboat starboarded his helm, so as to be sure and pass safely to the eastward of and under the stern of the schooner, as she was going towards the west shore, and, when he saw that he would go clear, eased his starboarding; that the schooner had gone but a short distance to the westward beyond the line of the course of the steamboat and her barges, when the pilot of the steamboat saw the man at the wheel of the schooner put her helm down to come about; that he immediately rang the bells of the steamboat to slow, and stop, and reverse her engine; that these bells were immediately obeyed, and the engine was backing when the collision occurred; and that, while the schooner was still in the wind, with her sails shaking, the master of the steamboat, from his forward deck, seeing the man at the wheel of the schooner, and seeing that he had got the wheel down, and that the schooner was going about, cried out to him to right his wheel, and not to go about there. The man who was at the wheel of the schooner says that he did not hear this hail, nor a hail made by the pilot of the steamboat. But it is in proof that both of those hails were made. The master and the pilot of the steamboat and the master of the starboard barge, all of whom appear to be experienced men, acquainted with the navigation at the place where the schooner went about, say that she could safely have stood some distance further to the westward. It would have required her retardation but for a short interval of time, to enable the steamboat and her barges to pass in safety. As those on the steamboat and her barges had just passed West Camp dock, the pilot of the steamboat and the masters of the two barges, one of whom was on his own, the starboard, barge, and the other of whom was in the pilot house of the steamboat, at the time, and all three of whom were observing the schooner and her movements, are more reliable witnesses as to the distances from the west shore, of the place where the schooner went about, and of the place of collision, than any of the witnesses for the libellants could be, except those on board of the schooner. For the reasons already given, the only two witnesses from the schooner, her captain and the man at her wheel, who give any evidence on the subject of those localities, are overborne largely, as to the quality and the weight of their testimony, by the witnesses from the steamboat and her barges.

One circumstance is entitled to much weight. The pilot of the steamboat was alive to his responsibility. As the schooner was passing to the westward, he starboarded, so as to be sure and go under her stern, and then he passed on, entertaining, it is clear, from his non-action in view of what he saw, no idea that there was any danger of a collision with the schooner on her next subsequent tack. There is nothing to show that he either had, or ought to have had, any idea that there was a risk of such a col-

lision, calling upon him to make some manœuvre to avoid it, before he saw the schooner's helm put down. If he had entertained such an idea, his proper manœuvre would have been either to starboard still more, or to port, and in either event to stop and reverse also. But he did no one of these things before he saw the schooner's helm put down, and he refrained from action evidently because he saw, from his knowledge of the channel, that there was a free course for him to go by, if the schooner did not improperly come back across his track. Any other view involves the conclusion that he recklessly went on when he must have seen and known that a collision was almost certain. There is nothing in the evidence to warrant that conclusion, and the contrary view only involves the inexperience and ignorance of the man at the wheel of the schooner, which are abundantly established.

There is another view. It was the duty of the schooner to keep her course, but she is not absolved from the consequences of the neglect of any precaution required by the ordinary practice of seamen, or by the special circumstances of the case. Act April 29, 1864, art. 20 (13 Stat. 61). Now, whether she did or did not stand to the westward as far as she could run with reasonable safety, her coming about and getting on a course to the eastward involved two things, beyond a cessation of her movement to the westward, namely, a shaking in the wind before filling off on her new tack, and such filling off. Wherever the place of her shaking in the wind was, with reference to the western bank of the channel, it was in fact, as shown, a place where the water was sufficiently deep for her, and the west bank of the channel from there runs straight for some distance down; and, on the testimony in the case, even that of the master of the other sailing vessel, the schooner could have been held in stays, by competent management, for some length of time—long enough, I am satisfied, for the steamboat and her barges, going as they were at good speed, to have passed safely by.

On the whole, I think that the steamboat has excused herself from fault in respect to this collision, and that the libel must be dismissed, with costs.

Case No. 17,306.

The W. D. B.

[Hask. 236.] [1]

District Court, D. Maine. Oct., 1869.

SALVAGE—COMPENSATION IN CASES OF DERELICT—PURCHASE OF SALVOR'S CLAIM BY OWNER'S AGENT—SALVAGE SERVICES—CONTRACTS—TOWAGE CONTRACTS.

1. Salvage amounting to $850, or one half of the gross amount received from the sale of the property saved, is considered a reasonable award for salvage service rendered in bringing a wreck into port, found derelict in pleasant weather, not far from the coast, and in the accustomed track of coasters and fishermen.

2. The agent of the owners of the lost property, having purchased the claim of part of the salvors, is allowed from the sum awarded as salvage, the amount that he paid for the claim and no more. The law does not allow an agent to speculate on the misfortunes of his principal.

3. Services, performed in righting a wreck after it is saved from immediate danger and has reached a port of safety, are not properly salvage service, and should be paid for on the basis of labor performed and services rendered; but a contract, made between the salvors and the persons furnishing such service, should be regarded, if reasonable.

[Cited in The Clotilda, Case No. 2,903.]

4. The same rule applies to towage service rendered under like circumstances.

5. Contracts for towage, made between masters of tugs and persons in charge of a wreck, should be scrutinized by courts of admiralty, and annulled if it appears that undue advantage was taken of the necessities of the persons in charge of the wreck to procure unreasonable recompense.

6. The full sum fixed by the contract for towage service will not be allowed, but only a quantum meruit, if it appears that the service did not accomplish the result agreed to be performed.

7. Taxable costs and expenses are ordered paid from claimant's moiety of gross sales.

In admiralty. Libel in rem for salvage service in saving a wreck.

The owners appeared and claimed their property, and by answer disputed the amount claimed in the libel.

Thomas B. Reed, for libellants.

Almon A. Strout and George F. Shepley, for claimants.

FOX, District Judge. This schooner, belonging to St. John, N. B., was dismasted and capsized in the gale of Sept. 8th, off the coast of Maine, whilst on her voyage from Boston to this port, and all hands were lost. On the morning of September 11th, the wreck was discovered by the crew of the fishing schooner, Mary A. Downes, about twelve miles southeast from Wood Island, bottom up, with no one on board. The M. A. Downes was twelve tons burthen, with a crew of four men and two boys. They boarded the wreck and undertook to tow her into Wood Island, for this purpose fastening ropes around her keel by driving through them spikes into the keel and planking, and hitching their cable through these ropes, thus secured to the wreck. After they had thus worked for about two hours, the schooner Winfield Scott, a fishing vessel of about seventy tons, with a crew of twelve men, came alongside and offered her assistance in towing the wreck, which was at once accepted. A hawser was taken to the Winfield Scott, and both vessels had been employed in towing about twenty-four hours, bringing the wreck within two or three miles of Wood Island, when the steam tug Uncle Sam, Willard, master, came up and proposed to tow the wreck into Portland harbor. Some discussion arose as to the price to be paid to the tug, the skippers not being willing to pay more than two hundred and fifty dollars, but the captain of

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

the tug insisted on three hundred, and this amount was finally agreed upon, and a written agreement was signed on board the tug by which Willard undertook to tow the wreck to Portland for that amount. The Uncle Sam, together with a smaller tug, then attempted to tow the wreck to Portland, about twenty-four miles distant. There was some sea on, but the weather was pleasant, and so continued for a number of days. Finding the tugs were able to make but little progress on account of the chains, spars and rigging, dragging badly under the wreck, Willard agreed with the skipper of the Mary A. Downes to take the wreck into Wood Island, which was accomplished in a few hours. The tugs then attempted to right the wreck, but did not succeed, and returned to Portland, leaving the wreck in charge of the fishing schooners, with the understanding that whenever they should get her righted, the tugs would come out and tow her round to Portland.

Two large broad sloops engaged in carrying stone to the Saco breakwater, furnished with strong derricks and steam windlasses, were afterwards employed in an attempt to turn over the hull, payment being dependent on success. They, however, failed in the attempt, breaking one of their derricks, and thereby destroying a dory belonging to the M. A. Downes.

The Winfield Scott, after remaining four days at Wood Island, proceeded on her fishing voyage, leaving the wreck at anchor in charge of the M. A. Downes, and a few days afterwards, all claim for salvage in behalf of the Winfield Scott and her crew was assigned to David Boyd, Charles H. Chase, and W. Willard, for one hundred and fifty dollars, Willard being the master of the tug, and Chase, one of the firm of Chase & Littlejohn, who were the agents for the owners of the wreck. The purchase of the Winfield Scott's claim was made without objection from the owners, or agent of the insurance company in which the vessel was insured, and who were aware of the arrangement before it was completed. Chase and Boyd then chartered the schooner Nellie Chase to go round to Wood Island and assist in righting the wreck, agreeing to pay her thirty-five dollars per day for three days, certain, and twenty-five dollars per day, so long as she might be engaged beyond the three days. Boyd, a rigger and man of experience in such business, went on board the Nellie Chase on Thursday morning, September 23d, with five men and proper tackles and purchases. They left Portland about seven in the morning, were towed out to Wood Island by the Uncle Sam, turned the wreck over in a few hours, and the same day it was towed round into Portland Harbor together with the Nellie Chase and M. A. Downes, arriving about midnight. The crew of the M. A. Downes remained in charge of the wreck until its arrival in Portland, and rendered all the aid and assistance in their power whilst in charge of the property.

A libel was filed by the Mary A. Downes for salvage. The owners and crew of the Winfield Scott, by Boyd and others, also intervened by petition, claiming to be made parties as salvors. Chase & Boyd have also filed a supplementary petition for an allowance of the expenses of the Nellie Chase, for Boyd's services at Wood Island, and also, for certain expenses paid by Chase for watchmen, &c.

The wreck and materials have been sold under an interlocutory order of sale, and the gross amount realized is $1,702.00.

This vessel was clearly derelict at the time she was discovered by the Mary A. Downes. She was then drifting on the high seas, more than a dozen miles from land, with no one on board, her crew having all perished in the gale three days previously, one of her owners, the master, having been lost, and the others, resident in New Brunswick, being entirely ignorant of the disaster and of the situation and condition of their property. Under these circumstances, the aid and assistance rendered by the two fishing vessels in towing the wreck for twenty-four hours towards the coast, and afterwards employing the steam tug in bringing the vessel into a place of safety, were clearly of a salvage nature, and justified them in standing before the court as claimants for a reasonable salvage, for the benefits thus conferred, by their exertions, upon the owners of the property thus saved. As is very clearly stated by Judge Ware in the case of The Emblem [Case No. 4,434]: "By the common law, the finder of property, which has been casually lost, has no legal claim against the owner to anything in the nature of a reward or compensation for finding. All that he can pretend to is the re-payment of the actual expenses he has incurred in preserving it, and upon the payment of this, the owner is entitled to receive his property free from all other charge. * * * The maritime law, from considerations of public policy, has established a different rule for goods which are lost at sea. A person, who preserves goods which are lost, or in danger of being lost, by the fortunes of the sea, is entitled to a reward for that service. * * * By saving them, he acquires a sort of proprietary interest in the goods, a jus in re, and a complete possessory right against all persons claiming an interest in them, to retain them until his compensation is paid, or until he can proceed to enforce his right against them by due course of law. * * * The right of dominion, or the absolute property, in the meantime remains in the original owner. But he is under no obligation to assert his right by intervening with a claim. He may abandon his property if he pleases, and if he does so, and declines to make himself a party to the suit, no decree can be made against him."

The great learning and experience of Judge Ware, in matters of admiralty, must always commend his decrees, in cases of this nature, to the favorable consideration and approval of all who may be called to act upon similar

causes, and I have, therefore, carefully examined all the decisions of this learned judge in salvage cases which are to be found in the reports, that I might ascertain what amounts he was accustomed to allow in such cases.

In the case of The Elizabeth and Jane [Case No. 4,356] a brig found derelict, about twenty leagues from Seguin with foremast gone, mainmast half cut off, sails and rigging in a ruinous condition, and filled with water that was towed by the salvors, after four days' labor, into Harpswell, the court, in 1823, recognized the general rule of a moiety being awarded in cases of derelict, admitting it as in force as a general guide of judicial discretion, yielding to the reason and equity of particular cases, held that if the salvors claim a larger share, it belongs to them to extract the case from the rule and show that a larger share ought to be allowed. In that case, a moiety of the gross amount of sales, viz., $1,308, was allowed for salvage.

The case of The Bee [Case No. 1,219] was decided in 1836. She had been thrown on her beam ends, lost both masts, and drifted into Bradford's Cove on Grand Menan, where she came to anchor; the next day, November 13th, the crew left her with one anchor down and chain not secured, and went ashore for assistance, the wind at that time blowing a gale directly on shore, and the vessel exposed to its full force and drifting towards the rocks. The libellants heard the story of the crew as to the condition of the vessel, and went on board and took possession. The crew afterwards came out of the woods, down to the shore, with the intention of returning to the vessel. The salvors retained possession, rigged jury-masts, procured some small sails and got her into Lubec on the 17th. In that case the value of the property saved was about $2,000 and Judge Ware allowed $350 salvage.

In 1837 the Rising Sun [Case No. 11,858] was found by a fishing vessel about twenty miles south of Cape Sable, deserted by her crew, on her beam ends, full of water, and was towed by the salvors into Penobscot river. The value of the property saved was $536. Three-fifths of this was allowed as salvage, the value of the salvor ship being $2,000, besides her cargo of fish.

In his opinion in that case, Judge Ware says: "The rule seems formerly to have been considered imperative to allow a moiety in all cases without distinction. But in modern times the rule is not considered as inflexible. Sometimes, though rarely, more is given, and sometimes less, having a just regard to the circumstances of each case, to the risk, the labor, the amount of property saved, and the value of that put at hazard by the salvor's service."

The Amethyst [Case No. 330] was decided in 1839. It appeared that vessel was capsized and her crew taken off, and four days afterwards, she was fallen in with fifteen or twenty miles south-east of Monhegan by three fishing vessels belonging to Boothbay, who towed her the next day near to Boothbay harbor; but before she arrived within that harbor a storm arose, the cables parted from the wreck, and she was driven on to a reef. Next day there was a heavy sea, and the labor of saving the property was severe, attended with danger to life in getting the cargo from the wreck, and it was necessary to guard it after it was landed to protect it from plunder. The value saved amounted to only $841. The court allowed the three fishing vessels $400 salvage, leaving cost and expenses a charge on the residue.

In the case of The Emblem [supra] (1840) the whole amount of property saved which was liable to salvage was $600. There were taken from the wreck, at the same time by the salvors, bills of exchange and drafts to the amount of $8,000, belonging to the same persons who owned the other property; but upon these the court did not consider that salvage could be allowed. A number of persons were rescued from the wreck, so enfeebled by their suffering, as to be entirely helpless. A salvage of $380 was allowed.

There are other decisions of Judge Ware not reported, but within the recollection of the court, and such as The Goods Saved from the Bohemian, in 1864, and the case of The Mary A. Howes [Case No. 9,193], a fishing vessel that had been boarded by the rebel privateer Tacony, her crew taken off, and the vessel partially dismantled and set on fire, and afterwards found by the libellants and taken into Boothbay. In all of these cases a moiety was allowed for salvage. On a careful examination of his decrees, I am confirmed in the opinion, that under ordinary circumstances in cases of a derelict, where the amount saved was neither very large nor very small, it has been usual and customary in this district, to allow a moiety, or about that proportion of the property as salvage. In 1865, Judge Benedict, in case of The Charles Henry [Id. 2,617,] acted upon this rule, stating that the burden was on the claimant to show that a different measure should be applied if he wished it reduced.

The circumstances of the present case do not suggest any valid reasons for any departure from this proposition. The wreck was found in pleasant weather, at not a great distance from the coast, and in a position where from the large number of coasters and fishing vessels which abound in this vicinity, in all probability she would have been picked up by some other vessel if the libellants had not discovered her. The value of the property at risk in effecting the salvage was not very large, both vessels probably not being worth much, if any, over $4,000. The risk to life and property in the service was very slight, and the labor of towage was quite moderate and but for a short period; no particular skill was either requisite or manifested; and under all the circumstances of the case, I am of opinion that $850, being a moiety of the gross amount of sales, is a reasonable award and compensation for the services rendered to the owners of this property in saving it; for it should ever be remembered by the court, if not by the salvors, that

the property, although wrecked, still belongs to its original owners, and that salvage is only a reasonable and proper compensation, to be awarded out of the property itself, for the benefit conferred upon the owner by bringing it to a place of safety and restoring it to him. The apportionment of this amount among the respective parties is not without difficulty.

The claim of the Winfield Scott has been transferred for the sum of $150 to Chase and others, and as all parties, both salvors and purchasers, by the purchase have demonstrated that they considered that amount a fair remuneration for the services rendered by that vessel, I am inclined to adopt their conclusions and not to increase the amount. The wreck at the time of this purchase was at Wood Island, comparatively in a place of safety, and the salvors were well aware of the services they had rendered, and what they should receive in satisfaction therefor. The purchasers of this claim, one of whom was then acting as agent for the owners of the vessel, certainly should not ask for anything beyond an indemnity and return to them of the amount thus advanced in defraying the charges and claims on the property of the principal, whose interests this agent was bound to guard and protect; for the law will not permit an agent to speculate on the misfortunes of his principal, or to hold any profits incidentally obtained in the execution of his duty. From the evidence before me, I have no reason to suppose that Capt. Chase had any such motive or purpose, but giving him full credit for his statement, that he purchased this claim in order to control the wreck for the owner's benefit, and that he was influenced solely by what he believed to be for their advantage, and had no intention personally to gain any profit or advantage thereby, most praiseworthy and honorable motives, which should actuate every honest agent whilst in the discharge of the duties of his agency, I can have no doubt that it will be entirely satisfactory to him and his co-purchasers, if I award for their benefit on the libel in behalf of the Winfield Scott, the sum of $150, the claimants not having raised an objection, which might have been presented, founded on the transfer of the claim to these parties.

The petition of Boyd and Chase is for the payment of certain expenditures incurred by them, and for Boyd's services about the vessel after their purchase of the W. Scott's claim. These services, as I think, are to be considered, not as absolute salvage services, but rather as claims for work and labor done upon the property after it had been saved from immediate danger and had reached a port of safety.

The Nellie Chase was chartered by the petitioners to go to Wood Island and assist in righting the vessel, and they agreed to pay her thirty-five dollars per day for three days absolutely, and twenty-five dollars per day for the time she might be further employed. They left here about seven o'clock in the morning, were towed to Wood Island by the tug, and returned about midnight the same night with the wreck, having been actually employed short of twenty hours, but if the bargain was a fair and reasonable one, upon which point there is nothing to discredit it, the owners of the Nellie Chase are entitled to receive their three days' pay, although they have been deprived of their vessel but a single day, and they have had the use of her for the two days for which they thus will receive compensation from the petitioners. It would have been more satisfactory to the court, if the contract had been to pay a reasonable amount for the time to be actually employed; but as it appears to have been difficult to obtain a vessel, and it is not shown that one could have been obtained on any other terms, I will allow the charge of $105 on account of the Nellie Chase. Another claim made on account of this schooner is for a hawser, which is said to have been chafed and parted in towing the wreck, or as is set forth in the bill of items, "spoiled in righting and towing schooner." This charge is one which I should not certainly allow to its full extent. The schooner was hired for the purpose of righting the wreck, was to be towed out and back, of course in connection with the wreck, if the undertaking should prove a success; all the spars, rigging, hawsers and other appurtenances of the schooner were to be used in any way which was reasonable and proper, and if whilst thus used, they should be injured, I apprehend the damage should be borne by the schooner, and not by those who have hired her for this employment. It certainly must have been well understood, that the work about which she was to be employed, was something unusual and would make somewhat severe demands upon the vessel, her rigging and other appurtenances in accomplishing the business she had undertaken; her spars, ropes and hawsers would necessarily be required to withstand heavy strains and great force; they were hired for this very purpose as a part of the vessel, and the damage to them, if any, should not be charged to the hirers, especially when we consider the large amount to be paid for one day's employment of the vessel. It is said, the hawser was broken and chafed whilst in use as a tow-line from the tug to the wreck; if so, the tug may be accountable, as she should have been provided with proper tow-lines; if she was deficient, and obtained the hawser from the schooner which was in charge of her master, it is a matter solely between the tug and schooner as to the damage done by the tug to a hawser for which the charterers of the schooner can in no way be held responsible.

Boyd went in the Nellie Chase, taking with him five of his men, and his tackles and purchases sufficient to right the wreck. His claim is one hundred twenty-five dollars for this day's work. He ordinarily charges

three dollars and a half a day for his men, and the use of his blocks and purchases, he states would be worth ten dollars. Chase claims twenty-eight dollars paid for watching the property after it was brought to Portland, and before it was taken possession of by the marshal. He also presents another bill for horse hire, services of Capt. Shannon, and telegraph charges, amounting in all to thirty-four dollars and forty-six cents, no part of which, as I think, can properly be allowed in the present suit, as they are charges to be borne by the owners, without regard to any salvage services. Upon the best consideration which I can give to the claim presented by Boyd & Chase, for their own charges and the bills of the Nellie Chase, I shall award and allow them the sum of $225.

The only remaining claim is that of the original salvor, the Mary A. Downes, and this includes the amount properly chargeable for towage by the steam tugs. It appears that the two small fishing vessels had succeeded in towing the wreck in her then condition about ten miles, and as the weather then was and continued for some days, I have no doubt they would with perseverance have succeeded in getting it into Wood Island, if they had chosen so to do; still it was quite proper for them to obtain the assistance of the tugs, at a reasonable price, and the court will always be quite ready to sustain any agreement for towage for wrecks, which under the circumstances may be fair and just. In the present case, the agreement, as made, was to tow this wreck as it then was, bottom upwards, into this port for three hundred dollars. Willard, the master of the tug, has been for many years engaged in this business, saw the condition of the wreck, and must have been aware of the slow progress of the schooners in towing it, and he demanded a very considerable sum for taking it to Portland, and more than the skippers of the fishing vessels thought reasonable; but situated as they were, they finally agreed to pay this amount for this particular service, and the court would probably have allowed that sum, if the tug had performed her part of the contract, which it must be remembered was to take the wreck into Portland, as it then was, and not as it might afterwards be, when righted at the expense of the salvors, and so placed as to be towed there in a third of the time it would have taken, in the condition the wreck was when the bargain was made.

I deem it not improper to suggest in relation to these contracts for towage entered into by the masters of the tugs with those in charge of wrecked property, that a court of admiralty is inclined to scrutinize such bargains with considerable care, and before they will be sustained and enforced, the court must be satisfied that the master of the tug has not taken advantage of his position to make an unreasonable bargain, and insist on an exorbitant recompense.

Mr. Justice Story in The Emulous [Case No. 4,480], says, "It is true, that contracts made for salvage services are not ordinarily held obligatory by the court of admiralty upon the persons whose property is saved, unless the court can clearly see that no advantage is taken of the parties' situation, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. No system of jurisprudence purporting to be founded upon moral, or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive, and exorbitant, that he might turn the price of safety into the price of ruin; that he might turn an act demanded by Christian and public duty into a traffic of profit, which would outrage human feelings and disgrace human justice." These remarks are quite applicable to salvage services by towage, and whenever such a contract is produced, and a much larger compensation is found to have been agreed upon than is ordinarily claimed for towage services, the court will not feel obliged to allow such exorbitant sums, although the party may have signed an agreement to pay the amount. In most cases it will probably be better for all concerned that the towage services of wrecks should be rendered without any special agreement as to the rate of compensation, leaving this to be determined afterwards, when both parties are on shore on an equality, by the parties themselves, or by the court in case of disagreement.

Admitting, for the purposes of this decision, that three hundred dollars would not have been an exorbitant amount for towing the wreck, as she then was, into Portland, and that the bargain was fair and just and obligatory on both sides, it is quite manifest that the tug has not performed her part of it, because after a very short attempt at towing the wreck, the captain of the tug declared that he could not accomplish it, and thereupon, as he says, obtained the consent of the skipper of the M. A. Downes, that he should take the wreck into Wood Island, and come out and take it round to Portland when righted. This proposition was assented to, but it does not appear that the skipper agreed to pay the amount of three hundred dollars for this service, which could be much more expeditiously and easily accomplished when the wreck should be upon an even keel. I am not at all convinced that the tugs could not have taken the wreck into Portland harbor as she then was. They were certainly much more powerful than these fishing vessels, and, although it might have probably taken the tugs somewhat longer than was desirable, I

believe they would have succeeded in getting the wreck into Portland harbor without any great risk to the property, and that the hull could have been righted for less than half the expense it cost at Wood Island, provided the tugs had performed their part of the contract, and brought the wreck in here as it was stipulated they should do. Not having done so, the skippers of the fishing vessels are not legally bound to pay the master of the tugs the stipulated amount, but he is only entitled to claim a just and fair compensation for what he has done. I have hesitated, between $200 and $250, but on the whole, considering that on the first day some assistance was rendered by the tugs, and that afterwards the Uncle Sam was employed for one day about the wreck, I have decided to allow the M. A. Downes the sum of $250 for the tugs' services, which is certainly full and liberal compensation for all the aid rendered by them at any time. A balance of $225 remains of the moiety allowed for salvage. This sum is somewhat in excess of the amount allowed the Winfield Scott, but the ropes and hawsers of the Mary A. Downes were badly injured in towing the wreck, and her dory destroyed. These damages, being sustained when the vessel was not employed under any contract, but whilst in discharge of her duties as salvor, I think, may properly be considered by the court in the estimate of the salvage to be allowed. This schooner was much smaller than the Winfield Scott, and had but half as many men, but she remained in charge of the wreck until it was brought round to Portland, and assisted in the various attempts at righting it, and under all the circumstances, I shall award the $225 to the Mary A. Downes, together with $250 to remain in the registry for the present, and to be paid to the master of the steam tugs upon his filing a discharge of all claim for services in this behalf.

The taxable costs and expenses are to be paid from the remaining moiety of the gross sales in the registry. Decree accordingly.

WEAKLEY (OLIVER v.). See Case No. 10,502.

WEAMER, In re. See Case No. 17,796.

WEATHERBEE (PUTNAM v.). See Case No. 11,485.

Case No. 17,307.

In re WEAVER.

[9 N. B. R. 132.] [1]

District Court, E. D. Missouri. 1874.

ACTS OF BANKRUPTCY — SUSPENDING PAYMENT — WHO ARE MERCHANTS — FRAUDULENT PREFERENCES—DISSOLUTION OF PARTNERSHIP—SALE OF STOCK.

1. Notes given by a solvent partner, after the dissolution of the firm, to one of the creditors who had assisted in starting and dissolving the firm, and by way of settlement, will not be considered as the commercial paper of such partner, he not being by business a merchant, and having entered into the partnership to benefit a relative, and closing it up as soon as it was discovered to be unprofitable.

2. Giving a deed of trust upon property, to secure a debt previously secured by a mechanic's lien, is merely a change of securities and not a fraudulent preference given to the mechanic having the lien.

3. Where a partnership was dissolved, and whole stock transferred to the only solvent partner, for the purpose of settling the affairs of the partnership, a sale of the whole stock by such partner is not an act of bankruptcy, for it was designed that a sale by gross should be made, and the evidence rebuts the presumption made by the statute.

[In the matter of Christopher Weaver, a bankrupt.]

TREAT, District Judge. This is a proceeding by the petitioning creditor to have respondent declared bankrupt. The defendant (a bricklayer) to assist his son-in-law, who was brother-in-law of petitioning creditor, formed a partnership with his son-in-law in the hardware business. The defendant knew nothing of the business. The petitioning creditor agreed to furnish goods and money to the co-partnership, receiving ten per cent. interest on his advances. After several months, the co-partnership not being successful, and the partners not being in accord, it was agreed, at the instance of petitioning creditor, in order to avoid having a receiver of the partnership estate appointed, that the defendant should take the stock of goods, secure to the petitioning creditor part of the amount due by the co-partnership, and give his notes for the balance. The notes given on such settlement, no fraud having been shown, as alleged in the answer, stand as valid. Two of them, unsecured, were, at the date of the filing of the petition, past due for more than fourteen days.

The first act of bankruptcy charged, is the suspension of commercial paper, defendant being a merchant, &c. It seems that the paper was given to petitioning creditor on the dissolution of the co-partnership to close the same, and that defendant, knowing nothing of the business, took the assets with the view of stopping the business altogether. The case of Davis v. Armstrong [Case No. 3,624] is not applicable to this case. These notes were given in final settlement at the close of mercantile business, and therefore fall within another class than commercial paper issued by a merchant.

The second act of bankruptcy charged, is that defendant sold out the whole stock of goods in the store for about four thousand dollars. But that was the very object for which he received the stock, as understood by all parties, and therefore if such sale were prima facie evidence of fraud, under section thirty-six [of the act of 1867 (14 Stat. 534)] the prima facie case has been rebutted. There is no evidence that the sale was to defraud, unless the vague expectation of the creditor, that the proceeds

[1] [Reprinted by permission.]

were to be applied to his debt in preference to others, is to control. The object, at the dissolution, was to have the defendant save himself by taking and disposing of the assets, he being the only solvent partner. The third ground is, that defendant gave a deed of trust, to secure past indebtedness, by way of preference. The deed was given in lieu of a mechanic's lien on buildings which the cestui que trust had erected, and therefore no advantage was gained by the creditor. The whole case must, therefore, rest on the proposition, whether the notes given in settlement on the final dissolution of a co-partnership are to be considered the commercial paper of a merchant; the mercantile business ending at that time; all of the co-partnership notes except a balance of one of seventy dollars, now in litigation, have been paid, also all the debtor's notes—unless the notes to petitioning creditor are to be considered within the rule.

It was competent for the petitioning creditor to hold the old notes of the co-partnership against each of the partners, and then, within the case cited, pursue the partnership and its individual members in bankrupt proceedings. The dissolution of a co-partnership having paper, issued while the mercantile firm was in existence, to lie over more than fourteen days does not change the statutory rule. It is not by mere mutual consent to a dissolution that partners can avoid the provisions of the act. But when the petitioning creditor negotiates a dissolution as in this case, and takes new paper of one of the partners for the firm's indebtedness to him, with the knowledge that the latter, in taking the firm assets, does so only to sell out the stock as soon as a purchaser can be found, and not to continue mercantile pursuits, such new paper thus taken cannot be considered commercial paper of a merchant.

Hence, as to the first act of bankruptcy, there has been no general suspension of commercial paper by a merchant, within the meaning of the act.

Second. The sale of the stock taken by defendant and sold in gross was not fraudulent or made to defeat the bankrupt act.

Third. The deed of trust given in lieu of a mechanic's lien was not a preference within the meaning of the bankrupt act.

Case No. 17,308.

WEAVER v. ALTER et al.

[3 Woods, 152.] [1]

Circuit Court, D. Louisiana. April Term, 1878.

EQUITY PRACTICE — CROSS BILL BETWEEN CO-DEFENDANTS—MORTGAGES—ANNULMENT OF TAX SALE.

1. A controversy between co-defendants to a bill in equity cannot be the matter of a cross-bill, unless its settlement is necessary to a complete decree upon the case made by the original bill.

[Distinguished in Gregory v. Pike, 29 Fed. 590.]

2. The annulment by decree of court of a tax sale of premises mortgaged to secure notes held by different parties, inures to the benefit of all such holders, and not solely of the holder at whose suit the decree was made.

3. Where, according to the jurisprudence of Louisiana, property mortgaged to secure several notes has been sold, at the suit of the holder of one of the notes, for a sum insufficient to discharge the entire mortgage debt, and he has been paid his pro rata share of the proceeds of sale, the purchaser takes the property subject to the lien of the mortgage which secures the pro rata share of the other holders of notes. In such case, the prescription of one of such notes does not inure to the benefit of the other holders of notes secured by the mortgage. The pro rata share of each note holder is unaffected thereby.

In equity. Heard for final decree upon pleadings and evidence.

The bill was filed by the complainant (Daniel Weaver], who was the holder of one of the notes secured by a mortgage, to recover from the purchasers of the mortgaged property, who had become such at a sale ordered by the court in a suit to enforce the mortgage, his share of the purchase price, and to assert his lien therefor on the mortgaged premises.

The facts were as follows: The complainant and respondents [Charles E. Alter and others] each held one or more promissory notes which were secured by a common mortgage upon the Ormond plantation, a plantation situated in the parish of St. Charles, in this state. The common mortgage was executed in the year 1871. Subsequently the mortgaged property was sold for taxes to Henry Shepherd. Within the period allowed for redemption of property sold for taxes, Alter, one of the respondents, tendered to Shepherd the amount paid by him at the tax sale, with the fifty per centum of interest, which amount Shepherd refused to receive. Thereupon, Alter instituted a suit against Shepherd to annul the tax sale on account of certain irregularities, and, as owner, to redeem. The supreme court of this state (Alter v. Shepherd, 27 La. Ann. 208) held the sale regular, but on account of the seasonable tender of Alter, who they held, as one of the mortgagees, came within the meaning of the term owner, decreed that the tax sale should be annulled and vacated. Alter then as holder of the notes secured by mortgage, obtained judgment and caused the mortgaged property to be seized under an execution, by the sheriff of the parish of St. Charles and sold. At this sale Alter became purchaser of a large portion of the mortgaged property, and Mrs. McLean, the other respondent, of the remaining portion. The property brought at this sale $24,205. Mrs. McLean, one of the respondents, filed a cross-bill, in which she alleged that the price of the portion of the mortgaged property which she bought was not equal to the amount of the whole price, which, upon a pro rata division, would come to her,

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

and she sought to recover the deficiency from her co-defendant Alter. To this cross-bill both the complainant and the respondent Alter demurred. One of the promissory notes secured by the common mortgage, it was alleged, had become prescribed since the sheriff's sale, though it was not contended that it had become prescribed prior thereto.

Both the complainant and the defendant, Mrs. McLean, insisted that the prescription of this note should inure to their benefit, and thus increase ratably the amount of the realized price to which they were entitled as co-mortgagees.

J. D. Rouse and Wm. Grant, for complainant.

T. J. Semmes, Armand Pitot, M. M. Cohen, Jos. P. Hornor, and W. S. Benedict, for defendants.

BILLINGS, District Judge. The questions presented for decision arise on the cross-bill, and relate to the effect of the redemption from the tax sale by Alter, and the effect of the alleged prescription of the non-presented note.

First. Is the matter set up by way of cross-bill, properly matter of a bill not original? The most precise definition of a cross-bill which I have been able to find in the text-books, is in Coop. Eq. Pl. p. 85. "A cross-bill," says he, "is a bill which ex vi terminorum implies a bill brought by a defendant in a suit against a plaintiff respecting the matter in question in that bill." But sometimes it is brought against the co-defendants in such depending suit, where they have opposite claims which the court cannot determine in such depending suit upon the bill filed, and the determination of such clashing interests is still necessary to a complete decree upon the subject matter of the suit. But in such last mentioned case, the original plaintiff must be named a defendant, together with the defendants in the first cause. See, also, to the same effect, Story, Eq. Pl. §§ 392, 396; Wright v. Miller, 1 Sandf. Ch. 123; Galatian v. Erwin, 1 Hopk. Ch. 48; Shields v. Barrow, 17 How. [58 U. S.] 145; Cross v. De Valle, 1 Wall. [68 U. S.] 14; Ayres v. Carver, 17 How. [58 U. S.] 594 and 595, and Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 809, 810. Now, the matter of the complainants' suit here is to recover, with privilege, so many dollars and so many cents from the defendant Alter as his ratable proportion of the price of the portion of mortgaged property bought by him, and from defendant Mrs. McLean, a fixed sum as the ratable proportion of the price of the portion of the mortgaged property bought by her. The subject matter of the cross-bill is a settlement between these two defendants of the balance due from one to the other, resulting from the price severally paid, and to be paid by them, as compared with the respective amounts of their mortgaged notes. With this accounting the complainant has no sort of interest. It could not at all affect his rights, nor qualify the decree in his favor. It has no more to do with the case, as presented by him, than would a cross-bill between defendants whom he had sued as members of an ordinary partnership for their virile share of a debt due by a partnership, where one defendant should interpose a cross-bill asking, as against a co-defendant, an accounting with reference to all the partnership affairs. The fact that both defendants are citizens of the state of Louisiana, would prevent the court having jurisdiction over the controversy presented by it, viewed as an original bill. As a cross-bill, it must fall, as presenting nothing which is necessary to a complete decree upon the subject matter of the complainant's case. The obligation of the defendant Mrs. McLean to the complainant, became distinct from that of her co-defendant when each concluded a purchase of a portion of the mortgaged land at the sheriff's sale, and he cannot be made to be embarrassed by any accounting between them.

Secondly. As to the effect of the proceedings by the defendant Alter to annul the tax sale. Precisely what this proceeding was appears in the statement of the case by the supreme court, in Alter v. Shepherd, 27 La. Ann. 208. They say the plaintiff, as holder of several promissory notes secured by mortgage, sues to annul a tax sale of the mortgaged property and a subsequent sale thereof by the purchaser, on the grounds of alleged defects and informalities in the tax sale, collusion therein in the second sale, and his right as mortgagee to redeem the land, which he alleges he offered to do according to law within the legal delay."

The court then proceed to discuss the question whether Alter, the plaintiff in that suit, as mortgagee, came within the meaning of the term "owner" as used in the statute of 1873, and decide that he did, and that, as owner, he was entitled to redeem, and decree "that the tax sale and all subsequent sales of said property be annulled upon Alter paying to Shepherd the amount of the tax, with the additional penalty of 50 per cent imposed by the statute; that Alter have judgment against the maker of the notes for $33,750 (the amount of the mortgage notes held by him), with interest, with vendor's privilege and mortgage." I think this decree interprets itself. It annuls the tax sale and the subsequent sale which still further conveyed the property, upon the refunding by the mortgagee of the amount of tax and penalty, and gives judgment for the amount of the notes secured by the common mortgage held by Alter, with vendor's privilege. They have simply vacated the tax conveyance, leaving the property subject to whatever privilege and mortgage were upon it prior to the execution of the conveyance. They have not increased or diminished the extent of Alter's privilege. Of course equity will require that the amount paid by Alter, which inured to the benefit of himself and his co-mortgagees, with the interest, should first be re-imbursed to him out of the proceeds of the mortgaged property, but with that exception the relative rights of the parties secured by the common mortgage

remain unchanged. Indeed, had the supreme court designed to make their decree inure to the benefit of Alter solely, they would have decreed, not the annulment of the conveyance, but a conveyance from the tax sale purchaser or his transferee to Alter.

It was urged that the rule prescribed by the Civil Code, arts. 1970 and 1977, which direct that, in case the revocatory suit brought by a judgment creditor to annul a contract made by his debtor in fraud of his rights, is maintained, that the property which was the subject of the contract should be applied to the judgment of the plaintiff. But these articles provide for the revocation of the fraudulent contract only so far as relates to its effects upon the complaining creditor. The mortgagee in this case had no right in equity to have a preference over his co-mortgagees. Nor did the decree of the supreme court give him any. It annulled the sale, and that cancellation operated necessarily in aid not only of the plaintiff in the suit, but of all parties holding concurrent mortgages. The suit of Alter v. Shepherd, supra, was not a suit under these articles of the Code, but a suit to enforce the rights of Alter to redeem, as an equitable owner, under the law regulating the sale of land for taxes. When viewed as such an action, it gave the plaintiff only the right to redeem for himself and his co-mortgagees.

Thirdly. It is urged, both by the complainant and the respondent Mrs. McLean, that one of the notes for the sum of $5,000, secured by the common mortgage, has, since the sheriff's sale, become extinguished by prescription, and that this fact should to that extent reduce the mortgage and ratably increase the amounts coming to them respectively. The theory of the law as to the effect of a judicial sale provoked by one of several parties holding concurrent mortgages is, that the sale does not extinguish the other mortgages created by the same act and at the same date. If the mortgaged property does not bring enough to satisfy in full all the concurrent mortgagees, the sheriff should collect the pro rata share of the seizing creditor, and the portion coming to the other mortgagees should be left in the hands of the purchaser, subject to their call and secured by their mortgages. Pepper v. Dunlap, 16 La. 163, and Scott v. Featherston, 5 La. Ann. 306. If, then, as in this case, the property brought less than enough to satisfy the common mortgage so far as the purchaser is concerned, after paying to the seizing creditor his pro rata of the proceeds of the sale, he would assume a debt to each of the other holders of the mortgage notes equal to his pro rata share of the proceeds, who, from the time of the sale, has, as against the purchaser and the property in his hands, a claim secured by his mortgage for a sum thus judicially ascertained. If, after the sale, extinguishment of one of the mortgage notes takes place, the same effect is wrought, so far as relates to the purchaser, as would be brought about if he had purchased property subject to an indivisible claim secured by a mortgage. The extinction of the claim would extinguish the mortgage. Grayson v. Mayo, 2 La. Ann. 927. So here, if one of these notes secured by the common mortgage has, since the sheriff's sale, been extinguished, it has not affected the claims or privileges which the other holders of similar notes have against the property or purchaser. Had there been no sale, the extinction of one of the notes by prescription would have inured to the benefit of the holders of the others. But the intervention of a third person under a judicial sale, with liabilities fixed by the sale, prevents, so far as he is concerned, that result. The pro rata share of each holder of the mortgage notes remains unaffected. In the language of the supreme court, in Scott v. Featherston, supra, "the portion coming to the other mortgage creditors would, in that case, remain in the hands of the purchaser, subject to their call and secured by their mortgages."

As to the defense set up by the respondent Alter in his answer and cross-bill, that the complainant, as pledgee, cannot recover, I think, according to the proofs and under the law of Louisiana, it cannot be maintained.

The demurrers to the cross-bill of the respondent Mrs. McLean must be sustained, and the complainant must have a decree against the respondents Alter and Mrs. McLean, severally, for the pro rata share of the price of the portion of the mortgaged property purchased by them respectively, with interest, less the amount as against the respondent Alter of his payment to effect the redemption, with the addition of expenses and interest.

WEAVER (BONNELL v.). See Case No. 1,630.

WEAVER (GODDARD v.). See Case No. 5,495.

WEAVER (LOWRY v.). See Case No. 8,584.

Case No. 17,309.

WEAVER v. McLELLAN.

[5 Ben. 79.] [1]

Circuit Court, E. D. New York. March, 1871.

HALF PILOTAGE — VESSEL OWNED IN ANOTHER STATE NOT A FOREIGN VESSEL.

1. The pilotage law of New York required "foreign vessels and vessels under register" to take pilots and gave half pilotage on a tender of service to such vessels, and a refusal. A tender of service was made by a pilot to a vessel owned by residents of Maine, and sailing under a fishing license. The service being refused, the pilot filed a libel to recover half pilotage. *Held*, that, to entitle the libellant to recover, the tender must be made to a vessel subject to pilot fees.

2. This vessel was not within either of the classes specified, and was not, therefore, subject to pilot fees.

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

[This was a libel by James H. Weaver against Hector McLellan to recover half pilotage fees.]

BENEDICT, District Judge. This is an action by a pilot to recover half pilotage, of the owner of the schooner E. R. Kane. It presents the same question as to the jurisdiction of the court, which was raised and decided in the previous case of Banta v. McNeil [Case No. 966], where my opinion upon the point is expressed.

But it involves an additional point, namely, whether the defendant's vessel, to which the libellant tendered his services, was within the scope of the state statute, upon which reliance is placed; and it is contended that, under the act relied on, she was not bound to take a pilot, and could not be the subject of a tender of pilot services, within the meaning of the act. The tender, which is by the statute made in certain cases equivalent to performance, must be a tender to a vessel subject by law to pilot fees, and, therefore, presumed to require the service tendered.

The law of the state, upon which alone reliance has been here placed, to create a liability on the part of the defendant, declares such liability only in the case of "foreign vessels and vessels under register." This phrase designates two distinct classes of vessels, and excludes all others. In one class are included vessels owned in any state of the Union, if registered, distinguishing between the registered vessels of the United States, and those enrolled or licensed, and excluding the latter. In the other class are all vessels which cannot be registered or enrolled, because not owned by citizens of the United States. The latter only are "foreign vessels," within the meaning of the act.

Here the proofs show, that the vessel in question was owned by a citizen of the United States, a resident of Maine, and that she was sailing under a fishing license; and it is said that she was a foreign vessel, because her owner resided in Maine, since each of the states is considered foreign to the rest. The distinction alluded to as founded upon the non-residence of the owner within the state limits, has no application here. It has never yet been recognized by the supreme court, except in cases of material men, and it would seem (The St. Lawrence, 1 Black [66 U. S.] 522) to be there noticed simply as affording ground for a presumption of exclusive personal credit. It has no effect in a case like this, where the statute itself makes no such distinction.

The words "vessels under register," include vessels owned in other states, if registered, and the act distinguishes only between those registered, and those not registered, because owned by foreigners, and does not mention the class to which this vessel belongs, namely, the enrolled or licensed vessels of the United States. Nor was this vessel under a register. She was not registered, but was sailing under license. It is true that she had permission to touch at foreign ports, and, therefore, under section 21 of the act of 1793 [1 Stat. 313], was bound to have a manifest, and enter her cargoes as provided for ships arriving from foreign ports; but she was not, therefore, a registered vessel, but still a licensed vessel.

Such a vessel was not bound by any law to take a pilot. She is presumed not to require the services rendered by the libellant, and no liability attached by virtue of the statute to the defendant, because of the master's refusal to take the pilot, or because of the service performed by the pilot in making the tender of his services.

The libel must, therefore, be dismissed, with costs.

WEAVER (NEWTON v.). See Case No. 10,193.

Case No. 17,310.

WEAVER v. The S. G. OWENS.

[1 Wall. Jr. 359.] [1]

Circuit Court, E. D. Pennsylvania. Nov. 13, 1849.[2]

FOREIGN AND DOMESTICK VESSEL—JURISDICTION—LIEN—SHIP CHANDLERY.

1. For the purposes of enforcing a lien given by a state law against domestick vessels, and where the national character is not in dispute; the person rightfully in possession, navigating the vessel for his own use and profit, by officers and mariners appointed and employed by himself, will be considered the owner, whether he be lessee, mortgagee, or parol vendee, notwithstanding some other person may be the registered owner and have the legal title or general ownership in himself.

[Cited in The Island City, Case No. 7,109; Reeder v. The George's Creek, Id. 11,654; The John Farron, Id. 7,341.]

[Cited in Metcalf v. Hunnewell, 1 Gray, 298; Donnell v. The Starlight, 103 Mass. 231.]

2. The district court of the United States has power to enforce the lien on domestick vessels under the Pennsylvania statute of June 13th, 1836, which, though providing, almost entirely, for a process of enforcement through the state courts, does yet not exclude, but in one section, contemplates the action of the federal court.

3. "Ship chandlery," is a term of extensive import, and includes every thing necessary to furnish and equip a vessel, so as to render her seaworthy for the intended voyage. Accordingly not only stores, stoves, hardware and crockery, were held to be within the term, but muskets and other arms also;—the voyage being round Cape Horn to California, in the course of which voyage, arms are sometimes carried for safety.

[4. Cited in The Witch Queen, Case No. 17,916, to the point that the question whether a vessel is to be regarded as foreign or domestic depends upon the residence of her owner, and not on the place of her registry or enrollment.]

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

The ship S. G. Owens was registered in the district of Maryland, as the property of Mr. Buck and others, her owners, resident in Balti-

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

[2] [Affirming Case No. 13,634.]

more. On the 21st of February 1848, being then at Philadelphia, she was made the subject of an agreement by the owners, who "do by these presents sell said named ship to H. & S. Townsend." Part of the money was to be paid on the execution of the agreement, and the balance on certain days thereafter. The new purchasers, the Townsends, agreed "to forfeit all claim of ownership on the said vessel," provided they fail to perform their portion of the contract; and the other parties agree that when the money is all paid, they will have the ship "legally transferred" to the Townsends. The registry was not changed. This agreement was made and executed at Philadelphia, where the Townsends were. But they were not residents there in the ordinary sense of that word. They seemed to be mere adventurers who came there for the occasion, one of them intending to take passage in the ship for California, which was to be its first destination. They took possession of the vessel, to fit and navigate her for their own use and profit, and appointed her officers and seamen. They then proceeded to fit her out on an expensive scale for two hundred and fifty passengers, and laid in stores for a two years' voyage. The contracts with the material men and others were not made by the Townsends in person. The captain, sometimes alone, sometimes in company with the father of one of the partners, who acted as the agent of the concern, gave orders, and they were executed in all cases on the credit of "the vessel and her owners." The Townsends paid the money required to be paid on the execution of the agreement, but could pay no more; and on the 25th April transferred their contract and the outfits of the vessel to Evans of Philadelphia, who paid the purchase money on the vessel, and had her registered anew, in his own name. Between the date of the agreement with the Townsends and the date of Evans' purchase, the libellants furnished certain matters to the ship, for which this libel was filed. [Case No. 13,634.] It is requisite here to state that an act of the Pennsylvania legislature declares (Act June 13th, 1836, § 1) that vessels of all kinds, "built, repaired or fitted within this commonwealth, shall be subject to a lien for all debts contracted by the masters or owners thereof, for work done or materials found or provided in the building, repairing, fitting, furnishing or equipping of the same." But it confines by express words (Act June 13th, 1836, § 3) this lien, to "carpenters, blacksmiths, mast-makers, boat-builders, block-makers, rope-makers, sail-makers, riggers, joiners, carvers, plumbers, painters, ship-chandlers, coppersmiths, brass-founders, coopers, venders of sail-cloth and lumber-merchants." Any one of these persons (section 4) "may file a libel in the office of the district court or court of common pleas of the proper county, wherein the cause of action shall arise, or in any county where the said ship may be found." On the filing of this libel (section 8), writs, whose forms are prescribed by the act, both for mesne and final process, and issuing from a "county," are given by "the commonwealth of Pennsylvania to the sheriff of said county." If there are more libels than one, there may be a consolidation of suits. (Section 9). Questions of fact are to be "tried by a jury of the county." (Section 13.) But the act, forbidding any attachment to issue against a vessel already sold or held, by the district court of the United States (section 9), provides, nevertheless, that if the payment of her debts prior to the time of sale, shall be decreed by the said court, "the lien shall continue until the payment thereof shall be enforced by the process of such court." A complete system of enforcing the lien is provided by the act in the state court, and this is the only allusion to the courts of the United States in the act.

In this state of facts, the libellants, trading as "ship chandlers," had filed claims for ropes, ship tools, sea stores, provisions, glass and Britania ware, china, crockery, pencils, and varieties of hardware, including cooking stoves, cooking utensils, muskets and other arms, furnished, as has been already said after the time when the Townsends became interested in the vessel, and before the transfer to Evans. The testimony of several shopkeepers and nautical men proved that, in their understanding, ship chandlery was a word of very extensive import, including every thing that could be wanted, on, in or about a ship's service. And in a printed advertisement of the plaintiff's, for the sale "of ship chandlery," were enumerated near two hundred articles, including quills, ink and ink-stands, letter-paper, table-spoons, tea-spoons, knives, forks and cork-screws, besides a great number of items of hardware, and a general announcement of "crockery" and "tin-ware." It appeared also that guns were taken for defence upon a California voyage, round Cape Horn.

The following questions accordingly arose in the court, where the case came on appeal: I. Whether, as regards the port of Philadelphia, the ship was a foreign or domestick one. II. Whether if a domestick one, the district court of the United States could enforce the lien given by the Pennsylvania statute against domestick ships. III. If it could, whether such articles as those furnished in this case, were within the terms "ship chandlery," and such accordingly as "ship chandlers" could claim a lien for.

G. M. Wharton and Mr. Kennedy, for Evans.

There is no lien under the general maritime law. For all the purposes of lien the vessel, by the agreement of February 21st, had passed to the Townsends. The language is, we "do sell." These persons resided in Philadelphia, so far as they resided any where. The vessel was in her home port and a domestick vessel; a case where no lien attaches for supplies. The General Smith, 4 Wheat. [17 U. S.] 438.

II. The Pennsylvania statute does not give a lien which the courts of the United States can enforce. That act designed to create and en-

force in courts of the state, a lien which neither existed nor could be enforced elsewhere: and it simply gives admiralty process to the state courts, in certain cases where none existed in the admiralty itself. The admiralty is not once mentioned in the act, except to prevent a conflict with the state jurisdiction. The process prescribed by the act, testes from a "county," and is from a state to a "sheriff." The act provides for consolidation of suits and trial by jury; proceedings unknown to the admiralty. It is a state affair in its very source; and the act itself, as it ought to do, and as it had the power alone to do, enforces its protection through courts where it had power to enforce them, if any where, and not in this court where it has no power at all. The provision in the ninth section refers to the case of foreign vessels against which the act gives a lien as well as against domestick ones, which may be held by the United States process in virtue of general principles.

But in the last place, the act never meant to give a lien for such articles as are embraced by this claim. The court has decided that it gives no lien to stevedores. M'Dermot v. The S. G. Owens [Case No. 8,748]. It embraces no more, those persons who supply sea stores, provisions, or articles for passengers' use merely. The context of the section, and the class of persons embraced by it, shew that it meant to protect those persons alone who furnish articles used in or about the vessel itself. Stores are used by the passengers.

Donegan & Barnes, for libellants.

There is a lien under the general admiralty law. The agreement with the Townsends was not a sale. The registry remained unchanged. The ship was never "legally transferred;" and the Townsends, having failed to pay the balance of the purchase money, "forfeited all claim of ownership." The owner of the vessel was therefore always at Baltimore: that was her home port: and it is a foreign port so far as Philadelphia is concerned.

II. The admiralty may enforce the state lien, if the ship is not foreign. The ninth section of the state act, itself, declares that if the admiralty shall hold or have sold the vessel, no process shall issue from the state for the lien which the act gives: and provides that if payment of her debts prior to time of sale be decreed, the lien shall continue until payment be enforced by process of such court: i. e. by the court of admiralty. The act could give no power to the admiralty to enforce a lien created by the state. It is enough that it creates the lien. It assumes, and rightly, that the admiralty in virtue of its own powers, can enforce a lien already existing. This matter has been decided by the supreme court. Peyroux v. Howard, 7 Pet. [32 U. S.] 324, 341. It provides a state process, where the admiralty don't proceed, only because it could provide no other.

The act does not mean to give a lien for such articles alone as are attached to the ship's hull. It meant to give to a creditor in a domestick port, the same rights that one in a foreign port would have. An act of Pennsylvania relating to liens on houses, confines its lien to "work done or materials furnished for or about the erection or construction" of the house. But the lien here is for work done or materials found or provided in the building, repairing, fitting, furnishing or equipping the ship. It is, moreover, a remedial act and to be construed in advancement of the rights of the "ship chandler," whom it provides for. The evidence is that, in nautical and common parlance, every thing used in or about the ship's service is included by the term ship chandlery.

GRIER, Circuit Justice. In reference to the question, whether a court of admiralty has jurisdiction to enforce a lien on a vessel given by a state law. I need only say that the supreme court of the United States has decided that such a lien may be enforced, and that the point is not open. Peyroux v. Howard, 11 Pet. [36 U. S.] 324, 341. The eighth section of the present act I may add, however, contemplates that this lien may be enforced in a court of admiralty as well as in a state court.

The next question is, whether this ship is foreign or domestick, as regards the port of Philadelphia? It is admitted that a vessel owned in a port of any other state, which puts into the port of Philadelphia, would be liable, under the general maritime law of the United States, for repairs made or necessaries supplied, in order to enable her to prosecute her voyage. She is considered for this purpose as a foreign vessel, when in the port of a state where her owner does not reside, notwithstanding her national character as an American vessel remains the same.

The enrolment of a vessel is for the purpose of establishing her national character and to give her the privileges of an American vessel. In a question of ownership inter partes, it is but prima facie evidence of title in the person in whose name she is registered, and liable to be rebutted by proof of actual ownership in another, whether temporary or absolute, as lessee or vendee. It is not necessary to enquire whether by the maritime law the title to a ship can pass by parol. I have no doubt but that by the law of Pennsylvania, the title would pass by actual sale and delivery as in the case of other personal chattels, without any written bill of sale. The formal bill of sale reciting the registry may be necessary for the purpose of enrolment, but as between the parties, and those who deal with the vessel, and where the national character is not in dispute, the person rightfully in possession navigating the vessel for his own use and profit, by officers and mariners appointed and employed by himself, will be considered the special owner, whether he be lessee, mortgagee or parol vendee, notwithstanding some other person may be the registered owner, and have the, so called, legal title, or general ownership in himself. If the Townsends had hired this vessel for a year, or for a single voyage from Philadelphia to California

and back again, although Mr. Buck in Baltimore, might be the lessor, and registered and general owner of the vessel, with the legal title, yet the Townsends and not Buck, would be considered as owners, as between themselves and all persons dealing with the Townsends, for supplies furnished to the vessel. Neither they nor the captain, their officer and agent, could bind Mr. Buck the registered owner, by any contract made for such supplies. A vessel hired or leased by a merchant in Philadelphia from a merchant in Baltimore, for the purposes of a voyage from Philadelphia to California and back again, and furnished and equipped by the lessee in this port, could not be considered as a foreign vessel by those who dealt with the lessee in this place, notwithstanding the legal title and general ownership of the Baltimore lessor. In such case this would be considered as the home port of the vessel.

We have in this case not a mere agreement to sell at a future time, but a sale in verba de presenti—(we "do by these presents sell said named vessel)—an actual delivery to the vendee, and a large sum of money paid to the vendor. It is true there is an attempt to give a defeasible title, on condition subsequent. The vendor has endeavoured in this way to retain a lien in the nature of a mortgage to secure the balance of the purchase money;—whether successfully or not we need not enquire.

The Townsends having thus obtained rightful possession of the vessel, with a title (defeasible perhaps on condition subsequent, or as mortgagor) whether legal or equitable it matters not,—proceed to equip her for a voyage to carry passengers from this port to California. They appoint the captain, hire mariners, contract with passengers; and the libellants treat with them as owners, and supply materials to furnish and equip the vessel for her intended voyage. No one supposed he was dealing with Buck in Baltimore as owner, or that the Townsends or the captain appointed by them, could bind Buck by any contract. Buck is guilty of no fraud to the injury of libellants. They treated with the Townsends as owners, who for the time at least, resided here. As to the libellants and all who dealt with them, the ship was a domestick vessel, and this her home port. No seizure of the vessel by Buck, under his supposed legal title as mortgagee, would defeat or supersede any liens obtained by the libellants or others against the ship, while in the possession of the Townsends. If the libellants treated with them as the legal owners, they cannot complain, if every remedy against the vessel be allowed them as if such were the actual fact.

Under no view of the facts of this case, therefore, can this vessel be treated as foreign.

Being a domestick vessel, then, have the libellants any lien under the act of Pennsylvania, which enumerates ship chandlers among the persons entitled to such protection?

Although the counsel for the owners insist that many of the articles provided by the libellants, as groceries, crockery-ware, cooking stoves and cooking utensils, muskets and guns, are not ship chandlery; yet they furnish us with no criterion to test the fact as to what articles are, and what are not within the definition. A chandler is defined by lexicographers, as "an artisan whose trade is making candles, or as one who sells candles." This was the meaning of the term as originally used: but as sellers of candles in course of time, extended their business and assortments so as to include groceries of many kinds, the meaning of the term became more expanded; and we find it used as a synonime for "dealer." Thus a dealer in corn is called in England a corn chandler.

A "ship chandler" is usually defined, as "one who deals in cordage, canvass and other furniture of ships." Now it has been decided (Brough v. Whitmore, 4 Term R. 206) that provisions for the use of the crew are included in the term "furniture" of a ship. In fact, "furniture of ships," ex vi termini, includes every thing with which a ship requires to be furnished or equipped to make her seaworthy. The testimony of the merchants and nautical men who have been examined on this subject, leaves no doubt that the term is indefinite, and includes all articles furnished by ship chandlers, which are almost innumerable. Persons fitting out vessels apply to these persons for every thing necessary for the outfit, from a needle to an anchor, including groceries, liquors and all ship stores; in a word every thing necessary to furnish and equip a vessel, so as to render her seaworthy for the intended voyage. The materials necessary to fit, furnish and equip a vessel, must depend on the nature of the voyage. A steam packet and a whaling vessel, would require very different furniture and equipments, both in character and amount. A vessel bound for California with two hundred and fifty passengers, would not be seaworthy for such a long voyage, without immense stores of provisions of all sorts. It is moreover found necessary for vessels going round Cape Horn, to carry arms for the purpose of defence.

The law gives a lien to a ship chandler, and does not define or limit the articles for which he is to have this lien, further than that they shall be used in "fitting, furnishing and equipping the vessel;" and every debt contracted by the master or owner of a vessel, with a ship chandler for articles or materials used for any one of those purposes, is within the letter as well as the spirit of the act; it matters not by what other names the same article or material may be designated. The master and owners of this ship have also given their own definition of ship chandlery, by ordering from the libellants, who as "ship chandlers," advertised these things, to fit and equip the ship with them for the voyage. Decree of the district court affirmed with costs.

Case No. 17,311.

WEAVER v. THOMSON.

[1 Wall. Jr. 343.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 5, 1849.

ADMIRALTY—APPEALS—AMENDMENT OF LIBEL.

An appellee in admiralty may amend in this court the libel he has filed in the district court, so as to make a claim here for damages above costs, caused by a vexatious appeal.

[Cited in The Charles Morgan v. Kouns, 5 Sup. Ct. 1175, 115 U. S. 76.]

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

The district court having given a decree in admiralty, [case unreported,] the libellee, who had been cast, appealed to this court. The libellant below—the appellee here—now setting forth that the appeal was for delay merely, and vexatious, and that he had been greatly injured by the mere fact of the delay, Mr. Vandyke asked leave to amend the libel originally filed in the district court, so as to make a further claim for damages, above costs, thus caused by appellant's act.

GRIER, Circuit Justice. I have repeatedly expressed my design of discouraging appeals unless there was some substantial grounds for them in a manifest error in the decree of the court below. In questions particularly of mere fact, and in those, like salvage, depending on sound discretion, I discourage them because they lead to speculations on the temperaments and dispositions of the respective judges, and are taken on a little besides a calculation of chances. Where the want of ground for the appeal is so obvious as to shew that the case must have been carried up here for delay merely, I see no objection to allowing a party to recover damages for any injury done by the delay to which he has thus put his opponent in a vexatious and unreasonable way. Amendment allowed.

Case No. 17,312.

WEAVER v. WALTON.

[The case cited under above title in 1 Flip. 441, 5 Chi. Leg. News, 125, and 6 Alb. Law J. 422, is the same as Case No. 5,488.]

WEAVER (WARREN v.). See Case No. 17,203.

Case No. 17,313.

In re WEBB et al.

[2 N. B. R. 614 (Quarto, 183); [2] 2 Am. Law T. Rep. Bankr. 87; 9 Int. Rev. Rec. 169; 16 Pittsb. Leg. J. 43.]

District Court, S. D. Ohio. May, 1869.

BANKRUPTCY OF PARTNERSHIP—PRIORITY OF UNITED STATES—REVENUE BOND SIGNED BY INDIVIDUAL PARTNERS.

Where individual members of a co-partnership signed internal revenue tobacconist's bonds as accommodation sureties, and the firm subsequently being adjudged bankrupt, the collector of internal revenue holding the bonds, the conditions of which had been broken, proved the debts thereon in bankruptcy, and claimed payment out of the partnership assets by priority of distribution to the United States. *Held*, that the debts were individual debts, and the claim of the United States to prior payment out of partnership assets was not valid, but it would be good against individual assets.

In this case, the register, Flamen Ball, Esq., made the following report:

In pursuance of an order of reference, to me directed and issued by the court on the petition of Drausin Wulsin, Esq., assignee of said bankrupts, in the matter of the claim of Leonard A. Harris, collector of internal revenue of the United States, for the First district of Ohio, after notifying said collector, I sat at my office in Cincinnati, on the 22d day of March, and on the 1st day of April, 1869, to hear such testimony as might be produced by either party in reference to the claim of the United States against said bankrupts, filed in this cause; and having heard all the testimony offered by said parties, I do now herewith return the same, with a statement of the material facts proved, and the points of law arising thereon. On the 20th day of February, 1868, the said collector made and filed in this court proof of a claim in favor of the United States, and against the firm of William A. Webb & Co., amounting in all to the sum of nine thousand and seven dollars and fifty cents. As to the sum of seven dollars and fifty cents, part of said claim, there is no dispute; but the question at issue relates to the liability of the firm upon the two bonds, copies of which are exhibited with said evidence. These bonds were the ordinary bonds given to the collector by manufacturers of tobacco, and are designated as "Tobacconist's Bonds." The first was executed May 14th, 1867, by Robert Walter as principal, and William A. Webb and Gilbert M. Johnson as sureties, conditioned to pay the sum of five thousand dollars in case of default, and the second bond was executed by Samuel Lottier and Samuel R. Wade as principals, and by Mr. Webb and Mr. Johnson as sureties, conditioned to pay the sum of four thousand dollars in case of a similar default. The condition of each bond has been broken by the principals, and the United States, through their collector, claims the whole amount of both bonds as a preferred claim out of the assets of the late firm of William A. Webb & Co., now in the hands of the assignee. The assignee claims that the obligation of each bond is the obligation of the parties subscribing the same as individuals, and that the same are not the obligations of the firm, and that the partnership debts must be first paid out of the partnership assets. There is no proof showing that either of these obligations was incurred by the partnership, but, on the contrary, the evidence shows that the firm de-

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

[2] [Reprinted from 2 N. B. R. 614 (Quarto, 183), by permission.]

rived no benefit or advantage, as consideration for signing the same, but that they were merely accommodation sureties. Lottier & Wade were the principals in one bond, Robert Walter was the principal in the other.

It is conceded that if any assets should be realized from the separate estates of the sureties, those assets should be applied to the payment of this debt in preference to the individual creditors of the respective bankrupts; so, also, it is conceded that if a surplus of the partnership assets should remain after the payment of the partnership debts, such surplus should be so applied. The principle of law applicable to this case, in my opinion, is, that partnership assets must be first applied to the debts of the partnership; and that as this debt is not a debt of the partnership, but simply a debt of the individual partners, the claim of the United States must be postponed until all the debts of the partnership shall be paid from the assets of the partnership. This principle of law is sustained by the decisions of all courts everywhere, and it is fully recognized by the thirty-sixth section of the bankrupt law [of 1867 (14 Stat. 534)], which provides, inter alia, as follows: "And after deducting out of the whole amount received by such assignee, the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the co-partnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors." The partnership property is a fund appropriated by law to the payment of the partnership debts, and, as the liability of the several partners on the bonds now under consideration is binding upon them as individuals, and not on them as partners in a firm, I am clearly of the opinion that the claim asserted by the collector to priority in the distribution cannot be sustained.

LEAVITT, District Judge. The opinion of the register on the question stated by him is affirmed, and the assignee of the bankrupts is directed to allow and adjust the claims against the sureties in the bonds described in favor of the United States, on the basis that the claims against said sureties are against them in their individual capacities, and not as members of said firm.

Case No. 17,314.

In re WEBB et al.

[3 N. B. R. 720 (Quarto, 177);[1] 2 Chi. Leg. News, 313.]

District Court, S. D. New York. May 10, 1870.

BANKRUPTCY—DISCHARGE.

To entitle a bankrupt to discharge, the proceeds of his property to be divided among his creditors must be equal to fifty per cent. at the time of the hearing of the application for the discharge before the register.

[Cited in Re Kahley, Case No. 7,594; Re Van Riper, Id. 16,874; Re Vinton, Id. 16,951; Re Waggoner, 5 Fed. 917.]

Application of the bankrupts [Charles C. Webb and Thomas H. Taylor] for final discharge.

BLATCHFORD, District Judge. The proceeds of the bankrupts' property in the hands of their assignee, subject to be divided among their creditors, must, at the time of the hearing of the application for their discharge before the register, be then equal to fifty per centum of the amount of the claims proved against their estate, on which they are liable as principal debtors, in order to entitle them to discharge, unless the assent named in section 33 [of the act of 1867 (14 Stat. 533)] is filed. I concur with the view taken in Re Freiderick [Case No. 5,092].

[1] [Reprinted from 3 N. B. R. 720 (Quarto, 177), by permission.]

Case No. 17,315.

In re WEBB et al.

[6 N. B. R. 302.][1]

District Court, D. Kentucky. 1872.

BANKRUPTCY — ASSIGNEE'S LIABILITY FOR RENT.

A landlord's right to rent, against the bankrupt's estate, expires on the day of adjudication. If the assignee occupy the premises after that day, he, and not the estate, is liable for the rent; when, however, his occupancy is for the benefit of the estate, he will be credited by the rent he is obliged to pay.

[Cited in Bailey v. Loeb, Case No. 739; Re Hufnagel, Id. 6,837.]

[Cited in Deane v. Caldwell, 127 Mass. 244; Abbott v. Stearns, 139 Mass. 170, 29 N. E. 379.]

The bankrupt held a lease from Gustavus Schurman's estate, now in the hands of Robert Cochran, as receiver, by order of the Louisville chancery court, at an annual rental of two thousand seven hundred dollars, which lease expires on the first day of July, eighteen hundred and seventy-two. J. C. Webb & Co. were forced into bankruptcy on the ninth day of October, eighteen hundred and seventy-one, and the assignee took possession of the leased premises, and held the same up to January thirteenth, eighteen hundred and seventy-two, for the purpose of selling off the stock on hand, at which time the assignee paid all rent to January thirteenth, eighteen hundred and seventy-two, and offered to surrender the premises to the landlord, which surrender the landlord accepted, with the express understanding that he claimed the rent for the full term of the lease up to July first, eighteen hundred and seventy-two. The landlord afterwards rented the premises to another tenant at four hundred and fifty-two dollars and fifty cents less than J. C. Webb & Co. had agreed to pay to July first, eighteen hundred and seventy-two. The

[1] [Reprinted by permission.]

case came up in an agreed statement of facts. The landlord claimed a lien under the statute laws of Kentucky, which give the landlord a lien on the property of the tenant or sub-tenant on the leased premises for twelve months' rent, due or to become due. The assignee claimed that he had a right under the bankrupt act to surrender the lease, and that neither the assignee nor the bankrupt's estate were liable to pay the sum of four hundred and fifty-two dollars and fifty cents, claimed by the landlord.

BALLARD, District Judge. I am induced to the opinion that under the bankrupt act the landlord's right to rent against the bankrupt's estate expires on the day of the adjudication. If the assignee occupy the premises after that day, he, and not the estate, is liable for the rent. But, of course, when his occupancy is for the benefit of the estate, and is in fact beneficial, he will be credited by the rent which he is obliged to pay. In this case the rent should be paid to January thirteenth, eighteen hundred and seventy-two, and no longer.

Case No. 17,316.

In re WEBB.

[Decided by the supreme court of New York, Second District, October 22, 1862. See 10 Pittsb. Leg. J. 106.]

Case No. 17,317.

In re WEBB.

[4 Sawy. 326; 16 N. B. R. 258; 10 Chi. Leg. News, 27; 5 N. Y. Wkly. Dig. 174.] [1]

District Court, D. Nevada. Sept. 7, 1877.

BANKRUPTCY OF A PARTNER — JOINT CREDITOR — PROOF OF DEBT.

A joint creditor, in case of the separate bankruptcy of one member of the firm, has a right to prove his joint debt, and vote for assignee in the separate bankruptcy.

[In the matter of Watson T. Webb, a bankrupt.] Webb, at the time he was adjudged a bankrupt, was a member of the firm of Webb & Mallard. At the first meeting of his creditors the register permitted both joint creditors of Webb & Mallard and separate creditors of Webb to prove their debts and vote for assignee. But two votes were cast for assignee, one by a joint creditor for James Hood, and one by a separate creditor for A. H. Ricketts. The register declared a failure to elect, and, there being no opposition, appointed James Hood to be assignee. Exception was taken to the action of the register in allowing the joint creditor to prove and vote, and the point has been certified for decision. There is also an application on behalf of Ricketts for an order removing Hood and appointing him as assignee. The register certifies that the only assets surrendered are joint assets.

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 5 N. Y. Wkly. Dig. 174, contains only a partial report.]

Whitman & Wood, for petitioner.
James Hood, in person, opposed.

HILLYER, District Judge. Whether a joint creditor may prove his joint debt and vote for assignee, in case of the separate bankruptcy of one member of the firm, is the question to be decided. Under our present bankrupt law [14 Stat. 517], many important consequences result from the proof of a debt, or the having a provable debt. By section 5034 the choice of assignee is to be made by the "greater part in value and in number of the creditors who have proved their debts." If it can be shown, then, that the joint creditors have a right to prove their debts, it would seem to follow that they have a right to vote for assignee. While there are conflicting decisions as to the effect of such proof, so far as my search has gone, all agree that the joint creditors may prove their debts in the separate bankruptcy, under section 5067. That section allows "all debts due and payable from the bankrupt" to be "proved against the estate of the bankrupt." Section 6 of the bankrupt act of 1800 (2 Stat. 23) allowed the "creditors" of the bankrupt to prove their debts, and under this general designation of "creditors" it was the opinion of the supreme court that a joint creditor might prove his debt in a separate bankruptcy. Tucker v. Oxley, 5 Cranch [9 U. S.] 34. Speaking of the joint debt in that case, Marshall, C. J., says: "Although due from the company, yet it is also due from each member of the company." It was also held that a proviso, similar to our present section 5118, that "the discharge should not affect any person liable as partner with the bankrupt," while the act did provide for a discharge from all debts which were, or might have been, proved, removed all doubt as to the right of a joint creditor to prove against the estate of one partner in bankruptcy.

I should be content to rest my decision upon the language of the present bankrupt law and the authority of Tucker v. Oxley, but for the fact that the decisions under the existing law are not uniform.

It was held, directly, that the joint creditors could not vote for assignee in case of the separate bankruptcy of one partner. In re Purvis [Case No. 11,476]. Yet in that case the joint creditors had proved their debts, apparently without objection. In Wilkins v. Davis [Id. 17,664], Lowell, J., states the true rule to be that the joint creditors may prove and vote for assignee.

In the following cases the right of the partnership creditors to prove their debts in the separate bankruptcy is conceded: In re Frear [Case No. 5,074]; In re Pease [Id. 10,881]; U. S. v. Lewis [Id. 15,595]. But no question as to their right to vote for assignee arose.

There are a number of other cases which indirectly touch this question. They are those upon the effect of a discharge granted to one partner in his separate bankruptcy. The law is (section 5119) that "a discharge in bankruptcy, duly granted, shall * * * release the

bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy." Whether or not a creditor's claim is released by a discharge depends upon its provableness; whether or not he can vote for assignee depends upon his having proved his debt.

Under our present bankrupt law there are decisions that a discharge granted to one partner, in his separate bankruptcy, releases him from his joint as well as individual debts. Such are In re Downing [Case No. 4,044]; In re Stevens [Id. 13,393]; In re Abbe [Id. 4]; In re Leland [Id. 8,228]; Wilkins v. Davis [supra]. There are also cases holding that such a discharge does not so release him. Such are Hudgins v. Lane [Case No. 6,827]; In re Winkens [Id. 17,875]. And see In re Noonan [Id. 10,292]; In re Little [Id. 8,390]; In re Grady [Id. 5,654].

These latter cases indirectly decide that the joint debts are not provable, as the former, it seems to me, decide that they are provable in the separate bankruptcy.

Again, it has been held that a joint debt is a provable debt under section 5021, and will support a petition for a separate adjudication against one partner. In re Melick [Case No. 9,399]. This has long been the rule in England. Ex parte Crisp, 1 Atk. 133; Ex parte Elton, 3 Ves. 238. And there, notwithstanding the general rule is to the contrary, the joint creditor, who takes out a separate commission, shares in the separate estate pari passu with the separate creditors. Story, Partn. § 278.

It may, then, be safely assumed that in this country the general current of authority is in favor of the provableness of the joint debts in the separate bankruptcy. It follows, from the language of the bankrupt act, that if the joint creditors may prove they may vote for assignee. Beyond this it is not necessary to decide the effect of proving the joint debts in the present case. The action of the register in allowing the joint creditors of Webb & Mallard to prove their debts and vote for assignee is approved, and the prayer of the petition is denied.

Case No. 17,318.

WEBB v. ANDERSON.

[Taney, 504.] [1]

Circuit Court, D. Maryland. April Term, 1858.

CHARTER PARTY—LIEN FOR FREIGHT—ASSIGNMENT OF BILLS OF LADING TO SECURE ADVANCES—DELIVERY OF CARGO—WAIVER OF LIEN—BANKRUPTCY.

1. The vessel, of which the libellant was master, was chartered to take a cargo of flour from City Point, in Virginia, to Rio Janeiro, and taking in a cargo of coffee at Rio, to proceed to Baltimore; the charterer was to pay $1.25 per barrel on the flour, in full for the hire of the vessel for the round voyage; so much thereof as might be needed for expenses, was to be paid to the master at Rio, and the balance, on the arrival of the vessel at Baltimore. The charterer obtained from L. G. (the claimant) large advances upon the flour, and endorsed the bills of lading (which were "to order") to L. G., who endorsed them to his agent at Rio, with directions to purchase coffee with the proceeds, to be shipped to him at Baltimore: the agents of L. G., at Rio, took possession of the flour, on its arrival, and shipped, by the same vessel, to Baltimore, one hundred and thirty bags of coffee, consigned to L. G.: on the arrival of the vessel at Baltimore, the charterer having meanwhile stopped payment, the coffee consigned to the claimant, was taken possession of, under these proceedings, to meet the owner's claim for the freight due by the charterer: the net proceeds of the sale of the flour at Rio did not cover the whole amount of the claimant's advances on it, and the consignment of coffee was insufficient to make up the deficit. *Held*, that if the coffee be regarded as the property of the charterer, and shipped by his agents, and the claim of L. G. nothing more than a lien upon it, it would be liable to the whole amount of the freight due under the charter-party.

2. As between charterer and ship-owner, it is always implied, unless there be an express contract to the contrary, that the freight must be paid before the delivery of the cargo.

3. If the interest which the claimant acquired in the flour was a mere lien which attached itself to the proceeds, and to the coffee purchased with the proceeds, then the lien for freight would be prior, and preferred to his.

4. But the interest of L. G. (the claimant) in the coffee, was something more than a mere lien; it was his property, and the charterer had no right to the possession or control of it, nor to the proceeds, unless a surplus remained, after satisfying the amount to secure which the flour had been transferred to the claimant.

5. The lien of the ship-owners upon the return cargo, under this charter-party, did not depend upon the funds with which it was purchased.

6. The claimant was a mortgagee of the flour, and nothing more; but to the extent of his interest, his rights stand on the same ground as if he had been the purchaser; and to that extent he is to be considered the purchaser and owner of the flour, from the time of the assignment and delivery to him of the bills of lading.

7. The claimant, however, purchased subject to existing claims, and whatever rights the ship-owners had, at that time, acquired under the charter-party, either to the outward or inward cargo, remained unchanged.

8. The delivery of the flour to the agents of the claimant at Rio, was a delivery to the claimant, who therefore held it, by reason of such delivery to him, discharged of any lien for freight, and consequently, when the flour was sold, there could be no lien upon the proceeds.

9. Under these circumstances, the coffee was purchased with the claimant's money, and shipped as his property at the ordinary freight.

10. If the bill of lading signed by the master was in violation of his duty, or inconsistent with the charter-party, it would not impair the rights of the ship-owners.

11. But this charter-party does not contain the usual clause by which the owner binds the ship, and the charterer binds the cargo to the performance of all the covenants in the charter-party, and upon general principles of law, the merchandise is bound for its own transportation only, and its liability cannot be extended further, except by stipulations in the charter-party under which the voyage was performed.

In admiralty. The libel in this case was filed by the late Judge Glenn, on the 20th of

[1] [Reported by James Mason Campbell, Esq., and here reprinted by permission.]

November, 1851, while at the bar, but being appointed district judge, during the pendency of the cause, it was, under the act of congress, transferred to the circuit judge (TANEY, Chief Judge), to be tried before him. The freight in question was earned under the following charter-party: "This charter-party entered into this eighth day of May A. D. 1851, between Beverly Clopton, as agent of British barque Invincible, and Thomas Davies, master, burden two hundred and eighty-nine tons, now lying in the harbor of City Point, of the one part, and David Anderson's Son, of the other part: witnesseth that the said Beverly Clopton, as agent, and Thomas Davies, as master aforesaid, for the consideration hereinafter mentioned, have let on freight, unto the said David Anderson's Son, the whole tonnage of the said vessel, excepting the cabin and other necessary room for the stowage of her dunnage, tackle, provisions and furniture, for a voyage to be made with the said vessel, in manner hereinafter mentioned; and the said Beverly Clopton, agent, and Thomas Davies do hereby promise, that the said vessel shall be staunch, strong, well-apparelled, and furnished with all things necessary for the intended voyage, and that she shall receive from the said David Anderson's Son a full and complete load of flour, at Port Walthall, where said barque shall come, and when the said loading is so completed, to depart with the first favorable wind and weather, and without delay unnecessary, proceed to the port of Rio Janeiro; the said flour to be delivered at said Port Walthall, alongside of said barque, at the risk and expense of said charterer, and on her arrival at said port of Rio, or as near thereto as vessels of her size can approach, shall, there and then, deliver her said cargo of flour within reach of the vessel's tackle, to the agents or assigns of the said David Anderson's Son; the said vessel to be furnished by the agents or assigns of said David Anderson's Son, with a cargo of coffee, or other articles, or so much thereof as may be necessary for ballast, which is to be delivered alongside of said vessel, which said vessel or barque aforesaid shall then proceed on her voyage to Baltimore, in the state of Maryland, where the cargo is to be discharged; and being there arrived, the said loading to be delivered to the said David Anderson's Son, agents or assigns, and thus to end the intended voyage; excepting always against the dangers of the seas, robbers, pirates, restraint of princes and rulers, and all unavoidable accidents and calamities. For and in consideration of which, the said David Anderson's Son does promise and agree to and with the said Beverly Clopton, agent, and Thomas Davies, master, that there shall be paid unto the said Thomas Davies, master, or his successor in office, freight, at the rate of one dollar and twenty-five cents per barrel, on the outward cargo, with five per cent. primage thereon, which is to be regarded as full compensation of freight out and home for the voyage; the said barque being bound to bring home a full cargo of coffee, or other articles, to Baltimore, free of additional freight; it being understood, however, that the said master shall be paid so much of his freight in Rio, as may be required for his expenses there, without commissions. And the said David Anderson's Son will load the barque here with dispatch; and further promises and agrees to allow thirty working days to load the barque at Rio, including the number of days required and necessary to discharge the same after arrival at that port; and the said David Anderson's Son further promises and agrees, that if the said vessel shall be detained longer than the days allowed, then there shall be paid to the captain of the vessel, or his assigns, demurrage, at the rate of twenty dollars per day, day by day, as the same may become due. And for the due performance of all and singular the foregoing obligations, the parties bind themselves each to the other in the penal sum of one thousand dollars. The vessel, on her return to Baltimore, to be consigned to the friends of the charterer there, and to pay two and a half per cent. commission on three thousand dollars, instead of whole amount of freight. In witness whereof, the parties interchangeably set their hands and seals, the day and year aforesaid. Beverly Clopton. [Seal.] Thomas Davies. [Seal.] David Anderson's Son. [Seal.] Signed, sealed and delivered in presence of Wm. B. Dubney (as to all the parties)."

J. Glenn, for libellant.

J. Nelson and A. S. Ridgely, for claimant.

TANEY, Circuit Justice. The libellant [William C. Webb] is the owner of the British barque Invincible, and this controversy arises out of a charter-party, by which the vessel was let to freight to David Anderson's Son, a merchant in Richmond. The contract on behalf of the vessel was executed by Beverly Clopton, as agent, and Thomas Davies, as master, and stipulated on their part that she should receive from David Anderson's Son, a complete load of flour, at Port Walthall (City Point, on the James river), and proceed to Rio Janeiro, and there deliver the cargo to the agents or assigns of the charterer, the said agents or assigns to furnish a cargo of coffee or other articles, or so much thereof as might be necessary for ballast, with which the vessel was to proceed to Baltimore, where the cargo was to be discharged, and the same being delivered to the charterer's agents or assigns, the intended voyage to be ended. And in consideration of the premises, Anderson's Son agreed to pay the master, or his successor in office, at the rate of one dollar and twenty-five cents per barrel, on the outward cargo, with five per cent. primage, which was to be regarded as full compensation of freight out and home, for the voyage; the said barque being bound to bring home a full cargo of coffee, or other articles, to Baltimore, free of additional freight; it being understood, however, that the master should be paid so much of his freight in Rio,

as might be required for the expenses there, without commissions.

The barque sailed accordingly, laden with three thousand four hundred and fifty barrels of flour, and arrived at Rio, where the cargo was delivered; only seven hundred and twenty-seven barrels were shipped by Anderson's Son; the residue of the cargo was shipped on freight by other persons. In order to enable Anderson's Son to make this shipment, they obtained from Lambert Gittings, the present claimant, an advance of two thousand four hundred and ninety dollars, upon the following terms, as stated in a letter to him, dated 22 May 1851:

"I have decided to let it go forward on my account, and submit its sale and management to your address, to be consigned by you to such house as you may think proper, and sold on arrival, as you may direct, or to be held by you, as you may judge most to my interest. I submit the entire management of this small shipment to your own discretion, to manage as if your own. I have filled up the bills of lading at the current rate of freight at which the balance of the cargo is shipped."

At the time this letter was written, only five hundred barrels had been shipped by Anderson's Son, upon which the advance by the present claimant was seventeen hundred dollars; afterwards, two hundred and twenty-seven barrels, in addition, were purchased and shipped upon the same terms, upon which the claimant advanced seven hundred and ninety dollars. The bills of lading, signed by the master, stated the shipment to be made by Anderson's Son, and to be deliverable at Rio, to their order or assigns; and they were endorsed and delivered by Anderson's Son to Lambert Gittings, the claimant, making the flour deliverable to his order.

The ship was consigned by the charterer to Maxwell, Wright & Co.; but the flour shipped, as above mentioned by the charterers, was consigned to Miller, Le Cocq & Co., by the claimant, with directions to dispose of the same promptly, to the best advantage, and pass the proceeds to his credit, subject to his future instructions. And in a subsequent letter, he directed the consignees to invest the proceeds in coffee and ship it to him in Baltimore, by the Invincible, if she should return at the fair-going rate of freight, otherwise, by the barque Delawarean, or some other good vessel.

The flour in question was accordingly delivered to Miller, Le Cocq & Co., and the Invincible being about to sail on her return voyage, before it was sold, they purchased, under the direction of the claimant, as above stated, one hundred and thirty bags of coffee, charging the amount paid for it as a debit against the proceeds of the seven hundred and twenty-seven barrels of flour consigned to them. The bill of lading, signed by Davies, the master of the Invincible, states that it was shipped by Miller, Le Cocq & Co., to be delivered at the port of Baltimore, to Lambert Gittings, or his assigns, he or they paying freight for the said goods, fifty cents per bag, with five per cent. primage.

The adventure proved to be an unfortunate one; the net proceeds of the flour did not pay the amount advanced by Gittings, and before the Invincible arrived at the port of Baltimore, Anderson's Son, the charterer, had stopped payment, and there was due for freight, under the charter-party, $3682.58. Under these circumstances, the master refused to deliver the coffee, upon payment of the freight mentioned in the bill of lading, and filed his libel stating that the coffee was put on board as the return cargo, by the agents of Anderson's Son, at Rio Janeiro, and praying that it might be sold for the payment of the freight due under the charter-party. Upon this libel, Lambert Gittings intervened, claiming the coffee as his property, shipped on his account by his agents, and praying that the same might be delivered to him, upon payment of the freight and primage mentioned in the bill of lading.

It is admitted, that the coffee, at the port of Baltimore, is not of sufficient value to pay the amount advanced by the claimant. There is no imputation of bad faith on either side; both parties have evidently acted fairly and honestly, and the difficulty between them has arisen from the inability of Anderson's Son to comply with the contract they made with the agents of the ship-owners.

The question before the court is, what are the rights of these respective parties now before the court, under this contract? For, although the first bill of lading for the outward cargo is signed by Clopton for the master, and the second by the master, who joined with Clopton in making the charter-party, and these bills of lading state the freight on the flour to Rio to be fifty cents per barrel, yet it is obvious, that these instruments were not intended to supersede the charter-party, or waive the rights which the shipowner had under it. In the letter of Anderson's Son, of the 22d of May, before referred to, he informs Gittings, that the filling up the bills of lading with the freight specified was his own act; and it appears to have been done for the purpose of entitling Anderson's Son to receive at Rio, for his own use, the amount therein mentioned. There is no intimation in his letter, that the provisions of the charter-party were waived, by a new contract in relation to this flour, and the freight, it appears, was, in fact, paid to Maxwell, Wright, & Co., the agents of the charterer, to whom he had consigned the ship.

If the coffee is regarded as the property of Anderson's Son, and shipped by his agents, and the interest of Gittings nothing more than a lien upon it, it would, undoubtedly, be liable to the whole amount of the freight due under the charter-party. The freight, it is true, is regulated by the quantity of flour carried on the outward voyage, and no additional freight is to be charged on the homeward cargo; but the freight agreed upon was the compensation for the round voyage, and the balance due after the payment provided for at Rio, was due on the delivery of the return cargo at Baltimore.

There is, indeed, no express stipulation that the delivery is to be made upon the payment of the whole freight; yet, as between the charterer and ship-owner, this is always implied, unless the terms of the charter-party show the contract to have been otherwise; and that the cargo, by the agreement of the parties, was to be delivered before the freight was paid. If the interest which Gittings acquired in the flour was a mere lien, which attached itself to the proceeds, and to the coffee purchased with the proceeds, then undoubtedly, the lien for freight would be the prior and preferred one, and his lien postponed until the whole freight was satisfied.

But I think the right of Gittings to the coffee was not a mere lien; it was something more; it was his property, and Anderson's Son had no right to the possession or control of it; nor to the proceeds, unless a surplus remained, after satisfying the amount to secure which the flour had been transferred to Gittings. The coffee was not purchased or shipped by the agents of the charterer; and was never in their possession, nor under their control. It was purchased for Gittings, by his agents, and shipped to him, and at his risk, under his instructions. It is true, it was purchased out of the proceeds of the 727 barrels of flour; but the lien of the ship-owners upon the return cargo, under this charter-party, did not depend upon the funds with which it was purchased. There is no covenant that the proceeds of the outward cargo should be invested in a homeward one; and if this coffee was the property of the charterer, the lien would be precisely the same, whether it was brought with the proceeds of the flour, or with any other funds. The circumstance that it was purchased with the proceeds of the outward cargo, therefore, does not, of itself, make it liable for the whole freight, and is of no further importance, than as a fact to be considered in connection with the other testimony in the case, in determining whether the claimant's interest in the coffee, before and at the time of the shipment, was a lien only, or a right of property.

A good deal of the argument has turned upon the question, whether, in this transaction, the claimant is to be regarded as a mortgagee, or as a purchaser of the flour. It is very clear, that it was a mortgage and nothing more; but that question is not material to the decision; for to the extent of his interest, his rights stand on the same ground, as if he had been the purchaser. This point was decided by the supreme court, in Gibson v. Stevens, 8 How. 399, 400, where, in a case analogous to this, the court said, that the mortgagee, to the extent of his advances, was a purchaser, and that the mortgagor retained nothing but an equitable interest in the surplus, if anything remained after satisfying the claims of the mortgagee. And the same principle was applied by the court to the case of a bill of lading, in Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 441. In that case, the bill of lading was endorsed and delivered, as a security for money lent, in like manner with the case before us; and the court held, that the interest of the mortgagor, or assignor of the bill of lading, was nothing more than a resulting trust in the surplus, if any remained after satisfying the debt intended to be secured. To the extent of his advances, therefore, Gittings is to be considered the purchaser, and as the owner of the flour, from the time of the assignment and delivery of the bills of lading. He, however, purchased subject to subsisting claims; and whatever rights the ship-owners had, at that time, acquired under the charter-party, either as to outward or inward cargo, remained unchanged.

Now, in relation to the 727 barrels of flour, there was no lien, except for the freight to be paid at Rio. There is no allegation that this stipulation of the charter was not complied with, or that this flour was liable to be detained by the ship-owner, or improperly delivered by the master. The consignees of the claimant paid, it seems, all that was demanded or due upon it as freight, and the flour was delivered to them, and received by them, as the property of Gittings, to be disposed of in every respect as he might think proper. The possession of the agents of the claimant was his possession; and he, therefore, held the property in, and the possession of, this flour, on shore at Rio, free and discharged from any lien upon it for freight; and consequently, when the flour was sold, there could be no lien on the proceeds. He was not bound to invest them in a return cargo, and if he did so, he was not bound to ship it by the Invincible.

The proceeds were in his hands, and his exclusive property, to the extent of his advances; and he was not restricted in the disposition he might choose to make of them, by any contract with the charterers on his part, nor by any contract or covenant between the charterers and the ship-owners, made previous to the assignment to him. His agents were expressly instructed, if they shipped by the Invincible, to ship at the fair going rate of freight, and had no authority to place it on board the barque upon any other terms. Under these circumstances, the coffee was purchased with his money, and shipped as his property, at the ordinary freight. If the bill of lading signed by the master was in violation of his duty, or inconsistent with the charter-party, it would certainly not impair the rights of the ship-owners; but it was his duty to receive on board, from individual shippers, any cargo that might be offered at the ordinary freight; it was no more in violation of the charter-party to receive and transport the goods of Gittings than of any one else. There being no stipulation in the charter-party that the proceeds of the flour should be invested in a return cargo, there can be no more ground for charging his coffee with the whole freight, than the goods of any other individual who shipped a homeward cargo; and it will hardly be said, that the property of every individual shipper, under a charter-

party like this, even if he had notice of its terms, would be liable for the whole freight, or any freight beyond that of its transportation.

This charter-party does not contain the usual clause by which the owner binds the ship, and the charterer binds the cargo to the performance of all the covenants in the charter-party. Upon general principles of law, the merchandise is bound for its own transportation only; and its liability cannot be extended further, except by stipulations in the charter-party under which the voyage was performed.

The cases referred to are distinguishable from this, and were determined upon principles which do not apply to the case before me. In the case of Faith v. East India Co., 4 Barn. & Ald. 636, the goods were purchased in the foreign port, by the agents of the charterers, for and on account of the latter; and although they were shipped, by the bill of lading, in the name of these agents, yet they were marked with the initials of the charterers, and the letter of the shippers to the consignees directed them to account with the charterers. The claimants were these consignees, and they had advanced money to enable the charterers to purchase the outward cargo, but they had no assignment of the bill of lading, and no property in the goods shipped to, and sold at the foreign port; nor was the return cargo purchased for them or with their money, but for and on account of the charterers themselves, and with their means in the hands of their consignees, at the outward port.

Besides, the transaction was obviously collusive, and intended to deprive the ship-owner of his lien for freight on the goods of the charterers. The freight for the round voyage was sixteen pounds per ton of the vessel. The master was one of the charterers in interest, although not named in the instrument, he had a joint interest with the charterers in the adventure, and was appointed master at his request; and he was expressly required by the instructions of the ship-owner, "to sign all bills of lading with the clause of freight payable according to charter-party." The master (Chivise), finding, after his arrival at the foreign port and landing the cargo, that the adventure would prove a losing one, retired from the command of the ship, and concurred with the consignees in appointing a new one; and the new master signed bills of lading for the goods which were purchased, as above mentioned, for the charterers, stating in the bills of lading that the goods were to be transported for the ordinary freight. This was in direct violation of the instructions of the ship-owner; and it was evidently a contrivance to deprive the ship-owner of his lien for freight on the return cargo, in order to pay, in preference, a debt due to the consignees of the return cargo, who had advanced money for the outward voyage. The court so regarded the transaction, and it is so treated in their opinions, especially in that of Chief Justice Abbott.

In the case of Gracie v. Palmer, 8 Wheat. [21 U. S.] 605, the contract of affreightment was for a round voyage, from Philadelphia to Madeira, and thence to Bombay and Calcutta, and home to Philadelphia; thirty-three thousand dollars to be paid as freight for the whole voyage at her home port, before the return cargo was delivered. The charterer sailed in the vessel, and being unable, at Calcutta, to obtain a full cargo on freight, for the return voyage, entered into an agreement with Palmer, that if he would make him an advance, to purchase the merchandise, the goods should remain in Palmer's possession, while they remained in Calcutta; and that he would deliver to him a bill of lading stipulating for the delivery of the goods to the agents of Palmer in Philadelphia, free of freight. This agreement was made with the consent of the master, and the money was advanced, and the goods purchased accordingly by the charterer; they were shipped as the goods of the charterer, and on his account and risk, to be delivered to a certain house in Philadelphia, named in the bill of lading, the freight, as stated in the bill of lading, having been settled at Calcutta.

In this case, therefore, the goods were purchased by the charterer himself, and shipped on his account and risk; and by the terms of the charter-party, the freight was to be paid to the ship-owner in Philadelphia, before the delivery of the return cargo; the master had no authority to alter this contract, nor to receive the freight at a foreign port; and in truth, no freight was paid. The principle upon which the case turned, and upon which it was decided, is briefly and clearly stated in the opinion of the court.

In page 634 of the report, Mr. Justice Johnson, who delivered the opinion of the court, says: "The goods are expressly laden on board as the property of Chambers (the charterer) on his account and risk; and the question is, not how far his contract may exempt the goods of another from freight, but how far he may incumber his own goods with a lien, which shall ride over or supersede their general liability for the freight." And it must be observed, that nothing more was demanded by the ship-owner, than the freight usually demanded on such goods from India; the freight for the whole voyage was not claimed.

The case before me, in every material circumstance, differs from this. Here the goods were not purchased by the charterer, nor for him by his agents; nor were they shipped as his property, nor at his risk; they were charged with the usual freight on such goods from Rio, which the claimant has offered to pay; and there is nothing in the bill of lading signed by the master, at

variance with the terms of the charter party.

The case of Campion v. Colvin, 3 Bing. N. C. 17, is equally distinguishable from the present. The facts and the points decided in that case are summed up in the opinion of Tindal, C. J., on page 28. "In the first place," says the chief justice, "the outward cargo was consigned to Messrs. Colvin & Co., in Calcutta, the persons who were the agents of Gooch (the charterer), himself; in the next place, the return goods were purchased by advances made by Colvin & Co. to Gooch, upon the security of the outward cargo, which still remained in their hands; in the third place, the case expressly says, these goods were and still are the property of Gooch, and by the bill of lading, were consigned on his part to some person in London. Are we to say upon that, that the particular mode of consigning these goods, which Gooch, the owner, thought proper to adopt, should vary the real situation of the parties?" This summary is sufficient to show how essentially the case of Campion v. Colvin differs from the present in its circumstances, and how different the point decided in that case is from the one now before me.

As relates to the case of Small v. Moates, 9 Bing. 574, it would be perfectly analogous to this, if the matter in dispute here was the freight payable at Rio, on the flour, according to the terms of the charter-party. As I have already said, the transfer or sale of the property, after it was shipped by Anderson's Son, could not deprive the ship-owner of any lien upon it, to which he was entitled against Anderson's Son, by virtue of the charter-party. But there is no dispute about the freight payable at Rio, upon the delivery of the outward cargo; the claim goes further, and insists that a lien for the whole freight attached to the outward cargo shipped by Anderson's Son, adhered to the proceeds, after it had been delivered to the purchaser, and followed the merchandise bought by him with the proceeds, and shipped on board the chartered ship, as his property, and on his own account and risk. No case has extended the lien of a ship-owner so far; and for the reasons stated in this opinion, I think it cannot be so extended in the case before me, and shall decree accordingly. If the coffee, at the port of Baltimore, was worth more than the amount for which it was assigned to the claimant, the surplus would be liable to the whole freight due the ship-owners, and the order in favor of Davenport would be no obstacle to the recovery. But as it is admitted that there will be no surplus, it is liable only for its own freight from Rio de Janeiro.

I have looked into the case of The Volunteer [Case No. 16,991], which, at first view, seemed to have some analogy to this; for there the proceeds of the outward cargo, then on board, were assigned, and the inward cargo purchased with these proceeds was held liable for the whole freight stipulated in the charter-party. But this assignment, it appears, was not made to a purchaser or mortgagee, but was an assignment for the benefit of creditors; the charterer having become bankrupt during the outward voyage, of course, these assignees stood in his shoes; and the assignees had no greater or superior rights in the return cargo, than the charterer himself would have had, if he had not become insolvent; nor, indeed, were any greater rights claimed for them, as is evident from the opinion of the court.

WEBB (ARNOTT v.). See Case No. 562.

Case No. 17,319.

WEBB et al. v. BOWERS et al.

[Brunner, Col. Cas. 554;[3] 11 Law Rep. 84.]

Circuit Court, D. Massachusetts. Oct., 1847.

COSTS ON INJUNCTION FOR INFRINGEMENT OF COPYRIGHT.

Where an injunction is refused, but the plaintiff still has a right to proceed at law, if the plaintiff stipulate not to proceed at law, costs will not be awarded to either party.

Rule in relation to costs. The complainants had brought a bill in equity against the respondents for an alleged infringement of copyright. The case having been referred to the master at a former term was argued on his report, and the court refused to grant an injunction, but ordered the case to be continued to enable the complainants to bring a suit at law if they saw fit. The respondents moved that the bills be dismissed with costs, but WOODBURY, Circuit Justice, held, that the case seemed to come within one of the exceptions to the general rule, that costs must go with the prevailing party. The exception was that where the remedy in equity was refused, and yet the party plaintiff might proceed at law, costs would not be allowed. But the complainants must stipulate that they will not proceed at law or costs will be allowed. It was ordered that costs should be refused to both parties if the complainants should, within ten days, enter a stipulation not to proceed at law.

WEBB (DURYEE v.). See Case No. 4,198.

Case No. 17,320.

WEBB et al. v. PEIRCE.

[1 Curt. 104;[1] 15 Law Rep. 9.]

Circuit Court, D. Massachusetts. March, 1852.[2]

SHIPPING—CHARTER BY MASTER—OWNER PRO HAC VICE—LIABILITY FOR SUPPLIES.

Where a master hires a vessel "on shares," under an agreement to victual and man the ves-

[3] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

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

[2] [Reversing Case No. 17,321.]

sel, and employ her in such voyages as he thinks best, having thereby the entire possession, command, and navigation of the vessel, and the relation of principal and agent not existing between the master and owners, the master thereby becomes the owner, pro hac vice, during such time as the contract exists; and he, and not the general owner, is responsible for necessary supplies.

[Cited in Mayo v. Snow, Case No. 9,356; The Larch, Id. 8,085; The Freeman v. Buckingham, 18 How. (59 U. S.) 190; Thomas v. Osborn, 19 How. (60 U. S.) 30; The Caroline Casey, Case No. 2,421a; Donahoe v. Kettell, Id. 3,980. Explained in Flaherty v. Doane, Id. 4,849. Cited in Thorp v. Hammond, 12 Wall. (79 U. S.) 416; Fox v. Holt, Case No. 5,012; The Montauk, Id. 9,717; Mott v. Ruckman, Id. 9,881; The India, 16 Fed. 263; Scull v. Raymond, 18 Fed. 550; The International, 30 Fed. 377; The L. L. Lamb, 31 Fed. 33; Douse v. Sargent, 48 Fed. 695. Approved in The Alvira, 63 Fed. 154.]

[Cited in brief in Sims v. Howard, 40 Me. 277. Cited in Somes v. White, 65 Me. 546; Durando v. New York & N. Steam Boat Co., 4 N. Y. Supp. 387.]

This was an appeal from a decree of the district court of the United States for the district of Massachusetts, sitting in admiralty. [See Case No. 17,321.] The libellants sought to recover of the respondent, who was the general owner of the brig Antoinette, belonging to Belfast, in the state of Maine, the price of certain supplies furnished by them to the master of that brig, in the city of Boston.

CURTIS, Circuit Justice. It is proved in this case, and not denied, that the libellants furnished the supplies mentioned in the schedule annexed to the libel; that they were ordered by the master of the brig, and were suitable and necessary; and that, at the time when the supplies were furnished, the respondent was one of the general owners of the vessel. This is sufficient to make a prima facie case of liability; for, ordinarily, the master is the agent of the owner, clothed with authority to contract, in his behalf, for necessary supplies for the vessel, and, therefore, such contracts bind the owner personally, upon the familiar principles of the law of agency. But it is also true, that the master may not be the agent of the general owner for any purpose. A special property, carrying with it the entire possession and control, and leaving in the general owner only an interest in the nature of a reversion, may be created in a vessel as well as in any other chattel. And when such special property has been created, it necessarily follows, that the master is the agent of the owner of this special property in the vessel, and not the agent of the owner of the general or reversionary interest. The possession and control belonging to the former, and the employment being his, whatever is done by reason of that possession, and in the exercise of that control and employment, is his also, and the persons by whom it is done are his agents.

I am aware that a different doctrine is laid down by Lord Mansfield, in Rich v. Coe, Cowp. 636, and that Mr. Justice Story, in his treatise on Agency, (section 298,) has declared, in conformity with Lord Mansfield's opinion, that a private agreement between the owner and the master, by which the latter is to have the entire ship to his own use for a specified period, and is to make all the repairs at his own expense, cannot affect the liability of the owner to third persons, upon the well-settled principle of the law of agency, that the apparent authority of an agent may be trusted to by strangers. If the private agreement between the owner and master be of such a nature as to leave the relation of principal and agent still existing between them, it is undoubtedly true, that the owner would be bound by all contracts respecting the navigation and employment of of the vessel, within the usual scope of the master's authority, notwithstanding a secret agreement between them, that the master should not thus bind the owner. But if the arrangement between the master and owner be such, that the relation of principal and agent does not exist, there is no room for the application of this principle of the law of agency, simply because there is no agency in the matter.

Now, that this relation of principal and agent, between the general owner and the master, may cease to exist, and that either the master or any third person may be clothed with a special ownership, so as to stand as a principal in respect to the navigation and employment of the vessel, is too well settled to admit of serious question. It is distinctly asserted by the supreme court of the United States, in Marcardier v. Insurance Co., 8 Cranch [12 U. S.] 39, and in Gracie v. Palmer, 8 Wheat. [21 U. S.] 605, and has been so held in numerous cases, in England and in this country, which are collected in 3 Kent, Comm. 138, 139, and the doctrine of Lord Mansfield must be considered to be overruled by the court of king's bench, in Reeve v. Davis, 1 Adol. & E. 312. In this case, there was an agreement between the owner and the master, by which the latter was to have the vessel to his own use for the period of twelve months, to victual and man the vessel, and keep her in repair. This agreement was unknown to the plaintiff, who furnished supplies for the vessel, and sought to recover their price of the general owner, who was held not to be liable therefor. Perry v. Osborne, 5 Pick. 422; Cutler v. Winsor, 6 Pick. 335; Winsor v. Cutts, 7 Greenl. 261; Sproat v. Donnell, 26 Me. 185; and Taggard v. Loring, 16 Mass. 337; are all cases of similar contracts between the master and owner, which were held to substitute the former in place of the latter, as owner, and that the relation of principal and agent did not exist between them. Concerning this last case, Mr. Justice Story, in Arthur v. The Cassius [Case No. 564], expresses some doubt; and he held that a master, who had agreed with the owner to employ and navigate, victual and man a vessel, retaining as his compensation, as master and for his own services, one half of

the freight which should be earned, could, by a charter-party, give a lien on the vessel to the shippers of merchandise. But he points out a difference between the contract of hiring in Taggard v. Loring, and in the case before him, and the question decided did not depend upon the rule of law now under consideration. It may well be, that the master, having for the time being the control and navigation of the vessel, may enter into charter-parties containing the usual clause, binding the ship to the merchandise and the merchandise to the ship, and that full effect would be allowed to such a clause by a court of admiralty, upon the ground that the power thus to bind the vessel to shippers, resulted from the master's possession, and the purposes for which he held it, wholly independent of the consideration, whether he was acting as agent or principal, or whether one person was entire owner, and the master his agent, or another person the owner, pro hac vice, and the master the agent of the latter. And I cannot suppose that this very eminent judge intended to cast the least doubt upon a rule of law so well settled, and which he himself had so often recognized, which enables the general owner to create a special ownership; which is thus interposed between him and all third persons as to whom the special owner is principal, and responsible as such. I understand the doubt expressed by him to have arisen in his mind, not concerning this rule of law, but as to quite a different question, viz., whether the contract in Taggard v. Loring was sufficient, in point of law, to create the master owner pro hac vice. Upon this question I think the rule is at this day perfectly well settled. When the possession, command, and navigation of the ship are let by the general owner, the hirer becomes owner pro hac vice; the possession is his; the employment is his; the contracts respecting that employment are his; the master, if he employs one, is his agent; if he commands the vessel himself, he acts on his own account. In the language of Chancellor Kent, (3 Kent, Comm. 138,) "this may be considered the sound and settled law on this subject." So that, in a case like this, where the question is, whether the general owner is liable for supplies furnished to the master, we must inquire whether the general owner had parted with the possession, command, and navigation of the vessel, and thus interposed another owner, to whom the credit must be deemed to have been given. This requires an investigation of the facts of the particular case; and it is correctly argued by the libellant's counsel, that the decisions relied on by the respondent's counsel —that when a vessel has been taken on shares, the general owner is not liable for supplies— do not necessarily apply to this case, because its facts may be different from those. Accordingly, much evidence has been introduced by both parties, relative to this contract of hiring, and its nature and incidents, a large part of which was not exhibited to the district court.

The testimony of the master, which is not controlled, proves that he made a verbal agreement with the owners to sail the vessel on shares. He was to victual and man the vessel, and pay one half the port charges, and he and the owners were to divide the gross earnings equally. He was to go wherever he chose with the vessel, and employ her in such ways as he might think fit during an indefinite period of time. On cross-examination, he says his contract was founded on—by which I understand him to mean, in conformity with—a well-settled usage at Belfast, to let small vessels on shares; that he had no right to appoint another master in his place, and that he has no doubt the owners could at any time remove him, and that he might give up the vessel without any notice; that there was no agreement to that effect, but he so understands the usage. I have examined the letters of the master which were put into the case, but I find in them nothing inconsistent with his testimony. Such being the contract, it is quite clear that, while it subsisted, the master had, in point of fact, the entire possession, command, and navigation of the vessel. It would be difficult to state a case of more absolute possession, command, and navigation, than that he should take the vessel, command her, victual and man her, go with her where he pleased, and employ her in such trade as he saw fit. But still, there are certain elements in the contract which require examination. The contract was for no definite period of time; and it is urged that, by reason of this, and by force of the usage of the trade, the owners might displace the master at any time, and so he had not the possession and command as owner, or any different possession and command from those of an ordinary master, sailing the vessel solely on the owners' account. That after a master has made such a contract as this, and has hired a crew, and purchased supplies for a particular voyage, and actually entered upon and partly completed it, the owners should have the right to turn him out of possession without notice, and thus break up an enterprise lawfully begun, and in the completion of which he has an important interest, and which is to be completed by his crew and his supplies, is so much in conflict with the nature of the contract, and the just rights of the parties flowing from it, that plenary evidence would be required to convince me of the existence of such a right. There is no reason to suppose that such a right was created in this case by any express stipulation. And the admission of the master that it existed, is rested by him solely on his understanding of the usage of trade applicable to such cases.

I do not deem it necessary to decide whether such a usage would be void on account of its unreasonableness, because I am not satisfied of its existence. The evidence is conflicting; and so much of it as tends to prove such a usage may be referred to the opinions of the owners of vessels who have testified to it, rather than to any settled practice, sufficiently general and long continued to create such a

right. Indeed, no one case of removal of the master during a voyage, by force of the usage, has been clearly proved; and many persons from Belfast and other ports, long acquainted with this trade, have been examined, who appear to be ignorant of such a practice. My conclusion is that, in point of fact, there is no such usage, and that it results, from the nature of this contract, when it is for an indefinite period, that it amounts to an absolute and indefeasible hiring of the vessel for every voyage which shall be begun before notice, by the general owner, of his intention to discontinue the contract. And this brings the case within that class of cases which have turned on such contracts of hiring, and in which it has been held the master was owner, pro hac vice, and not an agent of the general owner. Cutler v. Winsor, 6 Pick. 335; Perry v. Osborne, 5 Pick. 422; Thompson v. Hamilton, 12 Pick. 428; Manter v. Holmes, 10 Metc. [Mass.] 402; Thompson v. Snow, 4 Greenl. 264; Sproat v. Donnell, 26 Me. 185.

The evidence respecting the usage of trade is also conflicting as to the right of the owner to control the master in his choice of a voyage, and the power of the master to appoint another master in the home port.

I do not deem it necessary to find what the usage is upon the first of these points, because the uncontradicted evidence of the master proves an agreement with the owners that he should employ the vessel as he saw fit, and while this contract existed the owners had no power to control him in this particular. It does not seem to me to be shown that, by the usage, the master to whom the vessel is let, may appoint another in his place in the home port. There is a personal confidence reposed in him by the owners, who rely on his skill to manage the employment, as well as the navigation of the vessel, and the instances of such changes, spoken of by some of the witnesses, appear to have been infrequent, and were probably sanctioned by the owners as expedient and proper, rather than acquiesced in as matter of right on the part of the hirer. But, however this may have been, it does not seem to me inconsistent with the entire possession, command, and navigation of a vessel, that the hirer is restrained from appointing a person other than himself master, any more than it is inconsistent with the entire possession and temporary ownership of a house, that the lessee cannot underlet or assign his lease. It is a usual incident of ownership of a vessel, whether general or special, that the owner should have power to choose and appoint the master; but I know of no rule of law, and can see nothing in the nature of the case, which requires it to be an inseparable incident of such ownership; and, therefore, the fact that the hirer must himself, personally, command the vessel, does not prove that he is not owner pro hac vice. It has been suggested, on the authority of Dry v. Boswell, 1 Camp. 329, Skolfield v. Potter [Case No. 12,925], that the moiety of the gross freight the master retains, under such a contract, to his own use, may be considered to be in lieu of his wages as master, and so that it is only a contract of hiring of the master by the owners. But this is not consistent with the facts. The master not only commands the vessel, and manages her trade and employment, but victuals and mans her, and the moiety of the gross freight is not retained by him simply as a compensation for his services. It is more in accordance with the contract to consider the moiety of the gross freight paid to the owners, as their charter-money, for the use of the vessel. This is the view taken of the contract in the cases already referred to, and it is satisfactory to my mind. The truth undoubtedly is, as stated by Abbott, C. J., in 1 Ryan & M. 42, that, soon after the passage of the Registry Acts, the leaning of the English courts was to hold the registered owners liable for repairs and supplies. Rich v. Coe was one of those decisions. But the subject having become more accurately understood, a better principle was introduced, and more recent cases decide that the true question is, to whom was the credit given. If no intervening ownership has been created, the credit is deemed to be given to the general owner. But if the vessel is let out to hire, the owner is no longer a contracting party for supplies, and so not liable. Such is the modern doctrine on this subject; it is now too well settled to be departed from; and I may add, that it seems to me to rest on sound principles. My opinion is, that, when a master hires a vessel "on shares," under an agreement to victual and man the vessel, and employ her in such voyages as he thinks best, he thereby becomes the owner, pro hac vice, during such time as the contract exists, and that he, and not the general owner, is responsible for necessary supplies. There is a circumstance in this case, not necessary, in my judgment, to its decision, but which tends strongly to strengthen the equity of the defence. It is that Webb, one of the libellants, who sold these supplies to the master, was for several years a resident of Belfast, and engaged in such business at that place that he must have been acquainted with the custom, nearly universal there, to let vessels, of the class of this brig, to the masters, on shares, and that he therefore had ample means of knowing that this vessel was so let, and that the master, and not the owners, was to victual and man the brig.

To prevent misapprehension, I desire to state, that I have examined the able opinion of Judge Ware, in Skolfield v. Potter [supra], in which he charged the general owners of a vessel let on shares, with the wages of a seaman. There are elements in that case upon which the decision may rest consistently with the principles upon which this case has been decided; and I do not intend to express any opinion as to a claim for wages on a general owner, who has received freight earned in the voyage, for which wages are claimed. The result is, that the decree of the district court is to be reversed, and the libel dismissed, with costs.

Case No. 17,321.

WEBB et al. v. PEIRCE et al.

[1 Spr. 192; 14 Law Rep. 200.] [1]

District Court, D. Massachusetts. Nov., 1850.[2]

MARITIME LIENS—AUTHORITY OF MASTER — SUPPLIES—CHARTER TO MASTER.

1. The master of a vessel, in a port of a state to which she does not belong, has authority, by virtue of his office, to bind his vessel and owners, for necessary supplies.

2. Where the master of such a vessel had taken her on shares, agreeing to victual and man her, he had no right, as between himself and his owner, to obtain provisions upon the credit of the owners.

3. But third persons, ignorant of any special agreement, had a right to trust to the apparent authority of the master; and if they did so in good faith, the owner would be bound personally, for necessary supplies and provisions.

This was a libel in personam, promoted by Messrs. Webb & Low, of Boston, ship-chandlers, to recover payment for stores furnished to the brig Antoinette, owned by the respondents, who lived in Belfast, Maine. At the time the stores were furnished, the brig was lying in Boston, and they were ordered by one Richards, the master, and nothing was said on either side, as to the party to whom credit should be given. The libellants knew the respondents to be the general owners of the vessel, and had dealt with them before as such, and had no acquaintance, or previous dealings, with Richards; and knew nothing of any arrangement between him and the respondents, as to the sailing of the vessel; and charged the stores to the brig Antoinette, and owners. For the defence, it was shown, that at the time the articles were furnished, Richards was sailing the vessel on shares, under the usual agreement, that he should victual and man the vessel, and pay half port charges, the gross earnings being equally divided between him and the owners. The goods furnished were groceries, and like consumable stores; and did not go to the permanent use of the vessel. The contract between the master and owners was parol, for no fixed period, and rested on the general usage. As to this usage, the libellants offered evidence, that under it, the master had no power to appoint another master, in his own place, or to remove one appointed, and that the owners always exercise a general control over the voyages, and remove the master at their pleasure.

R. H. Dana, Jr., for libellants, contended: 1st. Under this contract, the master did not become (as between himself and the respondents) a temporary or special owner, but all the criteria of ownership and control, rested still with the general owners; the contract being either one of employment, the compensation measured by earnings, or one of special partnership. Emery v. Hersey, 4 Greenl. 407; Lyman v. Redman, 23 Me. 289; Arthur v. The Cassius [Case No. 564]; Skolfield v. Potter [Case No. 12,925]; Fenton v. City of Dublin Steam-Packet Co., 8 Adol. & El. 835.

2d. Even if the master does obtain, under this contract, the control of the vessel, so as to be, between himself and the respondents, the temporary owner, yet the policy of the law does not permit the general owners to set up, against persons who are ignorant of it, a special contract, made with a person whom they are holding out to the world as merely master, and as clothed with the ordinary powers of a master. Rich v. Coe, Cowp. 636; Dry v. Boswell, 1 Camp. 329; Arthur v. The Cassius [supra]; The Nathaniel Hooper [Case No. 10,032].

3d. Credit is presumed to be given to the general owners. James v. Bixby, 11 Mass. 34; Jones v. Blum, 2 Rich. 475; Cox v. Reid, 1 Car. & P. 602; Ex parte Machell, 2 Ves. & B. 216; Jennings v. Griffiths, Ryan & M. 42; 3 Kent, Comm. 135.

Bradford Sumner, for respondents, contended, that on the evidence, the master was owner for the time being, and as such was solely liable for stores of this description. Reeve v. Davis, 1 Adol. & E. 312; Story, Bailm. §§ 294, 295; 3 Kent, Comm. 135, 140; Abb. Shipp. 41, note, 65, note; Thompson v. Snow, 4 Greenl. 264; Winsor v. Cutts, 7 Greenl. 261; Reynolds v. Toppan, 15 Mass. 370; Taggard v. Loring, 16 Mass. 336; Perry v. Osborne, 5 Pick. 422; Cutler v. Winsor, 6 Pick. 335; Cutler v. Thurlo, 7 Shepley [2 Appl; 20 Me.] 213; Williams v. Williams, 10 Shepley [23 Me.] 17; Lyman v. Redman, Id. 289; Manter v. Holmes, 10 Metc. (Mass.) 402.

Mr. Dana, in reply, said, that in most of the cases cited, it was either proved or assumed, that the master, under the contract set up, had the sole power to direct the employment of the vessel, and to appoint and remove a master under himself; and there was no case where, in the absence of such tests of ownership in him, the general owners had been exempted from liability.

SPRAGUE, District Judge. There has been a great deal of evidence in this case, but the result of the whole is this: The respondents, residing in Belfast, Maine, were owners of the brig Antoinette. They made a contract with Richards, to take her on shares, and be master. Richards was bound to victual and man the vessel, at his own expense. Under this agreement, Richards took the possession and command of the vessel, and his name was inserted in her papers, as master. In the course of her employment, and while so commanded, the vessel being in the port of Boston, was in need of provisions, to enable her to proceed on a voyage, and the master had not the funds wherewith to pay for them. At the request of the master, the libellants furnished the necessary provisions, on the credit of the vessel and

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission. 14 Law Rep. 200, contains only a partial report.]

[2] [Reversed in Case No. 17,320.]

owners, and now bring this suit therefor, against the owner. It is objected, in behalf of the respondents, that as the master took the vessel on shares, and was thereby bound to have procured these provisions at his own expense, he was not authorized to bind the owners personally therefor. This defence would be valid against all persons who knew of the special agreement, under which Richards had the command of the vessel. But the libellants had no knowledge thereof, nor were there any circumstances which should have put them upon inquiry. They trusted to the apparent authority of the master to bind the owner. There can be no doubt, that if the relation in which the master stood to the respondents had been what it apparently was; that is, if he had been on wages, in the usual manner, he would have had authority to pledge the personal credit of his owners; and this suit could have been maintained. Does the special agreement, restricting the authority of the master, which was unknown to the libellants, defeat their right? I think it does not. The respondents placed Richards in the command of this vessel, as master, and she was documented accordingly. Richards was thus held out as possessing the usual right and authority of master, in their full extent. Among the usual and well known powers of a master, is that of obtaining necessary supplies, in a foreign port, upon the credit of his vessel and owners. The respondents, when they placed him in the office of master, thereby represented to all persons, that he had authority to bind the respondents, as owners of the vessel, for such supplies as were furnished by the libellants. Upon this representation, the furnishers, acting in good faith, had a right to rely. It is no answer to say, that by a private arrangement between the owner and master, the authority of the latter was to be restricted, or that it was specially agreed. that the latter should not exercise one of the ordinary and usual powers appertaining to his office. As between the owners and the master, he had, indeed, no right to exercise the power so inhibited, and it was a violation of his duty to do so. But as between the owners and third persons, such special and secret restriction can have no effect, and the owners must be held responsible to the libellants, in the same manner as if it had never existed. The view already taken being decisive, I do not think it necessary to consider what weight might be given to the fact, that the respondents were to receive half the earnings of the voyage, which these supplies enabled the vessel to make. Decree for the libellants.

NOTE. Upon appeal to the circuit court, this decree was reversed. [See Case No. 17,320.] Subsequently, in Thomas v. Osborn, 19 How. [60 U. S.] 29, 30, the supreme court say, that in such case, the master may bind the vessel for supplies, but not the owner personally. But this was a dictum only, and has never been decided by the supreme court. Quære, as to the distinction which it sets up. In The Sophie, 1 W. Rob. Adm. 369, the court say, that in these cases, they "never can make a ship responsible for advances and supplies, for which the owner himself, if he were in this country, would not be responsible." So, too, in The Alexander, 1 W. Rob. Adm. 360. And practically, this special ownership leaves the enterprise subject to the same necessities, as if the master were master merely, and not charterer; and the maritime law gives him the same power to borrow, in order to meet that necessity, as if he were not charterer. "There must be nothing in the case to repel the ordinary presumption, that the master acted under the authority of the owners." 3 Kent, Comm. 163. See, also, The Freeman, 18 How. [59 U. S.] 182.

WEBB (PLUMMER v.). See Cases Nos. 11,233 and 11,234.

Case No. 17,322.

WEBB v. PORTLAND MANUF'G CO.

[3 Sumn. 189;[1] 3 Law Rep. 374.]

Circuit Court, D. Maine. May Term, 1838.

LEGAL AND EQUITABLE REMEDIES—DIVERSION OF WATER COURSE—INJUNCTION—RIPARIAN RIGHTS—MILL OWNERS.

1. Actual perceptible damage is not indispensable as the foundation of an action. It is sufficient to shew a violation of a right. The law will presume some damage in such a case. A fortiori, where the act done is such, that, by its repetition or continuance, it may become the foundation or evidence of an adverse right.

[Cited in Whipple v. Cumberland Manuf'g Co., Case No. 17,516.]

[Cited in Lund v. City of New Bedford, 121 Mass. 290; Ross v. Thompson, 78 Ind. 97; Quigley v. McKee, 12 Or. 25, 5 Pac. 347; Plumleigh v. Dawson, 1 Gilman, 552.]

2. A party may recover at law nominal damages for a diversion of a water-course, where no actual damage has occurred, as a means of establishing and protecting his right. A fortiori, he may assert his right in equity, by a writ of injunction.

[Cited in Kyle v. Board of Com'rs of Kosciusko Co., 94 Ind. 119; Inhabitants of Brookline v. Mackintosh, 133 Mass. 224; Gilbert v. Showerman, 23 Mich. 453; Scheetz's Appeal, 35 Pa. St. 95; Lyon v. McLaughlin, 32 Vt. 426; Rigney v. Tacoma Light & Water Co. (Wash.) 38 Pac. 149. Cited in brief in Hewett v. W. U. Tel. Co., 4 Mackey, 426. Cited in Hargro v. Hodgdon, 89 Cal. 628, 26 Pac. 1107; Faust v. City of Huntington, 91 Ind. 496. Cited in brief in Morse v. Machias W. P. & M. Co., 42 Me. 120, 122. Cited in Sproat v. Durland (Okl.) 35 Pac. 689; New York Rubber Co. v. Rothery, 132 N. Y. 296, 30 N. E. 842; Carpenter v. Gold, 13 Hans. (88 Va.) 553, 14 S. E. 330; City of Moundsville v. Ohio River R. Co., 37 W. Va. 103, 16 S. E. 514; Lawson v. Mowry, 9 N. W. 282, 52 Wis. 236; Lawson v. Menasha W. W. Co., 59 Wis. 398, 18 N. W. 440; Kimberly & Clark Co. v. Hewitt, 75 Wis. 376, 44 N. W. 304; Barton v. Union Cattle Co., 28 Neb. 357, 44 N. W. 456. Cited in brief in Fairhaven Marble & S. Co. v. Adams, 46 Vt. 501.]

3. No riparian proprietor or mill-owner has a right to divert or unreasonably retard the natural flow of water to the parties below; and no proprietor or mill-owner below has a right to retard or throw it back upon the lands or mills

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

above, to the prejudice of the right of the proprietors thereof.

[Cited in Pratt v. Lamson, 2 Allen, 285.]

4. Where there is a mere fugitive and temporary diversion of water, without damage, and without pretence of right, a court of equity will not interfere, by way of injunction. Quære, whether there would be any redress at law.

[Cited in Elliot v. Fitchburg R. Co., 10 Cush. 196; Howe Scale Co. v. Terry, 47 Vt. 120; Moore v. Clear Lake Waterworks (Cal.) 8 Pac. 818. Cited in brief in Davis v. Winslow, 51 Me. 291.]

5. The plaintiffs and defendants were owners of different mills, in severalty, on the same milldam. The defendants opened a canal into the pond, at some distance above the dam, for a supply of water to work one of their mills, the water thus withdrawn being returned into the river immediately below the dam. *Held*, that both parties were entitled, per my et per tout, to their proportions of the whole stream, on its arrival at the dam, and that neither party could divert any portion of it, though the portion diverted were a less quantity than he would naturally use at his mill on the dam. It will be no answer to such a violation of right by one party, that the other has not inclosed the quantity of water in the stream by means of a reservoir higher up.

[Cited in Pratt v. Lamson, 2 Allen, 288; Plumleigh v. Dawson, 1 Gilman, 551; Druley v. Adam, 102 Ill. 195; Moulton v. Newburyport Water Co., 137 Mass. 166. Cited in brief in Jordan v. Mayo, 41 Me. 554. Cited in Watson v. Peters, 26 Mich. 515; Pinney v. Luce, 44 Minn. 370, 46 N. W. 563.]

Bill in equity for an injunction by the plaintiff to prevent the defendant from diverting a watercourse from the plaintiff's mill, and for further relief.

The facts admitted on all sides were, that at the Saccarappi Falls, on the river Presumpscut, there were two successive falls, upon which there are erected certain mills and milldams, the latter being called the upper and the lower milldams, and the distance between them is about forty or fifty rods; and the water therein constituted the mill-pond of the lower dam. The plaintiff is the owner of certain mills and mill privileges, in severalty, upon the lower dam, and the defendants are entitled to certain other mills and mill privileges on the same dam, also in severalty. As to a portion of one of the mills, there was a controversy between the parties in regard to title; but that controversy in no essential degree affected the question presented to the court. The defendants are the owners of a cotton-factory mill near the left bank of the river, and opened a canal for the supply of the water necessary to work that mill, into the pond immediately below the upper dam; and the water thus withdrawn was returned again into the river immediately below the lower dam. The defendants insisted upon their right so to divert and withdraw the water, by means of their canal, upon the ground, that it was a small part only, (about one fourth) of the water, to which, as mill owners on the lower dam, they were entitled; and that there was no damage whatsoever done to the plaintiff's mill by this diversion of the water.

Upon the coming in of the answer a preliminary question was suggested by the court at the hearing.

C. S. Daveis, for plaintiff.

P. Mellen and Mr. Longfellow, for defendants.

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

STORY, Circuit Justice. The question, which has been argued upon the suggestion of the court, is of vital importance in the cause; and, if decided in favor of the plaintiff, it supersedes many of the inquiries, to which our attention must otherwise be directed. It is on this account, that we thought it proper to be argued, separately from the general merits of the cause. The argument for the defendants then presents two distinct questions. The first is, whether, to maintain the present suit, it is essential for the plaintiff to establish any actual damage. The second is, whether, in point of law, a mill owner, having a right to a certain portion of the water of a stream for the use of his mill at a particular dam, has a right to draw off the same portion, or any less quantity of the water, at a considerable distance above the dam, without the consent of the owners of other mills on the same dam. In connection with these questions the point will also incidentally arise, whether it makes any difference, that such drawing off of the water above, can be shewn to be no sensible injury to the other mill owners on the lower dam.

As to the first question, I can very well understand that no action lies in a case where there is damnum absque injuria, that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand, how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact; in other words, that injuria sine damno is not actionable. See Mayor of Lynn v. Mayor of London, 4 Term R. 130, 141, 143, 144; Com. Dig. "Action on the Case," B, 1, 2. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. A fortiori, this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it

assumes the character, not merely of a violation of a right, tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain, that it may be lost or destroyed, without any possible remedial redress. In my judgment, the common law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him.

So long ago as the great case of Ashby v. White, 2 Ld. Raym. 938, 6 Mod. 45, Holt, 524, the objection was put forth by some of the judges, and was answered by Lord Holt, with his usual ability and clear learning; and his judgment was supported by the house of lords, and that of his brethren overturned. By the favor of an eminent judge, Lord Holt's opinion, apparently copied from his own manuscript, has been recently printed.[2] In this last printed opinion, (page 14), Lord Holt says: "It is impossible to imagine any such thing, as injuria sine damno. Every injury imports damage in the nature of it." S. P. 2 Ld. Raym. 955. And he cites many cases in support of his position. Among these is Starling v. Turner, 2 Lev. 50, 2 Vent. 25, where the plaintiff was a candidate for the office of bridge-master of London bridge, and the lord mayor refused his demand of a poll; and it was determined, that the action was maintainable for the refusal of the poll. Although it might have been, that the plaintiff would not have been elected, the action was nevertheless maintainable; for the refusal was a violation of the plaintiff's right to be a candidate. So in the case cited, as from "23 Edw. III. 18, tit. 'Defence,'" (it is a mistake in the MS., and should be 29 Edw. III. 18b; Fitz. Abr. tit. "Defence," pl. 5), and 11 Hen. IV. 47, where the owner of a market, entitled to toll upon all cattle sold within the market, brought an action against the defendant, for hindering a person from going to the market with the intent to sell a horse, it was, on the like ground, held maintainable; for though the horse might not have been sold, and no toll would have become due; yet the hindering the plaintiff from the possibility of having toll was such an injury as did import such damage, for which the plaintiff ought to recover. So in Hunt v. Dowman, Cro. Jac. 478, 2 Rolle, 21, where the lessor brought an action against the lessee, for disturbing him from entering into the house leased, in order to view it, and to see whether any waste was committed; and it was held, that the action well lay, though no waste was committed and no actual damage done; for the lessor had a right so to enter, and the hindering of him was an injury to that right, for which he might maintain an action. So Herring v. Finch, 2 Lev. 250, where it was held, that a person entitled to vote, who was refused his vote at an election, might well maintain an action therefor, although the candidate for whom he might have voted might not have been chosen; and the voter could not sustain any perceptible or actual damage by such refusal of his vote. The law gives the remedy in such case; for there is a clear violation of the right. And this doctrine, as to a violation of the right to vote, is now incontrovertibly established; and yet it would be impracticable to show any temporal or actual damage thereby. See Harman v. Tappenden, 1 East, 555; Drewe v. Coulton, Id. 563, note; Kilham v. Ward, 2 Mass. 236; Lincoln v. Hapgood, 11 Mass. 350; 2 Vin. Abr. "Actions," [Case] (N. c.) pl. 3. In the same case, of Ashby v. White, as reported by Lord Raymond, 2 Ld. Raym. 953, Lord Holt said: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." S. P. 6 Mod. 53. The principles laid down by Lord Holt are so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a juridical view, incontrovertible. And they have been fully recognised in many other cases. The note of Mr. Sergeant Williams to Mellor v. Spateman, 1 Saund. 346a, note 2, Wells v. Watling, 2 W. Bl. 1239, and the case of the Tunbridge Dippers, Weller v. Baker, 2 Wils. 414, are direct to the purpose. I am aware, that some of the old cases inculcate a different doctrine, and perhaps are not reconcilable with that of Lord Holt. There are also some modern cases, which at first view seem to the contrary. But they are distinguishable from that now in judgment; and, if they were not, "Ego assentior Scævolæ." The case of Williams v. Morland, 2 Barn. & C. 910, seems to have proceeded upon the ground, that there was neither any damage nor any injury to the right of the plaintiff. Whether that case can be supported upon principle, it is not now necessary to say. Some of the dicta in it have been subsequently impugned; and the general reasoning of the judges seems to admit, that if any right of the plaintiff had been violated, the action would have lain. The case of Jackson v. Pesked, 1 Maule & S. 235, turned upon the supposed defects of the declaration, as applicable to a mere reversionary interest, it not stating any act done to the prejudice of that reversionary interest. I do not stop to in-

[2] See "The Judgments Delivered by the Lord Chief Justice Holt, in the case of Ashby v. White, and in the Case of Paty [Holt, 526], printed from the original MS." London: Saunders & Benning, 1837. It is understood, that the publication is under the direction of Lord Chief Justice Denman. See particularly, p. 14, 15, 27, 30, of these opinions.

quire, whether there was not an over-nicety in the application of the technical principles of pleading to that case; although, notwithstanding the elaborate opinion of Lord Ellenborough, one might be inclined to pause upon it. The case of Young v. Spencer, 10 Barn. & C. 145, turned also upon the point, whether any injury was done to a reversionary interest. I confess myself better pleased with the ruling of the learned judge (Mr. Justice Bayley), at the trial, than with the decision of the court in granting a new trial. But the court admitted, that, if there was any injury to the reversionary right, the action would lie; and although there might be no actual damage proved, yet if any thing done by the tenant would destroy the evidence of title, the action was maintainable. A fortiori, the action must have been held maintainable, if the act done went to destroy the existing right, or to found an adverse right.

On the other hand, Marzetti v. Williams, 1 Barn. & Adol. 415, goes the whole length of Lord Holt's doctrine; for there the plaintiff recovered, notwithstanding no actual damage was proved at the trial; and Mr. Justice Taunton on that occasion cited many authorities to show, that, where a wrong is done, by which the right of the party may be injured, it is a good cause of action, although no actual damage be sustained. In Hobson v. Todd, 4 Term R. 71, 73, the court decided the case upon the very distinction which is most material to the present case, that if a commoner might not maintain an action for an injury, however small, to his right, a mere wrong-doer might, by repeated torts, in the course of time establish evidence of a right of common. The same principle was afterwards recognized by Mr. Justice Grose, in Pindar v. Wadsworth, 2 East, 162. But the case of Bower v. Hill, 1 Bing. N. C. 549, fully sustains the doctrine for which I contend; and, indeed, a stronger case of its application cannot well be imagined. There the court held, that a permanent obstruction to a navigable drain of the plaintiff's, though choked up with mud for sixteen years, was actionable, although the plaintiff received no immediate damage thereby; for, if acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. The case of Blanchard v. Baker, 8 Greenl. 253, 268, recognizes the same doctrine in the most full and satisfactory manner, and is directly in point; for it was a case for diverting water from the plaintiff's mill. I should be sorry to have it supposed, for a moment, that Tyler v. Wilkinson [Case No. 14,312], imported a different doctrine. On the contrary, I have always considered it as proceeding upon the same doctrine.

Upon the whole, without going farther into an examination of the authorities on this subject, my judgment is, that, whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and if no other be proved, the plaintiff is entitled to a verdict for nominal damages. And, a fortiori, that this doctrine applies, whenever the act done is of such a nature, as that by its repetition or continuance it may become the foundation or evidence of an adverse right. See, also, Mason v. Hill, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1.

But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage; that would furnish no ground, why a court of equity should not interfere, and protect such a right from violation and invasion; for, in a great variety of cases, the very ground of the interposition of a court of equity is, that the injury done is irremediable at law; and that the right can only be permanently preserved or perpetuated by the powers of a court of equity. And one of the most ordinary processes, to accomplish this end is by a writ of injunction, the nature and efficacy of which for such purpose, I need not state, as the elementary treatises fully expound them. See Eden, Inj.; 2 Story, Eq. Jur. c. 23, §§ 86–959; Bolivar Manuf'g Co. v. Neponset Manuf'g Co., 16 Pick. 241. If, then, the diversion of water complained of in the present case is a violation of the right of the plaintiffs, and may permanently injure that right, and become, by lapse of time, the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiffs at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, a fortiori, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiffs. A court of equity will not indeed entertain a bill for an injunction in case of a mere trespass fully remediable at law. But if it might occasion irreparable mischief, or permanent injury, or destroy a right, that is the appropriate case for such a bill. See 2 Story, Eq. Jur. § 926–928, and the cases there cited; Jerome v. Ross, 7 Johns. Ch. 315; Van Bergen v. Van Bergen, 3 Johns. Ch. 282; Newburgh & C. Turnpike Co. v. Miller, 5 Johns. Ch. 101; Gardner v. Village of Newburgh, 2 Johns. Ch. 162.

Let us come, then, to the only remaining question in the cause; and that is, whether any right of the plaintiff, as mill-owner on the lower dam, is or will be violated by the diversion of the water by the canal of the defendants. And here it does not seem to me that, upon the present state of the law, there is any real ground for controversy, although there were formerly many vexed questions, and much contrariety of opinion. The true doctrine is laid down in Wright v. Howard, 1 Sim. & S. 190, by Sir John Leach, in regard to riparian proprietors, and his opinion has since been deliberately adopted by the king's bench. Mason v. Hill, 3 Barn.

& Adol. 304, 5 Barn. & Adol. 1. See, also, Bealey v. Shaw, 6 East, 208. "Prima facie, (says that learned judge,) the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water, which flows in the stream; and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors, who may be affected by his operations; no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above, or to diminish the quantity of water, which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant." The same doctrine was fully recognised and acted upon in the case of Tyler v. Wilkinson [Case No. 14,312], and also in the case of Blanchard v. Baker, 8 Greenl. 253, 266. In the latter case the learned judge, (Mr. Justice Weston), who delivered the opinion of the court, used the following emphatic language: "The right to the use of a stream is incident or appurtenant to the land through which it passes. It is an ancient and well-established principle, that it cannot be lawfully diverted, unless it is returned again to its accustomed channel, before it passes the land of a proprietor below. Running water is not susceptible of an appropriation, which will justify the diversion or unreasonable detention of it. The proprietor of the watercourse has a right to avail himself of its momentum as a power, which may be turned to beneficial purposes." [3] Mr. Chancellor Kent has also summed up the same doctrine, with his usual accuracy, in the brief, but pregnant, text of his Commentaries, (3 Kent's Comm., 3d Ed., lect. 42, p. 439); and I scarcely know, where else it can be found reduced to so elegant and satisfactory a formulary. In the old books, the doctrine is quaintly, though clearly stated; for it is said, that a water-course begins ex jure naturæ, and having taken a certain course naturally, it cannot be (lawfully) diverted. "Aqua currit, et debet currere, ut currere solebat." Shury v. Piggot, 3 Bulst. 339, Poph. 166.

The same principle applies to the owners of mills on a stream. They have an undoubted right to the flow of the water, as it has been accustomed of right and naturally to flow to their respective mills. The proprietor above has no right to divert, or unreasonably to retard, this natural flow to the mills below; and no proprietor below has a right to retard or turn it back upon the mills above, to the prejudice of the right of the proprietors thereof. This is clearly established by the authorities already cited; the only distinction between them being, that the right of a riparian proprietor arises by mere operation of law, as an incident to his ownership of the bank; and that of a mill-owner, as an incident to his mill. Bealey v. Shaw, 6 East, 208; Saunders v. Newman, 1 Barn. & Ald. 258; Mason v. Hill, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1; Blanchard v. Baker, 8 Greenl. 253, 268; and Tyler v. Wilkinson [supra], are fully in point. Mr. Chancellor Kent, in his Commentaries, relies on the same principles, and fully supports them by a large survey of the authorities. 3 Kent, Comm. (3d Ed.) lect. 52, pp. 441–445.

Now, if this be the law on this subject, upon what ground can the defendants insist upon a diversion of the natural stream from the plaintiff's mills, as it has been of right accustomed to flow thereto? First, it is said, that there is no perceptible damage done to the plaintiffs. That suggestion has been already in part answered. If it were true, it could not authorize a diversion, because it impairs the right of the plaintiffs to the full, natural flow of the stream; and may become the foundation of an adverse right in the defendants. In such a case, actual damage is not necessary to be established in proof. The law presumes it. The act imports damage to the right, if damage be necessary. Such a case is wholly distinguishable from a mere fugitive, temporary trespass, by diverting or withdrawing the water a short period, without damage, and without any pretence of right. In such a case the wrong, if there be no sensible damage and it be transient in its nature and character, as it does not touch the right, may possibly (for I give no opinion upon such a case), be without redress at law; and certainly it would found no ground for the interposition of a court of equity by way of injunction.

But I confess myself wholly unable to comprehend, how it can be assumed in a case, like the present, that there is not and cannot be an actual damage to the right of the plaintiff. What is that right? It is the right of having the water flow in its natural current at all times of the year to the plaintiff's mills. Now, the value of the mill privileges must essentially depend, not merely upon the velocity of the stream, but upon the head of water, which is permanently maintained. The necessary result of lowering the head of water permanently, would seem, therefore, to be a direct diminution of the value of the privileges. And if so, to that extent it must be an actual damage.

Again, it is said, that the defendants are

[3] The case of Mason v. Hill, 5 Barn. & Adol. 1, contains language of an exactly similar import, used by Lord Denman, in delivering the opinion of the court. See, also, Gardner v. Village of Newburgh, 2 Johns. Ch. 162.

mill-owners on the lower dam, and are entitled, as such, to their proportion of the water of the stream in its natural flow. Certainly they are. But where are they so entitled to take and use it? At the lower dam; for there is the place, where their right attaches, and not at any place higher up the stream. Suppose, they are entitled to use, for their own mills on the lower dam, half the water, which descends to it, what ground is there to say, that they have a right to draw off that half at the head of the mill-pond? Suppose, the head of water at the lower dam in ordinary times is two feet high, is it not obvious, that by withdrawing at the head of the pond one half of the water, the water at the dam must be proportionally lowered? It makes no difference, that the defendants insist upon drawing off only one fourth of what, they insist, they are entitled to; for, pro tanto, it will operate in the same manner; and if they have a right to draw off to the extent of one fourth of their privilege, they have an equal right to draw off to the full extent of it. The privilege, attached to the mills of the plaintiff, is not the privilege of using half, or any other proportion merely, of the water in the stream, but of having the whole stream, undiminished in its natural flow, come to the lower dam with its full power, and there to use his full share of the water power. The plaintiff has a title, not to a half or other proportion of the water in the pond, but is, if one may so say, entitled per my et per tout to his proportion of the whole bulk of the stream, undivided, and indivisible, except at the lower dam. This doctrine, in my judgment, irresistibly follows from the general principles already stated; and what alone would be decisive, it has the express sanction of the supreme court of Maine, in the case of Blanchard v. Baker, 8 Greenl. 253, 270. The court there said, in reply to the suggestion, that the owners of the eastern shore had a right to half the water, and a right to divert it to that extent: —"It has been seen, that, if they had been owners of both sides, they had no right to divert the water without again returning it to its original channel (before it passes the lands of another proprietor). Besides, it was impossible, in the nature of things, that they could take it from their side only. An equal portion from the plaintiff's side must have been mingled with all that was diverted."

A suggestion has also been made, that the defendants have fully indemnified the plaintiff from any injury, and in truth have conferred a benefit on him, by securing the water by means of a raised dam, higher up the stream, at Sebago Pond, in a reservoir, so as to be capable of affording a full supply in the stream in the dryest seasons. To this suggestion several answers may be given. In the first place, the plaintiff is no party to the contract for raising the new dam, and has no interest therein; and cannot, as a matter of right, insist upon its being kept up, or upon any advantage to be derived therefrom. In the next place, the plaintiff is not compellable to exchange one right for another; or to part with a present interest in favor of the defendants at the mere election of the latter. Even a supposed benefit cannot be forced upon him against his will; and, certainly, there is no pretence to say, that, in point of law, the defendants have any right to substitute, for a present existing right of the plaintiff's, any other, which they may deem to be an equivalent. The private property of one man cannot be taken by another, simply because he can substitute an equivalent benefit.

Having made these remarks, upon the points raised in the argument, the subject, at least so far as it is at present open for the consideration of the court, appears to me to be exhausted. Whether, consistently with this opinion, it is practicable for the defendants successfully to establish any substantial defence to the bill, it is for the defendants, and not for the court, to consider.

I am authorized to say, that the district judge concurs in this opinion. Decree accordingly.

Case No. 17,323.

WEBB et al. v. POWERS et al.

[2 Woodb. & M. 497; [1] 10 Law Rep. 152.]

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

COPYRIGHT—UNRECORDED ASSIGNMENT—INFRINGEMENT—EXTENT OF COPYING ALLOWED—COMPILATIONS, ETC.—CHANCERY PROCEDURE—CONCLUSIVENESS OF MASTER'S REPORT.

1. In a suit in equity for the violation of a copyright, brought by the assignees of the copyright, the assignments, although not recorded, are still valid as between the parties, and as to all persons, like the defendants, not claiming under the assignors.

2. Where the bill alleged the plaintiffs to be citizens of the United States, and this is not denied in the answer, it must be considered as admitted, although no other evidence of citizenship is offered.

3. The report of a master in chancery may be re-examined, although the presumption is in its favor.

4. Some similarities, and some use of prior works, even to copying of small parts, are tolerated in some kinds of books; such as dictionaries of all descriptions, gazetteers, grammars, maps, arithmetics, almanacs, concordances, cyclopædias, itineraries, guide books, and similar publications.

[Cited in brief in Chicago Dollar Directory Co. v. Chicago Directory Co., 14 C. C. A. 219, 66 Fed. 983.]

5. A subsequent compiler must not use so much of the arrangement and materials of one prior, as to show a substantial invasion, and without novelty and improvement, so as to indicate no new toil and talent.

6. The leading inquiry, in such a case, is, whether the book of the defendants, taken as a whole, is substantially a copy of the plain-

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

tiffs; whether it has substantially the same plan and motive throughout, and is intended to supersede the other in the market, with the same class of readers and purchasers, without introducing new matter, and with only colorable deviations.

[Cited in Drury v. Ewing, Case No. 4,095.]

7. How far the purchase and sale of the defendants' books by the plaintiffs, or the delay of the latter to bring a suit, may operate as a bar,—quære?

8. Where the defendants' book (called the Flower Vase) had, like the plaintiffs' book (called Flora's Interpreter), the class, order and description of the flower placed on the same page with its name and interpretation, instead of being in notes at the end, as in a previous work, and where it copied verbatim about twenty definitions out of one hundred and forty-eight, consisting of one hundred and fifty-six words in the whole volume; and in three or four instances, some of the significations were varied in form slightly, but not in substance; and in nineteen cases, parts of the prose descriptions, &c. were the same; and it appeared that the plaintiffs had also copied other matter from previous compilers in a similar manner; and that other novelties of the plaintiffs' work were not copied by the defendants; where the defendants' work was, in substance, original, consisting chiefly of original poetry,—was much smaller than the plaintiffs', and sold at a less price; it was *held*, that the copying of such definitions did not, in itself, constitute a violation of the copyright; but that, taken together with the copying of a new feature in the arrangement of the materials, such as the transfer of the notes from the end of the book above-mentioned, both together might constitute an infringement, for which an action at law would lie. But it was *held*, that they did not furnish a sufficient ground for an injunction; especially, where the arrangement pervaded the whole work, and could not be easily separated; and where there was no intention of piracy from the plaintiffs' work.

[Cited in Greene v. Bishop, Case No. 5,763.]

9. But where the violation is clear, and the part copied can be easily separated, an injunction is usually proper against that part.

[Cited in Farmer v. Elstner, 33 Fed. 499. Cited in brief in Chicago Dollar Directory Co. v. Chicago Directory Co., 14 C. C. A. 220, 66 Fed. 984.]

This was a bill in equity, filed February 7, 1845. It alleged that, in March, 1832, Marsh & Co. published a book, called "Flora's Interpreter," prepared by Mrs. S. J. Hale, who, for a satisfactory consideration, agreed that Marsh & Co. should be the exclusive proprietors of the book, and take out a copyright for the same in their own names. The usual averments followed as to the several steps having been taken, which are required by law to make a copyright valid, and the due assignment of the same to the plaintiffs, on the 5th of July, 1842. The bill then alleged, that the plaintiffs continued to be the owners of the copyright; that the plan and combination of the matter in it, as well as divers notes, are new; and that they had numerous copies of it for sale at reasonable prices, which they wished to dispose of; but that the respondents, without the consent of the plaintiffs, on the 1st day of September, 1843, and before and after, caused to be printed and sold, and still have for sale, a large number of copies of a work, entitled "The Flower Vase, Containing the Language of Flowers and Their Poetic Sentiments, by Miss S. C. Edgarton." This was averred to be an infringement on the copyright of the plaintiffs, and injurious to it and to their sales. A disclosure was asked from the defendants, how many copies of the Flower Vase had been printed by them and sold; and an injunction was prayed against further sales of the same, and an account and payment of the profits of the previous sales. The answer of the respondents was put in, April 5th, 1845, and admitted, that in September, 1843, they published and sold, and have on hand to sell, copies of the book entitled the "Flower Vase." They denied, that the plaintiffs were the sole proprietors of the book, called "Flora's Interpreter," or that the copyright thereof had been legally taken out, or that the plan and combination of its matter were new, or that they have been copied in the Flower Vase, or that the defendants have infringed on the rights of the plaintiffs, or injured them by their publication and sales of the Flower Vase. They disclose, further, that 18,100 copies of their work have been printed since July 5th, 1842, and 17,500 copies have been sold, and that it is stereotyped, and numbers struck off as needed. A replication was filed, taking issue on these denials, and, at the October term, 1845, the cause was referred to Charles Sumner, Esq., a master in chancery, to examine and report, whether the plan and combination, or materials of Flora's Interpreter, are new, so far as they have been copied in the Flower Vase, and how far any parts of it have been so copied; and to report the evidence and his conclusions thereon, to such extent as either party might desire. The master made a full and elaborate report, at the October term, 1846, in which he came to the conclusion, that all the features in the plan of the plaintiffs' book had been before combined in similar works, except the special designation of the sentiment expressed by the flower; and all the combination, except that the class, order and description of the flower are in notes at the end, and in a table or glossary there, in Flora's Dictionary, instead of being spread on the same page as in the plaintiffs' book. He also found, that the defendants had used in their book some parts of the plaintiffs', in some few instances copying not only the exact words, in the poetic signification and description, but mistakes in orthography and classification, and such as did not exist in other than the plaintiffs' book. In a few other cases, the defendants had copied the poetic signification, where it existed substantially in other books as in the plaintiffs'. In some other instances the defendants proposed to prove, that the plaintiffs had also copied freely from prior works of this kind. But this fact was admitted, as the claim of novelty in the preface was made, not to the illustration of flowers by poetry and sentiment, as that had often been done before, but to something "new in the arrangement, and the introduction of American sentiments." The master further reported, that novelty merely in

the plan or arrangement of such a book as the plaintiffs', is not a legal subject of copyright, independent of the materials. But, if it was, he reported, that the novelty in the plan, and the use of it by the defendants, was so slight, as not to amount to an infringement, by the defendants. The materials of the plaintiffs' book used by the defendants were only one hundred and fifty-six words in the same expressions, and this, whether looking to their quantity, or quality and value, was not deemed by him sufficient, in a work of this kind, to amount to an infringement of the copyright of the plaintiffs.[2] Whether the conduct of the plaintiffs had been such as to bar their recovery, if otherwise entitled, was not decided on by the master, as he did not consider that point referred to him. Objections were also taken to his report before completing it, that he had not been sufficiently minute as to the facts, and had not stated the merely colorable deviations by the defendants from the book of the plaintiffs. But the master declined doing it, because not desired at the hearing, and not considered by him necessary for a correct decision on the merits. And he further reported, as to other exceptions, that they were applicable rather to his conclusions of law than fact, and therefore declined to

[2] The language of the master upon these points was as follows:

"And the first question that arises is the general question, whether the plan, combination, or arrangement of a book, independent of the materials and language, is susceptible of copyright. Important as this question may seem to be, it does not appear to be illustrated by the light of decided cases. The case of Hogg v. Kirby, 8 Ves. 215, has been thought to exclude the conclusion that the plan of a book was the subject of a copyright; but the injunction granted in this case seems not to have been founded on copyright, but on the power of the court to restrain a party from carrying on a trade, or from publishing a work, under a fraudulent representation that such trade or work was that of the plaintiff. See Id. note (Sumner's Ed.). The case of Cary v. Faden, 5 Ves. 23, recognizes a copyright in a road-book; but it was in the plan in combination with the materials. The case of Gray v. Russell [Case No. 5,728] says that a work may be the subject of copyright, although the materials which compose it may be found in the works of other authors antecedently printed, provided the plan, the arrangement, and the combination of those materials be original; but even this case does not decide the distinct question, whether a plan, independent of the materials to which it is applied, and on which it is wrought, is a subject of copyright. In the absence of any governing authority, the question must be regarded in the light of principle. It cannot be disguised that the plan of a book is often a peculiar part of its merits. Some authors receive high commendation merely for the arrangement of their subject, descending even to such particulars as the division into chapters and sections; and again even into the further divisions of paragraphs. This is applicable to historical compositions as well as to scientific and philosophic productions. It would be difficult, however, if not impossible, to hold a subsequent writer amenable to any other tribunal than that of criticism, who should write another work on the same subject in language of his own, but cast in the same chapters and sections. Indeed, the law in such a case as I am now supposing, seems to be clearly settled in the matter of abridgments. An honest abridgment is admitted to be no violation of the copyright of the work abridged; but the very idea of an abridgment implies the preservation of the original plan, arrangement and combination, abridged, or reduced to a smaller scale. Indeed, it will cease to be an abridgment exclusively, if it does not preserve these features; as a miniature would fail to be a portrait if the original proportions and traits of the countenance are not represented. In making an abridgment of Mr. Irving's Life of Columbus, or Mr. Bancroft's History of the United States, the natural and inevitable course would be to follow their plan, to walk by their light, to keep firm hold of the thread which they have provided in their narratives; to adopt their mode of developing the subject; to rely upon their divisions; to lean upon all the landmarks which they have set up; in short, to abridge their works, by preserving, as far as possible, the original peculiarities in a smaller compass. Perhaps no class of works are subjected to abridgments more than dictionaries, nor has any person questioned the lawfulness of such abridgments; but they cannot fail to preserve the plan, arrangement, and combination of the original dictionary. Take, for instance, the recent extensive and most important dictionary of the English language, by Richardson, which is on a plan entirely new, I believe, as applied to the English language. Can it be doubted that an abridgment of this work might be made, reducing its two quartos to a single octavo, in which its peculiar plan should be preserved? Nor does it seem to me that it can be doubted that another dictionary, of another language, or even of the English language, may be made on Richardson's plan, which shall not be an abridgment, but shall be founded on fresh labor and fresh materials.

"Let us regard for a moment the peculiar plan of the plaintiffs' book. It is here applied to the illustration of botany. Suppose this identical plan applied to different works illustrating the kindred sciences of geology, zoology, or ornithology, would the plaintiffs have a right to proceed against these works? If, however, there is a copyright in a mere plan, they clearly would have this right. All the details of their plan are applicable to birds as well as to flowers; they both have (1) a common or popular name, (2) a scientific name, (3) a class and order, and both susceptible of short descriptions, (4) a poetic signification may be devised for each, (5) poetic authorities may be found or invented in support of the signification. It seems very clear that an ornithological interpreter, following precisely the plan, arrangement and combination of the plaintiffs' book ('Flora's Interpreter'), would not be an infringement of their copyright. But it must be admitted that the circumstance that the plans of two works are identical, may be important evidence to show that one book is a copy of the other. It may happen that the plan of a work is so imbedded in the very materials of which it is composed, so inwoven into its very texture, that the two cannot be separated, or at least that the appropriation of the plan, without the excuse of an abridgment, may lead to the natural inference that there was an unfair use of the earlier work. It does not, however, seem to me that there is any thing in the character of the plaintiffs' plan, which can entitle it qua plan to the protection of the law. I cannot hesitate, therefore, to find that, in point of law, the mere plan, arrangement, or combination of a book like the plaintiffs', independent of the material to which it is applied, is not the subject of copyright. Supposing, however, that the plan, arrangement, or combination of a book, independent of the materials, were susceptible of copyright, the question would then arise whether the part of the plan, arrangement, or combination, copied or taken by the defendants, amounted to an infringement. By reference to the facts as I have found them, it will appear that each of

make any change. Some of the evidence in the case was annexed to the report, and is referred to in the opinion of the court, when deemed material, as will be other portions of the master's report, and the book of the plaintiffs, as well as that of the defendants, copies of both of which are filed in the case.

Sidney Bartlett, for complainants.

The character of the work for which the plaintiffs claim protection, as found by the master, is twofold: 1st, and principally as a compilation involving a plan, combination and arrangement; 2d, as being, to a partial and limited extent, original. The case will be placed by the plaintiffs on three propositions: I. That, treating the plaintiffs' book as a mere compilation (and wholly irrespective of their rights in the plan, combination and arrangement, and also of the piracy, by the defendants, of the new and original matter), the proof shows a violation of their rights by the defendants which, upon established principles, will be restrained by injunction. II. That if treating the plaintiffs' book as a mere compilation, the proof did not show such violation as above alleged, yet that the plan, combination and arrangement of the plaintiffs' work (irrespective of the materials with which they are connected), is their property, protected by law as against a rival work, and that it has been violated by defendants. III. That if the plan, combination and arrangement, separate from the materials, were not by law protected as against a rival work, yet that the proof in this case shows, in addition to copying the plaintiffs' plan and arrangement, the defendants have also copied servilely (blunders and all) plaintiffs' selected materials connected with their plan and arrangement, and their new and original matter connected with said plan and arrangement, and thus, upon undisputed principles, ought to be enjoined.

As to the first point, that treated as a mere compilation, the plaintiffs' book and rights have been violated, the report of the master proceeds on a mistake of the law. The doctrine is well established, that compilations are protected to the extent that no rival work can servilely copy from such compilation, or take advantage of a selection, but may resort to the original works as authorities. Longman v. Winchester, 16 Ves. 270; Wilkins v. Aikin, 17 Ves. 424; Matthewson v. Stockdale, 12 Ves. 270; Gray v. Russell [Case No. 5,728].

There remain then, on this point, the mere questions of fact: Are the works rival works; have the defendants servilely copied, to what proved extent, and what is the legal inference

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the features, constituting the combination of the plaintiffs' book, had been employed in prior and kindred works, and that all of them but two had been actually combined on the same page in Flora's Dictionary; but these very features had been introduced into the French 'Flore Medicale.' The question, then, arises whether the employment, by the defendants, of the description, and class, and order in their plan is an infringement. It seems to me very clearly that it is not. The description, class, and order had been introduced on the page in a similar way in the 'Flore Medicale,' and they had been actually employed in Flora's Dictionary, though they were introduced at the end. The portion of the plan or combination of the plaintiffs that has been copied is so small as to be immaterial, almost inappreciable. It falls naturally under the maxim of the law, 'De minimis non curat lex.' I therefore find that there has been no infringement of the copyright of the plaintiffs, so far as regards the plan, arrangement, or combination.

"The next question is, whether, in point of law, the materials taken or copied by the defendants, amount to an infringement of the copyright of the plaintiffs. I have already set forth what has been actually taken,—amounting in all to one hundred and fifty-six words. Is the taking of these words an infringement? It is unquestionable in law that an author may make use of the labors of his predecessors. Indeed, almost all books, except a few of rare genius, are more or less derived from the various labors of earlier authors. To such an extent is this true, that the famous saying of old Burton approves itself to all minds, that books are like medicines, which the apothecary composes by pouring from one phial into another. The law of copyright does not absolutely cut off the use of a book under its protection, so that nothing from it can be poured into new volumes. It merely restrains the use to such an extent that there shall be no material interference with the contents of the book, and that it shall appear to be used in good faith and not colorably, in order to make a profit out of the labors of the earlier author. Under this principle, the author of an abridgment is protected, although he employs sentences, passages, and pages from the preceding book. But it would be difficult to imagine any abridgment of any work which should not contain more of ipsissima verba of the original work than the defendants' book contains of the plaintiffs'. Looking at the actual quantity that has been taken, it seems trifling. It is far less than a reviewer would extract who should review the book; nor would it probably be deemed worthy of notice, if five times the amount were extracted from the plaintiffs' book, and published in all the newspapers of the country. I would put this question distinctly, whether there can be any doubt that editors of journals and reviews of all kinds would be considered justifiable in extracting a far larger amount? If they would be considered justifiable, the question then distinctly arises, whether the defendants could not make a similar use, in short, whether the fact that they were engaged in a work in pari materia should exclude them from rights enjoyed by all the rest of the world. It seems to me clearly not. It is said, in some of the cases, that it is not only quantity that is looked to, but value, in determining the question of infringement. Bramwell v. Halcomb, 3 Mylne & C. 738. Whether I regard quantity or value, I am compelled to conclude that the part of the materials copied by the defendants, is too insignificant in character for the law to notice. I therefore find that there is in no respect an infringement, by the defendants, of the copyright of the plaintiffs. This finding seems to determine all the points that have been referred to me by the order of the court. Another point was raised by the counsel, and evidence touching it introduced, viz.: that the plaintiffs, by their conduct, had concluded themselves to such a degree that they could not appeal to the equitable jurisdiction of the court. Although the evidence introduced in connection with the law on this subject, as illustrated in two recent cases in English chancery (Saunders v. Smith, 3 Mylne & C. 711, and Rundell v. Murray, Jac. 311), seems to conclude this point, I forbear from expressing my conclusions thereupon, because it does not seem to have been referred to me."

from the extent proved, as to the residue being or not being a servile copy? 1. That the two books are upon the same subject, on the same plan and intended as rival works, is admitted and assumed throughout the master's report. 2. That the defendants, in making their book, had the plaintiffs' book before them, is admitted by their preface; and that they used the plaintiffs' book, was a fact distinctly admitted by them at the hearing, as appears by the master's report. 3. Was it used as a guide to the original authorities, or did they servilely copy? This is answered by the proofs made by the plaintiffs, of numerous cases where the plaintiffs' blunders are servilely copied and perpetuated. 4. The legal inference of this proof is, at least, that all those parts of the plaintiffs' book, ejusdem generis, have been servilely copied. Matthewson v. Stockdale, 12 Ves. 270; Mawman v. Tegg, 2 Russ. 385, 394. 5. This legal inference is conclusively supported by the fact, that, since the hearing upon motion for temporary injunction, the defendants (though that course was suggested by the judge, and is shown by the cases to be uniformly pursued) have failed to take the testimony of their compiler, Miss Edgarton, to show to what extent the plaintiffs' book was copied, and this leads to a cogent inference that other parts of the plaintiffs' book were also copied. 6. As affecting the good faith of the defendants, it is to be noted, that their preface says (as to these very parts of the plaintiffs' book thus shown to be copied, blunders and all) "though the compiler has imitated, she has not copied." Also, that the answer flatly denies copying. 7. The most favorable result to the defendants in the proof is, that, viewing the plaintiffs' work as a mere compilation, and confining the inquiry to the violation of it by the defendants in that respect merely, the whole nomenclature of flowers and their botanical divisions into classes and orders, is servilely copied by the defendants.

The next point is, that the plaintiffs' plan and arrangement are, as against a rival work, protected, and have been violated. 1. The extent to which plaintiffs' plan, combination and arrangement are original, and of its identity with defendants' book, are summed up by the master. 2. The defect of the master's report is, that it disposes of each subject of violation separately, and nowhere considers their united effect. 3. The plaintiffs' whole merit on this point is, that they have combined in a head note on the same page two features, which were never before combined on the same page of any work, either ejusdem generis or scientific, and the test of the value of this combination is, that the defendants have exactly copied this arrangement of the two features. 4. The plaintiffs further suppose, too, that a new combination is protected as a whole, and not merely the parts which were never before combined. Emerson v. Davies [Case No. 4,436]. 5. The fact of violation, its extent and value being determined, there remains the question of law, whether plan, combination and arrangement, separate from the materials with which they are connected, are the subject of copyright, and on this point the following cases would be conclusive. Emerson v. Davies and Gray v. Russell [supra].

The next point is, that the defendants have not only used the plaintiffs' plan and combination, and used it in connection with the plaintiffs' compiled materials, but also pirated, in connection with both the above, the plaintiffs' original matter. The extent of this violation by copying in verbis, is shown in the master's report. This enumeration excludes copying with colorable alterations of phraseology, because, as the master says, among other things, that it would be unimportant and immaterial in determining the merits of the case.

And as to the third objection, that it was inconsistent with his views of the law. The authorities on this point of colorable alterations, are 12 Ves. 270. The plaintiffs suppose this to have been a clear mistake of law, and his duty by the master; but as the aggregated violations are sufficient, as they suppose, to furnish them a remedy, they only use the point to show that there exist in the defendants' book colorable alterations of the plaintiffs' original matter, to some undefined extent. One portion of the original matter thus copied in verbis is "the poetic signification of flowers." These are the work of study and taste, and give a principal value to the work. Of these twenty have been literally copied, besides those copied with colorable variations. But it has now been indisputably shown that the defendants have servilely copied: 1. The whole of the plaintiffs' compilation of the nomenclature of flowers, and their botanical division into classes and orders without resort to the original authorities. 2. To a certain extent in verbis, and to a presumed extent with colorable alterations, the plaintiffs' poetic signification of flowers; and also the plaintiffs' description of flowers and their localities. 3. As these last occur in the plaintiffs' book in the same head note, which contains the nomenclature and botanical description that were shown to have been copied, blunders and all, the legal inference is, that the whole of the defendants' head notes were copied from the plaintiffs'. 4. In addition to this, the defendants are shown to have copied the plan, combination and arrangement with which in the plaintiffs' book the above materials thus borrowed are connected.

There remains a farther question as to the remedy. The principles that regulate the granting injunctions in these cases are: 1. The quantity and value of the part taken. 2. If quantity be small, then the question is, whether there existed the animus furandi. Gods. Pat. 216. Looking at and aggregating the various parts of the plaintiffs' work, proven and presumed in law to have been copied

in verbis, and the undefined amount copied with colorable variations, the plaintiffs respectfully submit, that in case of a rival work, designed, as will be obvious, to drive, by its cheapness, the plaintiffs' work from the market the quantity and value of the parts taken are sufficient to warrant the injunction. But if a doubt existed as to quantity, the animus furandi is clear, and comes in aid of the plaintiffs. The manner of taking without acknowledgment (see 17 Ves. 422; 3 Mylne & C. 737), the denial in the answer of the defendants, and the preface of their book, the failure to produce the testimony of their compiler, determine the animus. The next question as to remedy, is its extent. That is, can the court in its injunction separate the borrowed parts, which, when capable of ascertainment, it usually does? or, is this a case in which, as the defendants had ample means, by introducing the evidence of their compiler to distinguish what she copied, and have failed to do it, the language of Lord Eldon, in Mawman v. Tegg, 2 Russ. 385–390, and Emerson v. Davies [supra], is to be applied. The case has now come up for final decree. The defendants had full opportunity before the master, and again under the admonition of the court at the hearing for a temporary injunction; they are not entitled now to delay, and add to the plaintiffs' expenses by further proceedings. There will be an attempt made by defendants to avoid the legal consequences of their conduct, by insisting at the hearing upon the laches of the plaintiff in bringing this bill. It is a sufficient answer to the point, that no such defence is set up in the answer, and cannot therefore now be heard. The reason is, that the plaintiffs must have notice to the end that they may amend their bill, and show the circumstances. 2 Daniell, Ch. Prac. (Perkins' Ed.) 814, (old Ed.) 240; Doggett v. Emerson [Case No. 3,960]; Langdon v. Goddard [Id. 8,060]; The Chusan [Id. 2,717]. But if the question were open to the defendants, there is nothing which, according to established principles, would affect the plaintiffs; for: 1. If they had been the authors of their book, and therefore familiar with its contents, and capable of readily detecting piracies, instead of booksellers, yet nothing is clearer than even when lapse of time has exceeded the period of limitation, yet, if the defendants have not been deceived, or led to change their condition, they cannot set up merely laches. 2. The defendants' work was stereotyped in 1842, and no proof of change of condition is offered or set up by the answer. The cases of laches are, Platt v. Button, 19 Ves. 447; Rundell v. Murray, Jac. 311 (331); Saunders v. Smith, 3 Mylne & C. 737.

P. W. Chandler, for respondents.

WOODBURY, Circuit Justice. Several objections are urged in this case against a recovery by the plaintiffs, which are formal rather than substantial. One is, that the assignments, under which they claim, do not appear to have been recorded. But they are still valid as between the parties, and as to all persons like the defendants, not claiming under the assignors. See cases in Leland v. The Medora [Case No. 8,237], Mass. Dist., Oct. 1846. Another is, that the plaintiffs are not proved to be citizens of the United States. But that being averred in the bill, and not denied by the answer, must be considered as admitted. There are some other objections, which have either been removed by evidence, or probably may be; and hence, if the case can be decided on the merits, without delay and expense as to any formal objection, it will be better for both parties that this should be done. Passing by, then, the other preliminary exceptions, how does this case stand on the merits? The report of the master is in favor of the defendants. From the care evinced in the examination, and the high character of the gentleman who made it, much weight must be given to its conclusions. But the parties are entitled to a revision of it here, and, though the presumptions are in its favor, at the outset of the examination, yet if it cannot stand the scrutiny, to which it has been subjected in argument, and which the court is bound to bestow on it, the plaintiffs ought to succeed.

It may conduce to a more lucid exposition of the merits between these parties, as to the originality of their respective books, to ascertain, first, what each claims as novel or peculiar. Neither of the parties makes any pretence to be inventors of dictionaries of flowers. Whether arranging them alphabetically or scientifically, and whether describing and defining them in prose or poetry, according to their classes and orders, or their medical virtues, or the sentiments they are accustomed to inspire, and whether illustrated by engravings of them, or the opinions of those most experienced in the beautiful hues and figurative language of flowers,—all this had been done before the first of these publications. It had been done, too, not only abroad, but in this country, and more especially in the "Flora's Dictionary," published in Baltimore, in 1830, and republished in 1831, with the reputation of having been compiled by Mrs. Wirt. In the preface to the plaintiffs' book, Mrs. Hale acknowledges her obligations to other writers on this subject, and more especially to the author of Flora's Dictionary, just described. And in the preface to the book of the defendants, Miss Edgarton also expresses her indebtedness to others, who had labored in this garden before her, and especially to the "Flora's Interpreter" of the plaintiffs. Again, there is much discrimination to be used in inquiries of this character, between different kinds of books, some of which, from their nature, cannot be expected to be entirely new. Thus, dictionaries of all descriptions, when on like subjects, philological, lexicographical, professional, or scientific, must contain many definitions and descriptions, almost identical; as must gazetteers, grammars, maps, arithmetics, almanacs, concordances, cyclopæ-

dias, itineraries, guide books, and similar publications. In these, if great errors have not previously existed, or unusual ignorance to be corrected, no great novelty is practicable or useful; unless it be to add new discoveries or inventions, new names, or words, or decisions,—so as to post up the subject to more recent periods,—or unless it be to abridge and omit details, and condense a more voluminous work into a smaller and cheaper form, so as to bring its purchase and use within the reach of new and less wealthy classes in society. Some similarities, and some use of prior works, even to copying of small parts, are in such cases tolerated, if the main design and execution are in reality novel or improved, and not a mere cover for important piracies from others. Trusler v. Murray, 1 East, 363, note; Gray v. Russell [Case No. 5,728]; 12 Ves. 270; 16 Ves. 269; 17 Ves. 422. What was there novel, then, in the combination and materials of the plaintiffs' book which the defendants have copied? Nothing in the arrangement, except that the "class and order and description of the flower" are placed on the same page, with its name and interpretation, instead of being in notes at the end, as in the second edition of Flora's Dictionary. In the materials there is, also, a novelty in the special designation of the sentiment in the plaintiffs' book, which is not in Flora's Dictionary. But the defendants have not imitated that, and hence it becomes unimportant. All, then, which the defendants have copied in the arrangement, which did not exist in other books than the plaintiffs', and to which the plaintiffs of course have no exclusive claim, is the mere transfer of the notes to the same page with the flower to which they relate,—a closer juxtaposition; and all in the materials of the plaintiffs, which are original, and have been copied verbatim, are a few "poetic significations," or definitions, being about twenty in one hundred and forty-eight, and consisting of only one hundred and fifty-six words out of the whole volume. In three or four other instances, some of the significations are varied in form slightly, but not in substance; and in nineteen cases, parts of the descriptions of flowers, and their localities, in prose, are used by the defendants, which were employed by the plaintiffs. The defendants offered to prove, in explanation of this, that the plaintiffs had copied in this way still more extensively from others; and it is difficult to conceive of different works, describing the appearance and locality of the same plants, not using like language, and often in some particulars the same, if the plant or flower has been long known, and the notices of them are, as in these cases, very brief, being embodied frequently in a single line. In compiling dictionaries of all kinds, gazetteers, and similar works, the materials of all must, to a considerable extent, be the same, and to such an extent are allowable; and the novelty or improvement, as before remarked, can be substantial in scarcely any case, unless the matter is usefully abridged in bulk and price, or a material change is made in arrangement, or more modern information is added in valuable quantities, or important errors are corrected, or important omissions are supplied. While, on the one hand, a prior compiler is not permitted to monopolize what was not original in himself, and what must be nearly identical in all such works on a like subject; yet he, who uses it subsequently to another, must not employ so much of the prior arrangement and materials as to show that the last work is a substantial invasion on the other, and is not characterized by enough new or improved, to indicate new toil and talent, and new property and rights in the last compiler. That is the cardinal distinction. Thus a material addition is made to a common dictionary, which shall, like Webster's, add definitions of a large number of words before omitted; or quotations from the authors, who have employed the words in the sense adopted, like Johnson's; or rules for the proper pronunciation of each word, like Walker's; or the roots from which the word has been derived, like several others. And no one would complain of a new dictionary as an infringement on former ones, if it contained any of these important additions, and had not in other respects servilely copied but a few definitions of old words from any one former author. Now was the defendants' book of this character, or otherwise? A little further scrutiny into this case will show, whether the change here by the defendants was real or only colorable. They followed, to be sure, the arrangement of the plaintiffs, but that arrangement was not novel with them, except putting on the same page, one part of the account of the flowers, which before had been placed in notes at the end. This could hardly be deemed of sufficient importance to justify a prosecution, unless connected with other infringements as to materials and design, or unless this was a change more essential in some other respects than a mere transfer of similar matter from one page to another. But of this more hereafter. Besides this, however, it is contended, that the defendants have copied materials and design also to such an extent, as to be convicted of a substantial infringement.

The leading inquiry then arises, which is decisive of the general equities between these parties, whether the book of the defendants, taken as a whole, is substantially a copy of the plaintiffs? whether it has virtually the same plan and character throughout, and is intended to supersede the other in the market with the same class of readers and purchasers, by introducing no considerable new matter, or little or nothing new, except colorable deviations?

We have already stated the quantity of materials literally copied, amounting to only about one hundred and fifty-six words. Perhaps half as many more may be considered substantial uses of the plaintiffs' book. But what are the differences? numerous or not? essential or trivial? To illustrate the differences in these two works, in order to see whether they are substantial or otherwise, it will be necessary to compare first their prefaces. They of course profess to relate to like subjects, as do all mod-

ern Floras of this character, and must therefore, as before remarked, contain something of the same matter. But do they really and materially in any respects differ? Their claims and pretensions, in the prefaces, are certainly not the same. The book of the plaintiffs claims merely some novelty in its arrangement, and the use of American poetry to illustrate what is there called the sentiment of flowers. The novelty in arrangement, as before shown, does exist, but is very trifling so far as regards anything imitated by the defendants. But there was another novelty, perhaps more material, which was not imitated by them, in giving first some European or anonymous poetry on the signification of each flower, and then separately some remarks by American authors, illustrative of the sentiment inspired by each flower. This last, and this substitution of American sentiments and authors for foreign ones, seem to me to constitute the great novelty and attraction of the plaintiffs' book, in its matter, over others on this subject, which had preceded it. In this way quotations are introduced from sixty to seventy different American poets, and twenty to forty pieces from some of them, besides the many beautiful extracts given from foreign poets under the other head of illustrating the "signification of flowers." In this way the authoress of the plaintiffs' book was original, in these important particulars, but not in giving a poetical language to flowers, or discussing a sentiment in them, a symbol of affection, as these had existed here before and in Europe, and in the East for ages, if not since Paradise. This authoress also attempted to unite some botanical instruction with poetry; but that was not a new union or combination, nor did she, however highly gifted and favorably known, in other respects, pretend to furnish any scientific information beyond what is contained in Linnæus, Jussieu, Eaton, and other botanists, nor even to emulate Darwin's "Loves of the Plants." On the other hand, what novelty did the authoress of the defendants' book aim at? the same? or none? She claimed none in the arrangement, and that of other writers on flowers, and that especially in the plaintiffs' book, where original, was in some degree followed, as before shown, in transposing notes from the end to the page to which they apply. But even in arrangement the last was not like the plaintiffs' in a few important particulars. There is not one piece of poetry cited to show the signification, and another piece to show the sentiment, as in the plaintiffs', but generally only a single piece for each flower, and that to illustrate merely what she calls the sentiment. But in materials, the defendants' book furnishes, and professes to furnish, a striking difference. The poetry, instead of being quoted from American authors of celebrity, like the plaintiffs', claims to be chiefly original by Miss Edgarton herself, and her title to it is not denied in the answer or the argument. The substance, the staple of the book, is then truly original, and not colorably so; as much as if she had undertaken to publish a volume of poetry, chiefly original, on the subject of Flowers. Again, Mrs. Hale's book, belonging to the plaintiffs, is one in several respects of higher and more ambitious pretensions than the defendants'; pretensions, too, well sustained. It is an octavo volume. It consists of some two hundred and twenty-four pages. It has two colored engravings; has a double index, one to the flowers, and one to their interpretations, and double pieces of poetry to each flower, usually extracted for one purpose from distinguished foreign poets, and for the other from distinguished Americans; and has five pages of instruction and explanations in botanical science, as an introduction; and has been sold per copy at one dollar, or one dollar and twenty-five cents. While, on the other hand, the defendants, in the preface, claim only the merit of a book on the subject much less expensive, and chiefly original in all its poetry, instead of extracts from eminent writers; and it is only a small duodecimo, instead of an octavo, with but one hundred and fifty-one pages, of that reduced size, instead of two hundred and twenty-four, and of larger size; and it has no scientific introduction on botany, has no plates or engravings, and only one index to the flowers; has no double illustrations of the signification and sentiments, and sells for merely twenty-five cents a copy, or less than one fourth of the price of the other.

On a computation it will be found, that the plaintiffs' book is on so different a scale as to contain near three times more matter than the defendants', besides being so different in the substance and originality of it; and that it illustrates many more flowers, being two hundred and thirty, while the defendants' illustrates only one hundred and forty-eight. The stock used in each per volume, differs in a still greater ratio; and in the defendants', from its smaller type as well as less matter, is probably not one fourth of that in the plaintiffs'. For a further illustration, using their own favorite language and symbols, both of these works are flowers, and not destitute of charms; but one is more like the magnolia grandiflora or japonica in size and attraction, and the other, like the wayside violet or anemone. They both come from females, with loveliness peculiar to their sex; but they still essentially differ; as one develops matronly experience and more ripened graces, while the other is just opening her buds and blossoms. It will thus be seen, that the book of the defendants is much less complete and useful than that of the plaintiffs; is suited for a different and humbler class of readers; and would, in truth, be little more than an abridgment, if its poetry was not chiefly original, and some of its other features so different. See the case of Johnson's Rasselas, in Dodsley v. Kinnersley, Amb. 403; Bell v. Walker, 1 Brown, Ch. 451; Gods. Pat. 339. Considering then its form and substance, its design and use, my mind strongly inclines to the conclusion, that the aim of Miss Edgarton in preparing the defendants' book

was in truth what she describes it to be in her preface, to furnish original poetry on the sentiment of flowers, and to do it in such a form as to be much less expensive, and to circulate in hands, which could not so well afford to purchase the existing and larger and more expensive treatises on that subject. In effecting this object, she did not aspire to novelty in arrangement, or discoveries in science as to botany, but in some respects copied from others, and among them from Mrs. Hale, as she had a right to do in some degree, and to some extent, if it was not her main design to compile a like treatise, with only colorable but not real differences. The copying of errors or mistakes in such cases is therefore not unusual, and only shows the fact more clearly of the actual copying in those particulars, but cannot affect the question, whether they are enough in quantity and value to characterize the whole work or its main design to be a piracy. 12 Ves. 270; 17 Ves. 422; 1 East, 363; Mawman v. Tegg, 2 Russ. 385. That depends on other considerations.

Believing then the main design in the defendants' book to have been different in important respects from that of the plaintiffs', in regard to the production and publication of original rather than extracted poetry to illustrate the sentiment of flowers, and in several things varying in material details from the plaintiffs', with a view to make it less expensive and to circulate among a different class of readers, rather than be a substitute with the same class, I see in this no infringement on the copyright of the plaintiffs, and do not consider this design and the execution of it to be void, because in carrying it out a use is made in its botanical descriptions of former works to some extent, and their arrangements in part copied. Wilkins v. Aikin, 17 Ves. 422; Gods. Pat. 215; Cary v. Kearsley, 4 Esp. 168. More especially the plaintiffs cannot complain of this, when they have done the same as extensively in respect to others. The nature and value of the parts copied, being chiefly definitions and descriptive epithets, indicate no appropriation of much mental toil in others, any more than does the small quantity. White flowers must in all such books be described as "white," and red as of a "red hue," and those from India as belonging to the East; and it is so in like cases, and of like character, in several of the similarities here. 3 Mylne & C. 740; 4 Esp. 168. They could not be described in any other way, if described naturally and truly. But when these copyings or close resemblances have gone further, and beside the few lines of description and the few parts of others have encroached on one feature in the arrangement, new or peculiar in the plaintiffs' book, they do, thus combined, probably constitute a legal infringement of their copyright; but they hardly seem to furnish a sufficient ground for the extraordinary interposition of this court by a permanent injunction. I say, both combined; for in a work of this character, partaking so much of the nature of a dictionary, these copies of definitions, so few and unimportant in number and value compared with the whole work, are not, independent of following the plaintiffs' plan, to be regarded as a violation of the plaintiffs' copyright, when the main design is of a new and different character. They are nothing compared with what is ordinary, and almost inevitable in all new works on such a subject. Nothing compared with what is usual in reviews of a work, and is there allowable as being neither a rival nor substitute. Bramwell v. Halcomb, 3 Mylne & C. 738. Nothing improper in an abridgment. If the leading design is truly to abridge and cheapen the price, and that by mental labor is faithfully done, it is no ground for prosecution by the owner of a copyright of the principal work. Gods. Pat. 238; Gray v. Russell [Case No. 5,728]. But it is otherwise, if the abridgment or similar work be colorable and a mere substitute. Butterworth v. Robinson, 5 Ves. 709. One test of this is the quantity and value of the matter extracted. In 1 Camp. 97, a case is stated of seventy-five pages copied out of one hundred and eighteen. In 2 Russ. 388, the close imitation of copying was twenty pages out of forty-eight, or nearly one half, and hence vitiated the work. 11 Sim. 31. And in 1 East, 363, twenty pages were copied literatim et verbatim. Here it is but parts of twenty or thirty lines out of near seven thousand. The former, so great a quantity, indicates theft, animus furandi. The latter, so small a quantity, indicates rather illustration, and comports with the preface acknowledging aid from the plaintiffs' work, but having some different and material purposes to accomplish, and not being a mere substitute, with no essential changes. (Gods. Pat. 216; Eden, Inj. 381, note; Roworth v. Wilkes, 1 Camp. 97; 2 Kent, Comm. 382; 8 Ves. 225.) Where nine tenths was copied, an injunction was clearly proper (1 East, 358), but not where only one tenth was copied (Amb. 403). See, also, Folsom v. Marsh [Case No. 4,901]. Or as here, not one two-hundredth.

But the aspect of this case becomes somewhat different and more favorable to the complainants, when we add to this the other circumstance, that a small part of the novelty in the arrangement has been imitated. Though small in value, such an imitation or appropriation of another's invention may be actionable; and the subject of an injunction, perhaps, if easily separated from the rest of the book. Emerson v. Davies [supra]; Lewis v. Fullarton, 2 Beav. 6; Barfield v. Nicholson, 2 Sim. & S. 1, 6; 16 Ves. 270; Wilkins v. Aikin, 17 Ves. 424; Stockdale's Case, 12 Ves. 270; Gray v. Russell [supra]. But it is doubtful, whether this small transfer of matter to a new place is sufficient alone to sustain a copyright, without some new and additional materials; and more doubtful still whether an injunction ought to is-

sue, when the whole is pervaded or leavened by it, and the whole destroyed on account of it, rather than damages given only to the extent or value of the encroachment. But here the adoption of the new feature in the arrangement, however small it be, pervades the whole work, and no permanent injunction can issue against it without destroying the whole work as now compiled. I think, therefore, that such a remedy, applied to a case situated like this, would be disproportionate, unsuited to the case, and hence unjust. Whatever damages the plaintiffs have thus sustained may, however, be obtained by a suit at law, without destroying the whole work; and that is therefore the more equitable relief in a state of facts like these. Drew. Inj. 199; Bell v. Whitehead, 17 Law J. 441 [8 Law J. Ch. (N. S.) 141]; 9 Law J. Ch. (N. S.) 323; 1 East, 385. On the contrary, where the violation is clear, and the part copied can readily be separated, then an injunction is usually proper against that part. London Lat. Comp. v. Bedells, Webst. Pat. 140; 13 Rep. of Arts, 167; Emerson v. Davies [supra]. So, where a party wilfully mixes or interweaves the property of another, with his own, with a bad motive, and so as not to be easily separated, he may be required at times to lose the whole. 2 Russ. 385; 2 Brown, Ch. 85. But here the motive does not seem to have been culpable, the plan cannot be separated from the work, and the plaintiffs can obtain ample redress at law in damages, without destroying the whole.

Both parties have relied upon the opinion of the district judge in this case, being in their favor, when refusing a temporary injunction, but ordering an account of sales to be kept and the plates not sold. He thought more light would be flung on the case at the final hearing, by the testimony of Miss Edgarton being particular as to the extent she used and meant to use the plaintiffs' book. But neither party have asked leave to offer it, and the inclination of his mind seems to have been, that the part of the arrangement claimed to be original by the plaintiffs, and followed by the defendants, was hardly sufficient to justify an injunction. A novelty in arrangement, especially so trifling as this, without any new material connected with it, seemed to him, and still seems to him to be, of questionable sufficiency to be protected by a copyright. The master seemed to be of the same opinion, on the ground "De minimis non curat lex." Slight changes, like the use of chapters and verses, where none existed before, as some hundreds of years ago in the Bible, or the introduction of punctuation, which is said not now to exist generally in acts of parliament, or the use of sections instead of pages, which in modern times is reviving only an ancient practice, would all have higher claims to novelty and usefulness, than merely transferring the same material from one page at the end to another in the central part of a book, as here. Some machines have been changed merely by inverting their position; but they are not deemed entitled to protection. But, however this may be sufficient or not, to claim legal protection (and I am inclined to think it is), my opinion, as before intimated, is, that the use of it should not be enjoined against, when it runs through the whole book, and cannot be separated from the rest. It would generally be equitable and just to let the party, under such circumstances, seek redress for it by damages in a suit at law. It is not a suitable case for the exercise of a peremptory injunction, which is chiefly to aid legal rights, and in cases of copyrights runs against specific parts copied. It is usually done to work substantial justice between the parties, rather than destroy the whole book of the defendants, for the small infringement in the arrangement, if otherwise it was novel, and unexceptionable, and useful to the community. See cases where a part may be enjoined against, 17 Ves. 422; 11 Sim. 31; 2 Russ. 385; 3 Mylne & C. 737.

This conclusion renders it unnecessary to decide on the point how far the conduct of the plaintiffs, in the purchase and sale of the work of the defendants, and in some delay to prosecute, should bar this application, though redress might perhaps be still had at law. On this see Eden, Inj. 207; 7 Ves. 1; 19 Ves. 447; 3 Mylne & C. 711; Rundell v. Murray, Jac. 311; Lewis v. Chapman, 3 Beav. 133; 8 Ves. 224, note. And for the same reason, the motion by the defendants to file a supplemental answer, in order to allege that matter more specifically, need not be acted on. On the necessity for this, see 2 Daniell, Ch. Prac. 814; Taylor v. Carpenter [Case No. 13,784]; Doggett v. Emerson [Id. 3,960]. Delay in this bill is also urged against it; but length of time so as to bar, by any statute of limitation, must be pleaded. 19 Ves. 447; 2 Jac. 311; cases cited in Hunter v. Marlboro' [Case No. 6,908]; Taylor v. Benham, 5 How. [46 U. S.] 233. And if to bar, independent of the statute, a change of circumstances and injury by the delay must appear.

Another point made was, the master's refusal to go into an inquiry as to the extent of colorable imitations. Though in the master's situation I should have been disposed to make the inquiry, there was some ground for his refusal, after the hearing was over, it not having been pressed before. It is pretty decisive, however, that such instances were not frequent, or they would earlier have been suggested, or could more readily be pointed out. And there is no pretence that they can exist in the great mass of the defendants' book, as it professes to be original matter, and no exception has been made that it is not truly original.

The intent not to be guilty of piracy, which has likewise been referred to in the argument, would not be material, if much had actually been copied, and the new work was a mere substitute. But if this be doubtful, the intent not to pilfer from another, colorably or otherwise, for the substantial portions of the new work, may be important. In fine, as, from all the evidence in this case, it seems quite clear, that the main intent was to make a much cheaper work, and one with original poetry,

rather than colorably to republish the plaintiffs' or any similar book, I think the prayer for an injunction must be refused.

Case No. 17,324.

WEBB et al. v. QUINTARD.

[9 Blatchf. 352; 5 Fish. Pat. Cas. 276; 1 O. G. 525; Merw. Pat. Inv. 708.] [1]

Circuit Court, S. D. New York. Jan. 24, 1872.

PATENTS—ANTICIPATION—FOREIGN PUBLICATIONS—DATE OF INVENTION—REDUCTION TO PRACTICE—SHIP ARMOR.

1. The letters patent granted to Charles W. S. Heaton, April 14th, 1863, for an "improved defensive armor for ships and other batteries," are void, for want of novelty.

2. In 1861, a description and drawings were published in a printed publication, in England. From those, the United States, in 1863, caused to be constructed and placed on a vessel, armor like that claimed in the patent of Heaton, one of such drawings being practically the same thing as the armor placed on such vessel. Heaton conceived the idea of his armor in 1856. In 1858, he experimented, by firing a pistol at small pieces of wood and iron. He made no experiments from the fore part of 1859 till the latter part of 1861, when he began to make a model of a war vessel, which he completed early in 1862. The first trial he made with real armor was in March, 1863. *Held*, that Heaton did not make his invention before the date of the English publication.

3. A printed publication is, by the 6th, 7th, and 15th sections of the act of July 4, 1836 (5 Stat. 119, 123), put on the same footing with a patent taken out at the time of the publication; and, regarding the English publication as a patent, it was not unjustly obtained for that which had before been invented by Heaton, who was using reasonable diligence in adapting and perfecting it.

4. Heaton did not make his invention until he made his model, and he did not begin to make that until after the English publication had been made.

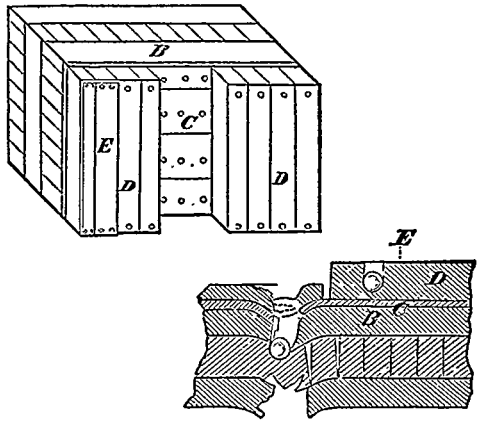
[Cited in Lamson v. Martin, 159 Mass. 565, 35 N. E. 81.]

5. A previous conception of the possibility of accomplishing what the English publication makes known, was not enough. There must have been a reduction of the idea to practice, and an embodiment of it in some distinct form.

[2] [Final hearing on pleadings and proofs.

[Suit brought (by William H. Webb and Charles W. S. Heaton against George W. Quintard) on letters patent for an "improved defensive armor for ships and other batteries," granted to complainant Charles W. S. Heaton, April 14, 1863.

[The nature of the invention is set forth in the opinion, and will be readily understood by reference to the accompanying engraving, in which B represents the ordinary outer planking of a ship; C, metallic armor; D, an outer layer of timber; and E, a thin exterior sheathing of iron.



Charles F. Blake and Samuel D. Cozzens, for plaintiffs.

Edward N. Dickerson, for defendant.

BLATCHFORD, District Judge. This suit is brought on letters patent granted to the plaintiff Heaton, April 14th, 1863, for an "improved defensive armor for ships and other batteries." The specification states, that the longitudinal outer timbers of the vessel form the backing to the armor, that the armor plates are laid against the backing in the usual way, and that the armor plates are covered with an outer layer of timbers, to deaden and to gradually resist the penetrating force in its passage to the armor plates. It then says: "In this heavy buoyant surface lies the gist of my invention or discovery. My invention consists, not in the introduction of wood, rubber, or any other like yielding substance, behind the metal armor, but in the discovery that a timber or other yielding surface, will deaden or resist the power of a cannon ball, when such wood or other surface is backed by the metal armor, which usually is on the surface, and when such metal armor is backed by sufficient wood or other backing to hold it rigidly in its normal position. My system of armor for vessels or forts does not contemplate stopping the ball at the immediate surface; but the metal, or armor proper, is placed at an intermediate point, so that, by the time the shot has reached it, its momentum is so greatly reduced, that it is arrested without serious injury, either from starting the bolts or fracturing the metal armor. The object of my system of armor is to render a war vessel or other structure shot-proof with a less amount of iron armor than is now used with that end in view. By using less metal and more timber, I increase, instead of decreasing, the buoyancy of a ship, and, at the same time, greatly increase the resisting effect of the armor plating. Another object which I have in view is, to obviate the tendency to break the bolts or fastenings of the plating, when it is struck by a

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 352, and the statement is from 5 Fish. Pat. Cas. 276. Merw. Pat. Inv. 708, contains only a partial report.]

[2] [From 5 Fish. Pat. Cas. 276.]

ball." The specification then illustrates the operation of the invention, in connection with drawings. It states that the patentee, in practice, simply overlays the iron armor of an ordinarily constructed vessel (which iron armor is backed up by sufficient backing to rigidly support the plates) with an outer layer of timber, which timber is only bolted on sufficiently strong to hold it to its place; and that his invention also consists in plating or thinly sheathing this timber, on its outer or exposed surface, not however to stop shot, but to prevent a raking shot from tearing the timber, and also to prevent the wood from being too readily set on fire, as such sheathing would exclude the air and so retard combustion. The claim of the patent is: "The employment of wood, or its equivalent, when used in the manner and for the purpose substantially as described." The application for the patent was filed on the 28th of March, 1863.

In 1863, the government of the United States caused to be constructed for itself a vessel of war called the Onondaga. The vessel was built by the defendant, under a contract with the government, as a vessel with iron armor. During the progress of her construction, wooden armor on the outside of the main iron armor, and a thin plating of iron on the outside of such wooden armor, were put upon the vessel, by the order of the navy department, given in March, 1863. The wooden armor and the iron plating were put on and completed in June and July, 1863. Such wooden armor and iron plating were applied in consequence of a description and drawings published at London in 1861, at pages 8 to 17, and plate 2, of a volume entitled, "Transactions of the Institution of Naval Architects, Volume 2," being a paper "On the construction of iron vessels of war iron-cased," by J. D'Aguilar Samuda, Esq., and were made in accordance with such description and drawings. The vessel, when completed, passed into the ownership, possession and service of the government. On the 2d of March, 1867, an act was passed by congress (14 Stat. 543), authorizing and directing the secretary of the navy to deliver the vessel to the defendant for his own use and behoof, on the payment by him to the treasury of the United States of the sum of $759,673. He paid the money and received the vessel, and, in the spring of 1867, sold her to the French government, and delivered her at that time to such government, on such sale, in the city of New York. When so received and when so delivered, she had upon her the said wooden armor and iron plating. It is for this sale, as an infringement of the patent, that this suit is brought. The patentee, in his testimony in the case, admits that one of said drawings in said volume is practically the same thing as the armor of the Onondaga.

To counteract the force of this state of facts, it is attempted to carry back the invention of Heaton to a date anterior to 1861, but, I think, without success. The patentee testifies, that, while in England, in 1856, he saw an iron-clad gun-boat, and the idea occurred to him that the wood ought to be outside of the iron armor; that, within a week from that time, he wrote to the British admiralty, suggesting that a defence be made consisting of wood outside of iron, and asking for aid or authority to experiment to that end; that, three or four months afterwards, he received a reply refusing such authority; that, in September or October, 1858, while in the United States, he fired a revolver at the wooden head of a nail keg, fastened by a wire to the sheet iron top of the perpendicular lever of a railroad switch, and hit the wood obliquely, and concluded that an oblique shot would damage the side of a ship more than a shot striking it squarely would; that, a few days afterwards, he fastened a piece of plank between a thin piece of sheet iron and a thick piece of sheet iron, and laid the article down on a railroad tie, with the thin iron piece uppermost, and fired at it with a revolver straight down, and also obliquely, and found that the thick iron under the plank was not affected by the shots, and that the thin iron prevented the oblique shots from damaging the plank; that he made no experiments from the forepart of 1859 till the latter part of 1861; that, at the latter date, he began to make a model of a war vessel, to illustrate his new system of armor; that, early in 1862, about the time the model was done, he wrote to the secretary of war, asking to have the model examined; that the first trial he made with real armor on his plan, by firing at it with cannon, was made in New York in March, 1863; and that a like trial was made by him at Washington City, about the same time. On these facts, it is contended, for the plaintiffs, that Heaton completed in 1856 the invention of putting wood outside of iron for armor, and that he completed in the fall of 1858 the invention of the wood outside of the iron, and the thin iron outside of the wood.

The 6th section of the act of July 4, 1836 (5 Stat. 119), provides for the granting of a patent to a person for an invention "not known or used by others before" his discovery or invention thereof. The 7th section provides, that there shall be an examination of the alleged new invention, and that if, on the examination, it shall not appear "that the same had been invented or discovered by any other person in this country, prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale, with the applicant's consent or allowance, prior to the application, if the commissioner shall deem it to be sufficiently useful and important, it shall be his duty to issue a patent therefor; but whenever, on such examination, it shall appear to the commis-

sioner that the applicant was not the original and first inventor or discoverer thereof, or that any part of that which is claimed as new had before been invented or discovered, or patented, or described in any printed publication, in this or any foreign country, as aforesaid, or that the description is defective and insufficient, he shall notify the applicant thereof, giving him briefly such information and references as may be useful in judging of the propriety of renewing his application, or of altering his specification to embrace only that part of the invention or discovery which is new." The 15th section provides, that it shall be a defence to an action at law on a patent, "that the patentee was not the original and first inventor or discoverer of the thing patented, or of a substantial and material part thereof claimed as new, or that it had been described in some public work anterior to the supposed discovery thereof by the patentee * * * or that he had surreptitiously or unjustly obtained the patent for that which was in fact invented and discovered by another, who was using reasonable diligence in adapting and perfecting the same; * * * provided, however, that, whenever it shall satisfactorily appear that the patentee, at the time of making his application for the patent, believed himself to be the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been before known or used in any foreign country, it not appearing that the same, or any substantial part thereof, had before been patented or described in any printed publication." These provisions of the 6th, 7th and 15th sections of the act of 1836 have been, in substance, re-enacted in the act of July 8, 1870 (16 Stat. 198).

Under these provisions of law, if the publication in the English work preceded the discovery by Heaton, the defence to the suit is made out. Under the law, the publication in the English work is put on the same footing with a patent taken out at the time of the publication. The sole question, therefore, is, whether Heaton made his invention before the date of the English publication. The occurring of the idea to him, in England, in 1856, and his letter to the British admiralty, certainly, cannot be regarded as a making of the invention. Nor can his pistol practice in 1858 be so regarded. The first attempt he made to embody his ideas in a practical form, by constructing a model, was in the latter part of 1861, the model having been finished early in 1862. This was all of it, according to the evidence, after the publication had been made in England, from which the Onondaga was armored as she was. If the English publication were an American patent, could it be said, in defence to an action on it, that it was unjustly obtained, for that which had in fact before been invented by Heaton, who was using reasonable diligence in adapting and perfecting it? Heaton may have used reasonable diligence in developing his ideas towards making an invention. But that is not the point. To give him a precedence over the English publication, he must have first made the invention, and then have been using reasonable diligence in adapting and perfecting the invention so made. When did he make the invention? Not until he made the model, which, according to the evidence, he did not begin to make until after the English publication had been made. The articles at which he fired with a pistol cannot be regarded as an embodiment of the invention, so as to destroy the rights of the defendant in respect of a vessel actually armored in accordance with what was published in England in 1861. Colt v. Massachusetts Arms Co. [Case No. 3,030]. Looking at the English publication as a patent issued, which is the proper view in respect to this case, it cannot be defeated by showing that Heaton previously conceived the possibility of accomplishing what the publication makes known so satisfactorily that it has been followed in armoring the Onondaga. To constitute Heaton a prior inventor, he must have proceeded so far as to have before reduced his idea to practice, and embodied it in some distinct form. Parkhurst v. Kinsman [Id. 10,757]. In order to prevent the defendant from having the benefit of the English publication, it is necessary that Heaton should have previously discovered the thing and reduced it to actual practice. Cox v. Griggs [Id. 3,302]. The pistol practice of Heaton was not a reduction of his ideas to practice, or an embodiment of them in a distinct form, within the good sense of these rules, so as to constitute an invention on his part, within the meaning of the statute.

The bill must be dismissed, with costs.

[For another case involving this patent, see Heaton v. Quintard, Case No. 6,311.]

Case No. 17,325.

WEBB v. SACHS.

[4 Sawy. 158;[1] 15 N. B. R. 168; 9 Chi. Leg. News, 156.]

District Court, D. Oregon. Jan. 8, 1877.[2]

BANKRUPTCY—PROOF IN ACTION TO RECOVER PREFERENCE—TRADER—WHEN INSOLVENT—CONFESSION OF JUDGMENT—PRESUMPTION—REASONABLE CAUSE—FRAUD—COURSE OF BUSINESS.

1. What an assignee must prove to recover under section 35 of the bankrupt act [of 1867 (14 Stat. 534)], against a party who has received a preference.

2. A trader is insolvent who is unable to pay all his debts in money as they become due in

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

[2] [Affirmed by circuit court; case unreported.]

the ordinary course of business, without reference to the value of his property.

[Cited in Anshutz v. Hoerr, 1 Fed. 593; Harris v. Bank, 15 Fed. 788.]

3. A confession of judgment followed by a seizure of the debtor's property upon execution, if made by an insolvent with a view to prefer the creditor, is an unlawful preference.

[Cited in brief in Sartwell v. North (Mass.) 10 N. E. 825.]

4. If an insolvent debtor does an act which operates as a preference, he is presumed to have intended such result, until the contrary appears.

5. A creditor has reasonable cause to believe his debtor insolvent when he has knowledge of such facts and circumstances as are calculated to put a prudent man upon inquiry.

[Cited in Metcalf v. Officer, 2 Fed. 643.]

6. A fraud upon the bankrupt act is not necessarily what is popularly known as a fraudulent act, but one by which its provisions are evaded or avoided.

[Cited in brief in Fairbanks v. Bank, 38 Fed. 634.]

7. A disposition of property by an insolvent debtor not made in the usual and ordinary course of business, is evidence of fraud until the contrary appears.

[Cited in Re Seeley, Case No. 12,628.]

8. If a creditor has reasonable cause to believe his debtor insolvent when he takes a preference from him, it is immaterial what he thinks or knows about the latter's intentions in giving such preference.

[Cited in Re Hauck, Case No. 6,219.]

Action for money had and received to the use of the plaintiff [G. A. Webb] under section 35 of the bankrupt act—section 5128 of the Revised Statutes.

The plaintiff, as assignee of A. W. Sturgis, a trader in Jackson county, who was adjudged a bankrupt on the petition of certain of his creditors on May 5, 1876, brought an action against the defendants [I. and S. Sachs], merchants at Jacksonville, under section 35 of the bankrupt act, to recover $2,248.79 alleged to have been received by them as a preference contrary to said act.

On the trial, it appeared that on March 6, 1876, and for some years before, Sturgis kept a store on Applegate creek, where he sold goods to miners; and that he also possessed a farm, a mining-ditch, and some mining ground in the vicinity; that on December 9, 1875, Sturgis gave the defendants his promissory note for the sum of $1,826.93, payable one day after date, with interest at one per centum per month, in settlement of a debt that was due the defendants for several years before that time; that on March 6, 1876, said Sturgis confessed judgments in two actions then pending in the circuit court for Jackson county against him for the sum of $1,773.67, and also afterward, and upon the same day, confessed judgment in favor of the defendants for the sum of $2,224.35 upon the note aforesaid; and that in a few days after this confession of judgment, the defendants examined the stock and accounts of Sturgis, and on March 14 issued execution upon said judgment, and seized the goods of Sturgis and sold them thereon for a few dollars more than their debt and costs.

The evidence also tended to show that at the date of the confession of judgment to the defendants, Sturgis owed about $6,300; and that his property would not fetch at auction a sum equal to that amount; that the defendants were aware that Sturgis had other creditors, and of the value of his assets, and that the confession was made by him at the suggestion and solicitation of the defendants, with a view to get security for their debt, and after repeated demands for payment of the note.

John W. Whalley and F. W. Fechheimer, for plaintiff.

W. W. Thayer and Richard Williams, for defendants.

DEADY, District Judge (charging jury). To enable the plaintiff to recover in this action, he must prove to your satisfaction that on March 6, 1876, Sturgis was insolvent, and that being so insolvent, he procured his property to be seized by the defendants, with intent to prefer them over his other creditors; and that such defendants accepted such preference with reasonable cause to believe that Sturgis was then insolvent, and also knew that such seizure was made in fraud of the bankrupt act.

Upon the admitted facts of the case, it appearing that Sturgis was a trader, he was insolvent within the meaning of the act, as applicable to his case, if he was then unable to pay all his debts in money as they became due in the ordinary course of business, even if it appears probable that he might have been able to have paid them all in full, if time had been given him for that purpose.

A confession of judgment in this state by an insolvent debtor is an act which may result in giving a preference to the creditor obtaining or accepting such preference, because it authorizes such creditor to at once seize the property of the debtor, and thereby appropriate it in satisfaction of his debt to the exclusion of the other creditors; and if such confession is actually followed by an execution and seizure of the debtor's property, it is an unlawful preference within the meaning of the act, if made with a view to prefer such creditor.

If an insolvent debtor, knowing his insolvency, does an act, as confessing a judgment, which operates as a preference to one of his creditors, the law presumes that he did such act with an intention to give such preference, and the jury are to act upon that presumption, unless the evidence satisfies you to the contrary. If a debtor, with knowledge of his insolvency, does an act which operates as a preference to one of his creditors, he is presumed to have so intended, as that is the necessary consequence of his act; and the additional fact that such debtor was really moved to give such preference for any other or particular reason, such as to save costs, or satisfy the solicitations of an importunate creditor, or preserve his good will or keep up his business, does not affect such presumption; whatever the debtor's motive may be, if he was aware of his

condition, he is presumed to intend the necessary and natural consequences of his acts. A trader is presumed to know whether he is insolvent or not, and the burden of proof is upon those who claim the contrary to show it.

An assignee cannot recover from a preferred creditor the property or its value obtained by means of such preference, unless such creditor accepted such preference with a reasonable cause to believe his debtor then insolvent. This is the principal question in the case for your determination. Reasonable cause to believe, is knowledge of such facts and circumstances in regard to the matter in question as would put a prudent man upon inquiry; in this case it is knowledge of such facts and circumstances as suggest substantial doubts as to the solvency of the debtor, or excite reasonable suspicions as to his ability to pay his debts in money as they become due in the ordinary course of business. In considering this question, you are to consider all the circumstances of the case, and the conduct of the parties, and come to a conclusion, as reasonable men, accordingly.

Nor can the assignee recover in this action, even if the defendants took this preference with reason to believe their debtor insolvent, unless it also appears that they knew the confession of judgment was made in fraud of the bankrupt act. An act done in fraud of the bankrupt act is not necessarily what is known or considered as a fraudulent act, but only something contrary to such act, and the effect of which is to evade or avoid its provisions. Therefore a payment by an insolvent of one of his creditors in full, so far as such payment prevents an equal distribution of such insolvent's property among his creditors, is necessarily an evasion and avoidance of the act, and therefore a fraud upon it. If Sturgis, being insolvent, made this confession of judgment with a view to give the defendants a preference, the confession was necessarily a fraud upon the bankrupt act; and if the defendants accepted such preference with reasonable cause to believe Sturgis insolvent, the law presumes that they also accepted it with knowledge that it was made in fraud of the act, because such was the necessary legal effect or consequence of such preference. Every man is presumed to know the law—and therefore a creditor is presumed to know that a preference which he receives from his insolvent debtor contrary to the provisions of the bankrupt act, is made in fraud of it—that is, contrary to or in evasion of it.

It is claimed that this confession of judgment was a transaction not in the usual and ordinary course of Sturgis' business, and therefore that fact is evidence of fraud in the matter. The contrary of this has not been claimed by counsel for defendants. A confession of judgment which enables a creditor to seize the debtor's stock in trade and close out his business, seems incompatible with the idea that it was something done in the usual and ordinary course of such business. If, therefore, it shall appear to you that this act was not in the usual and ordinary course of the debtor's business, but without it, then the law declares that such fact is prima facie evidence of fraud—and of such fraud or illegality as vitiates this transaction and entitles the plaintiff to recover, unless the evidence satisfies you to the contrary.

It is claimed by counsel for defendants that before the plaintiff can recover, it must not only appear that Sturgis made this confession with a view to give them a preference, but that the defendants were aware of such intention or purpose on the part of Sturgis. But it is immaterial what the defendants thought or knew about Sturgis' intentions. If they had reasonable cause to believe that Sturgis was insolvent, and knew that this confession was made in fraud of the act, they knew enough to know that the act was contrary to law, and that they ought not to have accepted such preference. Nevertheless, that this confession was made by Sturgis with intent to give the defendants a preference is a part of the plaintiff's case, and must be made out by him before he can recover. But, as I have said, if Sturgis was unable to pay all his creditors in full as their debts became due, at the date of this confession, then, taken in conjunction with the subsequent seizure of his property under it, it necessarily operated as a preference, and therefore the law presumes that he intended it to have such an effect.

The jury found a verdict for the plaintiff for the sum claimed.

[Affirmed on error in the circuit court. Case unreported.]

WEBB (TARR v.). See Case No. 13,757.

WEBB (UNITED STATES v.). See Case No. 16,655.

WEBB (WASHINGTON v.). See Case No. 17,237.

Case No. 17,326.

WEBBER v. HUMPHREYS.

[5 Dill. 223; 8 Reporter, 66; 8 Cent. Law J. 417; 20 Alb. Law J. 78; 26 Pittsb. Leg. J. 204.] [1]

Circuit Court, E. D. Missouri. April, 1879.

REMOVAL OF CAUSES—WHAT IS A SUIT AT LAW OR IN EQUITY?

A motion, under the Missouri statute as to corporations, for execution against a stockholder cannot be removed to the federal court. It is not a "suit at law or in equity," within the meaning of these words as used in the statutes giving the right of removal of causes from state to federal courts.

[Cited in Petters v. Georgia Railroad & Banking Co., Case No. 11,048; Buford v. Strother, 10 Fed. 408; Pratt v. Albright, 9 Fed. 637; Filer v. Levy, 17 Fed. 613; Wol-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 8 Reporter, 66, 20 Alb. Law J. 78, and 26 Pittsb. Leg. J. 204, contain only partial reports.]

cott v. Aspen Mining & Smelting Co., 34 Fed. 823; Lackawanna Coal & Iron Co. v. Bates, 56 Fed. 738.]

[Cited in brief in Wilson v. St. Louis & S. F. Ry. Co., 108 Mo. 588, 18 S. W. 288, 291.]

At law.

Mr. Wieting, for the motion.

Mr. Shepley, contra.

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

DILLON, Circuit Judge (orally). This is a motion by Webber to remand the case to the state court. Strictly, it should have been in the form of a motion to dismiss. It appears upon the record filed in this case that Webber some time since recovered a judgment against this corporation, known as the Illinois and St. Louis Bridge Company, for a considerable sum of money. It also appears that an execution has been issued on that judgment and returned nulla bona. That judgment was recovered in the circuit court of the state for the city of St. Louis, and the execution on the judgment issued out of that court. When the execution was returned, the plaintiff in the judgment made a motion for execution against, among others, Solon Humphreys, alleging that he was the holder of a large number of shares of the stock of this corporation, and that those shares had not been fully paid. That motion was based upon this clause of the statute of the state of Missouri (1 Wag. St. p. 291, § 13), occurring in the chapter on corporations: "If any execution be once issued against the property and effects of a corporation, and there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon." The double liability having been repealed in 1870, the present attempt is to compel Mr. Humphreys to pay the amount alleged to be due on his stock as a debtor of this corporation. Substantially, when we arrive at the essence of this proceeding, the idea is this, that Mr. Humphreys, as the holder of unpaid stock, is a debtor to the corporation, and creditors of the corporation have a right to subject that debt to the payment of their claims. This provision, that execution may issue against the stockholder of an insolvent corporation on the return of nulla bona, is accompanied by this proviso, viz.: "Provided, always, that no execution shall issue against any stockholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly." When proceedings of the character above named have been had, an execution issues against the stockholder to enforce his liability to pay. Such a motion was made in the circuit court of the state in which this judgment was rendered, and notice was given to Mr. Humphreys that an application would be made for an execution against him under this statute. He filed an application to remove the case as made by this motion to this court, alleging everything that was necessary to entitle him to a removal, so far as citizenship and value are concerned.

The question is whether a motion of this kind may be removed. Of course, that question depends on a true construction of the acts of congress in that regard. From the earliest legislation on this subject down to the present time, the nature of the cases that may be removed has been described substantially in the same language. In the 12th section of the original judiciary act [1 Stat. 73], in the act of 1866 [14 Stat. 306], in the act of 1867 [Id. 558], known as the "Local Prejudice Act," and in the broad and comprehensive act of 1875 [18 Stat. 470], also in the Revised Statutes, where the earliest enactments are embodied, the language as to value is: "Any suit wherein the amount in dispute exceeds the sum or value of $500;" and in the act of 1875 (section 2), descriptive of the cases which may be removed, it is stated that "any suit of a civil nature, at law or in equity, in which the amount in dispute exceeds the sum of $500," may, under certain prescribed conditions, be removed.

The suit must be one of a civil nature, at law or in equity. This is a proceeding against Mr. Humphreys to compel him, under this statute of Missouri, to pay for his stock. If it is a civil "suit at law or in equity" within the meaning of the act of 1875, he is entitled to have it removed; if not, he is not thus entitled.

In the case of West v. Aurora, 6 Wall. [73 U. S.] 139, Chief Justice Chase said: "A suit removable from a state court must be a suit regularly commenced by a citizen of the state in which the suit is brought, by process served upon the defendant who is a citizen of another state, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the state court." This undoubtedly expresses the general rule. There are several other cases reported which have some bearing on the present case, and the substance of them in this regard is substantially this: that it is the main suit or controversy between the parties that is removable, and not a mere sequence or dependency of a suit. On the circuit there is reported a decision (Chapman v. Barger [Case No. 2,603]), arising under the statutes of Iowa, as to the rights of an "occupying claimant." It had the approval of all the judges of that circuit court, including Mr. Justice Miller. That case, in substance, was this: The Iowa statute provides that where, in an action of ejectment, the plaintiff recovers a judgment for the property against the defendant hold-

ing the property in good faith and under color of title, and the unsuccessful defendant has made improvements, no execution shall issue to put him in possession if the defendant, in a given time, files a petition in the case, asking to be allowed the value of his improvements. Such a judgment was rendered in a state court against a party, and in due time he filed a petition—the unsuccessful defendant in the ejectment suit—for an allowance for his improvements, and the plaintiff in the ejectment suit thereupon applied to remove the case to the federal court, and the question was whether the contest between him and the defendant in respect to the value of the improvements was cognizable on that removal by the federal court. We held that the petition of the occupying claimant could not be removed. In that case the court says: "We hold that the petition of the occupying claimant cannot be removed, as, under the Iowa statute and decisions of the supreme court of the state, it is essentially part of and ancillary to the main suit. The main suit is at an end, and a judgment has been rendered therein in the state court. That judgment must remain in the state court; it cannot be brought here. The petition of the occupying claimant—whose rights are wholly statutory—is a dependency of the main suit, and cannot be separately removed. Under the legislation of Iowa in respect of occupying claimants, as construed by the state supreme court, and in view of the relief to which each party is entitled, it is apparent that the rights of the parties must be adjudicated in one and the same court." An apparent exception to this principle is presented in the case of Patterson v. Boom Co. [Id. 10,829]. It was decided in that case that a suit in the state court between a land-owner and an incorporated company exercising the right of eminent domain, where the question to be tried was the value of the land, was a suit of such a nature as could be removed to the federal court, although the proceeding in its inception was an appraisement by commissioners appointed under the charter of the company. The legislation in Minnesota, under which that case arose, is peculiar. It provides that when a condemnation is had, if the owner is dissatisfied, he may take an appeal from the sheriff's jury, or whatever the local inquisition is, to the court of the state; and provides, further, how it shall be conducted—that one party shall be the plaintiff and the other the defendant, and that the only question to be tried shall be the amount of damages. It was decided, under those circumstances, that the case was removable; and within the past few weeks the supreme court of the United States has affirmed that decision. The supreme court of New Hampshire (55 N. H. 351) has decided a point somewhat analogous—to the effect that a garnishee or trustee holding credits, etc., joined as defendant for that purpose, is not within the removal acts, and cannot transfer the case as to himself, but only as between the principal parties in the suit.

The statute of Missouri on the subject of corporations, in furnishing a remedy for creditors, makes a provision, in the 13th section, that, if the corporation becomes insolvent, and a judgment is recovered against it in the courts of the state, and an execution is returned nulla bona, any creditor of that corporation may have execution against any stockholder in the corporation, to collect from that stockholder the balance which he may owe on his stock. That is one of the remedies which the statute of Missouri provides in respect to the liabilities of the stockholders and the rights of creditors of corporations.

In this case the creditor obtained his judgment against the corporation in the state court, and that court issued an execution thereon. This is simply a proceeding to enforce these provisions of the statutes of Missouri in regard to the liabilities of stockholders. This is not an independent suit; it is a mere sequence, dependency, or supplemental proceeding, based on the state statute, as a means of enforcing the judgment of the state court. It is our opinion, therefore, that this proceeding cannot be removed into this court. As well might it be attempted to remove proceedings under an execution upon a judgment in the state court. The state court refused to enter an order for removal, and the stockholder filed a transcript of the case so far as to bring before us this question.

The proper entry to make is simply an order to dismiss the case.

Case dismissed.

WEBBER (UNITED STATES v.). See Case No. 16,656.

Case No. 17,327.

WEBER v. UNITED STATES.

[See Case No. 17,329.]

Case No. 17,328.

WEBER v. UNITED STATES.

[Hoff. Dec. 10.]

District Court, N. D. California. Jan. 3, 1861.

MEXICAN LAND GRANTS—LOCATION—OBJECTIONS TO SURVEY.

[Where a decree locating a grant rests on the idea of conforming as near as may be, and in a general way, to the supposed intention of the grantor, the court is not precluded from thereafter modifying in a slight degree the directions of the lines so as to obtain a location by which existing rights acquired in good faith may be protected.]

[Claim of Charles M. Weber, to the rancho of Campo de los Francesca, including the site of the city of Stockton.]

HOFFMAN, District Judge. This case having been finally confirmed [Case No. 16,657], and a survey and location made by the surveyor general, it was brought before the court on exceptions to the location. After a full hearing of various counsel, the court delivered its opinion, setting forth at length its reasons for the judgment therein pronounced. [Id. 17,329.] A new survey has accordingly been made, and it now comes up for final approval.

The only question open for discussion is whether this last survey and location are in accordance with the opinion of the court. As, however, the correctness of the location, as directed by the court to be made, was accidentally touched, I may say that I have seen no reason to suppose that the conclusion arrived at and the survey ordered to be made were not correct, and as likely to carry into effect the presumed intention of the grantor as any that could be adopted. It has seemed to me that the surveyor has substantially conformed to the decree of the court.

It appears, however, that the claimant has long occupied a tract of land differing in a slight degree from the boundaries which a rigid adherence to the opinion of the court would require to be established. On both the northern and southern sides, the limits of the land so occupied by him would include tracts not embraced in a strict survey under the decree, while they fail to include tracts of corresponding size, which, under the decree, would be embraced within the boundaries. The tracts included within the claimant's own location have, in great part, been sold to subgrantees, who have, in some instances, made valuable improvements upon it; while the tracts not included or claimed by him have, in like manner, been disposed of by the United States under the pre-emption laws. It is suggested that under these circumstances a slight deflection of the lines which, reasoning on general principles, the court established, should be allowed; and that the grantees of the claimant on the one side, and of the United States on the other, should be protected by the survey finally approved.

If the diseño included a larger quantity of land than that indicated in the grant, so as to leave the claimant a right of election as to the precise location of the granted land, it is clear that he would be held to have exercised that election by making sales and receiving purchase money from subgrantees. He would, therefore, be estopped to give the grant a different location, so as to leave out the land of his own grantees, and to take in the settlements of the pre-emptors, who, trusting to his assurances as to his own boundaries, had in good faith settled on what they supposed, and he asserted, to be public land. If, then, this rule would be enforced against him in invitum, it would seem but reasonable to apply the same principle at his suggestion. The difficulty is that the diseño does not embrace any more than the granted land, for all the lines are evidently drawn for quantity, and so as to include, as was supposed, eleven leagues. But the precise location of these lines is not so distinctly shown; on the contrary, the court has felt called upon to depart from their apparent location with reference to natural objects, in order to satisfy the other and more unmistakable calls of the diseño; the latter being considered clearly to show that the tract intended to be granted was bounded on the western side by the margin of the San Joaquin river, and that that line was to be of such a length as to include, with three other sides of equal length, a tract eleven leagues in extent. It further appeared to the court that the eastern or back line was intended to be parallel with the western line, which conformed to the general course of the river, and to be of equal length with it; and that the side lines were to be drawn so as to connect the extremities of these two lines respectively, notwithstanding that the angles formed at their junction might differ in some degree from those apparently indicated on the rude diseño submitted. This determination, resting, as it did, on the idea of conforming as near as might be, and in a general way, to what was supposed to be the intention, evidently quite undisputed, of the grantor, should not preclude the court from modifying in a slight degree the direction of those lines so as to obtain a location by which existing rights, bona fide acquired, may be protected. In almost all cases of survey location the decision of the court is, necessarily, rather the arbitrium boni viri than the enunciation of any absolute and positive judgment, founded upon the clearly defined and unmistakably expressed intention of the grantor.

The court is, in fact, compelled to exercise, in some degree, the discretion which the judge who gave juridical possession exercised under the Mexican laws, and which the system of granting, founded on rude diseños and very loosely defined boundaries, necessarily confided to him. It has appeared to me, therefore, that I ought to sanction the slight departure made in this case by the surveyor general from the theory of location established by the court, when, by so doing, I conform to what, it cannot be doubted, the juridical officer would have done without hesitation, and what is demanded ex æquo et bono for the protection of the rights of those who hold under the claimants, as well as under the United States.

For these reasons I am of opinion that the survey returned to this court by the surveyor general, and approved by him on the 23d day of January, 1860, should be confirmed and approved.

Case No. 17,329.

WEBER v. UNITED STATES.

[Hoff. Op. 66; Hoff. Dec. 8.]

District Court, N. D. California. Dec. 2, 1859.

MEXICAN LAND GRANTS—LOCATION OF SURVEY—GRANT OF QUANTITY.

[1. Where a grant is of a certain quantity of land to be taken in the form of a square, and at

the place delineated on the diseño, but no boundaries are named, the condition as to quantity and shape must control, as against any natural objects represented on the map.]

[2. In locating a grant the court cannot be controlled in establishing the lines by the fact that the survey, which it regards as conformable to the grant, will include part of lands falling within the limits of a subsequent grant which has not yet been confirmed.]

Survey of the Stockton claim.

HOFFMAN, District Judge. This case comes up on objections to the survey filed by the claimant. The facts are as follows: On the 14th July, 1843, William Gulnac, from whom the claimant derives his title, petitioned Gov. Micheltorrena for the "land shown on the map" (which he transmitted with his petition) "consisting of eleven square leagues." No name is given to the tract, or boundaries mentioned in this petition; and it merely asks for a tract, eleven leagues in extent, at the place delineated on the map. In the informe given by the prefect of the First district, pursuant to the order of the governor, the land is called "Campo Frances"; and in the report made by Jimeno that officer objects to the extent of the land as being "very great, unless it is requested for the formation of a colony"; in which case he suggests that the names of the persons who formed it should be expressed. The governor, however, appears to have granted the land without inserting in the grant the names of the "families for whose benefit it was solicited, and in the decree of concession it is stated that eleven square leagues of land are granted to Don Guillermo Guinac, between the river San Joaquin on the east, and the laguna, called that of McCloud." In the title paper delivered to the party the land is described as that "known by the name of 'Campo Frances,' of the extent of eleven square leagues, between the river San Joaquin on the east, and the laguna called McCloud's." The fourth condition describes the land "as eleven square leagues in extent, as explained by the respective map."

It will be observed that in this case the map is not merely referred to in the grant as indicating and explaining the land granted, but it appears to have afforded to the governor the only means of ascertaining what land was solicited. The petition specifies no boundaries, nor does it even give the name of the land; it merely asks for the "land shown on the map, consisting of 11 sitios." On referring to this map, we find a figure delineated, each of the sides of which is marked as "lindero," or boundary, and as of the length of three leagues and a half. Two sloughs are also represented on the map, the one marked "Laguna de McCloud," and another, though not marked, is evidently intended to represent the estero of Campo Frances, from which the tract derived its name. Across the southern boundary line, the name "Campo Frances" is written. The site of this place, which appears to have been an old camp of French trappers, is not disputed. It appears not only from the distance between these sloughs, as represented on the map, compared with the entire length of the western boundary line, which is marked of the extent of 3½ leagues, but also from the scale attached to the map, that the draughtsman supposed that the Campo Frances slough was about two leagues from the Laguna de McCloud. He has, accordingly, placed the eastern and western corners at a distance of about three-fourths of a league from those esteros respectively, so as to give to the western boundary the length of 3½ leagues, as is inscribed upon it. It appears, however, that the real distance between the sloughs is much less than two leagues, and the land cannot now be surveyed in a figure with equal sides and including an area of 11 leagues, without extending the western line, either to the north of the Laguna de McCloud, or to the south of the Campo Frances, to a greater distance than according to the diseño that boundary extends.

Under these circumstances two questions are presented:

1. Shall the western boundary be restricted to the limits represented on the diseño, i. e. shall it stop at points to the north and south of those esteros, at the distance from them indicated by their position on the diseño, notwithstanding that by so doing that line would not be more than 2½ leagues long; or shall the "call for length" determine the extent of that boundary, and the line be produced until it is of sufficient length to contain within the three other boundaries of equal length, an area of eleven leagues?

2. If this line is produced as suggested, shall it be produced southwardly beyond the Campo Frances slough, or northwardly beyond the Laguna de McCloud, or equally beyond both, until the requisite length be obtained?

The last was the only question discussed at the hearing, but the first is necessarily presented, and requires consideration. It is evident that if we fix the length of the western boundary line by the points at which by the diseño it appears to terminate, —that is at points distant three-quarters of a league to the north and south of the two sloughs respectively,—we must disregard the other call of the diseño, which gives to that line the length of three and one half leagues. The claimant could not then obtain a tract eleven leagues in extent, unless we lengthen to a corresponding extent his northern and southern lines, so that he may obtain in depth what he loses in length along the river. But to give this power to the survey would be to disregard one of the most obvious indications of the diseño, viz. that the tract was to be bounded by four parallel

lines of equal length, and the extent along the river was to be equal to the depth running back from the river. If, however, we follow that call of the diseño, and make the boundaries of equal length, then, with the western line limited as has been mentioned, the whole tract will be of considerably less extent than eleven leagues—the quantity granted. But that the claimant is entitled to that quantity of land is clear; for not only has it been confirmed to him by the final decree [Case No. 16,657] under which the survey has been made, but it appears from the documents in the case that he petitioned for that quantity without mentioning any boundaries; that objections were made because of the quantity, and that the governor determined to grant, and the assembly to approve, a concession of that quantity; the natural objects mentioned in the grant serving merely to indicate the place where the eleven leagues granted were to be taken, and not being intended as boundaries of the tract. To determine the length of the western boundary by the position of its two ends, with reference to the natural objects indicated on the diseño, but without reference to its length as mentioned on the same drawing, is to assume that the governor intended to grant a specific tract by boundaries, of which the area was merely estimated, and not a tract of certain dimensions, of which the supposed boundaries were indicated. But the usage and general practice with regard to grants in this country, and the proceedings and documents relating to this grant, clearly showing that the governor, who had probably no knowledge of the tract, except from the diseño, could not have intended to limit the length of the line along the river with reference to the natural objects delineated on the diseño, but to make it of a certain extent, viz. three and a half leagues, so as to include, with three other boundaries of equal length, the area of land, viz. eleven leagues, which he undoubtedly intended to grant.

It is true, as a general principle, that in construing a grant, distance should yield to natural monuments; and this for the obvious reason that it is more likely that parties should mistake the length of a line than the visible object at which it begins or terminates. But in this case the beginning and the termination of the line are obviously imaginary points, taken at such distances to the north and south of the two sloughs as it was supposed would make the length of the line such as was intended, and is inscribed upon it; and the language of the grant itself, as well as the petition and preliminary proceedings, show that the grant was of a certain quantity of land, to be of the shape and at the place delineated on the diseño. For these reasons I think it clear that the land should be surveyed in a figure of four equal sides, of such length as to embrace within them the quantity of land granted to Gulnac and confirmed to the claimant. The western boundary must, therefore, be produced either to the north or south, or in both directions, until the requisite length be obtained; and this brings us to the second question presented for discussion.

It is concluded on the part of the United States that the line should be extended towards the south, and that the position of the northern termination, as indicated by the diseño, should be preserved. The reasons for this location chiefly relied on, are: 1st. That the grant mentions the land as "between the Laguna de McCloud and the San Joaquin"; that, therefore, that call is of higher dignity than any other; and the northern boundary should be fixed as near the laguna as the diseño will permit, and in strict conformity to it. 2d. That by extending the line northward the river Calaveras will be reached, which is not delineated on the diseño, and was not intended to be included. 3d. That another grant to the northward embraces in its diseño lands to the southward of the Calaveras, which, if it should be finally confirmed, would be interfered with by this grant, if located as desired by the claimants. There is certainly much force in these objections, and the point is not free from difficulty. It is to be observed, however, in answer to the 1st, that, though the grant and decree of concession do describe the land as between the river San Joaquin and the Laguna de McCloud, yet it is clear that that description was not used to indicate the boundaries of the land. The diseño which accompanied the petitions showed unmistakably to the governor that the land solicited was not bounded by the Laguna de McCloud, but by a line drawn a considerable distance beyond it, and obviously as far beyond it as, according to the draughtsman's idea of the topography, would be necessary to make a line drawn at an equal distance beyond the Campo Frances slough, 3½ leagues distant from it.

If the only description of the land were that contained in the grant, it would undoubtedly be necessary to take the Laguna de McCloud for a boundary, but, inasmuch as the land asked for and granted is shown by the diseño, on which the northern boundary is laid down as beyond the laguna, there does not seem to be any reason for treating the mention of that laguna in the grant as constituting a call of higher dignity than any other call indicated on the diseño. It appears, moreover, that the "Campo Frances" is represented on the diseño as on or near the southern boundary. The site of this camp is a natural object, susceptible of certain identification. From it the rancho derived its name. It might therefore be argued with much force that this call should govern, and, inasmuch as the northern line is fixed at an arbitrary distance above the laguna, while the position

of the southern boundary is indicated by the site of the Campo Frances, that therefore the line should be extended for quantity to the north, and not to the south, and the indication of the diseño as to the location of the southern line should be respected. But it appears to me that there can be but two modes of locating this grant. The one is, as before stated, to determine the length of the western boundary, by reference to the natural objects on the diseño, disregarding the call for length. The other is, to treat the grant as a grant of a certain quantity of land, and to make the call for length on the western line, and the delineation of the tract as an equilateral figure control the calls for natural objects. For the reasons heretofore assigned I adopt the latter alternative, and, if this view be correct, I can see no sufficient reason for making up the required length in one direction more than in the other.

The second reason assigned for locating the land as desired by the United States has already been incidentally disposed of. It is true the Calaveras location is not on the diseño. It is apparent that, owing to the error in regard to the distance between the sloughs, it was not supposed it would be reached. But neither is any natural object to the south of the Campo Frances slough represented, and for the same reason. And yet, if such had existed, it would not, on the hypothesis on which the diseño is drawn, have been included. The fact that either or both of these objects are not included, merely proves what has been so often stated: that the draughtsman supposed that the requisite quantity would be obtained by establishing the northern and southern boundaries at about three-fourths of a league to the north and south of the two esteros respectively, and, therefore, delineated his boundaries accordingly. The suggestion of the district attorney, therefore, may tend to show that the line should be limited by the natural objects; but it does not tend to support his own theory of location, which admits that the extent of the line should be produced in a southerly though not in a northerly direction.

With respect to the suggestion that there is another, but more recent, grant to the northward, which, if it be finally confirmed, will be interfered with, it is to be observed that, if the construction already given to the grant in this case be correct, the rights of the claimants must be deemed to have been fixed by it, and could not be affected by subsequent grants of any portion of the tract. The subsequent grantee, falling into the same error with regard to the distance between the sloughs as that committed by the draughtsman of the diseño in this case, may have supposed that the land, three-fourths of a league north of McCloud's lake, was vacant, and therefore included it in his diseño. But if we are right in supposing that the governor intended to grant with reference to quantity, and not to natural objects, the land had already been granted to Gulnac, and the subsequent grantee was mistaken in supposing it vacant. It moreover appears that the grantee has sold or quit-claimed large portions of the land on the northern side of the Laguna de McCloud, while to the south of the Campo Frances slough a considerable portion of the land over which the United States now proposes to extend the survey has been sold to pre-emptioners.

On the whole, it has appeared to me, though the case is not free from difficulty, that the tract should be located in an equilateral figure, the sides of which are to be of such length that the whole area included within them shall be eleven square leagues of land; the western boundary of the tract to be made of the requisite length by extending it to an equal distance to the north of the Laguna de McCloud, and to the south of the Campo Frances slough, until the requisite length be obtained.

[In accordance with this opinion, a new survey was made, which was confirmed. Case No. 17,328.]

WEBER (UNITED STATES v.). See Case No. 16,657.

Case No. 17,330.

In re WEBER FURNITURE CO.

[13 N. B. R. 529.] [1]

District Court, E. D. Michigan. 1876.

BANKRUPTCY OF CORPORATIONS—COMPOSITION PROCEEDINGS.

1. Corporations as well as natural persons have the right to avail themselves of the provisions of the bankrupt law [of 1867 (14 Stat. 517)] pertaining to composition.

2. In deciding a motion to confirm a resolution of compromise, the court will take into account the relations of the creditors favoring the compromise to the debtor, and the relative number of creditors whose individual opinions are expressed in person by the resolution as compared with those who dissent.

[Cited in Re Keller, Case No. 7,654.]

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

3. A resolution of compromise which is palpably opposed to the best interests of all concerned will not be confirmed.

On May 17th, 1875, thirteen creditors of the company filed their petition, setting forth certain acts of bankruptcy, and praying that the company might be adjudged a bankrupt. An order to show cause was issued, returnable on the 17th of May, when a denial of bankruptcy and a demand for a trial by jury were interposed. No further proceedings were had on this petition; but on the 25th of June, the company petitioned that an order might be made for a meeting of the creditors to consid-

[1] [Reprinted by permission.]

er a proposal for a composition, under section 43, as amended by section 17 of the act of June 22, 1874 [18 Stat. 178]. In compliance with this petition, a meeting of the creditors was ordered, at which it was resolved by a very large majority of the creditors, far exceeding in number and amount the requirements of the act, that it was for the best interests of all concerned to accept twenty cents on the dollar in full satisfaction and discharge of the debts of the company, provided that Bernard Stroh should, by joining in the composition, insure and promise the payment of the sum in cash within fifteen days after the resolution should be recorded. George Moebs, to whom the company, prior to the proceedings in bankruptcy, had made an assignment of its entire property for the benefit of the creditors, also joined in this composition, and released all his right, title, and interest in the assets of the company, which were to be transferred to Stroh on payment of such twenty per cent. Henry Weber, manager of the company, and personally bound as indorser upon a large amount of its paper, expressly covenanted that the compromise should not release or affect his liability as such indorser.

On the 23d of July, eleven days after the meeting was held, the Detroit Chair Company, a creditor of the Weber Company, filed with the register the following objections to the composition: First. That the Weber Furniture Company is a business corporation, and under the bankrupt act cannot be discharged of its debts, and is not entitled to the privileges of the proceedings contemplated by section 43. Second. That said com_ ny, prior to the filing of the petition for adjudication as a bankrupt, made and delivered an assignment of all its property to George Moebs, as assignee, who accepted the same, for the benefit of all its creditors, share and share alike, and by which all the creditors became rightfully entitled to have such assignment carried out; and such right cannot be defeated by any such proceedings, as is attempted under said section 43. Third. That the proposition to pay twenty per cent., when the statement of the assets showed that fifty per cent. will and can be paid, is unjust, and ought not to be considered or accepted.

Certain other objections were filed, but were not urged upon the argument. In all, ten creditors, representing about fifteen thousand five hundred dollars, joined in these and similar objections.

Don M. Dickinson, Alfred Russell, and Ashley Pond, for the motion.

J. W. McGrath, F. H. Canfield, D. C. Holbrook, and C. I. Walker, for the objecting creditors.

BROWN, District Judge. The first objection, that proceedings for a composition cannot be taken by a corporation, is based upon the last clause of section 5122 of the Revised Statutes, which provides, that "no allowance or discharge shall be granted to any corporation or joint stock company, or to any person, or officer, or member thereof." It is claimed that as the composition, when ratified by a sufficient number of votes, operates as a satisfaction of all debts exhibited in the statement of the debtor, it in effect amounts to a discharge, and hence falls within the inhibition contained in section 5122, above cited. All the other provisions of the act apparently apply as well to corporations as to natural persons. Indeed, section 5013 declares, that the word "person" shall also include corporations; and the general rule undoubtedly is, that where persons are mentioned in a statute, corporations are included, if they fall within the general design of the act. Ang. & A. Corp. §§ 6, 191; Commissioners v. Bank of Brest, Har. (Mich.) 106; Town v. Bank of River Raisin, 2 Doug. (Mich.) 530. The original act provided only for a discharge by order of the court. It is true that section 43 provided for the superseding of proceedings in bankruptcy by the choice of a trustee, to whom the assignee might transfer the entire property of the bankrupt; but no provision was there made for a composition or satisfaction of debts. Indeed, the section expressly provides that a bankrupt should have a like right to apply for and obtain a discharge after the passing of such resolution, and the appointing of such trustees, as if the resolution had not been passed. By the 17th section, however, of the act of June 22, 1874, amending section 43, an entirely new proceeding is contemplated. The debtor may propose to his creditors a compromise, and such compromise, when obtained, shall be accepted in satisfaction of debts due them from the debtor. Corporations are not expressly excluded from the benefits of this provision. I cannot see that they are excluded by implication. The word "discharge" used in section 5122 evidently applies to a discharge by order of the court upon a petition of the debtor. This is the only discharge contemplated in the original act. Seven years thereafter a new provision is engrafted upon the act, by which the debtor may obtain a satisfaction of his debts by the act of his creditors. I see no reason why this should not apply equally as well to corporations as to natural persons. No express adjudication is found upon this point, although it was found in the Case of Haskell [Case No. 6,192], that it was not the intention of the statute that no debtor could make a composition with his creditors, who, by reason of preference, or otherwise would not be able to obtain his discharge. This case falls within the general rule in question: that the inability of the debtor to obtain a discharge by order of the court does not preclude his obtaining satisfaction of his debts by way of composition.

The third objection is substantially, that the composition is not "for the best interests of all concerned," within the meaning of the statute. From the language of section 17, of the amended act, I think that to justify the court in confirming the composition, the following

facts should be made affirmatively to appear: (1) That a meeting had been called under the direction of the court, and upon not less than ten days' notice to each creditor, of the time, place, and purpose of such meeting. (2) That a resolution has been passed by a majority in number and three fourths in value of the creditors of the debtor, assembled at such meeting, either in person or by proxy. (3) That it has been confirmed by the signatures thereto by the debtor, and two-thirds in number and one-half in value of all the creditors. (4) That notice of the presentation of the resolution has been given to all the creditors of the debtor of not less than five days. (5) That the composition is for the best interests of all concerned. Upon the establishment of these facts, it is the duty of the court to cause such resolution to be recorded, and a statement of the assets and the debts, which the debtor is required to produce at the meeting of the creditors, to be filed.

Upon the argument of this motion much discussion was had upon the question, how far the court was authorized to examine into the reasonableness of the proposed compromise. Under the former English bankrupt act there seems to be some difference of opinion as to the duty of the court in this regard. In the case of Latham v. Lafone, L. R. 2 Exch. 115, Mr. Chief Baron Kelly, in commenting upon composition deeds under the bankrupt act, uses the following language: "Looking at the general scope of the enactment, I am of opinion that the intention of the legislature was to leave to the majority of the creditors the decision of all questions of expediency as to the affairs of the insolvent debtor, but to reserve to the courts of law the determination of the reasonableness of their arrangements. The act has, for the first time, conferred upon a specific majority of the creditors the power to bind the rest by their informally given vote, but the protection of the interests of the remainder is committed to the law, and before we can hold the deed binding upon nonassenting creditors, we must see that it is not unreasonable in the mode in which it affects them." The majority of the court, however, seem to have decided the case upon the ground that the deed in question was not within the purview of the act, and had some doubt as to the opinion of the chief baron upon the question of reasonableness. There is no doubt, however, that where the composition is so unreasonable as to be evidence that the creditors who signed it were actuated by friendly feeling toward the debtor to accept a composition greatly disproportioned to the assets, or where it was apparent that they did not act bona fide for the benefit of all the creditors of the debtor, it will not be upheld. See Ex parte Cowen, 2 Ch. App. 563. It must be conceded in both these cases that courts of law in dealing with deeds of this description have held that the deeds must be reasonable. See, also, the following cases: Dingwall v. Edwards, 4 Best & S. 738; Wells v. Hacon, 5 Best & S. 196; In re Richmond Hill Hotel Co., L. R. 4 Eq. 566; Ex parte Nicholson, 5 Ch. App. 332; In re Richmond Hill Hotel Co., 3 Ch. App. 10; Ex parte Roots, 2 Ch. App. 559; Ex parte Radcliffe Investment Co., L. R. 17 Eq. 121; Ex parte Duignan, L. R. 11 Eq. 604; Ex parte Birmingham Gaslight & Coke Co., L. R. 11 Eq. 204; Ex parte Levy & Co., Id. 619; Bell v. Bird, L. R. 6 Eq. 635. The recent English bankrupt act of 1869 has apparently been construed as taking away from the courts every question, except that of fraud or bad faith in obtaining the compromise. See Ex parte Linsley, 9 Ch. App. 290; Bissell v. Jones, L. R. 4 Q. B. 49. I have not the full text of the English bankrupt law before me, but the only power given to the courts seems to be found in the section quoted in Ex parte Radcliffe Investment Co., L. R. 17 Eq. 124, note, which follows nearly the language of the last clause of section 17 of the act of 1874, and enacts that if it appears to the court, on satisfactory evidence, that a composition under the section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt, and proceedings be had accordingly. It does not seem to be necessary that the court should find the compromise to be for the best interests of all concerned, as required by our act. Hence the English decisions upon the questions of reasonableness do not seem to be applicable here. I find but one American case upon this point. In Re Whipple [Case No. 17,513], in which it was held by Judge Lowell, that congress had imposed upon the courts the difficult and delicate responsibility of rejecting a composition, if opposed by a small minority of the creditors, when it is made to appear that a settlement in bankruptcy would be more for their interest. He announced the rule that the judge must make his comparison, not with what the debtor might possibly have done, but rather with what the assignee in bankruptcy could do. I am entirely content with this view of the law, and, indeed, I hardly see how any other construction can be placed upon the words: "Being satisfied that the same is for the best interests of all concerned." It is not unfrequently the case that a small division in cash is hastily accepted by the creditor without a careful examination of the debtor's condition, especially if his claims be small and the expenses of opposing a composition would be greater than any additional dividend he might receive. Not unfrequently, too, he is actuated by friendly feelings toward the debtor, or by fear that the estate would suffer a material diminution in the bankruptcy court, or by the pressing needs of the creditor himself, to whom a small percentage in cash may be of more value than a much larger dividend paid after the lapse of months; but where a composition deed has been signed by a large majority of the creditors upon a full consideration of the condition of the debtor, I should be very reluctant to over-

rule their judgment simply because I thought the estate would yield a larger dividend in bankruptcy. Much would depend upon the character of the property and the state of the markets. In the case above cited, Judge Lowell intimated "that a difference of five per cent. upon the amount of the debts, and the probable amount of the assets, would not be sufficient to induce me to reject the resolution." I would go even further than that, and say that, where the property consisted of real estate or of goods, the value of which depended upon the caprices of fashion, or other like contingencies, I would not overrule the discretion of the creditors, fairly exercised, if the difference were ten, or even fifteen per cent.

In the case at bar there were seventy-four creditors present at the meeting, in person or by attorney, representing debts to the amount of one hundred and four thousand two hundred and sixty-four dollars and fifty-two cents. The debtor produced at the meeting a statement showing the whole of his debts and assets, and the names and addresses of his creditors to whom said debts respectively were due, and the resolution in question was adopted by a vote of seventy-two creditors, representing one hundred and three thousand four hundred and seventy-six dollars and ninety-six cents, against two, representing seven hundred and eighty-seven dollars and fifty-six cents. It does not appear how many of these creditors were present in person, and how many by attorney; nor is it material to the consideration of this case. The statement furnished by the debtor at the meeting showed a list of one hundred and sixty-three creditors, representing two hundred and fourteen thousand four hundred and seventy-five dollars and thirty-two cents. Of these, one hundred and sixty-one creditors, representing one hundred and forty-six thousand nine hundred and seventy-nine dollars and seventy-five cents, signed the composition. Of the one hundred and sixty-three creditors, one hundred and thirteen, whose debts exceeded fifty dollars in amount, proved claims in the aggregate sum of one hundred and sixty-seven thousand three hundred and thirty-seven dollars and ten cents; forty-seven creditors, representing an aggregate of sixty-seven thousand four hundred and ninety-five dollars and fifty-seven cents, have either neglected or refused to join in this action; but fourteen of these appear to have proved their debts. Under ordinary circumstances, had this larger vote in favor of the compromise expressed the personal opinion of each of these one hundred and sixteen creditors, I should have felt constrained to confirm their action, although I might have thought they had erred, and erred widely, in coming to this conclusion. But in determining the reasonableness of a compromise like this, I think it legitimate to inquire how many individual opinions were expressed in favor of it. If, on examination, it were found that a few persons represented a very large number of creditors and a very large amount of claims, I should feel much less reluctant in reviewing their decision, though each vote represented an individual opinion. On examination of this case, it appears that, although one hundred and sixteen creditors have signed this composition, eighty-eight of them were represented by four attorneys, so that there were in fact but thirty-two individuals whose presumed opinion was expressed in favor of this compromise. As there were forty-seven non-assenting creditors, supposing each to have expressed his opinion in the case, there is actually a large majority who have pronounced against it.

Again, in the case of Ex parte Cowen, above cited, it was held a proper subject of comment, that certain of the creditors were actuated by feelings of charity and benevolence toward the debtor, and certain others were related to him by marriage. Indeed, I think the court may take into consideration any fact tending to show that the creditor was influenced by friendly feelings, or by any other motives than those which usually actuate creditors in endeavoring to make the best terms with a debtor or to whose personal responsibility they have trusted. I find in this case, that Mr. Dickinson, attorney for twenty-seven creditors, acted as solicitor for the debtor, and filed a denial of bankruptcy and a demand for a trial by jury. He appears also, by one of the depositions on file, to have been retained to defend several suits brought up against the company in the common law courts. While it is entirely probable that his retainer by the company in these matters may have familarized him with its affairs, and enabled him to form a juster estimate of the amount it was able to pay by way of compromise, it is also possible it may have somewhat prejudiced him in forming his judgment as to the propriety of such compromise. Occupying these apparently antagonistic positions, it cannot be expected that the court will give the weight to his judgment, to which, under other circumstances, it would be justly entitled. Mr. George F. Marks, attorney for twenty creditors, appears, by his deposition in proof of a personal debt, to have been general foreman for the furniture company for ten months prior to the destruction of its manufactory by fire. While imputing no bad faith to him, his position was not that of an ordinary creditor seeking to make the most out of his debtor's assets, and his vote should not be entitled to great weight as to the non-assenting creditors. Of the twenty-eight creditors not represented by either of these four attorneys, twenty-two signed the composition in person. Of these twenty-two, however, but four held claims exceeding three hundred and fifty dollars in amount. One of these was the firm of George Moebs & Co., representing a debt of twenty thousand and one dollars and fifty-six cents. Not only is the head of this firm, George Moebs, the common law assignee of the furniture company, but the note representing the debt of his firm is secured by indorsement of Mr. Stroh, the person to whom it is proposed, by this

composition, to turn over the entire assets of the company. Mr. Dickinson, who represents a claim of seven hundred dollars, is, as has already been observed, the solicitor for the debtor in this case. Philip H. Marks, who has proved a claim of nine thousand three hundred and five dollars, is also secured to the amount of eight thousand dollars by the indorsement of Mr. Stroh. The fourth creditor who signed in person, is the firm of Holmes & Co., representing seven thousand three hundred and sixty-five dollars and thirty-six cents. This claim is apparently subject to no comment. The remaining eighteen creditors represent but two thousand three hundred and ninety-eight dollars and thirty-eight cents, an average of one hundred and thirty-two dollars and ninety-six cents; a very small amount compared with the aggregate of the assenting creditors, and particularly small as compared with the amounts represented by the four attorneys already referred to. Mr. Russell, attorney for thirty-five creditors, represents fifty thousand nine hundred and six dollars and eighty-five cents, an average of one thousand seven hundred and forty dollars and nineteen cents. Mr. Dickinson, the attorney for the twenty-seven creditors, represents twenty-two thousand eight hundred and ninety-five dollars and ninety-four cents, an average of eight hundred and forty-seven dollars and ninety cents. Mr. Somers, attorney for six creditors, represents five thousand nine hundred and ninety-seven dollars and fifty-two cents, an average of nine hundred and ninety-nine dollars and fifty-eight cents. Mr. Marks, the fourth attorney, represents twenty creditors, an average of but one hundred and seventeen dollars and thirty-eight cents. His claims, however, appear to be those of the employees of the company. These four attorneys, therefore, represent eighty-two thousand one hundred and forty-eight dollars and two cents out of one hundred and forty-six thousand eight hundred and seventy-nine dollars and seventy-eight cents. Some stress was also laid upon the fact that the Detroit Savings Bank, a wealthy local corporation, a creditor to the amount of fourteen thousand two hundred and seventy-five dollars and thirty-five cents, had assented to this compromise. I find, however, on examination of its proof of debt, that it is represented by notes secured by the personal obligation of Henry Weber, and by collaterals deposited by Weber to secure the performance of this obligation, and that out of these collaterals, before the proof of debt in question, there had already been realized about ten thousand dollars.

I have alluded to these facts, not to show that there is any irregularity or invalidity in the adoption of this compromise, but simply to prove that there is not that preponderance of unbiased individual judgment, which, at first blush, the figures would seem to indicate.

I proceed now to inquire how this discretion has been exercised. At a meeting of the creditors called to consider the propriety of adopting a compromise, the debtor submitted a statement of its assets, substantially as follows:

Merchandise	$44,179 07
Accounts and notes, good	14,197 43
Accounts and notes, doubtful	19,297 27
Accounts and notes, claiming offsets	4,123 20
Accounts and notes collected by H. Weber that should be charged to him	6,803 25
Accounts and notes, worthless	893 67
Entered as profit and loss in 1874	46,653 04
Real estate, consisting of vacant lots and wild lands in different parts of the state	9,922 34
Insurance on the manufactory of the corporation and its contents, which, just prior to the assignment, had been destroyed by fire	68,500 00
Horses	310 00
Tools	387 02
Cash	183 93

The amount of debts stated in its schedule, filed at the same time, is about two hundred and fifteen thousand dollars, as above stated. Now, assuming that the figures above given represent the actual value of the property, it will be seen that the merchandise alone will pay the twenty per cent. offered by way of compromise; that the insurance alone would pay a dividend of about thirty-two per cent. The probable dividend which an assignee in bankruptcy would realize is shown by the following estimate to be nearly forty-eight per cent. If the estimate placed by the debtor upon its assets be correct, the estate ought to realize for its creditors from forty to forty-five per cent.:

Assets.

Merchandise as per inventory	$ 44,179 07
Assets and notes, good	14,197 43
Assets and notes, doubtful; at fifty per cent	9,648 63
Assets and notes collected by Weber	6,803 25
Real estate	9,922 34
Insurance	68,500 00
Horses	310 00
Tools	387 02
Cash	183 93
	$154,131 67

Deductions.

Assets carried forward		$154,131 67
Profit and loss account	$46,653 84	
Paid workmen since petition filed	4,275 39	
Premiums on insurance	661 50	
		51,590 73
Net assets		$102,590 94

But it is claimed that the court cannot assume that the amounts set opposite these respective items represent the actual value of the assets in question, but simply their face value; but the term "face value" is evidently inapplicable to any items except the accounts and notes and the insurance. With reference to the accounts and notes, the debtor has expressly excluded this construction by classifying them as "good," "doubtful," "claiming offsets," and "worthless." I can put no other construction upon the word "good," except that in the opinion of the debtor such accounts and notes are good for their face. In making my calculations, I have estimated the doubtful

as worth fifty per cent on their face value, perhaps as reasonable a construction as could be given to this word. I have left out of consideration entirely those pronounced worthless, as well as those to which offsets are claimed. The merchandise is valued as per inventory, and it was suggested that it is usual to inventory at cost, and that the court could not presume that the furniture would realize at a forced sale as much as this; but it must be borne in mind that the company was itself a manufacturer of furniture; that its business was to manufacture at a profit, and, if there is any presumption about it, it would be that it would realize more than the actual cost of manufacture.

I can put no other construction upon the figures set opposite the items of real estate, except that this is the value of the real estate in the estimation of the debtor. I think I must assume that the item of sixty-three thousand five hundred dollars insurance, represents the face of the policies held by the company upon its manufactory. It was hinted that the companies claim a defense to these policies upon the ground that Mr. Weber had himself set fire to the manufactory in question. Nothing of this kind appears in the record. It does not even appear that the companies have refused to pay, or that payment has been demanded. Even if suits had been commenced, and a defense pleaded by the companies, I do not see that the court could assume that these defenses were good, and that the policies were absolutely worthless, when the suits may possibly have been collusive, and the defenses interposed for the very purpose of leading the creditors to believe the insurance could not be collected. In the affidavit annexed to this statement Mr. Weber swears the statement of assets is a true statement of such assets, and that the different items thereof were truly characterized in such statement. If the figures set opposite these respective items represent anything at all, they represent the value placed by the debtor upon the items in question, and it is highly improbable that in seeking a compromise with its creditors it would over estimate the value of assets from which these creditors were to realize their claims. While I have no doubt that it is sufficient prima facie evidence that the composition is for the best interest of all concerned, to show that the requisite majority of creditors have accepted and that the burden of proof is then thrown upon the dissenting creditors, still, where the record shows upon its face, by the debtor's own statement, that his estate is able to pay a much larger dividend, I think the dissenting creditors may rely upon this statement, and are not bound to prove the facts by affidavits, which would only corroborate it. If the debtor's statement under estimates the value of his property, the creditors may prove the fact by affidavits, or, perhaps, may take a reference to the register; but they are not compelled to do so, if they are content, as in this case, to accept the debtor's statement as true. How this compromise was able to obtain the large vote it did, I am unable to understand. Certainly it could not have been by the statements apparent upon this record, or by the arguments made upon the hearing of this motion. Upon the face of this record, as it is laid before me, I have no hesitation in pronouncing against this composition. My conclusion upon this point renders it unnecessary to consider the very difficult questions arising under the second objection. An order will be entered denying the motion to confirm and record the composition.

[This order was reversed, on review, by the circuit court. See Case No. 17,331.]

Case No. 17,331.

In re WEBER FURNITURE CO.

[13 N. B. R. 559.] [1]

Circuit Court, E. D. Michigan. 1876.

BANKRUPTCY—COMPOSITION PROCEEDINGS—INDICIA OF FRAUD—REVIEW IN CIRCUIT COURT.

1. When, at a meeting of creditors, the debtor is examined in reference to the value of the assets mentioned in his statement, and the resolution of compromise is regularly passed, under section 17 of the act of June 22, 1874 [18 Stat. 178], although there is a great apparent discrepancy between the assets contained in the statement and the percentage accepted by the resolution, and other indicia of fraud exist, the district court should not refuse to record it, without giving the debtor and majority creditors full opportunity upon notice and hearing, as provided by the statute, to bring before it all the facts in view of which the latter accepted the compromise.

[Cited in Re Keller, Case No. 7,654.]

2. When one tribunal reviews the judgment of another, or the action of its own subordinate bodies or officers, it should never reverse without having before it all the facts and conditions upon which the decision to be reviewed was based.

3. The English and American cases upon the authority of the creditors reviewed, and a strong preference expressed for the rule deduced from them, which makes the decision of the majority conclusive as to the amount of the compromise, where their judgment is exercised in good faith, and there is nothing to indicate fraud, accident, or mistake.

[Cited in Re Jacobs, Case No. 7,159.]

This was a petition in review to reverse the judgment of the district court refusing to record a resolution of compromise. [See Case No. 17,330.] The record is voluminous, and in order to develop all the points discussed on the argument, the facts would be extensive. There was a wide discrepancy between the compromise offered, and the apparent value of the property. As the sole point decided is that it was error in the district court to reject the resolution without notice and hearing to the parties, the particular dates and facts presented in the record became immaterial, except as they are stated in the opinion itself.

[1] [Reprinted by permission.]

Don. M. Dickinson, for the debtor.

Moore, Canfield & Warner and D. C. Holbrook, for objecting creditors.

EMMONS, Circuit Judge. Several questions have been argued at the bar which will not be noticed in this judgment. The only one decided is whether the district court erred in refusing to record the resolution of compromise without notice and hearing of the parties concerned, thus bringing before it all the facts upon which the creditors themselves acted before passing judgment upon the papers presented. That power existed to review the resolution upon its merits, is not questioned. The statute in plain terms authorizes either the rejection of the resolution, when it is presented for record, or its rescission subsequently, if it is prematurely recorded. What we here decide is not that power has been exercised which does not exist, but that it has been exerted without proper proof. The resolution of creditors is adopted at the meeting at which not only the statement filed by the debtor is presented, but the debtor himself is examined at length, giving the creditors all the information which any, even the least of them, desire. This collateral evidence, in a great majority of cases, must be far more important than the statement itself in enabling creditors to judge of the value of the assets. This important feature of the proceeding, and which is that upon which the resolution in many instances must mainly depend, is not in the first instance brought before the court. The statement and resolution is alone presented. The statute provides no mode by which the testimony of the debtor shall be recorded, or, if recorded, can be brought before the district judge. It is a case coming within that very familiar and universal principle which forbids a court, in reviewing the judgment of another, to reverse for error of any kind, where, in the theory of the proceedings, the facts upon which the inferior tribunal has proceeded are not brought before it. The same principle is applicable where a court reviews the findings of its own subordinate officers. If the facts upon which such officer has passed judgment are not brought before the reviewing tribunal, we know of no exception to the rule that a judgment or finding pronounced is affirmed. The principle goes farther, and in instances where provision is made to carry up the facts for judgment, if in the course of the proceedings it appears that they are not all contained in the record, affirmation is the necessary result. Not because they are any more illustrative than numerous other similar judgments, but for the reason that they are accessible in previously prepared papers, we refer to a few cases, going upon the general principle which we think is disregarded when the court assumes the burdensome and impolitic duty of rejudging in all instances the judgment of the creditors, without having laid before it, as the statute provides, the facts, without which it is a presumption of law they would not have acted.

Walker v. Boston & M. R. R., 57 Mass. [3 Cush.] 1, was a proceeding to condemn lands for a railroad. The court had power to grant a new trial or reject the verdict. It was objected that the record did not affirmatively show that certain conditions, necessary by the statute to give validity to the verdict, had been complied with. At pages 2 and 3, the court say: "If the court of common pleas are called upon to set aside the verdict of a sheriff's jury, on the ground that the respondent had not due notice of the application, the objection cannot be sustained by showing that such notice does not appear by the warrant, the return or the record of the court, for it may, notwithstanding, be proved, by evidence aliunde, that the respondent was summoned, or that he consented to take notice without summons, or in fact appeared before the commissioners." Here the record shows affrmatively that there was an examination and proof in explanation of the statement. The only presumption which is asked is that it was sufficiently full to justify the vote of the creditors.

Flagg v. City of Worcester, 62 Mass. [8 Cush.] 69. Commissioners having issued their warrant, the jury assessed damages for taking lands, and on its return it was objected that it did not appear that any determination by the mayor and aldermen, as required by the statute, had been made so as to authorize the commissioners to issue a warrant for a jury. After saying that an objection could not avail because not seasonably urged, the court say: "Besides, it well may be taken for granted in ulterior proceedings, in cases of this kind, where the contrary is not shown by the record, that it was made to appear satisfactorily to the commissioners that such determination had been made by the mayor and aldermen. The maxim 'Omnia rite acta presumuntur' is applicable." Martin v. Stevens, 3 Ind. 519. The evidence was not returned. On error the court say: "If any state of proofs might have sustained the charge, it will be presumed right." Cullen v. Lowery, 2 Har. (Del.) 459. The court say: "The record shows it is for a school tax. There is one case, and only one, in which the justice had such jurisdiction, and perhaps we ought to presume it was such a case rather than the contrary." There was no affirmative proof that it was such a case. And see applying in various forms of proceeding the same general principle of presumption in favor of the rectitude of proceedings which are being reviewed on error: McKinney v. Pierce, 5 Ind. 422; Elder v. Robins, 2 Ind. 210; Montgomery v. Doe, 4 Ind. 266; Wagers v. Dickey, 17 Ohio, 439; Hicks v. Person, 19 Ohio, 426; Bankhead v. Hubbard, 14 Ark. 300; Richardson v. Denison, 1 Aik. 210; Stearns v. Warner, 2 Aik.

26; Kingsley v. Bank, 3 Yerg. 107. In the last case it is said: "The judgment should clearly have been for the defendant, if all the testimony was that certified in the record; but, as it does not appear there was no more, it will be presumed there was more." It may have been quite clear on the face of the statement in this instance, that the assets would have paid more than twenty cents, but, as is said in the case just cited and its numerous fellow-judgments, the presumption is the omitted testimony was sufficient to explain and overcome it. Coil v. Willis, 18 Ohio, 28, is a case quite applicable in its reasoning to the case before us. Clements v. Benjamin, 12 Johns. 299, on certiorari. The facts before the court by no means warranted the judgment, but it was held the burden was on the plaintiff in error of showing affirmatively, by procuring a proper return, that there was no additional explanatory proof. We think in this case the burden was upon the objecting creditors to show the insufficiency of the evidence collateral to the statement given by the debtor. Holly v. Rathbone, 8 Johns. 148; Wilson v. Fenner, 3 Johns. 439; Kline v. Husted, 3 Caines, 275. Similar adjudications in New York are very numerous. See, also, Wight v. Warner, 1 Doug. [Mich.] 384; Fleming v. Potter, 14 Ind. 486; Sharp v. Johnson, 22 Ark. 79; Long v. Rodgers, 19 Ala. 321; Newberg v. Henson, 12 Cal. 280; Stockton v. Burlington, 4 G. Greene (Iowa) 84; Bailey v. Clark, 6 Fla. 516; Pratt v. Miller, 2 Kan. 192; Stewart v. Wilson, 5 Dana (Ky.) 50; Byrne v. Riddell, 2 La. Ann. 11; Gray v. Howard, 12 Mich. 171; Barnsback v. Reiner, 8 Minn. 59 [Gil. 37]; Anderson v. Williams, 24 Miss. 684; Raymond v. Edgar, 19 Mo. 32; Weed v. New York R. Co., 29 N. Y. 616; Brindle v. Brindle, 50 Pa. St. 387; Martin v. Bank, 2 Coldw. 332; Ward v. Townsend, 2 Tex. 581; Edmiston v. Garrison, 18 Wis. 594; Lamb v. Grover, 47 Barb. 317; Hays v. Hays' Admr. 26 Mo. 123; People v. Wayne Circuit Judge, 18 Mich. 483.

This is not the larger portion of judgments we have examined on this subject on a former occasion; reference to them all would serve no useful purpose. There is no department of the law where judgments are more numerous and pointed to a principle, or where they have applied one in more diverse circumstances or more universally. They authorize us to apply it in the case before us, and say that where no fraud appears, the duty is cast upon the objecting creditor to show affirmatively that the resolution of the creditors is unwarranted, and that the court should record it, unless upon notice and hearing it inquires into the testimony, which shows it ought to be rejected.

We should not understand from the judgment of the learned judge of the district court that he would at all disagree with these generalities. We should infer that the only difference between his judgment and our own consists in a mere matter of practice. Shall the burden of bringing this additional testimony before the district court be assumed by the creditors, whose resolution is to be recorded, or shall the presumption exist that that resolution is right until attacked by those who are interested in showing it to be erroneous? We think a more convenient practice is to extend to those interested the presumption of rightfulness which attends all other judicial and statutory action. We think it would be, in the last degree, inconvenient, if, whenever an apparent discrepancy between the assets and the compromise appears, the court is to be burdened with the duty of re-hearing the testimony and acting as the guardian of those interests which the creditors themselves, in the very nature of the case, are so much more capable of protecting. We cannot assume any such duty upon petitions of review, and think it will lead to ill consequences, if adopted as a practice in the district court.

We have been favored by full citations of English and American judgments upon this statute. In selecting a portion of these which have been cited and commented upon, in justification of our judgment, we do but little more than reproduce their analysis and consideration from the very able brief of the counsel for the debtor. This efficient aid is sufficiently rare in its occurrence to make our acknowledgment for its presence here not unworthy of mention.

We think the following adjudications upon the English act, precisely like our own, so far as this subject is concerned, differing from it only in the mere practice by which the subject is reached, show that the British courts have uniformly held that in all questions of mere amount, and all conditions, and terms which affect the simple question of policy on the part of the creditors, up to the point where fraud or ill-faith is reached, it is left entirely to the discretion of those who are alone interested in the result. Without being called upon to affirm that this will be accepted as law under our own statute, we think the adjudications there and in this country already pronounced upon the same subject, are coercive to at least this extent—that when a resolution has been regularly passed, and there is nothing before the court but it and the statement of the debtor under the act, it will, prima facie, be held to be good, and that unless there is some feature in it so gross as to excite the suspicion of fraud, it will be affirmed.

Ex parte Radcliffe Inv. Co., L. R. 17 Eq. 121, decided in 1873 on appeal to the bankruptcy court. Bacon, C. J., in construing that clause of the statute which provides for adding to or varying the original resolution of compromise, and holding that the persons who are not to be affected by the amendatory resolution are not creditors, dis-

cusses with much fullness the powers conferred upon creditors, under the English statute, and says: "Now, the existing statute has made this striking and marked difference in the law of bankruptcy—that all, or nearly all, the powers and authority which were given to the court under the former statutes are now transferred to the creditors. They are made the administrators and judges of their own affairs, and they are, under the terms of the statute, bound by the votes of a certain majority at a meeting duly convened. One of the things contemplated by the existing statute is to regard only the interests of creditors, and it is in their interest alone that it provides that it shall be in their power to prefer the acceptance of the composition to the issuing of proceedings in bankruptcy against their debtor, or to resorting to any other legal remedy they may possess." His whole judgment rests largely upon the assumption that the absolute power of binding the minority is conferred upon the majority of creditors. The primary authority is vested in them.

Ex parte Duignan, L. R. 11 Eq. 604, in 1871. The deputy judge had ordered a levying creditor to deliver property to the trustee in liquidation, holding that the same principle applied in such case as in that of an ordinary adjudication in bankruptcy. Affirming this ruling, on appeal, Bacon, C. J., again minutely reviewing these statutory provisions, says: "They hand over to the creditors of insolvents generally an absolute power of determining the manner in which, and the terms upon which the assets of the debtor who is found to be bankrupt, whether in consequence of a hostile proceeding originated by his creditors, or by his own confession, shall be administered and distributed." It is this unlimited power conferred by the statutes which furnishes the keynote for their construction.

Latham v. Lafone, L. R. 2 Exch. 115, has been cited at the bar, and is relied upon in the opinion of the learned judge of the district court to show, what is not doubted, that power is given by this law to reject or set aside the resolution of compromise. A motion was made to discharge a debtor from arrest because a deed of composition had been signed and registered. The motion was denied. Two judges held the deed unreasonable upon grounds having nothing to do with the mere quantum of money to be paid. The circumstances were so gross as to incline an equal number to base their judgment upon the far better ground that it was not a deed under the statute at all. The judgment has no tendency to show that the court, without collateral facts, will review the decision of creditors as to the percentage they shall receive. This criticism is fully supported by the following language in one of the opinions: "The main object of this section was to enable the creditors to manage their own affairs. It was clearly intended to confer large discretionary powers on the creditors, and we ought to give every effect to that intention. I agree that if the deed is unreasonable to the extent of absurdity we ought not to sanction it, but prudence is so much a relative matter that it becomes very difficult to say conclusively that a deed is unreasonable on this score, where the creditors have said it is reasonable, and, except in cases of inequality, we have no certain test to go by."

In re Cowen, 2 Ch. App. 563, was relied upon for the same purpose as the preceding. Leave was given below to issue execution, notwithstanding a composition by the debtor, under the act of 1861. Lords Turner and Cairns both rest their judgments upon the ground that the deed was not executed in good faith. There was an expectation of benefit peculiar to the consenting majority, which is expressly pronounced a fraud upon the rights of the others. Among other evidences of ill-faith the circumstances of haste in which the deed was executed, and that there was no examination of the debtor, no evidence of the value of the assets, are referred to. What gives this judgment much weight in favor of the positions taken by the promoters of this bill of review is what is said upon the other point, and which is alone applicable here. Proof having been made in that case that the assets would pay ten, instead of two, shillings in the pound, and this fact being relied upon at the bar to show that the compromise was unreasonable, within the reason of decisions which had held that unreasonable clauses invalidated a deed, Lord Cairns, at page 569, says: "It was much pressed in argument that wherever the court finds the deed to be unreasonable in its provisions it will be treated as invalid, and that it is unreasonable if the amount of composition be not in fair proportion to what the debtor is able to pay. But in my opinion there is a statutory power given to a majority of the creditors to bind the minority. They are made the judges of the propriety of the arrangement so long as they exercise their power bona fide; and it certainly seems to me that it would be contrary to the spirit of the act that this court could sit in review on their decision as regards the quantum of composition they may agree to accept. But this is subject to the paramount obligation that this power, like all other powers, must be exercised fairly, so that there may be a bona fide bargain between the creditors and the debtor. If it should be found that the bargain was tainted with fraud, the arrangement will not be binding on the non-assenting creditors. If, for example, it were found that there was a bargain with some of the creditors to give them some peculiar benefit, that would be a fraud. But even without any ingredient of fraud, if the creditors, from motives

of charity and benevolence, which might be highly honorable to them, were willing to give the debtor a discharge on payment of a composition wholly disproportioned to his assets, that would not be such a bargain as the act requires, and would not bind the non-assenting minority." Lord Turner is equally explicit. It is evident that the last sentence quoted from Lord Cairns, which concedes a deed would be illegal when the majority acted from motives of benevolence, without moral corruption, in no way qualifies the previous doctrine that the mere quantum of payment is solely for the creditors. What is meant is, that where their judgment in good faith is pronounced upon the financial ability of the debtor, the power of the majority is paramount; but where it appears affirmatively that the majority is made up of relatives, warm personal friends of the debtor, or those who have high personal interests in his future prosperity, insomuch as to constitute evidence that they have not performed their duty under the act in deciding what the debtor can pay, but are disqualified from the performance of such duty by their personal relations, their prejudices, or their frauds, then their action will be reviewed. The law in all cases, irrespective of motive, deems such action a fraud.

Ex parte Linsley, 9 Ch. App. 290, reviewing the successive decisions of the deputy judge and chief judge in bankruptcy, on an application to set aside an order discharging a debtor under a composition, held, that where it quite clearly appeared upon the face of the schedules, by the valuation of the debtor himself and by the sworn testimony of expert valuers, that there was a surplus beyond paying all his debts and the composition was for fifty cents, that as no fraud appeared and the creditors were not deceived, the objection of the opposing creditors should be overruled, and a compromise resolution affirmed. This judgment would have been well cited by the majority creditors to sustain the resolution in this case had there been a hearing upon notice and evidence in the court below. It is, indeed, a strong one to show the absolute power accorded to the creditors under the British statute, from which ours was taken, where it is exercised in good faith. It is referred to here only to suggest that it and its kindred fellow-judgments under the British statute establish a principle which, if followed here, will at least prevent the rejection of a resolution where nothing whatever appears beyond the written statement and the resolution itself. Ex parte Nicholson, 5 Ch. App. 332. The deed provided for the acceptance of the obligation of a third person in discharge of debts, instead of relying on the property of the bankrupt. The British statute does not, like our own, provide that the payment shall be in money. The court, in deciding the deed not unreasonable arguendo, repeats the doctrine that the statute confers with much fullness the power of deciding this whole question upon the majority of creditors, and that their decision will not be interfered with so long as bad faith does not appear.

In re Richmond Hill Hotel Co., L. R. 4 Eq. 566. The deed postponed the payment for two years. Motion to restrain the action of a creditor, objection being made that such a deed was unreasonable, the court approving. Stone v. Jellicoe, 3 Hurl. & C. 263, which held a deed good when the payment was only forty pounds a year, added, "Can I say the delay of payment for two years makes the deed unreasonable? The creditors must judge of that."

Ex parte Roots, 2 Ch. App. 559, was an application for leave to issue execution. The commissioner granted it upon the ground that one deed having failed for non-performance by the debtor, it being succeeded by another of the same amount, and evidence being presented that the assets would pay a much larger sum, the deed was fraudulent. In the court of chancery, on appeal, Lord Cairns said: "None of the cases cited warrant the court in holding the deed unreasonable merely for the amount of the composition." The case was sent back for a further investigation as to whether it was fraudulent in fact, the court strongly disapproving the ground of the judgment below, which rested upon certain indicia or prima facie presumptions of fraud upon the face of the papers. The doctrine of the judgment is quite full to the principle that the question of amount, the terms of the deed, so as they are within the law, are wholly for the majority, and that the onus of proving ill faith is upon those who charge it, and being charged, that plenary proof will be demanded to sustain it. A suspicious succession of deeds, a wide discrepancy between the assets and the amount to be paid, both existed. The reviewing court conceded they were manifest indicia of fraud; but that they were by no means sufficient without proof aliunde to show actual ill faith.

In re Reiman [Case No. 11,675], was an application to record a resolution brought before the circuit court on a petition of review. It was objected that the payments were by promissory notes and not in money, and that an item of assets had been omitted from the statement. Justice Hunt several times in the course of his judgment refers to the principle involved in the following quotation: "He (the debtor) presents a list of the names and amounts of his creditors and of his assets. His creditors consider the subject thus presented, and are authorized to examine the debtor under oath to obtain better or more precise information. The whole matter being thus before them they resolve that their interests require that a compromise shall be made, and that, if the debtor will pay them a certain percentage on their debts, they will accept it in satisfaction, and he shall be discharged. They deliberately resolve, upon an understanding of all the facts, that this is all that his property can be made to pay. Are they not as capable as a court of law of judging on that

subject? Some one must decide the question of the amount of the dividend, and of the discharge. Some one must say that the debt of an opposing creditor shall be discharged without payment in full: and the fact that the body of creditors determine the point is no more oppressive to the opposing creditor than if the determination had been made by the court." The precise point was not before Justice Hunt, nor does he refer to the English judgments, but his comments are strikingly like those of the best considered English adjudications upon the subject before us.

In re Haskell [Case No. 6,192]. It was objected before Judge Lowell, in opposing the confirmation of a resolution, that the statement made by the debtor was insufficient. In deciding that a statement made by the bankrupt of his assets might be used for that purpose, he says: "It is true that such a schedule cannot inform creditors of such particulars as will enable them to decide understandingly upon an offer of composition. But what written statement will do this? The law requires the debtor to be present and to answer all inquiries, and the creditors are not bound to act until all such inquiries have been answered, including those by a majority, or by a single creditor, and including a due inspection and explanation of the books."

Ex parte Jewett [Case No. 7,303] was an application before the same judge to confirm a resolution of compromise. It was objected that a creditor was not permitted to examine the debtor and also that the sum to be paid was insufficient. A new meeting was authorized on account of the former error, but speaking of the other objection, that the quantum of payment was insufficient, the learned judge says: "Congress has inserted in the statute a clause not found in the English act, putting upon the court the duty of ascertaining whether the composition will be beneficial to the parties concerned. After the very full discussion at the bar, and nearly two days spent in inquiring into the debtor's assets, every one connected with the case conceded, I believe, that a burden has been cast upon the court that is not easily sustained, of instructing parties concerning their own interests. In the absence of fraud and concealment, the question for the court seems to be, not whether the debtor might have offered more, but whether his estate would pay more in bankruptcy. There can be no other standards, because the court cannot require the debtor to make a second offer; and perhaps ought not to permit him to do so under any circumstances. And as it is established by all experience that a man can make more out of his own assets than assignees of more general capacity than he, and entirely honest, can possibly realize, there is an undoubted margin in many cases which the debtor may save by offering less than he might offer, but more than his creditors can obtain by process of law. The English statute makes the determination of the creditors final on that point, in the absence of fraud, and I dare say it will be found that the practical administration of our law must be very similar." It is said the practical administration of the American law should be like the English, from which it is taken. It would seem from this quotation that the British acts by express enactment made the decision of the majority conclusive. They do not do so. It is only by sound judicial construction and the unfitness of attempting to rejudge the judgment of creditors when they have all the facts before them, and where there is no fraud, that the courts refuse to interfere upon the mere question of quantum. All which the learned judge means is this, that under the British practice the resolution is entitled to be recorded by the registrar if it is regularly passed. He has no discretion or power to inquire into the merits. If the resolution is to be reviewed it must be done by motion to set it aside, when, under the English practice, precisely the same inquiries are made as are proper under our statute when a motion is made to record the resolution in the district court. The powers of the creditors are alike in each. So are those of the court. The only difference is that in England it requires a special motion to set aside, while here the question may be raised in opposition to the motion to record.

In view of this statutory and judicial history, English and American, the manifest inconvenience of a contrary practice, and which is well illustrated in the case of Jewett, where two days were consumed by a district court in dealing with the mere financial question, what we suggest as the true rule is, that when nothing appears to the district court beyond what would have appeared to the English registrar —the naked statement and resolution—as a nearly universal rule the resolution will be recorded. That if the decision is to be reviewed it must be done by notice and hearing, when the principles applicable to the judgment should be such as we have sought to deduce from the English judgments on motions to set aside. They have our hearty approval as being consonant with the manifest intention of the statute, and the impossibility of tribunals organized like the district and circuit courts supervising with anything like intelligence the honest and regularly exercised judgment of the creditors. We have said that where no evidence aliunde the statement and resolution is presented, the resolution as a nearly universal rule should be recorded. The only exception we would recognize is where it manifestly appears there was some fraud, accident, or mistake—such a contingency as would incline the court in any other case of ordinary practice ex mero motu to refuse to proceed, and upon notice to all parties concerned, require the exceptional and suspicious circumstances to be explained. That such circumstances did not appear in this case it is not necessary for us to affirm. We think it is sufficient to justify our judgment in authorizing the resolution to be recorded, that even if this did appear, inquiry was not made, but the proceedings adjudged fraudulent upon

the mere face of the papers. Upon precedent and principle alike we think this was erroneous. The judgment of the same court in Re Whipple [Case No. 17,513], is in no wise in conflict with our decision. It did, it is true, upon a mere question of how much, refuse to record a resolution of compromise. It was, however, upon full hearing. All the facts were before the court. Whether the American courts ought to assume this duty of supervision to an extent much larger than that exercised in England is not before us for decision. We prefer the rule as there announced, but shall cheerfully acquiesce for the sake of conformity in what shall be the general judgment of co-ordinate tribunals.

There are some other features in the case which might with propriety be discussed, but we prefer resting our judgment solely upon the error that there was no hearing and evidence outside of the resolution and statement. Bissell v. Jones, L. R. 4 Q. B. 49, is cited by the petitioners in review in support of that feature of the present composition which transfers in certain contingencies the property to Stroh. No objection has been made to it by counsel in this court. We see none ourselves, but have not much considered it. And see Wells v. Hacon, 5 Best & S. 196, and Ex parte Nicholson, 5 Ch. App. 332.

The fact that a large majority of the creditors assented to the resolution has been earnestly urged by the petitioners in review. We do not deem it material whether great or small. It is only a circumstance which might with others be taken into consideration in a doubtful case, where fraud or gross inadequacy appeared. The fact that many creditors appeared by attorney, referred to in the opinion of the learned district judge, we do not deem of consequence here. It, too, is but another fact in the mass of evidence which would be necessary to invalidate the resolution. It is explained that the attorneys who signed for the creditors were attorneys in fact, especially authorized in most instances to sign for a precise sum named in the compromise. In such circumstances, where the attorney has but a ministerial duty to perform, there is no incompatibility in the same person appearing as attorney for the debtor upon the record and also as the attorney in fact, authorized to compromise as a special ministerial duty—that of signing the deed of compromise for the sum named in the power of attorney itself.

These matters are referred to here only as illustrative of what we deem at least the better and safer principle, that of rejudging the judgment of the creditors only upon the fullest hearing and consideration of all the testimony. They may all be more or less important when that testimony is fully before the court.

Case No. 17,331a.

Case of WEBER RANCH.

[See Case No. 17,328.]

Case No. 17,332.

In re WEBSTER et al.

[9 Int. Rev. Rec. 137.]

Circuit Court, S. D. New York. 1869.

CUSTOMS FRAUDS—COMPROMISE OF CRIMINAL PROSECUTION—AUTHORITY OF SECRETARY OF TREASURY—RIGHTS OF INFORMERS—JUDGMENT IN FRIENDLY SUIT—CONCLUSIVENESS.

1. Frauds upon the customs revenue were discovered, and criminal proceedings instituted against the offenders, and action commenced to recover the duties estimated to be due. Upon negotiation, the secretary of the treasury, acting under section 10 of the act of March 3, 1863 [12 Stat. 740], authorized a compromise,—that all said civil and criminal proceedings should be discontinued, and the offenders should pay to the United States $59,722 in gold, on account of said duties, and $32,000 in currency, on account of penalties incurred, and thereupon be relieved from all liabilities. All said proceedings were accordingly stopped, and the sums mentioned paid into the registry of the court, but only after confession of judgment in a friendly action of debt for the several amounts as penalties, instituted by the district attorney. The United States claimed the entire gold fund as duties. The customs officers claimed one-fourth as their legal share of the fund as penalties, and two sets of informers claimed shares of the fund as penalties, against the United States, and as between each other. *Held*, that the compromise was without legal or binding effect, and invalid, in not having been made in accordance with the said section, and the secretary of the treasury had no power, under any law, to compromise criminal proceedings in such a case. Notwithstanding the invalidity of the compromise, the entire gold fund adjudged upon the admission of the offenders in the negotiations which led to it, and upon other uncontradicted evidence, to belong wholly to the government as duties.

2. The record in the said friendly action of debt was not conclusive evidence of the rights of the parties and the character of the fund.

3. As between two sets of informers, where the first information of the frauds, which led to the eventual recovery of the penalties, was given by one set, and the other rendered valuable service in collecting evidence and testimony, and expended money therefor, without which it was doubtful whether any considerable sum would have been realised, *held*, that the first set, that gave the information which induced the prosecution, was entitled to the informer's share.

At law.

Simon Towle, for the United States.

C. A. Seward, for Webster, Moulton & Beecher.

C. Fine, for Burtnett & Heffelin.

A. W. Tenney, for Wiggins.

BENEDICT, District Judge. This is a controversy between the customs officers and certain informers on the one hand, and the United States on the other; and also between the informers, among themselves in regard to the distribution of a certain fund which originally consisted of $59,722 in gold and $32,000 in currency, and which was paid into the registry of this court, under the following circumstances: In the summer of 1867 the officers of the customs having discovered that great frauds upon the government had been

perpetrated by persons doing business in this city under the name of J. W. George & Co., by means of the unlawful withdrawal, without payment of duties, of dutiable merchandise from the bonded warehouse Nos. 290 and 291 West-street, criminal proceedings were instituted against the offenders, in which several of them were arrested and held to bail for trial, and a civil action for duties, amounting to $400,000, was commenced in the district court against one of them, named Henry Hart, in which suit a large amount of real estate and personal property was attached; a quantity of cigars, appraised at some $25,000, was also seized by the collector, as forfeited by reason of these frauds. Pressed by these proceedings, the offenders commenced negotiations with the officers of the government, which terminated in an agreement made at Washington with the secretary of the treasury, by which it was arranged that the offenders should pay to the United States the sum of $59,722 in gold for the duties on the cigars, brandy, rum, gin and wine withdrawn by them without payment of the duty, and also $32,000 in currency as penalties for illegal abstraction of such bonded merchandise; and upon such payment the government was to discharge all the property which had been attached or seized, and release the offenders from all civil and criminal liabilities relating to the illegal transactions. Accordingly, instructions were issued to the district-attorney to carry into effect the arrangement, and the offenders proceeded to make the payment agreed on. This payment, however, by arrangement with the district-attorney, was not made in the action for duties which was pending in the district court, but a new, and in some sense a friendly, action of debt was commenced in the circuit court, not for duties, but for penalties and forfeitures, amounting to the sum agreed on, namely, $59,722 in gold, and $32,000 in currency, in which action judgment was confessed on the same day, and the same satisfied on the payment, into the registry of the circuit court, of the sums demanded. At the same time the property attached in the action pending in the district court was released from custody, and all the criminal proceedings stopped. The cigars held under seizure by the collector were also directed to be released on due entry, and payment of the duties to the collector. There being thus $59,722 in gold, and $32,000 in currency, in the registry of the court, a controversy arose respecting the rights of the customs officers and the informers in the fund, it being claimed by the officers and informers that no part of it was duties, but that it was all penalties and forfeitures, and as such was distributable one-half to the government, one-fourth to the customs officers, and one-fourth to the informers. A controversy also arose between the parties claiming to be the informers, in regard to their respective rights. One-half of the gold and one-half of the currency, being clearly payable to the United States, has been so paid by consent, and one-half the residue of the currency admitted to be payable to the collector has also been paid by consent, thus leaving in the registry $29,861 in gold and $8,000 in currency. To one-half of this $29,861 in gold the customs officers lay claim. The informers claim the other half, as well as the balance of the currency. These respective claims have been set forth by petitions, under which, by order of court, testimony in behalf of all parties has been taken by the clerk, upon which petitions, and some 363 pages of testimony, with a mass of exhibits, the case now comes before the court for its determination.

The course of procedure adopted in this proceeding appears to me somewhat irregular. A more proper practice would have been for the customs officers and informers to have set forth their claims to this fund by petitions to which answers should have been interposed by the government, and upon the issues thus framed and the testimony adduced by the respective parties in support of their allegations a decree could have been rendered with less danger of confusion and mistake. The respective parties petitioning here seem to have treated each petition as an answer to the others, and the custom-house officers appear to have considered themselves entitled to prove their case under the petition presented by the United States. But as all parties have spread out their case very fully on the evidence, and as all the points in controversy have been considered and argued by the counsel without objection, as if duly pleaded, it appears unnecessary to direct the proceedings to be reformed.

In considering the questions thus raised it will be convenient to examine first the claim made by the customs officers and informers to that portion of the fund consisting of $29,861 in gold. The claim in regard to this is $59,722 in gold, of which the $29,861 remaining in the registry is a moiety, consisted of fines and penalties, and that a moiety of it is given by law to the customs officers and informers, while on the part of the United States it is contended that the $59,722 was not fines and penalties, but duties, in which no person is entitled to share with the government. The determination of this issue renders it necessary to consider at the outset the effect of the record of the judgment in favor of the United States against the offenders which was entered on the 27th day of December, 1867, and was satisfied upon the payment of this fund into the registry. This record, which it has been suggested on this argument must be conclusive in favor of the customs officers and informers, would, as I view it, if held conclusive, deprive those persons of any right to any portion of the fund. This will appear from an examination of the record itself. The cause of action which the record sets forth, and which was admitted by the confession is this: That certain parties, defendants, unlawfully removed from a bonded warehouse dutiable goods without payment of the duties, whereby, as it is averred, the value of the goods became for-

feited to the United States, wherefore the United States became entitled to have of the defendants $59,722 in gold and $32,000 in currency. The record nowhere refers to any statute by virtue of which the alleged forfeiture arose, and no statute has been found which forfeits the value of the goods for any such act as is set forth in the declaration, or which, upon the facts stated in the declaration, created a legal liability on the part of the defendants to pay to the United States this $59,722 in gold, and $32,000 in currency. Now, customs officers and informers can only claim to share in fines, penalties and forfeitures which are created by some law of the United States. If no statute exists by virtue of which any particular sum of money, whether called a fine, penalty or forfeiture, has been demanded and paid, no customs officer or informer can share in the money. Here was no forfeiture of goods, for no goods subject to forfeiture were proceeded against; the cigars which were seized by the collector were released, without any other condition than that they be duly entered, the duties paid, and the illegal acts charged in the declaration did not render the parties liable in a civil action under any law of the United States, to such fines and penalties as were demanded. It may be that the $32,000 in currency, which formed part of the demand, can be held to be thirty-two fines of $1,000 each incurred by virtue of the act of Aug. 6, 1846, and that portion of the fund has been so treated by the government; but this would not affect the $59,722 in gold which is now under consideration. If, then, the record alone were to be looked to as fixing the rights of the parties it would seem to confer no rights upon the customs officers and informers to a distributive share of the gold in the registry. This difficulty has been realized on this proceeding, and accordingly the customs officers and informers have not rested their claims upon the record of the judgment alone, but have without objection on the part of the government introduced much testimony to show the real nature of the claims made by the government against the offenders.

The case being thus opened, evidence has been also introduced by the United States tending to show the circumstances under which this money was demanded and paid. This evidence, therefore, thus introduced by the respective petitioners, and which discloses the actual liability which the parties who paid this money were under to the United States, and from which they sought to be discharged by the payment which they made must be considered in connection with the record in determining the character of the fund in question and the rights of the parties to share therein. It is proper to say here, that if the course of this proceeding had been otherwise, and the judgment entered on the 27th of December, 1867, had been relied upon as decisive of the character of this fund, it would doubtless have been incumbent upon the court—called on as this court is by this proceeding, to distribute a fund in its registry—to require a fuller explanation than has yet been given of the circumstances under which that judgment was taken. Upon this argument it has been treated by the counsel for the government as an inadvertence, and perhaps properly so treated, but it is such an inadvertence as to require full explanation before I should feel justified in disposing of this large amount of money in accordance with its terms.

Looking, then, into the evidence as it has been given, it appears that certain parties, doing business under the name of J. W. George & Co., perpetrated frauds upon the government by removing for consumption dutiable goods from a bonded warehouse without payment of the duties, that criminal proceedings were commenced against them, and, also, a civil proceeding, to recover some $400,000 of duties, in which suit a large amount of property was attached, whereupon the offenders applied to the secretary of the treasury for relief, and then plainly and deliberately admitted themselves to be liable to the government for duties amounting to $59,722 in gold, which they promised to pay, together with the sum of $32,000, as thirty-two penalties for as many unlawful withdrawals, which they also admitted to have been committed by them, and thereupon the secretary agreed that all the parties implicated should be released from all civil and criminal liability relating to the transactions in which they had been engaged, upon the payment of such duties and penalties. In pursuance of this agreement the parties did pay into the registry of this court the $59,722 in gold, and the $32,000 in currency in question, and all the pending civil and criminal proceedings were thereupon stopped by the district-attorney; but the payment, instead of being made in the proceedings pending at the time of the agreement with the secretary, was made in satisfaction of a judgment confessed by them in a friendly action which they suggested should be commenced as affording them a more satisfactory evidence of the payment of the money which they had agreed with the secretary to pay. Upon this evidence it has been claimed by the government that the agreement made by the secretary was a compromise made by virtue of the act of March 3, 1863, § 10 (12 Stat. 740), and therefore decisive of the character of the fund realized in pursuance of it; but to this I do not assent. The authority conferred by the act referred to is an extraordinary power which the interest of the secretary of the treasury, as well as that of the government, require to be carefully guarded against abuse. The statute therefore confines the power to the compromise of claims in favor of the United States, and confers no power at all in regard to criminal prosecution. It looks also to the attorney of the government in charge of the claim as the proper place of origin for arrangements looking to a compromise, and might well be held to confer no power in regard to claims not in suit, and it requires as the basis, and the only legal basis of action on the part

of the secretary, a report of the attorney of the government showing in detail the condition of the claim and the terms of compromise proposed, and also showing the approval of the terms by the attorney. It also requires in addition that the solicitor of the treasury should recommend the acceptance of these terms. Thus it will be seen that the act provides for the creation and preservation of a complete record of all cases of compromises, showing the transaction in detail, and the voluntary assent of three different officials to the terms of compromise which it is proposed to accept is required to make it effective. Under the statute the action of the secretary is confined to the acceptance or rejection of the terms recommended by the attorney. Here the terms agreed to by the secretary were never reported or recommended by the district-attorney, and the action of the secretary must therefore be held to be without sanction of law and of no effect as a legal compromise.

The present case, in which it has been claimed by the government that the recommendation of the district attorney of terms requiring a less sum than that finally agreed on by the secretary warranted the secretary under the statute in accepting terms deemed more favorable, affords a good illustration of the result of any other than a strict adherence to the provisions of the act. For it seems, as I understand the figures, that the terms agreed upon by the secretary, although apparently less favorable to the offenders than those recommended by the district-attorney, were, in fact, more favorable, and the sum realized was several thousands of dollars less than the parties themselves had offered to the district-attorney. While considering the action of the secretary in making this compromise, I feel bound to notice another prominent feature in it, which is, that the secretary undertook to compromise the criminal proceedings which were pending in court. Neither the act of March 3, 1863, nor any other act that I know of, confers that power upon the secretary of the treasury. The solicitor of the treasury may perhaps have power in a proper case, and upon his own official responsibility, to instruct a district-attorney to effect a discontinuance of a criminal prosecution for offences arising under the revenue laws; but I know of no statute which permits either the secretary or the solicitor to demand money of a person accused of crime in consideration of causing a criminal prosecution to cease, notwithstanding the fact that the money may be demanded for the United States, as was the case here. Civil suits for penalties and forfeitures may be compromised or remitted by the secretary in the manner prescribed by law, but I apprehend that neither the power to determine the extent of punishment to be inflicted in a criminal proceeding, nor the pardoning power has been intrusted to the secretary or the solicitor or the collector. The action of the secretary in regard to the criminal proceedings pending against J. W. George, Henry Hart and others, was therefore, of no legal or binding effect whatever, and his action in regard to the civil suits against the same parties was also unauthorized for want of compliance with the conditions which the statute imposes upon his power of remission and of compromise.

But while the agreement made by the secretary has no effect as a legal compromise to determine the character of the fund in question, the admission of the parties made to the secretary during the negotiation which ended in the agreement are competent and very controlling evidence to show the liabilities of the parties to the government and the real character of the fund which they subsequently paid in discharge of their liabilities. These admissions, with other uncontradicted evidence in the case, show that the parties who paid this $59,722 in gold were legally liable to the government for duties upon cigars and liquors amounting to that sum. This cannot be disputed as to $34,834.50 of the amount, for Henry Hart was the importer of cigars on which the duties had been duly ascertained and assessed at that sum, and which he withdrew without payment of any duty. As to the remainder, being duties charged on rum, gin, brandy and wine, although the custom-house officials seem to have difficulty in tracing the articles, the secretary had thirty-two orders on the bonded warehouse for certain specified withdrawals of such liquors, which were signed by these same parties, which quantity, it is proved, they withdrew without payment of the duties. The appraisers and other officers of the custom-house declare that neither the records of the custom-house nor the orders, nor both together, enable any one to say what amount of duties have been lost, but there is evidence tending to show withdrawals of liquors by these parties from this warehouse without payment of the duties. And this evidence with the admissions of the parties as to the amount, is sufficient to show that this is not a case of simply calling a sum duties which was in reality penalties, as has been contended, but that an actual legal liability to the government for duties existed, the exact amount of which the parties admitted and promised to pay. It is said there could be no legal liability for duties, because no duties can be "collected, levied, and paid" as duties unless the merchandise is in the possession and control of the government; as soon as property is fraudulently withdrawn, the power to collect duties ceases, and fines, penalties, and forfeitures are imposed. But the law is otherwise. Duties are not simply a charge upon the merchandise to be collected by means of the custody of the property only; they are also a personal charge against the importer—a debt created by law which may be collected by a civil action wholly irrespective of the possession and custody of the goods. U. S. v. Lyman [Case No. 15,647]. Here cigars, on which the duty was $34,834.50, were actually imported by these parties, who were liable as importers for such duties, and who discharged that liability by the payment of the fund in question, while the liquors were bought by them in bond sub-

ject to duties, sufficient in amount, as they themselves admitted, to make up the balance of the $59,722, and which they became also liable to pay when they withdrew the merchandise for consumption, as they subsequently did.

Again, it is said that there was no liability for duties so far as the liquors were concerned, because the goods had been taken out of the bonded warehouse on bonds to deliver them to a manufacturing warehouse, whereby the right to duties was lost, and the only subsisting liability was for damages upon the bonds. But the evidence shows quite plainly that the ostensible transfer to the manufacturing warehouse which was owned by these same parties, was simply a cover for the fraud. The real intention of the parties, when the goods were bought, was to withdraw them and put them upon the market without payment of duties, and that intention was successfully carried out by means of the ostensible transfer to the manufacturing warehouse. The whole was but one single connected enterprise, namely, the withdrawal of these dutiable goods for consumption without payment of the duties. Furthermore, if this $59,722 in gold be not duties, what is it? It is said to be penalties prescribed by the act of Aug. 6, 1846, but the penalties provided by that act are a fine of $5,000 or imprisonment in the discretion of the court, and a penalty of $1,000 for opening the warehouse and getting access to the goods in the absence of the custom-house officer. If the latter penalty was ever incurred by these parties, which is by no means clearly shown, it forms the portion of the fraud consisting of the $32,000 in currency and is not the gold. Besides, what act prescribes a penalty in gold? But the fund in court is said to be a single amount paid by virtue of the duress of the civil and criminal proceedings; and therefore that no part is duties. Now, an exaction, not based upon a legal liability, paid to avoid the exposure and punishment likely to follow a criminal prosecution, is what is characteristically called in common parlance "hush money." If such were the character of this fund it would not avail the customs officers and informers, for they are by law entitled to a certain share of lawful fines, penalties and forfeitures, imposed and collected by virtue of provisions of law. No statute gives them any right to any portion of irregular exactions. But to suppose the secretary of the treasury, or the solicitor or the district-attorney to have consented to such an exaction from offenders like these, is to impute a gross dereliction. No such supposition is necessary to determine the character of this gold, for the evidence sufficiently shows that it was demanded as duties—was due as such, and was so paid. It must accordingly be distributed as such.

In dismissing this branch of the case I may properly add that the action of the secretary of the treasury in making the agreement which he did with these offenders, and which was severely criticised upon the argument as an attempt to deprive the customs officers and informers of their legal rights, does not appear to me to be capable of such a construction. If such an intention were disclosed by the proofs, it would receive no support at the hands of this court, for the rights which the law gives to informers and to customs officers, in order to insure a better enforcement of the revenue laws, are rights which are entitled to be carefully protected, both by officials and courts. I discover no such intention in the action of the secretary, but only an effort to obtain for the government as great a portion of the duties legally due it as was possible by the method adopted. Whether a vigorous prosecution of the civil action for the $400,000 of duties supposed to have been lost, and the proper criminal punishment of the offenders for their crimes, together with an enforcement of the forfeitures incurred would not have been a method more likely to secure obedience to the law in future is, perhaps, open to question, and it may be that such a course would have realized in addition to these duties, a larger amount of penalties and forfeitures than the $32,000 which was paid; but the abandonment by the officers of the government of the prosecutions for penalties and forfeitures, although it may have been irregular or injudicious, can have no effect to change the character of a payment of duties, which is shown to have been made in discharge of a subsisting liability to such duties. My conclusion upon this branch of the case therefore, is, that the customs officers and informers have failed to show themselves entitled to a distributive share of the $29,861 of gold now in the registry.

There remains only to determine who are the informers entitled to the $8,000 of currency which has been substantially conceded to be penalties distributable to the informers; the other quarter of the $32,000 in currency having been, as before stated, paid over to the collector as penalties in which he was entitled to share. The persons claiming to be the informers are, J. W. Wiggins, D. H. Burtnett, and J. W. Heffelin; on the one hand, who claim one quarter of the whole amount of penalties, and E. D. Webster, George T. Moulton, and J. S. Beecher on the other; the latter persons do not present for the decision of the court any issue between themselves, but have consented that whatever may be found payable to any of them shall be paid to the attorney who represents them all. They do, however, dispute the right of Burtnett, Wiggins or Heffelin to any share as informers.

I have examined the voluminous evidence bearing upon this question with care, and while I am satisfied that Wiggins procured valuable evidence, and Burtnett and Heffelin evidence still more important, tending to make out a strong case against the offenders without which, indeed, it is doubtful whether any considerable sum would have been realized from them, and although it seems to me not consistent with justice that Burtnett, who spent much time, and expended some money in ferreting out the details of the fraud and in finding the property, which was attached as the property of Henry Hart, still I am unable to adjudge either Burtnett or Heffelin or Wiggins to be legally

entitled to share in this fund as informers. Their action cannot be said to have induced the prosecutions which were instituted. The fraud was discovered by others. Proceedings were commenced in pursuance of that information, and the clue to the parties was obtained before either Wiggins or Burtnett or Heffelin gave any information; what they did was to furnish evidence tending strongly to confirm the truth of the statements of the informers. The informer is he, who, with the intention of having his information so acted upon, first gives information of a violation of law which induces the prosecution and contributes to the recovery of the fine, penalty, or forfeiture, which is eventually recovered. Sawyer v. Steele [Case No. 12,406]; Bank v. Bangs, 2 Edw. Ch. 105; Lancaster v. Walsh, 4 Mees. & W. 16. In the present case information had been given of these frauds, upon which positive and effective action was taken and which contributed to the recovery of the $32,000, a considerable period before either Wiggins or Burtnett or Heffelin gave any information at all, and such first informers, who were Webster, Beecher and Moulton, are the legal informers entitled to informers' share of this fund. In accordance with these views a decree must be entered adjudging that E. D. Webster, Rodman G. Moulton, and John S. Beecher, are entitled as informers to the $8,000 currency in the registry, and that the United States is entitled to the $29,861 in gold.

WEBSTER (BURNHAM v.). See Cases Nos. 2,178 and 2,179.

WEBSTER (CASKIE v.). See Case No. 2,500.

Case No. 17,333.

WEBSTER v. COOPER.

[Cited in Tufts v. Tufts, Case No. 14,233. Nowhere reported; opinion not now accessible.]

Case No. 17,334.

WEBSTER v. CROTHERS.

[1 Dill. 301.] [1]

Circuit Court, D. Nebraska. 1870.

REMOVAL OF CAUSES—JUDICIARY ACT.

In cases properly removed here under section 12 of the judiciary act [1 Stat. 79], the defendant is not in default for not having answered or pleaded in the state court before or at the time of filing his petition for the removal.

[Cited but not followed in Heidecker v. Red Star Line S. S. Co., 32 Fed. 707. Cited in Pelzer Manuf'g Co. v. St. Paul Fire & Marine Ins. Co., 40 Fed. 186.]

Suit for specific performance of contract for the sale of lands, commenced in the state court by publication against the defendant, a non-resident. By the published notice or summons the defendant was required to answer on the 16th day of May, 1870, that being the first day of the May term. On that day the defendant appeared and filed his petition and the requisite bond for the removal of the cause to the United States circuit court for the district of Nebraska, and the next day the court ordered the removal. The defendant did not answer in the state court or take any steps therein except to apply for the removal of the cause. On the first day of the next term of this court, the plaintiff moved for a default against the defendant for his failure to answer; and that is the question before the court.

Redick & Briggs, for the motion.
Gannt & Wakely, contra.

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

DILLON, Circuit Judge. This removal was applied for and properly granted under the twelfth section of the judiciary act. It was applied for at the time the defendant was required to and did make his appearance. He was not bound to plead anterior to, or contemporaneously with, the filing of his petition for the removal of the cause. When that petition was duly made, the requisite facts entitling to a removal shown and the surety offered, it became "the duty of the said court to accept the surety and proceed no further in the cause." The state court could not require or receive an answer after the removal was thus applied for, and hence there was no default on the part of the defendant in not answering in that court, and none for not answering in this court, since this is the first day of the term occurring after the cause was transferred to it. The cause is in equity, and the defendant will be required to plead by the next rule day to the merits. If he desires to demur we order that he do so at this term. Ordered accordingly.

NOTE. Under section 12 of judiciary act the right must be claimed when appearance is entered. Johnson v. Monell [Case No. 7,399]; Sweeney v. Coffin [Id. 13,686]. Therefore when the action in the state court is by consent referred and is continued, it is afterwards too late to have it removed under section 12 of the judiciary act. Robinson v. Potter, 43 N. H. 188. Practice: McBratney v. Usher [Case No. 8,661].

Case No. 17,335.

WEBSTER v. GILMAN.

[1 Story, 499.] [1]

Circuit Court, D. Maine. May Term, 1841.

RENUNCIATION OF DEVISE—NON-POSSESSION—ESTOPPEL—FEE SIMPLE AND FREEHOLD ESTATES—WRIT OF FORMEDON—CONVEYANCE BY DISSEISED LIFE TENANT — CONTINGENT REMAINDERS — MERGER.

1. A mere non-possession of real estate by the devisee under a devise, short of the period,

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

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

prescribed by the statute of limitations to bar a right of entry, does not amount to a positive renunciation or disclaimer of the devise, or to proof thereof, on the part of the devisee.

2. Quære, whether by our law, any renunciation or disclaimer, not by deed or matter of record, would be an extinguishment of the right of the devisee. At all events, it should be evidenced by some solemn act or acknowledgment in writing, or by some such open and positive act, as will prevent all future cavil, and operate as a quasi estoppel.

3. A tenant in fee simple cannot maintain a writ of entry, founded upon his supposed seisin of a freehold only; for he has no such estate separate from the entire fee. But he must count according to the fact, upon his own seisin in fee simple. The same is the case with a tenant in fee tail; and his appropriate remedy is by a writ of formedon, and not by a writ of entry.

4. Where a devisee of a life estate makes a conveyance thereof, at a time when she is disseised of the premises, the conveyance is inoperative.

5. Where a devisee in remainder in fee purchases the life estate, he becomes tenant in fee simple, and the life estate becomes merged in the remainder.

6. Where there is a devise to A. for life, remainder to B. and C., to preserve contingent remainders, remainder to the issue of A. in tail male; there, if A. should renounce or disclaim the life estate, the subsequent remainders to B. and C. would immediately take effect, and so preserve the contingent remainder to the issue of A. in tail male.

Writ of entry, dated the 15th of February, 1838. The demandant [Henry Webster], describing himself as an alien, subject of Great Britain, and averring, that he had never been a citizen of the United States, or any part of the same, in his count demanded a certain tract of land, situated in Mercer, in the county of Somerset, and state of Maine, being part of the fifteen mile lot D. 2, formerly a portion of the Plymouth Company proprietary lands on the Kennebec, of which the demandant claimed to have been seised in his demesne as of freehold within twenty years, and complained of a disseisin done by the defendant [Caleb Gilman]. The tenant pleaded, that he did not disseise, &c.; and upon that, issue was joined, and the cause was committed to the jury. At the trial, the demandant proved, that lot D. 2, which, it was admitted, embraced the demanded premises, was originally granted and assigned by the proprietors of the Kennebec purchase, whose title was deduced from the ancient colony of New Plymouth, to Florentius Vassal, of London, his heirs and assigns, December 12th, 1770, according to a copy in the case, taken from the Proprietary Records, bk. 3, p. 22, in pursuance of a vote extracted from the Records, in same volume, pages 29–55.

Florentius Vassal made his will, disposing of this, among other portions of his estate, September 20th, 1777, and he died in the course of the following year. The will was proved (as appears by the copy filed in the case) in the prerogative court of Canterbury, on September 14th, 1778; and an exemplification of it was exhibited, which had been filed and recorded in the probate office for the county of Kennebec, under the law of the state of Maine. By this will, the testator devised certain plantations in the Island of Jamaica, and also all his "lands, tenements, and hereditaments whatsoever, situate and being in New England, in North America, and all his estates, right, and interest therein," to the Right Hon. Hugh Lord Viscount Falmouth, the Right Hon. William Wildman, Lord Viscount Barrington, and Charles Spooner, Esquire, and their heirs, to the uses, and upon the trusts, and for the interests and purposes, and with, under, and subject to, the powers, provisoes, and declarations thereinafter limited, declared, and expressed, as to, for, and concerning one of the aforesaid plantations, called "Sweet River," &c., and also as to, for, and concerning all my lands, tenements, and hereditaments whatsoever, situate, lying, and being in New England aforesaid, as follows: To the use of his son Richard Vassal and his assigns for and during his life; and from and after the determination of that estate by forfeiture or otherwise, during the life of the said Richard, to the use of the said trustees and their heirs, during the life of the said Richard, in trust to preserve the contingent uses and estates thereinafter mentioned from being defeated or destroyed; and for that purpose to make entries and bring actions, as occasion shall be or require, &c.; and from and after the death of the said Richard, to the use of all and every the son and sons of the body of the said Richard, begotten or to be begotten, to be equally divided between or among his said sons, if more than one, share and share alike, and they to take as tenants in common, and not as joint tenants, and the several and respective heirs male of the body and bodies of such son and sons, there being more than one; and on failure of such issue male of his or their body or bodies respectively, then as to the part and share or parts and shares of and in the said premises, as well originally belonging to, or accruing, or devolving upon such son or sons by survivorship, the same shall, so often as it shall happen, go and remain unto and to the use of the survivors and survivor and others and other of the said sons, and to the heirs male of the bodies and body of such surviving and other sons, if more than one, to take in equal shares as tenants in common, and not as joint tenants, and if the issue male of all such sons save one shall fail, or if there shall be but one son, then to such or remaining son and the heirs male of his body issuing; and for default of such issue, to the use of William Dickenson and William Smith, and the survivor of them, and the executors, administrators, and assigns of such survivor, for the full end and term of six hundred years, to commence and be computed from the failure of such issue male of the said Richard, and

thenceforth fully to be completed and ended, without impeachment of waste, upon the trusts for the intents and purposes, and under and subject to the provisoes thereinafter expressed, of and concerning the same term; and from and immediately after the end, expiration, or other soever determination of the said term, and in the meantime, subject thereby and to the trusts thereof, to the use of Elizabeth Vassal, the then only daughter of the said Richard Vassal, and her assigns for and during her life, and from and immediately after the determination of that estate by forfeiture or otherwise, during the life of the said Elizabeth, to the said trustees, Lord Viscount Falmouth, Lord Viscount Barrington, and Charles Spooner, and their heirs, during the life of the said Elizabeth, in trust by the ways and means before mentioned to preserve the contingent uses and estates thereinafter mentioned from being defeated or destroyed, &c. &c.; and from and immediately after the decease of the said Elizabeth, to the use of all and every the son and sons of the said Elizabeth to be begotten, to be divided amongst such sons, if more than one, share and share alike, and they to take as tenants in common, and not as joint tenants, and the several and respective heirs male of the body and bodies of all and every such son issuing; and in case of the decease of any such son or sons, there being more than one, and failure of such issue male of his or their body or bodies respectively, then as to the part or share or parts or shares of and in the said premises, as well originally belonging to, as accruing or devolving upon such son or sons by survivorship, the same shall from time to time, as often as it shall so happen, go, remain, and accrue unto the use of the survivors and survivor, others and other of the said sons and the heirs male of the body and bodies of such surviving and other son and sons respectively, such surviving and other sons, if more than one, to take also in equal shares as tenants in common, and not as joint tenants; and if the issue male of all such sons save one shall fail, and if there shall be but one such son, then to such one or remaining son and the heirs male of his body issuing; then to the use of the second and every other daughter and daughters of the body of the said Richard, &c. &c. Richard Vassal died about the year 1795, leaving only one child, Elizabeth Vassal, who afterwards intermarried, first, with Sir Godfrey Webster, deceased, by whom she had issue, two sons, viz. Sir Godfrey Vassal Webster, since deceased, and Henry Webster, the demandant. The said Elizabeth afterwards, in the year 1797, married Richard Henry Fox, Lord Holland, by whom she had issue, one son, Henry Edward Fox. The pedigree, &c. were proved by the depositions of Charles Rose Ellis, Baron Seaford, &c. and William Hughues Brabant, Esq., solicitor, which are in the case. Brabant testified, that all the charges upon lands devised by the will (which were designed to raise portions for younger daughters of Richard, and certain annuities) had been, to the best of his knowledge and belief, discharged or satisfied; and that there were no outstanding terms under the will unsatisfied; and that those lands were not now subject to any life estate, other than that of Lord and Lady Holland; nor to any estate for years, created by the last will of Florentius Vassal. To such facts, as he testified to, he came to the knowledge by being solicitor to the late Sir Godfrey Webster, last deceased, and Colonel Henry Webster, the plaintiff, and from documents in his hands, as their solicitor, and in relation to the above facts particularly from personal inquiries made by him, as such solicitor. To which testimony objections were taken at the trial, as incompetent; but for the purposes of the trial they were overruled.

Lord Seaford testified, that he was acquainted with Richard Vassal from about the year 1779 until he died, about the year 1795; that he was acquainted with Elizabeth Vassal, now Lady Holland, and her family; that he had resided at different periods in the Island of Jamaica, where the plantations devised by the will of Florentius Vassal lay; that these plantations were held pursuant to the will of Florentius Vassal, and continued to be held and possessed under the same, by Lady Holland or her husband, Lord Holland; and that the former lands of the said Florentius were not, to his knowledge, subject to any life estate, other than that of Lord and Lady Holland, or to any estate for years, created by the will of the said Florentius. To which testimony, also, objections were taken at the trial, as incompetent; but for the purposes of the trial they were overruled. The facts stated by Lord Seaford, so far as they did not lie within his own knowledge, he derived from general reputation, and what he always understood, and heard, and believed, at the different times referred to, from members of the family of Richard Vassal and Lady Holland, and persons connected with it.

The demandant's counsel introduced a deed from Lord and Lady Holland, bearing date the 30th of January, 1836, releasing and surrendering to the demandant all her right to the premises, which was duly acknowledged and recorded, and the execution proved by one of the attesting witnesses. And he also proved an entry upon the premises by Sylvanus W. Robinson, Esq., on behalf of the plaintiff, November 3d, 1837.

The defendant produced the testimony of witnesses to prove his possession of the property, and to disprove the seisin of Lord and Lady Holland at the time of the execution of the said deed, and for a period long prior thereto. Asa Clark testified, that in the year 1798, when he first became acquainted in that vicinity, the said [Caleb] Gilman was then making improvements on the land by clearing the same; that there

were trees cut on the said lot, which must have been cut as early as June, 1797; that in 1799, the said Gilman claimed all the land, which he now occupies; that the witness then knew the lines, which embraced that claim, and has no reason to doubt, that he claimed the same, when he first began his improvements, as supposed in 1797, and that Gilman moved his family on to the land in the spring of 1801. John Longley testified, that in June, 1798, or 1799, he put up a barn frame for the said Gilman on the land; and at that time he had made considerable improvement on the place by clearing and cultivating the land and raising crops, and that from the appearance some one must have been there occupying the place, as a farm, at least two years; and that the said Gilman had been in possession of the same land ever since the putting up of the barn frame. Simeon Robbins also testified, that he had known the lines of the said Gilman's farm for thirty years; they were visible and clearly indicated and embraced the land, which had always been occupied during that time; and the larger part of it had been surrounded by fences, since he first had knowledge of it. William Farnsworth testified, that he assisted the defendant in moving his family on to that farm, in March or April, 1801; at which time he had buildings erected on the farm; and previous to that time the witness had been on the premises and seen improvements making thereon by the clearing of the land. The same witnesses testified generally, that this possession, so far as they respectively know, was open, notorious, exclusive, and comporting with the ordinary management of similar estates in the possession and occupancy of those, who have title thereto, or satisfactorily indicative of such exercise of ownership, as is usual on the improvement of a farm by its owner. A verdict was thereupon taken for the tenant under direction of the court, and the cause continued nisi for the consideration of any questions of law, arising upon the effect of the provisions of the will, and the facts proved in the case. The argument of the counsel for the tenant was then in part heard, but upon an intimation of the court, that there was a fatal objection to the suit, the counsel declined to argue further.

E. E. Daveis and Charles S. Daveis, for demandant.

Tenney & Preble, for tenant.

The argument for the demandant was to the following effect: The tenant relies upon his possession of the premises for forty years, as proof of title in him. At common law the person, having the right of property, could pursue his remedy at any time. If the right is taken away, it must be by statute. But the statute of limitations (Laws Me. c. 62, § 4; 1 Laws Mass. p. 325, c. 13, § 4), does not begin to run against a party, until his right of entry accrues. Such are the terms of the statute. We expect to show, that a right of entry has accrued to the demandant within the period limited; and we make the point, that adverse occupancy, not commencing in the lifetime of the testator, will not prevent the right of entry from accruing to him in remainder. Hunt v. Burn, 2 Salk. 422; S. P. 1 Salk. 339; Doe v. Danvers, 7 East, 299; Wells v. Prince, 9 Mass. 508; Wallingford v. Hearl, 15 Mass. 471; Stevens v. Winship, 1 Pick. 318; Jackson v. Schoonmaker, 4 Johns. 390. We shall next endeavour to show, that a right of entry has accrued to the demandant; although there is no evidence of the death of Elizabeth, we contend, that there is evidence, that she refused the estate devised. And when the devisee of a particular estate refuses, he in remainder may enter immediately. Shelley's Case, 1 Coke, 101; Chedington's Case, Id. 154; Vin. Abr. "Remainder," C 2, pl. 2; Plowd. 544; 1 Eq. Cas. Abr. 216, pl. 4; Bac. Abr. "Remainder and Reversion," E. The refusal of the estate devised renders that portion of the devise absolutely void, and the estate must go immediately to him in remainder. Avelyn v. Ward, 1 Ves. Sr. 420; 2 Brownl. 247. He may enter immediately, although this is not according to the terms of the devise. As indeed it must generally happen. In this case the words are (after giving a life estate to Elizabeth Vassal), "And from and after her decease to the use of her sons," &c. The law construes this to mean, from and after the termination of her life estate. In neither case does the law require a strict adherence to the letter of the devise. Since in the former the remainder-man must permit strangers to occupy the land, until the death of the tenant for life. And in the latter, he must wait until the termination of a life estate, which never commenced. In either case the intention of the testator would be defeated by interpreting literally his own words.

Such a construction has been put upon the words limiting an estate upon the termination of an estate tail, where the remainder is limited to take effect "upon the death of the tenant in tail without issue," or "upon failure of issue," or "for want of such issue." In these cases, where the devise in tail has become void by the devisee dying in the life of the testator, those next in remainder have not been compelled to wait, until the death of the issue of such tenants in tail, which would be the strict construction of the terms of the devise; but those terms have been held merely descriptive of the estate previously limited, and, this estate being void, the subsequent limitation takes place. Hutton v. Simpson, 2 Vern. 722; Hartopp's Case, Cro. Eliz. 243; Wynn v. Wynn, 3 Brown, P. C. 95; Goodright v. Wright, 1 P. Wms. 397; s. c. 1 Strange, 25, 10 Mod. 370;

Hodgson v. Ambrose, 1 Doug. 337; Warner v. White, 3 Brown, P. C. 435, same law. As was said by Lord Mansfield in Hodgson v. Ambrose, so we say, that the words, "and after the decease of the said Elizabeth," mean the same thing as, "and after the termination of the said life estate"; and that this is the common case of a remainder after a life estate, where, if the devisee for life first estate never takes place, he in remainder may enter immediately. Fuller v. Fuller, Cro. Eliz. 422, 423.

The principle, (which is the same in estates tail and for life,) which we contend for, as established by the authorities cited, is this: That where a particular estate is given by devise, and a remainder over is given, whether the remainder is limited in general terms, upon the termination of the particular estate, or is limited in terms, descriptive of the mode, in which such particular estate usually determines, and it turns out, that the particular estate is void, the estate in remainder shall vest in possession immediately. The intention of the testator to give a general remainder shall not be defeated by the particular words; but they are construed as descriptive of the estate previously limited, and not as forming a condition precedent to the vesting of the estate in remainder. Thus, as estates tail are usually determined by the "death of the devisee without issue," "by the failure of issue," &c. it is held, that the limitation to the remainder-man upon these contingencies must be construed as a general remainder over. And we contend, that the remainder over in the present case should be construed in the same way, since estates for life are usually determined by the death of the tenant for life. Taking it to be established, that the demandant's right of entry accrued upon the refusal of Elizabeth Vassal to take the estate, we proceed to the consideration, in what manner and at what time this refusal was given.

No precise form is necessary to constitute a refusal or disclaimer of a devise. It was formerly said, that it must be evidenced by matter of record, and it was held in Crewe v. Dicken, 4 Ves. 97, where there was a devise to trustees, and one of them released and conveyed his right to his co-trustee by deed, that this was not a good disclaimer of the trust. The same law was attempted to be maintained in Nicloson v. Wordsworth, 2 Swanst. 365; but Lord Eldon held the release by deed sufficient to enable the remaining trustees to act alone. It is not necessary, that the disclaimer should be by matter of record; neither must it be by deed. Bonefant v. Sir Richard Greenfield, 1 Leon. 60, Cro. Eliz. 80; Smith v. Wheeler, 1 Vent. 128; 4 Kent, Comm. 533; Shep. Touch. "Testament," p. 452; Townson v. Tickell, 3 Barn. & Ald. 31. Any acts of the devisee, which evidence unequivocally his intention to refuse the devise, will amount to a disclaimer of the devise. Plowd. 543; 1 Pow. Dev. 429; 5 Bart. Conv. 192; Ward v. Ward, 15 Pick. 511, 525. This is apparent in the familiar case of a testator, devising to a third person property, claimed by another devisee under the will, and the devisee still claims the property in opposition to the will. This act is a waiver or disclaimer of the benefit of the devise. So, in all other cases of implied conditions, if the devisee neglects to comply with them, the law presumes, that he does not accept the devise. So, in all cases of election. Upon the most thorough examination, which we have been able to give to this point, we do not find, that the refusal of a devise is governed by principles at all different from those governing the refusal of an estate conveyed by deed poll, or any other onesided contract, viz. to make it binding, the grantee must accept it; and whatever evidences, that he does not accept, is a valid disclaimer. This is a rule of such simple common sense, that it may seem a waste of time to cite so many authorities, in support of it. But ever since Crewe v. Dicken, the point has been a subject of grave doubt with the judges, and is marked with a query by the reporters. And yet there are but two decisions, which are not in accordance with it; and they are perfectly reconcilable to it, viz. Crewe v. Dicken, which went on the ground, that there was an acceptance by the trustee (which is opposed to Nicloson v. Wordsworth) and the case of Doe v. Smyth, 6 Barn. & C. 112.

These cases have been allowed to throw a cloud over the point, so that it has been considered doubtful, whether a man could by will fasten an estate upon another, from which he could not free himself without trouble and expense. Chancellor Kent merely says, that a man is not bound to accept a devise to him nolens volens. According to the rule, for which we contend, a verbal refusal, or acts showing an intention to refuse, or a passive refusal, are all good disclaimers of an estate devised, provided they evidence the intention unequivocally. Elizabeth Vassal disclaimed the devise of the land in dispute by positively refusing to accept it. She utterly neglected to take any steps to secure the land devised, or in any manner to take or claim any benefit from the land, until her right to do so was taken away by the statute of limitations. It is difficult to conceive a more deliberate refusal of a devise than such conduct evinces,—a refusal in fact. And the law would imperatively imply a refusal, under such circumstances, on the ground, that it is thwarting the intention of the testator; for nothing could be more directly opposed to it, than that the lands should go into the possession of a stranger, because the devisee would neither take them herself, nor, by a formal disclaimer, suffer the devise over to take effect. There are several reasons, why this period should be fixed upon, as that at which the refusal of the devise is evidenced; and we therefore make the point, that when the devisee of a particular estate neglects to enter, until he is bound by the statute of limitations, this amounts to a refusal of the

devise. One very obvious reason in its favor is, that it is the period, at which the devisee suffers all practicable means of asserting his right to drop, since a devise is utterly without remedy, when the right of entry is gone. Practically, a devisee takes nothing but a right of entry. Secondly, it defeats the intention of the testator to suffer a stranger to enjoy an estate, which he wished to keep in a particular line. Thirdly, it takes away the right of the remainder-man, since the disseiser can commit waste, to the utter destruction of the estate in remainder, and there could be no legal remedy against him; he claiming the fee, and no one else having a right to enter upon him. And this rule is supported by authority. Wells v. Prince, 9 Mass. 508.

This brings us to the consideration, at what time the right of entry of Elizabeth Vassal was lost. 1 Laws Mass. p. 238, c. 13, § 4, and Laws Me. c. 62, § 4. By the enactment, she had twenty years, from the time the adverse occupancy commenced, to exercise her right, and by the proviso in favor of persons beyond seas, she had ten additional years. It appears, from the evidence, that Gilman began to occupy the land in 1798, therefore Elizabeth Vassal's right expired in 1828; and then, as we contend, and according to the above case, a right of entry accrued to the demandant, Webster, which he had twenty years to improve; and accordingly entry was made on the land, on his behalf, by Robinson, November 3d, 1837. If the court rule, that this point is not sustainable, but that a shadow of right still abides in the tenant for life, sufficient to prevent the entry of the remainder-man, then we ask the consideration of the court to the question, whether it is possible for the particular tenant, in any mode, to refuse the devise after her right of entry is gone. If not, whether this is not an additional reason for confirming the rule laid down in Wells v. Prince. If it is in her power to disclaim, a disclaimer by deed is certainly a good one, according to the authorities. And we offer the deed of Lord and Lady Holland, by which they released to the remainder-man all their interest under the devise. This deed cannot operate as such, since there was no seisin in Elizabeth; but it may operate as a disclaimer, or a refusal; that is, though it cannot convey a right, it can remove an impediment to the enjoyment of this right. Goodtitle v. Bailey, Cowp. 600; Shep. Touch. 79; Jackson v. Schoonmaker, 2 Johns. 233, 234. This deed would operate as a disclaimer of the devise, if such a disclaimer is adequate to effect the intention of the parties. Under it, a right of entry accrued in 1836 to the demandant as reversioner, and his right was perfected by an entry made on his behalf in 1837.

STORY, Circuit Justice. This cause has been very well argued; but, upon the actual posture of the pleadings and evidence, we do not entertain any doubt whatsoever, that our judgment ought to be for the tenant. The writ is a writ of entry, brought by the demandant, counting upon his own seisin within twenty years, as of a freehold; and upon the general issue of nul disseisin, the cause came on for trial. The title of the demandant may be shortly stated, as arising in this manner. Florentius Vassal (his ancestor) being on the 20th of September. 1777, seised of the demanded premises, made his will, and thereby devised the same to Lord Viscount Falmouth, Lord Viscount Barrington, and Charles Spooner and their heirs upon certain trusts, viz. to the use of his son, Richard Vassal, and his assigns for life, and upon the determination of that life estate by forfeiture or otherwise, to the use of the trustees, during Richard's life, to preserve contingent remainders, and, after the death of Richard, to the use of his sons, as tenants in common, in tail male, with cross remainders among all the sons, if more than one; and upon default of such issue male, if any, and all of the sons, to William Dickenson and William Smith, and the survivor of them, his executors, administrators, and assigns, for a term of years, upon certain trusts, not necessary to be stated, and which are admitted to have been completely satisfied; with remainder, subject to the term, to Elizabeth Vassal, the then only daughter of Richard, for her life; remainder to the original trustees, Lord Falmouth, Lord Barrington, and Charles Spooner, to preserve contingent remainders; remainder to the sons of Elizabeth, as tenants in common, in tail male, with cross remainders; and upon failure of such male issue upon certain other limitations over. Richard Vassal died without leaving any issue male; and thereupon according to the terms of the will, Eliazbeth Vassal (now Lady Holland), his daughter, became entitled to a life estate. The demandant is her only surviving son, and of course is entitled, as heir in tail in remainder, subject to her life estate. Lady Holland by her deed in the case, conveyed her life estate in the premises to her son, Henry Webster; and he now claims title thereto under that deed in the present writ of entry.

In the first place, then, upon the posture of the facts, it is plain, that the deed of Lady Holland was wholly inoperative as a conveyance, because at the time of the execution thereof, Lady Holland was disseised of the premises; and, by the common law, which is our law, seisin is indispensable to the due validity and operation of such a deed of conveyance. But, then, it is said, that Lady Holland, in fact, never accepted the life estate in the premises under the will, but waived, or refused, or disclaimed the same; and that her acquiescence for so long a period, without asserting any right of entry or possession, is a sufficient proof thereof. We see no reason in the facts of the case, upon which such a conclusion can be legitimately founded. On the contrary, her deed to her son is cogent evidence, that she did assert her title under the will, and meant (although ineffectually in point of law) to convey that title by her deed to her son. We know of no rule of law, by which a

mere naked non possession, or non exercise of the right of entry and possession of real estate under a devise, short of the period, prescribed by the statute of limitations to bar a right of entry, is held to amount to a positive renunciation, or disclaimer of a devise, or to proof thereof. It may be even doubtful, whether under our laws any renunciation, or disclaimer, not by deed or matter of record, would be an extinguishment of the right of the devisee. But, at all events, it should be evidenced by some solemn act or acknowledgment in writing, or by some open and positive act of renunciation, or disclaimer, which will prevent all future cavil, and operate in point of evidence, as a quasi estoppel.

In the next place, if Lady Holland had renounced or disclaimed her title to the demanded premises under the devise, how could that help the demandant? The determination of her estate by such a renunciation or disclaimer, will amount to no more than a determination thereof in her lifetime, in the sense of the will. And what then would be the effect? It would vest the demanded premises in the trustees to preserve contingent remainders during her life, leaving the remainder in tail male to her issue; that is, leaving the demandant, Henry Webster, tenant in tail in remainder. There is no pretence to say that the trustees have renounced their trust estates. They, therefore, under such circumstances alone would now be entitled to maintain a writ of entry, for the recovery of the premises, founded upon their freehold. So that, in point of law, in either view, the present writ of entry brought by the demandant upon his own seisin of a supposed mere freehold, is entirely disproved by the facts; for the freehold is not in him, but in Lady Holland, or in the trustees.

In the next and last place, (to view the case most favorably for the demandant, according to the argument,) if the life estate of Lady Holland could be treated as determined, or extinguished, and the estate of the trustees, to preserve contingent remainders, were merged in the remainder vested in the demandant, there would still be a fatal objection to the present writ of entry, since it is founded upon the seisin of a mere freehold by the demandant; whereas, in point of fact, he would, if seised at all, be, under such circumstances, seised of a fee tail. The writ is not, therefore, supported by the evidence, or adapted to this case. A tenant in fee simple cannot maintain a writ of entry founded upon his supposed seisin of a freehold only; for he has no such estate separate from the entire fee. But he must declare according to the truth of the case upon his own seisin in fee simple. A tenant in fee tail is in a similar predicament. He is in no just sense seised of a freehold only; but of a fee tail. His appropriate remedy is by a writ of formedon; and not by a writ of entry, founded upon a mere freehold. The writ, therefore, varies from the title, and is not maintainable.

For these reasons we are of opinion, that judgment ought to pass for the tenant in this suit.

Case No. 17,336.

WEBSTER v. MASSEY.

[2 Wash. C. C. 157.] [1]

Circuit Court, D. Pennsylvania. April Term, 1808.

INSOLVENCY — DISCHARGE UNDER FOREIGN LAW — CONFLICT OF LAWS — BAIL.

1. The defendant had been discharged by the insolvent laws of Pennsylvania, of 1790 and 1798. The court refused to enter an exoneretur on the bail-bond upon this ground.

[Cited contra in Richardson v. The M'Intyre, Case No. 11,789.]

2. The laws of a foreign country, where a contract is made, will be regarded by foreign tribunals as to the obligations of the contract, and as to its discharge.

[Cited in Burrows v. Hannegan, Case No. 2,206.]

3. A discharge of the person under a foreign insolvent law, leaves the contract still in force; and whether bail shall be demanded or not, must depend on the laws of the country where the suit is brought.

Rule to show cause why an exoneretur should not be entered on the bail-bond, the defendant having been discharged under the insolvent laws of Pennsylvania, passed in 1790 and 1798. This law only discharges the person from imprisonment or arrest, in any of the cases of creditors, returned as such by the debtor.

Mr. M'Shane, in favour of the rule, read the following cases: 2 Strange, 733; 1 Atk. 255; Cooke, Bankr. Law, 347; 1 East, 6; 3 Ves. 447; [Millar v. Hall] 1 Dall. [1 U. S.] 229.

Mr. Hopkinson, against the rule, insisted that the defendant could not be discharged by a state court, because the plaintiff was not returned as a creditor. Secondly; that the cases cited, apply only to the discharges under the bankrupt laws of a foreign country, and not to mere discharges of the person.

BY THE COURT. The difference between a discharge from the contract itself by a foreign judgment, and a mere discharge of the person, is an obvious one. The laws of a foreign country, where the contract is made, will be regarded by the tribunals of another country; and so will the same laws which discharge the debtor from the obligations of his contract. In Camfranque v. Burnell [Case No. 2,342], this court decided, that the defendant should not be held to bail, because the French aret was incorporated with, and governed the contract. But as to the mere forms of proceedings, the laws of the country, to whose tribunals the appeal is made, must govern. A discharge from the contract, therefore, by a foreign law or judgment, is conclusive everywhere, upon that contract. But a discharge of the person only, under a foreign insolvent law, leaves the contract still in force; and whether bail should in such cases be de-

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

manded or not, must depend upon the laws of the country, where the suit is brought. The other objection, taken by the plaintiff's counsel, appears to have considerable weight in it. Upon the whole, we are of opinion, in this case, that the defendant ought not to be discharged without common bail. Rule discharged.

Case No. 17,337.

WEBSTER et al. v. NEW BRUNSWICK CARPET CO.

[1 Ban. & A. 84;[1] 5 O. G. 522.]

Circuit Court, D. New Jersey. March, 1874.

INFRINGEMENT OF PATENTS—COMBINATIONS—OMISSION OF ELEMENT—MECHANICAL EQUIVALENTS—LOOMS FOR WEAVING PILE FABRICS.

1. Where a patent has been granted for a combination of old mechanical elements, it is an infringement to use all of the elements but one, and for the one not used, substitute another old element, which, at the time of the invention, was known as its mechanical equivalent, performing substantially the same functions.

[Cited in Welling v. Rubber-Coated Harness-Trimming Co., Case No. 17,382; Putnam v. Hutchinson, 12 Fed. 134.]

2. In order to avoid the charge of infringement in such cases, the substituted element must be a new one, or must perform a substantially different function, or must be unknown at the date of the patent as a proper substitute for the one omitted from the patented combination.

[Cited in Welling v. Rubber-Coated Harness-Trimming Co., Case No. 17,382.]

3. The patent granted to William Webster, August 27th, 1872, for "a new and useful improvement in looms for weaving pile fabrics," described and claimed the invention to be a combination of mechanical elements, one of which was a wire bar or trough mounted on a vertical shaft, pivoted at the outer end, with the end nearest to the loom oscillating to the extent required to transport the wire into the shed. The defendant used a loom containing all of the elements of Webster's patent, except that last mentioned, for which was substituted a wire bar or trough mounted upon a horizontal rock shaft, supported by two arms, and reciprocating equally throughout its whole length. It was shown by the evidence that the latter method of supporting the trough was old in the art at the date of Webster's invention, and that it performed no different function from the Webster method. *Held*, that the defendant's loom infringed the patent of Webster.

[Distinguished in Webster Loom Co. v. Higgins, Case No. 17,342.]

In equity.

C. A. Seward and B. R. Curtis, for complainants.

Geo. Gifford and Wayne Parker, for defendants.

NIXON, District Judge. This bill is filed against the corporation defendant, for infringing certain letters patent, No. 130,961, issued to William Webster, August 27, 1872, for "a new and useful improvement in looms for weaving pile fabrics."

The answer denies the infringement, and sets up, as a defence, a prior invention by one Ezekiel K. Davis; and that letters patent were granted to him, for inventions in looms for weaving pile fabrics, dated February 9, 1869, and numbered 86,651; that the looms which the defendants had in use, and which were alleged in the bill of complaint to infringe the Webster patent, were constructed and operated in conformity to the description contained in the said patent to Davis; that defendants had a license under said patent to use said looms; and that they rightfully and lawfully used under said license.

I. The complainants' patent refers to the wire motions of a loom in the manufacture of pile fabrics. It is a patent for a combination; and the question of infringement is determined by the construction of the fifth claim, which, in the specifications is stated as follows:

"In combination, the lay and its rigid shuttle-box, the pivoted vibrating wire trough, the reciprocating driving slide, and the latch moving thereon, the latter being operated by the wire box, the combination being and operating substantially as described."

The combination has six constituents: (1) The lay not differing from the lay used in the ordinary loom, whose functions are to support the shuttle in its motions backward and forward. (2) A rigid shuttle-box, as distinguished from a sliding one, placed on the same side of the loom as the wire motion, and so attached to the lay that it partakes of its backward and forward movements. (3) The pivoted vibrating wire trough, which acts as a support to the wires. By means of the latch, and the reciprocating driving slide, the wires are drawn from the fabric into this trough, which oscillates towards the lay, transporting the wires into the proper position, where they are pushed out of the trough into the open shed of the loom. (4 and 5) The reciprocating driving slide and the latch, the former forcing the wire from the trough into the shed, and the latter catching into the head of the wire by a spring hook, drawing it again from the fabric into the trough. (6) The wire-box, which is a contrivance or receptacle for the heads of the wires, when they are inserted in the fabric. The box has a slot on its top, under which there is always the head of a wire when the loom is in operation. The nose of the latch drops into this slot and engages the head of the wire that lies nearest to the breast-beam of the loom, whence it is withdrawn to the trough. The wire-box has also other functions. It operates as a cam, disengaging the latch from the wire head after the wire has been inserted into the shed, and supporting the hook so that it cannot engage with any of the wires in the box while the hook and trough are passing from the open shed to the breast-beam.

The evidence hardly admits of a serious doubt but that the defendants have in-

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

fringed this combination. The testimony of the complainants' expert, Mr. H. B. Renwick, is explicit in the matter. After an examination of the looms in use by the defendant corporation, at their works in New Brunswick, and after producing two models, one, marked "P," and representing the parts making up the combination referred to in the fifth claim of Webster's patent, and the other, marked "D," exhibiting the loom seen by him at New Brunswick, so far as it represented the mechanical elements or contrivances that are referred to in said fifth claim, he testified that one contained substantially all the parts embraced in the other; that they operated in combination in the same way, and produced the same effect. He said, referring to the model of the machine used by defendants:

"In this model, the lathe represented is an ordinary lathe, to which a shuttle-box is rigidly attached, so that it oscillates with the lathe. In it there is a vibrating wire trough T, which is long enough to support the wire—support that portion of it, which is not in either the shed or the fabric, or the whole of it when the wire is pulled out—and so oscillates as to transport the wire from the locality at which it was pulled out to that at which it is to be inserted, thus performing precisely the same duties that the wire trough performs in the Webster loom. It differs from Webster's solely in the way in which it is mounted, so as to be capable of oscillating to the required extent. In Webster's the trough is mounted on a vertical shaft or pivot. In the defendants' loom the trough is mounted upon a horizontal shaft. But the two troughs are the same, and support and transport the wire in substantially the same way. The defendants' loom has a reciprocating driving slide, which acts as a piston and pushes the wire out of the trough into the shed, and also carries the latch or hook, which pulls the wire out of the fabric into the trough. This driving slide is identical, in all respects, with that of Webster. The defendants' loom has also a latch or spring hook, which engages with a nick or depression in the head of the wire, and operates to pull the wire out of the fabric and deposit it in the trough. This latch is substantially identical in construction and operation with Webster's latch. In the defendants' loom there is likewise a wire-box, which contains the heads of the wires when they are inserted in the cloth, and along the bottom of which the heads of the wires slide, as in Webster's wire-box. The top of this box in the defendants' loom, is so shaped that when the nose of the latch strikes the top of the box, the latch is lifted and the wire released from its grasp and left in the cloth; also, in such a way that it holds the latch lifted while the latch and trough are oscillating toward the breast-beam, thus preventing the latch from engaging with the wire head while it is so moving; and the top of this box has also a slot in it, which permits the latch or hook to drop so as to take hold of that wire which is nearest the breast-beam, in order that this wire may be drawn out of the cloth. The top of the Webster latch-box is constructed in the same way to produce these same effects."

Instead of contradicting this testimony of the identity of the two machines, the defendants' expert, Mr. E. S. Renwick, in effect corroborates it. He recognizes their difference in the mode of mounting and operating the wire trough, as Mr. H. B. Renwick did. But it is a significant fact that the able counsel of the defendants addressed no question to him which would test the accuracy of the direct testimony of the complainants' expert, that, notwithstanding this difference in mounting, the troughs were the same, and supported and transported the wire in substantially the same way; and the responses made by the witness to the carefully-worded questions 7 and 8 show the reason why he was not interrogated upon the subject. After his examination of "Exhibit Davis Model, J. G. Jr.," he is asked, in question 7, to "state whether or not there is represented in any condition of that model substantially the combination specified in the fifth claim of the Webster patent, if that claim be not limited to the wire bar being pivoted at one end," and he replies, that, "if the wire bar or wire trough recited in the fifth claim be not limited to one which is connected with its support, at its outer end, by means of a pivot, then the said model does contain, in substance, substantially the same combination as is recited in the said claim, when the model is in the condition of having the shuttle-box rigidly connected with the lay by means of two bolts, etc."

Again, he is asked, question 8, "If the fifth claim of the Webster patent be limited to the wire bar (or trough), being pivoted at one end only, then does the Davis loom, as constructed by the Gilbert Loom Company, contain the combination specified in that claim?" and he answers: "In my opinion it does not, because the wire bar of the Davis loom is constructed with a horizontal rock shaft located below it, in such manner that the bar reciprocates bodily and equally throughout its whole extent, instead of vibrating or oscillating in a horizontal plane, as the wire bar or trough described in the Webster patent does; and because it would be impossible to attach the wire bar or trough either to the breast-beam of the loom or to the lay, as described in the Webster patent, if a horizontal rock shaft, such as the wire bar in the Gilbert loom, is connected with, were employed."

It is to be inferred that the only difference which he found in the combination used by the defendants and the combination patented by the complainant Webster, was the substitution by the former of a wire bar or trough, mounted upon a horizontal rock-shaft, supported by two arms, and reciprocating equally throughout its

whole length, for a wire bar or trough mounted on a vertical shaft, pivoted at the outer end, with the end nearest to the loom oscillating to the extent required to transport the wire into the shed.

And all the witnesses of the defendants who testified to the substantial dissimilarity of the mechanism, based their opinion upon these different methods of imparting the necessary motions to the wire trough in operating the machine.

In this state of the case, the question arises: Is this substitution of mechanical means a mere equivalent for the means employed by the complainants, or are they new, performing substantially different functions? Or in other words, have the defendants exhibited invention by dropping one of the instrumentalities of the complainants' combination, and supplying its place with another, new or old, whereby new functions, capabilities, results, have been imparted to the concrete machine? If they have, they will not be treated as infringers, although they use four of the five elements of the complainants' patent, and if they have not they will be so treated, although they only use four of the five.

What is the extent of the defendants' alteration of the complainants' patent? It is simply adopting a different method of supporting the wire trough; and the means adopted are old in the art. They have taken all the combinations of the Webster patent, except pivoting the support of the wire trough at the one end, and producing the wire motions by the oscillations of the other; and accomplish the result, possibly better in degree and more efficiently, by supporting the trough upon a horizontal shaft, and running bodily from end to end, which was a well-known device, in use for years in the Weild & Bigelow looms.

It is, as if one, examining the patented combination and admiring its efficiency, and desiring to appropriate it without the license of the inventor, should say: "This is a skilful combination, and the result benefits mankind. But all the ingredients are old, and, out of the combination, belong as much to me as to the inventor. I observe that he has not incorporated into his machinery Weild & Bigelow's mode of supporting the wire trough, and although the effect and result of his mechanism are the same, his method of producing them seems to the eye to be different. I understand the courts have held, that unless all the constituents of a patented combination are used, the patent is not infringed. I will try the experiment of substituting the Bigelow mode of supporting and adjusting the wire trough, so that the wire can be carried from the trough to the shed; and, if it prove successful, I shall secure all the benefits of the inventor's patent, leaving to him, what is too often his only recompense, the honor of the invention." He tries the experiment, and finds, to his delight, that the substituted mechanism is quite equal, if not superior, to the means designated in the patent for accomplishing the same result.

But this is not invention. It is piracy; and, if the law permits it, then all patents for a combination are worse than worthless, and may be avoided by the exercise of the most superficial attainments in mechanical knowledge.

But the law does not permit it. It protects the inventors of combinations against the substitution of equivalents, as fully as the inventors of other patentable improvements. Whatever may have been the inferences drawn from the earlier decisions of the supreme court in regard to the right of the public to use patented combinations, where all the ingredients are not taken, the recent case of Gould v. Rees, 15 Wall. [82 U. S.] 187, establishes the doctrine that, in order to avoid the charge of infringement in such cases, the substituted ingredient must be a new one, or must perform a substantially different function, or must be unknown, at the date of the plaintiff's patent, as a proper substitute for the one omitted from the patented combination.

Applying the principle of this case to the one in hand, it is clear that the horizontal shaft, supporting the wire trough by two arms, substituted by the defendants for the pivoted shaft of the complainants, was not new; that it does not perform substantially different functions, and that it was known at the date of Webster's patent as a substitute for the omitted mechanism.

II. The other defences of the defendants were not seriously urged, and it is not necessary to dwell upon them. The E. K. Davis patent of February 9, 1869, was not exhibited by them in evidence; and, if it had been, the testimony seems to be that the looms complained of were not constructed in accordance with the model, specifications, and claims of that patent. No allusion is made in the description of its organization in regard to the discovery, use, or utility of a rigid shuttle-box, which is the central idea of Webster's alleged improvement.

But it was claimed in the answer and insisted on in the argument, that this was a prior invention of Davis, and that he caused a model to be constructed as early as 1868, which was capable of adjustment and use with a rigid shuttle-box.

If the mutilated machine, put in evidence to establish this claim, had been altered to embrace such mechanism, when the brothers Crossley saw it in the autumn of 1868, it is, nevertheless, a fair deduction from the testimony, that Davis acquired all of his knowledge on the subject from the inspection of Webster's original drawing, made by him in the winter of 1865–6, and exhibited to Davis and others in the spring of 1868. That he did not comprehend the value of the invention, or that he did not then deem himself to be its original and first inventor, is also to be inferred from the fact that it was not claimed in his patent of the subsequent year.

The delay of Webster in taking out his patent, after he had completed his invention, seems to be satisfactorily explained. Under the circumstances it was not unreasonable. It is the

old story of poor inventors patiently waiting at the door of rich capitalists. The Bigelow patent was about expiring, and Webster's new wire motions could only be used in union with some of the patented ingredients of the Bigelow loom. As he was unable to make an arrangement with the Higgins's, who were licensees of Bigelow, in regard to the adoption of his improvements, and as he could not get others, like Weaver or Beattie, to unite with him, from fear of suits for infringements, he was obliged to wait, either for the death of the Bigelow patent, or until the heart of capital should relent, in order to give his invention to the world under circumstances that might afford him some compensation for his years of thought and unrequited effort. It is the opinion of the court under all the aspects of the case, that there should be a decree for the complainants, according to the prayer of the bill.

NOTE [from 5 O. G. 522]. This cause having been brought on to be finally heard on the pleadings and proofs, and Mr. C. A. Seward and Mr. B. R. Curtis having been heard on behalf of the plaintiffs, and Mr. Richard Wayne Parker on the behalf of the defendant, and due deliberation having been thereupon had, it is ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, doth order, adjudge, and decree: I. That the letters patent set forth in the bill herein issued to William Webster on the 27th day of August, 1872, for a new and useful improvement in looms for weaving pile fabrics, numbered 130,961, are valid in law. II. That the plaintiffs are the sole and exclusive owners of all the rights created or conferred by said letters patent. III. That the defendant has infringed and violated said letters patent by using within the city of New Brunswick, and within the jurisdiction of this court, carpet-looms containing the improvements described in said letters patent and recited in the fifth claim thereof. IV. That the said defendant do account to the said plaintiffs both for the damages sustained by them and for the profits made by the said defendant in consequence of such infringement. V. That an account of the said damages and of the said profits be taken and stated by S. D. Oliphant, Esq., a counselor-at-law, and the clerk of this court as master of this court, pro hac vice; and that the defendant, its attorneys, agents, servants, and employés, attend before the said master, from time to time, on notification from him, and under his direction; and that the plaintiffs may examine the said defendant, its officers, employés, attorneys, agents, and servants under oath, as to the several matters pending on the said reference; and that the said defendant produce before the said master on oath all such deeds, contracts, specifications, papers, and writings, as the said master shall direct, in their custody, or under their control, or subject to their order, relating to said matters which shall be pending before said master; and that the said master have all the authority and power conferred upon masters in like cases, by the 77th rule prescribed by the supreme court of the United States, as rules of practice for the courts of equity of the United States. VI. That a perpetual injunction issue out of and under the seal of this court, against the said defendant, commanding it, its attorneys, agents, servants, workmen, officers, and employés, to desist and refrain from making, using, or vending any looms for carpets containing or embodying any of the inventions or improvements described in said original letters patent to the said William Webster, and recited in the claims thereof; and from in any manner infringing upon or violating any of the rights or privileges granted or secured by said letters patent. VII. That the said plaintiffs recover of the said defendant, as well the damages as the profits, which shall be reported by the said master hereunder; and that upon the confirmation of his report, a decree be entered against the defendant therefor, and also for the costs of the plaintiffs in this suit in this court, and that the plaintiffs have execution therefor, and for the compensation of the said master, to be fixed on the coming in and confirmation of his report. VIII. That the parties and master may apply, upon due notice to this court upon the foot of this decree, for such other and further order, instructions, and directions as may be necessary.

[The cause was subsequently heard on exceptions to the master's report. See Case No. 17,338.]

[For other cases involving this patent, see note to Webster Loom Co. v. Higgins, Case No. 17,342.]

Case No. 17,338.

WEBSTER et al. v. NEW BRUNSWICK CARPET CO.

[2 Ban. & A. 67;[1] 9 O. G. 203.]

Circuit Court, D. New Jersey. April, 1875.

INFRINGEMENT OF PATENTS—ACCOUNTING—BURDEN OF PROOF—ASCERTAINMENT OF PROFITS—PATENTED IMPROVEMENTS.

1. In taking an account under a decree for the infringement of a patent, where the profits and damages are to be estimated upon the extent of the use of the infringing machines in manufacturing an article, it is incumbent on the complainants to show affirmatively the number of yards produced by the use of such machines.

2. Where a witness stated that a certain number of yards were manufactured, but did not state in precise terms that it was the entire quantity produced, and gave other evidence of the capacity of the infringing machines, which tended to show that a much larger quantity might have been manufactured, and the master inferred that the witness did not mean to indicate the whole production, and for want of more sufficient data reported in favor of the amount which an average of the number of the machines used, under favorable conditions of operation, were capable of producing within a specified time: *Held*, that the master was in error, as the question is not what could be, but what was produced by the use of the complainants' invention.

3. The master should have made his estimate of the profits for which the defendant is chargeable, upon the actual production by the use of the instrumentalities employed, and not upon the capacity of such instrumentalities.

4. Where the complainants' invention is an improvement upon an existing machine by which its productive capacity is increased, the measure of the complainants' profits is to be ascertained from the consideration of the advantage which has resulted to the defendant by his unauthorized use of the complainants' invention, and would be the amount produced over and above what would have been produced by the machines if the complainants' improvement had not been used.

[Disapproved in Webster Loom Co. v. Higgins, 43 Fed. 674.]

5. Profits are in the nature of damages which up to the date of the final decree are unliquidat-

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ed, and interest should not be allowed before that time.

In equity.

C. H. Seward, for complainants.
George Gifford, for defendant.

NIXON, District Judge. On the final hearing of this case [Case No. 17,337], the decree of the court was, that the letters patent No. 130,961, issued to the complainant, [William] Webster, August 27, 1872, for a new and useful improvement in looms for weaving pile fabrics, were valid in law; that the corporation defendant had infringed the same by using the improvements described and recited in the fifth claim; that a reference should be made to the master to take an account of the profits realized by the defendant, and of the damages sustained by the complainants, in consequence of the said infringement. The master has made his report, to which the counsel for the defendant have filed ten exceptions.

1. The first refers to the amount of the production of the looms, in the use of which the defendant infringed the complainants' patent —the master assuming, from the evidence, that the defendant manufactured 450,864 yards of carpet during the period of the infringement, whereas, it is claimed that the proof shows a manufacture of only 153,472 yards. It is to be regretted that a fact which was probably capable of positive demonstration, has been left in such an uncertain and doubtful state. It was incumbent on the complainants to exhibit, affirmatively, the whole amount of the production, in order to measure the damages, and to approximate the extent of the profits. Under the decree and reference they had access, by subpœna, to the books of the company, and to its officers, consignees, and agents. They chose to rely alone upon the testimony of Mr. Short, the company's superintendent, and on the inferences which they thought could be legitimately drawn from his statements, in regard to the number of looms purchased, and their capacity of production. He says that he was the superintendent of the company from the date of its organization to the adjudication in bankruptcy; that he was familiar with its operations; with the number of looms used; with the style and cost of the carpets made, and with the prices received; that the company had forty-three looms, in all, but only used on the average thirty-one; that during the interval between October 1st, 1872, when the company started business, to September 20th, 1873, when it closed, it produced by the use of these looms, 153,472¾ yards of carpeting of the kind known as tapestry Brussels; that they were consigned to S. B. Hunt & Co. and J. B. Archer & Co., the former firm receiving 38,215⅛ yards and the latter 115,257⅝ yards.

That was the whole testimony on the question of production. No further inquiry was made, either in the direct or the cross examination, in regard to the subject, and it would seem that both parties, recognizing the honesty of the witness and his opportunities of knowledge, were satisfied to accept his statement as true. If they had not been, it would have been easy for either side to have brought forward the books of the company, or the consignees, or other consignees and agents, if there were any, and from these sources to show its want of correctness. But, because the witness did not say, in precise terms, that the 153,472¾ yards was the entire quantity produced, and because he gave other evidence in reference to the capacity of the looms, with the complainants' wire motion attached, which tended to show that a much larger quantity might have been manufactured, the master has inferred that the witness did not mean to indicate the whole production, and, for the want of more sufficient data, he has reported in favor of the amount which an average of thirty-three looms, under favorable conditions of operation, was capable of producing within the specified time. I have carefully examined the evidence, and think the master has mistaken its clear import. In the inquiry concerning the profits, the question is not what could be, but what was produced, by the use of the complainants' invention, and the fair construction of the witness's testimony is, that 153,472¾ yards was the actual amount. The first exception, therefore, is sustained.

2. Without considering the remaining exceptions in detail, it is sufficient to observe, generally, that the radical defect of the master's report seems to be that he has, in fact, made his estimate of the profits for which the defendant is chargeable, upon the capacity of the instrumentalities employed, and not upon their actual production. The error is the more remarkable, because he evidently, and properly, aims, in his report to limit the profits to the increased product.

The measure of the complainants' profits, on this reference, is to be ascertained from the consideration of the advantages which have resulted to the defendant by its unauthorized use of the complainants' invention. These advantages have arisen from the use of looms, the daily yield of which, with a good operator and under favorable circumstances, was about forty-eight yards, instead of looms with a daily yield under the same conditions, of about thirty yards. If I understand the evidence taken, it is to the effect that the incorporation of the complainants' wire motion into a Bigelow machine, adds about eighteen yards per day to its productive capacity; and as both parties have taken that loom as the best now open to the public use, it would seem that no difficulty ought to exist about the correct method of arriving at the profits for which the defendant should account.

The first inquiry is, what is the net profit which the defendant realized upon each yard of carpet manufactured? The master—after fully considering the cost of making, the expenses of consignees, and the average prices received on sales—finds this to be $20^2/_5$ cents

per yard, and, under the evidence, I deem that to be a reasonable approximation.

The next inquiry is, what was the increased production in consequence of the use of the complainants' patent, from October 1, 1872, to September 20, 1873? The master reports this increase to be 201,949 yards, which, as we have already seen, is deemed to be in excess of the whole actual production. The process of reasoning by which he reaches that result is as follows: The average capacity of the Bigelow loom is 26½ yards per day; the average capacity of the same with the complainants' wire motion attached, is 48 yards, showing an increase of 21½ yards per day in favor of Webster's invention. The aggregate production of 31 looms—the number in use by defendant—at 48 yards per day, is 450,864 yards, for 303 working days of ten hours each. The aggregate production of the same number of looms for the same length of time, at 26½ yards per day, is 248,914½ yards—exhibiting an increased production of 201,949½ yards, by the use of the complainants' patent. See Master's Report, fol. 408.

But it is quite obvious that this calculation is based on the capacity of the looms. It assumes that during every minute of the ten hours of each working day, every loom was in running order, in operation, and in the hands of a good operator; whereas the evidence is that the defendant corporation had inexperienced workmen; that the looms were new, bady made, and run at great disadvantage; and that the mill was frequently stopped for alterations or repairs of breakages.

The calculation should have been made on the actual production, which we have hereinbefore held to have been 153,472¾ yards, and then the method of computation would have been as follows:

If 31 looms—each with a productive capacity averaging 48 yards per day—yielded 153,472 yards in 303 working days, how much would the same number of looms yield, in the same time, having a productive capacity of only 30 yards per day each? The number of yards would, of course, bear the same relative proportion to 153,472, as 30 bears to 48, and would amount to 95,920 yards. The difference between these would be the increased production, to wit, 57,552 yards. As it does not appear from the testimony that the material, labor, machinery, interest on capital, and all the elements which enter into the cost of production, would, to any extent, vary in the two cases, we are not called upon to perplex the subject—as the counsel for the defendant did on the argument—with their consideration. The measure of profits to the complainants is the net profit realized by the defendant on this increase, which was $20^2/_5$ cents per yard, amounting to $11,741.40—for which sum a final decree will be entered for the complainants with costs. All costs that have accrued to the complainants since the assignee in bankruptcy became a party to these proceedings, are to be paid in full, from the bankrupt estate.

With regard to the question of interest, this does not seem to be a case where it should be allowed before the entry of the final decree. The profits are in the nature of damages, which up to that date are unliquidated. I find nothing in the evidence that distinguishes the case in principle from American Nicholson Pavement Co. v. City of Elizabeth [Case No. 309], and Mowry v. Whitney, 14 Wall. [81 U. S.] 653, and the master's report, giving interest from the date of the interlocutory decree, is overruled.

[For other cases involving this patent, see note to Webster Loom Co. v. Higgins, Case No. 17,342.]

WEBSTER (UNITED STATES v.). See Case No. 16,658.

Case No. 17,339.

WEBSTER v. WARREN.

[2 Wash. C. C. 456.] [1]

Circuit Court, D. Pennsylvania. April Term, 1810.

ACTION OF COVENANT — PLEADING — DEFENSES — DEPENDENT AND INDEPENDENT COVENANTS — EVIDENCE OF PERFORMANCE — MITIGATION OF DAMAGES.

1. Action of covenant upon an agreement under seal by which the plaintiff stipulated to perform, in the Philadelphia and Baltimore theatres, for three years, and not to play or sing at any other theatre, without the license of the defendant; and the defendant agreed to pay the plaintiff so much per week, and to allow him the profits of a benefit and a half each season, provided the plaintiff kept and performed all his covenants, and not otherwise.

2. The defendant pleaded covenants performed, with leave to give in evidence, every thing which amounts to a legel defence.

[Cited in Dushane v. Benedict, 120 U. S. 640, 7. Sup. Ct. 699.]

3. The defendant offered evidence to prove that the plaintiff had played at other theatres, without his license; and ill conduct on his part, which had produced riots at the theatre.

4. This plea, according to its import, and the understanding of the bar, amounts to an agreement that the defendant may give in evidence any thing which he might plead, and which, in point of law, can protect him from the plaintiff's claim.

[Cited in Dushane v. Benedict, 120 U. S. 640, 7 Sup. Ct. 699.]

[Cited in brief in Ellmaher v. Insurance Co., 5 Pa. St. 187.]

5. Where the covenants are dependent, the plaintiff cannot support this action as to them, without showing performance of every affirmative covenant on his part, and in such a case, it is competent to the defendant to prove a breach of such as are negative.

[Cited in brief in Rankin v. Depmott, 61 Pa. St. 264.]

6. Where the covenants are independent, evidence under the plea of covenants performed, with leave, &c., cannot be given, which amounts to a bar of the plaintiff's action, or to an offset

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

of damages sustained by a breach of other independent covenants. Such evidence cannot be given in mitigation of damages.

This is an action of covenant, upon an agreement under seal, executed by both parties, whereby the plaintiff agrees, for three years, to play and perform upon the Philadelphia and Baltimore theatres, under the management of the defendant, such parts and characters as should be allotted to him by the managers, to attend the rehearsals at the times appointed, and to pay, or permit the manager to retain, such forfeits as he, Webster, may incur, according to a table of forfeits annexed, and not to play, or perform, or sing, on any other stage, or in any other place, during the above time, without a license first obtained from the manager. In consideration of all which covenants to be performed by Webster, Warren agrees to allow him, for the first year, eighteen dollars per week, during the seasons, payable weekly by the treasurer; and for the remaining two years, twenty-three dollars and thirty-three cents per week. The agreement then proceeds to state, that if Webster shall keep and perform all and singular the above covenants, on his part, and not otherwise, Warren agrees to allow him annually, one winter, and half of one summer benefit. The parties then mutually bind themselves each to the other, in a certain penalty, to keep their said covenants. The breaches laid in the declaration are, that the defendant, in April, 1808, before the expiration of the three years, discharged the plaintiff, although he was always ready, and offered to perform his parts of the agreement and had refused, from that time, to pay him the sum stipulated per week, and also to allow him the benefits, to which he was afterwards entitled. Plea, covenants performed, with leave to give in evidence every thing which amounts to a legal defence; to which plea issue was taken. The plaintiff proved his dismission, the probable value of his benefits, to which he claimed to be afterwards entitled, the nonpayment of them, and of his weekly allowances. The defendant then offered evidence to show that the plaintiff had broken his agreement, by playing or singing, without license, at New-York, previous to his discharge; that by his misconduct, either real, or imputed to him by the public, the character of the theatre had been injured, and each night, when the plaintiff appeared, the theatre had, for this reason, exhibited scenes of riot and confusion; and, finally, that the plaintiff had sustained no injury by being turned away, having received at other theatres much more than the defendant was bound to pay him. This evidence was objected to, and the court called upon the defendant's counsel to begin and show, if they could, that it was proper.

Mr. Rawle and J. R. Ingersoll, for defendant, insisted, that under this plea, and according to the practice of this state, the defendant was at liberty to give in evidence, any matter which might have been specially pleaded, or in mitigation of damages; and that it was not necessary to give notice of the matters intended to be urged in the defence. That these were dependent covenants, or if not so, still, as the defendant could have no remedy for the breaches committed by the plaintiff, he might offer the matter in evidence, to lessen the damages.

C. J. Ingersoll, for plaintiff, combated all those points and cited the following cases, 1 Sandf. 320; Cowp. 56; 2 Bac. Abr. 92, Doug. 684; 1 Term R. 638; 1 Esp. 35; 1 Camp. N. P. 377, 5 Bos. & P. 136; Willis, 157.

BY THE COURT. The greatest difficulty arises from the singularity of the plea, which seems almost peculiar to this state. But, construing it according to its own import, and the understanding of the bar, we conceive it amounts to an agreement, that the defendant may give in evidence any thing which he might plead, or which, in point of law, can protect him against the claim; and, although it would seem just, that the plaintiff should have notice of the matter of the defence, yet, as in similar actions and pleas on policies of insurance, it is not the practice to give such notice, unless called for, we should consider the objection now made on this account, as a surprise on the defendant, which might induce the court to set aside the verdict, if against the defendant. With respect to the breach assigned, as to the benefits, it is clear, that the covenants are dependent, and that the plaintiff is not entitled to claim any thing in the way of benefits, without showing performance of every affirmative covenant on his part, and it is competent to the defendant to prove the breach of such of the covenants as are negative. But as to the other parts of the agreement, the covenants are mutual and independent, Webster agreeing to do certain things, and not to do others; and Warren, in consideration of such covenants, agreeing to pay him so much per week. As to those covenants in respect to the weekly pay, the defence set up amounts either to a bar of the plaintiff's action, or to an offset of damages, sustained by a breach of independent covenants. It is impossible that the first can be supported, where the covenants are independent. If the defendant has been injured by a breach of the covenants on the part of the plaintiff, he may recover damages in an action against him, but he cannot give such breaches in evidence, either by way of bar, of offset, or in mitigation.

Upon this opinion being given, the parties agreed to a compromise, and a juror was withdrawn.

Case No. 17,340.

WEBSTER v. WOOLBRIDGE.

[3 Dill. 74.] [1]

Circuit Court, E. D. Missouri. 1874.

BANKRUPT ACT—LIEN OF JUDGMENT—EXECUTION SALES—RETURN DAY—SALE AFTER RETURN DAY—MISSOURI STATUTES.

1. A lien on real estate lawfully obtained under a valid judgment, by a creditor before the

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

commencement of the proceedings in bankruptcy against the judgment debtor, is protected against the bankrupt act [of 1867 (14 Stat. 517)], and is good against the assignee in bankruptcy.

2. Without statute provision an execution is functus officio after the return day; but by the legislation of Missouri, where a levy on land has been duly made, the power to sell exists after return day, for the execution and lien thereby created are by statute continued in force until the end of the second or later term of the proper court, if a sale be not made at the next term after the levy.

3. These principles applied and *held* to preserve a lien of a judgment creditor although no sale had been made under his levy.

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

On the 9th day of May, 1872, John M. Woolbridge obtained a judgment in the Pettis county circuit court against Powhatan Woolbridge for $6,269.08 on which an execution was issued, tested May 21, 1872, directed to the sheriff of St. Louis county, returnable at the September term, 1872, of the Pettis county circuit court. This suit was levied by the sheriff of St. Louis county on real estate of the said Powhatan on May 23, 1872, and the sale advertised for the 19th day of June ensuing. On the 18th day of June, 1872, a petition in bankruptcy was filed against the said Powhatan in the district court of the United States for the Eastern district of Missouri, at St. Louis, and on that day the Central Bank of St. Louis, representing itself to be a creditor of the said Powhatan, filed in the said federal district court a bill in equity against the said John M. Woolbridge and Philip C. Taylor, the sheriff of St. Louis county, stating the foregoing facts, and averring that the said judgment was fraudulent under the bankrupt act, and praying that the defendants be restrained from enforcing the judgment or making the sale. On June 19th a provisional injunction was ordered as prayed, which was continued in force until June 29th, 1872, on which day the court made the following order: "Ordered that the provisional injunction be dissolved, and with the consent of the parties, it is further ordered, that P. C. Taylor, sheriff, do proceed to sell under the execution the real estate levied on, and hold the proceeds subject to the further order of this court." For some reason, which does not appear, this sale was not made by the sheriff; and, on the 31st day of August, 1872 (the suit being returnable to the September term, 1872), he returned the execution with a return thereof of his levy, May 23d, 1872, and that he did not sell by reason of the injunction order of the United States district court of June 19th, 1872. On the 31st July, 1873, a second execution upon the said judgment, reciting the former suit and the levy and return thereon, was issued to the sheriff of St. Louis county. On the 3d day of November, 1873, Webster, the present plaintiff, having been appointed assignee in bankruptcy of Powhatan Woolbridge, filed a bill supplemental to the one which had been filed by the Central Bank, setting forth the same facts and others, the object of which was to show that the said judgment of John M. Woolbridge had been procured in fraud of the bankrupt act, and praying that apparent lien of the said judgment and execution be set aside and declared void, and for general relief. Answer and replication were filed, and proofs taken, and on the 17th day of February, 1874, a decree was passed by the district court to the effect that the judgment was valid, but that neither the same nor the execution levied by virtue thereof was a lien upon the real estate in St. Louis county. [Case unreported.] From this decree John M. Woolbridge appeals. No appeal was taken by the assignee.

Krum & Patrick, for appellant.
F. N. Judson, for assignee.

DILLON, Circuit Judge. The decree establishes that the judgment of the appellant against the bankrupt prior to the proceedings in bankruptcy was fairly obtained and is valid. The assignee has not appealed, and does not question the correctness of this part of the decree. Tested by the doctrine of City Bank of St. Paul v. Wilson, lately decided by the supreme court of the United States (17 Wall. [84 U. S.] 473), this judgment rendered in Pettis county would not, of itself, be a lien upon lands in St. Louis county, but the execution issued upon it became a lien on those lands when the same was levied on them. Gen. St. 1865, p. 643, § 23. This is admitted. The levy was made and the lien by virtue thereof became perfect prior to the commencement of proceedings in bankruptcy against the judgment debtor, and this lien unless it has been lost is protected by the bankrupt act, and is good as against the assignee in bankruptcy.

The assignee in bankruptcy insists that by the laws of the state of Missouri, the lien acquired by the levy ceased in consequence of the failure of the sheriff to sell as required by the statute and the command of the writ, and as he was expressly authorized and ordered to do, by the district court of the United States, on the 29th day of June. On the other hand the judgment creditor maintains that the lien given by the levy still subsists, and that the bankruptcy court ought to have recognized its validity. Unless there is a statute to that effect, a lien acquired by a valid levy during the life-time of the writ subsists, though no sale be made under the writ, and the levy being returned, it may, after the return day, be enforced by a venditioni exponas.

And the question here is, whether there is a statute in the state under which the lien of the execution by virtue of the levy has ceased. It will be observed that this is a contest not between two conflicting levies, but between the judgment creditor and the general creditors represented by the assignee in bankruptcy.

It will also be observed that if the sale had been made by the sheriff, and the money brought into court, the decree of the court would have given it to the judgment creditor. It was not his fault that he was enjoined. No intervening rights have attached. If he has lost his priority it results from his inaction and from that alone. It will also be observed that the validity of his judgment was all the time being questioned in the district court by the original and supplemental bill, and that when the order dissolving the injunction was made, it was with a view to draw the proceeds of the sale from the state court into the bankruptcy court so as afterwards to determine the rights of the contesting parties thereto. Nothing would have been gained to the estate had the sale been made, and nothing has been lost to it by the omission to make it. Under these circumstances, if the judgment creditor has lost the fruits of his vigilance and benefit of his levy it must be by virtue of a direct and express statute to that effect.

The sections of the statute (Gen. St. 1865, p. 646) relied on by the assignee are as follows:

"Sec. 51. In all cases where an execution is or shall be issued and levied by the proper officers upon real estate, and, for any cause, a sale of such real estate shall not be made at the next term of the court of the county in which such sale is to be made, the execution and lien created thereby shall remain and continue in force until the end of the second term of the court of the county where the land is situated, and until a term of said court is held at which said real estate may be sold according to law.

"Sec. 52. Where an execution is issued from a court of record in one county, and sent to the sheriff of any other in this state, and the same is levied on real estate and from any cause the circuit court of the last mentioned county shall not be held before the return day of the execution, the sheriff shall retain said execution, and the levy made by virtue thereof shall remain in full force until there shall be a term of the circuit court in said last mentioned county at which said real estate may be sold."

These statute provisions will be better understood by referring to the act of March 23d, 1863 (Laws 1863, p. 20), and the decisions of the supreme court of the state construing that act, and by comparing with it the sections above quoted. Stewart v. Severance, 43 Mo. 322; Wood v. Messerly, 46 Mo. 255; Porter v. Mariner, 50 Mo. 364; McDonald v. Gronefeld, 45 Mo. 28; Bank v. Bray, 37 Mo. 194; Lackey v. Lubke, 36 Mo. 115. Upon the exact point now under consideration, in the absence of any opinion of the supreme court of the state to guide me, it is my judgment that sections 51 and 52 do not destroy or put an end to the lien of the levy under the execution issued upon the appellant's judgment.

In Missouri the executions are returnable in term and the law has always required execution sales to be made during a term of the circuit court. Bank v. Evans, 51 Mo. 335, 347. Without a statute an execution is functus officio after the return day. Bank v. Bray, 37 Mo. 194. But by the statute under consideration, where a levy has been duly made, the power to sell exists after the return day, for the express provision is that if there is a levy when the writ is in force and the sale is not made at the next term, the execution and lien created thereby shall remain and continue in force until the end of the second term and until a term of court is held at which the real estate may be sold according to law.

This obviates the necessity of a new writ, and authorizes a sale upon the writ under which the levy was made, at the second term of the proper court, or, if need be, at a still later term. But when a term arrives at which the land levied on may be legally sold, and it is not, then a sale made afterward by virtue of the original execution might be, and probably would be void. Viewed in the light of the act of 1863 and its purposes (45 Mo. 30; 42 Mo. 332), the statute is entirely consistent with the common law doctrine, that after a levy the writ may be returned on the return day and the levy enforced by a venditioni exponas. And such is the opinion of Adams, J., in Porter v. Mariner, 50 Mo. 364, who, construing the act of 1863, upholds a sale made in 1865, under a new execution, upon a levy made in 1861, and says, arguendo, that "a venditioni exponas might have been issued (in 1865) on this levy (in 1861) without regard to the statute" of 1863. The decree appealed from will be reversed, and the case remanded to the district court. Decree accordingly.

That assignee in bankruptcy takes, subject to existing legal and equitable rights in third persons, see Meador v. Everett [Case No. 9,376]; Hamilton v. National Loan Bank [Id. 5,987].

WEBSTER, The MAUD. See Cases Nos. 9,302 and 9,303.

Case No. 17,341.

WEBSTER LOOM CO. v. HIGGINS et al.

[13 Batchf. 349;[1] 9 O. G. 965.]

Circuit Court, S. D. New York. May 13, 1876.

PATENT INFRINGEMENT SUITS — AMENDMENTS TO ANSWER—NEW DEFENSES.

In a suit in equity on a patent, the defendant, more than one year after the plaintiff's proofs were closed, moved to amend the sworn answer, by averring, on information and belief, that the patented invention was in public use for more than two years before the patent was applied for, and that it was described in a prior patent granted by the United States. The only excuse offered for not inserting the first defence in the original answer was, that the counsel who prepared such answer was under the impression that the suit was subject to the law as it stood prior to the patent act of July 8, 1870 [16 Stat. 198]. As to the second defence, the excuse was,

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

that such counsel had no knowledge or information of any description in any patent prior to the plaintiff's, of a certain device: *Held*, that the motion must be denied.

[Cited in De Florez v. Raynolds, Case No. 3,743; Page v. Holmes Burglar-Alarm Tel. Co., 2 Fed. 333; Spill v. Celluloid Manuf'g Co., 22 Fed. 97; Witters v. Sowles, 31 Fed. 10; Rice v. Ege, 42 Fed. 660.]

[Bill by the Webster Loom Company against Elias S. Higgins and others for infringement of letters patent No. 130,961, issued Aug. 27, 1872, to William Webster for an improvement in looms for weaving pile fabrics.]

Clarence A. Seward, for plaintiff.

George Gifford, for defendants.

JOHNSON, Circuit Judge. The answer in this case was sworn to on the 4th of September, 1874, a replication was filed, and the complainant's proofs were taken and were closed on the 9th of October in that year. On the 30th of December, 1875, the defendants gave notice of the present motion to amend their former answer, by interposing two new defences. They seek to aver, on information and belief, that the complainant's alleged invention was in public use for more than two years prior to the application for the letters patent to Webster, and that the same is described in letters patent of the United States, granted to William Weild, dated January 13th, 1857, and numbered 16,415.

The only excuse offered for the omission to insert the first of these proposed defences in the original answer is found in the affidavit of the defendants' counsel who prepared the answer, that, when he prepared it, he omitted to state the fact now proposed to be inserted, because he was under the impression that the suit was subject to the law as it stood prior to the patent act approved July 8th, 1870. He does not say that his impression has since changed, although that may, perhaps, be inferred from his present motion; nor is it claimed that the facts were not known at the time when the answer was interposed. If the suit is governed, in the respect in question, by the act of July 8th, 1870, or by the equivalent provision of the Revised Statutes, and if the law is, that a public use in this country for more than two years before the application of an inventor for a patent, bars his right to a patent, or avoids the patent after it has been granted, irrespective of his consent to, or acquiescence in, such use, then I think that a party who wishes to avail himself of such a defence, ought, under all ordinary circumstances, to do so at the earliest opportunity. If he fails to do so, something more must be established than that he has been guilty of laches, to induce a court to excuse his neglect and allow so harsh a defence to be interposed.

Nor do I think the defendants entitle themselves to be now allowed to interpose the other defence proposed. The patent they seek to set up as an anticipation of the Webster patent they owned for a number of years and until it expired. They must be taken to have known its specification and claims. Their counsel does not state that he was not acquainted with the patent, nor that he had not, before the answer was put in, examined and considered the specification. His statement falls very far short of that. It is, that, when he prepared the answer, he had no knowledge or information of any description in any patent prior to the patent on which the suit is brought, of a cylinderwire motion such as is referred to in the affidavits of Duckworth and Hicks. He does not say that he has any such knowledge now, nor give the court any reason to consider that he finds in that patent what the two affiants, Duckworth and Hicks, are understood to say they conceive to be described there. These persons also base their statements upon the ground of a particular construction to be put on a claim in the Webster patent, which the plaintiffs do not assert and have not asserted, and which seems to me quite incapable of being maintained. I am of opinion, therefore, that justice does not require that the amendment should be permitted to be made, in view as well of the laches which has occurred, as of the substance of the amendment itself.

The motion to amend the answer must be denied.

[For other cases involving this patent, see note to Webster Loom Co. v. Higgins, Case No. 17,342.]

Case No. 17,342.

WEBSTER LOOM CO. v. HIGGINS et al.

[15 Blatchf. 446;[1] 4 Ban. & A. 88; 16 O. G. 675.]

Circuit Court, S. D. New York. Jan. 14, 1879.

PATENTS—SUFFICIENCY OF SPECIFICATIONS—COMBINATION CLAIMS—AGGREGATIONS—PRIOR USE—SHIFTING BURDEN OF PROOF—PILE FABRIC LOOMS.

1. The letters patent issued August 27th, 1872, to William Webster, for an improvement in looms for weaving pile fabrics, are invalid.

2. In respect to the fifth claim of said patent, namely, "In combination, the lay and its rigid shuttle box, the pivoted vibrating wire trough, the reciprocating driving slide, and the latch moving thereon, the latter being operated by the wire box, the combination being and operating substantially as described," the descriptive part of the specification is insufficient.

3. The combination set forth in said fifth claim is not a patentable combination, but a mere aggregation of devices.

4. When a defendant has shown prior knowledge and use, the burden of showing prior invention is on the plaintiff.

[Cited in Washburn & Moen Manuf'g Co. v. Haish, 4 Fed. 904; Thayer v. Hart, 20 Fed. 694; Kittle v. Hall, 29 Fed. 514; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 127.]

5. Webster was not the first inventor of the invention sought to be covered by said fifth claim.

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

[This was a bill in equity by the Webster Loom Company against Elias S. Higgins and Nathaniel D. Higgins for alleged infringement of a patent.]

Edward N. Dickerson and Clarence A. Seward, for plaintiff.

George Gifford and Ebenezer R. Hoar, for defendants.

WHEELER, District Judge. This suit is brought for relief against an alleged infringement of letters patent No. 130,961, issued, August 27th, 1872, to William Webster, and owned by the plaintiff, for an improvement in looms for weaving pile fabrics. The defendants, in their answer, allege, that, by previous contract with Webster, they are the owners of all such improvements made by him, deny that he was the first inventor of the invention patented, and allege, that, before the time of any invention thereof by him, the same, or substantial and material parts thereof, were described in, among others, letters patent of Great Britain to Erastus B. Bigelow, to William Weild, and to Moxon, Clayton and Fearnley, and in letters patent of the United States to Elias S. Higgins, assignee of William Weild, and to Ezekiel K. Davis, and that the same was known to, and used by, Ezekiel K. Davis and Thomas Crossley, of New York, at New York, that the description of the invention is obscure, and not sufficient to enable one acquainted with the art to which it belongs, to construct and use the loom therein attempted to be described, that there is no description in the patent of the combination specified in the fifth claim thereof, and deny infringement. On the hearing, the plaintiff relied solely upon the fifth claim of the patent, and the defendants abandoned all claim of ownership of the invention by virtue of any contract with Webster.

In Weaving pile fabrics, such as Brussels carpeting and velvets, wires are woven like filling into them, taking up warp into loops, over the wires, above that part of the cloth made of other warp and filling, constituting the pile of the fabric. Enough wires are woven in, and left there, to make a piece sufficiently large and firm to withstand the beat of the machinery, and then, as the weaving proceeds, those put in first are successively withdrawn, carried back and inserted again into open sheds of warp made to receive them, and woven into and carried along with the cloth. The heads of the wires are made much larger than the wires themselves, and square and flat, to fit into a box beside the cloth, with a narrow opening toward it, that will permit their moving freely along with the cloth. The looms used are not much different from those used in weaving other fabrics, except that machinery is added for withdrawing, carrying back and inserting the wires, which is called a wire motion, and the rest of the looms must be adapted to the working of that, so as not to interfere with it. As the wires are withdrawn, the loops are left to be held in place by the other warp and filling, as woven together, and, consequently, there must be a thread of filling woven in between the weaving in of each wire, and there must be two beats of the lay carrying the reed which beats up the filling and wires, and corresponding motions of the shuttle carrying the filling, to each insertion of a wire. The motions of the parts must all be so timed that the wires will be inserted when the lay is swung away from the woven cloth and makes room, and the sheds for them are opened to receive them, and that the lay will beat up the wire, swing back for a thread of filling to be carried through, and beat that up, while the wire motion is after another wire, and be in the proper position to carry the shuttle, with its threads of filling, at the times when they must go in. The wires must be carried past the fell of the cloth, toward the lay swung back, to reach a place in the sheds open sufficiently wide for them to be thrust into; the reed must stand on the edge of the lay away from the cloth, to make room on the lay for the shuttle race, and must be carried by it to the fell of the cloth when it beats up the wires and filling; and so the lay must move past the fell of the cloth toward the wire motion. To prevent collision between the lay with shuttle boxes attached and the wire motion, in making these movements, either the wire motion must be arranged so that it will insert the wires, and move out of the way, before the lay and shuttle box arrive where the wire motion goes, or so much of the lay and shuttle box, on that side of the loom, as would hit the wire motion, must be detached from the rest of the lay while that moves up with the reed, and be kept out of the way of the wire motion. In the Bigelow loom, the wire motion consisted of a forked arm and reciprocating lever, extending upward through a horizontal rocking shaft, which were so timed as to be together at the wire box when the lay beat up, and that was crooked out of the way for a short distance opposite, so it would move past them when in that position. In the Weild looms, the wires were withdrawn by a latch on a reciprocating slide, into a horizontal trough, oscillating between the points of withdrawal and insertion, and pushed out of the trough into the sheds by an arm extending from the slide far enough to follow and reach them until in place. A part of the lay was detached, and, with the shuttle box, kept back when the rest beat up, out of the way of the trough and extending arm of the wire motion. In the Moxon, Clayton and Fearnley patent, the wires were to be withdrawn by a latch into a groove in a table, and carried into another groove that would direct them into the sheds. This table would appear to be in the way of a rigid lay and shuttle box. Webster was familiar with such looms, and, in 1865 and 1866, conceived the idea of improving them,

by making a wire motion to them that could be used with a straight and rigid lay, and made a drawing of parts of a loom representing such a lay, and parts of a wire motion representing a reciprocating withdrawing and pushing slide, mounted on a wire trough, oscillating between the points of withdrawal and insertion of wires. So far as appears, this was the first representation ever made of such a device for a wire motion. Said Davis was a machinist, master mechanic of the defendants, who are large carpet manufacturers, in the alteration and repair of their looms, and familiar with such looms. In 1867, he commenced to invent improvements to them, and had a model of his loom, containing his improvements to that time, made, which showed a wire motion, containing a reciprocating withdrawing and pushing slide, mounted on a bar slotted so as to be like the sides of a trough, with a pin to assist in supporting the wires, supported on upright arms to a rocking shaft, moving between the points of withdrawal and insertion of the wires, and a rigid lay with a sliding shuttle box, which was held back when the lay moved up, and kept out of the way of the wire motion. This was the first invention of a sliding shuttle box. Webster showed Davis his drawing in March, 1868. Davis applied for a patent in July, 1868. One was issued for his improvements February 9th, 1869. Davis showed his model to Webster November 11th, 1869. Webster made application for a patent June 21st, 1870; and the one in suit was granted August 27th, 1872. What the application of Webster was is not shown. He declared that he had invented certain "improvements in looms" for weaving pile fabrics, &c., and, in his specifications, set forth the nature and object of his invention in these words: "The first part of my invention relates to the combination and arrangement of the reciprocating or driving slide, sliding bar, withdrawing and inserting devices, and trough, in such manner that the trough shall be capable of oscillating between the points of withdrawal and insertion of the wire, the sliding bar receiving a horizontal motion at the same time that the pushing slide is being reciprocated on the trough by the driving slide. The advantage of this part of my invention is, that a shuttle box, rigidly connected with the lay, may be used. The second part of my invention relates to the means for preventing the wire from bounding back from its position in the wire box, and consists in a spring attached to the inner end of the wire box, and fitting indentations or openings in the heads of the wires. The third part of my invention relates to the combination of the vibrating trough directly with the lay. The fourth part of my invention relates to a modification of the mechanism, and consists in having the oscillating trough and reciprocating slide pathway combined or made in one piece, and having the withdrawing and pushing devices combined or connected and reciprocated thereon by power applied directly thereto, the object of this part of my invention being to dispense with the driving slide and stationary slide pathway and sliding bar. The fifth part of my invention consists in the combination, with a lay having a rigid shuttle box, of a pivoted, vibrating wire trough, a reciprocating driving slide and latch, the latter being operated by the wire box to release the wire, and the slide and latch moving on the trough, all as set forth." Then, a description of the accompanying drawing, mereup stating what parts the figures represented. Then, a description of his improvements, in which he described a stationary sliding pathway on which the reciprocating or driving slide would move; a withdrawing and pushing slide secured to an oscillating trough pivoted to the breast beam, so as to reciprocate thereon, and be moved by a bar secured to it, and sliding in a mortise in the withdrawing and pushing slide, and with a wrist on the latter to which to apply power; the wire box latch and their working; and said: "Sheet 2, Fig. 3, represents the fulcrum H, of the oscillating trough E. as attached to the end of the lay C^2, by a plate H^1. The other end of the trough may be operated by a cam or other device, not shown. Fig. 4 represents a modification of the invention. The withdrawing and pushing slide, B^1, in this case, becomes the driving slide. The fulcrum or centre, H, of the oscillating trough, E, is represented as being attached to the breast beam, A^1, of the loom, in the same manner as shown in Fig. 2, sheet 1. Fig. 5 represents an end view of the withdrawing and pushing slide described in Figs. 3 and 4, but with the trough attached with shuttle box. The fulcrum of the oscillating trough, E, may be attached to the shuttle box or lay of the loom, or to a vertical shaft." He further described some of these parts by reference to figures of the drawing, representing different views of them, and described a horizontal movement of the latch, and stated that he did not expect to confine himself to the precise form of the several parts described. The first claim is for the vibrating trough, driving slide, its guiding way, the pusher, latch and sliding bar, combined and operated, substantially as described. The second is for improvements about the wire box. The third is for: "The combination, with the lay, C^2, of the trough, E, when arranged, connected and operating as described, and for the purpose set forth." The fourth is for the oscillating trough, constructed to serve as a slide guideway, in combination with the driving slide, pusher and latch, operating substantially as, and for the purposes, set forth. The fifth is for: "In combination, the lay and its rigid shuttle box, the pivoted vibrating wire trough, the reciprocating driving slide, and the latch moving thereon, the latter being operated by the wire box, the combination being and operating substantially as described."

The form and language of the patent leave what the inventor intended to describe in his specification, and cover by the fifth claim, somewhat open to inquiry. That claim is al-

most identical with the fifth part of the description of the nature and object of the invention, and they obviously refer to the same thing. Neither is intelligible without reference to what precedes. In what precedes that part of the description there is a combination of the wire trough with the lay, by being pivoted to it, mentioned. The same thing is again mentioned twice in the specification preceding the claims. The use of a lay with a rigid shuttle box is referred to in connection with the first part of the description of the nature and object of the invention, as an advantage to be derived from, but not as a part of, the invention. That part is different from that mentioned in the fifth part. Upon this view, it might, with some plausibility, be said, that the combination with the lay intended, when mentioned in the fifth part as being "as set forth," and in the fifth claim as being "as described," was the combination by pivoting the wire trough to the lay, which had been set forth and described, and not some other combination not in any manner set forth or described. If that should be held to be the combination, neither the defendants nor any others, have used it, and the defendants do not infringe. In argument, however, the fifth part of the invention, and the fifth claim, have been treated as for the parts mentioned, in combination generally, without regard to pivoting the wire trough to the lay or shuttle box.

In what has been stated, of and concerning the contents of the patent, every word concerning the lay and shuttle box has been recited. There is in it no allusion to any machinery or contrivance for moving the reciprocating slide, except a wrist on it for attaching power to it; nor for moving the wire trough, except the rod H^2, mentioned in connection with a trough pivoted to the lay; nor any whatever for moving the lay; nor is any other shown in the drawing or models. As has been said in argument, in behalf of the plaintiff, the patent is to be construed in the light of what was before known to persons skilled in the art of making and operating such looms, and liberally in favor of the patent, in accordance with the maxim, "Ut res magis valeat quam pereat," not, however, for the purpose of adding to the patent anything not there, but of reaching the true meaning of what is there.

Either form of the wire motion described in the patent, except that pivoted to the lay, might, probably, be put in place of the wire motion in the Weild looms and, by attaching the power to the wrist of the driving slide, be made to operate without any material, if any, alteration of the other parts. But neither form would so operate by being so substituted in that loom with a rigid lay and shuttle box in place of the detached lay and shuttle box, because the wire trough would not keep out of their way. Nor could either form be substituted, without other material alterations, for the wire motion in the Moxon, Clayton and Fearnley looms, nor without still greater and more material alterations, for that in the Bigelow looms. As wire motions merely, to be used as improvements on the Weild looms, as the inventor probably intended, they seem to be well enough described. But, construing the fifth part of the invention broadly, as construed in argument, the combination goes outside of the wire motion, into the loom proper, and the question is, whether that combination is well enough described, "to enable any person skilled in the art" "to which it appertains" "to make, construct," "and use the same." Competent experts and workmen have testified, on the part of the defendants, that what is necessary in that behalf cannot be done without the exercise of inventive genius. Those equally competent have testified for the plaintiff that it can be. To do it, with any of the then existing looms, motion would have to be given by machinery to the vibrating wire trough, to move it out of the way of the lay, at the proper time, to allow all the connecting parts of the wire motion to do their work, and permit the lay, reed and shuttle boxes to do theirs, without interference. The times of the motions of the parts were to be calculated, and the machinery to accomplish the motions at the proper time was to be contrived and constructed. The witnesses who say no invention would be required do not say but that all this was to be done. They merely say that competent workmen could, in their opinion, do it without invention. The requirement of the law seems to be, that the specification should be full and plain enough so that a fairly competent workman at loom building could take it, and, exercising what then existing knowledge there was common to that trade, follow it out, and by it, without invention or addition, construct an operating loom, containing the parts mentioned as in combination in the fifth claim, working together. Curt. Pat. §§ 254, 255. A loom is mentioned, and not a wire motion merely, here, because a part of the loom proper is taken into the claimed invention, and the parts taken would be fragmentary, and could not operate, without the rest. Whether the specification is so sufficient is a question of fact, to be determined upon the evidence, and the nature of the things to be done, as it is made to appear. The horizontal pushing slide, in the Weild wire motion, extending towards the lay and shuttle box, was a great obstacle to the use of a rigid lay and shuttle box; and Webster, by the things well described, dispensed with that. But still he retained the oscillating trough, which, as used in the Weild wire motion, where only it was known to be used, would always be in the way of a rigid lay and shuttle box, and he provided no mode whatever for keeping them out of the way. If a workman had undertaken to work out Webster's specification, when he had made and put into a loom all the parts described or mentioned in it, his situation would be the same as that of Davis was in September, 1868, when he undertook to furnish the Crossleys with a loom like that represented by his model, except that

it should have a rigid shuttle box. He then had, in his working model, a reciprocating withdrawing and pushing slide, mounted on a slotted bar, which was the equivalent of Webster's vibrating trough, all as the plaintiff now claims to be an infringement. Still, when the shuttle box was made rigid, the parts would clash; and, although he was an inventor and a master mechanic, and much more than an ordinarily competent workman, it took him nearly two years to arrange and time them so they would not clash. The trough was to be kept out of the way, by having the right motion given to it at the right time. The motion and time were to be found, and finding them would be invention. It was a problem to be solved, which would require experiment, which is more than a specification is allowed to require and be valid. McFarlane v. Price, 1 Starkie, 199; Turner v. Winter, 1 Durn. & E. [Term R.] 602; Rex v. Arkwright, Webst. Pat. Cas. 64; Curt. Pat. § 255; Evans v. Eaton, 7 Wheat. [20 U. S.] 356; Sullivan v. Redfield [Case No. 13,597]. It is said, that a competent workman could give any required motion at any required time to parts of machinery, which may be true. Still the requisite motions and times would remain to be found. It is a significant fact, in this connection, that no looms nor models, containing this alleged invention, were made by Webster, or by the plaintiff, or by any one under them or either of them until after those claimed to be infringements had been made and seen. Upon these reasons, the conclusion seems to be inevitable, that the specification is not sufficient.

Furthermore, the fifth claim is for the invention of a combination of a lay with a rigid shuttle box, with the parts of a wire motion named in it. There can be no invention about that unless the parts do work together in accomplishing some result, so as to make a working combination. The functions of the lay are to carry the reed and shuttle boxes, and to serve as a shuttle race, without having anything to do with the wire motion. The functions of the wire motion are to withdraw the wires, carry them back, and insert them, without having anything to do with the lay. They do not join together in doing anything. All that is required of either, in connection with the other, is to keep out of its way. In some sense they combine together, and with all the other parts of the loom, to make the fabric produced; but that is not the combination described. In the same sense the parts of a stove mentioned in the combination in question in Hailes v. Van Wormer, 20 Wall. [87 U. S.] 353, combined with all the other parts, to give heat; but that did not make a patentable combination. As said by Mr. Justice Strong, in that case each produces its appropriate effect unchanged by the others. That effect has no relation to the combination, and in no sense can be called its product. This placing the parts together would be the mere aggregation of devices, not invention. As well might the breast beam, the heddles, or any of the more remote parts of the loom, be mentioned, and claimed as included.

Upon this subject, in connection with that of the sufficiency of the specification, it seems proper to remark, that, if no invention was necessary to combine these parts, describing the combination of them, merely, describes no invention; if invention of some mode of combining them was necessary, such mode is wholly wanting.

If, for any reason, however, these conclusions are not correct, the question whether Webster was the first inventor of the invention sought to be covered by the fifth claim is to be decided. There is no fair question but that looms like those which the plaintiff claims to be infringements were made and operated by, and were, therefore, known to, and used by, Davis, as alleged in the answer, before the date of the patent, so as to defeat it, unless the invention was made before. As this patent is not accompanied by the application in evidence, the invention must be taken to have been made at the date of the patent, unless it is shown by parol proof to have actually been made at a prior date. Kelleher v. Darling [Case No. 7,653]. The burden of proof rests upon the defendants, to show, beyond any fair doubt, the prior knowledge and use set up; but, where they have sustained that burden by showing such knowledge and use prior to the patent, the burden of showing the still prior invention claimed, by at least a fair balance of proof, must rest upon the plaintiff. Substantially all the evidence there is upon that subject is the original drawing of Webster, with the testimony of himself and others showing that it was made by him in 1865 and 1866, and the other drawings, not much different from that, with testimony that they also were made by him at a time earlier than those looms. There is scarcely any explanation of the drawings, or of the workings of the parts represented, in his testimony, or in what he said, as testified by others, contemporaneously with making or exhibiting the drawings, more than that they represented a wire motion, and that a shuttle box rigidly attached to the lay could be used with it. All the drawings show a lay with such a shuttle box that show any lay, but show no mode of operation by which it could be used. The lay is always shown in the position the lays of the Weild looms are in when their shuttle boxes are in line with them, the same as if rigidly attached, and never in a position where they would be detached to keep out of the way of the wire motion, with the wire motion out of its way, so as to show that with its rigid shuttle box it could be used. The drawings would seem to be mere drawings of his wire motion with the lay sketched, as the breast beam and some other parts appear to be, for the purpose of showing that it was the wire motion of a loom, without showing any particular combination of the wire motion with any of the parts of the loom proper. If such a showing was intended, the evidence fails to show satisfactorily that the in-

tention was carried out. To say that this shows the invention of any real combination of a lay having a rigid shuttle box, with the parts of the wire motion, would be going beyond what is fairly shown by any substantial evidence in the case. The abiding conviction produced, as the effect of the exposition of the case in the very able and exhaustive arguments of counsel, as well as of more examination and study of it than what is here written will probably indicate, is, that, while Mr. Webster did really invent some new parts for wire motions, he never fully completed any invention of any combination of them with any of the parts of a loom. To allow such an invention and patent as is here shown to stand in the way of other inventors would be very unjust to them, as contrary to the plain requirements of the patent laws, for, should they invent any mode whatever, for doing what the patentee shows no way of doing, he would be enabled to say that their mode was his, and to maintain his claim to it.

In coming to the conclusions here reached, neither the decision, nor the opinion of the learned judge making it, in Webster v. New Brunswick Carpet Co. [Case No. 17,337], upon this same patent, have been overlooked, or lightly considered. Had this case been like that, or understood to be so, no more would have been necessary here than to follow, and refer to it. But counsel on both sides of this case have treated it as being essentially different from that, and the counsel for the defendant, in this express themselves satisfied with the decision in that, upon the pleadings and evidence on which it was made. What that case in fact was is not shown in this. The opinion, however, shows that most of the questions here made and passed upon were not there raised and considered.

Let a decree be entered dismissing the bill of complaint, with costs.

For other cases involving this patent, see Webster v. New Brunswick Carpet Co., Case No. 17,337; Webster Loom Co. v. Higgins, 105 U. S. 580; Loom Co. v. New Brunswick Carpet Co., Case No. 17,338; Webster Loom Co. v. Higgins, Id. 17,341; Webster Loom Co. v. Short, Id. 17,343.

Case No. 17,343.

WEBSTER LOOM CO. v. SHORT et al.

[10 O. G. 1019.]

Circuit Court, D. New Jersey. Dec. 19, 1876.

EQUITY PRACTICE—CROSS BILL—NOTICE.

[A cross bill should be stricken from the files, if filed without notice to the solicitor of the defendant.]

The Webster Loom Company, a corporation created under the laws of the state of New York, filed its bill for an infringement of a patent. It made a New Jersey corporation and two of its directors and trustees defendants. It alleged that the two individual defendants had formerly owned the infringing looms as co-partners, and, as such, that they had taken a license from the plaintiff, whereby they had agreed to pay a certain royalty per day on each loom, and that such license established the measure of damages as against all the defendants. [James] Short and [George] Whittaker answered, and then filed a cross bill, asking that the plaintiff might be decreed to surrender the license for cancellation. The Webster Loom Company, being a New York corporation, could not be found in the district of New Jersey to be served with process, and thereupon Short and Whittaker entered an order for publication, and for its service in New York on the plaintiff as an absent defendant, requiring it to appear and plead, answer, or demur to the cross bill within a time specified. The Webster Loom Company moved to set aside this order, and to strike the bill from the files, upon the ground that the order of publication had been improperly obtained, and without notice, and that no leave to file the cross bill had been granted. It cited: Miles v. Bacon, 4 J. J. Marsh. 457; Garner v. Beaty, 7 J. J. Marsh. 223; Eckert v. Bauert [Case No. 4,266]; Ward v. Seabrey [Id. 17,161]; Bronson v. La Crosse, 2 Wall. [69 U. S.] 293; Sawyer v. Sawyer, 3 Paige, 263; Smith v. Hibeernian, 1 Schoales & L. 238; Elliott v. Millett, 1 Hogan, 125; French v. Dear, 5 Ves. 547, 550; Wartnaby v. Wartnaby, Jac. 377; Blake v. Smith, Younge, 596; Story, Eq. Pl. § 66, 2 Daniell, Ch. Prac. p. 1410; and Holderness v. Rankin, 2 De Gex, F. & J. 258.

NIXON, District Judge. The motion in this case is to strike the cross bill from the files of the court on the ground that it was filed without notice to the solicitor of the defendants. As there is no proof or suggestion of notice, the motion must prevail. The rule is clear upon this point, for the reason that such a bill is of great value to the defendant in the original suit, not only in giving him a discovery which may enable him better to defend, but also in giving him jurisdiction over a non-resident complainant by directing him to appear, by solicitor, when no subpena can be served. There is no law which authorizes an order of publication in suits of this nature, and the order was improvidently taken. The defendant is entitled to an order that the bill be taken from the files of the court.

Case No. 17,344.

The W. E. CHENEY.

[6 Ben. 178.] [1]

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

TUG-BOAT AND TOW—DELAY IN VOYAGE—STORM—BURDEN OF PROOF.

1. On the 6th of November, 1871, a tug-boat took in tow a barge, at Elizabethport, N. J., to tow her to Brooklyn. She reached Port Johnson, in the Kills, that day, and left the barge there, coming on to New York herself that night. The next morning she took a tow

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

back to Elizabethport, and there took in tow other boats, which she brought to Port Johnson, and there picked up the barge and started on with her. In towing the barge across New York Bay, the latter was sunk in consequence of a storm. The tug-boat alleged that she left the barge at Port Johnson because the weather was such that it was unsafe to tow her through, and that the storm by which she was sunk, on the 7th, was an unexpected squall: *Held*, that the tug was bound to have towed the barge from Elizabethport to Brooklyn, without leaving her at Port Johnson, unless there was good reason for doing so.

[Cited in The King Kalakau, 43 Fed. 172.]

2. If it were shown that there was good reason for having left the barge at Port Johnson, the burden of proof was on the tug to show that there was no time, before she did take the barge in tow again, when she could have proceeded with her so as to have avoided the sudden squall.

3. She had not shown this, and was liable for the loss of the barge and her cargo.

[Cited in The E. D. Holton, 55 Fed. 1013.]

In admiralty.

Beebe, Donohue & Cooke, for libellants.

Goodrich & Wheeler, for claimant.

BLATCHFORD, District Judge. These are two libels filed to recover, the first one the value of the barge Col. J. A. Mulligan, and the second one the value of a cargo of coal on board of her. The barge and her cargo were sunk and lost, while in tow of the steam-tug W. E. Cheney, in the harbor of New York, in the vicinity of Robbins' Reef buoy, on the 7th of November, 1871, in the day time. The answers admit the making of an agreement, on the 6th of November, by the tug, to tow the barge, then having the coal on board, from Elizabethport, New Jersey, to Brooklyn. The answer in the first case alleges, that the cargo of the barge, 201 tons, was more than her usual and ordinary cargo. The answer in the second case alleges, that such quantity was more than the barge was able to carry. The barge was taken in tow by the tug, at Elizabethport, on the 6th, and towed as far as Port Johnson, in the Kills, and there left over night, the tug proceeding to New York, and remaining there that night, and going the next morning to Elizabethport, with a tow of empty boats, and thence back to Port Johnson, with loaded boats, and there, on the morning of the 7th, taking in tow the barge and seven other loaded boats, all abreast, four on each side of the tug, the barge being the third boat from the tug, on the starboard side of the tug. On the voyage to New York, the wind was violent and the sea high, and the barge took in water over her bows, so that she sank, with her cargo.

The libels allege, that the leaving of the barge at Port Johnson, on the 6th, was contrary to the duty of the tug; that, when the tug took the eight boats in tow, on the 7th, at Port Johnson, it was well known that the wind, which was from the northwest, would increase in violence, as the day grew older; that the nine vessels abreast presented a broad and uncontrollable front to the action of the increasing violence of the wind and the roughness of the waves, while a smaller front would have been presented if the tow had been made up in tiers; that, as the tow proceeded, the wind rapidly increased, until it was apparent that it would be dangerous, if not impossible, to cross the waters of the bay with safety to the tow; that, instead of stopping in a place of safety, or turning back, when she might, the tug kept on, with the tow, the wind and the waves constantly increasing; that then the tug carelessly, negligently, and unskillfully attempted to turn around with the tow, by attempting to tow towards the wind, thus presenting the broadside of the barge to the full action of the wind and the force and roughness of the waves, when the barge filled and sank, with her cargo; and that the loss was occasioned solely by the neglect and want of care and skill of those navigating the tug, and, among other things, in not remaining by the barge, and taking a proper time to cross the bay, in taking other employment, after she had taken the barge in tow and assumed obligations towards her, in not returning to the barge at an early hour, while the weather was calm, in going to Elizabethport and towing other loaded boats, and thus losing time and increasing the risk, in making up a tow which presented nine vessels abreast, in not making up the tow in tiers, in not stopping and returning when she found the wind increasing, in attempting to turn towards the wind, instead of keeping off before the wind, to a place of safety, and in taking in tow so large and improper a number of loaded vessels.

The answers allege, that the tow was stopped at Port Johnson on the 6th, on account of a severe storm, which rendered it improper to proceed; that the tow of eight boats was not an improper one for the tug and was properly made up; that, when the boats were taken in tow at Port Johnson on the 7th, the weather was fine; that, when the tow arrived outside of Robbins' Reef, a sudden and unexpected squall from a northwesterly direction struck the tow and continued for about twenty-five minutes; that it was impossible to stop the tow in that place and the safest way was to proceed on their course; that, by the squall, and by the perils of the sea, or by reason of the overloading of the barge and her being very deep in the water and old and decayed, she was unseaworthy and unable to resist the dangers of the sea; that the water was washed upon her deck and, because her hatches were open, into the hold; that, thereupon, the master of the tug, seeing the danger to the barge and that she would inevitably sink, put his tug and tow around head to the wind, and not off before the wind, and endeavored to run the tow back into the Kills and beach the barge, but the boat, before she could be beached, sank; that the accident occurred by the perils of the sea, and was inevitable, or else through the fault of the persons loading and managing the barge, in that, among other things, she was too deeply laden, that she was

an old and unseaworthy boat, that her hatches were left open, and that she was insufficiently manned; that the persons in charge of the tug were not guilty of any negligence, unskilfulness or mismanagement, in the time and manner of towing, or making up the tow, or otherwise; and that the accident was occasioned by the perils of the sea, and was inevitable, or else by the negligence, mismanagement and unskilfulness of the agents of the libellants and the persons managing the barge.

Under the contract of towage admitted by the answers—one from Elizabethport to Brooklyn—the tug was bound to proceed on the voyage and take the barge to Brooklyn, without leaving her for a time at Port Johnson, unless there was good reason for doing so. The tug claims to have shown good reason therefor, because of the violence of the wind and sea on the afternoon of the 6th. Assuming good cause to have been shown for leaving the barge at Port Johnson for a time, the disaster having happened, the burden of proof is on the tug to show that there was no time prior to the time when, on the 7th, she resumed the trip with the barge, that she could have taken the barge in tow and transported her safely to Brooklyn from Port Johnson, and thus have avoided the alleged sudden squall set up in the answers. The tug fails to show this and does not allege it in her answers. She does not aver or show that she could not have transported the barge safely during the night of the 6th, or that there was any such violence of winds or waves during that night as would have prevented such safe carriage. On the contrary, the evidence on the part of the libellants establishes that the wind went down with the sun on the 6th and that the night was quiet. On this ground alone condemnation of the tug must follow, even assuming that the weather was fair when the vessels left Port Johnson on the 7th, and that the disaster happened as the result of a sudden squall.

No fault on the part of the barge in overloading, or improper loading, or in manning or equipment, is shown. The tug took her in tow as she was, with a full opportunity to see how she was loaded, manned and equipped.

There must be a decree for the libellant in each case, with costs, and a reference to a commissioner to ascertain the damages.

WEED (DAVIS v.). See Case No. 3,658.

Case No. 17,345.

WEED v. KELLOGG et al.

[6 McLean, 44.] [1]

Circuit Court, D. Michigan. June Term, 1853.

DEPOSITIONS — PRESENCE OF WITNESS — CONFESSIONS.

1. The deposition of a witness, who is at the place where the court is held, if objected to, cannot be read if the witness be able to attend the court.

[Cited in Whitford v. County of Clark, 119 U. S. 525, 7 Sup. Ct. 308.]

2. The confessions of a silent partner, not known in the proceedings, may be given in evidence.

At law.

Hunt & Newberry, for plaintiff.

Frazer, Davidson, Holbrook & Lathrop, for defendants.

McLEAN, Circuit Justice. This action was brought on a promissory note for $2092.01, payable at Oliver Lee's Bank, at Buffalo, three months after date. The defendants pleaded, 1. The general issue of non assumpsit. 2. That Smart was an accommodation indorser, at the request of Geisse & Kellogg, and signed the note which was paid 1 November, 1849. 3. That the note in the first and second counts of the amended declaration, was owned and in possession of Elias Weed & Co., which firm was composed of plaintiff and Elias Weed, of Buffalo in the state of New-York, and that heretofore, to wit, on the day and year last aforesaid at, &c. defendants delivered a large quantity of flour, to wit, one thousand barrels of great value, to wit, of the value of $3000, in full payment of said promise and assumptions in the first and second counts of the declaration, which flour was accepted to be applied as aforesaid. 4. That the note in the first and second counts of the amended declaration, heretofore, to wit, on the 26th day of Sep., 1849, was possessed by the firm of E. Weed & Co., (of which firm the plaintiff was the company,) and that whilst E. Weed & Co. so held and possessed said note, Asher L. Kellogg, one of the defendants, of the firm of James A. Armstrong & Co., shipped and consigned a large quantity of flour, to wit, one thousand barrels, of the value of $4000, with directions to apply and appropriate a sufficient amount of the avails to pay the note. In his replication plaintiff says, defendant did not pay the sums of money in the first and second counts, or any part thereof, as alleged. That the said Elias Weed & Co. did not receive or accept the said thousand barrels of flour to be applied in payment, &c. To the plea of Smart, he says, that no part of the sum claimed in flour as alleged, was received. The jury being sworn, a deposition of Mr. Sibly was then offered in evidence, which was objected to, as the witness was then in Detroit. The court held the deposition could not be read, if the witness were able to attend the trial. Mr. Sibly states that in the spring of 1849, he was clerk for defendants. He left their employment, and was afterwards agent for the plaintiff, who lived in Detroit. In 1848-9, a contract was made by defendants with plaintiff, for the delivery of 500 bbls. of flour, to be delivered at Buffalo to plaintiff, who was engaged in the forwarding business at that place. Near the close of the spring of 1849, a second contract was

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

made for another lot of 500 barrels of flour made at the Ceresco mills. This flour was not sent. The money was paid by Rockafellow or Weed as agent. This payment was made on the second contract, to be delivered on the opening of the navigation. Plaintiffs refused to take any flour except from a certain mill. A note was given to deliver the flour, or return the advance. After harvest in 1849, all the flour made by the Ceresco mills was sent to plaintiff to pay the notes due. Mr. Sanger, cashier of the Utica Bank, says, the note was received in bank and discounted, which had been given by Rockafellow. Mr. Reed's deposition states, he knows the note was paid by a check, but farther he knows nothing, except from the books of the bank. Mr. Weed was offered as a witness to prove the admissions of Elias Weed, which was objected to. The court observed. the pleas allege Elias Weed to be a partner in this note, with William Weed. His admissions, being a partner, though not named on the docket, are admissible to show the discharge of the said note, during the existence of the partnership. The witness stated that Elias Weed was a partner, having an equal interest in the note. In a conversation with him he admitted the note had been discharged, and should have been delivered up.

Nonsuit was suffered.

Case No. 17,346.

WEED et al. v. MILLER.

[1 McLean, 423.] [1]

Circuit Court, D. Indiana. May Term, 1839.

RECOVERY ON PROMISSORY NOTE—DIFFERENCE OF EXCHANGE—BILLS OF EXCHANGE.

The difference of exchange may be recovered on a bill of exchange. But this seems not to be the rule where the action is founded on a promissory note, and there is no count or allegation in the declaration to cover the rate of exchange.

[Cited in Howe v. Wade, Case No. 6,777; Reiser v. Parker, Id. 11,685.]

[This was an action by N. Weed & Co. against Asa Miller on a promissory note.]

White & Lockwood, for plaintiffs.

Mr. Cooper, for defendant.

McLEAN, Circuit Justice. This action is brought on a note given at New York, without stating where payable, and suit being brought in this state, the plaintiffs contend that they are entitled to recover, in addition to the amount specified in the note and interest, the difference in exchange between this state and New York. It is admitted that the rate of exchange is two per cent. The declaration does not allege that the note was payable in New York, nor is there any count on the rate of exchange. The note is dated at New York, and from this it is contended that it was payable there. There can be no question that the rate of exchange may be recovered on a bill of exchange payable at a particular place, where the declaration contains the necessary averment, but the instrument now under consideration is not a bill of exchange, and the declaration is in the common form.

In the case of Andrews v. Bond, 13 Pet. [38 U. S.] 65, the court held that, the indorsee of a bill of exchange payable in New York, properly included the rate of exchange in a second bill payable at Mobile, given in payment of the first bill, if the transaction was fair and not designed as a cover for usury. And in Story, Confl. Laws, p. 225, it is laid down as a general principle that where a debt payable at a particular place is paid elsewhere, the rate of exchange ought to be included, and is recoverable. But in such cases, the place of payment must not only appear upon the face of the instrument, but the declaration must contain the necessary averments.

In the case of Adams v. Cordis, where a foreign creditor sues for his debt, the court say, 8 Pick. 260, that in that state he will recover, in the case of a bill of exchange, at a par of exchange. And in Martin v. Franklin, 4 Johns. 125, "the plaintiffs were merchants in Liverpool, and it was admitted the debt was contracted in Great Britain, that the account between the parties is in sterling, and that the interest is calculated at five per cent., the legal rate of interest in Great Britain. In the declaration all the counts except the last, state the defendants as being indebted to the plaintiffs in the city of New York, and the last count lays the venue in New York, but does not mention any particular place at which the defendants were indebted. And the court held that the debt was to be paid according to the par and not the rate of exchange. It is recoverable, say they, and payable here to the plaintiffs or their agents, and the court are not to enquire into the disposition of the debt after it reaches the hand of the agent; he may remit the debt to his principal abroad, in bills of exchange, or he may invest it here on his behalf, or transmit it to some other part of the United States, or to other countries on the same account; we cannot trace the disposition which is to take place, subsequent to the recovery, nor award special damages upon such uncertain calculations. All that the plaintiffs can ask is their debt justly liquidated and paid in the lawful currency of the United States."

And in the case of Hendricks v. Franklin, 4 Johns. 122, the court remark: "In this case the question is what damages the plaintiff, who is indorser of a foreign bill of exchange, of which the defendant is the drawer, and which was returned protested for non acceptance and non payment, is entitled to recover; the plaintiff contending that he has a right to recover as well the principal and interest as also twenty per cent. damages, and an additional two per cent., as the difference of exchange. The payment of this two per cent. the defendant resists." "The right to recover

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

twenty per cent. on the protest of a foreign bill of exchange rests with us on immemorial commercial usage, sanctioned by a long course of judicial decisions." The two per cent., for difference in exchange, was not allowed.

And the court, in 8 Pick., say: "We subscribe to this doctrine and are satisfied, when the suit is brought in this commonwealth, by a foreign creditor, who sues here on the trustee process, the judgment can only be for the amount due at the par value of lawful money for sterling."

In the case of Scofield v. Day, 20 Johns. 102, which was an action of assumpsit on a promissory note made by defendants at Montreal, in Lower Canada, payable to the plaintiffs, who resided in England, or to their order, with interest, until paid in England; the court say, "the plaintiffs are entitled to English interest, and not to the rate of interest in Lower Canada. And the interest is to be calculated up to the time of the judgment, not to the time when the money might, in the ordinary course of business, be remitted to England. The plaintiffs are not entitled to any allowance on account of the difference of exchange with England."

In the case of U. S. v. Barker [Case No. 14,517], the court decided that the holder of a bill is entitled to recover at the rate of exchange, at the time notice of the protest is given; and that such was the settled law in New York. And in the case of Cropper v. Nelson [Id. 3,417], the court held, where the money stated in the bill is sterling money, the jury are to settle the amount according to the rate of exchange at the time of the trial.

From these authorities, the law would seem to be settled that on a foreign bill of exchange, under the commercial usage that obtains, the rate of exchange may be recovered. At all events, that the rate of exchange is not recoverable on a note of hand where the declaration lays the venue in the state where the suit was brought, and there is no count nor allegation to cover the difference of exchange.

This is a matter which depends upon authority founded on commercial usage. And under the circumstances of this case we think the plaintiff is not entitled to the two per cent. claimed, admitted to be the difference of exchange between this state and New York.

WEED v. SMALLWOOD. See Case No. 16,315.

Case No. 17,347.

WEED et al. v. SNOW.

[3 McLean, 265.] [1]

Circuit Court, D. Michigan. Oct. Term, 1843.

PAROL EVIDENCE—RECEIPTS—PAYMENT—GIVING NOTE—BANK NOTES—VALIDITY.

1. A receipt is only evidence of payment, and may be explained or contradicted by parol.

[Cited in The Cayuga, 8 C. C. A. 190, 59 Fed. 485.]

2. A note is not payment unless it be expressly received as such.

[Cited in brief in Moore v. The Newbury, Case No. 9,772. See Allen v. King, Case No. 226.]

3. The safety fund law, which prohibited all banks subsequently established, from issuing notes except they are payable on demand and without interest, applies to a bank charter granted on the same day.

4. And where notes are issued in violation of such law, they are void.

[Cited in Davis v. Bank of River Raisin, Case No. 3,626.]

[Cited in brief in McMurray v. St. Louis Oil Manuf'g Co., 33 Mo. 382.]

[5. Cited in U. S. v. Chong Sam, 47 Fed. 883, to the point that an act takes effect from the day of its approval by the executive, and includes that day, unless its operation is postponed by its own terms.]

At law.

Mr. Bates, for plaintiffs.

Williams & Ten Eyck, for defendant.

McLEAN, Circuit Justice. This is an action of assumpsit for goods sold by plaintiffs to defendant, in May, 1838. The declaration contained the common counts, to which the general issue was pleaded. On the trial, the plaintiffs produced the bill of goods sold to the defendant, the 4th May, 1838, by plaintiffs, which was admitted to be correct. The defendant then produced a receipt for the payment of the goods, which was admitted to be signed by the agent of the plaintiffs. The plaintiffs then offered the depositions of Richard O'Conner and others to prove that the receipt was given, not for cash, but for two drafts or checks make by defendant, on the Bank of Clinton: one for five hundred dollars; the other for seven hundred and fifty dollars; the first payable at sixty days, the second, at six months, payable to the order of Jera Payne, and indorsed by him and accepted by the bank, payable in current country notes. That it was agreed between the plaintiffs and defendant at the time the drafts were received they were not considered as payment until paid. This evidence was objected to, but the court admitted the evidence.

The defendant then offered in evidence, the deposition of E. Warner, cashier of the Bank of Clinton, which conduced to prove that the drafts had been credited to the account of Charles H. McClure, former cashier of said bank, and cancelled. To rebut the presumption of payment of the drafts by the bank, the plaintiffs then gave in evidence the proceedings in a court of chancery of the state of Michigan, in which an order for an injunction against the Clinton Bank, was made by the chancellor, August 20th, 1838; which injunction was issued and continued down to the pretended payment; and that such payment, if made, was in violation of the injunction, and consequently void. To this proceeding an objection was made, but the evidence was admitted. Under the instructions of the court the jury found a verdict for the plain-

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

tiffs; and a motion is now made for a new trial.

It is insisted the court erred in admitting parol evidence to show on what terms the receipt was given. No principle is better settled than that a receipt is only prima facie evidence of payment, and may be explained, varied or contradicted, by parol or other extraneous testimony. There was nothing in the nature of the receipt offered by the defendant, to distinguish it from an ordinary receipt. It contained no agreement between the parties. Trisler v. Williamson, 4 Har. & McH. 219; Ensign v. Webster, 1 Johns. Cas. 145; House v. Low, 2 Johns. 378; Tucker v. Maxwell, 11 Mass. 143.

It is urged that the drafts were received in payment. The facts proved show that the drafts were not received in payment; and whether so received or not, was left to the jury. On this point the verdict is sustained by the evidence.

It is contended that the Bank of Clinton was not subject to the safety fund act; and that the drafts were legal. The first section of that act provides, "that any monied incorporation having banking powers, hereafter to be created in this state, or when their charter shall be renewed or extended, shall be subject to the provisions of that act." Approved 28th March, 1836. The act establishing the Bank of Clinton was passed the same day, and consequently is within the provisions of the above act. By the 31st section of the safety fund act, it is provided that "no monied corporation subject to this act, shall issue any bill or note of the said corporation, unless the same shall be made payable on demand and without interest."

It is proved that these drafts were accepted by the bank before they were signed by the drawer, and from their form they were evidently intended to circulate, and were, substantially, issued by the bank in payment of its debts, or otherwise, and were, as we think, in violation of the 31st section above cited. The drafts were then void, as having been drawn in violation of law. But if this were not the case, the plaintiffs have not made the drafts their own, by failing to make demand of the bank when they were payable, and giving notice to the defendant, with the same strictness as is required on a bill of exchange by the law merchant. The drafts were payable in current bank notes, by the acceptance, and this destroyed their negotiability. The admission of the suit in chancery against the Clinton Bank was not erroneous, as it showed that the bank could not have paid the drafts as alleged.

The motion for a new trial is overruled, and judgment.

WEED (WOODWORTH v.). See Case No. 18,022.

WEED, The SARAH J. See Case No. 12,350.

Case No. 17,348.

WEED SEWING MACH. CO. v. WICKS et al.

[3 Dill. 261;[1] 2 Cent. Law J. 475.]

Circuit Court, W. D. Missouri. April Term, 1875.

PRACTICE—PARTIES—ACT OF JUNE 1, 1872—REAL PARTY IN INTEREST.

1. Since the act of congress of June 1, 1872 (17 Stat. 197, § 5), the provisions of the state statutes as to pleading and practice in purely legal actions are in the main applicable to such actions in the circuit court of the United States.

2. Where the state law directs or authorizes all suits to be brought in the name of the real party in interest, this will, in the absence of some special statute of congress, give the like party the right to sue in actions at law in the federal courts sitting in such state.

[Cited in Albany & Renssellaer Iron & Steel Co. v. Lundberg, 121 U. S. 454, 7 Sup. Ct. 960; May v. County of Logan, 30 Fed. 253.]

On demurrer to the petition. The plaintiff is the Weed Sewing Machine Company, which the petition alleges to be created by the laws of the state of Connecticut and a citizen thereof. The petition states that the defendants are citizens of Missouri and residents in the Western district thereof.

The petition counts upon a bond executed by the defendants, as follows:

"Know all men by these presents, that we, S. Taylor Wicks, John S. Tyler, and John W. Lisenly, of Springfield, county of Greene, and state of Missouri, are held and firmly bound to F. S. Bartram, of the city of St. Louis, and state of Missouri, agent for the Weed Sewing Machine Company, of Hartford, Conn., in the penal sum of one thousand five hundred dollars, to be paid the said F. S. Bartram, agent, or his attorney, executor, administrator or assignee. For which said payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, and every one of them, by these presents. Sealed with our seals, and dated this 1st day of July, A. D. 1871. The condition of the above obligation is such, that whereas, S. Taylor Wicks, and John S. Tyler, of Springfield, Mo., as aforesaid, intend to carry on the trade or business of dealing in the sewing machines manufactured by the Weed Sewing Machine Company, of Hartford, Conn., at said Springfield, for which said sewing machines the said F. S. Bartram is general agent, and whereas, the said Wicks and Tyler have applied to the said F. S. Bartram, agent, to supply them with goods in the way of their trade, which he, as agent of said company, has agreed to do upon condition that the said Wicks and Tyler enter into a bond in the penalty above mentioned, upon the terms hereinafter expressed. Now if the said Wicks and Tyler, their heirs, exec-

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

utors or administrators, shall, from time to time, and at all times hereafter, pay or cause to be paid unto the said F. S. Bartram, agent of said company, his executors, administrators or assigns, all and every such sum or sums of money as shall at any time or times hereafter become due and owing to the said F. S. Bartram, agent as aforesaid, for goods sold or furnished by him to the said Wicks and Tyler, or sent or delivered on their order, at the time said sum or sums respectively become due and payable; or if the said Wicks and Tyler, their executors or administrators, shall at any time or times hereafter make default in the payment of such sum or sums when due and payable, but shall well and truly pay the same within thirty days from the day a written notice of said default and failure to make payment, as aforesaid shall be deposited in the post office at St. Louis, by said F. S. Bartram, agent, addressed to the said Wicks, Tyler, or Lisenly, at Springfield, Mo., aforesaid, or within thirty days from the time personal notice of said default and failure to make payment is given said Wicks, Tyler, or Lisenly by said F. S. Bartram, agent, then, in any of said cases, the above written bond and obligation shall be void and of no effect; otherwise shall remain in full force and virtue.

"In testimony whereof, we have hereto affixed our hands and seals this first day of July, A. D. 1871. (Signed)

"S. T. Wicks, John S. Tyler, and John W. Lisenly."

The petition alleges that the plaintiffs, at the request of the defendant, supplied the latter, under the said contract or bond, with machines at the prices stated in an account thereof annexed to the petition, and that the defendants, though requested, have failed to pay the amount due the plaintiffs therefor.

It is also alleged that the plaintiffs are the sole and real parties in interest in the bond declared on, and that the plaintiffs' agent the said Bartram, never had any interest therein.

The Code of Missouri contains this provision: "Every action shall be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust * * * may sue in his name without joining with him the person for whose benefit the suit is prosecuted; and a trustee of an express trust includes a person with whom, or in whose name, a contract is made for the benefit of an other." Wag. St. p. 999, §§ 2, 3.

The demurrer to the petition rests upon the following grounds:

1st. The action upon this bond can only be brought in the name of F. S. Bartram, the obligee therein named.

2d. If it can be brought in the name of the plaintiff (the Weed Sewing Machine Company) the petition, in order to give this court jurisdiction, should show that Bartram was a citizen of some other state than Missouri and so could himself have maintained an action thereon.

Ewing & Smith and Bray & Kenton, for plaintiff.

Edwards & Son, for defendants.

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

DILLON, Circuit Judge. I am inclined to the view that Bartram and not the corporate plaintiff, his principal, is the obligee in the bond, and for the purposes of this demurrer will concede such to be the case. The result of this concession is that by the principles of the common law, an action for the breach of the condition of the bond, which is under seal, could be brought only in the name of Bartram, although his principal might alone be interested in the recovery.

It must also be conceded that under the federal constitution and legislation, the distinction between law and equity, and the corresponding remedies, is established, and remains in full force unaffected by the practice act of June 1, 1872. Robinson v. Campbell, 3 Wheat. [16 U. S.] 212; Bennett v. Butterworth, 11 How. [52 U. S.] 674; Thompson v. Railroad Cos., 6 Wall. [73 U. S.] 134. Indeed that enactment not only recognizes, but proceeds upon this distinction.

It is also undoubtedly true, that under the provisions of the Missouri Code in respect to parties quoted in the statement of the case, an action like the present might be brought in the proper court by Bartram in his own name although his principal would alone be interested in the recovery. But it is equally true (under the averment made in the petition to the effect that the sewing machine company is the sole and real party in interest and supplied the consideration for the debt sought to be enforced) that under the provision of the Missouri Code, the action, if brought in the state court, might be maintained by the sewing machine company in its own name. Wag. St. p. 999, §§ 2, 3, and notes of cases.

The present action being one at law, the mode of pleading and procedure prescribed by the state statute is applicable to it, and the suit is well brought, under the averments of the petition, in the name of the plaintiff as the real party in interest. This principle was distinctly decided by the supreme court prior to the act of 1872, in respect to cases removed from the state to the federal court. Thompson v. Railroad Cos., 6 Wall. [73 U. S.] 134. In the case cited, Mr. Justice Davis remarks: "The law of Ohio directs that all suits be brought in the name of the real party in interest. This constitutes a title to sue, when the suit is brought in the state court in conformity with it." Since the act of 1872, at all events in a purely legal action, the real party in interest has a right to sue in federal courts, if the case is one which is otherwise within the jurisdiction of those courts, and there is no special statute of congress, making a different provision.

If this view is correct, then this suit is well brought in the name of the plaintiffs, and this

is decisive of the question made by the defendants, for it is well settled that it is the citizenship of the parties to the record that governs in determining the jurisdiction of the circuit court, not of persons interested in the controversy, but who are not parties. Irvine v. Lowry, 14 Pet. [39 U. S.] 293; Bonafee v. Williams, 3 How. [44 U. S.] 574; Osborn v. Bank of United States, 9 Wheat. [22 U. S.] 856; Davis v. Gray, 16 Wall. [83 U. S.] 203, 220; Coal Co. v. Blatchford, 11 Wall. [78 U. S.] 172.

As the petition shows that the plaintiffs alone furnished the consideration for the debt or claim sought to be enforced, and that the agent, Bartram, had no interest therein, if the promise of the defendants, though made in form to Bartram, had not been contained in an instrument under seal, there is a line of strong adjudications which hold that plaintiffs might sue to enforce the promise without the aid of any statute. It is, however, unnecessary to consider the case in this view, as the state statute gives the plaintiffs the right, and the act of congress of June 1, 1872, makes the right equally available to them in the federal court.

They are not the assignees of Bartram, and hence it is not necessary that the petition should show that Bartram's citizenship is such that he could have maintained the action if no assignment had been made.

Judgment accordingly.

As to real parties in interest, see Insurance Co. v. Railroad Co. [Case No. 96]. See, also, Opdyke v. Pacific Railroad [Id. 10,546].

Case No. 17,349.

In re WEEKS.

[8 Ben. 265; [1] 13 N. B. R. 263.]

District Court, S. D. New York. Dec., 1875.

BANKRUPTCY — RE-EXAMINATION OF CLAIM — PAYMENT ON NOTE BY MAKER AFTER PROOF OF CLAIM AGAINST ENDORSER—PLEDGE.

A firm at various times obtained money from a bank, on business notes owned by it, which the firm endorsed and delivered to the bank at the various times when the money was obtained, and also on notes made by one member of the firm and endorsed by the other. The firm afterwards going into bankruptcy, the bank proved its claim for the amount of all the notes. A dividend of thirty per cent. became payable by the assignee. It appeared that, after the bank had proved its claim, the sum of $855.61 had been collected of the makers of some of the business notes, but in no case had the amount collected equalled seventy per cent. of the note. *Held*, that such collection was not to be treated as reducing the claim against the bankrupt firm on which the dividend was payable, and that there was no pledge of or lien on personal property of the bankrupts, for the securing of the debt of the bankrupts to the bank, within the meaning of section 5075 of the Revised Statutes of the United States, as respected the notes endorsed by the bankrupts.

[Cited in Re Pulsifer, 14 Fed. 249.]

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

[In the matter of George S. Weeks, a bankrupt.]

[2] [I, the undersigned register in charge of the above entitled matter, to whom it was referred by a special order of this court, bearing date April 17, 1875, to inquire on testimony, and report whether the petitioner referred to in said order be entitled to the dividend heretofore declared on the amount proved by said petitioner herein, or, if not, to what amount the said claim should be reduced, do hereby certify and report that I have been attended by counsel for the respective parties, and have taken all the testimony offered by them respectively, all of which is herewith handed up, and have listened to their arguments and examined their briefs, which are also herewith handed up.

[Since the proving of the claim in bankruptcy, the further sum of eight hundred and fifty-five dollars and sixteen cents has been paid upon one or more of the notes by the makers thereof. But upon no one of the notes aforesaid has the maker paid a sum equal to seventy per cent. of its face. The creditor, while admitting that the sum of one hundred and twenty-three dollars and twenty-four cents so paid upon said notes prior to the proving of its claim in bankruptcy should go to reduce its claim against the estate, insists that the sum of eight hundred and fifty-five dollars and sixteen cents, so paid upon the notes subsequently to the proving its claim in bankruptcy, ought not to be applied in reduction thereof as against the estate, but that it is applicable only to the sum which will remain due and owing after the thirty per cent. dividend shall have been received. The result of this would be that the creditor would hold in addition to the dividend of thirty per cent. claimed from the estate, all sums that have been paid since the proof of its claim in bankruptcy, and all sums that shall hereafter be paid by the respective makers, less than seventy per cent. of the aggregate sum so due on said notes, free from any claim by the assignees in bankruptcy, and would be liable to refund to them of moneys so received only such sum as should be paid in excess of such seventy per cent.; or the creditor would, at most, be liable to pay over to the assignees only such sum as should be paid upon any one or more of said notes, in excess of such seventy per cent. thereof.

[It is very clear that the holder of a promissory note may sue the maker and indorser in separate suits, and recover the whole face of the note in each suit, and he may enforce the payment of both judgments. Equity would undoubtedly interfere and prevent a double payment, either by injunction or by declaring a trust in favor of the maker or indorser, or both maker and indorser, as the case might be. That, however, it may be said, presents a question of law upon contract. It is here a question of an equitable distribu-

[2] [From 13 N. B. R. 263.]

tion of a bankrupt's estate among his creditors. But equity never impairs a legal contract. If a man part with his goods or money upon the credit of two men under separate contracts, or a several contract, he ought to be at liberty to enforce those contracts against each debtor severally, and collect what he can from each, not exceeding the sum due. If both of such debtors should go into separate bankruptcy, his right as against each ought not to be thereby impaired. The result of this would be that such creditor could prove his claim against both estates, and receive, if the assets would admit of it, the whole sum due in such proportions from each estate as each might be able to pay. That this would be no wrong against other creditors of such estates is clear by contemplating for a moment a case where one of such bankrupts has no assets whatever, while the other estate was sufficient to pay the entire amount of the claims against it. In short, each bankrupt legally owes the entire debt, and the holder of the note is entitled by law to collect the whole from either.

[There must clearly be some period or point of time at which a partial payment by a maker of a note should cease to be applied in reduction of the amount payable upon such note out of the estate of the bankrupt indorser, and when such payment should go simply to reduce the amount due from the maker. A sum larger than that actually remaining due upon the note could not be proved in bankruptcy, and hence all payments prior to such proof must be applied to reduce the sum upon which a dividend can be demanded. When that proof is once made, it ought, I think, to be conclusive as to the amount due, and not be subject to variation by subsequent payments, unless the result would be to overpay the note. A partial payment by the maker after payment of the dividend would go simply to reduce the amount due from the maker, and could in no sense affect the amount paid from the estate, so long as both payments do not exceed the sum due, or face of the note. The period therefore in question must be either the time of proving the claim, or the time of the actual payment of the dividend. To adopt the latter as the period would subject the proceedings in bankruptcy to inconvenient fluctuation, and, in a case like the present, be a thing almost impracticable. Upon these forty-seven notes payments might have been made daily between the time of the proving of the claim and the time of paying the dividend. In such a case it would require new and successive computations to a degree that would be embarrassing. I do not see that there is any greater injustice in fixing the time at the one period than at the other, and I observe that the time of the proving of the claim is the period that seems to have been adopted in the case of Sohier v. Loring, 60 Mass. 537. See, also, Blake v. Ames, 90 Mass. 318.

[The remaining question here presented is, was the transaction between the bank and the bankrupt firm a sale and purchase of the notes, or was it a loan, indorsing over and receiving the notes as collateral security therefor.

[The law will presume, in the absence of proof to the contrary, that the notes are business paper. Collins v. Martin, 1 Bos. & P. 648, 651; Holliday v. Atkinson, 5 Barn. & C. 501. The testimony casts no doubt upon this presumption save as to the five notes above mentioned, amounting in all to four thousand four hundred and ninety dollars and thirty-nine cents, made and indorsed by the members of the bankrupt firm, which are clearly not held as collateral security. As to all remaining notes I understand counsel to agree that they are business paper. Referring to the concededly business paper, it may be said that they are not merely choses in action, but chattels in possession, subject to the same law as other chattels (McNeilage v. Holloway, 1 Barn. & Ald. 218), and when the transaction is the creation of a subsisting debt, as the loan of money, and chattels are at the same time delivered, the presumption, in the absence of proof to the contrary, is that they are delivered as security or pledge. There is no proof of sale, nor is there any presumption arising out of the delivery accompanying the creation of the claim here proven, that the title to the chattels passes to the bank other than as security or pledge. Again, there can be no doubt that without any demand and notice of nonpayment, the bankrupt firm would be liable for all the money they received from the bank as for money had and received, or loaned. The bank parted with the money, not at the request of or to accommodate the makers of the notes or any of them, but at the request and to accommodate the bankrupt firm. The fact that one-third and over of the entire sum had of the bank was upon notes made and indorsed by the members of the bankrupt firm—had as any other loaned money is had, for which the note of the borrower is given—shows at least the character of a part of the transaction, and it would be difficult to distinguish one part of it from another so far as the question under consideration is concerned. That part clearly was a loan of money from the bank to the bankrupt firm. It is not in proof distinctly that the money had by the bankrupt firm was from time to time charged as a loan upon the books of the bank, and the notes in question merely catalogued upon the books as so much security held therefor. But the contrary is not shown, and this is believed to be the usual practice of banks in such cases. This, perhaps only partial presumption, is aided by the language used by the creditor in its formal probate of its claim—the proof of debt. In that instrument the creditor says: "That the consideration of said indebtedness was money loaned to the firm of F. S. Weeks & Co., upon promissory notes indorsed by said F. S. Weeks & Co." Had this loan been upon bills of lading or any other chattel instead of "promissory notes indorsed, etc.," no one would

have doubted that it meant to assert that the bills of lading, or other chattel, were held merely as collateral security for a principal debt.

[It should, however, be remarked that it is inferable from the whole tenor of this paper and the schedules annexed to it, that the creditor does not mean to bottom its claim upon a loan, but rather upon the liability of the bankrupt firm as indorsers. Yet, had the transaction been the purchase of notes, the creditor would not probably have fallen into this use of language.

[Although the petition of the creditor asserts that the notes were discounted by the bank, the proof of claim asserts no such thing, but leaves it (except by inference) where the language above quoted leaves it. But the use of that word would help the case but little. The word discount does not necessarily imply a purchase and sale. It is quite as consistent with a loan upon the security of the notes of a third party as with the sale of them. "The discounting of a note by a bank understood to consist in the lending of money upon it, and deducting the interest or premium in advance." City Bank of Columbus v. Bruce, 17 N. Y. 507, 515. Bouvier says: "Among merchants the term used when a bill of exchange is transferred, is, that the bill is sold, and not that it is discounted. See [Bell v. Cunningham] 3 Pet. [28 U. S.] 80.

[Suppose these notes had been bonds—government or otherwise—would the transaction have been different? The application by the bankrupts for money and the accommodation granted by the bank to the firm would have been from the same motives, for the same purpose, and substantially in the same form. If the bank would have received a payment of interest or principal on the notes, it would also have taken the payment of the coupons upon the bonds, or even payment of the bonds themselves if they had fallen due before the loan was paid.

[Suppose accommodation paper were presented to a bank for discount and it should be discounted by the bank (in ignorance of the fact that it was accommodation paper) at a greater rate of interest than seven per cent., and in an action by the bank upon such paper, the plea of usury were interposed, can it be doubted that such a plea would prevail? yet such a plea could not prevail upon any other hypothesis than that the transaction was a loan.

[Nothing ought to be presumed in favor of a sale from the fact that the bank protested the notes at maturity. It is matter of everyday observation that banks (perhaps in the interest of the notary) protest paper that falls into their possession without much regard to any necessity for doing so.

[I cannot but regard this transaction, as far as all the business paper is concerned, as a loan upon the security of the notes. If so, it would be governed by section 5075 of the Revised Statutes.

[As to the debt represented by the five notes made by one of the bankrupt firm, and indorsed by the other, amounting to four thousand four hundred and ninety dollars and thirty nine cents, there seems to be no reason for saying that such five notes are held as security, and as to them the creditor should be allowed to receive its dividend. But as to the remainder of the claims, the creditor may surrender the notes to the assignees and receive the dividend, or their value may be fixed as provided in section 5075, and a dividend paid upon the balance.

[Respectfully submitted,

[I. T. WILLIAMS, Register in Charge.] [2]

BLATCHFORD, District Judge. I concur in the conclusion of the register as to the first question above presented.

As to the second question above presented, I am of opinion that there was not and is not any pledge of, or lien on, any personal property of the bankrupts, for securing the payment of any debt owing to the Metropolitan National Bank from the bankrupts, within the meaning of section 5075 of the Revised Statutes, as respects the notes endorsed by the bankrupts.

Case No. 17,350.

In re WEEKS.

[2 Biss. 259; [1] 14 N. B. R. 364 (Quarto, 116).]

District Court, N. D. Illinois. March Term, 1870.

BANKRUPTCY — EXECUTION LIEN — JUDGMENT BY CONFESSION.

1. An execution in the hands of the sheriff being by the laws of the state of Illinois a lien upon all the personal property of the defendant within the county, for the space of ninety days, if a petition in bankruptcy is filed during that time, the lien is transferred to the property in the hands of the assignee, and the execution must be paid in full out of the proceeds.

[Cited, but not followed, in Re Tills, Case No. 14,052. Cited in Re Paine, Id. 10,673; Re Stockwell, Id. 13,464.]

[See Bartlett v. Russell, Case No. 1,080.]

2. The fact that the judgment was entered upon a warrant of attorney does not invalidate the lien if the creditor did not know of the failing circumstances of the debtor, and if it was not entered up "in contemplation of bankruptcy or insolvency."

3. A direction by the execution creditor to the sheriff "to hold the execution, but not to levy for a few days, or until further orders," does not impair the lien.

[Cited in Crane v. Penny, 2 Fed. 190.]

On the 25th of October, 1869, Eldridge recovered a judgment in the superior court of Chicago, against Charles R. Weeks, upon which an execution was on the same day duly issued and delivered to the sheriff of Cook county. The judgment was entered upon a warrant of attorney, but Eldridge did not

[2] [From 13 N. B. R. 263.]

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

know that Weeks was in failing circumstances, nor was there any question that the warrant was given or judgment entered "in contemplation of bankruptcy or insolvency." Weeks was at the time the owner of and in possession of a stock of goods.

On the 11th of November following, Weeks filed his petition in bankruptcy, was duly adjudged a bankrupt, and the stock of goods passed into the hands of the assignee, and was sold by him. The sheriff had made a demand of Weeks upon his execution, and, upon his promise to pay, Eldridge had directed the sheriff "to hold the execution, and not to levy for a few days, or until further orders." No levy was ever made.

At the first meeting of creditors, December 10, Eldridge proved his debt as a secured claim, according to form No. 21, setting up his judgment and execution, and the lien thereby acquired under the law of Illinois.

Eldridge then filed a petition in the bankrupt proceedings setting up the above facts, claiming a lien under his execution, and asking to be paid in full out of the funds in the hands of the assignee.

Robert E. Jenkins, for Eldridge, presented the following points and authorities: By the judgment and execution, and placing the execution in the sheriff's hands, Eldridge acquired a lien on all the personal property of the bankrupt in the county, from the time it came into the hands of the sheriff (October 25th, 1869), for the space of ninety days. Gross' St. Ill. p. 375, § 8; Marshall v. Cunningham, 13 Ill. 20; Garner v. Willis, Breese, 290; Rogers v. Dickey, 1 Gilman, 636; Leach v. Pine, 41 Ill. 65. The failure to levy did not impair the lien. The property passed into the court in bankruptcy, subject to it, and Eldridge certainly has the right to pursue his lien in bankruptcy. The bankrupt act gives the court in bankruptcy jurisdiction to ascertain and liquidate all liens. See 1st section of bankrupt act of March 1, 1867 [14 Stat. 517]. By proving up his debt within the life of his writ, his lien was transferred to the funds in the hands of the assignee. This execution is a final process. The lien was not secured with a view to obtain a preference, but, on the contrary, was taken in good faith. See opinion of Drummond, J., in Re Joslyn [Case No. 7,550].

J. E. Lockwood, assignee and attorney pro se, presented the following: The execution returned "Not levied," is functus officio, and is no lien after such return. Garner v. Willis, Breese, 290; Phillips v. Dana, 3 Scam. 551; Watrous v. Lathrop, 4 Sandf. 700. If a judgment creditor enter into an agreement to stay his execution, it becomes dormant as to other parties, and he loses any lien made by a levy under it. Ross v. Weber, 26 Ill. 221; Storms v. Woods, 11 Johns. 110; Kellogg v. Griffin, 17 Johns. 274; Ball v. Shell, 21 Wend. 222.

R. E. Jenkins, for Eldridge, in reply, presented the following, upon the question raised by the assignee that Eldridge lost his lien by his direction to the sheriff "to hold the execution, but not to levy for a few days, or until further orders:" Notwithstanding this direction, this execution would still be a good lien, even as against other execution creditors. Houston v. Sutton, 3 Har. (Del.) 37; Caldwell v. Fifield, 4 Zab. [24 N. J. Law] 150; Sterling v. Van Cleve, 7 Halst. [12 N. J. Law] 285; James v. Burnet, Spencer [19 N. J. Law] 635; Doty v. Turner, 8 Johns. 20; Smith's Appeal, 2 Barr [2 Pa. St.] 331; Leach v. Williams, 8 Ala. 759. But this is not a question as between execution creditors. Weeks could not avoid this execution were he not in bankruptcy. Neither can his assignee, for liens good against the bankrupt are good against his assignees voluntarily, or others with notice, and "against assignees in bankruptcy, who are treated as volunteers." Fletcher v. Morey [Case No. 4,864]; Mitchell v. Winslow [Id. 9,673]; Talbert v. Melton, 9 Smedes & M. 9; and cited Payne v. Billingham, 10 Iowa, 360, upon the point that this execution was good between the parties, deeming the question too well settled to require further authorities.

BLODGETT, District Judge. I think the facts in this case clearly show a valid judgment in favor of Eldridge, and against the bankrupt, and a valid lien under the execution at the time of the commencement of the proceedings in bankruptcy.

There is no evidence of fraud or preference in the obtaining of the judgment and execution, and the delay in making the levy did not defeat the lien which the statute of Illinois gives against the goods of a defendant in execution from the time the writ comes into the hands of the sheriff.

The execution then being a valid lien on the goods of the bankrupt, must be first paid in full out of the proceeds of the goods in the hands of the assignee, as this court, in disposing of the proceeds, must respect, in the order of their priority, all liens and incumbrances on the assets from which such proceeds were derived.

It is not the purpose of the bankrupt act to defeat valid liens or even advantages which creditors have obtained by their superior vigilance or sagacity, unless there is evidence of fraud or some direct contravention of the positive prohibitions of the law.

Evidently this execution was a valid lien on the goods, as against Weeks, and his assignee, under the facts in this case, is in no better position than the bankrupt himself would have been.

The order will therefore be that the execution be paid in full by the assignee.

Consult Fitch v. McGie [Case No. 4,835], and cases there cited.

Case No. 17,351.

WEEKS v. The CATHARINA MARIA.

JURGENSON v. SAME.

[2 Pet. Adm. 424.][1]

District Court, D. Pennsylvania. 1790.

SALVAGE COMPENSATION — CARGO SAVED FROM WRECK—SEAMEN'S WAGES IN CASES OF WRECK.

[1. One third part awarded as salvage in a case where the vessel was lost and part of the cargo saved, and where the salvage was not attended with extraordinary hazard or difficulty.]

[Cited in Hand v. The Elvira, Case No. 6,015; Smith v. The Joseph Steward, Id. 13,070.]

[2. The general rule that if a ship perishes the mariner loses his wages does not apply when any part of the cargo is saved. He is entitled to his wages out of the goods saved, at least for the time served before loss, and so long thereafter as his attention and services are needed in caring for the goods saved.]

[Cited in The Two Catherines, Case No. 14,288; Lewis v. The Elizabeth & Jane, Id. 8,321; Poland v. The Spartan, Id. 11,246; The Dawn, Id. 3,666.]

In admiralty.

BY THE COURT. Two libels have been filed in the case of the scow Catharina Maria. The one [by Benj. Weeks] claiming a reasonable salvage for goods preserved from a wreck at sea, and the other [by Jurgen Jurgenson] suing for mariners' wages: the voyage having been finished by the sinking of the vessel. The circumstances of the case appear to be as follows: The scow Catharina Maria, Peter Moller, captain, being on her return voyage from St. Croix, to Copenhagen, was on the twenty-first of September last, overtaken with heavy storms, in which she suffered so long and so much, that on the eighth of October, she became a mere wreck, and no hope of safety was left. In this extremity Captain Benjamin Weeks, belonging to and bound for Philadelphia, came up with the distressed ship, and received the Catharina's crew on board his vessel. The wind, however, soon after moderated, so that Captain Weeks was enabled by the assistance of his own crew to take from the wreck 6 pipes and an ullage of Madeira wine, 6 cases of the like wine, 12 bales of cotton, and sundry articles of rigging, after which the Catharina Maria sunk and was lost.

The first object is, to ascertain what reasonable salvage should be allowed to Captain Weeks on the goods and materials thus saved and brought into port; and secondly, what wages the mariners of the lost vessel are entitled to, on this unfortunate conclusion of their voyage. As to the first, salvage is an allowance made by the consent of all nations and all laws, for saving a ship or goods from the danger of the seas, from fire, pirates or enemies. Lex Rhod. 46; Lex Mercat. 146; Park, Ins. 147; Wesk. Ins. 488; and other authors on the subject. The quantum, however, of this allowance cannot, from its own nature, be fixed by any maritime rule or statute; because the reason of the law must be governed by the circumstances of the case, which will be various, according to the hazard, trouble and expense of the salvage. "If only the ship perishes, and the goods are saved, in that case, the goods ought to pay a proportion of a fifth or tenth penny, according to the easy or difficult winning or saving of the said goods." Moll. de J. Mar. bk. 2, c. 5, § 4; Lex Oler. c. 4. So that the hazard or trouble should be the rule of salvage. In regulating the discretion of the courts in such cases, oppressive salvage, such as may accumulate distress on the unfortunate, should be avoided on the one part, and on the other a generous allowance should be the reward of those who exert themselves in the cause of humanity.

By these principles I have considered the circumstances of the present case, and finding by the testimony, that the salvage has not been attended with any extraordinary hazard or difficulty, I adjudge to Captain Benjamin Weeks, one-third part of the goods and materials saved from the wreck of the Catharina Maria, free of all legal costs or charges whatever. As to the mariners' wages, it is a general rule of law, that if the ship perishes the mariner loses his wages: because, if they are allowed their wages, their best endeavours may be wanting to preserve the ship. But this seems to be rather a rule of policy than of natural justice; and is generally restricted to cases of a total loss, and before any port of delivery hath been attained. For if any of the goods have been saved and delivered in a place of safety, the mariners do not lose their wages for the whole voyage. 1 Ld. Raym. 739; Keble, 831; Park, 592. However doubtful the law may be, with respect to the mariners' wages in cases of a total loss of ship and cargo, there can be none, when a considerable part of the goods have been brought into port, and delivered up to a competent authority to take charge of them. So long as the duty of the mariners calls for their attentions and services in the preservation of the ship or cargo, or of any part thereof, so long does their lien for wages inure, in proportion at least to the value of the property so saved. I adjudge, that the libellants have and receive their wages according to the ship's articles to the twenty-eighth day of October last, at which time, the remains of the wrecked cargo and rigging were delivered into the custody of the marshal of this court.

See cases of salvage, Warder v. La Belle Creole [Case No. 17,165]; Taylor v. The Cato [Id. 13,786]; Bell v. The Ann [Id. 1,245]; Bond v. The Cora [Id. 1,620]. In the case of Taylor v. The Cato [supra], the mariners of the Cato were allowed wages from the goods saved.

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

Case No. 17,352.

WEEKS v. LADD et al. BARKER v. SAME. SANDERSON v. SAME.

[2 Sawy. 520.] [1]

Circuit Court, D. Oregon. Jan. 26, 1874.

PLEADING — AVERMENT CONNECTING CAUSE AND EFFECT.

The complaint alleged that the defendants being directors of the O. S. N. Co., by their false and fraudulent acts and representations, depreciated the market value of the stock of said company, and the plaintiff relying upon the good faith of the defendants was induced to sell his stock in said company below its real value, to his damage: *Held*, on demurrer, that there was a failure to connect the alleged cause and effect by proper averment; that it should have been stated that the plaintiff was thereby induced to sell his stock, etc.

The demurrers in these cases were argued and submitted together. The actions were brought to recover damages alleged to have been sustained by the plaintiffs in the sale of their respective shares of stock of the Oregon Steam Navigation Company, a corporation formed and existing under the laws of Oregon, for the purpose of navigating the Columbia river and its tributaries. The damages claimed in the first case are $15,471.79; in the second one $19,000, and in the third one $55,860.

George H. Williams and John H. Mitchel, for plaintiffs.

William Strong, for defendants.

DEADY, District Judge. In Weeks' case the complaint alleges that the plaintiff is a citizen of California, and that the defendants, on August 29, 1867, and prior thereto, and while the plaintiff was the owner of forty-two shares of the stock of the O. S. N. Co., were directors of said corporation, and did by their false and fraudulent acts and representations reduce the market value of said stock sixty-two and a half per centum below its real value; and also that the plaintiff, "being ignorant of the fraudulent acts of defendants, as aforesaid, in diverting the funds of said company, all of which was done secretly by defendants, and in misapplying them, and relying upon the said representations and statements of defendants, and upon their good faith; and believing their said statements and representations so made as hereinbefore alleged to be true, was induced to sell, and did actually, on or about August 29, 1867, sell his said forty-two shares of stock in said company for a price greatly below the real value thereof at the time of such sale, and also greatly below what it otherwise would have brought in the market at that time, had it not been for the wrongful conduct of the defendants as aforesaid; that your plaintiff, being influenced and induced as aforesaid, by the fraudulent conduct of the said defendants as aforesaid, did, at the date hereinbefore stated, sell, assign, transfer, set over to ——, absolutely, all his forty-two shares of stock in said corporation for the price, and receiving therefor the sum of seventy-two and a half cents, and no more, on the dollar, par value thereof; that the real value of said forty-two shares of stock at that date, to the owner and holder thereof, was not less than twenty-five per centum premium on the par value thereof, to wit: the sum of $625 per share."

The defendants demur to the complaint because: (1) It does not state facts sufficient to constitute a cause of action; and (2) the action was not commenced within the time limited by law—two years after the cause of action accrued.

In support of the first cause of demurrer, the defendant makes the following points: (1) That the acts and representations of the defendants, even conceding them to be fraudulent, and that plaintiff was thereby induced to sell his stock at less than its value, are not sufficient foundation for the action. (2) The complaint does not show that plaintiff was induced by these false acts and representations to part with his stock. (3) That it should be averred that the representations were in writing.

Upon the second of these points the argument stands thus: For the defendants it is maintained that, admitting, as the demurrer does, the defendants did the acts and made the representations complained of, that the plaintiff believed them to be true, and that they had the effect to depreciate the market value of the stock, as alleged, still it does not follow that the plaintiff was thereby induced to sell his stock for less than its real value. There is a failure to connect the alleged cause and effect by proper averment. For aught that appears, the plaintiff may have been induced to part with his stock upon considerations altogether different than the apparent depreciation of its value. The alleged loss arose from the sale by the plaintiff of his stock for less than its real value, and unless it appears from the complaint that such sale was induced, or caused by the conduct of the defendants, it is insufficient in this respect.

The argument for the plaintiff impliedly admits this proposition, but insists that "it does appear from the complaint that the plaintiff was induced by the fraudulent acts of defendants to sell his stock."

In support of this assertion, reference is made to this allegation in the complaint: "That your plaintiff, being influenced and induced, as aforesaid, by the fraudulent conduct of the said defendants, as aforesaid, did, at the date hereinbefore stated, sell, assign, transfer, set over," etc.

But this allegation adds nothing to the complaint in this respect, for to be "influenced and induced, as aforesaid," is only to be influenced and induced as before stated. Now, the previous and only allegation to which this "as aforesaid" relates, does not state in terms that the plaintiff was induced by the conduct of the

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

defendants to make the sale in question, but only that he "was induced to sell, and did actually * * * * sell," etc.

Unless, then, the prior allegation, that the plaintiff believed in and relied on the representations of the defendants, necessarily implies that he was thereby induced to sell, etc., the complaint is insufficient for want of such averment. Without it, the alleged wrong and loss are not concatenated as cause and effect.

But the plaintiff does not maintain that there is ground for such implication, and I think it would be unsafe so to conclude.

The immediate inducement to sell may have been the necessity or desire of the plaintiff to convert his stock into money. In all the cases cited on the point there is a direct allegation in so many words, or to that effect, that the injured party was induced by the conduct of the other to do the act which caused the loss to him.

In Cazeaux v. Mali, 25 Barb. 583, the cause and effect are connected by the averment "that the plaintiff was influenced thereby in making the purchases." In Cross v. Sackett, 2 Bosw. 645, the allegation is: "And so believing, and on the faith and credit of the aforesaid false and fraudulent acts, practices and representations of the said defendants, * * * * the said plaintiff did" purchase the stock in question. The court (page 646) held this allegation equivalent to saying that, "by these fraudulent acts, they (the defendants) induced the plaintiff to purchase." In Gerhard v. Bates, 20 Eng. Law & Eq. 136, the court say: "If the plaintiff had only averred that afterward, having seen the prospectus, he was induced to purchase the shares, objection might have been made that a connection did not sufficiently appear between the act of the defendant and the act of the plaintiff from which the loss arose; but the second count goes on expressly to aver that the defendant, by means of the said * * * * representations, wrongfully and fraudulently induced the plaintiff to become the purchaser," etc. Thus, the wrong and the loss are clearly concatenated as cause and effect. In Newbery v. Garland, 31 Barb. 131, it is alleged that the plaintiff "was induced by these representations (the representations of the defendant) to purchase."

Upon the argument and authorities cited the point appears to be well taken. The argument for the plaintiff admits that the complaint should show that the plaintiff was induced to make the sale in question by means of the wrongful conduct of the defendants, and rests solely upon the bare assertion, which in the judgment of the court is erroneous, that the complaint contains such an allegation.

The cases cited supra were cases of the purchase of stock upon false representations as to its value and condition of the corporation by the seller. There it was held necessary to aver that the plaintiff was influenced to make the purchase by means of such representations. Without this the loss sustained by the purchaser would not appear to have been caused by the act of the seller.

The case at bar is one of the sale of stock by the plaintiff for a price below its real value, upon false representations as to its value and the condition of the corporation, not by the other party to the sale, but by third persons, who were then directors of the corporation. Therefore the allegation as to the influence these representations had upon the plaintiff in making the sale, should state not only that he was thereby induced to sell his stock, but also to sell it at a price below its real value, and thus incur a loss, which he otherwise would not.

Upon this point the demurrer is sustained, and therefore it is not necessary to consider it further.

The complaints in Sanderson's and Barker's cases are substantially the same as this, and the demurrers thereto are sustained for the same reason.

[NOTE. Abner H. Barker having died, Joseph Simon was appointed administrator. For a motion for leave to continue this action as administrator of Barker, see Case No. 990.]

Case No. 17,353.

WEEKS v. LYCOMING FIRE INS. CO.

[6 Reporter, 165; 7 Ins. Law J. 552; 26 Pittsb. Leg. J. 12.] [1]

Circuit Court, D. Vermont. Feb., 1878.

AUTHORITY OF INSURANCE AGENTS—PRELIMINARY PAROL CONTRACT — ENFORCEMENT — WAIVER OF CONDITIONS.

1. Where an insurance agent is furnished with blank policies which he is authorized to fill up and deliver and make binding until cancelled, his authority to make this larger completed contract includes an authority to make a preliminary executory contract to enter into it.

2. A parol agreement for insurance must include the subject of insurance, the time, amount, and premium.

3. Where under the circumstances the policy would have been binding, if one had issued, the agreement to insure will be binding.

4. Where a policy should have issued, pursuant to agreement, but was refused, such refusal is a waiver of the conditions in such policies requiring proof of loss within a certain time.

Bill to recover amount of loss by fire on a parol agreement by virtue of which a policy was to issue.

PER CURIAM. Several questions of fact and of law arising thereon have been made. One is as to whether the defendant's agent had authority to bind the defendant to an executory contract of insurance of the property. It is shown by the orators that the agent was furnished with blank policies, which he was authorized to fill up and deliver, and make

[1] [Reprinted from 6 Reporter, 165, by permission. 26 Pittsb. Leg. J. 12, contains only a partial report.]

binding for their whole term unless the defendant's officers should determine to cancel them, and if so, until they should be cancelled. This would constitute an executed contract of insurance, which would include the preliminary executory contract to enter into it, and authority to make this larger completed contract would include authority to make the included one. Wood, Ins. § 10, and cases cited; Insurance Co. v. Colt, 20 Wall. [87 U. S.] 560; Sanborn v. Insurance Co., 16 Gray, 453. Thus it appears that he did have the requisite authority. Another and more difficult question is, whether he, as such agent, did in fact enter into such preliminary contract. It is so usual and so proper that contracts of insurance be in writing that proof of them by parol ought to be clear. And to make out such contract each essential element of it must be shown to exist. The agreement on the part of the insurer must be made out by proving what it was to cover, for what time, at what sum, and for what price or premium; that on the part of the insured by showing an agreement at least to pay the agreed price or premium for the agreed insurance. When made out, one agreement is the consideration for the other.

[In this case there is no question about what the property was to be insured. All agree as to that. As to the commencement and duration, Mr. Walker testifies that it was to commence at the expiration of the policy in the Hartford Fire Insurance Company, which was Nov. 20, 1874. Mr. Cahoon, that he was to have the property to insure from year to year; and Mr. Newell, that he was directed by Mr. Cahoon to write an application in the form of a daily report, and to follow another policy and a register, each of which showed insurance for one year, and all agree that this was to be a renewal in the Lycoming instead of the Hartford Company, of an insurance which was for one year.] [2] And it appears the duration of the insurance was to be one year from November 20, 1874; that the amount of insurance was to be $3,333.33; the premium to be 1¾ per cent.; and that the report of the insurance was made and forwarded.

[Mr. Walker testifies that the price or premium was to be 1¾ per cent., and Mr. Cahoon that he made the premiums on insurance for the orators a matter of debt between him and them. Mr. Walker states what, if true, in connection with the Hartford policy, would cover the whole, when, after testifying to conversation on the subject between him and Mr. Cahoon on the last Monday in August or the first one in September, 1874, he says: "At this time it was agreed upon between me and Cahoon that the policy in the Hartford should be placed in the Lycoming at the expiration of the Hartford, and that the rate should be 1¾ per cent., instead of 1½ per cent., as we had paid before." This was objected to, and it is argued that it was not competent for the witness to state what was agreed to, but only what was said, leaving the effect to be found on the trial, and Linsley v. Lovely, 26 Vt. 123, is cited. The testimony held inadmissible in that case was that of a witness who testified not only to what he, but what the other party to negotiations between them understood from them. As was said in that case, one person cannot state what another understands without drawing an inference, which is the province of the trier. But one person might hear another expressly agree. In this case, according to what was said by the court in that, Mr. Walker could state what he understood or agreed to; and what Mr. Cahoon understood and agreed to may be readily inferred from his testimony that he directed Mr. Newell, his clerk, to renew the Hartford policy in the Lycoming, and from Mr. Newell's testimony to the same effect. And if all of Newell's testimony is true, not only the agreement must have been made, but the daily report of the insurance made and forwarded. That of Mr. Francisco and Mr. Bradley is to the effect that it was not received, which, in connection with the known accuracy of the mails, tends to show it was not sent.] [2] Whether this report was made and sent or not is not decisive, since the question is: whether the agreement to insure was made so that the report ought to have been made and sent and the policy written,—[and as to this testimony of the three witnesses concurs, and is not contradicted, but is strongly corroborated by the fact, shown by the policies issued as well as by the oral proof, that it was the arrangement between the insured and the insurance agent to keep $10,000 insurance on the property, and that this insurance was necessary to make up that amount.] [2]

It is claimed for the defendant that various things shown by the evidence to have existed about the property affecting the risk would have invalidated the policy if one had been issued according to agreement, and that therefore they vitiate the agreement. On this point the evidence is full to the effect that the defendant's agent knew of all these things and entered into the agreement in view of them. The agreement was to insure the property as it was situated. Under these circumstances the policy would have been binding, and the agreement is. Wood, Ins. § 402, and cases cited; Brink v. Insurance Co. 49 Vt. 453. [It was objected that there was a limitation in the charter of the defendant that would have cut off this risk, but if there is, it is not shown.] [2] If the policy had issued in the form contemplated, it would have required proof of loss within thirty days, which has not been made, and the want of it would have defeated recovery. But the policy was not issued, and when asked for was refused by the agent. The claim now made is not on the policy, but on the agreement for one not performed. The refusal of the policy was equivalent to a denial of all liability, made within the time in

[2] [From 7 Ins. Law J. 552.]

[2] [From 7 Ins. Law J. 552.]

which proof was required, and excused making such proof. Wood, Ins. § 419.

The orators are entitled to a decree for a policy, and the defendants to the amount of the premium not yet paid. As there has been a total loss of some of the property, and a partial loss of other of it sufficient to cover the whole amount, except that there was a special insurance on a piano, which was saved, so as to abate $50, to avoid circuity there should be a decree for the orators for the amount of $3,333.33, less the $50 abatement and the premium, $58.33. Decree accordingly.

Case No. 17,353a.

WEEKS et al. v. The NEW ORLEANS.[1]

Circuit Court, S. D. New York. July 31, 1879.[2]

COLLISION—STEAMER AND SAIL—ABSENCE OF LOOKOUT—REPAIRS.

[1. A steamer colliding with a schooner, in broad daylight, on the open ocean, *held* solely in fault; it appearing that her lookout had been withdrawn, that the man at the wheel did not observe the schooner until warned by a cry from her, and that the schooner steadily maintained her course until in extremis.]

[2. An injured vessel is not necessarily bound to employ such persons to make repairs as those in fault for her injuries see fit to recommend; and, when the recommendation is not made until after others have been engaged to do the work, the fact that the persons recommended offer to make the repairs for a less sum is not conclusive that the amount paid was too much.]

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

[This was a libel by John S. Weeks and others against the steamer New Orleans to recover damages for a collision.]

Facts Found by the Court.

(1) A little after 5 o'clock in the morning of the 6th of September, 1874, a collision occurred between the schooner Allie Blackmore, owned by the libellants, and the steamer New Orleans, in the Atlantic Ocean, about 40 miles southeasterly from Cape Henlopen. (2) The schooner had a carrying capacity of over 600 tons, though she registered only 390, or thereabouts. She was less than a year old, and bound on a voyage from Fernandina, Fla., to New York, with a full load of pine lumber, stowed below and on deck. (3) The steamship was 245 feet long, and of 1,448 tons burden. She was on one of her regular trips between New York and New Orleans. (4) When the collision occurred, it was broad daylight; and a vessel without lights might have been seen at least two miles away. The wind was very light from the southward and eastward, but a considerable swell was rolling from the southwest. (5) The course of the schooner was about N. E. by N. She had all sails set, but there was not wind enough to keep them full, and she was not making more than a mile and a half or two miles an hour. Her lights were properly set and burning, and she was in all respects well equipped and manned. (6) The course of the steamer was about S. by W. ½ W., and her speed 11 miles, or a little more, an hour. This was full speed. About 20 minutes before the collision, her lookout was withdrawn from his station on the forecastle, and set to work, with all the other men then on watch, washing decks. The second officer, whose watch it was, was with his men, superintending their work. From the time the lookout was withdrawn, there was no one where he could in any respect perform that duty, except the man at the wheel, and he did not discover the schooner until his attention was called to her by the mate at the time and in the manner hereinafter stated. (7) When the vessels were two or three miles apart, the steamer was discovered and duly reported by the lookout on the schooner. From that time she was closely watched. The schooner was kept steadily on her course until the steamer was not more than seven or eight hundred feet away, when, the danger of collision being imminent, the second mate, who was on deck, gave an order to luff, and at the same time called out in alarm to the steamer; but, before any material change in her course had been made, the vessels came together. (8) The schooner was not seen at all from the steamer until the second mate, hearing the cry of alarm which came from her, stepped from where he was standing on the main deck to the starboard side, and saw her close upon him. He immediately ran up from the main deck into the wheel house, where he ordered the wheel to port at the same time, assisting to put it over himself. The order to port aroused the captain, who was in a room opening out of the wheel house; and he, without stopping to put anything on, opened his door, and, seeing the schooner, rang the proper bells to slow and stop. Before the course of the steamer was materially changed by the porting of the wheel, or her headway visibly affected, she struck the schooner on the port bow, between the stern and the cathead, and cut into her about 20 feet on a line but slightly angling across the keel. The wound extended very nearly to the foremast, and to within 5 feet of the keel. (9) In a short time the steamer took the schooner in tow, and carried her to the Delaware breakwater. From there she was taken by a tug to Philadelphia, where she was unloaded, and her cargo taken on to New York. She was also put in repair and refitted at that port. (10) The account of damages as stated by the commissioner in his report is sustained by the evidence, except the item of $1,000 for damages to the starboard side. As to that, the evidence shows that when the repairs were completed the vessel was in as good general condition as she was before the collision, and that if the bill of Birely, Hillman & Streaker is paid in full, without the deduction of $600 for increase of value, full compensation will be made for any injury to the starboard side.

[1] [Not previously reported.]

[2] [Affirming Case No. 10,179. Decree of circuit court affirmed by supreme court in 106 U. S. 13, 1 Sup. Ct. 90.]

Conclusions of Law.

(1) That the collision was caused solely by the fault of the New Orleans in not keeping a sufficient lookout, and in not seeing the schooner in time to keep out of her way. (2) That the libellants are entitled to recover for the amount of the decree below, with interest on $14,026.92 from the date of that decree at the rate of 6 per cent. per annum. [See Case No. 10,179.] (3) As both parties have appealed, and the decree below is sustained, the costs of this court must be equally divided between the parties.

[On May 25, 1877, a decree was filed which merely disposed of certain of complainants' exceptions. Case No. 10,178.]

Scudder & Carter, for Weeks.
Man & Parsons, for the steamer.

WAITE, Circuit Justice. The facts, as found, are clearly established by the evidence, and satisfy me, beyond all doubt, that the failure of the steamer to keep a sufficient lookout was the sole cause of the collision. The order on the schoner to luff could not have contributed at all to the accident, and, if it did, made as it was in extremis, was not in law a fault. With her sails shaking for want of wind, and the sea rolling, it is impossible to believe that any change of her speed could have affected materially her course in the short time that intervened between the hail from her deck, heard on the steamer, and the coming together of the vessels. When this hail was given, it would take the steamer less than a minute at the speed she was going to reach the schooner. This is shown, not only by the estimates of the distance made at the time by those on both vessels, but by what transpired meanwhile. As soon as the second mate on the steamer heard the hail, he looked over the starboard side, saw the schooner, ran from the deck to the wheel house, gave the order to port, and himself helped to put the wheel over; but before the steamer, at her rate of speed, and steering easily, changed her course materially, the collision occurred. The captain, as soon as he heard the order to port, got up, opened the door from his room into the wheel house, saw the danger, and rang the bells to stop and back; but, before any perceptible change in the motion of the steamer, the vessels were together. The order to luff was not given until just about the time of the hail from the schooner, and probably a little after. The second mate says his order to luff was given, and the next thing "she struck us," and this is the effect of all the evidence upon this branch of the case. I place no confidence whatever in anything said by Oberg or Potter in conflict with the other testimony. They are very clearly unreliable.

Upon the questions arising on the exceptions to the commissioner's report, I think the judge below was right in his rulings. An injured vessel is not necesarily bound to employ such persons to make her repairs as those in fault for her injuries see fit to recommend. In this case the claimants would not admit their liability, and did not offer to make the repairs themselves. All they did was to say that if Pusey, Jones & Co. made the repairs, and they were liable, they would not dispute the bills. The tender of Pusey, Jones & Co. to do the work was not communicated to the libellants until after the schooner had been unloaded, and Birly, Hillman & Stracker employed to do the work. While the amount of the bill seems large, it is sustained by the evidence. The libellants disputed it, and would not pay until they had been sued, and judgment recovered against them. While this judgment may not conclude the claimants, it tends to show there was no collusion. The offer of Pusey, Jones & Co. to do the work for a less sum than it actually cost is not conclusive evidence that it cost too much. If the libellants show that they acted in good faith, that no more was done than was necessary to put their vessel in as good condition as she was before the collision, and that the prices paid were reasonable, they have made out their case. This I think they have done.

As to the allowance of $1,000 for damages to the starboard side, I think, with the district judge, that after the repairs were completed the vessel was, on the whole, in as good a condition as she was before she was injured. The port side was left in a better condition, and, if the extra expense thus incurred is allowed and paid, it will compensate for any unrepaired damage to the other side.

The evidence as to what Gore swore to on the trial of the suit instituted by Birely, Hillman & Streaker to recover the amount of their bill was properly ruled out. He testified to what he believed to be errors in the bill, but the result showed he must have been mistaken as judgment was given against him notwithstanding his evidence. Under such circumstances, his statements, even though made upon oath, can hardly be treated as admissions to overcome positive evidence as to what the facts really were.

This disposes substantially of all the questions relied upon by the claimants in their argument on this appeal. The demurrer allowed is, I think, sustained by the evidence, as is also the ship chandler's bill. The exceptions to the allowance for storage of timber in Philadelphia for transporting cargo to New York, and for the loss of freight have not been insisted on here. None of the exceptions taken by the libellants should, in my opinion, be allowed, except the 10th, which relates to the abatement of $600 from the bill of Birely, Hillman & Streaker on account of the increased value of the schooner after her repairs. That has already been considered. As to the interest on the sum allowed for demurrage, I think, under the circumstances, it was properly rejected. The amount allowed is sufficient, under the evidence, to cover interest to the date of the report.

On the whole, I think the decree of the dis-

trict court ought not to be disturbed. An entry may be prepared giving judgment in favor of the libellants for the amount of the decree below, and interest at 6 per cent. on the amount, in the aggregate, of all the different items of damage allowed by the district court, exclusive of the interest allowed and put into the decree. This amount I make $14,026.92. It is, however, subject to correction in case any error shall be discovered.

The decree will be for: (1) Decree below, $15,904.98. (2) Interest on $14,026.92 from June 11, 1877, to date of decree. (3) Costs in the district court.

As both parties have appealed, and the decree of the district court has been sustained, the costs in this court will be divided.

[NOTE. The libellants subsequently moved for a summary judgment against the sureties upon the appeal bond, which motion was denied, as having been made prematurely. Case No. 10,181. From the decree of this court affirming Case No. 10,179, an appeal was taken to the supreme court, where the decree was affirmed. 106 U. S. 13, 1 Sup. Ct. 90.]

Case No. 17,354.

WEEKS v. The NEW ORLEANS.

[See Case No. 10,181.]

WEEKS (THOMAS v.). See Case No. 13,914.

Case No. 17,355.

The W. E. GLADWISH.

[17 Blatchf. 77.] [1]

Circuit Court, S. D. New York. Aug. 28, 1879.

TOWAGE—NEGLIGENCE—LOSS OF CARGO—BURDEN OF PROOF—ICE—EXCESSIVE SPEED—WEIGHT OF TESTIMONY.

1. A person who ships cargo by a barge which he knows must be towed to her place of destination, is bound by the terms of towage which the barge agrees on with the tug which the barge procures to tow her.

2. If the barge is sunk and the cargo is lost, by contact with ice, while the barge is being towed by the tug, the owner of the cargo must show negligence on the part of the tug, in order to recover against it for such loss.

[Cited in The E. A. Packer, 22 Fed. 670.]

3. It was *held* not to be negligence in the tug to keep on, after reaching ice, instead of lying by, or making a harbor; that the towing hawser was not too long; that the speed was not too great; that nothing could have been done by the tug to avoid the danger, when the obstruction which actually caused the loss was seen; and that the barge and the vessels in the tow with her were not improperly arranged.

4. To make the tug liable for keeping on, it must appear that the error was one which a careful and prudent navigator, surrounded by like circumstances, would not have made.

[Cited in The James P. Donaldson, 19 Fed. 266; The E. A. Packer, 22 Fed. 671; The Allie & Evie, 24 Fed. 749; The Frederick E. Ives, 25 Fed. 450; The Wilhelm, 47 Fed. 93. Approved in The Battler, 62 Fed. 614.]

5. The judgment of witnesses as to speed, formed long after the event, and not based upon anything which specially attracted attention at the time, is rarely to be depended upon.

This was an appeal by the libellant from a decree of the district court, in a suit in rem, in admiralty, dismissing the libel. [Case unreported.] This court found the following facts: "The Eastern Transportation Line, having its office in the city of New York, was engaged in the business of towing boats and vessels for hire, between New York and ports on Long Island Sound, and elsewhere. It was the owner of various tug boats, employed in its business, and, among others, the W E. Gladwish, the F. B. Thurber and the Francis King. The A. W. Humphreys was a barge, or canal boat, owned by her master, James McKeag, and engaged in the business of transporting goods by water, for hire. She had no motive power of her own, but was towed from place to place by tugs employed for that purpose, as occasion required, by her owner, who was an experienced boatman. He had often been towed by this line. At some time before March 8th, 1875, the barge had been towed by one of the tugs of the line from New York to New Haven, under a contract to take her to New Haven loaded, and back light, for fifty dollars. She had the privilege of bringing back a load, if she chose, and, in that case, was to pay fifteen cents additional per ton for her load. No particular time was specified for her return, but she could come back at any time she was ready and the Line had a tug at New Haven that could take her. She staid at New Haven about four weeks, and, while there, took on board 360 pairs of car wheels, weighing 160 tons, belonging to the libellant, which she agreed to carry to Elizabethport, New Jersey, and there deliver to the Central Railroad Company of New Jersey, 'dangers of the seas excepted,' the consignors paying freight. A bill of lading in the usual form, bearing date February 27th, 1875, was signed by the master and owner. The tug Francis King arrived in New Haven, from New York, with a tow, on the morning of the 8th of March, 1875. She had been detained a long time on her voyage by the ice, which was found very thick west of Norwalk. The King started from New Haven, on her return voyage to New York, in the afternoon of the day she arrived, with a tow consisting of the Humphreys and ten canal boats. The Humphreys only had a load. All the other boats were light. The capacity of the Humphreys was about three hundred tons, but she had on board only the car wheels. She was taken in the tow at the express request of her captain and owner, he selecting that time to go back, under his original contract. When he made his request, he well understood that there was ice in the Sound, and that the King had with much difficulty made her way through it from New York. He took the line from the tug, when the tow was made up, with a full knowledge that he might, and probably would, encounter difficulties from the same cause, on

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

his way to New York. The libellant took no part in the contract for towage. It was known, however, that the barge must be towed when she did go. The time of starting was left entirely to the barge, though the agent of the libellant was desirous that she should deliver her cargo at its destination as soon as possible, and so informed her captain. The tow was made up, on the start, in two lines, side by side, and towed with hawsers astern. As the Humphreys was loaded, she was placed in the front tier and on the port side. It would have been unsafe, under the circumstances, to have towed her astern of the light boats. No objection was made by the captain of the Humphreys, or any one else, either to the length of the hawsers put out from the King, or to the arrangement of the tow. No ice was encountered, after leaving New Haven, that caused any detention, until some time during the night. The tow was then in the Sound, about opposite Norwalk. After a time, the tow was arranged in single file, the Humphreys still being the forward boat. The King kept on the best way she could, at no time attempting to return or make a harbor. During the 9th of March she sometimes loosened herself from her tow, went ahead and broke a channel, and then came back and took the boats forward in detachments of three or four at a time. At one time the ice was found so heavy and compact that she was compelled to lie by and wait for a change of tide to loosen it. On the change of tide she started again, and worked her way slowly along until about four o'clock in the afternoon, when she was a few miles to the eastward of Execution light. During all this time the weather was fine, without wind, and of a character to soften the ice. On the morning of the 9th of March, the president and superintendent of the Line started out from New York, with the tugs Gladwish and Thurber, for the relief and assistance of the tows in the ice. Some of these tows were on their way east from New York, and the King was known to have started from New Haven. These tugs met the King, to the eastward of Execution light, about four o'clock p. m. They there arranged themselves so that all three should take hold of the tow together. The Gladwish took the lead, the Thurber followed, and then the King. Another hawser was then put out from the King to the Humphreys, and from that time the tugs made the tow with a double hawser. The length of the hawser was not unusual. It was seen and not objected to by the captain of the Humphreys, who was all the time on his boat, steering and watching the navigation. His boat was still ahead, and the tow was still arranged in single file. After the tow was thus made up, the tugs proceeded through channels in the ice, which had been made or formed by steamers on their trips in and out of New York. These channels were generally crooked and of varying widths, from forty feet upwards, filled with broken ice. Sometimes, large cakes of floating ice were found, but, in this particular, it did not differ materially from what had been encountered before. Shortly after passing Execution light, a small space of open water was found. The ice channel formed by the steamers led into this open space from the eastward, and again out of it toward the west. On reaching this open space, the engine of the King was stopped, and that of the Thurber slowed, the Gladwish only keeping up her full speed. She was the most powerful boat of the three, and still ahead. Not long after the tugs passed out of this open space, and while, perhaps, some of the boats of the tow were still in it, the propeller A. C. Barstow came up from New York, on her way to Providence. Noticing the tugs approaching with their tow, she took the south side of the ice channel. The tugs at the same time went to the north. The propeller, finding a place in the solid ice which had been broken, further to the southward than the general line of the channel, forced herself into that. Between her and the tugs with their tow were large quantities of broken ice, packed together. After she got into this widened space, she put herself against the solid ice on the south and waited for the tow to pass, as it was not safe to attempt to go by in the narrower parts of the channel. While she lay there, the propeller City of New Bedford came along, bound from New York to New Bedford. She passed north of the Barstow and south of the tow, at a speed of six or seven miles an hour, cutting through the packed ice to reach the narrow channel astern of the tow and ahead of the Barstow. While the tow was passing these propellers, the Humphreys was struck in the port bow, a little distance from the stem, by a large cake of floating ice that had in some way been set in motion. A large hole was made in her side by the collision, and she soon filled and sank with her cargo. The tugs were then making their way, with the tow, through the channel, filled as it was with broken ice, at the rate of two or three miles an hour. The engine of the King was not moving and the Thurber was at half speed only. The piece of ice which struck the Humphreys was seen in motion from the King, but the tugs were not stopped, and nothing could then have been done to stop, or change the course of, the ice, so as to avoid the collision. The captain of the Humphreys had been at the wheel, doing what he could to steer her, as she followed the tugs, until just at that time, when he left the wheel-house to go to his supper. As soon as the collision occurred and its effect was known, the tugs were stopped on a signal from the King, and the King, letting go the hawser ahead, backed down to the Humphreys, to render what assistance she could. She had barely time to take off the captain and his family before the Humphreys went down. The other boats in the tow were taken in safety to New York. The tugs were all properly equipped, and navigated by competent and faithful officers and men."

Welcome R. Beebe and John McDonald, for libelant.

Robert D. Benedict, for claimant.

WAITE, Circuit Justice. The contract for the transportation of the car wheels was between the libellant and the barge only. The tugs are in no way responsible to the libellant for the performance of that contract. Their liability is under their contract of towage only, as to which the libellant is bound by the terms agreed on by the barge. As it was known, when the cargo was shipped, that the barge would be towed to her place of destination, the shipper, in the absence of anything to the contrary, is presumed to have left the time and the manner of the towage to the discretion of those in charge of her navigation.

There can be no recovery in this action except for negligent or unskillful towing. The tugs did not, by their contract, insure the safe delivery of the cargo at the end of their route. Their agreement was to tow the barge, and, in so doing, to use such care and skill as a prudent man would exercise, under like circumstances, in the management of his own business. The law implies that their care and attention were to be in proportion to the dangers encountered and the consequences of neglect. This is but common prudence. The greater the risk, the greater should be the effort to avoid it. The burden of showing negligence is on the libellant. The mere fact of sinking the cargo is not enough. Actual fault, contributing to the loss, must be proven.

The specific allegations against the tugs are, in effect, (1) that they kept on, after reaching the ice, without lying by, or making a harbor; (2) that the hawsers between the King and the Humphreys were too long for safety; (3) that the speed was too great when the collision occurred; (4) that, when the obstruction which actually caused the loss was seen, the tugs were not stopped and no efforts made to avoid the danger; and (5) that, after the Gladwish and the Thurber arrived, the tow was not divided and a part given to each tug to take on by itself. These will be considered in their order.

(1) As to not making a harbor. The master of the barge, by electing to go back with the King, when he knew that ice would probably be encountered on the way, in legal effect assumed, for the barge and her cargo, all the risks of towage in the ice, not caused by the neglect or unskillful navigation of the tugs. The contract was for such a degree of caution and skill as was required for towage under such circumstances. There was no obligation to return to New Haven, or seek some other harbor of refuge, simply because ice was found in the way. All parties anticipated, when they started, that ice would be found, and that, for some part of the distance, the dangers incident to towage under such circumstances would be encountered. The object was to get through such ice as they might meet, not to wait for it to melt. The tugs undertook to bring to this work such prudence and such nautical skill as was ordinarily required in such navigation. More was not contracted for, and more was not expected.

When the ice was reached, it became necessary to decide whether to lie by or go on. This involved the exercise of judgment as to what ought to be done under the circumstances. A mere mistake is not enough to charge the tugs with any loss which followed. To make them liable, the error must be one which a careful and prudent navigator, surrounded by like circumstances, would not have made.

The facts are, that the weather was fine, the sun warm, and the ice apparently yielding. There was no wind, and nothing seemed to be in the way of going on but the melting ice, much broken, and with many openings through which the tow might, to all appearances, be taken in safety. The King, which was then alone, had come through the same or like obstructions the day and night before, with a tow of loaded boats, and there was nothing whatever to indicate that a return voyage, with the tow taken on at New Haven, might not be made with equal safety. Propellers and steamboats had been for some time passing and repassing without serious damage, and every day the navigation seemed to be improving. In view of these facts, I cannot believe that ordinary prudence required an abandonment of the voyage for the time being, by lying up, or seeking a harbor. The tug was commanded by a competent master, and the captain of the barge was an experienced boatman. No objection was made by any one to going on, and it is evident that no person connected with the tow considered it necessary to stop. The progress made was slow and difficult, but all seemed to think there was no way but to keep on and do the best that could be done.

(2) As to the length of the hawsers. It is not easy to tell, from the evidence, precisely what the length was, but that it was not at the time believed to be unsafe or unnecessarily long is shown by the fact that no one complained of it before the accident. And, in this connection, the conduct of the master and owner of the Humphreys must not be overlooked. He had long experience and had been often towed through the Sound. His barge had been the head boat from the start. He had been watching the progress of the tow from the time it came into the ice. He was in a position to see if there was anything wrong either in the arrangement of the boats, or the management of the tug, and, it is impossible to believe, that, if he had considered the hawsers too long, he would not, in some form, have made known his dissatisfaction. I am satisfied, from the evidence, that the length was not materially increased after the Gladwish and the Thurber took hold; and, down to that time, the hawser had certainly done its work well. All the boats had been brought in safety a long distance, through crooked channels and difficult passages. Under these circumstances, it seems to me clear, that there could have been no such error in judgment, in this particular, as to make the tugs liable.

(3) As to the speed. It is impossible to say at what precise rate the tow was moving, but

it is certain that the engine of the King was stopped, and that of the Thurber slowed down to half speed; that the Gladwish found it difficult to use her full power, on account of the choking of some part of her machinery by the ice; that the channel, most of the way, was narrow and filled with broken and floating ice; and that the tide was against the tow. With all these difficulties, it seems to me impossible that the general speed at the time was such as to be unsafe. The judgment of witnesses in such matters, formed long after the event, and not based upon anything which specially attracted attention at the time, is rarely to be depended upon. It is always safer to look at the facts as they are known to have occurred, and judge from them.

(4) As to avoiding the ice that inflicted the injury. After a careful consideration of all the evidence, I am satisfied the collision which caused the loss was not with fixed ice, but with a large cake of ice which was itself in motion. The accident happened while the tow was in the vicinity of the propellers Barstow and City of New Bedford. Precisely how far they were away, is left somewhat in doubt, but, notwithstanding some conflict in the evidence, it seems to me clear that the intervening ice was not solid or stationary, but broken and floating. There undoubtedly were large pieces mixed with the mass, but none of it was what could be denominated fixed ice. The Barstow, until she came to a full stop, was working her way along and up against the solid ice. This would not have been necessary, if, as is contended, there had been a large field of solid ice, two or three hundred feet in width, between her and where the tow was to pass. The City of New Bedford passed the Barstow and the tow, by working her way through the intervening ice to the channel the tow had left. This indicates, beyond all doubt, that, while the pieces may have been packed closely together, the mass was not solid. Such being the case, it is easy to see, that a propeller, in passing along, would set the pieces, to some extent, in motion. Either the propellers or the tow had to move, in order to get by. When the Barstow first came up, some portion of the tow was in the narrow part of the channel, where it was unsafe to undertake to pass. The wide part of the channel, where she was lying by, was not very long. In the language of some of the witnesses, it appeared as though an opening had been made there for boats to pass. To get out of the way, she worked herself up against the solid ice. In the meantime, the tow was passing, and, when the City of New Bedford came along, it had got so far out of the narrow channel beyond, that she deemed it safe to keep on without stopping. The Barstow was willing to let her get by, as she was a larger and stronger vessel, and better fitted for opening the way, and the Barstow could follow in her wake. It is not possible to tell, from the evidence, precisely when, or where, or how the piece of ice which inflicted the injury was set in motion; but it is clear to my mind, that it was connected in some way with the movements of one or the other of these propellers. The testimony is so conflicting as to make it impossible to locate the propellers with reference to the tow at the time the collision took place, or to determine precisely what the Barstow was doing; but it is certain, that the City of New Bedford was moving somewhere in the vicinity, at a speed of six or seven miles an hour, and that, at some time not long before, the Barstow had been working her engine so as to get away from the tow as it was approaching. There was no other known cause for the displacement of the ice at the time, and the conclusion is, therefore, irresistible, that it must, in some way, have been done by the propellers. At this time, the tugs were moving cautiously, and there was nothing to indicate danger from the quarter it came. So far, I can see no fault in the management of the tugs.

The moving cake of ice which inflicted the injury was seen from the King before the collision took place, and it only remains to consider whether the tugs were in fault for not avoiding it after this discovery was made. There was not time enough, after the discovery, to stop the Humphreys altogether, and it does not seem to me that the additional headway produced by the tugs not stopping, was sufficient to cause the loss. If the tugs had been stopped, it is likely the result would have been the same. The only thing to be done was, if possible, to turn the ice away from the barge, or the barge from the ice. It will scarcely be contended that there was time enough to do this, from the tug. The ice did not come within reach from her, and, even if she had been loose from the other tugs, she could not have backed down soon enough to do any good. If the captain of the barge had been at his wheel, he might possibly have been able to steer away from the approaching danger; but, unfortunately, he had just at that moment been called to his supper, and was not in a place where he could attempt any such movement. For this, certainly, the tugs are not responsible, and, on the whole, I have been led to the conclusion that the tugs are free from blame under this allegation of fault.

(5) As to not dividing, and, in this connection may be considered the further complaint, presented on the argument, that, when the three tugs were brought together, no one man was placed in command of the whole.

Neither of these complaints is set forth specifically in the libel, and I cannot find that they are at all supported by the evidence. Certainly, some one person should be put in command, and the presumption is that this was done. Not a particle of evidence is found to the contrary. In the absence of such evidence, the law implies that what ought to be done was done.

So far as dividing the tow is concerned no witness has been examined on the subject, and the complaint seems to be based on theory rather than proof. It is certain the tow was not divided; but, in the absence of any testimony showing that it ought to have been done, I cannot hold that the judgment of the experienced men who acted on the facts as they actually ap-

peared at the time, was so clearly wrong as to make it a fault. Towing in sections would not be likely to reduce the speed. True, each tug might in that way more easily control its own movements; but it is far from certain that this, under the circumstances, would have been an equivalent for what must necessarily be lost by the change. The difficulty was in overcoming the obstruction of the ice. By keeping together, the power of all the tugs could be combined, and a longer continuous channel kept open. But, however this may be, there is nothing before me to show that keeping together was a fault.

On the whole, I am of the opinion that a case has not been made out against the tugs, and that the decree below, dismissing the libel, was right.

Case No. 17,356.

WEHL v. WALD.

[17 Blatchf. 342.] [1]

Circuit Court, S. D. New York. Dec. 10, 1879.

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—NOTICE OF APPLICATION—COMMENCEMENT OF SUIT.

1. W., a citizen of New York, brought a suit in a state court of New York against S., a citizen of New York, to recover money alleged to have been due by S. to N., a voluntary assignor to W. By an order of the state court, G., a citizen of Ohio, who claimed the money as assignee in bankruptcy of N., was made defendant in the suit in the place of S., S. having paid the money into court. W. then filed an amended complaint in the suit, in the state court, treating G. as the sole defendant, and asking judgment against him. G. answered the amended complaint. G. then removed the case into this court, without giving notice to the plaintiff of the application for the removal. The petition for removal set forth that "the controversy is between W., as assignee of the estate of N., who was at the commencement of this action, and now is, a citizen of the state of New York, and G., as assignee in bankruptcy of N., who is, and was at the commencement of this action, a citizen of the state of Ohio." On a motion by the plaintiff to remand the cause: *Held*, that the petition alleged the personal citizenship of the parties, and was not defective;

2. That no notice of the application for the removal was necessary, and the state court could, in practice, require it or dispense with it;

[Cited in Stevens v. Richardson, 9 Fed. 194; Chicago v. Hutchinson, 15 Fed. 134; Whelan v. New York, L. E. & W. R. Co., 35 Fed. 865.]

3. That it is not necessary, under sections 2 and 3 of the act of March 3, 1875 (18 Stat. 470), in order to the removal of a suit, that it should appear that the parties were citizens of different states when the suit was commenced;

4. That the suit, as between W. and G., must be regarded as having been commenced when G. was substituted for S., as a defendant.

[Cited in Bailey v. New York Sav. Bank, 2 Fed. 18.]

On motion to remand.

A. J. Dittenhoefer, for plaintiff.

Anderson & Howland, for defendant.

BLATCHFORD, Circuit Judge. The plaintiff, in September, 1878, brought a suit in the superior court of the city of New York, against Mayer Sternberger and Simon Sternberger, to recover from them $4,785.08, gold, with interest thereon from September 9th, 1878, which sum the complaint alleged they had received on or about September 2d, 1878, from the New Orleans National Banking Association, to the use of the plaintiff, the plaintiff being assignee of Gabriel Netter and Albert Netter, by a voluntary assignment for the benefit of creditors, made December 26th, 1877. On the application of the defendants, the Sternbergers, the superior court made an order, on the 25th of January, 1879, on notice to the plaintiff and to the present defendant, ordering that, on the deposit by the Sternbergers with the United States Trust Company, to the credit of the action, of $4,785.08 and interest from September 2d, 1878, being in all $4,916.25, after deducting $10 costs, within five days after the entry of such order, the present defendant be substituted as defendant in the action in the place of the Sternbergers, and that the Sternbergers thereupon be discharged from liability to either the plaintiff or the present defendant. The order also gave leave to the plaintiff to file an amended complaint in place of the original complaint. On the 19th of March, 1879, the superior court, on notice to all parties, modified its former order, so as to direct the deposit by the Sternbergers of $4,785.08 without interest, less $10 costs, and ordered that a deposit of said amount in accordance with the terms of the original order, by the Sternbergers, should be a full compliance therewith, and gave to the plaintiff time, after service of the new order and deposit of the money, to serve an amended complaint. The Sternbergers made the deposit on the 22d of March, 1879.

In April, 1879, the plaintiff put in an amended complaint. It sets forth the fact of the assignment to the plaintiff, the payment of the $4,785.08, gold, to the Sternbergers for the use of the plaintiff, as such assignee, the bringing of the suit in the state court, the two orders of that court, the fact that the Sternbergers had, on the 22d of March, 1879, deposited with the United States Trust Company said sum of $4,785.08, less $10 costs, and then demands judgment against Gustavus H. Wald, as assignee in bankruptcy of Gabriel Netter and Albert Netter and Netter & Co., that he is entitled to said sum of $4,775.08 and interest thereon from March 22d, 1879. The defendant, in May, 1879, put in an answer, in the state court, to said amended complaint.

Thereafter, the defendant presented a petition to the state court for the removal of the suit into this court. The petition sets forth, that the controversy in the suit "is between citizens of different states, that is to say, between the above-named plaintiff, Julius Wehl, as assignee of the estate of Gabriel Netter and Albert Netter, who was at the commencement of this action, and now is,

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

a citizen of the state of New York, and the above-named defendant, Gustavus H. Wald, as assignee in bankruptcy of Gabriel Netter, Albert Netter and Netter & Co., who is, and was at the commencement of this action, a citizen of the state of Ohio." The defendant gave the proper bond, and, on the 14th of June, 1879, the state court, without notice to the plaintiff, made an order declaring that "it is made to appear to the satisfaction of this court, that the above-entitled action is a suit of a civil nature, at law, now pending in this court, and that the controversy therein is between citizens of different states, that is to say, between the above-named plaintiff, who is a citizen of the state of New York, and the above-named defendant, who is a citizen of the state of Ohio, and that the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, and that this court doth accept said petition and bond."

The ground upon which the state court proceeded, in making the order for a change of the party defendant, was, that the present defendant had made a demand upon the Sternbergers for the same indebtedness claimed by the plaintiff; and that the Sternbergers were not in collusion with the present defendant, and were indifferent to the claims of either party, and had no interest in the subject-matter of the controversy, but held the money for the use of the Netters, or their proper legal representatives, and were ready and willing to deposit it in court to abide the event of the action.

The plaintiff now moves that this cause be remanded to the state court. At the time of the commencement of the suit, and at the time the petition for removal was presented, the plaintiff and the Sternbergers were citizens of the state of New York.

The plaintiff contends, that the petition for removal is defective, in that it does not allege the citizenship of the plaintiff and defendant, but only alleges that the plaintiff, as assignee, was and is a citizen of New York, and that the defendant, as assignee, was and is a citizen of Ohio. The case of Amory v. Amory, 95 U. S. 186, is cited. There, the averment in the petition was, "that said plaintiffs, as such executors, are citizens of the state of New York." The court held that the petition was defective, in not stating the personal citizenship of the plaintiffs. It is contended that, in the present case the personal citizenship of the parties is not stated. I think this is not so. The allegation is not that the plaintiff, "as assignee," was and is a citizen, and that the defendant, "as assignee," was and is a citizen, but is, that the controversy is between "the above-named plaintiff, Julius Wehl, as assignee of the estate of Gabriel Netter and Albert Netter, who was at the commencement of this action, and now is, a citizen of the state of New York, and the above-named defendant, Gustavus H. Wald, as assignee in bankruptcy of Gabriel Netter, Albert Netter and Netter & Co., who is, and was at the commencement of this action, a citizen of the state of Ohio." This is an allegation of the personal citizenship of the parties.

It is contended, for the plaintiff, that the removal proceedings were invalid because no notice of the application for removal was given to the plaintiff. The act of congress does not require notice. If, as matter of discretion, a state court can or does require notice in any case of removal, such notice was dispensed with in this case by the state court; and, the matter being one of practice, it is for the state court to regulate its own practice, and this court will not review such a question.

It is also urged, for the plaintiff, that the cause is not removable, under the act of March 3d, 1875 (18 Stat. 470), because the present defendant was not a party to the suit when it was commenced, and because the original defendants, the Sternbergers, were, when the suit was commenced and when the removal proceedings were instituted, citizens of the same state with the plaintiff. I had occasion to consider sections 2 and 3 of that act, in deciding a motion to remand in the case of McLean v. St. Paul & C. Ry. Co. [Case No. 8,892], in this court, and held, that, under those sections, it was not necessary, in order to a removal, that it should appear that the parties were citizens of different states when the suit was commenced. In that case the petition for removal set forth that the plaintiff "is a citizen of the state of New York" and that "the defendant is a citizen of the state of Minnesota." In accordance with that decision, this case was removable although the original parties to the suit were not citizens of different states.

But there is a further ground on which the case was removable. The plaintiff put in, in the state court, an amended complaint, treating the present defendant as the sole defendant in the cause, and as having been substituted as defendant, by the order of the state court, in the place of the Sternbergers. In such amended complaint the plaintiff demands judgment against the present defendant. The suit must be considered as having been commenced against the present defendant when he was brought in as a defendant. For the purposes of a removal by the present defendant, the suit did not exist so long as the Sternbergers were defendants. The petition for removal shows that the present defendant and the plaintiff were citizens of different states when the present defendant became a defendant. The petition being entitled in a suit between the plaintiff and the present defendant, the expression, twice, in the petition, "the commencement of this action," must be held to mean the time when the action first became an action between the plaintiff and the

present defendant. In this view, even if the right of removal in this case depends upon the facts existing as to diversity of citizenship at the commencement of the action sought to be removed, the case was removable. See Healy v. Prevost [Case No. 6,297].

The motion to remand the cause is denied.

[For subsequent proceedings, see 6 Fed. 163.]

Case No. 17,357.

WEIBERG et al. v. The ST. OLOFF.

[2 Pet. Adm. 428.] [1]

District Court, D. Pennsylvania. Nov. 30, 1790.

TREATY STIPULATIONS—JURISDICTION OF FOREIGN CONSULS—DISPUTES BETWEEN MASTER AND CREW — CONTEMPT OF COURT.

[1. The stipulation in the treaty with Sweden that its subjects shall enjoy the same privileges in the ports of the United States as are granted to the most favored nation does not give Swedish consuls the same exclusive jurisdiction to adjust disputes between the masters and sailors on Swedish vessels as is granted the French consuls, by special convention, as to French vessels.]

[2. The master of a foreign vessel absolutely refused to answer a citation issued in a suit by a mariner for wages, and confined the suitor in irons on his return from court, subsequently excusing himself by an allegation that the United States courts had no jurisdiction over disputes between the master and seamen of a Swedish vessel. *Held*, that the master was in contempt.]

[3. Seamen were engaged in the port of Cadiz, a statement being then made to them that they were going to Philadelphia and back to Cadiz, where they would be paid off and discharged. *Held*, that the action of the master, upon their arrival at Philadelphia, in undertaking, without any new agreement, a voyage to St. Andero, in Spain, and back to Philadelphia, justified the sailors in demanding their wages.]

[4. The seamen were treated by the master with uncommon cruelty, and one of them was confined in jail on land six days, and, when taken on board again, was so abused that he was disabled for three days from doing duty. They then made application in court for relief, and were detained in doing so three hours away from the vessel, and on their return they were pinioned and confined, and threatened with a drawn cutlass; and later, while the suit was pending in court, the master had one of libellants loaded with irons and confined. *Held*, that the conduct of the master was so cruel and unwarrantable as to dissolve the contract of employment.]

[Cited in The Jerusalem, Case No. 7,293; Davis v. Leslie, Id. 3,639; Bucker v. Klorkgeter, Id. 2,083; The Elwin Kreper, Id. 1,203; The Belgenland, 114 U. S. 364, 5 Sup. Ct. 864; The Salomoni, 29 Fed. 537.]

On the nineteenth of November, 1790, a libel was filed in this court by Mr. Bankson, one of the proctors of the court, in behalf of Errick Weiberg and Nicholas Casterius, two mariners belonging to the brig St. Oloff, a Swedish vessel under the command of Jonas Holmstedt. The complaint states, that the libellants had entered on board this vessel about the twenty-seventh day of December in the year 1789, at Cadiz, in the kingdom of Spain, on a voyage from thence to Philadelphia and back again to Cadiz; for the wages of five Spanish milled dollars per month. That the captain had, during the voyage, and since her arrival in this port, treated the libellants with uncommon cruelty, insomuch that it was dangerous for them to remain any longer in his employ: that application had been made in their behalf to Mr. Hellsteadt, the Swedish consul, resident in Philadelphia, who refused to grant them any redress. Whereupon, they pray that their wages may be paid, and themselves be discharged from any further continuance on board the said brig. In consequence of this libel, a citation was issued calling upon Jonas Holmstedt and all persons concerned, to appear and make their objections, if any they have, why a decree should not pass according to the prayer of the libellants. On the morning of the twentieth, the court met according to adjournment, when the marshal made return of the citation, certifying that the same had been duly served. The marshal's deputy at the same time informed the court, that he had first waited on Mr. Hellsteadt, the Swedish consul resident here, and informed him that he was going to serve the citation upon Captain Holmstedt, and shewed the copy of the writ; after which he went on board and presented it to the captain, who absolutely refused to receive it, saying, in an angry manner, that he was on Swedish ground: that he then left the citation on the binnacle, and came away.

Soon after this Mr. Hellsteadt the consul came into court, and after making some apology for the captain's behaviour, on account of his not understanding the English language, said, that by the laws of Sweden, the captain is vested with supreme command over his crew, who has a right to punish them according to his own discretion, to any extent, short of murder, or breaking of limbs; and that he neither is, nor can be, answerable to any foreign jurisdiction whatever for the exercise of this power; being accountable to the Swedish courts of judicature alone, on the return of the ship; that it was the captain's duty to refuse obedience to the citation issued from this court, or to do any thing that should seem to acknowledge its jurisdiction in a question between him and any of his crew; and that by the treaty between the United States and the court of Sweden, it is stipulated that the subjects of Sweden shall enjoy the same privileges in the ports of the United States that have been or may be granted to the most favoured nation in amity with them. Inferring, that as by the convention with France, the French consuls in the ports of the United States have an exclusive jurisdiction in the adjustment of disputes between the captains and their mariners, so ought the regulations and discipline on board of Swedish vessels, to be governed by the Swedish laws and customs, without the interference of the courts of the United States.

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

The judge said, that he thought that the citation should have been attended to with more respect. However, he would take the objection to the jurisdiction of the court under advisement, and examine the treaties referred to.

Errick Weiberg one of the libellants, then applied to the judge, suggesting that he was apprehensive of ill-usage if he should remain in the power of the captain. But the judge directed him to continue his duty on board; telling him, that he was under the protection of the court, and believed there was no danger of the captain's using him ill.

As yet no process had issued, except the citation; but as the jurisdiction of the court had been thus expressly denied, the proctor for the libellants moved on the twenty-second to amend his libel, and prayed that process might be awarded and issued against the brig St. Oloff, her tackle, &c. to abide the decree of this court in the cause aforesaid, which was ordered; an amended libel brought forward, and filed, and a writ of attachment issued accordingly.

On the twenty-third, the court being met, the proctor for the libellants complained that, notwithstanding what had been said on Saturday, the captain had seized upon Errick Weiberg, as soon as he came on board from attending on the court, had him put in heavy irons and confined him in the hold of the vessel. Weiberg was then examined, and testified to the cruel treatment he had received, and the irons and chains were brought in and laid before the judge.

On the twenty-fourth the Rev. Mr. Collin, the Swedish missionary resident in Philadelphia, appeared in court, and presented a letter signed by Jonas Holmstedt, in which he says, that "although he could not acknowledge the jurisdiction of the court in the cause brought before it by his seamen, as this would be repugnant to the allegiance he owed to the king of Sweden, yet no affront was intended to the court." At the same time another letter was handed to the judge, signed "Charles Hellsteadt, Swedish Consul," in which he says, that he is responsible in a public line to the king of Sweden; that he had already remonstrated before the court for interfering in the dispute between Captain Holmstedt and two of his seamen. And that he by this letter, protested against any decision that should be made for or against the parties, as the complaint ought to have been made to him, as consul, agreeably to the treaty now in force, between Sweden and North America.

The judge considered the cruel imprisonment of the libellant, whilst suing for justice, and under the protection of the law, as a manifest contempt of the court. He ordered all proceedings respecting the libel to be laid aside, until this contempt should be examined into, and the rights of humanity vindicated, which he said were paramount to all treaties.

The court was thereupon adjourned for an hour to meet at the state house, the court having hitherto sat at the admiralty office. The attorney of the United States for the district of Pennsylvania, was called upon for his opinion, who attended, together with several gentlemen of the bar, and also some Swedish gentlemen, and others who had heard of the matter. After examining the testimony with respect to Captain Holmstedt's conduct, Mr. Lewis, Mr. Bankson, and Mr. Sergeant, united in opinion, that the treaty with Sweden, as to the point in question, could not be so explained as to give the captain the exclusive jurisdiction he claims. That the words "the most favoured nation," used in the treaty with Sweden, are the words used in all the treaties between the United States and foreign nations in amity with them, and were never interpreted to found a jurisdiction exclusive of, or inconsistent with, the laws of the United States in our own ports. That such a right was never pretended in constructions of the general treaty with France; but that for vesting such a jurisdiction, a special convention was thought necessary, the terms of which have been specifically designated, and not left to inferences, or general construction. That as the captain's conduct, in the instance before the court, could not be supported by his exposition of the treaty, neither could he be justified in refusing obedience to the process of the court. And that this, together with the cruel treatment of the libellant, whilst under the protection of the court, was, and ought to be, deemed a contempt. Adding, however, that some allowance might reasonably be made, in alleviation, for the captain's being unacquainted with the language, and ignorant of the laws and customs of our country.

The judge having attended to these arguments, observed, that the admitting a jurisdiction exclusive of the laws of the United States, was a matter of too serious import to be rested on implication alone. That the words referred to in the treaty with Sweden could not by any construction be supposed to embrace all the objects comprehended in the special convention made with France. That let the question of jurisdiction be what it may, there could be no necessity for the contempt, which Captain Holmstedt had thrown upon the court, or of the violence with which the mariner had been treated. That a citation was the most moderate and unexceptionable process known, for bringing a matter before the court; after which, any plea to the jurisdiction might have been discussed, and would have been considered; but that his unprecedented conduct violated not only the rules of law, but even of common decorum. That he could not consistently with his duty, but consider the absolute refusal of answering to the citation, and the subsequent treatment of the libellant, whilst under the protection of the court, as a contempt, which ought not to pass unnoticed. That as to the amount of any fine that might be laid on this occasion, he was willing to give the apology that had been made its full weight, but that he was

firm in asserting the rights and authority of this court in the matter now before it.

Judgment. "That Jonas Holmstedt has been guilty of a contempt, in refusing to obey the process of the court, and in confining in irons a suitor whilst under the protection of the laws, and applying for the justice of the country. For which offence I award that he pay a fine of twenty dollars, with the costs of prosecution, and stand committed until this sentence is complied with."

On the twenty-fifth, the court met on the business of the libel. Mr. Collin, the Swedish minister, presented a letter to the judge, signed "Jonas Holmstedt," in which he says, that he is willing to answer any questions respecting the prosecution of this libel that may be asked, but cannot enter into any defence of his cause, as this would be a violation of the laws of Sweden, which he is, on his allegiance bound to obey. And then quotes a passage from the Swedish maritime law, directing that "if any disputes on the sea or on shore should arise between the captain and his crew, the parties are not permitted to sue for redress in a place subject to a foreign government," &c. &c. But these letters were not noticed, inasmuch as they uniformly expressed a denial of the jurisdiction of the court.

Mr. Soderstrom, the Swedish consul, resident in Boston, being here, addressed the court and said:—That he was very sorry he had not sooner heard of this disagreeable business, which he would have endeavoured to prevent by all the means in his power. That he could not justify the conduct of Captain Holmstedt with respect to contempt, but as judgment had already past, the error was irretrievable: as to the libel now depending, he prayed the judge to indulge him with a little time whilst he endeavoured to accommodate matters between the parties, by proposing that the libellants should be discharged from the brig St. Oloff, and put on board some other vessel bound for Sweden, and that the wages due to them should be paid over to him (Mr. Soderstrom), in trust for the mariners, until the dispute might be determined in Sweden by a court of that country. The judge approving of this proposal, the court adjourned till further notice.

On the twenty-seventh, Mr. Bankson received a letter from the Rev. Mr. Collin, informing that the proposed accommodation had proved unsuccessful, as consul Hellsteadt, "after the unlimited protest he had before made, could not permit the seamen to be received on board of any other vessel."

The cause then proceeded in course; the witnesses were examined, and the testimony reduced to writing.

On the twenty-ninth, a further progress was made in the cause, and some points of form adjusted.

BY THE COURT. I have duly considered the libel filed in this cause, and have heard and carefully attended to the testimony of the witnesses produced respecting the same; and I find, that the libellants entered on board the brig St. Oloff, Jonas Holmstedt, master, in December, 1789, in the port of Cadiz, in the kingdom of Spain; that no articles or written contract whatever were presented to the libellants by the captain, or any other person, to engage them in the service of this vessel, or for any designated voyage, except that they were told by the captain that they were going to Philadelphia and back again to Cadiz, where they should be paid off, at the rate of five dollars per month, and there discharged. That after their arrival at Philadelphia, the captain, without any new agreement whatever, undertook another voyage to St. Andero in Spain and back again to the port of Philadelphia, with the libellants on board, where the vessel now is. It also appears that Captain Holmstedt had treated the libellants with uncommon severity and cruelty, especially Weiberg, whom he had confined in jail six days in Philadelphia, before their sailing for St. Andero, and as soon as he was taken on board again, beat him and otherwise abused him, so that he lay three days disabled from doing any duty. That after their return to this port the last time, the libellants made application to a proctor of this court, to sue for the justice of the country in their behalf. That in prosecuting this business, they had been absent from the brig about three hours, and on their return to the vessel, the captain caused them both to be pinioned and confined; threatening them with a drawn cutlass and denouncing vengeance against them. And that afterwards, whilst this cause was before the court and during an adjournment thereof, the captain caused Weiberg, one of the libellants, to be laden with irons and chains, and confined on board the brig.

Under these circumstances, I am of opinion, first, that the deviation to the port of St. Andero in Spain, was such an alteration of the voyage, as might justify the mariner in demanding his wages. And secondly, that Captain Holmstedt's conduct with regard to the libellants, hath been so cruel and unwarrantable by the maritime law, as would of itself have dissolved the contract—the rights of humanity being superior to the specific laws and customs of any nation:

Whereupon, I adjudge and decree, that Errick Weiberg and Nicholas Casterius be discharged from any further services on board the brig St. Oloff; and that they have and receive the sum of eighty-six dollars and twenty cents, in full of the wages respectively due to them. That is to say, to Errick Weiberg the sum of fifty-three dollars and eighty-six and two-thirds cents, and to Nicholas Casterius the sum of thirty-two dollars and thirty-three and a third cents. And I do further decree, that the brig St. Oloff, with her tackle, apparel and furniture, or such parts thereof as may be necessary to satisfy this judgment, together with the charges and costs of suit, be

sold by the marshal of this district, according to law and custom, for the purposes aforesaid.

In the case of Willendson v. The Försöket [Case No. 17,682], the practice of the court as to foreign seamen, is fully explained.

Case No. 17,358.

WEIDE v. GERMANIA INS. CO.

[1 Dill. 441.] [1]

Circuit Court, D. Minnesota. 1870.

FIRE INSURANCE—REFUSAL TO ANSWER—FRAUD.

1. Under certain provisions of a fire insurance policy, the refusal of the assured to submit to an examination on oath, or to answer material questions respecting the loss, was considered not to work a forfeiture of the policy, but only not to cause the loss not to be payable until this was done; and such refusal should be pleaded in abatement, and separately from defences in bar.

2. False statements on oath by the assured, with intent to deceive the company, relative to the terms of settlement with other companies having risks on the same property, are material, and will defeat any right on the part of the assured to recover.

3. If the assured, after the loss, with intent to deceive the company, exhibits to it books of accounts containing false entries of a material nature, this is a fraud, and will defeat all right to recover upon the policy.

Action on fire insurance policy. The policy contained the usual condition as to the duty of the assured to give notice of the fire, and to render a particular account of the loss, signed and sworn to by the assured, and to produce a certificate of a magistrate as to the loss, and his opinion as to its bona fides. It was also provided therein that "the assured shall, if required, submit to an examination, under oath, by the company, and produce his books of accounts, vouchers, copies of bills and invoices, and exhibit the same for examination." The policy also provided for an appraisement of the property insured in case of loss by fire. Then followed clauses in the policy in the following words, viz: "And until such proofs, declarations, and certificates are produced, and examination and appraisal permitted, the loss shall not be payable." "All fraud or attempted fraud, or false swearing on the part of the assured, shall cause a forfeiture of all claim under the policy."

Allis, Gilfillan & Williams, for plaintiff.

Storrs, Lamprey, Paul & Brisbin, for defendant.

PER CURIAM (MILLER, Circuit Justice, and DILLON, Circuit Judge, concurring). It was held:

1. Under the above provisions of the policy, that a refusal on the part of the assured, to submit to an examination on oath, or his refusal, on such an examination, to answer material questions respecting the loss, would not have the effect to cause a "forfeiture," by the assured, of all claim under the policy, but simply to cause the "loss not to be payable," until such examination is submitted to, or such answer given.

2. That a defence under the clause that the assured had thus refused to be examined, or thus to answer questions, is in the nature of a plea in abatement, showing no present cause of action, and should be pleaded separately from the defence of "fraud" or "false swearing" which, if established, is a complete bar to a recovery, at any time, on the policy.

3. Under a plea setting up the defence of "false swearing:" held by the court that false swearing by the assured, either in the preliminary proofs of loss, or in the examination on oath as required by the policy, in a matter material to the rights of the company, with intent to mislead the company, would work a forfeiture of the policy; and false statements by the assured, on such examination, with intent to deceive and mislead the company, relative to the terms of settlement by the assured with other companies which had insured the same property, are material, and will defeat any right to recover under the policy.

4. Under the defence of "fraud," properly pleaded: held that if the assured, after the fire, with intent to deceive the company, exhibited to it books of accounts, in which there were false entries as to the value and amount of the goods insured and claimed to have been burned, this would be a fraud, or an attempt at fraud within the meaning of the policy, and would forfeit all rights thereunder.

NOTE. So in Missouri and Pennsylvania, it is held that the false statement, to work a forfeiture of all claim under the policy, must be willfully made with respect to a material matter, and with intent to deceive the insurer. Marion v. Great Republic Ins. Co., 35 Mo. 148; Franklin Fire Ins. Co. v. Updegraff, 43 Pa. St. 350. Questions of evidence ruled by the supreme court in cases connected with this loss. Insurance Co. v. Weide, 9 Wall. [76 U. S.] 677, 11 Wall. [78 U. S.] 438 [and 14 Wall. (81 U. S.) 375].

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

WEIGHTMAN (COOKE v.). See Case No. 3,180.

Case No. 17,359.

WEIGHTMAN v. QUEEN.

[2 Cranch, C. C. 172.] [1]

Circuit Court, District of Columbia. June Term, 1819.

SET-OFF—ASSIGNMENT OF OPEN ACCOUNT.

After the assignment of a claim upon an open account, the debtor cannot, in an action brought for the use of the assignee, set off a claim against the assignor, arising after notice of the assignment.

This suit was brought in the name of John Weightman, for the use of Henry Weightman, upon an open account assigned to the latter.

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

The defendant offered to set off a claim against John Weightman, arising since the defendant had notice of the assignment.

Mr. Lear, for plaintiff.
Mr. Jones, for defendant.

THE COURT decided that the defendant could not set off claims accruing after the notice.

WEIGHTMAN (ZANTZINGER v.). See Case No. 18,202.

Case No. 17,360.

WEIHENMYER et al. v. ARTHUR.

[22 Int. Rev. Rec. 368.]

Circuit Court, S. D. New York. Nov. 3, 1876.

CUSTOMS DUTIES—SLIPPER PATENTS—EMBROIDERY—BEAD ORNAMENTS—MANUFACTURES OF PAPER—PRINTED MATTER.

[1. Slipper patterns made of cotton canvas embroidered with worsted, and designed to be filled with more embroideries, are dutiable as embroidered manufactures of cotton, and not as manufactures of worsted.]

[2. Slipper cases consisting of cotton canvas embroidered with beads are dutiable as embroidered manufactures of cotton, and not as bead ornaments.]

[3. Perforated cardboard, on which are printed sentences or mottoes to be filled in with embroidery, are manufactures of paper, and not printed matter.]

[4. Cardboard, on which is imprinted in colors an ornamental design or patent for the purpose of showing the method of embroidering the patent upon canvas, is a manufacture of paper.]

[5. Pattern books consisting of sheets of paper stitched or folded together, upon which designs or patterns are printed in colors, are dutiable as printed matter.]

[This was an action by A. Weihenmyer and others against Chester A. Arthur, collector of the port of New York, to recover excessive duties.]

Hartley & Coleman, for plaintiffs.
H. E. Tremain, Asst. U. S. Dist. Atty., for defendant.

SHIPMAN, District Judge. The court charges the jury as follows: The plaintiffs imported into the port of New York in the year 1874 three distinct classes of goods, which are mentioned in this bill of particulars, and upon each of which they seek to recover an alleged excess of duties which were paid to the collector under protest. The prerequisites which are required by the statute as necessary to sustain a suit against the collector have been duly complied with by the plaintiffs. The first class of goods is that commonly known as slipper patterns. They are made of cotton canvas, embroidered with the needle with worsted, or with worsted and silk, and are designed to be filled with more or less additional embroidery, and to be worked or manufactured into gentlemen's slippers. The only witness who testifies on the subject says that the articles come under the general commercial term of embroideries, and that the term also includes articles of cotton, linen, or silk for ladies' and children's wear. The specific name of this article is slipper pattern. The plaintiffs contend that they are properly dutiable under the following clause of the Revised Statutes, approved June 22, 1874: "Embroidery—manufactures of cotton, linen, or silk, if embroidered or tamboured in the loom, or otherwise by machinery, or with the needle, or other process, not otherwise provided for, 35 per cent. ad valorem." The collector claims that the goods have been properly assessed under the clause of the same statute which provides a duty upon "flannels, blankets, hats of wool, knit goods, balmorals, woollen and worsted yarns, and all manufactures of every description, composed wholly or in part of worsted, the hair of the alpaca goat, or other like animals, except such as are composed in part of wool, not otherwise provided for." It is not necessary to consider whether the embroidery clause, which was originally enacted March 2, 1861, was or was not in force at the time of the revision, because section 5595 of the Revised Statutes provides as follows: "The foregoing seventy-nine titles embrace the statutes of the United States, general and permanent in their nature, in force on the first day of December, 1873, as revised and consolidated by commissioners appointed under an act of congress, and the same shall be designated and cited as the Revised Statutes of the United States." It is manifest that the embroidery clause was, at the time of the importation, a part of the tariff laws of the country. Neither is it necessary for me to determine whether the term "manufactures of every description, composed wholly or in part of worsted," is confined to a textile fabric of which worsted is a portion, and of the same class as the articles specifically mentioned in the worsted section, because I assume that, in the absence of a clause of the statute more specifically providing for articles of cotton, embroidered with worsted by the needle, such articles would be embraced in the worsted sections. Assuming therefore that, unless otherwise provided for, these articles should be properly classified as worsted goods, it seems to me that a more specific and definite classification has been made of these goods, in the embroidery clause, than in the worsted section. They are manufactures of cotton, and are embroidered with the needle, and do come within the general commercial term of embroidery, and are in ordinary language embroidered goods. The embroidery is their distinctive peculiarity. I am therefore of opinion that congress, after providing generally for worsted articles, intended to embrace manufactures of cotton, linen, or silk, if embroidered with any material save metal, in another class, and provides still another classification for articles embroidered with metal.

The second class of goods which was imported, consisted of slipper cases, which are

cotton canvas embroidered with beads, and intended to be attached to a back of ornamental wood, and then to be used as an ornamental piece of furniture and to hold slippers. The plaintiffs claim that this article comes within the embroidery clause, which has already been referred to. The collector insists that it is properly classified under the clause "all beads and bead ornaments except amber." The article is not, properly speaking, a bead ornament. It is to be made into an ornamental article for the dressing room or chamber, but in the condition in which it is imported, it cannot, with much precision in the use of language, be styled beads, or a bead ornament.

The third class is divisible into at least two subdivisions. The first class is perforated card board upon which are printed sentences, or mottoes, the letters of the sentences to be filled in with embroidery, and then to be used as ornaments for a room. The plaintiffs claim that these articles are "printed matter;" the defendant contends that they are "manufactures of paper." In my opinion it cannot be called "printed matter." It is manufactured for further ornamentation and use. The printed portion is designed merely to assist the purchaser in the subsequent ornamentation of the article, and the article was properly assessed by the collector.

One of the other two articles which remain for consideration was cardboard, upon which was imprinted in colors some ornamental design or pattern. The object was to show the purchaser how the pattern was to be embroidered upon canvas, and the various hues of worsted which were to be used in the embroidery. The other subdivision is what are called "pattern books," which are small sheets of paper stitched or folded together, upon which sheets are printed designs or patterns, to be used for the same purpose as the cardboard designs. In regard to these two subdivisions which I have last mentioned, the decision of the secretary of the treasury of September 17th, 1874, seems to me just and reasonable, from which I quote as follows: . . . "The distinction between 'manufactures of paper' and engravings or articles assimilated to engravings, prints, or articles assimilated to prints, printed matter or articles assimilated to printed matter, is somewhat difficult, but it is the intention of the department to construe such classification liberally, and not to impose the duty prescribed for manufactures of paper on articles other than those which constitute a change in the form of the paper. Printing on it with type, or by impression, or design, through the use of plates, does not effect such change. Where several sheets of paper are pressed together for embossing, such as heavy cards or other like articles, the rate applied to manufactures of paper should be imposed. Labels, ordinarily known and designated as printed labels, although prepared for affixing to any surface by some adhesive substance, are properly to be classed as printed matter." Adopting this distinction, which is as good as any which can be made in my opinion, the duty upon the cardboard was properly assessed. The pattern books being simply paper, printed upon, from colored designs or plates, are printed matter. Let there be a verdict for plaintiffs upon these classes of articles, viz.: the slipper patterns, the bead slipper cases, and the patterns and books.

Case No. 17,361.

In re WEIKERT et al.

[3 N. B. R. 27 (Quarto, 5).] [1]

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

ACTS OF BANKRUPTCY—SUSPENDING PAYMENT OF COMMERCIAL PAPER—PARTNERSHIP.

Firm dissolved, with written agreement, that one member should assume and pay its obligations, including outstanding commercial paper. Payment thereof was suspended, and was not resumed in fourteen days. *Held*, that such suspension was an act of bankruptcy, and the firm must be adjudicated bankrupts. It is unnecessary to allege or prove fraud in such suspension, where payment is not resumed within a period of fourteen days. In re Wells [Case No. 17,387].

[Cited in Baldwin v. Wilder, Case No. 806; Re Hercules Mut. Life Assur. Co., Id. 6,402.]

[See Re Ballard, Case No. 816.]

[Cited in Marble v. Janesville Manuf'g Co., 163 Mass. 180, 39 N. E. 1002.]

This was an involuntary proceeding—the petition alleging various acts of bankruptcy, and among others, that on the 17th of May, 1869, the respondents, being merchants, had fraudulently suspended payment of their commercial paper, and had not resumed payment within a period of fourteen days. On the return day, the respondent John Weikert did not file any answer. The respondent Frank M. Parker appeared and filed an answer, alleging that in April, 1869, the partnership existing between him and Weikert had been dissolved by an agreement in writing, whereby Weikert had assumed all the liabilities of the firm; also denying certain other allegations of the petition, but not denying that the commercial paper of the firm had been due and unpaid for more than fourteen days.

Counsel for the creditors moved for an adjudication upon the petition and answer as filed, basing his application upon the undenied allegation of the suspension of commercial paper; and cited, in support of his motion, In re Wells [Case No. 17,387]; In re Cowles [Id. 3,297].

Counsel for the debtors contended that the partnership having been dissolved before the suspension took place, that it could not be alleged and proven as an act of bankruptcy against the retiring partner, and that though it was admitted that commercial paper of the late firm was past due, yet the present manager of the business of the late firm was solvent, as he claimed, and could and ought to pay; that the fraud in the suspension was de-

[1] [Reprinted by permission.]

nied, and that the suspension was only prima facie evidence of fraud, which ought to be inquired into.

Counsel for creditors replied that any dissolution of the partnership could not affect creditors except by their consent, and that it was proper to commence this proceeding against both parties, to reach that which was partnership property at least, when the debt was contracted; that in the argument of counsel a fraud was proven in the suspension, if it were necessary to prove any fraud, for if the debtors were solvent, and did not pay their commercial paper when due, that was fraud in itself; and if they were unable to pay, then it was their duty to go into voluntary bankruptcy; and cited Judge Blatchford's opinion in the case of In re Lowenstein [Case No. 8,574].

Geo. Gorham, for creditors.
F. E. Cornwell, for debtors.

HALL, District Judge, said that he should adhere to his decision, made early in the administration of the bankrupt law, in the Case of Wells [Case No. 17,387], cited by creditor's counsel, and that he did not consider it necessary to allege or prove any fraud in the suspension, if it had been continued fourteen days. That the fact that this partnership had been dissolved, could make no difference with the liability of the retired partner, who could have saved the odium of bankruptcy by paying the indebtedness, which was the foundation of this case, and compelling his late partner to reimburse him, under the agreement of dissolution.

The adjudication was granted.

WEILL (MANHATTAN FIRE INS. CO. v.). See Case No. 9,022.

Case No. 17,362.

Ex parte WEIMER et al.

[8 Biss. 321; 7 Reporter, 38; 11 Chi. Leg. News, 65.] [1]

Circuit Court, E. D. Wisconsin. Nov., 1878.

EFFECT OF PARDON — OTHER OFFENSES — FORFEITURES UNDER REVENUE LAWS.

1. The recital of a specific, distinct offense in a pardon by the president limits its operation to that offense, and such pardon does not embrace any other offense for which separate penalties and punishments are prescribed.

2. A pardon from sentence for conspiracy to defraud the revenue, does not entitle the defendant to demand cancellation of a judgment of forfeiture for fraud upon the revenue.

Murphey & Goodwin, for petitioners.
J. C. McKenney, for the United States.

[Before HARLAN, Circuit Justice, and DYER, District Judge.]

DYER, District Judge. On the 23d day of June, 1875, an information was filed in the district court against certain property of the petitioner Weimer, situated in his rectifying house in Milwaukee, and the property was seized for condemnation. The causes of forfeiture as alleged in the information arose from violations of various sections of the Revised Statutes relating to such frauds upon the revenue as distinctly involve forfeitures of property.

In this proceeding, Weimer appeared as claimant and filed an answer to the information. After the seizure, he gave bond to answer for the property, to the extent of its appraised value, which was $1,346.25, and subsequently such proceedings were had in the forfeiture case, that the property was condemned as forfeited, and on the 2d day of March, 1876, judgment was entered against Weimer, and the stipulators in the bond for the amount of the bond, namely, $1,346.25 and costs, which judgment remains unsatisfied of record.

On the 20th day of July, 1875, Weimer was indicted with one John S. Taft, a revenue gauger, under section 5440 of the Revised Statutes, for a conspiracy to defraud the United States of the tax on distilled spirits then being in the rectifying house of Weimer, upon which the tax had not been paid, which conspiracy was alleged to have been formed and carried into effect in April, 1875. To this indictment there was a plea of not guilty. Upon trial, the defendants in the indictment were convicted, and Weimer was sentenced to pay a fine, and to imprisonment. While suffering such imprisonment pursuant to the sentence, he was pardoned by the president.

The case of the petitioner, Reynolds, was this: On the 1st day of May, 1875, certain property situated in the rectifying house of the petitioner and his partner, Burbach, was seized as forfeited to the United States. Subsequently, an information was filed against the property, in the district court, the alleged causes of forfeiture set forth in the information, being substantially identical with those recited in the information in the case of Weimer. Burbach & Reynolds appeared in the proceeding as claimants of the property, gave bond for its appraised value and filed an answer. Subsequently, decree of forfeiture and condemnation was rendered, and judgment against Reynolds and the stipulators in the bond was entered for $2,944.92 and costs, which judgment is unsatisfied of record. On the 20th day of July, 1875, Reynolds was indicted with Burbach and Taft for conspiracy, under section 5440. Upon trial of the defendants in the indictment, there was a conviction, and Reynolds was sentenced to pay a fine and to imprisonment. While the sentence was being executed, he was pardoned by the president, and discharged from further imprisonment. The parties, Weimer and Reyn-

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 7 Reporter, 38, contains only a partial report.]

olds, now present their separate petitions setting forth the foregoing facts, and ask the court, because of the pardons granted to them in the criminal cases, to direct that satisfaction of the judgments in the forfeiture cases be entered.

Counsel for petitioners contend that as a consequence of the pardons, and by operation of law, the judgments in question became extinguished, and that their cancellation of record should be ordered by the court. Their argument is, that the pardons extend to and remit to the petitioners all penalties and all forfeitures of property which are denounced by any law of the United States, as a consequence of any crime or misdemeanor committed by the petitioners, at any time anterior to the date of the pardon, unless saved by exception appearing on the face of the pardon itself.

I cannot concur with counsel in giving to the pardons in these cases so broad a construction. The pardons recite the offense of which petitioners were convicted, namely, conspiracy to defraud the United States of the tax on distilled spirits, which recital is followed by a declaration of pardon. Now, though it be true that a full pardon is granted in each case, it is a pardon only of the offense specified in the preceding part of the instrument. The offense of conspiracy to defraud the United States, is entirely distinct from every other offense under the revenue laws, for which specific penalties and punishments are prescribed. The offense of conspiracy may be pardoned, and yet the offender may be liable to have his property forfeited because of other violations of law which do not constitute a conspiracy. Counsel for petitioners construe the pardons as if they had, in terms, pardoned all offenses, against the laws of the United States, which have any reference to the statutes relating to internal revenue. If such a general pardon could be sustained, it is clear that none such has been granted in these cases.

Concerning the general effect and operation of a pardon, there need be no dispute. The language of the opinion in Ex parte Garland, 4 Wall. [71 U. S.] 380, is clear and full upon that question: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction, from attaching; if granted after conviction it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

It is to be borne in mind, however, that the offense here spoken of, is the precise offense of which the offender is pardoned, and none other. The punishment, penalties and disabilities referred to, are such as result from the identical offense of which the person is, in the eye of the law, by virtue of the pardon, made innocent. The restoration to former rights is commensurate only with the scope of the pardon, as it relates to the offense in the particular case.

Now, undoubtedly, the president may remit forfeitures and penalties. Judge Story was of opinion that the power of pardon was so general and unqualified that the power to remit fines, penalties and forfeitures was included in it. Story, Const. § 1504, and note. See, also, Osborn v. U. S., 91 U. S. 474. But in the present cases the president did not in terms, nor as I think, in legal effect, make such a remission. He only pardoned a distinct offense, specifically described in the instrument of pardon, and such a pardon cannot embrace any other offense for which separate penalties and punishments are prescribed.

Several cases decided by the supreme court of the United States, bearing upon the effect of a pardon, are cited upon the brief of counsel, as sustaining the present applications. In the Case of Garland, 4 Wall. [71 U. S.] 333, it was held that the pardon received by the petitioner restored him to his civil rights, including a previously acquired right to appear as an attorney and counselor in the federal courts. But the pardon, in terms, was "for all offenses by him committed, arising from participation, direct or implied, in the Rebellion;" and it was held that the effect of such a pardon was to relieve him from all penalties and disabilities attached to the offense of treason. So, in the Case of Armstrong's Foundry, 6 Wall. [73 U. S.] 766, in which it was held that the pardon granted to the party, relieved him from forfeiture of property employed in aid of the Rebellion, the pardon was of all offenses, and the consent of the owner to such use of his property was an offense, the penalty for which was forfeiture.

Again, in Osborn v. U. S., 91 U. S. 474, in which it was held, that the effect of the pardon in that case, was to restore to its recipient all rights of property lost by the offense pardoned, unless the property had, by judicial process, become vested in other persons, subject to such exceptions as were prescribed by the pardon itself, the pardon was as comprehensive in terms as in the cases previously noticed, and the decision is placed on the ground that the pardon covered the identical offenses for which a forfeiture of property had been decreed. So, again, in Knote v. U. S., 95 U. S. 149, the pardon was general, with an express restoration of all rights under the constitution and laws.

It is clear that these adjudications do not sustain the construction placed by counsel upon the pardon in the cases at bar. The principle established by these decisions, is, simply, that a pardon releases an offender from the consequences of the offense pardoned, and from the disabilities imposed by that offense. In other words, the penalties and forfeitures from which the person is released by a pardon, are

such as accrue from the particular offense or offenses embraced in the instrument of pardon. To affirm the doctrine urged in behalf of the present petitioners, is to say that though a pardon in terms and evident intent, only relieves its recipient from punishment for the offense therein named, nevertheless, in legal effect, it grants a release from the consequences of all offenses committed anterior to the date of the pardon, whatever may have been their nature, and however foreign to that which is expressed in the instrument of pardon. Such a view of the scope and effect of the pardons in the cases under consideration, is not maintainable. The application of petitioners is denied.

As to the effect of a pardon, see, also, U. S. v. Cullerton [Case No. 14,899].

Case No. 17,363.

WEIMER v. SLOANE.

[6 McLean, 259;[1] 4 Am. Law Reg. 174.]

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

ESCAPE OF SLAVES—AIDING AND ABETTING—ARRESTS BY AGENTS — COUNSEL FOR FUGITIVE SLAVES.

1. To sustain the allegations of the declaration in this suit, which is for aiding or abetting in the escape of slaves, under the fugitive slave act of 1850, it must appear that the alleged fugitives were slaves who had escaped from service, and had been arrested by the owner or his agent; and that the defendant, with knowledge of these facts, aided and abetted their escape.

[Cited in U. S. v. Buck, Case No. 14,680.]

[Cited in U. S. v. Weld, 1 Kan. 597.]

2. The statute authorizes an arrest, either by the owner or his agent, with or without warrant; but, when made by an agent, he must be authorized by a written power of attorney, executed and authenticated as required by the statute.

3. To make the defendant liable, it must appear that he had notice or knowledge that the slaves were fugitives, and were, at the time of the alleged unlawful interference, in custody under an arrest; but this notice or knowledge may be inferred from circumstances.

4. The test of the legality of an arrest is the law, and not the opinion of the defendant.

5. Any words or actions tending to effect an escape, and which lead to that result, are sufficient to implicate the defendant in the charge of aiding or abetting the escape.

6. An intention to effect an escape must appear, but such intention may be inferred from the facts. Every one is presumed to have intended the result necessarily and legitimately flowing from his acts.

7. A party acting as counsel for a fugitive slave, is protected from the consequences of his acts, so far only as they are within the proper limits of his professional duty.

[This was an action by Lewis F. Weimer against Rush R. Sloane to recover the value of certain slaves.]

Coffin & Stanbery, for plaintiff.

Vinton & Hunter, for defendant.

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

LEAVITT, District Judge (charging jury). This action is founded on the seventh section of the act of congress, of the 18th of September, 1850 [9 Stat. 462], known as the "Fugitive Slave Act," and is brought to recover the value of three persons named in the declaration, who, it is alleged, were the slaves of the plaintiff, owing him labor or service as such, in the state of Kentucky, and who escaped from him into the state of Ohio. There are several counts in the declaration, but as a verdict is insisted on, upon the third count only, charging the defendant with having aided, assisted, or abetted, in the escape of the alleged fugitives, the inquiries of the jury will be limited to that charge.

To sustain this charge, it must appear to the satisfaction of the jury, that the persons named in the declaration, at the time of the alleged illegal interference by the defendant, were the slaves of the plaintiff, owing him labor or service in the state of Kentucky; that they escaped into the state of Ohio, and had been arrested either by the owner, or his agent or attorney; and that the defendant, with knowledge that they were slaves, and had been arrested as fugitives, unlawfully aided, abetted, or assisted them to escape.

As it is not controverted, that the alleged fugitives were the slaves of the plaintiff in Kentucky, and that they escaped into Ohio, it is not necessary to advert specially to the evidence proving these facts. I will briefly notice the testimony touching the nature and extent of the defendant's interference with the rights of the plaintiff, before I advert to the legal principles involved in the case.

The first witness introduced by the plaintiff is James P. Patton, who says, that being at Sandusky city, in pursuit of some slaves who had escaped from his service, he received at that place a power of attorney from the plaintiff, authorizing him to arrest the slaves named in the declaration; that on the 20th of October, 1852, the slaves arrived in the cars, and were seen by the witness at the depot of the Mansfield Railroad. They were conducted by a colored man, from the depot to the steamboat Arrow, then lying at the wharf of the city, and were put on board. Witness called on Rice, a police officer of the city, and one Hedges and another person to assist in the arrest of the negroes. They went on board the steamboat, and the witness Patton saw and recognized them. He enquired of them, if they did not wish to return to Kentucky. George, one of the negroes, replied, that he did not care about going back. They were then arrested, it being about half after seven in the evening of the 20th of October, and, followed by a large crowd, proceeded to the mayor's office. The negroes were taken into the office, and took their seats on a settee on the south side of the room. The Mayor, Mr. Follett, was in the office; the room was crowded, and there was a good deal of excitement. Witness stated to the people present that the negroes were slaves, and informed the mayor

that he wanted a trial, to prove property. The power of attorney under which he made the arrest, with some others in his possession, had been laid upon the table at which the mayor was writing, by Rice. After some time, the mayor said he doubted whether he had any authority to try the case, and refused to do so, at the same time referring witness to a magistrate. Witness said he was determined to hold the negroes. The defendant stepped out of the crowd, and said, who is it that detains these colored people? Witness replied that he did. Defendant then enquired if Marshal Rice was in the room, and Rice replied that he was. Defendant asked Rice if he had a warrant to arrest the negroes, who said he had no warrant. Defendant then asked witness if he had a warrant, and was informed that he had none, and that he had arrested the negroes without any warrant, and brought them before proper authority, etc. Defendant said to witness, you should have had a warrant, and could not arrest without a warrant. Witness replied that he could arrest without a warrant, and intended to hold the negroes, and would hold every one responsible, if they were taken from him. Defendant smiled at this. Some conversation then followed about the value of the slaves, and witness said to defendant, he would hold him individually responsible, if he interfered with them, and that he might expect to pay $1,000 for each of the negroes, if he caused them to be taken out of his custody. Some conversation then took place, as to the ability of the defendant to pay for the slaves. Witness said he would have to pay for them if he interfered in their rescue, as he would certainly be sued. Defendant then took off his hat, and waved it over his head and said, Colored friends, arise, and take those colored friends of yours out of the room, with a row, or a rush. Witness is not quite certain which of these words were used. The crowd, of whom some twenty were colored men, some of them armed with clubs, rushed towards the slaves, and forced them out of the room, with a rush. Witness has never seen them since, and they have never been retaken. On his cross-examination, the witness stated that the power of attorney from the plaintiff was delivered to him at Sandusky, about a week before the arrest, and that before going to the mayor's office, he had handed that, with others, to Rice. At the office, the mayor requested witness to select the power identifying the negroes; he selected it, with another, and handed them to the mayor. Witness was armed with a revolver. Says he did not know till next morning, that defendant was a lawyer.

W. W. Hedges says, he was at Sandusky city in pursuit of some negroes who had escaped from him in Kentucky. First saw the plaintiff's negroes on the steamboat Arrow, on the night they were arrested. Was informed they were there, and assisted Patton, Rice, and another person, to take them. Patton had requested him to assist. The negroes were arrested at the cook-room of the boat. Witness went with the crowd to the mayor's office, after the arrest. Rice was in company, and on going into the office, he laid some papers on the mayor's desk. Some conversation took place between Patton, Rice, and the mayor, which witness did not hear. Heard some one ask, who brought the negroes there. Did not know defendant then. Now thinks it was the defendant who made the enquiry. Defendant then enquired for Rice, and asked him if he had a warrant to arrest the blacks. Then asked Patton if he had a warrant. Patton said he had none, but was authorized to arrest them. Defendant then took off his hat and waved it, saying: Colored people, remove your friends with a rush or row. On his cross-examination, the witness says he thinks defendant had a white hat. Says that two of the negroes, a man and a woman, recognized Patton on the boat, before the arrest. Says, also, that he heard defendant distinctly at the mayor's office, and that he spoke loud.

Oliver Rice testifies, that in October, 1852, he was acting as a constable and marshal of Sandusky city. Was at the steamboat Arrow. Patton and one Shrove had some negroes in charge. Patton said he had arrested them as slaves, and handed his papers to witness. Went to mayor's office; there was quite a crowd, and a good deal of excitement. Witness laid the papers on the mayor's desk. Did not hear much of the conversation between Patton and the mayor. After some time, defendant came into the room. Some conversation between defendant, Patton, and the mayor. Defendant had taken his seat near the mayor. Heard him ask if Rice, the marshal, was present. Witness replied that he was. And defendant then enquired of him if he had a warrant to arrest the negroes. Witness replied that he had no warrant. Defendant then raised his hat, and said: Friends of these colored people, remove them with a rush; and they all went out. There were a good many colored persons present, armed with clubs. Witness heard one of them say, they should never take the negroes away alive. On cross-examination, says, he thinks Patton was at the railroad depot. Patton had informed witness before what his business was, and that he wished witness to assist him. Witness's object in going to the steamboat was to suppress any riot, etc. Says defendant spoke in a loud voice at the mayor's office, and that he wore a white hat.

On the part of the defendant, a good deal of testimony has been introduced to prove the occurrences at the mayor's office, and to discredit the statements of the plaintiff's witnesses.

John B. Lott says, he was on the steamboat at the time the negroes were arrested, and went with the crowd to the mayor's office; called on the defendant at his office, to procure his services for the negroes as counsel. Defendant proceeded to the may-

or's office, enquired for Rice, asked him if the negroes were in his custody, and wished to see the authority by which they were held. Said he saw nothing to authorize their detention. Witness heard some one then say, hussle them out, and they all left the room.

Marshal Burton says, defendant is an attorney at Sandusky city. Witness was at the mayor's office, evening of October 20, 1852. It was much crowded. Heard defendant enquire by what authority the negroes were detained. Defendant was near the center of the room. Witness heard no answer to defendant's inquiry. Thinks defendant asked a second time for the authority by which the negroes were held. No reply to this. Defendant said, he saw no reason why they should be detained. Some one said, hussle them out. Witness saw defendant in the room. Thinks he had no hat on. Saw no movement of his hat. Heard nothing said by defendant about moving the colored people with a rush. Thinks he would have heard it, if it had been said. Did not hear defendant enquire for Rice. Thinks he would have heard it, if such enquiry had been made.

H. M. Cheeseborough: Was present at the mayor's office. Was there ten or fifteen minutes before anything was done in the way of business. Did not notice defendant, till he heard him enquire by what authority the negroes were held. Did not seem to address this enquiry to any one in particular. Witness heard some one ask for Rice. Some person said, the papers were with the mayor. Defendant repeated his enquiry as to authority. He paused, turned partly round, and said, there appeared to be nothing against these persons to detain them. Some one said, hussle them out, and the room was soon clear. When defendant spoke of there being no authority to detain the negroes, he turned toward the place where they were sitting. Did not see his hat, or any motion with a hat. Did not see Rice in the room at all. Heard nothing from defendant about colored persons removing their colored friends with a rush. Thinks he would have heard it, etc.

Mr. Jennings says, he was at the mayor's office. Saw defendant come in. Was accompanied by a colored man. Thinks he had a book in his hand. Heard defendant enquire, by what authority the negroes were detained. Thinks he heard the mayor say, he had no jurisdiction of the matter. Heard defendant ask for Rice. Rice came forward, as witness thinks. Defendant enquired if the negroes were in his custody. Rice said they were not detained by a warrant in his hands. Defendant then said, if there is no authority for holding them, they can go. All went out in a hurry. Thinks defendant had no hat on. Not positive as to this. Did not hear him say colored friends, etc. Thinks he would have heard the words, if they had been used. When defendant said, if there is no authority to hold the negroes, they can go, he turned round to the crowd.

Mr. Clark: Was at the mayor's office. Heard defendant enquire twice, by what authority the negroes were detained. Heard no reply. Defendant then said, he saw no reason why they should be detained. A colored man by the name of Locke, then said, rush them out, and they all left. Defendant had no hat on, and did not appear to be excited.

Joseph Jibbeau testifies as to what happened at the mayor's office: Defendant enquired for authority, etc. Asked for Rice, who came forward, and defendant asked him if he had a warrant. Rice said he had no warrant, etc. Defendant then asked, if there were any papers or authority by which the negroes were detained. Asked two or three times. No reply to this. After a short pause, defendant said, Colored friends, I don't see any thing to detain your friends. Locke then said, hussle them out, and they went out in quick time. Defendant spoke in a medium tone of voice. Thinks he had no hat on. Did not wave his hat. Did not use the words attributed to him by plaintiff's witnesses. Thinks he heard some one say, in reply to defendant's enquiry for authority, that the mayor had the papers.

Mr. Follett: Was mayor of Sandusky city, October 20, 1852. Heard a noise in the street. The crowd came into the office. Witness was writing at the time. Knew there were slaves there. Negroes were seated in the room. Witness paid no attention, but kept on writing, with his back to the negroes. After some time, Rice came in and laid the papers on witness's desk. Did not look at the papers. Mr. Bill asked, what he was going to do. Witness replied, he had no jurisdiction. Thinks he never spoke to Patton, or Patton to him. After some time, Rice came to his desk, and witness handed the papers to him. Rice asked witness if he had examined them, and witness replied that he had not. Witness went towards the door. Defendant came in, turned round and said, By what authority are these persons held in custody? Are there any papers to show why they are held here? Thinks Patton said, Rice has the papers. Defendant then said, Colored citizens, I see no authority for detaining your colored friends. The negroes and the crowd then went out. Patton then came up to defendant, and said, Here's the papers; those slaves are mine, and I will hold you responsible. Witness supposed that claimant had not before made known his claim. There was not much noise or excitement. Recollects distinctly that defendant had no hat on, or with him. Thinks it was after the crowd had left, and before Patton said, Rice has the papers, that defendant made the remark, that he saw no authority for detaining the negroes, etc. Defendant may

have used these words before. Witness says defendant did not use the words testified to by Patton, Hedges, and Rice. That Patton did not come to his desk, and ask him what he was going to do, and select the papers, etc.

Having given this condensed statement of the material facts in evidence, I do not propose to analyze, or make any comments upon them, with a view of aiding you in coming to a conclusion, as to what is or is not proved. That duty belongs exclusively to the jury, and I leave it to their deliberate and unbiassed action. I shall merely state the legal principles involved in the case, and leave it to the jury to make the application of them to the facts.

As before stated, there is no dispute in this case, that the three persons named in the declaration as the slaves of the plaintiff, were in fact such in Kentucky, and that they escaped thence into the state of Ohio. But it must moreover appear, that they were in legal custody, by an arrest, either with or without warrant, by the owner or some person legally authorized by him to recapture them. The 6th section of the act of congress before referred to, provides, "that where a person held to service or labor in any state or territory in the United States, has heretofore, or shall hereafter escape into another state or territory of the United States, the person or persons to whom such service or labor may be due, or his, her, or their agent or attorney, duly authorized by power of attorney in writing, acknowledged and certified under the seal of some legal officer or court, of the state or territory in which the same may be executed, may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges or commissioners aforesaid, of the proper circuit, district or county, for the apprehension of such fugitive; or by seizing and arresting such fugitive, where the same can be done without process; and by taking or causing such person to be taken before such court, judge, or commissioner," etc.

It will be seen from the foregoing provision of the statute, that the authority is expressly given to the owner of the fugitive, or his agent or attorney, to arrest without warrant. The arrest in this case was made by Patton, as the agent of the plaintiff, without any warrant for this purpose. It appears also, that the power of attorney under which he acted as agent, was executed and authenticated according to the requirement of the act of congress. The arrest of these fugitives was therefore clearly authorized by law, and they were legally in the custody of the plaintiff's agent, at the time of the alleged interference by the defendant.

But to sustain the present action, it must appear to the satisfaction of the jury, that the defendant had notice or knowledge that these persons were fugitives, and were legally in custody, when he aided in their escape. It is one of the material allegations in the plaintiff's declaration, that defendant knowingly, willingly, and illegally aided or abetted the escape of the fugitives. This must therefore be proved, as essential to the plaintiff's right of recovery. But the knowledge of the defendant, both as to the persons' being fugitives and being in legal custody, either may be established, by positive proof, or may be inferred from circumstances. In the case of Giltner v. Gorham [Case No. 5,453], it was held, that "to bring an individual within the statute, he must have knowledge that the colored persons are fugitives from labor, or he must act under such circumstances as show that he might have had such knowledge, by exercising ordinary prudence." It is in evidence in this case, that the defendant was employed as counsel for the fugitives, and it is not perhaps an unreasonable presumption, that he was apprised of all the facts which rendered it necessary that his professional aid should be invoked in their behalf.

As already intimated the jury must be satisfied that the defendant had knowledge that the fugitives had been arrested, and were in custody at the time of his alleged interference. If the plaintiff's agent held them without authority, they were illegally detained, and no one could have incurred liability by aiding them in their escape. It will be for the jury to determine, in reference to all the circumstances, whether the defendant may not be presumed to have known that the fugitives had been arrested. It is in evidence, both by the plaintiff's and defendant's witnesses, that on entering the mayor's office, he enquired by what authority the colored persons were held. If the witnesses for the plaintiff are entitled to credit, he was informed distinctly that the negroes were claimed by Patton as agent of plaintiff, and that he had arrested them, as he was authorized to do, without warrant. From the occurrences which followed the announcement of the fact, that the arrest had been made without warrant, it seems most probable the defendant supposed the negroes could only be taken and held in custody, by an arrest under a warrant. The power of attorney, proving the agency of Patton, was laid on the mayor's desk, and could have been seen by the defendant, if he had wished or requested to see it. If, under the erroneous belief that a warrant was necessary to justify the arrest of the fugitives, he did not ask for its production, or use reasonable diligence to ascertain the existence of the instrument, he is not protected from the consequences of his acts. As before stated, no liability was incurred by the defendant, without a legal arrest and detention of the fugitives; but the test of the legality of the arrest is to be determined by the statute, and not by the opinion of the defendant. On receiving information that there was no warrant, it would have been altogether proper for the defendant to have required the production of the written power under which the plaintiff's agent acted; and if this request had been evaded or refused, there would have

been reason for the conclusion, that the fugitives were in custody without any authority to detain them.

If the jury are satisfied that these persons were fugitive slaves and were legally in the custody of the plaintiff's agent, at the time of their escape, and that these facts were known to the defendant, or that, from the circumstances, he is fairly chargeable with such knowledge, the further enquiry remains, whether he aided, abetted, or assisted in their escape, in the sense of being liable to the penalty fixed by the statute. On this subject, I have only to remark, that any words or actions tending to produce an escape, if the result follows, will subject a party to the penalty of the law. It is not necessary that there should be any physical force used, to effect the escape. It is true, the party implicated must have intended such a result, but this intention may be inferred from the facts. Every one is presumed to have intended whatever is the necessary and legitimate result of his acts. If therefore an escape follows, as the result of certain words or acts, the law raises the presumption, that it was intended, and holds the party responsible.

In the case of Vaughan v. Williams [Case No. 16,903], which was an action for damages for rescuing certain slaves from the possession of the plaintiff, the learned judge said, in reference to what constituted an interference, subjecting the defendant to the penalty of the statute, that "if he (the defendant) countenanced and encouraged, from time to time, the movements of the crowd which resulted in the rescue, or being present, sanctioned it in any form, he is liable to the penalty. A man cannot incite others to the commission of an illegal act, and escape the consequences by the plea, that he did not put forth his hand in the consummation of the act."

As to the occurrence at the mayor's office, there are some discrepancies between the witnesses for the plaintiff and those for the defendant. It is the exclusive province of the jury to decide upon the credit due to the testimony of witnesses. It will be their duty, if practicable, to harmonize their conflicting statements, and thus avoid the conclusion that any have wilfully falsified the truth. But if this cannot be done, they must receive or reject the testimony, as their best judgment shall dictate. If the witnesses for the plaintiff are accredited, there is no room for a doubt, that the defendant unlawfully interfered for the rescue of the slaves. The words attributed to him by these witnesses, could have no other effect, under the circumstances of the case, than to induce the crowd to interfere for the rescue of the slaves. Rice, one of the plaintiff's witnesses, is impeached by proof of bad character for truth; and unless his testimony is corroborated by other witnesses entitled to credit it will be the duty of the jury to reject it.

The points of difference in the narratives of the witnesses, as to what took place at the mayor's office, are doubtless obvious to the jury, and need not be specially noticed. If, however, the jury shall reject the statements of all the plaintiff's witnesses, as unworthy of credit, it will be proper for them to enquire whether, upon the defendant's evidence, a verdict ought to pass for the plaintiff. What is sufficient to constitute an illegal aiding, abetting or assisting, the escape of a fugitive slave under the statute, has been stated by the court. It will be for the jury to make the application of the principles laid down, to the facts before them. It will be for them to enquire and decide, whether the evidence warrants the conclusion that the acts and words of the defendant were the direct cause of the escape of the negroes. If, without implicating the defendant, they can find a satisfactory reason for the sudden and hurried movements in the mayor's office, resulting in the escape of the slaves, it will be their duty to do so. The statute under which this suit is instituted, is highly penal in its provisions, and the party seeking a recovery upon an alleged violation of it, should be held to strict proof.

There is one point which has been strenuously urged by counsel, to which it is the duty of the court to call the attention of the jury. It is insisted, that the defendant acting as counsel for the fugitives, did no more than he was warranted in doing from his professional relation to them. In the case of Norris v. Newton [Case No. 10,307], one of the defendants acting as counsel for the slaves it was contended that in that character he was protected from liability. The court stated the law to the jury in these words: "So far as his acts were limited to the duties of counsel he is not responsible. But, if he exceeded the proper limits of a counsellor at law, he is responsible for his acts, the same as any other individual." This is doubtless the true principle, as applicable to this point. Persons arrested and in custody upon the charge of being fugitive slaves, have an undoubted right to all the benefits of counsel. And it is in no sense improper, that counsel should advise and assist persons in that situation. In their professional character, they may enquire into the authority by which the fugitives are held, or insist on a legal investigation of the question whether they are slaves; and on the hearing before competent authority, may urge their discharge from custody. If satisfied they are illegally restrained of their liberty, the great remedy by writ of habeas corpus may be rightfully resorted to. In short, any proceeding which is in accordance with the law of the land, may be instituted to test the question of the legality of their detention. But it would be extending the principle of professional privilege too far, to say that a lawyer is justified, even in behalf of a fugitive slave, in aiding and assisting his escape, in any mode which the

law does not sanction. There is perhaps good reason to infer, from the evidence in this case, that the defendant supposed the slaves could not be held in legal custody, without an arrest by warrant. As already stated, the law does not require this process to authorize an arrest. And if the defendant under a misapprehension of the statute has brought himself within its penalties, he is not protected from responsibility by his professional character.

But it is quite unnecessary to detain the jury with further remarks, in committing this case to them. The trial has been conducted throughout, by the counsel, not only with great ability, but with great fairness. No efforts have been made to introduce any false issues, or in any way to divert the minds of the jury from the merits of the case. This is creditable to the gentlemen concerned, and worthy of their distinguished professional standing. It remains for the jury, excluding every extrinsic consideration from their view, to decide this case in accordance with the duty their oath imposes. If, in their judgment, the plaintiff has sustained an injury for which the law, applied to the facts, entitles him to redress, I have the fullest confidence they will award it to him by their verdict. If, on the other hand, they should come to the conclusion that the defendant is not implicated as charged, the jury will cheerfully acquit him of all censure, by a verdict in his favor. And I need not say that in the decision of this case, the individual views of the jurors, as to the justice and expediency of the law upon which the action is founded, should have no weight.

The jury returned a verdict for the plaintiff, which, on a motion for a new trial, the court refused to set aside.

WEIR PLOW CO. (TURNBULL v.). See Case No. 14,244.

WEISE (UNITED STATES v.). See Case No. 16,659.

Case No. 17,364.

WEISER v. MAITLAND.

[Nowhere reported; opinion not now accessible.]

WEISS (EVANS v.). See Case No. 4,572.

Case No. 17,365.

In re WEITZEL.

[7 Biss. 289;[1] 14 N. B. R. 466; 3 Cent. Law J. 557.]

District Court, W. D. Wisconsin. Sept., 1876.

BANKRUPTCY OF LUNATIC.

1. A party under guardianship as a lunatic may be adjudged a bankrupt against the consent of his guardian.

2. An insane person can not commit an act of bankruptcy.

This was an involuntary petition, and on the return day of the order to show cause, the respondent appeared by his guardian, and filed an answer, stating that at the time of filing the petition he was insane, and under guardianship from the county court of Crawford county, and also, that he was insane at the time the several acts of bankruptcy are charged to have been committed.

F. W. Cotzhausen, for creditor.
O. B. Thomas, for bankrupt.

HOPKINS, District Judge. A motion in the nature of a demurrer has been submitted, involving the questions: First, can a party under guardianship as a lunatic be adjudged a bankrupt against the consent of his guardian? and, second, can an insane person commit an act of bankruptcy?

The first is jurisdictional, and involves the power of courts, on the application of creditors, to proceed against such parties. It is not new, and may be determined by the authorities. Freem. Judgm. § 152, says: "By a concurrence of judicial authority, lunatics are held to be within the jurisdiction of the courts. Judgments against them are neither void nor voidable." "A lunatic may be sued at law, after the execution of the commission of lunacy." Sternbergh v. Schoolcraft, 2 Barb. 153; Crippen v. Culver, 13 Barb. 424; Kernot v. Norman, 2 Term R. 390; Nutt v. Verney, 4 Term R. 121; Ibbotson v. Lord Galway, 6 Term R. 133; Ex parte McDougal, 12 Ves. 385.

The statutes of this state authorize suits to be prosecuted against insane persons under guardianship, and prescribe the mode of service of summons in such cases. Tayl. St. 1429, § 10. That courts have jurisdiction of actions against lunatics seems to be too well settled to admit of discussion at this time.

But it is claimed that, admitting such right, it does not follow that proceedings in bankruptcy may be had. I cannot see any reason for a distinction.

Bankruptcy is a proceeding or suit in its nature equitable—a sequestration of a debtor's property that the creditors may resort to, instead of an ordinary suit at law or equity. In such proceedings there are advantages that do not pertain to other remedies known to the law. The bankrupt act declares certain acts of a preferential character void, and authorizes suits by assignees to recover back from the offending party property obtained contrary to its provisions.

It is often the only proceeding that the creditors can take to collect anything, and to hold that the remedy by ordinary action is open to them, but that proceedings in bankruptcy are not, is a discrimination between remedies not founded upon or sustained by principle or authority, as will appear by an examination of the reported cases and elementary writers on the subject. In Anon., 13 Ves. 590, the lord chancellor said: "A commission of lunacy will

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

not protect the lunatic against an action, and a commission in bankruptcy is a species of action against which the lunacy cannot be a defense." The bankrupt act authorizes any person owing debts to be adjudged a bankrupt, either on his own petition or the petition of his creditors. This would not include infants and feme coverts, because they do not ordinarily owe debts, for want of legal capacity to contract. A party to be adjudged must have capacity to contract binding obligations. A married woman, under recent legislation in many states, now has such capacity and is liable to bankrupt proceedings. In 3 Pars. Cont. p. 462, it is said: "If a sane person commits an act of bankruptcy and afterwards becomes insane, he may be adjudged a bankrupt and his rights protected by his guardian." and at page 461, that "if one who incurs debts and is unable to pay them, becomes a lunatic, process may now issue and the usual proceedings be had for the benefit of creditors." These cases not only ignore the existence of any distinction between remedies, but on the contrary assert the right to proceed in bankruptcy against lunatics. See Shelford, Lun. 429; Robs. Bankr. 94, to same effect. Judge Lowell, in In re Pratt [Case No. 11,371], followed these authorities. In that case the petition was on behalf of the lunatic by his guardian, but I cannot see that that makes any difference upon the question of jurisdiction of the court. The proceedings there were sustained upon the ground that the lunatic was a person within the meaning of the bankrupt act and amenable to proceedings in civil actions by his creditors, and if a lunatic is to be regarded as a person within the meaning of the act, the court has the same authority to entertain proceedings against him as in his favor. The act makes no distinction. Courts of bankruptcy take jurisdiction by law and not by consent of parties. The bankrupt's counsel cited and relied upon In re Murphy [Id. 9,946], as showing that insanity at the time of commencement of the proceedings, was a good answer. That case is very imperfectly reported, neither the reasons nor the authorities relied upon by the learned judge are given, and, as it is against the general current of the authorities in this country, as well as in England, I cannot follow it as the law upon this question. So that upon the first point, I must hold in favor of the petitioning creditors, that the proceedings are maintainable.

But the second ground alleged in the answer, if true, is fatal to the case. An insane person cannot commit an act of bankruptcy; so that if the allegation that he was insane at the time he committed the alleged acts is sustained, the proceedings must be dismissed. In re Marvin [Case No. 9,178]; Ex parte Stamp, 1 De Gex, 345; In re Pratt, supra; 3 Pars. 462. This seems so clear upon principle, that I do not deem it necessary to spend any more time upon it. But the petitioners deny that he was insane at the time, which raises a question of fact which I shall submit to a jury as demanded by the respondents, reserving all further questions until that is decided.

Consult an article in American Law Register, March, 1874: "Married Women as Bankrupts."

Case No. 17,366.

In re WELCH.

[5 Ben. 230; [1] 5 N. B. R. 348.]

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

BANKRUPTCY—EXEMPTIONS.

Under the words "articles" and "necessaries," in section 14th of the bankruptcy act [14 Stat. 522], money cannot be set apart by the assignee to the bankrupt, unless such money is the proceeds of specific things which ought to be set apart under the head of "articles" and "necessaries."

[Cited in Re Hay, Case No. 6,253.]

[In the matter of William Welch, a bankrupt.]

The register in this case certified to the court, that the assignee had been requested by the bankrupt to set apart to him such property as he was entitled to, under the provisions for exempt property in the bankruptcy act; that the property mainly consisted of "dry and fancy goods;" that, thereupon, the assignee set apart two suits of clothes, three shirts and a cook stove, valued at $16.50, but declined to set apart any of said dry and fancy goods; that the assignee then sold all "the property of the bankrupt not so exempt," for $1,333.42; and that, thereupon, the bankrupt requested the assignee to set off and allow to him out of the proceeds of such sale a sum sufficient to make the amount of exemption $500, which the assignee declined to do. The register, on request of the assignee and the bankrupt, certified the question to the court.

BLATCHFORD, District Judge. Until I know what the "dry and fancy goods" were, by items and description, that were sold, and what was the property of said bankrupt that was sold, it is impossible for me to judge whether such goods and property come within the description, in section 14, of "other articles and necessaries of such bankrupt," so as to make it proper to set them apart, and, if sold, their proceeds. But I do not think that, under the word "articles," or the word "necessaries," money can be set apart, unless such money is the proceeds of specific things which could and ought to be set apart under the head of "other articles and necessaries of such bankrupt."

[See Case No. 17,367.]

WEITZEL (CALDWELL v.). See Case No. 2,306.

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

Case No. 17,367.

In re WELCH.

[5 Ben. 278.] [1]

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

SHERIFF'S POUNDAGE—BANKRUPTCY.

Where a sheriff had levied on property of a debtor who was afterwards adjudged a bankrupt, and the sale of the property was enjoined and the property was subsequently sold by the assignee in bankruptcy for an amount less than the face of the execution in the sheriff's hands. *Held*, that the sheriff was entitled to poundage on the amount which the property brought, to be paid by the assignee out of the proceeds; and that, if the sheriff acted in good faith, he was so entitled without reference to the validity of the judgment.

In this case two executions were issued to a sheriff against the property of William Welch, one on a judgment for $293 11, and one on a judgment for $3,265 06, under which the sheriff levied on the personal property of Welch. A petition in bankruptcy was then filed, and an injunction issued against the sheriff. On the proving of claims, the claim of the first judgment creditor was objected to and contested. The assignee sold the property for $1,333 42. The sheriff made out a bill for full poundage on both executions, which he presented to the assignee. The question what poundage he was entitled to, was certified to the court. [See Case No. 17,366.]

BLATCHFORD, District Judge. Poundage can be allowed only on the amount which the property brought.

As between the sheriff and the property, the sheriff has a lien on it for his poundage and fees, and is entitled to be paid out of its proceeds.

If the sheriff acted in good faith he is entitled to be paid, without reference to the validity of the judgment.

WELCH (DOE v.). See Case No. 11,456.

WELCH v. DUNHAM. See Cases Nos. 4,143-4,146.

Case No. 17,368.

WELCH v. HOOVER.

[5 Cranch, C. C. 444.] [2]

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

AGENCY—PROOF OF AUTHORITY—AGENT AS WITNESS.

1. An agent is a competent witness to prove his own authority, if not in writing; and is not incompetent by reason of his liability to either of the parties.

2. A parol authority will support a written contract.

Assumpsit, for feeding cattle, &c.

Mr. Brent, for plaintiff [Sylvester Welch], offered to examine Mr. Owens, as a witness, to prove that he, as agent of the defendant, contracted to purchase of the plaintiff seventy-four head of cattle; $500 to be paid in cash, and the residue by the 1st of November, when the defendant was to take the cattle away.

Mr. Bradley, for defendant [John Hoover], objected to the testimony of Mr. Owens, until his agency should be proved; and that he was not competent to prove his own agency; and that, if proved, he was not competent, because interested.

THE COURT, however (THRUSTON, Circuit Judge, doubting), permitted the witness to be examined without a release from either party; and decided that he was competent to prove his own authority, if it was not in writing. See Starkie, Ev. pt. 4, p. 55.

Mr. Bradley then objected, that a parol authority will not support a written contract made by the agent.

But THE COURT (MORSELL, Circuit Judge, absent) overruled the objection.

Verdict for plaintiff, $472.32.

Case No. 17,369.

WELCH et al. v. LAWSON.

[The case reported under above title in 1 Balt. Law Trans. 67, is the same as Case No. 8,151.]

WELCH (LEE v.). See Case No. 8,204.

Case No. 17,370.

WELCH v. MANDEVILLE et al.

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

Circuit Court, District of Columbia. July Term, 1808.[2]

ACTION ON ASSIGNED INSTRUMENT—DISMISSAL BY ASSIGNOR.

The legal plaintiff has a right to dismiss a suit brought in his name, by order of a person who claims to be his assignee of the right of action, and the court will not interfere to protect the assignee, unless the evidence of the assignment is clear.

This was an action of covenant in the name of James Welch, the plaintiff, but for the use, and by the order of Allen Prior, against Mandeville & Jamesson, upon a contract for the sale of land to them by Welch. At the second term after an office judgment had been entered against Welch at the rules, the defendant Mandeville, who alone had been taken, produced to the clerk a release

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

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

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

[2] [Affirmed in 7 Cranch (11 U. S.) 152.]

under the seal of Welch, and an order from him to dismiss the suit, whereupon the clerk made an entry upon the minutes of the court, that the action was dismissed by agreement of the parties. Afterwards, at the same term, the attorney who brought the suit in the name of Welch, moved the court to reinstate it, and grounded his motion upon his own affidavit, and the papers mentioned therein. The affidavit stated, that in the autumn of 1799, Prior brought to the attorney three bills of exchange, drawn by Welch upon Mandeville & Jamesson for 2500 dollars each, and an account in the handwriting of Mandeville, acknowledging a balance due to Welch on the 31st of January, 1798, of 8707 dollars and nine cents, to be paid in the times and manner therein stated. Prior, at the same time, stated that Welch was indebted to him and that he had taken those bills in payment, which Mandeville and Jamesson refused to accept, saying that Welch had deceived him in the sale of the lands. Prior left the papers with his attorney, and requested him to take the best measures to obtain the money from Mandeville & Jamesson; whereupon he brought two suits in the county court of Fairfax, in Virginia, the one was a suit at law in the name of Welch, against Mandeville & Jamesson, founded upon their acknowledgment of the balance of account. The other was a chancery attachment in the name of Prior, against Welch as an absent debtor, and charging Mandeville & Jamesson as garnishees.

Upon the trial of the suit at law, the defendants produced the original contract respecting the sale of the land, whereupon the attorney for Welch suffered a nonsuit, and having obtained an office copy of the contract, brought the present suit thereon, for the use of Prior, in the name of Welch, but without his directions, which was known to Mandeville. There had been no decision in the chancery attachment. The attorney never had any communication with Welch upon the subject of this suit; but he had reason to believe that Welch knew of the suits in Fairfax county, and did not interfere with them. The attorney corresponded solely with Prior on the subject of this suit, who had directed the application of the money when recovered. That the attorney did not know of the release and order to dismiss the suit until after the entry was made on the minutes, and that the suit had been dismissed without his consent or that of Prior, who had been at all the expense of the suit. That he had been informed that Welch was in the prison-bounds, and that when Prior put the papers into his hands, he informed him that it was his only prospect of receiving payment of the debt due to him by Welch. Whereupon the defendant, Mandeville, produced the affidavit of Welch, stating that he drew the bills in favor of Prior merely for him to get them accepted, and negotiate them for account of Welch and as his agent. That Prior never gave value for them, and instead of being the creditor of Welch, was his debtor; and that he (Welch) never made a transfer or assignment of the contract with Mandeville & Jamesson to Prior, or any other person. The defendant, Mandeville, also produced a paper purporting to be the answer of Welch, to the chancery attachment in Fairfax county (but which had not then been filed in the suit), which contained the substance of his affidavit, and also a letter written by Welch to Mandeville & Jamesson, and sent by Prior at the time he presented the bills, corroborating the fact that Prior was only his agent in that business.

In this state of the case the court below continued the motion to reinstate the cause until the next term, to give an opportunity to Prior to produce evidence of an assignment of the contract and of his right to bring suit upon it; at which term he produced his own affidavit, stating that Welch was indebted to him upwards of 14,000 dollars, and that Welch gave him the three drafts on Mandeville & Jamesson, for his (Prior's) own use and benefit, for and on account of a tract of land sold to Welch, and which Welch sold to another person. He produced also certain other documents tending to corroborate his affidavit.

But THE COURT refused to reinstate the cause, and ordered it to be dismissed according to the agreement of the parties, to which refusal Allen Prior took a bill of exceptions, which the court signed.

E. J. Lee, for Allen Prior, cited the following authorities, viz.: Corser v. Craig [Case No. 3,255], in the circuit court of Pennsylvania, by Judge Washington; Ex parte Byas, 1 Atk. 124; Atkin v. Barwick, 1 Strange, 165, 166; Ex parte Oursell, Amb. 297; Yeates v. Groves, 1 Ves. Jr. 280; Ancher v. Bank of England, 2 Doug. 637; McCullum v. Coxe, 1 Dall. 139; Fitzgerald v. Caldwell, 2 Dall. 215; Gibson v. Minet, 1 H. Bl. 602; Chit. Bills, 1, 2; Winch v. Keeley, 1 Term R. 619; Young v. Willing, 2 Dall. [2 U. S.] 276; Row v. Dawson, 1 Ves. Sr. 331.

[See Case No. 17,371.]

Affirmed by the supreme court of the United States, 7 Cranch [11 U. S.] 152.

Case No. 17,371.

WELCH v. MANDEVILLE et al.

[2 Cranch, C. C. 82.] [1]

Circuit Court, District of Columbia. Nov. Term, 1813.[2]

PARTIES—PLEADING—DEMURRER.

A person for whose benefit an action is brought, but who does not appear to be a party

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

[2] [Reversed in 1 Wheat. (14 U. S.) 233.]

upon the record, nor to be interested in the cause, cannot come in and, in his own name, reply fraud and collusion between the legal plaintiff and defendant to defeat the action; and such a replication is bad upon demurrer.

Covenant to pay money for land sold to the defendants. The defendants pleaded that in a former suit between the same parties, for the same cause of action, such proceedings were had that "the said James Welch came into court, and acknowledged that he would not further prosecute his said suit, and from thence altogether withdraw himself." Whereupon the record states that Allen Prior, for whose use this action is brought, comes and says, &c., in substance, that Welch being indebted to him (Prior) in more than $8,707.09; and Mandeville and Jamesson being indebted in the sum of $8,707.09 to Welch, the latter, by an equitable assignment, for a full and valuable consideration, assigned the said $8,707.09 to the said Prior in discharge of the debt to him, of which Mandeville and Jamesson had notice. That the suit was brought in the name of Welch for the use of Prior, with the knowledge of Mandeville. That the suit was "dismissed agreed," without the authority, knowledge, or consent of Prior, or his attorney; and that Mandeville knew that Welch had no authority from Prior to dismiss the suit. That the dismissal was procured by Mandeville with intent to defraud Prior, and that the entry and judgment thereon were made and entered by covin, collusion, and fraud; and that the said judgment was and is fraudulent. To this replication the defendant filed a general demurrer.

[See Case No. 17,370.]

E. J. Lee in support of the replication cited 2 Rolle, Abr. 46, G; Master v. Miller, 4 Term R. 341, 343; Corser v. Craig [Case No. 3,255]; Bright v. Eynon, 1 Burrows, 395; Maxwell v. Levi, 4 Dall. [4 U. S.] 330, 335; Simms v. Slacum, 3 Cranch [7 U. S.] 306.

Mr. Swann and Mr. Taylor, contra, contended that the replication could be only by the legal plaintiff; and that a stranger to the record could not intervene and plead that which the legal plaintiff would not be permitted to allege—his own fraud. That the only remedy which Prior had was to apply to the court to prevent the retraxit at the time it was offered. That to admit Prior's legal right to plead in the cause, is inconsistent with the rule of law that a chose in action is not assignable.

THE COURT (THRUSTON, Circuit Judge, absent) sustained the demurrer to the replication, because it was not made in the name of the legal plaintiff.

[The judgment of this court was reversed by the supreme court on a writ of error. 1 Wheat. (14 U. S.) 233.]

WELCH (PRUSEUX v.). See Case No. 11,456.

Case No. 17,372.

WELCH v. STE. GENEVIEVE.

[1 Dill. 130; 10 Am. Law Reg. (N. S.) 512; 14 Int. Rev. Rec. 93.] [1]

Circuit Court, D. Missouri. 1871.

MUNICIPAL CORPORATIONS—DISSOLUTION—RIGHTS OF CREDITORS—MANDAMUS TO COLLECT TAX, &C.

1. A municipal corporation, created by legislative act for public purposes, is not dissolved by its failure to elect officers.

[Cited in People v. Selma Irrigation Dist. (Cal.) 32 Pac. 1048.]

2. The officers of our municipal corporations do not, in the sense of the English books, constitute an integral part of the corporation, but are the mere agents or servants of the corporate body. (Arguendo by the circuit judge.)

3. Municipal corporations cannot be dissolved by the courts for non-user, or misuser of their powers or franchises. (Arguendo by the circuit judge.)

4. Where a judgment existed against a municipal corporation, having no property on which an execution could be levied, and whose duty it was to levy and collect a special tax to pay the judgment, and where the corporation was without officers and would not exercise the powers it had to supply itself with officers, the court appointed its marshal a special commissioner to assess, levy, and collect the requisite tax; but suspended the execution of the order so as to allow the corporation time to elect officers, and itself to levy and collect a tax.

[Disapproved in Rees v. Watertown, 19 Wall. (86 U. S.) 118. Cited in Milner v. Pensacola, Case No. 9,619; Kelley v. Mississippi Cent. R. Co., 1 Fed. 570.]

5. The ousting ordinance passed by constitutional convention of Missouri, and the general incorporation act of that state, in relation to towns, construed.

Motion to appoint a commissioner to levy and collect taxes to pay the plaintiff's judgment. The case is this: On the 9th day of September, 1865, the plaintiff filed in this court his declaration on certain negotiable bonds issued by the city of Ste. Genevieve, and the summons was served on the 11th day of the same September, on "Francis C. Rozier, president of the board of aldermen, and acting mayor" of the said city. The record in that case recites an appearance by counsel for the city and an agreement that the defendant will enter its appearance at the next term. At the October term, 1866, judgment by default was rendered against the defendant for $5,605. In May, 1870, the plaintiff filed his petition in this court for a mandamus, stating therein the recovery of the above-mentioned judgment; that execution had been issued and returned nulla bona; that the debt remains unpaid; that no tax to pay the same has ever been levied; that Francis C. Rozier was the last elected mayor, and certain other persons named were the last aldermen of the city; that they duly qualified when elected,

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 14 Int. Rev. Rec. 93, contains only a partial report.]

and served, and are still, in law, officers of the corporation; that no election has been held, and that the failure to elect is for the purpose of preventing the petitioner and others from collecting their bonds; that there is no way in which the petitioner can collect but by the relief prayed for, which is a writ of mandamus to compel Rozier and the aldermen named to levy a tax upon the inhabitants and property of the city sufficient to pay the judgment.

An alternative writ was issued as asked, to which, at the October term, 1870, Rozier and the other persons named made return as individuals, and not as mayor and aldermen of the city. They set out in substance in this return, that they were the mayor and aldermen of the city on the 4th day of July, 1865; that on that day the new state constitution was put into force, containing an ordinance (popularly known as the "Ousting Ordinance"), by which it was provided that within sixty days thereafter every person holding any office of honor or profit under the state, and in any municipal corporation, should take and subscribe the oath of loyalty therein prescribed, failing to take which oath within sixty days, said office, it was declared, should ipso facto become vacant, and the vacancy should be filled according to the law governing the case; and it was made penal to hold or exercise any of said offices without having taken and subscribed the oath. These persons return that they failed to take the oath, whereby their offices became vacant on the 4th day of September, 1865 (five days before the plaintiff's original suit was brought), and they have not since acted. It was also stated in the return, that in August, 1865, a pretended election was held, and city officers elected, who had taken the oath of loyalty, but that these persons refused to qualify, and never did qualify or act; but that no record of this election can be found. The return refers to the act of the legislature of the state of Missouri, approved February 19, 1866 (St. 1865, p. 911), which recites that "on account of past troubles of the country, certain incorporate towns and cities in this state have failed to hold their regular elections for offices now vacant and elective under their respective charters," and enacts "that any justice of the peace residing within the limits of any such incorporated town or city is required, on the petition of twenty-five qualified voters of such town or city, to order at once a special election to fill all vacancies in offices elective under their respective charters," &c. The return states that no election whatever has been held under the aforementioned act, approved February 19, 1866, and that the books and papers of the corporation are in the office of the clerk of the court. The return then sets up that, on the 4th day of June, 1867, the county seat of Ste. Genevieve county, acting under general laws of the state concerning municipal corporations, declared the "Town of Ste. Genevieve" incorporated by the name of "The Inhabitants of Town of Ste. Genevieve," and a certified copy of the proceedings of the county court in this regard is filed with the return; and the respondents deny that they are officers of the city, and claim that by the constitutional ordinance aforesaid, they are absolutely forbidden to act as such officers, and they ask to be dismissed. On this return the respondents were discharged, and now Welch, the judgment creditor, files his petition stating the above facts, and that there are not now, nor have there been for some years past, any officers of any kind in said corporation; that said corporation exists; that it has no property on which to levy; that his judgment is yet unpaid, and asking this court to appoint the marshal, or some competent person, to assess, levy, and collect, upon the taxable property within the corporation, a tax sufficient to pay the judgment. It is this petition which is before the court for action.

Glover & Shepley, for plaintiff.

Thomas C. Reynolds, contra (amicus curiæ).

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

DILLON, Circuit Judge. This application presents novel and interesting questions, some of which are of first impression. These will be noticed, however, only so far as may be necessary to reach a conclusion. The city corporation not now appearing by counsel, and the record of the judgment upon the bonds against the city reciting an appearance by it, and service of the summons having been made upon the last chief officer of the city, the validity of the judgment must, in this proceeding, be assumed. 1 Rev. St. 1855, § 2, art. 2; Muscatine Turn Verein v. Funck, 18 Iowa, 469.

The city of Ste. Genevieve was specially incorporated in 1849, by a public act of the legislature of the state. Laws 1849, p. 298. Its charter has been several times amended, and it was in 1851 expressly authorized to issue the bonds to the plank road company, on which the plaintiff's judgment was rendered. Act Feb. 7, 1851. And it was subsequently authorized to levy and collect annually, a special tax, to pay interest on such bonds. Act. Feb. 23, 1853.

The constitution of the corporation is after the usual model of municipal corporations, having a special charter; the inhabitants are the corporators, the mayor is the chief executive officer, and the aldermen constitute the governing body.

It is suggested that the corporation thus created has been dissolved because of its failure to elect municipal officers, and the disuse of its corporate functions since September 4th, 1865, when all of the municipal offices became absolutely vacant by force of the ousting ordinance passed by the constitutional convention. To this proposition I cannot give my assent. I deny that a corpora-

tion created by the legislature for the purposes of local municipal government can, without a provision to that effect, be dissolved by the mere failure to elect officers. The corporation is created by the charter. The officers do not constitute "the" corporation, nor does the council even constitute "a" corporation. The inhabitants of the designated locality, are the corporators. The officers are the mere servants or agents of the corporation. Municipal corporations are created for public purposes, being auxiliaries of the state to assist in local administration.

The effect at common law of the dissolution of a corporation was, that debts due by and to it were discharged, and its property reverted to the grantors. Formerly, corporations of all kinds, in England, both private and municipal, were usually created by royal charter, and the courts in that country have held, or assumed, that the loss of an integral part would dissolve a municipal corporation, or at least suspend its existence, and that its charter might, for a misuse of its franchises, be declared forfeited by judicial sentence in quo warranto, as in the famous case against the city of London in time of Charles II. Upon a critical examination of the decisions in England, I doubt whether it is settled law even in that country, that a municipal corporation can be totally dissolved in either of these ways; but if so, the doctrine has no application to our municipal corporations which are brought into existence for public purposes, by legislative act, and which do not, in the sense of the English books, consist of integral parts.

For non-user or mis-user, courts may judicially declare forfeited the charters of private, but not of public corporations.

The charter or constituent act of the corporation of Ste. Genevieve not being limited in duration, and not having been repealed by the legislature, is still in force, and the artificial body which it created still exists.

Under the constitution of the United States, which prohibits a state from passing any act which impairs the obligation of contracts, it may be doubted whether it would be possible even for the legislature of the state, notwithstanding its general supremacy over the public corporations, to dissolve a corporation so as to defeat the rights of its creditors. Van Hoffman v. Quincy, 4 Wall. [71 U. S.] 537; Butz v. Muscatine, 8 Wall. [75 U. S.] 583.

But if the state has the power, it has not attempted to exercise it; on the contrary, the act of February 19, 1866, recognizes in the clearest terms, the corporations as still existing, notwithstanding their failure to hold their elections for offices made vacant by the ousting ordinance; and provides a method by which elections may be held, and corporate officers supplied. There is much discussion in the adjudged cases, and some contrariety of opinion with respect to the right of officers to hold over in the absence of express provisions, beyond their terms, and until their successors are elected and qualified. But that question is not in this case, because whatever might otherwise be the legal right of the officers of the city to hold over, they cannot do so if they fail to take the oath required by the ousting ordinance.

The officers of the city having failed to take the prescribed oath, their official existence was absolutely at an end on the 4th day of September, 1865, and at that time the corporation had no legal officers. The corporation offices became vacant, and not having been filled, are still vacant. And we have the anomaly presented of a public corporation without any officers de jure or even de facto to execute its powers or fulfil its duties.

It is now suggested that the old corporation, if not dissolved in the manner before considered, was nevertheless dissolved or superseded by the organization in 1867 of the town corporation by the county court, under the general laws of the state. Rev. St. 1865, p. 240, c. 41.

If it was thus superseded the inquiry would arise whether the town corporation was any thing more than the authorized legal successor of the old corporation, and bound to discharge its obligations.

But on examining the abovementioned statute, under which the supposed new incorporation was attempted, and on which it rests for all the legal virtue it possesses, we find that it only authorizes, in the mode therein prescribed, the incorporation of towns and cities not already incorporated. It does not empower a town or city incorporated by special charter, and which cannot therefore destroy its corporate life at its own pleasure, to abandon its charter without the consent of the legislature which gave it, thereby leaving the locality without municipal government or rule.

Legislative sanction is, in this country, indispensably necessary to the existence of every corporation; and as this new town organization is without legislative authority, it is wholly without validity, and its officers have no right in law to exercise powers under the general incorporation act; much less have they the right to exercise the functions of officers under the special charter.

The city corporation being that which was established by the legislature under the charter, and that corporation remaining in existence, although it is without officers, it is clear that no validity can attach to an unauthorized organization under the general law. Offices must be de jure, but officers may be such de facto. To say that an officer is one de facto, when the office itself is not created or authorized by the legislature, is a political solecism, having no foundation in reason nor support in law. Decorah v. Bullis, 25 Iowa, 12, 18; Hildreth's Heirs v. McIntire's Devisee, 1 J. J. Marsh. 206; People v. White, 24 Wend. 520, 540.

If the gentlemen who are claiming under the new organization to be the officers of the

town had been elected under the charter, though irregularly, and were exercising and claiming to exercise the powers given by the charter, which is still the organic act of the municipality, they would be, in the true sense of the term, officers de facto, and their acts as respects the public would be valid, and this court might, notwithstanding the irregularities in their election, issue its mandamus to them to levy and collect the tax necessary to satisfy the plaintiff's judgment.

But they were not elected under the charter, nor do they claim or assume to be officers of the city; and hence they could not lawfully levy or collect the tax; and there is no duty resting upon them in this respect which this court could compel them to execute by its writ of mandamus.

The corporation under the special charter, and its amendments, is the legal and only corporate body; the new organization is a bald usurpation of the franchises of the state, and its acts, unless ratified by the legislature, are simply void. Decorah v. Bullis, 25 Iowa, 12.

Thus we perceive the suggestion that the new organization destroyed or superseded the old corporation, to be unfounded. Not only so, but the foregoing observations answer the further suggestion that the creditor should cause a writ of mandamus to be issued and directed to the officers who are acting under the new town organization.

The way is thus cleared to the immediate question which the court is called upon to decide, viz.: Whether it will appoint its marshal, or some other proper person, to assess and collect from the property of the municipality a tax sufficient to pay the plaintiff's debt.

For that debt he has the judgment of this court. Execution has been returned nulla bona. If the corporation had officers, a mandamus to require them to levy and collect the tax would be a remedy not only proper in itself, but one to which the judgment plaintiff is entitled as of right. This is settled law in this court, and it is not necessary to cite cases upon the subject decided by the supreme court of the United States. The corporation, however, has no officers, and we fear it is but too plain that the reason why the inhabitants do not elect officers under the act of February 19, 1866, is that they cherish the delusion that they can defeat the rights of creditors, and by taking on a new organization escape old liabilities. Such notions of justice or corporate morality, if entertained, receive no countenance in the legislation or judicial decisions in Missouri, or elsewhere. Lindell v. Benton, 6 Mo. 361; Rev. St. 1865, p. 244; Butz v. Muscatine, 8 Wall. [75 U. S.] 575, 581–584; Bank of Alexandria v. Patton, 1 Rob. (Va.) 499; Van Hoffman v. Quincy, 4 Wall. [71 U. S.] 537.

This court must protect and enforce the rights of its constitutional suitors. The sending of its marshal into an indebted municipality, armed with authority to levy and collect a tax, is the exercise of a delicate and extraordinary power, to be avoided whenever possible; but which it will use whenever judgments it renders cannot otherwise be enforced. Riggs v. Johnson Co., 6 Wall. [73 U. S.] 166, 198; U. S. v. Treasurer of Muscatine Co. [Case No. 16,538]. Were there any municipal officers in esse, the court certainly would not, in the first instance, appoint its marshal, but would issue its command to them.

Under the peculiar circumstances of this case, which is without a precedent, there seems to be no remedy to the plaintiff but to make the order he asks. Anxious, however, to avoid, if may be, the carrying of this order into effect, and to allow the corporation time to elect officers and itself to levy and collect the tax, the execution of the order will be suspended for the space of three months, and the right reserved to suspend it longer if a showing be made to the court, or any of its judges, that an election of municipal officers, as provided by the law and charter, has been duly held, and that the proper body has levied, and is proceeding, according to law, to collect the taxes necessary to satisfy the plaintiff's judgment. Ordered accordingly.

NOTE. At common law, a municipal corporation, it is said, may be dissolved: 1. By act of parliament; 2. By the loss of an integral part; 3. By surrender of the corporate franchises to the crown; and 4. By forfeiture of the charter, for abuse of its franchises, judicially determined. These modes of dissolution, except the first, are believed, by the reporter, to be inapplicable to our American municipal corporations, constituted for public purposes, by legislative act. The existence of a corporation does not depend upon officers, and hence there is no such thing as dissolution by the loss of an integral part. Of course a public corporation cannot abandon or surrender at will, its corporate functions or life. The doctrine of dissolution by forfeiture for misconduct is familiar in its relation to private corporations, but it cannot properly, it would seem, apply to municipal corporations as here constituted. See Willc. Mun. Corp. c. 7, which contains an interesting examination of English cases down to that time on the subject. This author doubts whether there can be an actual and total dissolution by loss of an integral part, or by surrender; but see 2 Kyd, Corp. c. 5; Glover, Corp. c. 20; Rex v. Pasmore, 3 Term R. 241; Grant, Corp. 305, note, and Mr. Justice Campbell's learned opinion in Bacon v. Robertson, 18 How. [59 U. S.] 480; People v. Wren, 4 Scam. 275; Smith v. Smith, 3 Desaus. Eq. 557. That mere failure to elect officers will not dissolve while the capacity to elect remains. See same authorities; also, Colchester v. Seaber, 3 Burrows, 1866; Mayor, etc., of Colchester v. Brooke, 7 Q. B. 383; Muscatine Turn Verein v. Funck, 18 Iowa, 469; Com. v. Cullen, 1 Harris [13 Pa. St.] 133; President, etc., of Mendota v. Thompson, 20 Ill. 197. Contra: Lea v. Hernandez, 10 Tex. 137, but quere.

As respects dissolution by repeal, the rights of creditors of a municipal corporation are protected from invasion by the constitution of the United States. See U. S. v. Treasurer of Muscatine Co. [Case No. 16,538]; Butz v. Muscatine, 8 Wall. [75 U. S.] 575; Gelpcke v. Dubuque, 1 Wall. [68 U. S.] 175; Board of Com'rs of Tippecanoe Co. v. Cox, 6 Ind. 403; Thompson v. Lee, 3 Wall. [70 U. S.] 327; Soutter v. Common Council of the City of Madison, 15 Wis. 30; Smith v. City of Appleton, 19 Wis. 468; Blake v. Portsmouth & C. R. Co., 39 N. H. 435. Compare Mumma v. Potomac

Co., 8 Pet. [33 U. S.] 281. Contra: President, etc., of Port Gibson v. Moore, 13 Smedes & M. 157, where the court seems to have overlooked the constitutional provision protecting creditors, and the case conflicts with those above cited.

WELCH, The JOHN M. See Case No. 7,359.

WELD (COFFIN v.). See Case No. 2,953.

WELD (KIMBALL v.). See Case No. 7,776.

Case No. 17,373.

WELD v. MADDEN.

[2 Cliff. 584.] [1]

Circuit Court, D. Maine. Sept. Term, 1866.

UNRECORDED DEED—FACTS CONSTITUTING IMPLIED NOTICE—CONSTRUCTION OF DEED.

1. A deed of certain real estate in Maine was executed in 1836, G. B. to F., but not recorded till 1858. At the execution of the deed, R. was in the occupation of the premises conveyed, and remained there, boarding with F., until the next summer, when he left and never returned. F. and his grantees always continued in open, notorious, and exclusive possession of the premises, making valuable improvements thereon. W. on the 8th of October, 1853, attached the premises, and on the 24th of November, 1857, levied on them as the estate of B. *Held*, that these facts constituted implied notice to W. of B.'s deed to F., although the same was not recorded until after the levy.

[Cited in Stafford Nat. Bank v. Sprague, 17 Fed. 789.]

2. The description of the premises in the deed B. to F., was as follows: "A certain lot, piece, or parcel of land in said Cherryfield, and on the west side of the Narragaugus river, and being all the lot of land which said Burbank purchased of one Joseph Chamberlain, except that part of said lot which said Burbank has heretofore sold and conveyed to said Freeman by deed, together with all the buildings, privileges, and appurtenances thereto belonging," there being no evidence of any prior deed from B. to F. it was *held*, that the title to the whole lot passed by the conveyance.

Writ of entry dated April 6, 1860, plea nul disseisin. The demandant [David Weld] attached the premises by due process as the property of Caleb Burbank, on the 8th of October, 1853. Judgment for the plaintiff was rendered October 24, 1857, and he levied his execution on the premises on the 24th of November, same year. Burbank acquired title by deed of warranty from one Joseph Chamberlain, dated November 7, 1835, duly acknowledged and recorded. Having introduced the levy, and proved that the land therein described was a part of the Chamberlain lot, the demandant rested his case. The tenant [Clarissa W. Madden] set up title in her former husband, Stephen O. Madden, deceased, and to support the issue upon her part introduced the following conveyances:—Deed: Caleb Burbank to William Freeman, dated August 18, 1836, and acknowledged on the same day, but not recorded till April 29, 1858, after the date of the levy. Deed: William Freeman to Stephen O. Madden, dated April 26, 1849, acknowledged on the same day, and recorded on the following day. Deed: Same to same, dated June 18, 1849, acknowledged same day, and recorded on the 1st of July, the following year. It was agreed that the tenant held the title of her deceased husband, and that the controversy should turn upon the construction and effect of the deed Caleb Burbank to William Freeman, prior in date to the attachment and levy, but in date of record subsequent to the attachment.

The tenant claimed that demandant had implied notice of the existence of the deed, and the evidence showed that the grantee under this deed went into possession in September or October next after the date of its execution, and that he remained upon the premises making valuable improvements, until he conveyed the property to Stephen O. Madden. One Tristam Redman was in possession of the premises under the grantor, at the date of the conveyance, and he remained in the house boarding with the grantee until the next summer, when he left, and never returned.

The description of the premises in the deed Burbank to Freeman was as follows:—"A certain lot, piece, or parcel of land in said Cherryfield, and on the west side of the Narragaugus river, and being all the lot of land which said Burbank purchased of Joseph Chamberlain, except that part of said lot which said Burbank has heretofore sold and conveyed to said Freeman by deed, together with all the buildings, privileges, and appurtenances thereunto belonging." The demandant insisted that the defence failed, because the deed Burbank to Freeman, under which the tenant claimed, was not recorded before the levy was made; but the court being of opinion that the question of implied notice should be submitted to the jury, the demandant offered to prove, as rebutting evidence, the contents of the deed referred to, in the recital of the deed Burbank to Freeman, which had previously been introduced by the tenant without objection. No notice to produce the deed had been given, and there was no other evidence that any such deed was ever actually executed than what appeared in the recital. Under those circumstances the court ruled that parol evidence of the contents of the deed was inadmissible, and no exceptions were taken to the ruling. The substance of the instructions upon the question of implied notice were, that open and visible possession of improved real estate by the grantee of an unrecorded deed was at the date of this transaction implied notice to a subsequent purchaser of the same land; that if the jury found that Freeman entered into the open and visible possession of the premises in October next after the date of his deed, and that he and those claiming under him continued in such possession, making valuable improvements thereon, to the date of the demandant's attachment, then they were instructed that these facts constituted implied

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

notice to the demandant of the deed of Freeman, although they might find that Redman was at the time in possession under the grantor, and continued to reside there till the following summer, provided they also found that Redman then ceased to live there, and that the possession of Freeman thereafter was open, notorious, and exclusive. Demandant moved for new trial.

P. Thatcher, for demandant.
Howard & Cleaves, for tenant.

CLIFFORD, Circuit Justice. The demandant does not controvert the correctness of the first instruction, nor can he with any hope of success, as such undoubtedly was the law at the date of this transaction. Conceding that, he nevertheless insists that the second instruction is erroneous, because it admits that the person in possession under the grantor at the date of the deed Burbank to Freeman remained for some months in the house with the grantee. His theory is that the change of possession must be immediate and complete in order to constitute the basis of the presumption of notice, but he refers to no decided case which gives any support to that theory. Redman was in possession of the premises at the date of the deed, but whether as tenant at will, or otherwise, does not appear. He claimed no title, and at once became a boarder in the family of the grantee. During the next summer he left the premises; and the grantee and those claiming under him have been in the open, notorious, and exclusive possession of the premises ever since, and for a period of more than sixteen years, when the attachment was made. Numerous authorities might be referred to in support of the ruling of the court, but it seems to be unnecessary, as they are all one way. The matters of fact assumed in the instruction have been found by the jury in favor of the tenant, and therefore in determining the legal questions they must be regarded as true. Such being the rule of law, it follows, as a necessary consequence, that if the instruction was correct, the demandant had implied notice of the deed under consideration.

The second exception impliedly concedes that the deed in question was duly executed, and that the demandant had due notice of its existence at the date of his attachment, but denies that the description in the deed is sufficient to convey to the tenant a good title to the premises. Evidently the question here presented is entirely separate and distinct from the one just decided. They should be separately examined, and must be separately decided, as nothing but confusion of ideas can result from considering them together. Prior title is in the tenant if the description in the deed Burbank to Freeman is sufficient to convey the land. Beyond doubt Burbank was the lawful owner of the whole of the Joseph Chamberlain lot, and it is equally clear that he conveyed to Freeman, by the deed of the 18th of August, 1836, all of the lot which he thus acquired, except what he had before conveyed by deed to the same grantee. The argument of the demandant is, that the recital negatives the theory that the tenant held and owned the whole lot, but the proposition as between the parties is refuted by the express words of the deed. The grantor did not intend to convey the land twice, but he evidently meant to convey the whole lot, and could not be heard to aver the contrary. All that he intended by the recital was to exclude the conclusion of a double conveyance of the same land, that is, he intended to convey the whole lot, unless he had previously conveyed a part of it to the same grantee. The inference perhaps is, that he had previously conveyed a part of the lot to the grantee, but the recital contained no such definite statement, nor are there any words by which either the deed or the land supposed to be reserved can be identified. Granting that the deed was a good and sufficient conveyance as between the parties, then it follows that the demandant cannot call the title in question, because he is a subsequent purchaser, with implied notice of the prior deed. His title under the finding of the jury is no better than it would be if the deed Burbank to Freeman had been recorded at its date, and if it had been it is very clear that the levy would be of no avail. Implied notice of a valid prior deed defeats the title of a subsequent purchaser, and it must be held to have the same effect upon a subsequent attachment of the same land. Much of the error in the argument for the demandant arises from commingling the two questions together. Unless the demandant had implied notice of the deed Burbank to Freeman, he must prevail; but if he had such notice, then he has no title whatever, if the deed between those parties was a sufficient and valid conveyance. The verdict of the jury shows that he had such notice, and it has already been shown that, as between the parties, a good title was conveyed to the grantee. The effect of the recital is to bind the grantor as well as the grantee, so that in no event could the former be heard to claim anything in the land described. Assume that the inference is that the grantor had previously executed a deed of a part of the lot to the grantee, still it is obvious that the recital of that fact could not lessen or impair the title of the grantee, as between the parties and the demandant, as a subsequent purchaser with notice is in no better condition. But estoppels must be certain to every intent, and I am of the opinion that the language of the recital is too indefinite to sustain the views of the demandant. Besides, he claims nothing under the recital, and consequently is in no condition to make the objection which is the foundation of his motion. Throughout the argument he fails to show in what manner he would be benefited by a new trial, if the instructions of the court as to implied notice are correct. He does not even suggest that the whole lot was not conveyed to Freeman prior to the attachment. All he pretends is, that a part of it was conveyed before the date of the

deed given in evidence; but it is difficult to see how that fact, if shown, could operate to his advantage, and he gives no explanations upon the subject.

Special reference is also made by the demandant to the other instructions of the court, but it is unnecessary to examine those suggestions, as no such exceptions were taken at the trial, and no such objections are embraced in the motion.

Being of the opinion that the finding of the jury is fully sustained by the evidence, the motion for new trial is overruled. Judgment on the verdict.

Case No. 17,374.

WELD et al. v. MAXWELL.

[4 Blatchf. 136.] [1]

Circuit Court, S. D. New York. March 2, 1858.

CUSTOMS DUTIES—EQUIPMENTS AND APPURTENANCES OF SHIP—WHEN NOT DUTIABLE.

1. An anchor and chain cable, which is bona fide a part of the equipments and appurtenances of an American vessel, is not, on being brought by her to the United States, subject to duty, under the revenue laws of the United States.

2. If an anchor and chain cable is purchased abroad, by an American vessel, to supply the place of one which has become unseaworthy, from any cause, after the sailing of the vessel from a port of the United States, and if such purchase is made bona fide, for the use of the vessel, and not to sell it again as merchandise, and if it is used for the vessel, then it is bona fide a part of the equipments and appurtenances of the vessel, and not subject to duty, upon its being imported into the United States.

3. To be merely used as a part of the equipments and appurtenances of the vessel is not sufficient to change the character of the articles, and to convert them from goods, wares and merchandise into a portion of the vessel. They must also be bona fide such a part, under a necessity not occasioned by any fault of her master or owners in not properly equipping her originally for her voyage.

This was an action [by William F. Weld and others] against [Hugh Maxwell], collector of the port of New York, to recover back duties paid on a set of anchors and chain cables, under the following circumstances: In December, 1850, the American ship Meridian, then a new vessel, sailed from Boston to New Orleans, and thence to Liverpool, having on board a set of anchors and chain cables, as a part of her equipments. That was her first voyage. After she arrived at Liverpool, her master, by the direction of her owners, previously given, obtained there, in April, 1851, another set, consisting of four anchors and their chain cables, and the same were brought to New York in the ship, in June, 1851. Nothing had happened, during the voyage to Liverpool, to make the anchors and chain cables with which she started less seaworthy than they were when she left the United States. The new set was purchased for the alleged reason that the former set was too light to hold the vessel while lying at anchor in the river Mersey. The new set continued to be used on the vessel after she brought it into the United States. The former set was also brought to New York in the vessel, and was then sent to Boston to be used on board another vessel. The collector, under the act of July 30th, 1846 (9 Stat. 42), imposed duties on the anchors and chain cables so purchased at Liverpool, as being goods, wares and merchandise imported from a foreign country into the United States. At the trial, the jury were instructed, that if the anchors and chain cables in controversy were, at the time of their arrival in the United States, bona fide a part of the equipments and appurtenances of the ship, they were not subject to duty, but that, if they were not then bona fide a part of such equipments and appurtenances, they were subject to duty; that, if they were purchased in Liverpool to supply the place of anchors and chains which had become unseaworthy from any cause, after the sailing of the vessel from a port of the United States, and if the purchase of them was made bona fide for the use of the ship, and not to sell them again as merchandise, and if they were used for the ship, then they were bona fide a part of the equipments and appurtenances of the ship, and not subject to duty, upon their being imported into the United States; and that, if they were purchased at Liverpool to supply the place of anchors and chain cables which had not become unseaworthy after the ship sailed from a port in the United States, then they were not bona fide such a part of the equipments and appurtenances of the ship as to be exempt from duty. Under these instructions, the jury found a verdict for the defendant. The plaintiffs now moved for a new trial on the ground of error in such instructions.

Almon W. Griswold, for plaintiffs.

Philip J. Joachimssen, Asst. Dist. Atty., for defendant.

INGERSOLL, District Judge. The question in this case is, whether the anchors and chain cables purchased in Liverpool were goods, wares and merchandise imported from a foreign country into the United States, within the meaning of the revenue law. If they were, then duties were rightly imposed upon them. It is insisted by the plaintiffs, that the articles in question were a part of the ship, and no more liable to the payment of duties than the vessel itself, and that, as the vessel was not liable to the payment of duties, these articles were not liable.

When the vessel sailed from Boston, she was equipped in such manner as her owners

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

saw fit. It was their duty to put on board of her such anchors and chains as were fitted for the voyage—such as would make her seaworthy. They equipped her with such anchors and chains as they saw fit. Nothing happened during the voyage to make them less seaworthy than they were at the time the ship sailed from the United States. If they were seaworthy for the voyage, when she sailed from the United States, they were seaworthy when she arrived at Liverpool. The anchors and chains purchased at Liverpool were procured to be used, not in aid of the old set, but in place of and in substitution for the same.

In the case of U. S. v. Chain Cable [Case No. 14,776], it was held, that if the chain cable then in question was purchased in Liverpool to supply the place of another cable, which had become unseaworthy on the voyage, and the purchase was made bona fide for the use of the ship, and not to sell as merchandise, or to be applied to a use distinct from its bona fide appropriation to the use of the ship, and if it was used for the ship on her arrival at the home port, and was bona fide an appurtenance of her, then it was such part of the equipments of the ship as was not comprehended in the terms "goods, wares and merchandise," within the meaning of the revenue laws of the United States.

After an attentive consideration of the questions presented by the motion for a new trial, in the present case, I cannot be persuaded that the plaintiffs have any legal or just cause of complaint in respect to the instructions given to the jury at the trial. That portion of the charge in which the jury were told, that if the anchors and chains in question were purchased in Liverpool to supply the place of anchors and chains which had become unseaworthy from any cause, after the sailing of the ship from a port of the United States, and if the purchase of them was made bona fide for the use of the ship, and not to sell them again as merchandise, and if they were used for the ship, then they were bona fide a part of the equipments and appurtenances of the ship, and not subject to duty, upon their being imported into the United States, was in conformity to the law as laid down in the case of U. S. v. Chain Cable [supra]. The law as thus given to the jury for their guidance is well established by authority, and there can be no sound legal exception taken to it; and the remaining portion of the charge, when examined attentively and tested by well settled principles, would seem to be as free from doubt.

The anchors and chains in question, were, at the time they were procured in Liverpool, goods, wares and merchandise. They continued to be goods, wares and merchandise up to the time they were brought to the United States, unless, subsequently to the time when they were so purchased, and prior to the time when they were so brought to the United States, they so changed their character as to cease to be goods, wares and merchandise, within the meaning of the revenue laws of the United States. They did not so change their character unless they became and were, at the time of their arrival in New York, bona fide a part of the equipments and appurtenances of the ship. To be merely used as a part of the equipments and appurtenances of the ship, was not sufficient to change their character, and to convert them from goods, wares and merchandise, into a portion of the ship. That was decided in the case of U. S. v. Chain Cable. In addition to such use, they must, in order to make them a part of the equipments and appurtenances of the ship, have been bona fide a part of such equipments and appurtenances. They could not have been bona fide a part of such equipments and appurtenances, unless a necessity existed, such as the law allows, to make them a part of such equipments and appurtenances. A necessity which the law allows is not merely a necessity dependent upon the will and discretion, and created by the act of, the master or the owners. It does not depend solely upon the bona fide motive of the master, when he purchased the goods, wares and merchandise, with the view to make them a part of the equipments and appurtenances of the ship. Such was not the necessity which existed in the case of U. S. v. Chain Cable, and which the court decided to be sufficient to convert the chain cable then in question into a part of the equipments and appurtenances of the ship. The necessity in that case was a necessity caused by no act either of commission or of omission on the part of the owners or master. It was a necessity created subsequently to the sailing of the ship from the United States, by a cause which the owners could not foresee, which they were not bound to foresee, and which, when the ship sailed on the voyage, they were not required to provide against. When that ship sailed from the United States, she was properly equipped for the voyage. By a casualty which took place subsequent to her sailing, she did not continue to be properly equipped for the voyage, and, by such casualty, she was made unseaworthy. The court decided that the master, in order to remedy the unseaworthiness, caused by such casualty, had a right to purchase, in a foreign port, goods, wares and merchandise, and bring them to the United States, as a part of the equipments and appurtenances of the ship.

If the Meridian was unseaworthy for a voyage to Liverpool, she was not made unseaworthy by any such casualty as existed in the case of the chain cable in U. S. v. Chain Cable [supra]. If she was unseaworthy in consequence of her having too

light anchors and chains for a voyage to Liverpool, such unseaworthiness existed before and at the time she sailed from the United States, and was known to her owners when she so sailed. If such unseaworthiness existed, it existed in consequence of the fault of her owners, whose duty it was to make her seaworthy for the voyage upon which she was about to sail. If a necessity existed at Liverpool, which required that she should have a new set of anchors and chains, such necessity was occasioned by the fault of her owners in not properly equipping her with a proper set of anchors and chains, fitted for the voyage upon which she sailed, and by no other necessity; and such a necessity is not sufficient, in law, so to convert the goods, wares and merchandise procured at Liverpool, into a part of the equipments and appurtenances of the ship, as to exempt them from duty, upon being brought into the United States. There can be no bona fide appropriation of goods, wares and merchandise to the use of the ship, so as to affect the revenue laws of the United States, when the appropriation is caused, and caused solely, by the neglect of the owners, in not complying with the duty required of them by law, to make the ship seaworthy for the voyage, before the voyage is undertaken. According to the case U. S. v. Chain Cable [supra], an appropriation of the articles to the use of the ship will not make them a part of the equipments and appurtenances of the ship, unless such appropriation is a bona fide appropriation. If the ship was unseaworthy, she was so by the culpable neglect of her owners in not furnishing her, before she sailed from the United States, with proper anchors and chains for the voyage; and no culpable neglect can be said to be bona fide.

Any other construction would open a wide door for the commission of fraud upon the revenue laws of the United States. In this very case, it is claimed by the plaintiffs that the anchors and chains with which the Meridian sailed from the United States, were seaworthy for any voyage, except for a voyage to Liverpool; and that they were insufficient for that voyage, only because they were too light to hold her while at anchor in the river Mersey. Both sets of anchors and chains, the old one, and the set purchased at Liverpool, came in the ship to the United States, as a part of her equipments and appurtenances. If the new set, upon the facts in this case, are not subject to duty, then all American ships can be sent to sea on a foreign voyage without any chains and anchors, and can, while abroad, be furnished with proper and sufficient ones, to be brought to the United States duty free.

The motion for a new trial is denied.

WELD (UNITED STATES v.). See Case No. 16,660.

Case No. 17,375.

WELDDES v. EDSELL et al.

[2 McLean, 366.] [1]

Circuit Court, D. Indiana. May Term, 1841.

PAYMENT OF JUDGMENT — RECEIPT OF DEPUTY CLERK—FRAUD—LIABILITY OF CLERK —EXECUTION.

1. Where defendants, by the misrepresentation of their agent, procured the deputy clerk to receive an assignment of a judgment, and depreciated paper, in payment of a judgment, for which he gave a receipt, the plaintiffs are not bound by it, and may issue their execution.

2. Such an arrangement being wholly unauthorized by the plaintiffs, the court will not set aside the execution.

3. Nor will the court enter a rule on the clerk to pay over the paper received by his deputy, the clerk never having sanctioned the arrangement.

4. The clerk is bound by the acts of his deputy, but where the act is not in the ordinary course of business, and, especially, where it has been done through the procurement and misrepresentations of a party, the liability of the clerk may be doubtful.

5. Under such circumstances the court will not give to the party a summary mode of redress.

[Action by Welddes against J. W. and Samuel Edsell.]

Mr. Lockwood, for plaintiff.

Mr. Cooper, for defendants.

McLEAN, Circuit Justice. Samuel Edsell, one of the defendants, filed an affidavit stating that, at November term, 1838, the plaintiffs, citizens of New York, obtained a judgment against them for $1,198.84, and that the defendants paid on the judgment $824.48, by the assignment of a judgment in the defendants' favor, against Roehill & Spencer, to and for the plaintiffs, and that on the 4th January, 1839, they paid to the clerk of this court $416.00, and, also, $8.40 costs on said judgment. That the amount of the judgment assigned had been paid to the plaintiff's attorney, and that the money paid to the clerk was equivalent to specie, as he is informed and believes, and that the clerk gave to defendants a receipt in full for the judgment. That notwithstanding said payment execution has been issued on the judgment, and is now in the hands of the marshal. And the defendants, by their counsel, move the court to set aside the execution.

The receipt of the deputy clerk was produced as above, and he, being sworn, states that the agent of the defendants, from whom he received the above assignment of the judgment and payment, and to whom the receipt was given, informed him that the plaintiffs' counsel had agreed to receive the judgment assigned and the payment of the Indiana paper, in discharge of the judgment against the defendants, and relying upon this state-

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

ment he made the arrangement with the defendant's agent.

The counsel for the plaintiffs, being sworn, states that, he made no such arrangement as above represented with the defendants or their agent. That the money on the assigned judgment is in his hands, subject to the order of the defendants. It has not been applied on the judgment against them, because the defendants refused to have it so applied, unless the counsel would agree, also, to sanction the above payment, in paper, to the deputy clerk.

On this state of facts the court refused to set aside the execution. The deputy clerk, in making the arrangement, was misled by the statement of the defendant's agent, and the plaintiffs ought not to be prejudiced by it. As the plaintiffs demanded specie from the defendants, and as the above arrangement avoided the payment of specie, it seems to have been intended to defeat the plaintiffs' demand. The arrangement was, in fact, made, without authority, and, under the circumstances, we think, the plaintiffs are entitled to their execution.

At a subsequent day of the term a motion was made for a rule on the clerk to pay over the money received by his deputy to the defendants, and the merits of the motion were discussed as though the rule had been granted. On a motion of this kind the court will not consider the question which has been raised as to the power of the clerk to receive the amount of a judgment on his docket, and give a discharge against it. It has been usual to make such payments, and this is enough to fix the liability of the clerk under ordinary circumstances. And had this payment been made in money the court would not hesitate to enter the rule. But this cannot be considered a bona fide payment on the part of the defendants. From the time the arrangement was made known to the clerk he refused to sanction it. And the deputy had no special authority to make it. It was not, in fact, in the line of his ordinary duty as deputy. Suppose he had executed a receipt to the defendants without receiving a dollar of the money, would the clerk have been bound? He did, in fact, execute a receipt without receiving money. The assignment of the judgment the deputy had no authority to take, nor had he a right to receive the Indiana paper which he did receive.

If an agent act within the line of his duty he binds his principal; but if he exceed his powers he does not bind him. The custom of an office, under the general sanction of its head, would bind him. Whatever is done, generally, by a deputy clerk may be presumed to be done with the sanction of the clerk; and, under such circumstances, no secret agreement or understanding, between the clerk and his deputy, can relieve the clerk from responsibility. But where a thing is done, as in the present case, out of the ordinary course of business, and, especially, where this deviation has been through the procurement and misrepresentation of the party or his agent, the liability of the clerk may be considered doubtful. If the act of the deputy were procured through the fraud of the defendants, it is clear that the clerk cannot be held liable.

But we deem it unnecessary, on this motion, to decide this question. Whether the clerk is liable or not, for the Indiana paper received by his deputy, we are clearly of the opinion that under the circumstances the defendants are not entitled to this summary relief.

Case No. 17,376.

WELFORD v. GILHAM.

[2 Cranch, C. C. 556.] [1]

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

GAMING DEBTS—INDEMNITY NOTE—JUDGMENTS—PLEADING.

1. A note given as indemnity to the bail, who had paid off a judgment obtained against his principal for a gaming debt, and for which the bail was liable, and had become fixed before he received the note, was not a note the consideration of any part of which was for money or other valuable thing won at any game, within the meaning of the Virginia statute against gaming.

2. A plea of the statute of gaming to a promissory note is substantially defective in not stating what debt or judgment the note was given to secure, by what court the judgment was rendered, and the names of the persons who won and lost the money.

3. The judgments which are made void by the Virginia statute against gaming are judgments voluntarily confessed by way of security for a gaming debt, not judgments rendered in invitum.

4. The statute of Virginia makes void all contracts where any part of the consideration is money won at any game.

Assumpsit against the indorser of Farish's note. The defendant pleaded the Virginia statute of gaming of the 8th of December, 1792 (page 174), which makes absolutely void all contracts where any part of the consideration is for money or other valuable thing won at any game. General demurrer, and joinder.

Mr. Mason, for defendant, cited Woodson v. Barrett, 2 Hen. & M. 80.

Mr. Wise, contra, cited Alcinbrook v. Hall, 2 Wils. 309.

CRANCH, Chief Judge. The defendant was sued as indorser of one Farish's note, and pleaded: 1st. The general issue. 2d. That before the making of the note, the maker and one Boyd "played together at a certain unlawful game at cards commonly called loo, for divers sums of money, upon tick and credit, and not ready money;" and that Farish lost, and Boyd won, divers sums

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

of money amounting to $410. "And afterwards there was instituted by the said Boyd against the said Farish upon his promises and agreements to pay the said sums of money so lost as aforesaid, a suit at law in the ——— court, in the city of Baltimore, in which such proceedings were had, that the said R. G. Welford, the plaintiff, became and entered as the special bail for the said Farish; and thereafter a judgment was rendered in and by the said court against the said Farish for the amount of moneys so lost by him as aforesaid, and thereupon certain proceedings were had and commenced by the said Boyd against the said Welford as special bail as aforesaid, in order to make him liable for and pay the amount of the judgment aforesaid; when, in order to relieve the said Welford as special bail as aforesaid, the note in the declaration mentioned was drawn and made by the said Farish and indorsed by the defendant with the intent and for the purpose of relieving the said Welford as special bail as aforesaid, and of being delivered to the said Boyd, in lieu of the said Welford's engagement as bail as aforesaid, and to secure the payment of the judgment aforesaid; and for the purposes and considerations aforesaid, the said note so drawn and indorsed as aforesaid, was thereafter delivered to the said A. H. Boyd, who took and received the same and carried the said note to be placed for collection in the Bank of Potomac, in the town of Alexandria. And the defendant avers that the said plaintiff thereafter, well knowing the consideration upon which the said judgment had been rendered, and in which he had entered as special bail as aforesaid, and that the same was rendered for the said amount of moneys so lost at the game aforesaid, paid off and discharged the same, and then and there took and received the said note mentioned, well knowing the purposes and considerations for which the same had been so drawn, indorsed, and delivered as aforesaid; and the defendant says that by reason of the premises, and by force of the statute in such case made and provided, the said note was then and is wholly void; and this he is ready to verify. Wherefore," &c. 3d. The third plea is like the second, excepting that it avers that the note was placed in the Mechanics Bank of Baltimore, for collection, who placed it in the Bank of Potomac for collection; and that it was after the dishonor of the note that the plaintiff paid off the judgment and received the note. 4th. The fourth plea is, "that the note in the declaration mentioned was drawn and given, in part, to secure a certain debt and judgment which before that time had arisen and been rendered for certain moneys won at unlawful gaming; and that the plaintiff took and received the said note, well knowing the purposes and consideration for which the same had been so drawn and given as aforesaid; and the defendant says, that, by reason of the premises, and by force of the statute in such cases made and provided, the said note was and is wholly void, and this he is ready to verify," &c. To the three last pleas there was a general demurrer and joinder.

The main question upon this demurrer is, whether the Virginia statute against gaming of the 8th of December, 1792 (chapter 96), is a bar to an action brought by the bail, (who was fixed upon a judgment against his principal for a gaming debt, and who paid off that judgment,) against the indorser of a note given to the bail for the amount which he had so paid. Or, in other words, whether it appears, by the pleadings, that any part of the consideration of this note was money won at cards, or other game, within the meaning of that statute? It is stated in the second plea, that the note was made and indorsed for the purpose of relieving Welford as special bail, and with intent to secure the payment of the judgment; and that the plaintiff, having paid off the judgment, knowing it to be for a gaming debt, took the note, knowing the intent with which it was made, and its consideration. The plea does not state that at the time the plaintiff became bail, or at the time of the judgment against Farish, or at any time before the plaintiff was fixed, as bail, he knew it to be a gaming debt. It must therefore be taken as a fact that he was innocently bound for the debt, and could not, at law, discharge himself but by paying it; for I presume he could not have pleaded the statute in bar of the scire facias. It is true that in second Institute (page 470), Lord Coke, in his commentary upon the statute of 13 Edw. I. c. 45, which gives the writ of scire facias to revive judgments in personal actions, says, "that the tenant or defendant, though he be stranger to the recovery, shall not plead against the recovery any thing that proveth it to be erroneous or voidable; but he may plead matter that proveth the recovery void; as that it was coram non judice, or the like." "Neither shall he, in a scire facias, plead any thing against the title or matter of the recovery, where he may have an action, and therein falsify the same." "But the tenant or defendant may plead divers matters, after the judgment given, to bar the plaintiff of execution, as outlawry, a release of actions," &c. And again, in page 472, he says: "And seeing the words of the scire facias be, quare executionem habere non debet, the tenant or defendant may plead any thing in bar of execution, as hath been said before." It is true also that the act of assembly of Virginia against gaming, of the 8th of December, 1792 (page 174), declares, "that all promises, agreements, notes, bills, bonds, or other contracts, judgments, mortgages, or other securities or conveyances whatsoever made, given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such promise, agreement, conveyances or securities, shall be for money, 'won' at any game, shall be

utterly void, frustrate, and of non effect, to all intents and purposes whatsoever." Yet I am strongly inclined to think that the judgments contemplated by that act, are only such judgments as should be voluntarily confessed by way of security for the debt. The words are, "judgments, mortgages, or other securities or conveyances," "made, given, granted, drawn, or entered into, or executed," "by any person." These expressions do not seem to refer to judgments rendered, by a court, in invitum; but such as should be agreed beforehand to be confessed by way of security; which was a very common mode of giving security in England at the time of the statute of 9 Anne, c. 14, from which the Virginia statute seems to be copied so far as it makes judgments void. The British statute does not use the words "promises, agreements, and other contracts," which are in the statute of Virginia; but it has the words "judgments, mortgages, or other securities or conveyances," and the English courts have decided that although the security is void, yet the contract remains; upon which ground the case of Robinson v. Bland, 2 Burrows, 1077, was decided in favor of the plaintiff; yet that judgment was for money knowingly lent at the time and place of play, and would have been void by the express words of the statute of Anne, unless the word "judgments," in that statute is to be restricted to judgments agreed to be confessed by way of security. If such a restricted construction be not given to the statute, the judgment in the case of Robinson v. Bland, was void the moment it was rendered; and the sheriff was a trespasser in serving the execution.

The judgment therefore of Boyd v. Farish, I apprehend, was not utterly void, so that the bail could avail himself of the statute by plea to the scire facias, as he could if the judgment had been coram non judice. If then, the plaintiff, Welford, was bound at law to pay the debt, and could not discharge himself by plea to the scire facias; and if he paid off the judgment, as the plea states, before he received the note; and if the note was given to him for his indemnity, or in the words of the plea, "for the purpose of relieving the said Welford, as special bail as aforesaid," and to secure to him the payment of the amount of the said judgment which he had paid, or was bound or was about to pay, (which I take to be a fair paraphrase, and to be the true meaning of the words, in the plea, "and to secure the payment of the judgment aforesaid,") then I think the facts stated in the plea do not show that any part of the consideration of this note was for money, or valuable thing won at any game, within the meaning of the statute.

I do not perceive any material difference between the second and the third pleas.

The fourth plea I take to be substantially defective in not stating what debt or judgment the note was given to secure; by what court the judgment was rendered; and the names of the persons who won and lost the money.

I am, therefore, of opinion that the judgment upon the demurrer ought to be for the plaintiff.

The other judges concurred.

WELLER (FRASER v.). See Case No. 5,064.

WELLER (ROGERS v.). See Case No. 12,022.

WELLER, The SAM. See Case No. 12,290.

Case No. 17,377.

In re WELLES.

[18 N. B. R. 525.] [1]

District Court, S. D. New York. Aug. 9, 1878.

BANKRUPTCY—COMPOSITION.

[1. The fact that the schedules stated the real estate of the bankrupt as of unknown or uncertain value is not a good objection to a composition.]

[2. The objection that the estate could pay more will not avail, unless very clearly made out, and the disparity is evident.]

[In the matter of Henry S. Welles, a bankrupt.]

Tremain T. Tyler, for bankrupt.

R. F. Andrews, for opposing creditor.

CHOATE, District Judge. Motion to confirm composition.

1. The objection that the schedules stated the real estate of the bankrupt as of unknown or uncertain value is not a good objection to a composition. If the schedules are imperfect or indefinite, creditors may have them amended, or may get the information they may require by examination of the debtors or otherwise.

2. The objection that the house in Utica, standing in the name of the bankrupt's wife, should have been included in the schedules, and should be deemed the property of the bankrupt, must be overruled. The facts were brought out by the testimony, and submitted to the creditors, and it is immaterial whether the property was named in the schedules or not. The possibility that an assignee might by litigation receive something from this property was, no doubt, one of the considerations that the creditors weighed in coming to the conclusion to accept the composition. I cannot say that they judged unwisely in giving very little value to this possibility.

The general objection that the estate could pay more is not one that will avail, unless very clearly made out, and unless the disparity is evident. I cannot say that this is shown. Motion granted.

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[1] [Reprinted by permission.]

Case No. 17,378.

WELLES v. NEWBERRY.

[4 McLean, 226.] [1]

Circuit Court, D. Michigan. June Term, 1847.

JURISDICTION OF FEDERAL COURT — COLORABLE ASSIGNMENT OF CAUSE OF ACTION.

[Where a note is transferred by a bank to a nonresident of the state to secure a prior debt, and is to be restored to the bank in case the debt is paid, and the transfer is made merely for the purpose of suing in the United States court, the note still remaining the property of the bank, the transferee cannot sue thereon in that court.]

[This was an action on a promissory note by William B. Welles against Oliver Newberry. Heard on motion for a new trial.]

Mr. Romeyn, for plaintiff.

Mr. Bates, for defendant.

WILKINS, District Judge. This cause was tried at the last term, and verdict rendered for the defendant. The action was brought against him as one of the indorsers of a certain promissory note, made by one George L. Whitney, at Detroit, January 21, 1839, for the sum of three thousand five hundred dollars, payable ninety days after date. The principal witness for the plaintiff, was Mr. John A. Welles, who proved the making of the note, the hand-writing of the defendant as indorser, its negotiation and discount at the F. and M. Bank of Michigan, at the time of its date, of which banking institution the witness was then the cashier, the protest of the note at maturity for non-payment, and the regular notice to the indorsers. On cross-examination, Mr. Welles further testified, in substance, as follows: "The Farmers' and Mechanics' Bank continued the owners of the note, until the 10th of March, 1845, when it was assigned by deed under seal, with other notes and assets of the bank to the plaintiff, as collateral security for a loan of money, made to the bank by him, and other stockholders, one of whom was a citizen of this state. The nominal consideration in the deed of assignment, was one thousand two hundred dollars. Under its provisions the proceeds, as collected, were to be applied by the plaintiff, as assignee, in payment of the loan to the bank; after the liquidation of which, by the means thus provided, or otherwise, this note, with others, if uncollected, was to revert to the bank. The note never was out of the possession of the bank—was never actually delivered to the plaintiff—and was transferred expressly with the view of bringing this suit in the court of the United States. The plaintiff was not here at the time of the execution of the assignment, and never had been here before. His first visit to this place, was in the summer of 1845, subsequent to the assignment; and neither he nor any other person ever paid any thing for the note. He was not aware that the plaintiff knew any thing about the transaction at the time, or that this particular note had been assigned to him. The bank had a general arrangement with certain of the stockholders, who had made pecuniary advances for its relief, to transfer to them as collateral security certain notes, but the original object in the assignment of this note to the plaintiff without his knowledge, was to enable suit to be brought in the circuit court of the United States, and thereby avoid the decision of the state courts, in relation to proof of notice. Subsequently, in the month of June, the plaintiff ratified the assignment, and accepted this note as collateral security for his advances, but the note itself never was delivered to him, and never passed out of the actual custody of the bank, until delivered by the witness to Mr. Abbot, the attorney of the bank, to bring this suit. The arrangement with the other indorser, was made and completed anterior to the assignment to the plaintiff." The note was delivered to the attorney without explanation, as the note of the plaintiff, and at the time, the bank was indebted to him beyond the amount of the note. Such is the substance of the testimony of Mr. Welles, the witness of the plaintiff, and for a long time the cashier of the Farmers' and Mechanics' Bank of Michigan, a banking institution chartered by this state, and located and doing business in the city of Detroit.

On the question presented by this testimony, the court, among other matters, instructed the jury that: "If they believed that the note was transferred only as collateral security, to secure a prior debt of the bank to the plaintiff, to be accounted for and restored to the bank, in case such debt was otherwise discharged, and for the purpose of suing in the United States court, the note still remaining the property, and in possession of the bank, then such assignment did not absolutely vest the ownership of the note in the plaintiff."

The new trial is asked, on the ground of the insufficiency of the testimony, and error in the charge of the court; but argued mainly on the last point. It is clear that the bank was the real holder of the note, from the period of its negotiation, down to the institution of the suit in this court. The assignment of the plaintiff, under the circumstances, with the sole object of bringing the suit in this court, did not divest the bank of its property, or make the plaintiff the real holder. He was merely the agent of the bank, with authority to collect, and bound to account for the proceeds; and if uncollected, to restore the note to the principal. In fact, the suit was instituted and prosecuted for the sole benefit of, and under the direction of the bank, in the name of the plaintiff. It is true, the possession of a negotiable note is prima facie evidence of the party's being a holder for a valuable consideration, and he is not bound to prove by other evidence, that he is a bona fide holder. But, if it is proved aliunde, that he is but a mere agent, to give jurisdiction to this court, and holds and prosecutes the note

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

as such, and with such object, he can not recover a judgment upon it here in his own name. Such was the decision of Mr. Justice Story in Thatcher v. Winslow [Case No. 13,863], and who cited 10 Johns. 387, and 5 Mass. 491.

The point made in Thatcher v. Winslow [supra] was, that the plaintiff was not the owner of the notes, upon which the action was brought, but that they belonged to the Merchants' Bank at Newport, by which they had been originally discounted, and that they had been delivered to the plaintiff for the purpose of enabling suit to be brought upon them in the circuit court of the United States. The evidence here was much stronger against the plaintiff's recovery, for this note was never actually delivered to him, nor was he privy to the deed of assignment at the time of its execution, his name being used without his assent at the time, and the assignment was made to him as a citizen of a foreign jurisdiction, having an interest in the bank, for the sole purpose of enabling the bank to bring suit in this court. Apart from his interest in the bank as a stockholder, the plaintiff had no substantial interest in the note. The jury found the facts that the plaintiff was to account to the bank for the note as agent, and to restore it, if not collected, and that the note still remained the property of the bank, and that the action was prosecuted for the benefit of the bank. Such being the case, he could not maintain an action as the indorsee of the note against the defendant in this court. But, the plaintiff's title to the note, if any he had, was not derived from the contract of indorsement. He did not receive it as negotiable paper, in the course of trade. The note was past due at the time of the transfer, many years previous to the assignment, the note had matured, and had been protested for nonpayment. His title, therefore, was conferred by the deed of assignment, which circumstance alone, was sufficient to defeat his action in this court. Motion for a new trial refused.

WELLFORD (CHESTER v.). See Case No. 2,662.

Case No. 17,379.

WELLFORD et al. v. EAKIN.

[1 Cranch, C. C. 264.][1]

Circuit Court, District of Columbia. Nov. Term, 1805.

ACTION ON NOTE—SUBSCRIBING WITNESS—PROOF OF HANDWRITING.

If the subscribing witness to a note be not within reach of the process of the court, it is not necessary to produce him or to prove his handwriting; but the defendant's handwriting may be proved.

Debt on note. Mr. Vasse was a subscribing witness. The plaintiff gave evidence that Vasse had been summoned at the last term from Staunton, in Virginia, but had heard he had gone to Tennessee. The witness never resided within the reach of the process of this court. See Smith v. Carolin [Case No. 13,020]; Jones v. Lovell [Id. 7,478]; Waterston v. Cook, not reported; Macubbin v. Lovell [Case No. 8,928].

THE COURT said that where the subscribing witness resides out of the reach of the process of this court, it is not necessary to produce him nor to prove his handwriting; but the plaintiff may produce evidence of the writing of the defendant.

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

Case No. 17,380.

WELLFORD v. MILLER.

[1 Cranch, C. C. 485.][1]

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

DEPOSITIONS — WITNESS RESIDING WITHIN 100 MILES.

This court will not grant a commission in a civil action at common law, to take the deposition of a witness residing in Virginia within one hundred miles of the place of trial, because he may be summoned to attend personally.

[Cited in Voss v. Luke, Case No. 17,014.]

Upon affidavit that witnesses resided in Fredericksburg (less than one hundred miles from Alexandria)—

Mr. Youngs, and Mr. Jones, for the plaintiff, moved for a commission to Virginia, to take the depositions of those witnesses to be used as well in a suit in chancery, as at common law depending in this court. The chancery suit was at issue and a general dedimus had been awarded.

THE COURT (DUCKETT, Circuit Judge, absent) suffered the commission to issue in the chancery suit, considering it as in aid of the general commission heretofore awarded. But refused it in the common-law case, because the witnesses (residing within one hundred miles) might be summoned to attend this court personally.

The law of Virginia of 29th Nov. 1792, § 13, p. 279, was cited by Mr. Youngs, which allows a commission to issue when the witness resides beyond sea, or in a foreign country, or in any other of the United States.

Case No. 17,381.

WELLFORD v. MILLER.

[1 Cranch, C. C. 514.][1]

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

BONDS—PROFERT AND OYER.

A copy will not be received as oyer, when a profert has been made of the original. And if a copy is offered, the defendant may demur.

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

Debt on a bond, with profert of the original bond. The defendant demanded oyer, and the plaintiff produced a supposed copy only, it being said that the original was in the possession of the defendant; whereupon the defendant demurred because the profert was of the original, and the oyer was of a supposed copy.

C. Lee, for defendant, cited Thoresby v. Sparrow, 1 Wils. 16; Smith v. Woodward, 4 East, 587.

Mr. Youngs, contra. The plaintiff could not have declared upon it as a bond lost or mislaid, and when he drew the declaration he supposed that the defendant would be compelled to produce it, so as to enable him to give oyer. Read v. Brookman, 3 Term R. 151. In Darlington v. Groverman [Case No. 3,576], this court compelled the defendant to receive a copy as oyer.

FITZHUGH, Circuit Judge. That was under the act of assembly of Virginia, the bond being filed in another court.

THE COURT stopped Mr. Lee in reply, and adjudged the demurrer to be good. The fact that the bond was in the defendant's possession did not appear upon the record.

Case No. 17,382.

WELLING v. RUBBER-COATED HARNESS TRIMMING CO. et al.

[1 Ban. & A. 282;[1] 7 O. G. 606.]

Circuit Court, D. New Jersey. May, 1874.[2]

PATENTS — CONSTRUCTION OF CLAIMS — INFRINGEMENT OF COMBINATION—MARTINGALE RINGS.

1. In the specification of letters patent, granted to William M. Welling, March 17, 1863, for "a new and useful improvement in rings for martingales," he described, as a new article of manufacture, a martingale-ring formed by taking a metallic ring, and a sufficient amount of any suitable composition, preferably an artificial ivory composition, called "factitious ivory" previously invented by him, and by dies or by hand, causing the composition to completely envelop the metallic ring, the mass of composition being pressed and solidified around it, by means of dies; the object of using the metallic ring inside of the ivory composition being to give it strength. The patentee claimed, "the ring for martingales, etc., manufactured as set forth, with a metal ring enveloped in composition as and for the purpose specified:" *Held*, that the patent would cover the application of hard rubber to a metal ring by means of dies.

2. The fact that the rubber must necessarily undergo the additional process of vulcanization, does not exempt it from the control of the patent. Though not the same substance, in its essence and constituents, as the "factitious ivory," it is a similar material as regards its capability of being adapted to the purposes for which the factitious ivory is used.

3. The Welling patent, construed to be for a metal ring surrounded with some plastic composition, like artificial ivory, capable of being compressed, solidified, and polished by the action of dies, and which is, in fact, subjected to such action, whereby a martingale ring is produced with an exterior surface more durable and more highly polished than had before been obtained by different processes.

4. The Welling invention held not to have been anticipated by rings made of ivory, or of compositions known as artificial, factitious or imitation ivory, or of metal coated with varnish, lacquer, japan, enamel, porcelain, or metallic plating, such coatings being applied with a brush or the fingers or fused on by heat.

5. A patent for a combination is infringed by the use of a similar combination, although one of the elements is omitted and another substituted for it, unless the substituted device is a new one, or was not known at the date of the patent as a proper substitute for the one omitted.

[This was a bill in equity by William M. Welling against the Rubber-Coated Harness Trimming Company and others for infringement of a patent.]

Frederick H. Betts, for complainant.

J. C. Clayton, for defendants.

NIXON, District Judge. This is a suit for an alleged infringement of letters patent No. 37,941, and bearing date March 17, 1863, granted to the complainant for "a new and useful improvement in rings for martingales;" and the questions in issue are determined by the construction and scope to be given to the specifications and claim of said patent.

The schedule annexed is dated April 8, 1862, and the complainant therein states his invention as follows: "In letters patent granted to me August 4, 1857, a composition and mode of making factitious ivory is set forth, and out of said materials, I have manufactured billiard balls, rings of various kinds, etc. My present invention does not relate to any particular composition, as that in the aforesaid patent, or any similar compound, may be employed. The nature of my said invention consists in the employment of a metallic ring within a ring formed of artificial ivory or similar materials, for giving strength to the same, thereby producing a new article of manufacture, and one that is stronger than an ivory ring, and possesses all the beauty of appearance, and can be afforded at a very much less cost. Ivory rings, particularly such as used for martingales, require to be made out of very solid ivory in order to be sufficiently strong, and hence are quite costly. In order to make my improved rings, I take a ring of metal such as shown at A; or said ring may be formed by punching out a washer from a sheet of metal, or in any other suitable way. I take the amount of artificial-ivory composition, and by dies or by hand cause the said composition to completely envelop the said ring with as much uniformity as possible, and to give the exterior finish to the same, press and solidify the mass of composition around the ring by means of dies, and in so doing, any plain, or more or less ornamental shape, may be given to the said ring or the surface thereof. My ring is thus made of the desired ornamental appearance, while great strength is attained at very little cost. What I claim, and desire to secure by letters patent, is, the ring for martingales, etc., manu-

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

[2] [Reversed in 97 U. S. 7.]

factured as set forth, with a metal ring enveloped in composition, as and for the purposes specified."

It is insisted by the defendants that if the patent is valid at all, it must be limited to a "martingale ring intended to imitate ivory, and made by covering a metallic ring with artificial ivory, such as is described in complainant's patent of 1857, or some similar compound." Bearing in mind the established American rule, that patents are to be construed liberally, and are not to be subjected to a rigid interpretation, I think that this construction is too narrow, and does not give to the patentee all that he is entitled to, under the specifications and claims of his patent. It is quite clear, indeed, that factitious ivory was the composition uppermost in his thoughts. Having the partiality of a parent for his offspring, he naturally imagined that no superior compound could be formed or used. It may be conceded that the full extent of his invention had not then dawned upon him. Men often build better than they know; but where the fair interpretation of the words employed to describe an invention or discovery includes matters not in the mind of the patentee at the time, he is as fully authorized to claim the unlooked-for as he is the anticipated results.

The specifications are not well drawn, either as to the grammatical construction of the sentences, or in the use of words to clearly convey the inventor's meaning. This is not adverted to because it is supposed that bad grammar or infelicitous methods of expression will avoid a patent, but because it is the duty of the court to ascertain the nature and the scope of the invention from the sense of the words which have been used in explaining it; and the same exact rule of interpretation is not to be applied at all times, but such, in each case, as will best enable the court to arrive at the meaning intended.

It is clear that the patentee had no thought of confining himself, or others, to the use of the factitious ivory; for, after referring to his patent of 1857, he says: "My present invention does not relate to any particular composition, as that (factitious ivory) or any similar compound may be employed. The nature of my invention consists in the employment of a metallic ring within a ring formed of artificial ivory or similar materials, for giving strength to the same," etc. He then claims "a ring for martingales, etc., manufactured as set forth, with a metal ring enveloped in composition" generally, "as and for the purposes aforesaid."

To understand, and correctly interpret, the patent, some reference may properly be made to the state of the art. The defendant's expert, Mr. Hedrick, who seems to be an intelligent witness, says, that prior to 1862 martingale rings were made in a variety of ways, and of different materials—of ivory, of compositions known as artificial, factitious or imitation ivory, of metal coated with varnish, lacquer, japan, enamel, porcelain, metallic plating, and compounds of rubber and gutta percha, and leather. The only known methods of applying the coatings to the iron ring, were, by a brush, or the fingers, or fusing on to it by heat. The ring gave the strength to the manufactured article, and the coating the exterior finish.

The object of the complainant, by his invention, was to introduce an improvement upon the known methods of coating, whereby he would impart strength, durability, and greater polish to the surface, thus producing a more valuable, useful, and beautiful result. His instrumentalities were all old—an iron ring, a plastic composition, and a die; but, so far as appears in the case, they were new in combination. If his patent had been simply for a metallic ring, covered with any compound capable of being moulded, or with factitious ivory or similar materials, it would have been void for want of novelty. If it had been for the use of the die in pressing or solidifying plastic substances generally, it would have been, probably, anticipated, in this regard, by the English letters patent to Barnwall and Rollason of 1860, in which such use of dies is plainly indicated. But the invention is for a combination, and the combination is a metal ring surrounded with some plastic composition, like artificial ivory, of such a nature, that it is capable of being compressed, solidified, and polished by the action of the dies, and which is, in fact, subjected to such action, whereby a martingale ring is produced with an exterior surface more durable, and more highly polished, than had before been obtained by different processes of manufacture, and at greater cost.

Have the defendants infringed the patent of the complainant, thus interpreted? Mr. Albright frankly tells us what they have been doing. He is called as a witness by the complainant, and is asked to detail the process, by which certain rubber rings of their manufacture, are made. He says (C. R. p. 17): "We take an iron ring, sheet or sheets of rubber rolled to the proper thickness, cut from the sheet a piece in the proper form, and envelop the iron ring with the covering of rubber, pressing the edges in the form of a lap with the fingers, causing the rubber to adhere and to become a homogeneous piece or cover. * * * The ring, when covered, has this outer coating of rubber in a plastic state. The ring is then placed in an oven and vulcanized. After the ring is taken from a vulcanator, after vulcanization, it is of irregular form or shape. We, to make the regular form or shape desired, put it in a lathe chuck, and turn it up in the form or shape desired, or by the use of a steel die, engraved in certain form to produce a ring, with such ornamentations on the outer ring as may be desired. The seam, or imitation stitch, is made by impressions from the die," etc. He further states that he manufactured the rings produced under letters patent bearing date October 9, 1866, February 12, 1867, February 13, 1872, and December 3, 1872; that he commenced the use of dies over two

years ago, to save expense in the production of the rings; that he claims to have been the inventor in the use of dies for such purpose; and that their use for shaping and ornamenting the articles is a valuable improvement.

The letters patent under which he justifies his action, and claims protection, have been issued or reissued to him, as inventor or assignee, several years since the date of the complainant's invention, and have been exhibited in the case. I have examined their specifications and claims with some care, and am unable to find anything in them, essential to the result, which is not anticipated by the Welling patent. For instance, in the specifications to the letters patent granted February 13, 1872, and reissued November 26, of the same year, he states, that he takes a metallic ring, a composition of vulcanizable gum of a consistency about equal to stiff dough, rolls it into sheets of uniform thickness, and applies it to the ring, working or pressing it to the metal, by the hand, or otherwise. It is then placed in moulds of proper shape, and vulcanized by the usual process, after which, the article is ready for the action of the dies. "The dies to be used should be a very little smaller than the article to be pressed, so that they may thoroughly compress and densify the coating upon the metal. They should have cuting edges, so as to shear off the superfluous coating, and should be provided with suitable indentations or engravings, so as to produce the desired ornamentations. * * * The dies now being ready are slightly heated, and the vulcanized articles are put, one at a time, in the lower die, while the upper die is pressed or dropped down upon it, with great pressure. As the dies act upon the coating with equal pressure in all directions, the coating is made homogeneous, dense, hard, tough, and susceptible to high polish, and is rendered more durable and better, than if it were not so pressed. The dies, at the same time, cut off the superfluous coating, apply ornamentation, if desired, and impart a considerable polish, thus doing away with much labor in 'tumbling,' 'finishing,' and 'polishing.'"

We have only to compare this description with the specification of the complainant's patent, to ascertain the substantial identity of the two methods. He, also, takes a metallic ring, the necessary amount of artificial ivory composition to form the covering, and, by dies or by hand, causes the said composition to completely envelop the ring with as much uniformity as possible; and, to give the exterior finish to the same, presses and solidifies the mass of composition around the ring by means of dies, and in so doing, any plain or more or less ornamental shape may be given to the ring, or the surface thereof. The ring is thus made of the desired ornamental appearance, while great strength is attained, at very little cost.

It will be perceived, that the only change made by the defendant's patent, is the substitution of a plastic composition known as rubber or gutta-percha, which necessitates the additional process of vulcanization, for the plastic composition called factitious ivory; not the same substance, indeed, as to its essence and constituents, but a similar material, in regard to its capability of being adapted to the purpose for which the former is used. It has not even the merit of novelty, for the English patent of Newton, granted in 1851, which was first exhibited in the case by the defendants, and, being withdrawn by them, was afterward marked as an exhibit for the complainant, clearly suggests this precise use of the material, without the application of dies. In his specification he says:

"When it is desired that the compound of caoutchouc or gutta-percha shall serve as a covering to the iron or other substance, a thin sheet of the compound is pressed with great care upon the iron or other substance, so as to expel all air from between the adjoining surfaces, and to cause the most perfect union and adhesion; the coated article is bound with strips or ribbons of cloth, whereby the compound is kept in close contact with the article during the process of hardening. The combined materials, thus treated, will be found to possess the qualities desired, the iron or other substance giving strength, and the compound giving a hard and durable surface. In this way, may be produced many articles used in and about harness or carriages, such as saddle-trees, buckles, martingale rings, dasher irons," etc., etc.

It was held, in a recent case in this court, —Webster v. New Brunswick Carpet Co. [Case No. 17,337],—that a patent for a combination is infringed by the use of a similar combination, although one of the elements is omitted and another substituted for it, unless the substituted device is a new one, or performs a function essentially different, or was not known at the date of the patent as a proper substitute for the one omitted.

It would seem, therefore, that the defendants are not permitted to shield themselves from the consequences of infringement, by incorporating into a patent the inventions of others, without, at the same time, so changing and adjusting the relations of the constituents thus taken, as to produce a new and useful result. They have failed to show that this has been done.

But, irrespective of this view, I am of the opinion, on the whole case, that the claim of the complainant's patent, fairly construed, is not to be limited to the use of factitious ivory; that it is broad enough to include the composition of rubber or gutta-percha, and that there should be a decree for the complainant, according to the prayer of his bill.

[NOTE. On appeal to the supreme court the decree of this court was reversed, and the cause remitted, with directions to enter a decree dis-

missing the bill of complaint, with costs. 97 U. S. 7. For an application for an attachment against defendants for violating an injunction of this court, see Case No. 17,383.]

Case No. 17,383.

WELLING v. RUBBER-COATED HARNESS TRIMMING CO. et al.

[2 Ban. & A. 1;[1] 7 O. G. 608.]

Circuit Court, D. New Jersey. Feb., 1875.

PATENTS COVERING PROCESS AND PRODUCT — REISSUES—CONTEMPT—VIOLATION OF INJUNCTION.

1. Both a process and the product may be covered by one patent; but in such a case the description of the invention in the specification and claims should disclose that the inventor had both results in his mind.

2. If the specification and claims of a patent are not broad enough to give to the patentee the full benefit of his invention or discovery, the defect should be cured by a reissue of the patent.

3. Where an injunction had issued against the defendants for manufacturing an article claimed in the patent, and on a motion for an attachment, for a violation of the injunction, subsequently made, it being shown that the alleged violation consisted in the manufacture of an article, which to be an infringement of the patent would require a broader construction of the claim than had been given to it, the court, at the final hearing, without expressing any decided conviction on the subject, denied the application for the attachment, but directed the master to proceed with the accounting and to take a separate account of the articles alleged to have been manufactured in violation of the injunction, so that the question might be more fully presented on exceptions to the master's report.

[Cited in Smith v. Halkyard, 19 Fed. 602.]

In equity. [This was a motion for an attachment for an alleged violation of an injunction restraining the defendants from making, using, or vending any harness or carriage trimmings containing the invention of the plaintiff [William M. Welling], to wit, "a ring, manufactured as set forth substantially," with "a metal ring enveloped in composition, as and for the purposes specified." The injunction had been obtained upon proof that the defendants had made rings for harness by coating metal with hard rubber by the use of dies. It was now charged, upon the motion for an attachment, that the manufacture of terrets, buckles, and hooks, by a similar process, was an infringement of the patent, and therefore an infraction of the injunction.][2]

Frederick H. Betts, for complainant.

J. C. Clayton and A. L. Keasbey, for defendants.

NIXON, District Judge. This is an application for an attachment against the defendants for violating an injunction issued by this court, June 12, 1874, restraining them from making, using, or vending to others to be used, any harness or carriage trimmings containing the invention of the plaintiff, and secured to him by letters patent, to wit: "a ring manufactured as set forth substantially," with a metal ring enveloped in composition, as and for the purposes specified. This injunction followed the decree of the court, sustaining the validity of the complainant's patent, No. 37,941 (March 17, 1863), for an "improvement in rings for martingales;" and the question now suggested is the scope of the said patent.

In the course of the accounting before the master, it was insisted by the defendants that the patent of complainant only referred to the use of certain compositions in the manufacture of rings for martingales, and hence the decree compelled them to account only for the manufacture of rings; whereas the complainant claimed that all the articles used in harness and carriage trimmings, which have been treated by the process described in his letters patent, such as terrets, buckles, and hooks, should be included by the master.

I have examined the bill, answer, proofs, arguments of counsel, and the opinion heretofore given in the case, and this examination has confirmed the strong impression in my mind, when this application was made, that the complainant is asking that a wider scope be allowed to the claims of his patent than has as yet been distinctly given to it by the court.

I do not mean to be understood as saying that it will not admit of such scope and meaning; but that the question had not yet been presented, and that this patent has not been considered in reference to such construction.

The principal question thus far presented was, whether the complainant, in the manufacture of rings for martingales, should be confined to a composition known as factitious ivory, or whether a ring coated with hard rubber, as prepared and used by the defendants, was an infringement of the complainant's patent? That such was the view of the court, is obvious from a few extracts from the opinion delivered after the final hearing. Welling v. Rubber-Coated Harness-Trimming Co. [Case No. 17,382]; and see 97 U. S. 7.

"It is insisted by the defendants," says the opinion, "that if the patent is valid at all, it must be limited to a 'martingale ring intended to imitate ivory, and made by covering a metallic ring with artificial ivory, such as is described in complainant's patent of 1857, or some similar compound.'" * * * "I think that this construction is too narrow, and does not give to the patentee all that he is entitled to, under the specifications and claims of his patent. It is quite clear, indeed, that factitious ivory was the composition uppermost in his thoughts. Having the partiality of a parent for his offspring, he naturally imagined that no superior compound could be formed or used." * * * "It is clear that the patentee had no thought of confining himself or others to the use of factitious ivory; for, after referring to his patent of 1857, he says: 'My present invention does not relate to any particular com-

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

[2] [7 O. G. 608.]

position, as that (factitious ivory) or any similar compound may be employed. The nature of my invention consists in the employment of a metallic ring within a ring formed of artificial ivory or similar materials, for giving strength to the same,' etc." He then claims, "'a ring for martingales, etc., manufactured as set forth, with a metal ring enveloped in composition' generally 'as and for the purposes aforesaid.'" * * * "I am of the opinion, on the whole case, that the claim of the complainant's patent, fairly construed, is not to be limited to the use of factitious ivory; that it is broad enough to include the composition of rubber or gutta percha, and that there should be a decree for the complainant."

All that the complainant is permitted to claim under the decision of the court as it stands is a specific article of manufacture to wit: A metal ring coated with any plastic composition capable of being compressed and solidified by the use and action of dies, whereby a ring is produced with an exterior surface more durable and more highly polished than has before been obtained by different processes of manufacture and at greater cost.

Such a construction obviously relates to the product. The complainant's patent is held to be good for the product resulting from a new combination of old instrumentalities. His claim on this application is understood to be for the process, and that the invention includes that as well as the product. Doubtless both may be covered by one patent, as was held by Judge Grier, in this court, in the case of Goodyear v. The Railroads [Case No. 5,563], but in such a case the description of the invention in the specification and claims should disclose that the inventor had both results in his mind. But the grave doubt here is, whether the specification and claim of the complainant's patent are broad and full enough to cover a new process as well as a new product.

It is a well-settled principle that a patentee may so limit his claim as to deprive himself of the full benefit of his invention or discovery. It was to remedy such a difficulty or omission that the privilege of surrender and reissue was granted in the patent laws. Patentees often fail to realize any substantial advantage from some of the most useful inventions, owing to their too narrow claims, until such surrender, amendment, and reissue have been made.

The complainant is entitled to be protected only in the rights which the letters patent cover and secure to him. I incline to the opinion that the specification and claim of the patent under consideration will be found too limited in their scope to admit of the construction now claimed for them by the able counsel for the complainant; but, without expressing any decided conviction on the subject, I shall, at this stage of the case, deny an application for an attachment and direct the master to proceed with the accounting. Under the reference already offered he may take an account: 1. Of the rings coated and finished by the defendants, according to their method, as described in the proofs. 2. Of the terrets, buckles, and hooks as claimed by the complainant.

He will make up the two accounts separately, so that the aggregate of each may be readily distinguished; and, when his report is made, the parties will have the opportunity of obtaining the judgment of the court, and in this new and as yet unconsidered construction of the specification and claim of the patent, after their views are more fully presented, as they may be, on exception to the report.

Case No. 17,384.

The WELLINGTON.

[1 Biss. 279;[1] 2 West. Law Month. 523.]

District Court, D. Wisconsin. April, 1859.

AFFREIGHTMENT—BILL OF LADING—STOWAGE ON DECK.

1. Under an ordinary bill of lading the carrier is liable for goods stowed on deck and necessarily jettisoned.

2. Although as a receipt a bill of lading is subject to explanation, and can be affected by parol proof, in so far as it is a contract, this rule does not apply.

[Cited in The Illinois, Case No. 7,005.]

3. Although it is not expressly stated in the bill of lading that all the goods shall be stowed under deck, yet such is its legal construction and effect, and proof of conversations before or at the time of its execution is not admissible to alter it in this respect.

4. If the master wished to stow a part of the goods on deck, he should have made a proper memorandum in the bill of lading, or obtained the written consent of the shipper, or have discriminated in the price of freight.

[5. Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 139, to the point that where a master signs a bill of lading for goods not received, or for more than are received, he acts beyond his authority, and the owner is not liable either to the original shipper, or any assignee of the bill of lading, whether he makes advances on the faith of it, or gives value for it, or not.]

In admiralty. Libellant shipped on board this vessel, at the port of Vermillion, in the state of Ohio, to be delivered at the port of Milwaukee, six hundred and thirty-five barrels of apples. The bill of lading is a clean bill—dangers of navigation only excepted, and duly signed by the master. One hundred and ninety-five barrels of the apples not having been delivered to the consignee, this libel was brought to recover their value. It appeared that this number of barrels had been stowed on deck, and in a storm were necessarily jettisoned. Depositions were offered in evidence to show, that the libellant verbally consented that any barrels which could not be stowed below, might be stowed on deck. It appeared on the part of the libellant, that he gave no directions as to the stowage of his apples, and he had left two days before they were received on board. By the bill of lading the whole number of bar-

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

rels was to be delivered to the consignee at Milwaukee, for thirty cents per barrel, full freight.

Wm. P. Lynde, for libellant.
John H. Van Dyke, for respondent.

MILLER, District Judge. [The bill of lading is a receipt, and also a written contract to carry the goods to the port of delivery, and to deliver them in good order, the dangers of navigation excepted.][2] It is well understood, that when goods are stowed on deck, with the consent of the owner, no loss by justifiable jettison can be recovered for, unless the accident, by which they are lost, would have been equally fatal if they had been under deck. Lawrence v. Minturn, 17 How. [58 U. S.] 100; The Waldo [Case No. 17,056].

Between the shipper and the carrier the bill of lading is not conclusive as a receipt.[3] The quantity and condition of the goods receipted for can be proved by parol to vary the bill of lading as a receipt.

The bill of lading does not state in express terms that the six hundred and thirty-five barrels of applies shall be stowed under deck; but this is a condition tacitly annexed to the contract by operation of law, and it is equally binding on the master, and the shipper is entitled to its benefits as a contract, as if it were stated in express terms. And this bill of lading not making distinction as to the amount of freight per barrel, implies a contract to stow the whole number of barrels under deck. Full freight is charged without exception. The parol evidence offered of conversations between the owner and the master before the bill of lading was signed and delivered, respecting the stowing of such barrels as the hold would not receive is inadmissible, as not evidence controlling the contract afterwards reduced to writing and delivered. Nor could such evidence of conversation at the time of the execution and delivery of the written contract be received, to control or vary the bill of lading, whether it expressly stated that all the goods should be stowed under deck or not. In the case of Lawrence v. Minturn [supra] there was a written contract that the article shipped should be placed on deck, [and the shipper did so stow it at his own expense.] [2] In the case of The Waldo [supra] a quantity of potatoes were stowed on deck, and being damaged by water were thrown over. Parol proof offered to show consent on the part of the shipper that they should be placed on deck, was rejected. [The court remarked: "The general rule is, that parol evidence cannot be received to contradict, vary, or control a written instrument. It is true, that the bill of lading does not say, in express terms, that the goods shall be stowed under deck. But this is a condition tacitly annexed to the contract by operation of law, and it is equally binding on the master; and the shipper is equally entitled to its benefit, as though it was stated in express terms. The parol evidence is offered, then, to control the legal operation of the bill of lading, and it is as inadmissible as if it were to contradict its words."] [2] In Barber v. Brace, 3 Conn. 9, the defendant offered parol testimony, to prove that at the time the bill of lading was executed, there was a verbal agreement to transfer the gin on the sloop's deck. The testimony was rejected, on the ground that the conversation both before and at the time the writing was given was merged in the written instrument. [It is true that the testimony was afterwards admitted to rebut evidence on the part of the plaintiff; but the court instructed the jury not to regard it as evidence to discharge the defendant. The verdict was rendered for the defendant on other grounds.] [2] In Sayward v. Stevens, 3 Gray, 97, the bill of lading was in the usual form except "seven boxes of shingles on deck." The plaintiff offered to prove by parol that all the articles stowed on deck were so stowed with the defendant's knowledge and assistance. The evidence was rejected. In the case of Creery v. Holly, 14 Wend. 26, it appears that ninety barrels of wrought iron shipped on a clean bill of lading, were placed on deck, and thrown overboard in a storm. Parol evidence of consent of the shipper that the goods might be so stowed was not received. The court, by Nelson, C. J., remarks, "It is true that nothing is said in the bill of lading as to the manner of stowing away the goods, whether on or under deck; but the case concedes that the legal import of the contract, as well as the understanding of the usage of merchants, imposes upon the master the duty of putting them under deck, unless otherwise stipulated; and if such is the judgment of the law upon the face of the instrument parol evidence is as inadmissible to alter it as if the duty was stated in express terms. It was a part of the contract. 8 Johns. 189. It seems to me it would be extremely dangerous and subject to the full force of every objection, that excludes the admission of this species of evidence, to permit any stipulation, express or implied, in those instruments, when free from ambiguity, to be thus varied; and besides, from the high character given to those instruments in commercial business would expose the insurer and purchaser to frauds." In Vernard v. Hudson [Case No. 16,921], a witness was permitted to testify to a verbal agreement, that a portion of the goods might be stowed on deck. The court declared the implied condition of a clean bill of lading, that the goods should be stowed under deck, but thought the evidence admissible, as not contradicting or varying an express written contract. The court in commenting on the case says: ["I take it to be very clear, when goods are shipped under the common bill of lading, it is presumed that they are shipped

[2] [From 2 West. Law Month. 523.]

[3] Abb. Shipp. 320, and cases cited; Id. 324, and cases cited; Goodrich v. Norris [Case No. 5,545]; Manchester v. Milne [Id. 9,006]; Zerega v. Poppe [Id. 18,213]; Baxter v. Leland [Id. 1,124]; Warden v. Greer, 6 Watts, 424; Barrett v. Rogers, 7 Mass. 297.

[2] [From 2 West. Law Month. 523.]

to be put under deck, as the ordinary mode of stowing cargo. The presumption may be rebutted by showing a positive agreement between the parties that the goods are to be stowed on deck, or it may be deduced from other circumstances,—such, for example, as the goods paying such freight only. The admission of proof to this effect is perfectly consistent with the rules of law, for it neither contradicts nor varies anything contained in the bills of lading, but it simply rebuts a presumption arising from the ordinary course of business. Now, although one witness has sworn to such an agreement, he is contradicted directly by as positive denials on the part of the agent who shipped the goods.] [2] There is the clear fact, that a full under-deck freight is stipulated for in the bill of lading, a fact certainly not easily reconcilable with the supposition that they were to be carried on deck. So that the preponderance of the evidence decidedly is that there was no such agreement to carry the goods on deck. If it had existed, one of two things ought to have occurred, either that under deck freight should not have been payable, or that there should have been some written memorandum on the bill of lading, to repel the inference from a full freight being stipulated for." In the case of Knox v. The Ninetta [Id. 7,912], a cargo of wheat was shipped on a clean bill of lading. It was alleged on the part of libellant, that a parol agreement was also made, that no other cargo should be received on board, and that the voyage should be made directly and without deviation. Evidence of this parol agreement was received by the court, on the ground that the bill of lading was a mere receipt. But it seems to me, that parol evidence was proper in that case to show the deviation. The verbal agreement was nothing more than an acknowledgment on the part of the master of his implied duty. And if by receiving additional cargo on deck, the cargo of wheat became damaged, the liability of the vessel had attached without the verbal agreement.

If the shipper of his goods was warned as to the manner in which they would be stowed, he cannot maintain an action occasioned by bad stowage; or if he interfered and directed in the manner of stowing. Meyer v. White, 32 Eng. Ch. R. 429; Fland. Shipp. §§ 215, 201. But that is not in this case. The bill of lading was made out and delivered to the owner, who had left for his home two days before the apples were received on board. There is no complaint of bad stowage. The applies stowed under deck were carried safely and delivered. The master should have made a memorandum on the bill of lading, or have required the written consent of the shipper on the bill, that the number of barrels not receivable under deck might be shipped on deck,—or have discriminated on the bill as to the price of freights of the barrels to be shipped on deck. Here was a clean bill of lading, the transfer of which would vest the title to six hundred and thirty-five barrels of apples, in a purchaser. [From the examination I have given the question, I conclude upon principle and authority, both that parol evidence of an agreement or consent of the shipper, that his goods may be stowed on deck, cannot be received where a clean bill of lading is given and full freight is charged, as in this case. * * * There was no necessity for removing any portion of the under-deck cargo. I am satisfied that the vessel is liable for the goods of this libellant that were not delivered according to the bill of lading.] [2] The transfer of goods shipped, by indorsement of bills of lading has become so common, that the interests of commerce require that such instruments should not be controlled by parol evidence. Decree for libellant.

NOTE. That a bill of lading in the usual form containing no stipulation that the goods shipped are to be carried on deck, implies a contract that they shall be carried under deck, and that parol evidence to the contrary will not be received, is also affirmed in Creery v. Holly, 14 Wend. 26; Sayward v. Stevens, 3 Gray, 97. In so far as a bill of lading is a contract, parol evidence is not admissible to vary its terms. Bradley v. Dunipace, 1 Hurl. & C. 521; Butler v. The Arrow [Case No. 2,237]. Evidence of mistake in not striking out clause in a receipt limiting the liability of the carrier admitted in Choteaux v. Leech, 18 Pa. St. 224. As far as respects agreement to carry and deliver, a bill of lading must be construed according to its terms. Portland Bank v. Stubbs, 6 Mass. 422; Barrett v. Rogers, 7 Mass. 297; Price v. Powell, 3 N. Y. 322; Ellis v. Willard, 9 N. Y. 529; Bradstreet v. Heran [Case No. 1,792]; Zerega v. Poppe [Id. 18,213]. Where, however, the bill of lading specifies that the freight is to be shipped on deck, and contains the usual clause, "dangers of navigation excepted," the shipper cannot recover if it is necessarily jettisoned. The Milwaukee Belle [Id. 9,627]. Where goods stowed on the main deck of a propeller were necessarily jettisoned, the owner was held entitled to the benefit of general average, and owner of vessel not liable as common carrier. Gillett v. Ellis, 11 Ill. 579.

Contra: In Johnson v. Crane, 1 Kerr, 356, the supreme court of New Brunswick held that the master of a ship who signed the usual bill of lading, was not liable for a loss by the jettison of goods laden on deck with the knowledge and consent of the shipper and consignee. See, also, Gould v. Oliver, 4 Bing. (N. C.) 142; Story, Bailm. § 530, and cases there cited; 1 Pars. Shipp. & Adm. 266, 267; Id. 352–357, and many authorities there cited.

WELLINGTON, The (HINDLEY v.). See Case No. 6,513.

Case No. 17,385.

WELLMAN v. BLOOD.

SAME v. WOODMAN.

[1 McA. Pat. Cas. 432.]

Circuit Court, District of Columbia. March. 1856.

PATENT OFFICE APPEALS—APPEALABLE ORDERS—REFUSAL TO EXTEND TIME FOR HEARING — INVENTION BY EMPLOYER — CREDIBILITY OF WITNESSES.

[1. The granting or refusal of an extension of time for the hearing, upon an affidavit of one

[2] [From 2 West. Law Month. 523.]

[2] [From 2 West. Law Month. 523.]

of the parties stating the grounds therefor, is a matter within the discretion of the commissioner, and from which no appeal lies, unless in case of gross abuse, which is not to be presumed.]

[2. Where an employer conceives the result embraced in the invention; or the general idea of a machine upon a particular principle, and, in order to carry his conception into effect, it is necessary to employ manual dexterity, or even inventive skill, in the mechanical details and arrangements requisite for carrying out the conception, the employer is, nevertheless, the inventor, and the employé the mere instrument through which he realizes his idea.]

[3. A witness who gives false testimony as to one particular cannot be credited as to any, according to the legal maxim, "Falsus in uno, falsus in omnibus."]

[4. If there be reason to suppose that the perjury or prevarication of one witness is the result of subornation, it affords a reasonable ground in a doubtful case for suspecting the testimony of other witnesses adduced by the same party.]

[This was an appeal by George Wellman from a decision of the commissioner of patents in an interference proceeding. The interference was originally declared between an application of Samuel Blood, assignor of Blood & Dix, and the patent of Horace Woodman; and said Wellman came in as a party before the hearing. The commissioner's decision was that the said Samuel Blood was the first inventor.]

J. Giles, for appellant.

Sam'l Cooper and A. B. Stoughton, for appellee.

MORSELL, Circuit Judge. The first interference declared in this case was that of the claim or application for a patent of said Blood and the patent of said Horace Woodman for improvements in machinery for cleaning top cards of carding machines; during the pendency of which, and after certain depositions and proof taken and returned preparatory to the trial of the issue between said first-mentioned parties, the application of the said Wellman was made; and before any decision as to priority, an interference was declared between the said Wellman and the said two other parties, and the time of trial appointed for the 30th of May (afterwards extended to the 4th June, 1855). Before said day of hearing, said Wellman, within the time limited by the forty-third rule of said office, applied to the commissioner, upon affidavit, for an extension of the time to complete the taking of his testimony. The grounds stated in the affidavit were deemed insufficient, and the application was refused.

Upon the trial of which issues the commissioner decided: First. That the interference between the respective parties was properly declared, and involved a combination of mechanism for elevating the card and stripping it, by the motion derived from a cam or cams on the shaft of the card cylinder and the intermittent movement of the lifter and stripper-frame card, to card back and forth from one side of the card to the other. Second. That George Wellman was properly refused a postponement of the day of hearing, because he did not state in his affidavit any particular facts material to show the priority of his invention which he could have proved by such postponement, but merely that he was advised that he ought to take additional evidence, and because he did not state what diligence he had used to procure testimony pending the interference. Third. That the testimony of Woodman was properly admitted, though the counsel of Blood gave notice to the office on the day of hearing that they objected to its admission for defect of notice; because counsel did not give notice of their objection to Woodman in the time required by the ninety-seventh rule of the rules and directions for proceedings in the patent office; and because to have refused to receive and hear his evidence would have been a surprise to Woodman, which it seemed was the object of the ninety-seventh rule to prevent; whereas, if the required notice had been given, he would have had an opportunity to retake his testimony. Fourth. That the evidence of L. Cutter, a witness for Blood, was properly received, although objected to by the counsel for Woodman on the ground of the discrepancies between his deposition in this interference and the interference previously declared between Blood and Woodman, because on reference to the deposition of Cutter given in the interference between Blood and Woodman it does not appear that the discrepancy is such as to throw a cloud on his credibility, but was merely such as might have been the result of a defect of memory. Fifth. That from the testimony it appears that Samuel Blood was the first and original inventor of the combination presented in his claim, and as such is entitled to a patent for the device as combined and applied and claimed by him in his application of the 10th of November, 1854.

Wellman appealed from this decision, and assigns for the reasons of his appeal: First. Because reasonable and sufficient time was not allowed to him to obtain all his material evidence to establish the date of his own invention and to show mistake or fraud in the dates of the drawings referred to in the evidence taken by said Blood and Woodman. Second. Because the commissioner based his decision, in part, upon evidence taken in a previously-declared interference between said Blood and Woodman, without any opportunity to said Wellman for cross-examination. Third. Because the commissioner, in coming to his decision, used a part only, and not the whole, of the evidence taken by Blood and Woodman in said previous interference between them. Fourth. Because the decision of the commissioner that said Blood was the first and original inventor of the thing claimed by him in his application is against the weight of the legal evidence.

The commissioner has laid before me the original papers and the whole evidence in the

cases of the interferences, together with the grounds of his decision touching the points involved by the reasons of appeal; and the time and place appointed for the hearing thereof being duly made known, the respective parties, by their counsel, filed with me their arguments in writing, and thereupon submitted the said case for my decision.

With respect to the reasons of appeal which raise the preliminary questions—granting or refusing further time upon the affidavit of the party stating the grounds of his application—it is a matter left to the sound exercise of discretion by the commissioner, and from which no appeal lies, unless in case of gross abuse, which is not to be presumed.

With respect to the objection to the admissibility of a portion of the testimony, it will be duly regarded in the further investigation of the case. I proceed to consider the merits of the issues between the parties; and that the evidence may be duly applied and appreciated, it will be necessary to look to the specifications and see what is the specific thing.

Wellman states, in substance, his to be: (1) A combination of mechanism for lifting and stripping the card by motion direct from cams or the shaft of the card cylinder. (2) The intermittent movement of the lifter and stripper from card to card, back and forth, from one end of the card to the other. The end or effect intended by each of the parties by their improvements appears to have been the same: First. The question will be whether the inventions are substantially the same; and if so—Second. Who was the prior and original inventor. To decide which questions it will be necessary to examine the testimony.

Wellman's first, and one of his principal witnesses, is M. C. Bryant, who is admitted to be a machinist of talent and reputation. He states that he has been accustomed to examine and compare patented machinery and inventions; that he is an expert; that he made the drawing marked Exhibit "A" for Wellman in April, 1852; that it represents a modification of the stripping apparatus which he saw the model of, at that time, made by Mr. Wellman. He gives a particular description of the several parts of the drawing. At the time he made it he had knowledge of a model of a stripping machine, and since then he has had knowledge of Wellman's stripping machine, which was made in accordance with that model. A particular description of the several parts of said drawing is then given by the witness. He is required by a cross-interrogatory to state from what information he made the drawing. His answer is that he was invited by Mr. Hinckley, the superintendent of the Merrimac Company Mills, to go to his counting-room and see a model of a card-stripping apparatus which he said was made by Mr. Wellman. He went and saw it (the model). He was asked by Mr. Hinckley his opinion concerning it. Witness said that it had too much top-hamper, but that he thought it might be easily reduced. A few days after, he saw Mr. Wellman and told him the same in substance. He requested witness to make a drawing with such modifications, and offered to pay him for his trouble. He made the drawing and gave it to him. He offered to pay him. He refused to take any pay, considering the trouble on his part of making the change of little importance. He is further asked, on cross-examination, whether he remembered the machine afterwards built by or for Mr. Wellman, and of which witness had spoken, and how, if at all, did it differ in the last-mentioned respect ("how were the parts shown for moving the frame which carried the stripping apparatus") from the model? He answered: "I think there was no essential difference." It may be inferred from the testimony of Bean that he began to work on said model in February, 1852. Witness, in stating the difference between the model sent to Washington and the one then shown him, says the latter is driven by a worm instead of a pinion gear.

John S. Bradshaw, the next witness on the part of Wellman, worked upon the two models just alluded to; received orders to work on the second on the 12th of June, 1852; finished it previous to the 23d of November, 1852. He states that he has been accustomed to make models for machines for patents; that he has invented and patented several machines, and has been examined as an expert in patent cases in the United States courts. He says the first working machine of Wellman's which he saw was in 1853. He is asked to look at the second model made by him, marked "George Wellman, Lowell, Massachusetts," and state the differences, if any, between that and the first model made by him. In answer he states very fully and minutely the differences, which are several. The length of the statement is too great to admit of being here recited. It shows, however, that by the change, or the new organized and combined arrangement, in addition to the other differences in the present model, the motion is communicated to the stripping shaft and cams by means of a chain belt and gear pulleys, thereby dispensing with those levers and couplings or tubes. The shaft, also, on the second model which communicates the motion to the stripping-shaft and cams with the gear pulleys is operated by a shaft lying directly above it, on which is a gear, with a portion of the teeth removed. This gear comes in contact with a pinion on the shaft with the gear pulley, giving it sufficient rotary motion to turn the stripping shaft and cams one entire revolution on their axis. The shaft with the gear pulley and pinion then remain at rest until the gear with a portion of the cogs removed again comes in contact with the same. There is still another difference: at the top of said upright shaft, instead of a worm and gear, as in the first model, the motion is communicated to the stripping shaft and cams by means of bevel gears. This witness states also several important changes of a similar nature in Well

man's first working machine since the first one he saw early in the year 1853; for which I refer to his answer to the appellant's interrogatory 22.

David G. Bean describes the difference thus: "In place of the worm gear, as seen in the model present, matching into the segment, is a pinion gear; the segment in the model, instead of teeth upon its periphery, has mangle pins; instead of the upright shaft from the mangle wheel in the model sent, the upper shaft has a chain belt to the main shaft; the cams, which upon the model sent are above the card, are placed upon the main shaft in the model; the lever that does the stripping, the end of which plays in the cams in the present model, is in the model sent hung on the curve about three or four inches from the main shaft; the lifting rod, which in the present model is outside of the cam, is in the model sent inside the cam; the strip card, which in the present model hangs upon a stand screwed on the segment arm, in the model sent is attached to an arm playing into the cam below."

Hinckley testifies to the same effect.

James F. Burgess, another witness for Wellman, says that he worked on the machines of Wellman; that he began on the 25th of April, 1853; that whilst so at work, about the end of June, 1853, Wellman told him that he was going to do away with the mangle wheel, and was going to use the segment as a mangle, thereby dispensing with a shaft and two large spur gears, "which I did on the last cards I built for him under his direction." In conformity to which principles Wellman's proof shows that he constructed various working machines which operated successfully in the years 1853 and 1854, and they were so placed in his last machine by Burgess.

In the absence of all opposing evidence the aforegoing proof must be deemed fully sufficient to establish the claim on the part of Wellman for the important improved invention, as stated by him in his specification. It appears that a number of machines have been constructed by him according to those principles, and have produced a perfect result as desired. This invention, in an organized combined state, shows the lifting and stripping cams placed on the main shaft of the card cylinder, the mangle pins in the segment on the lower end of the vibrating-arm (the mangle wheel is dispensed with and the segment used as a mangle, whereby a new element or constituent feature is substituted in the place of a mangle wheel and two large spur gears), by which means the object is attained, and much better by reason of an accellerated motion produced in the lifting and stripping. The construction is less complicated and more simple. By such an arrangement of the parts, and dispensing with costly machinery, the mode of operation becomes much more economical and cheaper. This arrangement, by which the omission of a part of the machinery previously used and considered essential in the construction of the machine, under the circumstances just stated, constitutes of itself sufficient patentable invention.

The proof further is that this improved feature is exhibited by the drawing made in April or May, 1852. That drawing was made by M. C. Bryant, and it is contended that the particular improved invention was his, and not Wellman's. Bryant himself does not say so. He says, as before stated, that he made the drawing for Wellman, and that whatever appears on the face of it was made at the same time or a few days after. He states, as already noticed, what it represents, and of his having seen the model of Wellman shown to him; and the information that he made the drawing from; and that the modification which he proposed was assented to by Wellman. He had seen a machine built by or for Mr. Wellman which did not essentially differ from the model in respect to its being moved by means of an intermittent-moving pinion engaging with pins on a mangle wheel. Wellman offered to pay him for the modification and drawing which he had made for him, but he refused to take any pay, considering the trouble on his part of making the change of little importance. The change was in respect to the top-hamper, which he thought might be easily reduced. He explains more particularly what he means by the top-hamper. But the general idea which embraced the principle of the improvement, I think, appears to have been conceived by Wellman, and I take the rule to be this: If the employer conceives the result embraced in the invention, or the general idea of a machine upon a particular principle, and in order to carry his conception into effect, it is necessary to employ manual dexterity, or even inventive skill, in the mechanical details and arrangements requisite for carrying out the original conception; in such cases the employer will be the inventor, and the servant will be a mere instrument through which he realizes his idea.

But it is further contended that Wellman did not approve of the modification as to the arrangemnt of cams on the main shaft. The evidence, I think, does not warrant this conclusion, as it is shown that he did after a time construct machines upon precisely the same principles, and that his reasons for not applying that arrangement to old cards was the want of a sufficient length of shaft and the practical difficulty of keeping the machinery clean; so that the inference drawn from that fact is unfounded.

If the view thus taken be correct, Wellman conceived the idea of the improvement, and practically reduced it, according to the established rule of law, in April, 1852.

The proof to sustain Mr. Blood's claim as prior inventor will be next considered. He supposes that his evidence establishes the date of his invention, as exhibited by his model and drawings, as early as March, 1846; and if he is right about this, he must unquestionably be considered the prior and original inventor on

this issue, if the invention is the same substantially as claimed and proved by Wellman. Lorenzo Cutter and Eben P. Blood are the two witnesses by whom this prior invention is supposed to be proved, and such is the tendency of their testimony, if what they have said be true; but it has been objected that they are unworthy of belief, and that no credit ought to be given to what they have testified. The particular circumstances urged in support of the objections appear to be the relation in which they stand to the party, Mr. Blood—Blood being a brother and Cutter a brother-in-law; that Cutter has been guilty of gross contradiction of himself, both in terms and spirit, in his testimony as given in the first and second depositions. In his first deposition, in answer to the first interrogatory on the part of Blood—in these words, "When did you first learn or understand that said Blood was designing and trying to invent this machine?"—he answered: "In February, 1853; I did not fully understand Blood's explanations." To the seventh interrogatory by same—"Have you seen any drawing of his machine; if so, when for the first time?"—he answered: "I have; I saw it in June, 1853, for the first time." The drawing marked Exhibit "A B" is shown to him, and is annexed to his first deposition. This, he answers, was the drawing of the machine shown to him for the first time in June, 1853. In his second deposition, which was taken at the instance of Mr. Blood in about four weeks, to the question put to him by Blood's counsel—"State whether you were knowing to said Blood's having previously to February, 1853, been endeavoring to design and construct a self card-stripping machine; where did you first hear that he was designing such a machine"—he answers: "I had; I first learned it in April, 1846; I then saw a drawing of part of a machine for stripping cards, which represented the arm slides and cams." He is shown a drawing purporting to have been made March 14th, 1846, and says the writing on the drawing is in the handwriting of Blood; and it is his impression that it is the same one (it is annexed to his deposition) shown to him the 14th of March, 1846, and of which he then had knowledge. In answer to an interrogatory put to him he says that he was no mechanic; never made a drawing; entirely unskilled; and never saw more than a few drawings. Yet, on this occasion, and on that of the drawings shown to him as of September, 1849, he undertakes and proceeds to describe in the most minute and scientific manner the various parts and intended operations of all the said drawings as relates to said alleged improvements. The reasons he gives to explain these gross contradictions are unsatisfactory. It cannot be true that he misapprehended the questions, or that he was too sick to answer truly what he did answer. It was seen in the interval between the two examinations that there was a deficiency in the proof, and this witness seems to have undergone a preparation to supply that deficiency. Sensible of the objections which have been urged as to the credibility of this witness, resort has been had to Eben P. Blood. From his ignorance and strange conduct in the course of the examination there is less reason to confide in the truth of what he says than in that of Cutter. He says he is no mechanic; never drafted any plan, nor ever examined any, except the one he was about to testify of. He describes the copy shown to him to be a true copy of the original, which he had not seen, according to his account, for nine years, or talked about it with any one. He shows the most gross prevarications and falsehoods to guard against committing himself. He appears to have been under a very improper influence. There is strong circumstantial proof, also, going to show the falsehood of what those two witnesses have testified to. The first is the lapse of time which is suffered to take place before he made application for a patent, without any good reason for the delay, if what they have said was true. His own witnesses, called by him in the course of the second examination, some of whom had stood in the most intimate and confidential relation to him, some of them working in the very shop with him—why are these drawings not spoken of and shown to some of these witnesses before the year 1853, when they are so made known to them by Blood as evidence of his invented improvement? It is especially worthy of notice that from his remarks to Jamieson, one of his witnesses, he plainly shows that no such drawings had been made. Jamieson states—having seen certain detached scraps of drawings on sand-paper and pieces of wood in Blood's drawer, and Blood at work on them, and that the more full drawings were made from these detached drawings—that when he mentioned having seen them to Blood, his reply was, "I shall soon have an opportunity to let you see a full drawing." Does not that imply that he had not then made them? This took place in the spring of 1853. None of his other witnesses prove his invention to have been earlier than the year 1853. The rule of law as to the credibility of the testimony of witnesses, which I feel myself bound to take as my guide on this occasion, is: "That a witness who gives false testimony as to one particular cannot be credited as to any, according to the legal maxim falsus in uno, falsus in omnibus." Again: "If there be reason to suppose that his perjury or prevarication is the result of subornation, it affords a reasonable ground in a doubtful case for suspecting the testimony of other witnesses adduced by the same party." I am therefore satisfied that Blood cannot be considered the first and original inventor of the improvement involved in this issue.

With the aforegoing views, it becomes unnecessary to give any opinion on the question of the admissibility of the copies of drawings given in evidence.

With respect to Woodman's claim, I need say but little. He has his patent, and cannot be affected in this mode of proceeding. I am satisfied that there are substantial differences between his invention and that of Wellman's

in this case. Upon the whole, I am of opinion, and do so decide, that Wellman, the appellant, is the first and original inventor of the improvement aforesaid claimed by him, and ought accordingly to have a patent therefor.

[Patent No. 14,481 was accordingly granted to G. Wellman, March 18, 1856.]

Case No. 17,386.

Ex parte WELLS et al.

[3 Woods, 128; 17 Alb. Law J. 111; 25 Pittsb. Leg. J. 107.] [1]

Circuit Court, D. Louisiana. Feb. 1, 1878.

REMOVAL OF CAUSES — DUTY OF STATE COURT — LOCAL PREJUDICE—SELECTION OF JURORS.

1. Where a petition is presented to a state court under section 641, Rev. St. U. S., for the removal of a prosecution pending in that court, to the federal court, the state court has the right to examine its sufficiency.

2. But the federal court, by virtue of its superior right to try the case, if subject to removal, is entitled to assert its jurisdiction by proper process directed to the state court.

3. Where this is done by the federal court, it will be the duty of the state court, and its officers, to yield obedience to the writs issued from the federal court to effect such removal.

4. The law passed by the legislature of Louisiana, March 13, 1877, prescribing the mode of selecting and drawing jurors, is not open to any constitutional objection.

5. A petition for the removal of a cause under section 641, Rev. St. U. S., which alleges that the law for the selection of jurors, which is constitutional and on its face fair, will be so administered as to secure a jury inimical to the petitioner, and which alleges the existence of a general prejudice against him in the minds of the court, jurors, officers and people, does not state facts sufficient to authorize the removal.

6. It is only when some state law, statute, ordinance, regulation or custom hostile to the rights of the petitioner, and their enforcement, is alleged to exist, that the petitioner can have his case removed under that clause of said section on which the petitioner in this case relies.

This was the petition of J. Madison Wells, Thomas C. Anderson, Louis M. Kenner and Gardone Casanave, for a writ of certiorari to the superior criminal court of the parish of Orleans. This petition stated that the attorney-general of Louisiana had filed, in said criminal court, an information against the petitioners, charging them with "falsely and feloniously uttering and publishing as true a certain altered, forged and counterfeited public record, to wit, the returns from the parish of Vernon of an election held for presidential electors in the state of Louisiana, on the 7th of November, 1876, knowing the same to be false, altered and counterfeited;" that the petitioners had been arrested, and given bail, and that their trial was fixed for an early day. It further stated that on the 23d day of January, 1878, pursuant to the laws of the United States, and particularly section 641 of the Revised Statutes, they filed a petition in the said superior criminal court for the removal of the said information and proceedings to the next circuit court of the United States of this circuit and district, for trial, and that the facts on which such application was made were fully stated and set out in said petition, duly verified by oath in accordance with said section 641. The petitioners claimed that by the presentation of said petition to the criminal court, the cause stood removed, and that the said court had no authority to proceed further in the case; but they stated that the court and its officers, and the attorney-general, had disregarded said petition, and were proceeding with the cause in contempt of the authority of the United States court. A copy of the petition presented to the criminal court was appended to the application made to the circuit court. The principal facts stated in the petition filed in the state court, as a ground for removing the cause, were that by reason of the ill feeling against the petitioners in the court, in the jury and in the public mind, throughout the parish of Orleans and the state, on account of their having been the returning officers of the election held in November, 1876, and republicans in politics, and of their acting in the canvass and compilation of the returns of said election, out of which the present prosecution originated, the most vindictive prejudice existed in the law-making and law-administering authorities of the state against them—they therefore believed that they would be denied their rights as citizens in the said court, and before any jury that might be impaneled therein under the existing jury law of the state, and that they would not be enabled to enforce their rights in said court in consequence of the inadequate remedies to that end provided. They further alleged that the jury law was passed March 13, 1877, and that in so far as it provided for the appointment of jury commissioners and the method of selecting the jury, it was intended for and operated in favor of, white citizens and against those of African descent, and that under it a jury had been drawn for the trial of the petitioners, the effect and intention of the law being to exclude persons of African descent, and other unprejudiced persons, from the jury, and to substitute in their place prejudiced white men, and thereby to deprive two of the petitioners, Kenner and Casanave (who were colored men), of a trial by their peers, and to bring them to trial by a white and prejudiced jury to the exclusion of men of their own color, and all the petitioners averred that through and by the machinery of said jury law, artfully contrived for the purpose, the state officers, and the court and its officers could and had so manipulated said law (and it was capable of such manipulation) as to deprive the petitioners of an impartial jury, and had organized a jury so prejudiced that defendants could not have a fair and impartial trial thereby, or by that court, and would be deprived of the full and equal benefit of the laws and proceedings for the security of

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission. 25 Pittsb. Leg. J. 107, contains only a partial report.]

their persons in this case. They contended that the jury law was in violation of the constitution of the United States and of the equal civil rights of the petitioners.

John Ray and C. B. Ray, for petitioners.

1. The filing of the petition for removal in accordance with the statute, ipso facto removes the case from the state to the federal court: Osgood v. Chicago, D. & V. R. Co. [Case No. 10,604].

2. When the case has reached the federal court, it may inquire whether the case is a removable one: Section 5, Act March 3, 1875 (18 Stat. 472).

3. The right of trial by an impartial jury of the vicinage is one of the rights guaranteed by section 1 of the 14th amendment to the constitution of the United States, and provided for by sections 1977, 1978, and 1979, Rev. St. U. S.

4. The right of removal cannot be claimed solely on the ground of prejudice arising from personal unpopularity. It must be averred that the impairment of rights originates under color of some statute, ordinance, regulation, custom or usage of the state, but it is not necessary that the statute, etc., should on its face purport to deprive the party of his civil rights secured by law.

[See Case No. 349.]

BRADLEY, Circuit Justice. The application now made to the circuit court and presented to me, raises these questions: First. Was the mere presentation of the petition for removal sufficient to arrest the jurisdiction of the state court, or had that court the right to examine into its sufficiency? Secondly. If the court had the right to examine into the sufficiency of the application, has the circuit court the right to re-examine the same, and, if found sufficient, to issue a writ of certiorari, or other writ, for the removal of the proceedings from the state court? Thirdly. If the circuit court has such right, did the petition in this case present sufficient ground for removing the cause?

I think the first and second questions must be answered in the affirmative. The state court surely is not bound to shut its eyes and yield to every application that comes to it. Though removal (when authorized) is a matter of right, and not of favor, yet the court must have the right to see whether the application to remove comes within the meaning of the law. I have no doubt, however, that the circuit court, by virtue of its superior right to try the cause (if subject to removal), is entitled to assert its jurisdiction by proper process directed to the state court. This view is corroborated by certain express provisions of the statutes. Section 716 of the Revised Statutes, declares that the United States courts may issue all writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. And, in the very case under consideration, it is provided by section 642 of the Revised Statutes, that if the defendant be in actual custody on process issued by the state court, and have performed all the acts necessary to a removal of his cause, the clerk of the circuit court is authorized to issue a writ of habeas corpus cum causa, which the marshal of the United States is authorized to serve by taking the body of the defendant into his custody to be dealt with in the circuit court according to law and the orders of said court, or, in vacation, of any judge thereof. This is the proper writ for removing both the cause and the person in such a case. Of course, the writ should not be issued by the clerk without being allowed by a judge of the court, which is the regular course in issuing writs of habeas corpus and certiorari. I think, therefore, that the circuit court may issue either a writ of habeas corpus cum causa or of certiorari, according as the defendant is in custody, or not in custody, for the purpose of removing the cause into that court. When this is done, it will be the duty of the state court and its officers to yield obedience to such writs; and it will be presumed that they will do so without any further inhibition, either by writ or otherwise.

The course pointed out in section 641, for the defendant to docket the case in the circuit court if the clerk of the state court refuses to furnish copies of the proceedings, is an additional and summary method of proceeding when only the clerk is delinquent. But it does not meet the exigency of a refusal on the part of the state court itself to recognize the defendant's right to remove the cause. This requires the more formal and orderly process of the court as above specified.

The removal of causes from one court to another is a form of quasi-appellate jurisdiction well known in the English system of procedure to which our own has constant reference. The forms of process necessary to be used for the purpose, and the principles upon which they are framed, are familiar to every student of the common law. The only peculiarity in the present case is, that the causes of removal are special and limited, and application therefor must be first made to the court a qua; the reason for which is undoubtedly to be found in the anxiety of the legislative department to avoid every possible cause of jealousy and complaint.

I should have no hesitation, therefore, to allow the writ of certiorari in this case, if I were satisfied with the sufficiency of the application. This brings me to that question.

As regards the law complained of, passed March 13th, 1877, prescribing the mode of selecting and drawing jurors, I have carefully examined its provisions, and am unable to see anything in it open to any constitutional objection. It provides for the appointment, by the judges of the principal courts in New Orleans, of two commissioners, whose duty it is made to select impartially from the citizens of the parish, qualified to vote, the names of not less than one thousand good and competent men to serve on juries. These names are to be placed in a box, and from thence is to be drawn the

general panel for each term. This is the principal feature of the law. Substantially the same method is in use in several other states. The commissioners, it is true, may abuse their trust; but no system can be devised that will not be liable to abuses.

The allegations with regard to the manipulation of the law in such manner as to secure a jury inimical to the petitioners, and with regard to the existence of a general prejudice against them in the minds of the court, the jurors, the officials and the people, are not within the purview of the statute authorizing a removal. The fourteenth amendment to the constitution, which guaranties the equal benefit of the laws on which the present application is based, only prohibits state legislation violative of said right; it is not directed against individual infringements thereof. The civil rights bill of 1866 was broader in its scope, undertaking to vindicate those rights against individual aggression; but, still, only when committed under color of some "law, statute, ordinance, regulation or custom." And when that provision in this law, which is transferred to section 641 of the Revised Statutes, gave the right to remove to the United States courts a cause commenced in a state court against a person who is denied or cannot enforce any of the rights secured by the act, it had reference to a denial of those rights or impediments to their enforcement, arising from some state law, statute, regulation or custom. It is only when some such hostile state legislation can be shown to exist, interfering with the party's right of defense, that he can have his cause removed to the federal court.

This being my view of the act, it follows that I cannot grant the application. If I am wrong the petitioners, having claimed the right of removal, and it being denied by the state court, may carry the case, after final judgment of the highest court of the state, to the supreme court of the United States, and obtain its judgment on the question.

The application is refused.

Case No. 17,387.

In re WELLS et al.

Ex parte CLAFLIN et al.

[1 N. B. R. 171;[1] 7 Am. Law Reg. (N. S.) 163; 1 Am. Law T. Rep. Bankr. 20; Bankr. Reg. Supp. 37; 6 Int. Rev. Rec. 181.]

District Court, N. D. New York. 1873.

ACTS OF BANKRUPTCY.

Where a trader stops payment of his commercial paper and does not resume payment thereof within fourteen days, he commits an act of bankruptcy.

[Cited in Jersey City Window-Glass Co., Case No. 7,292; Re Ballard, Id. 816; Re Smith, Id. 12,974. Quoted in Baldwin v. Wilder, Id. 806. Cited in Re Hercules Mut. Life Assur. Soc., Id. 6,402; Globe Ins. Co. v. Cleveland Ins. Co., Id. 5,486.]

[Distinguished in Haas v. O'Brien, 66 N. Y. 602.]

[This was a petition by H. B. Claflin & Co. for an adjudication in bankruptcy against Alfred L. Wells & Son.]

HALL, District Judge. The petition in this case alleges two acts of bankruptcy, namely: First, that on or about the 16th of March, 1867, the said Alfred L. Wells & Son, being possessed of a certain estate and property (to wit: a stock of dry goods and other articles, together with divers accounts against persons to whom they had sold goods, &c.), made an assignment of the whole of them, with intent to delay and hinder their creditors; and, second, that on or about the 16th of March, 1867, being merchants and traders, they fraudulently stopped and suspended, and had not resumed payment of their commercial paper within a period of fourteen days. The petition also shows that at the time above mentioned the firm was insolvent; that judgments had been taken against them; and that suits upon other demands against them had been commenced, and were being prosecuted to judgment and execution.

The execution of a general assignment for the common and equal benefit of all their creditors, is admitted; but it is denied that it was executed with the intent to delay or hinder creditors. As there is no replication to the answer containing this denial, and as the case has been brought to a hearing on the petition and answer, this intent, if it be not conclusively presumed as a matter of law, must be regarded as disproved; and as there is no allegation that the assignment referred to was made with intent to defeat or delay the operation of the bankrupt act, we are not now called upon to decide whether a general assignment making a disposition of the bankrupts' property substantially the same as that contemplated by the bankrupt act [of 1867 (14 Stat. 517)], can be considered an act of bankruptcy if made in good faith before the first day of June last, (and consequently before any petition could be filed under that act,) and for the single purpose of preventing a portion of his creditors from obtaining a preference over his other creditors.

We think there is no conclusive legal presumption that the assignment was made to delay or hinder creditors. It may, perhaps, be truly said it was made with intent to delay and hinder the particular creditors who were striving to obtain a preference over the other creditors of the respondents, by pressing the suits they had already commenced to judgment and execution; but this intent is not such an intent as the bankrupt act contemplates. Such an assignment, under such circumstances and with such intent, would not be held void under the statute of this

[1] [Reprinted from 1 N. B. R. 71, by permission.]

state, which avoids conveyances made with the intent to delay, hinder, or defraud creditors; and notwithstanding the provision of the 35th section of the bankrupt act, that a sale, assignment, transfer, or conveyance not made in the usual course of business of the debtor, shall be prima facie evidence of fraud, we are of the opinion that, under the denials contained in the answer in this case, we cannot properly hold that the making of the assignment, under the circumstances stated, was an act of bankruptcy.

Upon the second allegation of an act of bankruptcy, the petitioners are entitled to an adjudication in bankruptcy against the respondents. It is true that the construction of the provision of the bankrupt act on which this allegation is based is not entirely free from doubt, but the construction which justifies such an adjudication has been adopted in another district, and is, as we think, a reasonable and just construction of such provision. It was contended upon the argument that this provision, which authorizes proceedings in invitum against any person, "who being a banker, merchant, or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," does not authorize such proceedings unless the original stoppage or suspension of payment was fraudulent—no matter how long such suspension may be continued.

We understand that the United States district court of South Carolina has decided that such is not the true construction of the provision referred to, and that its true construction requires an adjudication in bankruptcy against a banker, merchant, or trader who "has suspended and not resumed payment of his commercial paper within a period of fourteen days," although such suspension or stoppage of payment was not fraudulent; and this, we think, is the fair and proper construction. The provision embraces the two cases; the one of an original fraudulent stoppage of payment, in which proceedings may be instituted at once; and the other of a suspension of payment not fraudulent, and not per se an act of bankruptcy, but which, if continued for more than fourteen days, becomes an act of bankruptcy by its continuance. The construction of the language of this particular provision under consideration, is, we think, best calculated to carry out the general intentions of congress, as expressed in the bankrupt act; and such construction, if not strictly required by, is certainly not inconsistent with the language of the particular provision alluded to.

It can hardly be supposed that congress intended that the creditors of a banker, merchant, or trader who had fraudulently stopped payment of his commercial paper, should be compelled to allow him fourteen days to consummate his fraudulent purposes, and perhaps secretly remove from the United States with the mass of his property before they could take proceedings against him. There is certainly no more reason for allowing such delay after a fraudulent act of that character than there is in a case where a bankrupt has fraudulently concealed or transferred a portion of his property. But when the suspension of payment is from necessity and without fraud, the period of fourteen days is properly allowed the honest trader, that he may, in case he is insolvent and is only temporarily embarrassed, take the necessary measures to enable him to pay his dishonored paper, and prevent his business being broken up by proceedings in bankruptcy. The accidental loss or miscarriage of expected remittances; the unexpected failure of a correspondent or of a bank in which his deposits are kept; the failure of his debtors to meet their commercial paper; or any other of the many misfortunes and accidents incident to commercial and financial operations, may compel an entirely solvent and perfectly safe merchant or trader to suspend for a day or two the payment of his commercial paper; but a merchant of fair character, who is solvent and deserving of credit, can, by means of temporary loans or otherwise, provide for resuming payment of his commercial paper within the fourteen days allowed by the bankrupt act. A suspension continued for a longer period may well be considered as evidence of hopeless insolvency or of a want of adequate capacity to carry on his business, and as entitling his creditors to take proceedings to secure the application of his property to the payment of his debts. Between these two classes—between the honest trader who suspends payment by reason of misfortune or accident, and the fraudulent one who stops payment that he may retain and secure his means for the future benefit of himself or family, to the exclusion of his creditors—congress has, we think, very properly made a clear distinction; a distinction which can only be acted upon by adhering to the construction heretofore given to the provision referred to by the only district court which has, within our knowledge, passed upon this question.

Case No. 17,387a.

In re WELLS.

[2 Hayw. & H. 187.] [1]

Circuit Court, District of Columbia. May 18, 1855.[2]

CONDITIONAL PARDONS—POWER OF PRESIDENT—CAPITAL CRIMES—COMMUTATION TO LIFE IMPRISONMENT—USE OF PENITENTIARY.

1. The president of the United States has the power to grant a conditional pardon for a capital offence.

2. That the penitentiary, although especially for the purposes enumerated in the statutes, yet as it was built by and under the control of

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

[2] [Affirmed in 18 How. (59 U. S.) 307.]

the United States, the president has the right to use it for the purpose of imprisonment, when the sentence has been commuted from hanging to imprisonment for life.

At law. For a writ of habeas corpus.

It appears that the petitioner was convicted of murder at the December term of the criminal court, 1851, and was sentenced to be hung for murder April 23d, 1852, on which day the president of the United States granted him a pardon, upon the condition that he be imprisoned during his natural life. Wells, in the conclusion of his petition, says: "Being duly informed by counsel, learned in the law, that the said pardon is absolute and the condition invalid, he prays that the writ of habeas corpus may issue to bring him before the court, and if it is found that his confinement is illegal and contrary to law, he may be discharged from his imprisonment."

Mr. Jones, for petitioner.

Mr. Key, for the United States.

Mr. Jones alluded to a similar case in Pennsylvania, but said authorities might be found in the statutes or in precedents at common law, but he contended that the president of the United States had nothing to guide him but the constitution and laws of the republic.

Mr. Key contended that the president of the United States has power to commute the sentence of death to imprisonment for life.

THE COURT, through MORSELL, Circuit Judge, pronounced the following decision:

After reviewing the arguments which had been presented and citing various authorities, said that the president of the United States has the power to grant a conditional pardon, as in this case, for a capital offence. If he had succeeded in showing that the president possessed this power the penitentiary of all others would seem to be the most suitable place.

It had been argued that the penitentiary was for persons convicted of offences punishable with imprisonment and labor under the laws of the United States, or of the District of Columbia. Although the penitentiary is principally for the purpose of punishment in enumerated cases as therein prescribed, yet as it was built by the United States, and is in charge of United States officers, paid by the United States, and of course is under the government and control of the United States he supposed, as the president, on whom the pardoning power is conferred by the constitution, has the right to commute punishment in capital cases, he has a right, as a sequence, to use the penitentiary for that purpose. Therefore the application must be discharged; it could not be sustained; the habeas corpus must be refused, and Wells will remain in the penitentiary.

[On appeal to the supreme court, the decree of this court was affirmed. 18 How. (59 U. S.) 307.]

Case No. 17,388.

In re WELLS.

[3 N. B. R. 371 (Quarto, 95);[1] 2 Chi. Leg. News, 49.]

District Court, D. Nevada. Nov., 1869.

BANKRUPTCY—INSOLVENCY DEFINED—INVOLUNTARY PROCEEDINGS.

1. *Held*, when a man's property is taken on legal process against him, that if all his property were sold, and would not produce money enough to pay his debts, that he is insolvent within the meaning of the law.

2. A solvent man is one that is able to pay all his debts in full as they become due.

3. It is the duty of one who is insolvent to apply to the bankrupt court in his own behalf, and if he does not, and some of his creditors take his property under legal process, he may be held to have suffered his property to be taken, and may be adjudged a bankrupt at the instance of creditors whose claims have not been provided for.

[Cited in Starkweather v. Cleveland Ins. Co., Case No. 13,308; Beattie v. Gardner, Id. 1,195; Re Heller, Id. 6,337; Haskell v. Ingalls, Id. 6,193; Re Dunkle, Id. 4,160.]

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

In bankruptcy.

BALDWIN, District Judge (charging jury). This is an application by McDonnell and Wood to have J. L. Wells adjudicated a bankrupt under the provisions of section 39 of the national bankrupt act [of 1867 (14 Stat. 536)]. The petitioners allege that Wells, being insolvent, did, on the 12th day of October, 1869, suffer his property to be taken on legal process, at the suit of one McCausland, with the intent thereby to give a preference to the said McCausland, and to delay and to defeat the operation of the bankrupt act. The respondent pleaded the general issue to the petition, the effect of which is to present the facts involved for our determination. These facts are: That on the 12th day of October, 1869, McCausland, in his own behalf, and as assignee of certain other creditors of Wells, instituted in one of the state courts an attachment suit against him, by virtue of which the sheriff has taken, and holds, all his property. It has been further proven that upon the day above mentioned the entire property of the respondent, if subjected to forced sale, would not have been sufficient to pay his debts.

The first question which arises in the case is, as to the fact of Wells' insolvency upon the 12th day of October instant—the day when his property was taken by the sheriff. If you believe from the evidence that Wells' property, if sold on that day, would not have produced enough money to pay his debts, then I charge you, as a matter of law, that he was insolvent, within the meaning of the bankrupt act. "A solvent man is one that is able to pay all his debts in full, at once or as they become due. Insolvency is merely the opposite of solvency. A man who is unable to pay his debts out of his own means, or whose debts cannot be col-

[1] [Reprinted from 3 N. B. R. 371 (Quarto, 95), by permission.]

lected out of such means by legal process, is insolvent; and this, although it may be morally certain that with indulgence from his creditors in point of time, he may be ultimately able to satisfy his engagements in full. The term insolvency imports a present inability to pay. The probable or improbable future condition of the party in this respect does not affect the question. If a man's debts cannot be made in full out of his property by levy and sale on execution, he is insolvent within the primary and ordinary meaning of the word, and particularly in the sense in which the word is used in the bankrupt act." Burrill, Assignm. 38, 41; 4 Hill, 652; [Bradford v. Union Bank of Tennessee] 13 How. [54 U. S.] 67; In re Lewis [Case No. 8,311]; Foster v. Hackley [Id. 4,971].

Did the respondent "suffer" his property to be taken upon legal process, with intent to give a preference to the attaching creditor, or with intent to delay or defeat the operation of the bankrupt act? It is claimed by the respondent, and indeed it sufficiently appears from the evidence, that there was no collusion between his attaching creditor and himself. From all that appears from the evidence, Wells did nothing to influence the issue of the attachment by McCausland. But for all that, he did, I think, "suffer" his property to be taken on legal process, within the meaning of the act. That voluntary action on the part of the insolvent is not requisite to bring him within the effect of the act, is shown by the whole context of section 39. For instance, among the various acts of bankruptcy enumerated in that section is being imprisoned for debt for more than seven days, than which it is difficult to conceive a more involuntary proceeding. The fact is, that the bankrupt act was designed to compel a fair distribution of an insolvent's estate amongst all his creditors—and, under the act, it is the duty of one who is insolvent to apply to the bankrupt court in his own behalf. If he does not so apply, and some of his creditors take his property under legal process, he may be held to have suffered his property to be taken, and may be adjudicated a bankrupt at the instance of creditors whose claims have not been provided for. Entertaining this view of the law, I charge you that Wells did "suffer" his property to be taken under process of law. It is urged that he did not so suffer it to be taken, with the intent to prefer the attaching creditor, or with the intent to delay or defeat the operation of the bankrupt act. Upon this point I find the gist of the authorities so tersely and clearly stated in the American Law Review for April, 1869, p. 539, that I give you the text in charge: "If an insolvent debtor suffers his property to be taken on legal process, so that the natural and probable result will be to give a creditor a preference, he will be presumed to have intended to give such a preference; and if he could have prevented the taking by filing his voluntary petition in bankruptcy, and has not done so, he must be held to have 'suffered' the property to be taken within the meaning of section 39"—citing numerous authorities. In this case Wells must have known that he was insolvent within the meaning of the act, as I have explained it to you; nor is it pretended that he did anything to prevent the taking of his property at the suit of McCausland. He must be held, therefore, to have suffered his property to be taken on legal process, with the intent to prefer one of his creditors, and with the intent to defeat the operation of the bankrupt act. See Avery v. Johann [Case No. 675]; In re Randal [Id. 11,551].

WELLS, In re. See Case No. 13,783.

Case No. 17,389.

WELLS v. The ANN CAROLINE.

[42 Hunt, Mer. Mag. 66.]

Circuit Court, S. D. New York. Sept. 27, 1859.[1]

COLLISION — CONFLICTING EVIDENCE — REVERSAL ON APPEAL.

[A decision of the district court dismissing the libel will be reversed where it appears that, although the testimony of the crews of the respective vessels was in direct conflict upon the controlling question, there is yet the testimony of several other witnesses, who were stationed upon other vessels in a position to observe the maneuvers of the colliding vessels, and who all concur in supporting the claim made by the crew of libelant's vessel. And in such case a decree will be entered in favor of libelant.]

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

In admiralty.

Benedict, Burr & Benedict, for libelant.

Mr. Donohue and Owen & Vose, for respondents.

Before NELSON, Circuit Justice.

The libel in this case was filed by the owner of the schooner John C. Wells, against the schooner Ann Caroline, to recover damages for a collision occurring in the month of February, 1854, on the eastern shore of Delaware Bay. The two vessels were beating up the bay in company with several other vessels, in a channel about a mile wide, between Crow Shoal and the Jersey shore. The wind was N. N. W., about a five or six knot breeze; the tide flood setting up the bay. The John C. Wells was close-hauled on her larboard tack, which was her long tack from Crow Shoal to the Jersey shore; the Ann Caroline close-hauled on her starboard tack on the opposite course from the Jersey shore to Crow Shoal. The Wells was very heavily laden—the Ann Caroline in ballast. The two vessels had tacked at the Crow Shoal upon their long tack nearly at

[1] [Reversing Case No. 17,389a. Decree of circuit court modified by supreme court in 2 Wall. (69 U. S.) 538.]

the same time, the Caroline at the time being to the leeward of the Wells, and somewhat astern of her. The Ann Caroline ran out but one-half or two-thirds of her course, when she suddenly came round on her starboard tack, in consequence of a vessel ahead suddenly backing and obstructing her course. While on this course, she came in collision with the Wells, striking her on her starboard side aft, about ten or fifteen feet from her taffrail, opening her side, and from which injury she sank to the bottom of the channel in a few minutes.

The main ground upon which the defence of the Ann Caroline is placed is, that she was on the starboard or privileged tack, and that it was the duty of the Wells to give way and pass to her right. The controling question in the case is whether or not the Wells was to the windward, and so far above the course of the Caroline, before the two vessels came together, as to forbid the application of this settled rule of navigation, that when two vessels are approaching each other on opposite tacks, both having the wind free, the one on the larboard tack shall give way and pass to the right. On looking into the proofs in the case, which are very voluminous, it will be found that the testimony of the master and hands on board of the respective vessels, as usual, is contradictory—those of the Wells claiming that the course of the Caroline was to the leeward and southerly of that of their vessel, while those on the Caroline insist that her course was to windward of the Wells.

If the case stood upon the testimony of these witnesses, we should regard it as so far conflicting and doubtful as to lead us not to interfere with the decree of the court below dismissing the libel. [Case No. 17,389a.] But there are four witnesses, masters and hands upon other vessels engaged at the same time in beating up this channel, and who were on the same tack with the Wells, but to the leeward and a little to her stern, who witnessed the collision and the course of the vessels previous to the accident, and they all concur in confirming the testimony of the master and hands of the Wells as to the course and relative position of the two vessels. The testimony of one of these witnesses has been taken in this court, and was not before the court below, which is very explicit and direct upon this question. There were several considerations urged on the argument by the counsel on both sides in support of their respective views of the case, which, as they rest principally upon a controverted state of facts, we do not deem it important to notice. We must, therefore, reverse the decree of the court below, and direct a reference to a commissioner to take proofs and report upon the libelant's damages in the case.

[NOTE. For a hearing on exceptions to the commissioner's report, see Case No. 17,389b. This cause was subsequently carried to the supreme court, where the decree of the circuit court was modified. 2 Wall. (69 U. S.) 538.]

Case No. 17,389a.

WELLS v. The ANNE CAROLINE.

[22 Betts, D. C. MS. 171.]

District Court, S. D. New York. Jan. Term, 1856.[1]

COLLISION—PLEADING AND PROOFS—SAILING VESSELS ON CROSSING TACKS.

[1. In cases of collision at sea in open view of all parties, courts look carefully to the first version given, and view with distrust all additions or subtractions therefrom. Hence the court will cautiously restrain each party from setting up a case by his proofs which is contradictory to that made by his pleadings.]

[2. Omission of the libel to state facts which on the hearing are made cardinal points in the cause—such as the course and strength of the wind, the tacks on which the colliding vessels were running, how far from the shores the collision took place, etc.—is faulty pleading, and not in compliance with admiralty rule 23 of the supreme court.]

[3. A sailing vessel tacking up Delaware Bay in the midst of a squadron of similar vessels *held* in fault for keeping so negligent a lookout that she did not discover one of the other vessels, which was coming up very fast astern of her, and making her tacks but little to leeward, until she was within 40 or 50 yards.]

[4. When two sailing vessels on opposite tacks are crossing each other, and there is a probability of collision, the one on the starboard tack keeps close to the wind, and the one on the larboard tack must beat away, or be answerable for the consequences.]

[This was a libel by William H. Wells against the schooner Anne Caroline to recover damages for a collision.]

BY THE COURT. A fleet of more than 20 sailing vessels got under way, at about midday, the 11th February, 1854, from their anchorages near Cape May. The craft were all schooners. The wind was fresh from N. W. or N. N. W., and the tide making, but not at full flood. Between two and three o'clock p. m. the John C. Wells, owned by the libellant, running close hauled on the larboard tack, and heading N. N. E., and the Anne Caroline, owned by the claimants, running also close hauled on the starboard tack, and heading W. by N., came in collision in the channel between Crown shoal and the Jersey shore, nearest to the shoal, but far enough off to leave the John C. Wells sailing room sufficient to come safely about, if she desired to do so. The John C. Wells was heavily laden, nearly down to the water's edge. The Anne Caroline was the larger vessel, and in ballast, and was making the greatest speed, when fully under way. The Cape May channel into Delaware Bay, where the mass of vessels were at the time

[1] [Reversed in Case No. 17,389. Decree of circuit court modified by supreme court in 2 Wall. (69 U. S.) 538.]

beating their course, is a narrow inlet, having a channel of less than a mile in width, and the vessels were changing from one tack to the other in plain view and near proximity to each other. The day was clear, and nothing obstructed observation across and up and down the channel, except the transit of the various vessels, in progress, from point to point. These circumstances bound all parties to the exercise of active watchfulness and promptitude, and relieve the court from the perplexity attendant upon ascertaining facts surrounding a collision, which occurs in the night, or in thick or obscure weather. When collisions at sea take place open to the view of all parties, and become afterwards subjects of litigation, courts look carefully at the first version given of the transaction by the parties concerned, and distrust all additions to or abstractions from the original representation, particularly when made under oath. The English admiralty are perhaps more tenacious on this point than the American, and will rarely hear evidence of either party tending to give the case a character differing from that presented by his pleadings.

I have on other occasions animadverted upon this topic, and, conceding the solidity and usefulness of the general principle, have been disposed to look with leniency upon errors in pleadings, and accept evidence not absolutely inconsistent with them, which parties are enabled to produce, and thereby give a juster understanding of the causes than was possessed by them when the pleadings were prepared, without requiring the record to be reformed. In permitting that practice, drawn from the circumstances, the character of the parties and the principles governing this class of actions have been before assigned. It is sufficient now to say that the court has cautiously restrained each party from thus setting up a case by proofs contradictory to that made by his pleadings. In this instance, the allegations of the libel are, that on the afternoon of Saturday, February 11, 1854, the schooner John C. Wells was run into and sunk by the schooner Anne Caroline, and that the libellant is entitled to damages therefor to the amount of $5,000.

The libellant alleges on his information and belief, that the facts of the collision, that the John C. Wells was on a voyage from New York to Philadelphia, deeply laden, with a valuable cargo, and on the afternoon of February 11th she had arrived in Delaware Bay, and was running about N. E. up the eastern shore of the bay, close hauled, and going about three knots an hour; that the schooner Anne Caroline, which was a much larger vessel and was light, was also bound up the bay, and was at this time running in the same general direction, but further in shore; that the said Anne Caroline, before she had beat out her tack, suddenly and unexpectedly went about, and running about six knots an hour, directly towards the John C. Wells, carelessly and negligently and wrongfully ran into the said John C. Wells, striking her on her starboard quarter, so soon and with such force that she sunk in so short a period that her crew were barely able to escape with their lives. It further charges that the collision was caused by the negligence of those in charge of the Anne Caroline in coming about when they did, in running directly towards the said John C. Wells, in not changing their course, so as to avoid her, in having no proper lookout, and in not hailing the said John C. Wells, or otherwise giving timely notice of the course intended to be pursued by said Anne Caroline.

The libel omits all assertion of various particulars which on the hearing were made cardinal, if not vital, points in the cause, and were attempted to be established by the libellant by proof, the course and strength of the wind; the tacks upon which the two vessels were running, how far from either or both shores the collision took place, or how far from the eastern shore the Anne Caroline came about and the impediments on the west shore to the John C. Wells going nearer to it than the position she was in when the collision took place.

It is manifest that the libel furnishes a meager statement of facts, to justify the court in adjudging that the Anne Caroline was culpable in anything done by her. The opinions and conclusions of the libellant are asserted emphatically enough,—that her conduct was careless, negligent and wrongful, and that the collision was occasioned by her sole fault; but he does not state the manner his vessel was being navigated, or what acts were done on board her to prevent or escape the collision, not even that a hail was given from her to the Anne Caroline, as a warning to the latter vessel. This mode of pleading fails to fulfill the requirement of rule 23 of the supreme court, in not propounding the various allegations of facts upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article. The difficulty under this form of pleading does not rest solely with the respondent in framing a proper reply, but the court cannot judicially find in the allegations a foundation for a decree in favor of the libellant: No facts are averred which exonerate him from fault, and none which fix culpability on the respondent necessarily conducing to the disaster, because it does not import a fault producing the collision, that the Anne Caroline came about unexpectedly, without running out her tack, and that she had no proper lookout, or ran directly towards the John C. Wells, or did not hail the latter vessel or otherwise give notice of the course she intended to pursue. The English admiralty demands the whole case to be stated in the libel, and will reject proofs at variance with or extraneous to the statements in the pleadings. The Anne & Jane, 2 W. Rob. Adm. 98, 104; The Virgil, Id. 201; The Ebenezer, Id. 209; The Speed, Id. 227, 228.

Without making the imperfection of the libel

a stringent ground of objection to the action, and recurring to the whole case made by the libellant's proof, it is necessary, before looking into the defence, to determine whether he has made out by his proofs a valid claim for damages against the Anne Caroline. Without he succeeds in this, the court cannot be called upon to criticise the sufficiency of the answer or the proofs produced in its support. The Hopper, 7 Cranch [11 U. S.] 389; The Boston [Case No. 1,673]; Jenks v. Lewis [Id. 7,280]; The Wm. Harris [Id. 17,695]. The master, first mate and a seaman are all the witnesses who were on board the schooner John C. Wells, who testify to her position or the acts of the John C. Wells to prevent the collision complained of, or to any particulars which impeded or embarrassed the maneuvers incumbent upon her to make on the occasion. The first mate says he was on the lookout about the middle of his vessel, and he thinks was a little forward of her main mast on the starboard side, and had a clear view of everything ahead. The John C. Wells came about on her long stretch and larboard tack, and proceeded about one-eighth of a mile, at the rate of four knots per hour, when the Anne Caroline came into her. The latter went about on that tack nearly at the same time with the Wells, and a little to leeward of the latter. He did not see her again until she was within forty or fifty yards of him, coming fast, on a 4 or 5 knot breeze (both vessels being then close hauled), and directly upon him. There was then time for her to have got out of the way by running up into the wind, but was not time for the John C. Wells to do anything in avoidance of her. There were a number of other schooners astern and to leeward of him, but he saw nothing to windward within two miles. The master of the Wells hailed the Anne Caroline, and then shoved his wheel down just as the vessels struck. Mr. Baker, the master, says he was at the wheel of the Wells when she tacked to the eastward. The Anne Caroline came round on the same tack about abreast of the Wells, then moving scarcely a mile an hour, just sagging off the shoal, and had not got her headway. The Anne Caroline was light, and running four or five knots towards him, both vessels close hauled. He did not see the Anne Caroline when she tacked with him off the shoal, nor at the time of her tacking east of him, but saw her just after she came about, and was making towards him. He saw her under the bow of the Wells. She was then short of a quarter of a mile from her. He hailed her to keep out of the way. There was not room on account of the shoal for his vessel to come about, and he could not any way avoid the Anne Caroline. She came right upon him without altering her course. He put his own wheel down, and ran forward as she struck. Does not know that his vessel was brought up by it into the wind at all. Bloomer, a man on the deck of the Wells, says he saw the Anne Caroline on the same course eastward with the Wells after the latter tacked. She was half a mile to leeward, and a little astern. No other vessel then ahead nearer than 1 or 1½ miles off. He then went below. Hearing some one speaking loud on deck, he came out, and, when he came up, saw the Anne Caroline, he thinks, 100 to 150 yards off, and, if she had then put her wheel up, she would have gone under the stern of the Wells, but the latter could not go about on account of the shoal, nor under the stern of Anne Caroline by putting her wheel up. There was no other vessel within two or three hundred yards of the two.

Examining the case made by the libellant, upon the law and the facts given in evidence by him, it is manifest that he was in fault on two essential particulars, either of which might have caused the collision, without supposing any blame on the part of the Anne Caroline. First, he was navigating in the midst of a squadron of other vessels, several of them, according to his own testimony, at short distances from him, and the accused vessel particularly coming up from astern very fast upon him, and making her tacks but little to leeward; yet he had no proper watch stationed, or else kept his lookout so negligently that he did not discover when she made her last larboard tack eastward, nor when she came about on the starboard tack, on which the collision took place. The call for vigilance in this respect was especially emphatic because of the numerous craft working their way nearly together against a breeze of 4 or 5 knots on a flood tide, and in a comparatively narrow channel, not exceeding one mile in width, and which necessarily exacted, from the varying speeds of the vessels, and the necessities of such navigation, frequent and abrupt changes of course.

The rule of navigation settled by the Trinity masters, sanctioned by the English admiralty courts, and by reiterated adjudications in the American tribunals, is, that when two sailing vessels on opposite tacks are crossing each other, and there is a probability, if their course is continued, they must come in contact, the one on the starboard tack keeps close to the wind, and the one on the larboard tack must beat away, or be answerable for the consequences. Abb. Shipp. 309, L, 236; John v. Paine, 10 How. [51 U. S.] 581. This rule does not depend, as is sometimes supposed, upon the fact that the vessels are approaching stem on. The George, 5 Notes of Cas. 368, 6 Notes of Cas. 53. Nor if the Anne Caroline was so far to windward that the master of the Wells might suppose she would go clear of him does that discharge the Wells of blame. Id. 56; The Woodpark, 7 Notes of Cas. 397. Whether the larboard tack should bear up or keep away will depend upon the relative positions and proximity of the approaching vessels. If the misfortune arises from the misconduct of the suffering party only, he must bear his own loss. Story, Bailm. § 608; 3 Kent, Comm. 231; The Woodrop-Sims. 2 Dod. 83. And it will be presumed her fault until she clearly proves the contrary. The Test, 5 Notes of Cas. 276 I find nothing in the evidence to relieve the Wells from the operation of this doctrine.

Giving her the advantage of proving the fact not alleged in the libel, that the Anne Caroline was not seen upon the starboard tack until she had approached so near that no reasonable effort by the Wells could avoid her, she has failed in establishing that fact. The master of the Wells saw the Anne Caroline short of a quarter of a mile off, and his mate forty or fifty yards, and both swear the distance was sufficient for her to have gone up into the wind, and thus have avoided the Wells. The master thinks the Wells could not have escaped the collision by the same maneuver, nor bear away under the stern of the Anne Caroline, because she was just coming round, and had scarcely got headway. His mate, however, and her crew attending to her sails and movements, says she was running 4 or 5 knots, and had proceeded ⅛th of a mile on this tack, when met by the Anne Caroline. All either of these officers did in the emergency was to hail the Anne Caroline to get out of their way.

The master of the Anne Caroline had a right to rely upon the opposite vessel doing her duty, and could not properly deviate from her own course until it became palpable that the Wells did not discover her, or did not intend to change her direction. The Catherine, 17 How. [58 U. S.] 170; The Mary Bannatyne, 18 Law Rep. 528. I cannot regard the apology attempted to be made had it been satisfactorily proved, that the Anne Caroline was not discovered from the Wells until too late for her to take measures to escape the collision, as any lawful excuse for her inertion. The utmost indulgence ever allowed for such excuse, is where there is some natural impediment, obscurity of atmosphere, &c, which intercepts the sight. Peck v. Sanderson, 17 How. [58 U. S.] 178. Otherwise the law imposes upon parties the consequences resulting from their failing to guard against dangers which, with the exercise of reasonable diligence, they might discover and avoid. The Friends, 1 W. Rob. Adm. 478; The Test, 5 Notes of Cas. 276; 3 Kent, Comm. 294. There would be no safety to persons or property transported by water if this rule was not peremptory and inflexible. I do not think the libellant, with every effort to prove the best case for himself he could make out without being tied by his pleadings to any specific state of facts, has succeeded in discharging his vessel from culpable conduct in the transaction, or fastening it upon the Anne Caroline, and accordingly, by the familiar law of collisions, his suit cannot prevail. In this view of the case, it is useless to discuss the evidence offered on the part of the Anne Caroline to prove she had been properly conducted. She was on the privileged tack, and did not attempt to depart from it, until it became manifest that a collision was imminent. The law did not require her to do so before, and the court will not inquire whether, when she made the effort to avoid the Wells, the best maneuver to accomplish that end was adopted. The libellant cannot recover upon his own case. Libel dismissed.

[NOTE. The decree of this court was reversed by the circuit court, and a reference ordered to ascertain the amount of libellant's damages. Case No. 17,389. For exceptions to the commissioners' report, see Id. 17,389b. An appeal was subsequently taken to the supreme court, where the decree of the circuit court was modified as to damages. 2 Wall. (69 U. S.) 538.]

Case No. 17,389b.

WELLS v. The ANN CAROLINE.

[N. Y. Times, May 31, 1861.]

Circuit Court, S. D. New York. May 30, 1861.

COLLISION—DAMAGES—VALUATION IN BOND.

[Where a vessel held liable for a collision has been released upon a stipulation for her value under the act of March 3, 1851 [9 Stat. 635], the amount of damages recoverable cannot exceed her actual value, although the bond was for a greater sum. The valuation for the purposes of determining the amount of the bond is not the real test of value in such a case.]

This case came up on exceptions to a commissioner's report. The libel was filed to recover for the sinking of the schooner William H. Wells, owned by the libelant, by the Ann Caroline [Case No. 17,389a], and a decree was given for the libelant on an appeal to this court [Id. 17,389], and it was referred to a commissioner to ascertain the damages. The commissioner reported the value of the Wells at $5,000. The Ann Caroline had been discharged from custody by consent, on the claimants filing a stipulation for value in the sum of $5,000. On the hearing before the commissioner the claimants offered to prove that the Ann Caroline was not worth $5,000, and insisted that, according to the act of congress of March 3, 1851 [9 Stat. 635], the libellant's recovery could not exceed the value of the Ann Caroline. The evidence was excluded, and on this ground the claimants excepted.

Benedict, Burr & Benedict, for libelant.
Owen, Gray & Owen, for claimants.

HELD BY THE COURT [NELSON, Circuit Justice]: That the act of congress is applicable to the case, and the libelant's recovery cannot exceed the value of the Ann Caroline. That the valuation of the vessel, whether by consent or otherwise, for the purpose of bond or stipulation to discharge it from the custody of the marshal, is not the test of real value in cases of collision under the act. That the evidence, therefore, should have been received.

The case was referred back, therefore, for a further report.

[This cause was subsequently carried to the supreme court, where the decree of the circuit court rendered in Case No. 17,389 was modified. 2 Wall. (69 U. S.) 538.]

WELLS v. The BAY STATE. See Cases Nos. 1,148 and 1,150.

Case No. 17,390.

WELLS v. CENTRAL VERMONT R. R. CO. et al.

[14 Blatchf. 426.] [1]

Circuit Court, D. Vermont. March 21, 1878.

DISSOLUTION OF INJUNCTION—TAXATION OF RAILROADS — CONSTITUTIONAL LAW — RESTRAINING COLLECTION OF TAXES—JURISDICTION OF FEDERAL COURTS.

1. Reasons stated why a motion to dissolve an injunction should be considered and disposed of on its merits, rather than that the injunction should be continued until the hearing, even if its maintenance then should be doubtful.

2. The provisions of the act of the legislature of Vermont (Laws Vt. 1874, Act No. 1, p. 16) providing for the taxation of the property of railroads, are not invalid by reason of the fact that lands improved by having a railroad built on them are not made taxable until they have been so improved ten years.

3. Whether section 3224 of the Revised Statutes of the United States, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," applies to a suit in a federal court to restrain the collection of a state tax, quere.

[Cited in Crawford v. Linn Co., 11 Or. 491, 5 Pac. 742.]

[This was a bill in equity by Samuel Wells against the Central Vermont Railroad Company and others.]

Benjamin F. Fifield, for orator.

Alfred G. Safford, for defendants.

WHEELER, District Judge. The motion of the defendants for a dissolution of the injunction heretofore granted in this cause, has been heard on bill, answer and argument of counsel. The injunction restrains the collection of municipal taxes assessed, under the law of Vermont providing for the taxation of the property of railroads, upon the property of the Vermont and Canada Railroad Company, in possession of the Central Vermont Railroad Company. Laws Vt. 1874, Act. No. 1, p. 16. Some of these taxes were assessed in 1875, and the time limited by law, within which they may be collected, will soon expire.

It was suggested, in argument, for the orator, that, if the injunction should be dissolved, he would be without remedy, and that, on that account, it should be continued to the hearing, even if its maintenance then should be doubtful. There would be some force to this suggestion, beyond what it now has, if the case was likely to or could stand any differently at the hearing from what it does now; but it is not likely to and cannot stand much differently. The only ground on which it is claimed that the taxes should not be collected is, that the law itself is unconstitutional and invalid. That question arises upon the face of the law, so that there are no issues of fact to be tried by proofs that might be presented differently upon the evidence then from what they can be now; and it is not apparent but that all questions of law involved have been as well presented now as they can ever be. And, besides, it is doubtful whether, if the injunction should be continued so as to prevent collection within the time limited, the taxes could be collected afterwards, although, ordinarily, a statute of limitation will not run upon an act restrained by injunction. For, in respect to taxes, the rate-bill and warrant are in the nature of an execution, differing, however, in so far that they cannot be renewed, and that they do not issue from, and are not returnable to, any court, where any answer to the fact that the time within which they were operative had elapsed could be shown. The question involved does not seem to be very intricate or difficult, and, in view of all these various considerations, it seems most just that it be disposed of on its merits, according to the usual course with such motions.

In behalf of the orator, it is not claimed but that the real estate of railroads is taxable, nor but that it is taxable in the mode by which that of the railroad reached is taxed by the law in question; but it is claimed that, on the face of the law, all are not taxed, and that the legislature has not the power thus to discriminate. If this claim was well founded, it is not easy to see how any of the laws of the state by which taxes are laid are valid. For, the only foundation of the claim is, that the taxes of the orator and his associates are made greater than they should be, by leaving others who should pay to go clear of paying any; and the same is true as to all other tax-payers as well as to them. That the property on which none are paid is of the same kind as that upon which the taxes complained of are assessed, can make no difference. If these tax-payers have the right to say that they will not pay their taxes because all other owners of the same kind of property are not required to pay like taxes, then all other tax-payers would have the same right, and all lawful taxation would fail, until the system should be made so perfect as to reach all property and all persons in the same proportion—a result not soon to be even hoped for. By the constitution of the state, the mode of laying taxes is left wholly to the legislature. It is merely said (Const. 1793, c. 1, art. 9) that "every member of society hath a right to be protected in the enjoyment of life, liberty and property, and, therefore, is bound to contribute his proportion towards the expense of that protection;" and that, "previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the legislature to be of more service to the community than the money would be if not collected." Under the constitution, exemptions similar to that complained of in this law have always been in force. Up to the year 1820 none but improved lands for pasturage, tillage, or mowing, or which were stocked with grass and within enclosure, were taxed, leaving all unimproved and unenclosed lands without taxation; and not only this, but

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

improved lands were not taxed until they had been improved two years. This exemption was very much like that complained of. By the law in question, lands improved by having a railroad built on them are taxed, but not until they have been so improved ten years. The improvement is greater, and the exemption longer but far less extensive, than those mentioned. So, persons have always been exempt from poll taxes until they arrive at a certain age, and almost always after they have passed certain ages. And, while horses, cattle, sheep and swine have been always taxed, the young of each, up to certain ages, have been left without being taxed. And the legislature has frequently, in its discretion, for the sake of encouragement to laudable enterprise, made particular exemptions, important in character, when considered in connection with the tax-paying property left—like the exemption of the whole township of Wheelock from all public taxes (Morgan v. Cree, 46 Vt. 773); the exemption of the Vermont Central Railroad from taxation (Vermont Cent. R. Co. v. Burlington, 28 Vt. 193); the exemption of certain persons (Wheeler v. Lane, 15 Vt. 26); and many others of like character. The right to make these exemptions has stood unchallenged until the present case, and the want of it is not consistent with the idea of the sovereignty that belongs to a state. So firmly settled is the power of the legislature of a state to make exemptions from taxation, that, when a franchise is granted by a legislature, free from taxation, it is not within the power of it to afterwards withdraw the exemption by repealing the law that created it, or by any other legislation. Gordon v. Appeal Tax Court, 3 How. [44 U. S.] 133; State Bank of Ohio v. Knoop, 16 How. [57 U. S.] 369; Vermont Cent. R. Co. v. Burlington, 28 Vt. 193. The power to make such exemptions, unless restrained by constitutional provisions, must rest with the legislature of every state, to be exercised in its own discretion. As is said in the opinion of the court, in State Bank of Ohio v. Knoop [supra], by McLean, J.: "The taxing power may select its objects of taxation." "Now, the exemption of property from taxation is a question of policy, and not of power."

Then, further, strictly speaking, this is not an absolute exemption of any property, if, in fact, it can be said to be any exemption. In the form of the enactment it is styled an exemption of the real estate of railroads until ten years from the time when traffic commences throughout their lines; but the form does not affect the substance. In effect, the legislature, in selecting objects of taxation, took railroads having ten years of growth, and of that class it exempted none. But, if the effect be stated, that they took railroads and exempted new ones during the first ten years of their existence, then it is only a qualified exemption, that will pass away with the prescribed time, as to all of them. And, still further, whatever it is called, it does not operate to create any discrimination in favor of or against any railroads, old or new. All those that had been in full operation ten years, and so were taxable under the law when it was passed, had realized their exemption of at least ten years in extent already, and those that had not could not by the law be taxed till they had, so that, altogether, the exemption, if not uniform, has existed so as to make a discrimination in favor of instead of against the one of which the orator is a stockholder, and those of its time.

From whatever point of view the subject is looked at, it seems clear, that no constitutional right of the orator has been infringed upon by this legislation and the proceedings under it.

There is another ground urged by the defendants why this injunction should not be maintained, and that is, as it is claimed, because such a proceeding is prohibited by the laws of the United States. The Revised Statutes of the United States (section 3224) provide, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Taken literally, this would prohibit such a proceeding as the one under consideration from being had in any of the state courts as well as in the federal courts. But, congress has no control over state courts, in respect to state taxes, and it is not to be presumed that it intended to reach beyond where its power extended, but to the contrary, and, therefore, that broad construction cannot prevail. It has exclusive control over the federal courts and federal taxation, and no one does or could claim but that this statute would apply to those courts, in respect to that subject. It also has exclusive control over the federal courts in respect to all other subjects, including proceedings concerning state taxation, when involved in those courts, and there is no very plain reason why this statute should not be held to apply to them, in respect to that subject, also. The reasons for not interfering in this way with state taxation are equally strong with those for not interfering with federal taxation, if not stronger. Congress has been careful to provide that the federal courts shall not interfere by injunction with proceedings in state courts. Rev. St. U. S. § 720. This statute in respect to interfering with taxation is legislation in the same direction, and it would seem reasonable, when congress had full power to restrain interference by the federal courts with state taxation, and used language broad enough to fully cover that restraint, and that construction is in accordance with the spirit and tendency of prior legislation, to presume that the intention was to accomplish that object. If this statute had been placed among those defining the powers of the federal courts, there would not be much, if any, doubt but that it was intended for a restriction upon those courts in all cases. But it is placed among the statutes relating to federal taxation, and that affords some ground for the argument that it was only intended to apply to such. As the scope of this statute is somewhat doubtful, and the propriety of restraining the collection of the tax by continuing the

injunction has been fully argued on the general ground, it has been thought better to examine into those grounds rather than turn the question upon the construction of the statute merely. On those grounds it appears to be clear that the injunction should be dissolved.

If ultimately it should turn out that the taxes are wholly illegal, the corporation of which the orator is a member can recover them back. And, if that corporation refuses to do so, and thus to protect his rights, and he has any legal and equitable right to his share, it seems quite probable that he can have his share decreed to him. The injunction is dissolved.

Case No. 17,391.

WELLS v. CHAPMAN.

[Nowhere reported; opinion not now accessible.]

Case No. 17,392.

WELLS v. DALRYMPLE.

[15 Int. Rev. Rec. 59; 4 Chi. Leg. News, 156, note.]

Circuit Court, W. D. Ohio. Jan., 1872.

CREDITORS' BILL—SALE OF REAL ESTATE—SUIT TO SET ASIDE—TITLE OF PLAINTIFF.

[1. In a proceeding to set aside a sale of real estate, the plaintiff must possess a judgment lien, or a lien by levy.]

[2. The objection that he has no lien is waived, unless taken in the answer.]

[3. To authorize an appellate court to reverse a decree on a question of fact, it should be able to say that, were the case reargued in the court below, that court would reconsider its own judgment.]

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

Hutchins & Ingersoll, for petitioner.
Mr. Stewart, for defendant.

EMMONS, Circuit Judge, held: That in proceeding to set aside a sale of real estate there must exist a judgment lien by statute, in which case the title must be in the judgment debtor, or a lien by levy, neither of which is here set up. That if this had been a plenary bill in equity it would be dismissed on that ground. But two cases [Day v. Washburn, 24 How. (65 U. S.) 352; Adler v. Fenton, Id. 407] hold that unless this objection is taken in the answer, it will be held to be waived. The answer does not raise the question. If proceedings were remanded for amendment to petition, the answer could then also be amended so as to raise this question, which would be fatal to the petition, the fact being that no lien existed before this petition was filed. Proceeding to review the case on its merits, EMMONS, Circuit Judge, held, that an appellate court, before reversing a decree on a question of fact, should be able to see some plain mistake, some misapprehension of the fact, so plain a misapprehension, so evident an error, as to warrant the appellate court, with much confidence, in saying that were the case reargued in the court below, that court would reconsider its own judgment.

Case No. 17,393.

WELLS v. GILL et al.

SAME v. YATES et al.

[1 Ban. & A. 77.] [1]

Circuit Court, D. New Jersey. March, 1874.

INFRINGEMENT OF PATENTS—HAT MACHINES.

The complainant's reissued patent for improvement in machines for making hat-bodies, having been adjudged valid in the case of Wells v. Jacques [Case No. 17,398], it was *held* that the defendants' machine infringed the patent, although their arrangement for conducting, or projecting, or getting the fur from the brush or picker to the exhaust cone, might be in some respects novel, and an improvement on the complainant's machine.

[Cited in Norton v. Jensen, 1 C. C. A. 455, 49 Fed. 863.]

[These were bills in equity by Eliza Wells against John Gill and others, and Henry J. Yates and others, for infringement of a patent.]

Henry Traphagen, for complainant.
A. S. Hubbell, for defendants.

NIXON, District Judge. The observations which I deemed it proper to make, in reference to the construction of the Wells' patent in Wells v. Jacques [Case No. 17,398] render it quite unnecessary that I should travel over the same ground in the above cases. Holding all the claims of the Wells' reissue valid, the only remaining question is, whether the use of the Gill machine is an infringement.

It may be true, as the counsel for the defendants so ably contended, that the arrangements of the devices in the Gill machine for conducting or projecting or getting the fur from the brush or picker to the exhaust cone, are, in some respects novel, and an improvement in efficiency, on the Wells machine; yet they are practically useless, except in combination with the constituents of the complainant's reissued patent, and cannot be used without infringing some of its claims, particularly the fourth.

This appears quite as clearly from the admissions of the defendants' principal witnesses, as from the direct testimony of the complainant's expert.

Let there be a decree for the complainant, in each of the above stated cases, and an order for an injunction and account, according to the prayer of the bill.

[For other cases involving this patent, see note to Burr v. Cowperthwaite, Case No. 2,188.]

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

Case No. 17,394.

WELLS v. GILL et al.

[6 Fish. Pat. Cas. 89;[1] 2 O. G. 590.]

Circuit Court, D. New Jersey. Nov., 1872.

PATENTS—INJUNCTION—PRIOR JUDGMENT SUSTAINING PATENT—EFFECT OF APPEAL—REISSUES—DISCRETION OF COMMISSIONER.

1. Ordinarily, a verdict and judgment sustaining a patent, control the discretion of a judge when he is asked to award a provisional injunction. They relieve him from the necessity of inquiring into the validity of the patent, and if he is satisfied there has been an infringement, the injunction may be said to be almost a thing of course.

2. If the judgment is acquiesced in, or is affirmed by the supreme court, any doubts in regard to the originality of the invention, or the validity of the patent, if considered de novo, should yield to the effect of the judgment.

[Cited in Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co., 49 Fed. 933.]

3. When, after judgment, a writ of error has been taken to the supreme court, although the presumption is that the judgment is correct, yet, when a motion for an injunction is brought in another circuit, the court will consider the errors alleged to have been committed at the trial, and if convinced that the case was submitted to the jury mistakenly—that there was radical error—will disregard the judgment.

[Cited in Woodard v. Ellwood Gas-Stove & Stamping Co., 68 Fed. 718.]

4. The motion for an injunction is an appeal to judicial discretion, and the court ought not to award the writ, unless satisfied that the complainant has a clear right, which the defendant is infringing.

5. The commissioner of patents, in granting a reissue, determines that what is claimed therein, was a part of the original invention, or included in it.

6. His decision is not absolutely conclusive in all cases, but it is settled that it is not reexaminable in the circuit court, unless it is apparent, upon the face of the patent, that he has exceeded his authority; unless there is such a departure of the new from the old patent, that it must be held, as a matter of legal construction, that the new patent is for a different invention.

7. In view of the case being before the supreme court, injunction withheld, if the defendants, within ten days, file a bond for the payment of the profits they may derive from the continued use of the invention, and for the damages such use may cause the complainants.

In equity. Motion for provisional injunction. Suit [by Eliza Wells against John Gill and George H. Gill] brought upon reissued letters patent for improvement in machinery for making hat-bodies, No. 2,942, dated May 19, 1868, granted to Eliza Wells, as administratrix of Henry A. Wells, deceased. The history of the patent, the claims of the original and the subsequent reissues, together with engravings of the machine, will be found in the report of Wells v. Jacques [Case No. 17,399]. In connection with the case of Wells v. Gill was argued the case of Eliza Wells v. Yates, the questions involved being the same in each.

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

E. N. Dickerson, for complainant.
Soule & French, for defendants.

Before STRONG, Circuit Justice, and NIXON, District Judge.

STRONG, Circuit Justice. To comprehend fully the merits of this motion, a brief statement of the facts exhibited by the proofs will be convenient. It appears that on April 25, 1846, letters patent for a hat-body manufacturing-machine were granted to Henry A. Wells, and that the patent was afterward extended seven years from April 25, 1860. The patentee having died, a further extension, by virtue of a special act of congress, was granted to Eliza Wells, the present complainant, as administratrix of the original inventor. This second extension was for seven years from April 25, 1867. The extended letters were subsequently surrendered, and a reissue was granted May 19, 1868. It is upon these reissued letters that the present complaint is founded.

Soon after the reissue, the present complainant commenced an action at law, in the circuit court of the United States for the Southern district of New York, against Ira Gill, who was at that time carrying on business at Walpole, Massachusetts, in partnership with his two sons, John Gill and George H. Gill, the present defendants. The suit was brought August 20, 1868, and it was for an alleged infringement of the last reissued patent. Soon afterward the complainant also filed a bill in equity, complaining of infringement in Massachusetts, against Ira Gill, and against his two sons above named, which remained undetermined, awaiting the trial of the action at law in New York. That case came to trial in April, 1872, and the result was a verdict and judgment for the plaintiff, and against Ira Gill. One, if not both the present defendants were present at the trial, and, though not parties to the record, nor technically privies, they were interested in the result in consequence of their partnership with their father.

During the trial, exceptions were taken to some of the rulings of the circuit judge, and a writ of error has been sued out to remove the judgment to the supreme court of the United States, where it is now pending. But that the verdict was satisfactory to the judge who presided at the trial appears plainly, I must conclude, from his subsequent action. It is averred in the bill, and not denied by any affidavits of the defendants, that, since the rendition of the judgment, injunctions have been granted at the suit of the complainant, in Connecticut, against infringements of her patent, and granted by the judge who tried the case in New York. It is also averred that in Massachusetts an injunction has been awarded against Ira Gill and these defendants, unless they give bonds to account for what, on final hearing, may be decreed against them. When it is observed that the bill is sworn to, not upon information and belief, but upon the

complainant's own knowledge, I think these averments, uncontradicted, must be regarded as established facts for the purposes of this motion, and that they accord with the judgment at law in tending to establish the right of the complainant.

It further appears that the defendants removed from Massachusetts to New Jersey a short time before the trial in New York, and that they are now using machines substantially the same as those which, in the action in the circuit court, were adjudged to be infringements of the Wells patent.

In view of these facts, the first and main question which I am to consider, is whether the exclusive right of the complainant, to the invention described in the patent, is sufficiently established to entitle her to a preliminary injunction.

Ordinarily, a verdict and judgment sustaining a patent, are controlling over the discretion of a judge, when he is asked to award a provisional injunction. They relieve him from the necessity of inquiring into the validity of the patent, and if he is satisfied there has been an infringement, the injunction may be said to be almost a thing of course. And had the judgment against Ira Gill been acquiesced in, or had it been affirmed by the supreme court, I should have no hesitation in awarding an injunction against even a stranger to the action, much less against those who, not parties to the record, nor technically privies, were partners with the defendant in the use of machines which were adjudged infringements, and who were present at the trial. Any doubts I might have in regard to the originality of the invention, or the validity of the patent, if considered de novo, I should feel constrained to yield to the effect of the judgment. But in this case there were exceptions taken to the rulings of the circuit judge, and a writ of error has been sued out.

The judgment, therefore, though conclusive while it stands, is, in one sense, not final. It may be reversed or it may be affirmed. The writ of error may be abandoned, and the judgment be left to stand as rendered. Meanwhile, is the judgment of no effect? Surely this question can not be answered in the affirmative. Even in a court of errors, the presumption is that the judgment of an inferior court, having jurisdiction, is correct. The burden is upon him who asserts error to show it. A plaintiff in error always has the affirmative. I agree that the motion for an injunction is an appeal to judicial discretion, and that I ought not to award the writ unless my conscience is satisfied that the complainant has a clear right which the defendants are infringing. I agree, also, that the judgment in the case of Wells against Ira Gill should not, under the circumstances, be considered as conclusive; and that I should consider, not only the errors alleged to have been committed at the trial, but also, independently, what has been alleged against the validity of the patent, and in denial of the defendant's infringement.

I have, therefore, reviewed the requests that were made for instructions to the jury, and the charge of the circuit judge, and I find nothing which I am prepared to say was erroneous. I am not sitting as a court of errors, but even now the judgment of the circuit court of New York is entitled to the presumption that it was right. Yet, if I were convinced that the case had been submitted to the jury mistakenly—if in the directions, or want of directions, of the circuit court, I thought there was radical error—I would disregard the judgment, and treat it as if it had never been rendered. I am not yet so convinced. Without discussing in detail the various matters which are suggested against the correctness of the mode of submission, this at least may be said, that error is not so palpable as to justify my treating the present motion as if nothing had been done to establish the plaintiff's right. At least the judgment, followed as it has been by injunctions elsewhere, and by the approval of the judge who presided at the trial of the case, makes out a prima facie case of title in the complainant, and of the infringement by the defendants.

Then what is there to repel this apparent right? It is insisted that the reissue to Eliza Wells embraces more than the original invention for which the patent was granted to Henry A. Wells, and therefore that the reissued patent is void.

But this is one of the questions which was tried in the action against Ira Gill, and decided adversely to what the defendants now claim. Besides, the commissioner of patents, when he granted the reissue, determined that what is claimed therein was a part of the original invention, or included in it. I do not say that his decision is absolutely conclusive in all cases; but it is settled that it is not re-examinable in the circuit court, unless it is apparent, upon the face of the patent, that he has exceeded his authority—unless there is such a departure of the new from the old patent, that it must be held, as a matter of legal construction, that the new is for a different invention. It would be going very far were I to hold this, in view of the action of the commissioner, and of the verdict and judgment in New York. And even without regard to those, I should hesitate in coming to the conclusion that the reissued patent is void. I am unable to perceive how anything that was decided in Burr v. Duryea, 1 Wall. [68 U. S.] 531, determines that what is claimed in the reissue was not embraced in the original invention.

That the machines used by the defendants are infringements of the complainant's patent, was one of the matters decided in the case of Wells v. Ira Gill [Case No. 17,395], and it must be conceded unless the question is still entirely open. Undoubtedly, the machine of the defendants is variant from the Wells machine in form and general appearance, as also in some details; but I think it substantially the same in principle and in mode of operation. Placed side by side, and operated at the same

time, the conviction forced upon my mind is very strong that the differences between them are formal merely, not substantial. At all events, the differences are not, in my judgment, sufficient to overcome the proper effect to be given to the verdict in the action against Ira Gill, even though that verdict and the judgment therein are not conclusive.

In my opinion, therefore, the complainant is entitled to an injunction. But, in view of the fact that the judgment in the circuit court of New York may be reversed, I think an injunction should be withheld if the defendants give security for the payment of the profits they may derive from the use of the invention, and for the damages their use may cause the complainant. I certainly would not order a provisional injunction if the judgment in the circuit court of New York had not been recovered.

Let, therefore, an injunction issue, unless the defendants, within ten days after notice of this order, shall give bond, with sufficient security, to be approved by the clerk of the court, conditioned to keep an account of all the hat-bodies made by each of the machines in question, and to file such account, under oath, once in three months in the clerk's office of this court, and to pay the amount of any final decree in this case; and in case the defendants neglect to file such account ten days after the expiration of every three months, it is ordered that an injunction issue. The bond to be given in the penal sum of $20,000. The same order, I think, should be made in the case of Wells v. Yates.

[For other cases involving this patent, see note to Burr v. Cowperthwaite, Case No. 2,188.]

Case No. 17,395.

WELLS v. GILL et al.

[6 Fish. Pat. Cas. 574;[1] 4 O. G. 669.]

Circuit Court, D. Massachusetts. Nov. 6, 1873.

REISSUED PATENTS—VALIDITY.

1. If the reissued patent does not, upon the face of the patent, embrace anything not substantially described or suggested in the original, the reissue is valid.

2. Reissued patent, No. 2,942, to Eliza Wells, dated May 19, 1868, declared valid.

In equity. Final hearing on pleadings and proofs. Suit brought [by Eliza Wells against Ira Gill and others] upon reissued patent, No. 2,942, to Eliza Wells, dated May 19, 1868. The history of this patent, the claims of the original and of the reissue, together with an engraving of the Wells machine, will be found in Wells v. Jacques [Case No. 17,398].

Edward N. Dickerson, for complainant.

H. F. French and A. L. Soule, for defendant.

SHEPLEY, Circuit Judge. Upon a full hearing of this case, and of the arguments of counsel, it is considered and adjudged by the court, that the reissued patent introduced in evidence in this cause, does not, upon the face of the patent, embrace anything not substantially described or suggested in the original patent to Henry A. Wells; and upon a careful revision of the evidence, the court is of opinion, and accordingly decides, that Henry A. Wells was the original and first inventor of the several combinations claimed in the reissued patent, and that the same is a good and valid patent; and the court is of opinion that the differences between the machine of the defendants and that of the complainant are formal merely, and not substantial, excepting that the defendants have introduced into their machine certain modifications of the exhaust current and of the combined action of the exhaust current with the current produced by the revolution of the brush or picker, which modifications are to be viewed only as additions to, or improvements upon, the devices embraced in the reissued Wells patent. The judgment of the court is, that the defendants did infringe, as charged in the complainant's bill in this case, and for an injunction and account, according to the prayer of the bill.

[For other cases involving this patent, see note to Burr v. Cowperthwaite, Case No. 2,188.]

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

Case No. 17,396.

WELLS v. HAGAMAN.

[29 Leg. Int. 405.][1]

Circuit Court, E. D. Pennsylvania. Dec. 20, 1872.

PATENTS—INFRINGEMENT—NOVELTY AND INVENTION—PRACTICE—REFERENCE TO COMMISSION OF EXPERTS.

1. In the machine for making hat bodies, the fibres of disintegrated fur which compose the bat are deposited upon the surface of a revolving perforated cone, beneath which a fan partially exhausts the air. This exhaustion causes an atmospheric pressure, which, above and around the cone, forces the fibres towards it, and retains them upon it. The fur is previously disintegrated by a revolving picker. A defect of the machine was that the currents of air produced by the rotation of the picker, not being conducted or directed, in proper planes, towards the cone, were divergent, and scattered the fibres. This former defect was first remedied by interposing an air chamber, to conduct the stream of fibres from the front of the picker, in the proper planes, towards the cone, with auxiliary and incidental appliances.

2. A patent for such an air chamber and appendages was not infringed by the substitution of a short uncovered fur projector in front of the picker. The revolution of the picker, if downward, produced a current of air whose primary direction was forward and downward. This direction of the air downward was gradually changed on the surface of the fur projector, which was formed or composed of a plate, or system of adjacent plates, of such a graduated inclination upward, and such a compound curvature, as coincided with a theory that the aerial current should project the fibres beyond

[1] [Reprinted by permission.]

the plate or plates, through open air, for the distances and in the planes required.

3. What would otherwise have been such a fur projector may be so elongated towards the cone, and may be of such curvature and elevation, as to become, in effect, a conducting trough, upon whose bottom the pressure of the air, from the resistance of its continuing downward tendency, may be so retained that a cover and elevated sides can be dispensed with. The patent was infringed by the use of such a trough, which the fibres did not leave until they arrived where the dominant aerial force towards the cone was no longer that which had originated in the rotation of the picker, but became that of atmospheric pressure caused by the exhaustion below the cone.

4. In a case doubtful in this respect, the question, which force predominated where the fibres left the supporting surface, might be a proper subject of reference to a commission of experts, or to a master.

5. The bat, when formed upon the metallic perforated cone, is covered with a felted or fulled cloth, wet with hot water, over which is drawn another perforated metallic cone, with or without an additional inner one, when the whole are immersed in hot water, whereby the bat is hardened sufficiently to be removed from the cone. The novelty of such a use of the wet, hot, covering cloth was denied where a printed description of a like use of a cowl of linen or flannel to be drawn gently over the bat, had been previously published. It was objected to the prior description, that a "cowl," properly so called, could not be thus used without a destructive abrasion of the newly formed bat. To this objection, it was a sufficient answer, that if such abrasion would have occurred from such use of a cover sewed up in the form of a cowl, a person skilled in the art would have understood the intended or proper use to be that of an open cloth, gently folded in the form of a cowl, upon the bat.

6. It was further objected that the prior description—though it stated that the original perforated cone, the bat, and its flannel or linen cowl, were to be covered with the other perforated metallic cone, and the whole then at once immersed in the boiling water—omitted to state that the linen or flannel cowl, when first applied, was to be wet with hot water, or wet at all. To this objection it was answered—First, that until the immersion of the whole, either a dry cloth or a wet one could be used, and that the difference was unimportant; secondly, that if it was important, then, as the hot water was always at hand, and its uses were already well known to the hat maker, the wetting of the covering cloth with it was either implied, or must have obviously suggested itself to a reader of the prior description who was skilled in the art. The second answer was a sufficient one, whether the first was or not.

In equity. Bill for infringement of a patent for an invention.

This case was heard upon the complainant's application that process of contempt should be awarded against the defendant for breach of a special injunction, and for breach of the further injunction included in a short decree against him, that the complainant's bill be taken as confessed. It was agreed that the question of infringement should be open to contestation, as if no decree pro confesso had been entered.

In the following statement, the pages noted are those of the report of the case of Burr v. Duryee, in the supreme court (1 Wall. [68 U. S.] 531–581), and the references by letters are to the several drawings or figures in that report.

In the machine for making hat bodies, the fur is disintegrated by a horizontal picker, whose revolutions are, it is said, two thousand, more or less, in a minute. The fibres of disintegrated fur which compose the bat are deposited upon the surface of a revolving perforated cone (page 558, Fig. 12), beneath which a fan partially exhausts the air. This partial vacuum causes an atmospheric pressure, above and around the cone, forcing the fibres towards it, and retaining them upon it. There was no authenticated measurement of the ordinary intensity of this atmospheric pressure; nor was there any evidence of the ordinary number of revolutions of the fan in any given time. The original patent of Wells (A. D. 1846), whose administratrix is the complainant, states that it had long been essayed to make hat bodies, by throwing the fibres of fur, wool, &c., by a brush or picker cylinder, into a perforated cone, exhausted by a fan below, to carry and hold the fibres thereon by the currents of air that rush from all directions towards and through the apertures of the cone, and thus form a bat of fibres ready for hardening and felting. He added that all these attempts had failed. The experiments to which he referred as having failed had been made where no mechanism was interposed between the rotating picker and the revolving perforated cone. Such of the fibres as reached that part of this intermediate open space which was near the cone were deposited on it through the suction caused by the atmospheric pressure. The defect of the machine was the absence of a proper instrumentality to prevent previous divergence of other fibres in those parts of the open space which were nearer to the picker. To economize what was thus wasted, and regulate the distribution of the fibres upon the cone in the different quantities required for varying the thicknesses of different parts of the bat, Wells (see the drawing on page 543) enclosed the picker, F, in an air chamber, M, extended so that its outlet, q. s., was near to the cone, O. This chamber he called a "tunnel." His original patent describes a brush or picker, F, whose back revolves downward, as the upper arrow indicates, and whose front, of course, revolves upward. This picker, F, is fed by a regulated supply of fur from behind, b, b', c, d. The fibres, as liberated from the picker, pass down a curved surface below the same upper arrow, towards the bottom of the tunnel, M. In consequence of the encasing of the picker, F, the supply of air would fail if the deficiency were not provided for. The supply is received from behind, through a narrow aperture, N, at the bottom of the tunnel. (See the lower arrow.) Here an inward current of air, produced by the rotation of the picker, is thrown by this rotation forward and upward into the tunnel, and expands within it. The air slit, N, though not an independent invention, was an important incidental part of the tunnel. From this

entrance the current of air, "induced," as the original patent states, "by the rotation of the brush, F, and the partial vacuum in the perforated cone, O, *prevents the fibres of fur from falling and resting on the bottom of the chamber, M, and carries them on to the perforated cone.*" The "*chamber or tunnel*" is described as *gradually changed in form towards the outlet*, where it assumes a shape nearly corresponding to a vertical section passing through the axis of the cone, O, but narrower than the cone, "for the purpose of *concentrating and directing the fur* thrown by the brush into the cone." The original patent also states that the *top, R*, of the chamber "is *gradually elevated, and the sides contracted to make the delivery aperture*," i. e. the outlet of the tunnel, "*nearly of the form of the cone, but narrower and higher*," &c. At the bottom of the outlet, was a hinged flap, q, to regulate the delivery of the fibres; and the upper part was provided with a hinged hood, s, which, whether operated by hand or by machinery, was carried up and down, to direct the discharge of the fibres, and distribute them properly on the cone, O, with the varying thicknesses required for different parts of the bat.

The patent, having been several times surrendered and reissued, and having been extended by the commissioner of patents, and afterwards further extended by congress (14 Stat. 637, 638), was again reissued in 1868. In this last reissue, the tunnel's bottom, sides, and top are described separately, as if they were disjoined plates, and the office attributed to each of them is explained separately; after which the description states that they "*are all united along their edges*," in the machine illustrated by the accompanying drawings. The original model, however, in which they compose a single entire tunnel, as described in the original patent, remains in the patent office, to show the meaning of the new phrase "united along their edges." Of this tunnel, as originally patented, the novelty and great utility have never been disputed. Under this head, if the case depended upon the original patent alone, the only question would have been that of infringement. In the machine whose use by the defendant was complained of as contumacious, the revolution of the face of the picker nearest the cone was downward. He used, as a substitute for the tunnel, an uncovered plate or board in front of the picker. On each side of this board was a raised edge, inclining inward. The board, as the defendant contended, was of such a curvature and inclination as coincided in theory with an appliance called a "fur director," described in a patent granted in 1860 to Boyden. The supreme court had, it was contended, decided in Burr v. Duryee, 1 Wall. [68 U. S.] 531, that the use of such an appliance was not an infringement of the patent to Wells. The machine in which Boyden's fur director was used is represented on page 549, and there is a drawing of the fur director separately, on a larger scale, at foot of page 560 (Fig. 21).[2] The revolution of the front of the picker, D, was downward, and in front of it was the fur director, F. The rotation of the picker was thus in the direction opposite to that of the picker of Wells; and the primary direction of the current of air produced by the rotation of Boyden's picker was consequently forward and downward, instead of forward and upward. But the downward current of air was received directly in front of Boyden's picker, D, upon the surface of his fur director, F, which was an uncovered curved plate, so inclined upward, as gradually to change, in part, the direction of the aerial current. The plate was described in the patent of Boyden as so bent or curved that its surface would have a certain relative position with the axis of the picker, D, and the surface of the cone, D, and give such a direction to the fur, as the latter was thrown on it by the rapid motion of the picker, that the fur would be drawn properly on the cone by the exhaust or suction within it. The plate, F, was described as of a compound curvature, longitudinal and transverse. Its highest point was at the centre, and the longitudinal curvature was gradually downward and upward on each side of the centre, with a slightly concave form. The transverse curvature corresponding with the surface of the cone, B, was described as follows: "The highest and central part of the plate, F, has its surface in line, or in a plane, which bisects longitudinally the axis of the picker, D, and strikes the apex of the cone, B; and the surface of the plate, F, at each side of its centre and highest point, is formed of portions of planes which bisect longitudinally the axis of the picker and points on the cone, extending down to its base." The following additional passages may be quoted from Boyden's patent: "The picker, D, by its rapid rotation, conveys the fur around on the plate, F, which, in consequence of its being curved, as described, causes the fur to be projected towards the cone, B, in a series of planes extending from its apex to the base, the exhaust or suction within the cone drawing the fur on it, after the proper direction has been given to the fur by the plate, F, the velocity of the picker being sufficiently great to project the fur within the influence of the exhaust of the cone. * * * This peculiar curvature of the plate, F, not only gives the proper direction to the fur, so that the latter may cover the cone, but it also directs the fur to the cone in proper quantity,—for instance, the central and highest part of plate, F, is comparatively a short curve, and directs a small quantity of fur to the upper part of the cone, where but a

[2] On page 550, line 8, the omission of a number after the word "figure" might mislead the reader into a belief, that the intended reference was to the figure on page 549, whereas, it appears, on reading Boyden's patent, that the intended reference on page 550, line 8, was to the figure which is mentioned as No. 21, in another connection, at the foot of page 560.

small portion is required; but it will be seen that the lower part of plate, F, has a double curved surface to supply the cone, one at each side of its centre, so that the cone will be properly supplied, the supply gradually increasing from the top to the bottom of the cone. * * * The plate, F, is gradually elevated at its outer edges, or towards the cone, from the positions above stated, in order to compensate for gravity; the latter serving to counteract, in a measure, the power of the exhaust and that of the picker, and give a downward movement to the fur. By slightly elevating the direction of the fur above its otherwise proper path, due provision is made for such a contingency."

What Boyden claimed as his invention was "the fur director or plate, F, curved or bent substantially as shown, and arranged in relation with the cone, B, and picker, D, to operate substantially as and for the purpose set forth." The fibres are so volatile that their escape from the machine of Boyden, as hitherto described, would cause great waste. It is diminished by his appliance of a concave piece, G, so connected with the inner lower end of the plate or fur director, F, as to form a semi-circular close cavity under the picker, D, and, in the words of his patent, permit any fur that might escape down between the plate, F, and picker, D, to be brought up by the picker so as to be again projected on the plate. The material is thus economized. This concerns the useful effect of the whole machine, but not the mechanical effect of the fur director, considered as alone the part here in question. Whether Boyden's machine, with the aid of this lower chamber, economizes the material sufficiently for practical competition with Wells's machine, was treated in the argument as unimportant, unless where explanatory of supposed motives of alleged infringement. If the board used by the defendant was proportioned as the fur director, F, in Boyden's drawing (page 549), the length from its inner to its outer end (towards the cone) would not exceed about four inches. The actual extension of the defendant's board in this direction is about eight inches, this being rather more than a fourth of the whole distance of the circumference of the picker from the middle of the nearest surface of the revolving cone.

When the bill in this case was filed, the defendant used, where this board or plate now is, a system of adjacent curved metallic flexible plates of which the extension towards the cone was not less prolonged. In a case of Jaques v. Weeks, tried at law in the circuit court for the Southern district of New York before Judge Woodruff, in January, 1871 [case unreported], such a use of like plates was found by the verdict of a jury to infringe the complainant's patent; and that court afterwards entered judgment upon the verdict. The present defendant, not conceiving himself at liberty to disregard this decision at New York, ceased to use the plates. Afterwards, assuming that the decision was not reconcilable with the prior decision of the supreme court, unless he was at liberty to use a fur-director of some kind, and not conceiving shortness of such an appliance to be essential to its proper definition, he substituted the present board. Upon this, the first question of contumacy arose.

In the original patent of Wells, and in the complainant's reissue, the claims of invention are differently expressed. In each, they are multiplied as for inventions of combinations variously described. But novelty can be properly alleged of two subjects only. One of them, the tunnel, has been fully described. The other is a covering cloth, which, wet with hot water, is applied to the bat, when formed upon the cone. The complainant's patent, if it was valid under this head, had been infringed. The question was only upon the novelty of this latter claim of invention.

In the complainant's reissued patent, it is stated to be well known that the application of hot water to a bat of fur fibres which have been suitably prepared to be made into hats by the well known felting process, is to partially felt the bat so that the fibres will hold together. This must be understood with reference to the state of the art at the date of the original patent. That patent also states that after the proper supply of fur has been deposited on the pervious cone, the non-united fibres are there held, in the form of a bat, only by the pressure of the surrounding air induced by the exhaustion of air from the inside of the cone, and hence, if, in that condition, the operation of the exhausting mechanism should be suspended, the fibres would be no longer held by the surrounding air, and would, by force of gravity, fall and destroy the bat. To prevent this, and render the bat available in the manufacture of hats, a flexible cloth is used. "The attendant takes from a kettle of hot water a piece of felt, or other cloth, rolled upon a roller, and applies one end of it to the surface of the bat still held by the pressure of the surrounding air, and, as the cone rotates, the felt cloth winds from the roller on to the bat; and, as the tip of the cone is semispherical, and this cloth cannot be conveniently extended over the tip, another piece of cloth, also taken from hot water, is applied to the tip of the bat." In this condition, the specification states, that "not only could the cone be safely removed from the machine, but the bat could be safely removed from the cone by careful handling." But in order "to harden the bat to a state of greater consistency after the wet cloths have been applied, * * * a strong perforated metallic cone is put over the cloth, and the whole is then dipped in hot water; and after that, the bat can be removed from the cone, and handled without the necessity of much care." The specification then describes an inner sustaining cone, and explains how it may be dispensed with. The claim under this head in Wells's original patent of 1846, was "covering the bat with felted or fulled cloth before it is removed from the

cone, or former, as described." What is claimed in the present reissued patent of 1868, is, "in combination with the pervious cone provided with an exhausting mechanism substantially as described—the covering cloth, wet with hot water, substantially as and for the purpose described."

Upon the question whether this was, in 1846, a novel invention of Mr. Wells, the defendant put in evidence two prior patents. Hurlbut's patent (A. D. 1834) was for the use of a vibrating exterior shell to harden hat bodies. His claim was for admitting steam into the cone upon which they were formed, and also for covering this cone with the cap or shell. The cone upon which they were formed was perforated with holes, and when the web which constituted the body was wound upon the cone it was "covered with a cloth;" and over the whole was put the vibrating cap. Ponsford's English patent (A. D. 1839) was published in print before any invention of Wells. Ponsford's improvements were, as he said, communicated by a nonresident foreigner. The improvement in the manufacture of hats, thus communicated, consisted, Ponsford said, in forming the felted bodies of hats wholly with cattle hair, or of cattle hair mixed with other materials after being prepared in a certain manner. He stated that hat bodies had been made of felts manufactured from wool and furs both separately and mixed in various proportions, but that he was not aware that a felt made wholly or in any considerable proportion of cattle hair had ever been applied to the making of hat bodies. He then described as follows the manner in which cattle hair was recommended by his informant to be felted and formed into hat bodies, viz: The hair being cleansed or prepared should be passed through a blowing machine such as was in common use, and then formed into a bat or fleece by means of mechanical arrangements founded on the principle of exhaustion, that was to say, the hair, as it passed from the blowing machine was to be tossed or thrown into the air from which it was to be sucked or drawn down upon hollow perforated cones or moulds of metal or wool, with an exhausting cylinder beneath. He added: "When the hair has been received on one of these perforated cones or moulds to a sufficient thickness, a cowl of linen or flannel is to be drawn gently over it, and then a hollow perforated cover of copper, or any other suitable metal is to be dropped over the cowl; the cone or mould is then to be immersed in a vat or tub of boiling hot water, and there allowed to remain for about a minute, after which it is to be taken out, and the metal cover, and flannel or linen cowl, removed, when the bat or layer of hair will be found felted to a degree that it may be readily finished off by the workman, in the usual manner, at the oven." The supreme court, after a remark that the complaint of infringement under this head had not been much insisted on, said: "The respondents contend that it is void, being for the same invention patented to Ponsford in England in 1839, and known to Wells, who was at the time in England. This allegation we find to be fully supported by the evidence, and decided accordingly." 1 Wall. [68 U. S.] 577, 578. That Wells was in England, or what he knew, was not proved in the present case. But this was immaterial, as the patent of Ponsford had been published in print. The important observation was, that Ponsford's was the same invention. This observation of the supreme court, lost, however, a great part of its force because the decision was upon Wells' patent as reissued in 1860, in which reissue the claim of invention under this head, whatever might have been its merits, was not so expressed that it could be supported. The complainant opposed three objections to the sufficiency of the description contained in Ponsford's patent: (1) that the subject of this part of his patent was not fur but hair; (2) that what Ponsford suggested was useless, because a "cowl," properly so called, could not be used without such abrasion of the newly formed bat as would have ruined it; (3) that he did not suggest that the cloth or cowl should be wet with hot water, or wet at all.

Mr. Dickerson and Mr. Myers, for complainant.

Mr. Collier, for defendant.

CADWALADER, District Judge. I am of opinion that the defendant is infringing the complainant's patent for the air chamber. But in so deciding I have been embarrassed, because, in the argument for the complainant, the authority of a judicial precedent has not been fully attributed to the decision of the supreme court, reported in 1 Wall. [68 U. S.] 531. The question of the authority of this decision has been confounded with some correct, but inapplicable, propositions upon the inconclusiveness of a judgment, except as between the litigants. To have contended that the propositions discussed by counsel in that court are inapplicable to the present form of the question, and that the experimental operation of the museum of machines there exhibited (see page 578) may not have represented their ordinary working condition, would, however, have been a fair and proper course of argument. I have also been embarrassed, because, since the inventor's death, the subject has been obscured rather than elucidated in reissues of the patent. Whether the reissue of 1868 could be sustained without reference to the original drawings and models, and to the original patent of 1846, remaining of record, is perhaps doubtful. But the reissued patent, aided by the model, &c., may, I think, be sustained. Therefore it will not be necessary to note any intermediate surrenders and reissues, except occasionally. The case will be considered upon the assumption, that whatever Wells invented is well patented. To relieve my own mind of such embarrassments, I have

prefixed a statement of the case, which may be considered as an introductory part of this opinion.

In the machines which have been exhibited or described, the current of air produced in front of the picker, by its rotation, was upward or downward as the rotation was upward or downward. Until the invention of Wells, there was no mechanism to control or change this primary direction of the air. Either the upward or the downward current of air was divergent from the proper direction. This direction should have been towards the revolving cone. A flow of air in any other direction scattered and wasted the fibres. The remedy for this divergence was an instrumentality which would conduct, or direct, the currents of air from the front of the picker towards the cone, till the fibres were brought so near to the cone that the force of suction towards it would sufficiently predominate. Here the distinct meanings of the words "direct" and "conduct" should not be disregarded. An additional purpose for which a new mechanism was required may be explained by observing that an ordinary hat should be thicker at the band than at the crown. The additional purpose therefore was, that the fibres deposited on the cone should reach it in such layers of varying quantity as to make the bat of the varying thicknesses required;—in the language of Judge Woodruff—to give a greater thickness in that part of the bat where thickness was desired, and a lighter deposit of fur where lightness was more desirable than mere strength. The purpose of interposing new mechanism was thus twofold. It was to determine towards the cone the general direction of the flow of air from the picker, and also to regulate the different thicknesses of the bat from the base to the top of the cone. The first person who interposed any mechanism to effect this twofold purpose was Mr. Wells. It was therefore assumed, after his death, by an assignee of the patent, that the use of any interposed mechanism which produces like useful effects, must infringe the patent, whether the mechanical effect was the same or not, and whatever may have been the mechanism used. This was a mistaken supposition, as the supreme court has decided. The twofold useful purpose may be effected more or less by either of two different mechanisms. One of them is an air chamber, called a "trunk" or "tunnel," to conduct the flow of air in which the fibres pass from the picker towards the cone. The other is an unenclosed short plate, or system of short plates, which may be called a "fur projector," placed in front of the picker, and so formed as to turn the currents of air initially in the direction required, in order that they may project the fibres towards the cone. The air chamber was the invention of Wells, who designated it as a "tunnel." The fur projector was a much later invention of Boyden, who gave to it the less appropriate designation of a "fur director." The two phrases will hereafter be used indiscriminately. The air chamber enclosed the currents of air which would otherwise have diverged from the proper direction, and conducted them so as to deposit the fibres in layers of the varying thicknesses required. The form and adjustment of the tunnel, with its auxiliary and incidental appliances, were sufficiently described in the original patent of Wells. The tunnel was considered by the supreme court the great and peculiar characteristic of the invention. 1 Wall. [68 U. S.] 571. Its novelty and great practical utility are unquestionable. Whether the machine, as patented, was automatic, and how nearly others may have made it so by subsequently improving its form and adjustment, or by any new invention, are immaterial questions, unless upon the measure of damages for an infringement.

On the question of infringement there is, of course, no difficulty where any contrivance or adaptation has been used for wholly or partly enclosing and conducting the stream of air in which the fibres pass from the picker, so that they may arrive where the draft caused by the fan will sufficiently attract them to the cone. There may be other infringements less obvious. Thus a tunnel may be much abridged, and may yet infringe. And there may be an infringement where the passage from the picker towards the cone is only partly enclosed, or is even wholly uncovered. In the machine used by the defendant, and, so far as I know, in all the machines upon which questions of infringement of the patent have been litigated, there was no top or cover of what supported or deflected, conducted, directed or projected, the air in which the fibres passed from the front of the picker towards the cone. This absence of the top or cover will here be explained. In all of these machines, the revolution of the front of the picker has been downward. The front of the picker of Wells, on the contrary, revolves upward. From the bottom and front of his picker the direction of the flow of air is forward and upward; and this direction afterwards continues unchanged. In the other machines, the different direction of the rotation of the picker causes the primary direction of the flow of air in front to be forward and downward. But, in all of them, the primary direction of the aerial currents downward is immediately more or less changed upon the surface of a gradual deflector of some kind, whose inclination is somewhat upward. Neither the difference in the direction of the picker's rotation, nor the consequent primary difference in the aerial current's direction, can, in itself, affect the question of infringement. But the gradual deflection upward of this aerial current, causes a pressure of the air upon the curved or gradually elevated deflector. This aerial pressure upon the surface of the deflector, though a diminishing one, loses a part only of its first intensity, because the primary direction is not

reversed, but only partly changed. Indeed, the curvature may be such that the intensity of the pressure diminishes very slightly. The air, if thus deflected on the bottom of a trough, retains a great part of its primary downward tendency, with a corresponding pressure opposing more or less its natural expansiveness upward. Such a trough, although without any top or cover, may thus perform, in part, the office of a tunnel or air chamber, in conducting the fibres towards the cone so as to infringe the patent of Wells. The elevation of the sides may thus, also be, in part, or even wholly dispensed with. A flat plate, or board, without elevated sides, may be so inclined and adjusted, and so prolonged in the direction towards the cone as to be an infringement. I understand this to have been virtually decided at law in the case of Wells v. Gill [Case No. 17,394], tried in the circuit court for the Southern district of New York, before Judge Woodruff, and in a case in equity at the suit of the same plaintiff against the sons and copartners of the same defendant in the circuit court of New Jersey, in which latter case a preliminary injunction was conditionally ordered by Judge Strong with Judge Nixon's concurrence. Upon this decision it may be observed that the last reissue of the patent claims, quite unnecessarily, the bottom of the tunnel, as an invention distinct from that of the sides and the top. The motive was doubtless to cover cases of partial infringement. The defendant in the case in New Jersey, contended that the reissue embraced more than the original invention. But Judge Strong said he was unable to perceive how anything decided in the case in the supreme court determined that what is claimed in the reissue was not embraced in the original invention. Unless, however, the office of the mechanism used is thus (or otherwise), in whole or in part, that of such a tunnel or chamber as the patent of Wells describes, there can be no infringement of his patent. It is only for the mechanism devised by him. Alternative but different mechanisms which produce in whole or in part the same, or similar useful effects, are not mechanical equivalents in that sense in which their use constitutes infringement. These points the supreme court has decided as questions of law.

The fur projector, whether formed of one plate, or composed of several, does not, like the tunnel, enclose aerial currents; nor does it, like the trough, or like the supporting plate, sustain them during any continued flow. In all cases in which the fur projector may be mentioned, it will be assumed that the picker's revolution is downward. Immediately in front of the picker, the fur projector receives the downward current of air, changes the primary direction of this current, and initially determines the planes of its ulterior direction. The mechanical theory is twofold: First, that of a projectile force of air towards the cone, or a theory somewhat analogous, the general direction of the air's motion, which was downward, but is gradually turned upward, being so determined initially by the projector, that the fibres are borne forward, beyond the projector, in the aerial current, towards the cone, till they arrive where suction sufficiently attracts them to the cone; and secondly, dividing the same general aerial current initially into such planes that the quantity of the fibres, in the several paths of their trajection, will be greater as the zones of the bat upon the cone approach its base. The latter twofold theory has been applied in machines in which curved stationary plates in front of the picker have had a gradual inclination upward. This inclination was increased slightly to compensate for gravitation of the fibres in their trajection through the open air. Boyden's patent, A. D. 1860, described the projection as upon a single plate, inclined upward, and of both a longitudinal and a transverse curvature. This plate was described in his patent as in front of the picker; and so bent or curved that the surface would give such a direction to the fur, as thrown on it by the rapid motion of the picker, that the fur would be drawn properly on the cone by the exhaust or suction within it. The plate was curved longitudinally so as to have its highest point at the centre, and was gradually curved downward and outward at each side of its centre with a slightly concave form; and was curved transversely in a series of steps descending from the centre in such planes that the cone might be fed with a supply of fibres gradually increasing from top to bottom.

The point decided by the supreme court was, that the use of Boyden's machine, as heretofore described, was not an infringement of the prior patent of Wells. Boyden's patent prefatorily described his invention as an improved mode of directing or guiding the fur to the cone, whereby trunks and all other comparatively complicated appliances theretofore used for the purpose were dispensed with, and what he called an exceedingly simple and efficient device substituted. Here the word "trunks" was obviously intended to refer to, or include the tunnel of Wells; and Boyden's plain meaning was, that what he had contrived, or devised, was actually intended by him as a substitute for that tunnel. It was therefore argued, that his declared purpose was to evade the right of Wells by the mere substitution of a mechanical equivalent. But the supreme court, not contradicting this, considered it unimportant, saying that, "every man has a right to make an improvement in a machine, and evade a previous patent, provided he does not invade the rights of the patentee." Page 574. That court also said that the phrase "equivalent" and other phrases were often used in such a vague and equivocal manner that they mystify and lead many to absurd conclusions who will not distinguish between things that differ. Page 572. The court said: "The machine of Boyden has not one of the peculiar devices, or combination of devices, of the Wells machine, nor any substantial identity

with it, unless by substantial identity, is meant every machine which produces the same effect. * * * That two machines produce the same effect will not justify the assertion that they are substantially the same, or that the devices used by one are, therefore, mere equivalents for those of the other. There is nothing in the Wells machine, or in its devices, which suggests the peculiar device employed by Boyden." Id. In order to determine the effect of this decision, it is necessary to read more than the report in 1 Wallace, which, though very able, is too condensed to give a full view of the question. The printed record contains seven hundred pages. The remarkable brief of one of the counsel mentioned in the reporter's note (1 Wall. [68 U. S.] 532, 533) contained eighty-six closely printed pages, and seventeen plates, many of them with several figures, besides twenty-one wood-cut figures. The references in the record were not to plates, or wood cuts, but to models, and working machines, of which "a large museum" was exhibited in court. See pages 532, 578. The extracts from Boyden's patent in the report are not quite full enough to convey to the mind sufficient ideas of his machine.

The important question is, what was, in principle, the decision of the supreme court? It was, I think, that Wells's exclusive right was not infringed by any substitution of a mechanism which, without enclosing, or continuously supporting, the motive air, merely determined its direction from the front of the picker so as to project unsupported fibres through an open space towards the cone.

A great deal has been said upon the question whether appliances to prevent lateral efflux of the fibres from Boyden's fur director, which I call "fur projector," would make it infringe the patent of Wells. In the present case, the curved board, which the defendant substitutes for the fur director, has, on each side, a raised edge of small, but appreciable height, and inclining inward. Where several plates are used, they may be so bent and inclined as in like manner to prevent lateral efflux. It is not material to inquire whether Boyden's machine, as exhibited in the supreme court, had any such lateral appliance, or any device of a similar tendency. Where a fur projector is not of improper dimensions, this mere prevention of lateral efflux cannot be important on the question of infringement. If the board of the defendant's machine was not prolonged beyond the extension required for simply determining the direction of currents of air from the front of the picker towards the cone, the elevated edges would, at most, only assist in determining such direction. If the function of the board was thus limited, these edges would not have caused it to infringe. The defendant contends that the board or plate used by him is, in principle, that of Boyden. This depends upon the question how nearly the board approaches the point or line where the force of aerial projection becomes inappreciable, or where the force of atmospheric pressure predominates.

On reaching, now, the true question to be considered, it should be premised that the difference between "conduction" and whatever may be called "projection" or "trajection," does not, in other cases, depend ordinarily upon questions of measurement. But, in the machines in question, so short is the path of the fibres, after they leave the picker, until the force of suction towards the cone predominates, that a change in relative proportions and distances, may, with or without a difference in the measures of the respective forces of aerial projection and atmospheric pressure, involve a difference in mechanical principle. Thus, if a so called "fur director" is elongated towards the cone, and supports the air which carries the fibres forward until the force of atmospheric pressure, impelling them to the cone, predominates, they are not projected by and through the air. In such a case, the mechanical theory of Boyden either ceases wholly to apply, or the distinction between his mechanism, and that of Wells, ceases to be a practical difference. The experimental operation of the machines which were exhibited in the supreme court, however fairly the experiments may have been made, was not likely to develope this proposition, or to explain its application. The experiments were exhibited on the part of the defendant whose only business it was to displace the complainant from the broader and independent position which he had taken. He had staked his case upon this broader question; and, on its decision, was content to stand or fall. Upon this question it mattered not whether aerial projection or atmospheric pressure was, at any point or line, the dominant force. Differences hereafter suggested as material would probably, therefore, not have been observed from the bench in witnessing those experiments. Let it be assumed, for example, as to Boyden's machine, that the normal force of aerial projection is that which is due to the picker's velocity of, say, two thousand revolutions in a minute; the effect of this velocity of rotation being somewhat reduced by the subsequent deflection upward of the currents of air. Let it also be assumed that the normal intensity of the atmospheric pressure upon the revolving perforated cone is that which is due to a certain weight. Let it be supposed, also, that the maximum velocity of the picker's rotation, disregarding differences in diameter, may be three thousand revolutions in a minute, and the minimum atmospheric pressure on the cone may be that which is due to one-half of the weight above supposed. The figure on 1 Wall. [68 U. S.] 549, corresponding with a drawing annexed to Boyden's patent, may then be considered as representing normal proportions of the machine, in one of its proper working conditions, when the picker and the exhausting fan each moves with its ordinary velocity. As the normal velocities of the picker and the fan respectively should, perhaps, always be approximately maintained when the machine is at work, it might not be correct, as to a working machine, to say that

there is a minimum velocity of the picker which is only from one thousand to fifteen hundred revolutions in a minute, and a maximum atmospheric pressure on the cone equal to double the first of the supposed weights. But in the experimental museum of machines exhibited in the supreme court, the difference between the degrees of intensity of atmospheric pressure would not have been observable; and a difference between sixteen and thirty-three revolutions of the picker in a second might not have been observed. Nor is it probable that a shifting of the position of the cone, bringing it a few inches nearer to the picker, would have been discerned from the bench. These changes might, however, almost, if not quite, convert the fur projector into a conducting trough.

Leaving the experiments exhibited before the supreme court, we may next consider a working machine whose picker and exhausting fan respectively move with normal velocities, which are constantly maintained; and we may assume that the proportions, and the relative distances of the parts of the machine correspond approximately with those on the same drawing on page 549, except that the so called fur director, being elongated towards the cone, is of twice the length of the fur director which is represented in the drawing. This would nearly coincide with the proportionate length of the board used by the defendant. Its length is within a small fraction of eight inches, occupying more than a fourth of the whole distance between the periphery of the picker and the middle of the nearest surface of the revolving cone. We do not know the velocity of the fan or that of the picker. The current of air in front of the picker was, when I saw it, apparently feebler than might, from inspection of the drawing annexed to Boyden's patent, be the supposed available aerial force. But this impression upon the mind of so inexperienced an observer, cannot be relied on. There is less uncertainty in considering the proportional measurement of the board. Such a measurement might, in some cases, be no sufficient criterion. But, in others, it may suffice to determine whether such a plate is a fur projector in truth, or is elongated so as to be a mere conducting air trough. If this plate had extended outwardly only four inches, or a very little more, I would not have considered it an infringement. If it had been extended farther, within what limit there is no present occasion to determine precisely, the case perhaps could not have been decided until after a special reference on the question of infringement. Under such a reference, to a commission of experts, or to a master, the question might, I suppose, be determined experimentally in some very simple manner. A theoretical determination perhaps could not be made without considerable difficulty; and experimental shifting and adjustment would probably be necessary before the most correct abstract theory of such a machine could be applied or tested.

The question, as it stands, may be safely decided by the court upon the actual extension of the board. Inspection of the defendant's machine, when in operation, shows convincingly—First, that if the board had extended outward only four inches, the waste of the fibres would have been immense; and, secondly, that, in the working condition of the machine, the present board reaches a point, or line, where the force of suction towards the cone predominates. I am of opinion that this board is not a legitimate fur projector, but is a conducting air trough in disguise, and that its use infringes the complainant's patent; and that it had been likewise infringed by the previous use of the curved metallic plates in the same part of the machine. In Wells v. Jaques [Case No. 17,399], a similar undue prolongation of such plates towards the cone would have been a sufficient reason for letting the verdict stand. The judgment in that case was thus consistent with the prior decision of the supreme court. If there is, in Boyden's patent, language of any such import that the so called fur director, although thus elongated, might seem to be included in his claim of invention, there is nothing in the decision of the supreme court, to support the pretension. The principle of Boyden's machine, as defined by the defendant's counsel whose argument prevailed in that court, was that the particles of fur and air were susceptible of having sufficient momentum imparted to them, to be projected for definite distances and definite directions through the open air. 1 Wall. [68 U. S.] 561; Mr. Harding's Brief, p. 41. The word "project" is used more than once in the patent with no other meaning. It has already been stated, that the question was not involved in the contention upon the other side in the supreme court. If the extension of a fur director towards the cone, was greater proportionally, or the distance between the picker and the cone was less proportionally, than in the drawing, or model, it may be doubted whether the complainant's counsel would there have attributed importance to such a difference. But not a word in the opinion, or in the reasoning of the supreme court, excludes the consideration of such a difference here, if it is really material. On the contrary, the supreme court said expressly, that Boyden's machine had, as an improvement, more claim to originality than that of Wells. Page 572. This would not have been said if the so called "fur director" had been considered as a mere trough conducting the air. If it be suggested that Boyden's patent was, not for a fur director, which merely projected the fibres, but for a fur director so formed as to conduct them on it until they reached the point or line where the force of suction predominates—such fur director meanwhile preserving the inclination and curvature described in his patent,—the suggestion will encounter objections in addition to some which have been already mentioned. One objection is, that his patent provides for so forming the fur director, that "slightly elevating the direction of the fur above its otherwise proper path," compen-

sates for the gravitation of the fibres. Here the familiar figure in 1 Wall. [68 U. S.] p. 562, exemplifies the well known effect of gravity in curving downward the path of a projectile passing through the air. But there is no such path, while the support of the fur director continues. Another objection is, that Wells had prescribed such a form of his air chamber as would coincide with the course of the fibres inside. Therefore the supreme court cannot have attributed novelty to Boyden's fur director simply in this respect. The form of the air chamber of Wells, appears in his drawings and model, and was described sufficiently in the reissued patent of 1860, upon which the case before the supreme court depended. The words of the original patent of 1846, which are fuller, and more precise, were, in this respect, carefully considered, and in part quoted by the supreme court. Page 566. Referring to those parts of the specification of 1846, which are quoted and italicized in the foregoing statement of the case, and bearing in mind, that the back of the picker, as there described, was revolving downward, and its front was revolving upward, the coincidence in the form of the chamber with the course of the air in it, is clearly indicated. The only function of the fur director to which the supreme court's opinion can be referred, is therefore, aerial projection of the fibres. Though the present use of the board in question thus infringes the complainant's patent, I do not believe that the defendant has been willfully contumacious. Nor do I think it surprising that he has misunderstood the question of the complainant's right, if I have succeeded in defining it correctly. The complainant should not suffer from the defendant's mistake. But it should not be visited with any penal consequences, if prompt reparation is made.

The question of infringement by the use of the hot wet covering cloth remains for consideration. This question is resolvable into three points mentioned at the close of the above statement of the case. Upon these points I am of the following opinion.

First. The hair was to be previously disintegrated; and the alternative use of disintegrated fur would have occurred to the mind of any reader, even though it had not been suggested, as it was, elsewhere in Ponsford's patent.

Secondly. If injurious abrasion would have occurred from the use of a cloth sewed in the form of a cowl, any person of the least skill in the art, would have known it, and would, therefore, have understood the use intended as that of an open cloth, to be gently folded in the form of a cowl, upon the bat.

Thirdly. It appears to have been proved experimentally, that the cowl could be thus formed in the first instance of a dry wrapping cloth. As this wrapper and the bat, and the inner and outer cone were by Ponsford's direction, to be at once immersed in the boiling water, the difference between a wet and a dry cloth wrapper, was perhaps, of little importance. If it was important, then, as the boiling water was at hand, and its uses were already well known to the hat maker, the wetting of the covering cloth with hot water, was either implied, or must have obviously suggested itself to any reader of Ponsford's patent, who was skilled in the art. Therefore, this use of such a cloth was not novel at the date of Wells's patent.

The defendant has, however, by making and using the board in front of his picker, infringed the complainant's patented exclusive privilege, and violated the injunction; and is therefore adjudged in contempt. But no attachment or other process will issue upon this adjudication till after a definitive consideration of what may be necessary in order to purge the contempt. If the defendant at once files a sworn account, such as would be requirable of him before the master under a reference upon a decree for an account, process of contempt will probably not be asked for by the complainant. Upon the filing of such an account, the complainant may apply for a reference. And either party may apply at any time, for further directions.

Case No. 17,397.

WELLS v. HUBBARD.

[2 Cranch, C. C. 292.] [1]

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

TRESPASS BY CONSTABLE—BREAKING INTO DWELLING.

A constable is not justified in breaking into a dwelling-house, by a warrant from a justice of the peace to search for goods clandestinely removed by a tenant to deprive his landlord of his remedy by distress for rent.

Trespass quare clausum fregit. The defendant [Solomon Hubbard], who was a constable, justified under a warrant from a justice of the peace to search for goods clandestinely removed by Sears, tenant of Johnston, within thirty days after the expiration of the term, under the statute of 11 Geo. II. c. 19.

Mr. Ashton, for defendant, cited Bradb. Dis. 14, 15, and the statute 11 Geo. II. c. 19, which was in force in Maryland, and adopted as the law of this county, by the act of congress of the 27th February, 1801 (2 Stat. 103), "concerning the District of Columbia."

Mr. Jones, for plaintiff [Cornelius Wells]. That statute does not authorize a warrant. The landlord, or his bailiff, by the first section is authorized to seize the goods, wherever found, within thirty days after removal; and by the seventh section, to break open and enter any dwelling-house where the same shall be suspected to be concealed, first calling the constable of the place to his assistance, and making oath before some justice of the peace, of a reasonable ground to suspect that such

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

goods are therein, and if found, may seize the goods for the arrears of rent, as if found in any open place.

Mr. Ashton, in reply. The magistrate had jurisdiction to issue the warrant, and the constable was bound to obey it.

THE COURT (THRUSTON, Circuit Judge, absent) was of opinion, that the constable was not, as constable, justified by the warrant, because the justice had no jurisdiction to grant such a warrant. That the right to break open the doors, was the right of the landlord, or his bailiff, as such. That the constable is required to be present only to keep the peace, and that, even then, if the goods be not found in the house, the constable who breaks open the doors, is liable to an action of trespass. Verdict for plaintiff.

Case No. 17,398.

WELLS v. JACQUES et al.

[1 Ban. & A. 60;[1] 5 O. G. 364.]

Circuit Court, D. New Jersey. Feb. 21, 1874.

PATENTS — CONSTRUCTION OF CLAIMS—REISSUES—CONCLUSIVENESS OF COMMISSIONER'S ACTION—COMBINATIONS—INFRINGEMENT—EQUITY SUITS—JOINDER OF DEFENDANTS.

1. A patentee is entitled to all the legitimate results of his invention, and it is not necessary that he fully comprehended the extent of his improvement, or the capabilities of his machine, in order to give to him, and those claiming under him, all the rights and benefits of his invention.

[Cited in Thomson Meter Co. v. National Meter Co., 12 C. C. A. 673, 65 Fed. 429.]

2. Every inventor is entitled to the benefit of all that he invents, and if, from inadvertency or mistake, and not from fraud in drawing the specifications or claims of his patent, he fails to acquire a right to his whole invention, he may surrender and have a reissue of the patent, from time to time, until his specifications and claims cover the whole ground.

3. The decision of the commissioner of patents, in awarding a reissue, cannot be reviewed in a suit brought for infringement of the reissued patent, unless it is apparent upon the face of the reissue, that there is such a repugnancy between the old and the reissued patent, that the court can hold, as a matter of legal construction, that they are not the same invention. Citing Seymour v. Osborne, 11 Wall. [78 U. S.] 543.

4. A patentee may claim a combination of mechanical elements, which of themselves will not produce a new and useful result, when his specification shows how the patented combination used with or supplemented by other devices and instrumentalities therein described, will produce such result.

[Followed in Roberts v. H. P. Nail Co., 53 Fed. 920.]

5. The separate claims of a patent must be construed in reference to the specification, and a claim for a combination which will produce a useful result only by co-operation with other mechanism or instrumentalities, the nature and operation of which is described in the specifications, is valid.

6. Where there is privity or connection between the different defendants, they are jointly liable upon a bill for infringing a patent.

7. The rule in equity, that two or more distinct subjects cannot be embraced in the same suit, does not apply to a suit for the infringement of a patent, brought against two defendants, one of whom was the owner of the infringing machines, and the other the lessee of the machines from such owner. Such a relationship created a privity between them, which made it proper to embrace them in the same suit.

8. Suit was brought for infringement of complainant's patent, as it existed prior to its last reissue. The defendant was using a machine known as the Boyden machine. The suit went to the supreme court, which held that the use of the Boyden machine was not an infringement of the complainant's patent as it then existed. The complainant subsequently surrendered the patent and obtained a reissue, and then brought the present suit for the infringement of the reissued patent, against users of the same Boyden machine. *Held*, that the defendants were not protected in the use of the Boyden machine by the decree in the former suit, which was tried and decided in reference to the patent as it then existed, and that they must now test their right to use it as against the complainant's reissued patent, as it now exists.

9. A hat-body machine, in which it is claimed that the fur is projected by a rotary picker downward against a surface, by which it is guided upon a former, is an infringement of a patent for a like machine, in which the fur is blown by such a picker upward against the upper side of a tunnel through which it is carried on the former.

[This was a bill in equity by Eliza Wells against Henry H. Jacques and others for infringement of a patent.]

Edward N. Dickerson, for complainant.

Cortlandt Parker, for defendants.

NIXON, District Judge. The complainant files her bill against the defendants for the infringement of a patent originally granted to Henry A. Wells, April 25th, 1846, for a new and useful improvement in machinery for making hat-bodies, which patent was extended to the complainant, by an act of congress for seven years from the 25th of April, 1867, and was by her surrendered and reissued May 19th, 1868.

The large amount of litigation in the courts for several years past in regard to this patent, is, perhaps, the best evidence that can be had of its value in the art of making hat-bodies.

Useless inventions are not ordinarily infringed; or, if they are, not enough interest is involved in them to induce the owners to spend their money and time in protecting them against the infringement. But it is not too much to say that the Wells patent revolutionized the mode of forming fur hat-bodies; that, upon its introduction the anterior slow and expensive process of "bowing," in which the workman snapped the string of a bow upon the mass of loose fur to throw it upon the bat, was almost at once superseded; and that since then the Wells machine under its numerous re-

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

issues, or other machines with such variations in their mode of operation as to produce the same result by the use of substantially different means, as their owners allege, or by the use of substantially the same means, as the owner of the Wells patent claims, have supplied the trade with a cheap and complete fur hat-body, with the deposit of the fur so graduated and controlled as to defy all competition by any other methods of formation known in the art.

The pleadings and proofs in this case present two questions for consideration: (1) What is the Wells patent, and what is the complainant entitled to claim and hold under it? (2) Do the machines used by the defendants infringe any of these claims?

1. Mr. Wells calls his invention "an improvement in machinery for making hat-bodies," thus recognizing the existence of other machinery which was in use in efforts to accomplish the same result.

It is alleged that it does not clearly appear from his descriptions that he fully comprehended the extent of his improvement or the capabilities of his machine. But it is not necessary that he should, in order to give to him, and those claiming under him, all the rights and benefits of his invention. Whatever are the necessary and legitimate results of an invention—whether the patentee comprehends them all or not—belong to him when he has complied with the requirements of the patent law, to protect him in its enjoyment and use against infringement.

His patent was for a combination—a combination of old and well-known mechanical devices to produce a new and useful result. In his schedule to the original patent he says—

"My improvements consist in feeding the fur (called the stock), after it has been picked, to a rotating brush between two endless belts of cloth, one above the other, the lower one horizontal and the upper inclined, to gradually compress the fur and gripe it more effectually when it is presented to the action of the rotating brush, which, moving at a great velocity, throws it in a chamber or tunnel, which is gradually changed in form toward the outlet, where it assumes a shape nearly corresponding to the vertical section passing through the axis of the cone, but narrower, for the purpose of concentrating and directing the fur thrown by the brush into the cone—this casing being provided with an aperture immediately under the brush, through which a current of air enters, in consequence of the rotation of the brush and the exhaustion of the cone, for the purpose of more effectually directing the fibres toward the cone, which is placed just in front of the delivery aperture of the chamber or tunnel, which aperture is provided at top with a bonnet or hood hinged thereto, and at the bottom with a hinged flap, to regulate the deposits of the fibres on the cone or other former, with the view to distribute the thickness of the bat wherever more is required to give additional strength."

This sentence reveals what was in the inventor's mind—a combination of machinery to produce, not a fur hat-body merely, but one with a regulated distribution of the fur on the cone, in the process of formation, giving, as he afterward states, "greater thickness in the parts of the hat which form the brim and edge or square of the top than on the top and crown."

The combination which he formed to accomplish this result was (1) an apron or endless belt; (2) revolving rollers; (3) a rotating brush or picker; (4) a chamber or tunnel with a hinged flap or hood; (5) a perforated revolving cone; and (6) an exhausting apparatus to produce a current by exhausting the air under the cone. After describing their relations to each other and their methods of operation and combination, he states his claim as follows:

"What I claim as my invention and desire to secure by letters patent in the machine above described, is the arrangement of the two feeding belts, with their planes inclined to each other and passing around the lips formed substantially as described, the better to present the fibres to the action of the rotating brush, as described, in combination with the rotating brush and tunnel or chamber, which conducts the fibres to the perforated cone or other former placed in front of the aperture or mouth thereof, substantially as herein described. I claim the chamber into which the fibres are thrown, in combination with the perforated cone or other former placed in front of the delivery aperture thereof, for the purpose and in the manner substantially as herein described; the said chamber being provided with an aperture below and back of the brush for the admission of a current of air to aid in throwing and directing the fibres on to the cone or other former, as described. I also claim the employment of the hinged hood, to regulate the distribution of the fibres on the perforated cone or other former, as described. And I also claim providing the lower part or delivery aperture of the tunnel or chamber with a hinged flap, for the purpose of regulating the delivery of the fibres to increase the thickness of the bat where more strength is required, as herein described, in combination with the hood, as herein described. And in the process I claim hardening the bat while on the perforated cone or former, and preparatory to its removal therefrom, by immersing it in hot water, as herein described. I also claim covering the bat with felted or fulled cloth, before it is removed from the cone or former, as described. And, finally, I claim the employment in combination of both the perforated cones, one for making pressure on and retaining the fibres of the bat until hardened, and the other to prevent the collapse of the cone or other former on which the hat is formed, substantially as herein described."

It is quite obvious to any one familiar with the controversies in the courts to which the owners of the Wells patent have been par-

ties, that these controversies have been aggravated, if not caused, by the defective manner in which the patentee specified his invention and stated his claims in the original patent. It is no imputation upon Mr. Wells to say this, for an examination of his two caveats, filed in the patent office—one on the 25th of June, 1838, and the other on the 9th of October, 1844—show that the invention was with him, not an inspiration, but a growth, proceeding from his mind—not life-sized and full armed like Minerva from the brain of Jupiter—but by slow and patient development, like the work of the sculptor from the rough marble.

The owners of the patent were not slow in discovering these defects and in attempting to remedy them. Availing themselves of the provisions of the act which authorize a surrender when a patent was found to be inoperative or invalid by reason of defective or insufficient specification or claim, and the error arose from inadvertence, accident, or mistake, and not from a fraudulent intention, this patent was surrendered and reissued on what was supposed to be amended and corrected specifications in two separate letters patent, one of which bore date September 30, 1856, and the other October 7, 1856, and which are designated reissues Nos. 396 and 400, respectively. These not proving satisfactory to the owners, another surrender was made and two new reissues had on the 4th of December, 1860—one numbered 1,086, for a process, and the other, numbered 1,087, for machinery.

It was under these reissues that the suit of Burr v. Duryee, so fully reported in 1 Wall. [68 U. S.] 531, was brought; and the decision of the court in that case, and the statement of the principles on which it rested, most probably induced the complainant, after the extension of the patent by act of congress, March 2, 1867, to again surrender the reissued letters patent No. 1,087, to the commissioner, and to obtain a new reissue, which was dated May 19th, 1868, and numbered 2,942, and on which the present action was commenced against these defendants.

In this last reissue no claim was made for the invention of "the mode of operation" of the machine, which had subjected the reissue of 1860 to so much criticism in the courts, but her claims are stated as follows:

"1. The combination of the rotating brush or picker, substantially such as described; the rotating pervious cone, provided with an exhausting mechanism, substantially as described; and the bottom plate or guide, substantially as described, for directing the fur fibres towards the lower part of the cone, and preventing the fibres going to waste, the said combination having the mode of operation specified, and for the purpose set forth.

"2. The combination of the feed-apron, the rotating brush or picker, substantially as described; the rotating pervious cone, provided with an exhausting mechanism, substantially as described; and the guide or deflector for directing the fur fibres on to the tip and upper part of the cone, substantially as described, the said combination having the mode of operation specified, and for the purpose set forth.

"3. The combination of the rotating brush or picker, substantially as described; the rotating pervious cone, provided with an exhausting mechanism, substantially as described; and the side guides, or either of them, substantially as described, to prevent fur fibres from getting out of the proper influence of the currents travelling to the cone, and to protect the travelling fibres from disturbing currents, the said combination having the mode of operation specified, and for the purposes set forth.

"4. The combination of the feeding-apron, on which the fur can be placed in separate batches, as described; the rotating brush or picker, substantially as described; the rotating pervious cone or former, provided with an exhausting mechanism, substantially as described, the said combination having a mode of operation substantially as described.

"5. The combination of the feed-apron, on which the fur fibres can be placed in separate batches, each in quantity sufficient to make one hat-body; the rotating brush or picker, substantially as described; the rotating pervious cone, provided with an exhausting mechanism; and the devices for guiding the fur fibres, substantially as described, the combination having the mode of operating specified and for the purpose set forth.

"6. In combination with the pervious cone, provided with an exhausting mechanism, substantially as described, the covering cloth, wet with hot water, substantially as and for the purpose specified."

It will be observed that these are all claims for a combination; that none of them presents the concrete machine, except the fifth, and that lacks the "covering cloth wet with hot water," mentioned in the specification of the sixth claim; but they are distinct combinations of the parts of a machine, each part, it is alleged, performing an independent and distinct function. For instance, in the first claim, we have the combination of the brush or picker, the pervious cone with an exhausting mechanism, and the bottom plate or guide for directing the fur fibres toward the lower part of the cone. That does not constitute a machine. It is nothing in itself and standing alone. It is only one of several combinations of devices or instrumentalities that go to make up the complete working machine. The inventor claims that, although the devices are old and may be used by anybody, the combination is new, and that it is a useful improvement in machinery for manufacturing hat-bodies. By such a specification of the separate combinations of the parts, which are used and needed to constitute the aggregate machine, the complainant has endeavored to take her case out of the general rule applicable to patents for a combination alone, to wit, that it is no infringement to use any of the parts or things which go to make up the combination provided the whole combination is not used. It is fairly

to be inferred from the language of Chief Justice Taney in Proutly v. Ruggles, 16 Pet. [41 U. S.] 341, that the difficulties of the plaintiffs in that case arose from not observing some such method in the specifications of their claims. "The patent is for a combination," he said, "and the improvement consists in arranging different portions of the plough and combining them together in the manner stated in the specification for the purpose of producing a certain effect. None of the parts referred to are new, and none are claimed as new, nor is any portion of the combination less than the whole claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described. * * * The use of any two of these parts only, or of two combined with a third, which is substantially different, in form or in the manner of its arrangement and connection with the others, is therefore not the thing patented. It is not the same combination if it substantially differs from it in any of its parts."

But the defendants insist that this last reissue is invalid:

(1) Because it embraces more than Mr. Wells claimed in his original patent.

(2) Because the devices in combination in the different claims cannot be employed alone for any useful purpose; but, only being useful when combined in a complete machine, the patent should have been for a unit and not for the distinct combinations.

(1) With regard to the first objection, it is undoubtedly true that it is not the province or the design of a reissue to enlarge the original right of the inventor, but to cure some defect arising from inadvertency or mistake, and not from fraud, in drawing the specifications or claims of the first patent. Every inventor is entitled to the benefit of all that he invents, and if he fails, for the reason above assigned, to acquire a right to his whole invention in his letters patent, he may surrender them and have a reissue, from time to time, until his specifications and claims cover the whole ground. His application is made to the commissioner of patents, and that officer, not this court, is the tribunal in which congress has vested the power of determining whether sufficient reasons exist to grant the reissue. His decision in the matter is final, in the sense that there is no appeal from it; and it does not seem to be re-examinable here, unless it is evident upon the face of the reissue that he has exceeded his authority, and that there is such a repugnancy between the old and the reissued patent that it must be held, as a matter of legal construction, that they are not the same invention. Seymour v. Osborne, 11 Wall. [78 U. S.] 543.

Conceding, then, that Mrs. Wells was entitled to claim in her reissue all that was included in her husband's first invention, and nothing more, the question recurs: Where is the repugnancy between the new and the old? It must consist in something added or in something essentially different. What more is included in the new than was fairly indicated and embraced in the old? The experts in the case specify nothing, and the court, upon careful comparison of the two, finds nothing. The surrender was made to correct and amend the specifications and claims. The law gave to the complainant that privilege. In exercising it she has somewhat varied the form of the expressions of some of the devices; as, for instance, the trunk or tunnel and the parts composing it; and in the claims of the reissue has segregated the parts to more fully exemplify their functions and meaning; but I cannot perceive that she has added anything or adapted anything that was not suggested in the original patent.

(2) The second objection to the reissue, divested of all verbiage, amounts to this: That an improvement on a machine is not patentable, unless the improvement, standing alone, and not in connection with some other mechanical devices not enumerated, is practically operative and useful. I cannot yield assent to that proposition. The separate claims of a patent must be construed in reference to the specifications; and if the specifications point out the arrangements to be made or the methods to be adopted in connection with other instrumentalities which the inventor may not claim as new, in order to render his invention practically useful, the test to be applied is not whether the claim alone will produce an useful result, but whether it will do so supplemented by and in connection with such designated devices and instrumentalities.

In the trial at law of the case of the complainant against two of these defendants, Jacques and Duryee, in the circuit court of the United States for New York, before Judge Woodruff and a jury in 1871, the several claims of this reissue were discussed, and his honor was requested to charge the jury, that if they believed that, with reference to the state of the art and the object to be accomplished, the combination described in the first claim would not produce any useful effect, then the patent reissue, which was stated in the plaintiff's declaration, so far as that claim was concerned, was void. He declined to do so, but directed the jury to construe the claim in reference to the specification of the patent, and if they found it would produce a useful result, when employed in the manner described in the specification, it should be regarded as a patentable combination. [Case unreported.]

And in the subsequent case of the complainant against John Gill, the same judge, in charging the jury on the question involved in this objection, further observed:

"An inventor is at liberty, when he has made an invention, if it consists of several distinct, effective, new devices, which, as an aggregate, may constitute, in his judgment, the best machine in the world, but of which certain of the parts may be omitted and it still be an effective, new, and useful machine—I say the

inventor is at liberty, in taking out his patent, to protect himself against that species of innovation by claiming the separate, new, and useful parts of the machine by themselves. Just as, for illustration, was suggested in the discussion by counsel: A party patenting a machine may introduce ingenious and new devices, which may be better than any other for the purpose, but some of which could be supplied by old devices; if he patents the machine and the combination containing his new devices—patents it only as a combination—a party who might think he could make a machine substantially useful for his purposes by omitting these devices and supplying their places by old devices having a different operation and character, would be at liberty to do so, and thus, practically, a large benefit, or perhaps the whole benefit, that is due the inventor might be lost. I say the patent law, therefore, permits the inventor not only to patent the machine as an aggregate, but to patent the new devices which enter into it, so that another may not avail himself of his ingenuity in that respect."

"That is the reason why reissues often become necessary, because, in the original patent, the party did not claim distinctly the separate items of the property which he had a right to claim."

These views of Judge Woodruff came under the consideration of this court upon an application for a preliminary injunction in the cases of the complainant against Gill and against Yates [Case No. 17,393], and no reason was found then or now to dissent from their general correctness.

Holding, then, that the several claims of the reissue are warranted by the model and specifications on which the original patent was granted, and not regarding the validity of the Wells patent as any longer an open question in this court, I proceed to consider the alleged infringement, by the defendants.

But on the threshold of this inquiry we are met by the counsel of the defendants with the objection that the bill should be dismissed, because it charges the defendants with a joint infringement, and the proofs are that they were several.

To sustain this objection, the settled rule in equity is invoked that two or more distinct subjects cannot be embraced in the same suit.

But the principle does not apply where there is a privity or connection between the different defendants, in reference to the object or subject-matter of the action. The pleadings and proofs in this case reveal the fact that two of the defendants, Jacques and Duryee, were the owners of a number of the machines which are alleged to infringe the complainant's patent. They used them from the date of the suit in New York, to wit, August 20, 1868, until November 30, of the same year, when another defendant, the Newark Patent Hat-Body Company, by its president, John D. Mitchell, the son-in-law of Jacques, leased them, with other property of Jacques & Duryee, for the consideration of fifty dollars per month. The large amount of property transferred by this lease to the corporation for so inadequate a sum; the reticence so apparent throughout the case as to the constituents of said corporation; the amazing ignorance manifested by Mr. Jacques in his examination in reference to it, and its formation so soon after the suit was commenced in New York against Jacques & Duryee, as infringers, all give weight to the suspicions of the complainant that the organization was a mere contrivance to escape responsibility.

But, without expressing any opinion on that point, it is a sufficient answer to the objection to observe that the defendant corporation took of Jacques & Duryee the machines complained of, and continued their use; and that if they were infringers at all, they shared with the lessors the fruits of the infringement; and that this relationship created such a privity between them as to render it proper to embrace them in the same suit.

I do not overlook the fact that, in the lease, they were called the Boyden patent hat-body machines, and that defendants' counsel insist that the court ought not to imply that any illegal or improper use was intended by the transfer. The court implies nothing; but the proof states that the precise machines transferred to the company, called by whatever name, were those whose use, the complainant alleges, was an infringement; and if that allegation is sustained, it will be no defence to show that they were known as the Boyden machines, and, in fact, contain the improvements known as the Boyden patent.

Have, then, the defendants infringed the Wells patent? They admit the use of the Boyden patent hat-body machines, but claim that they are protected in their use by the decree of the supreme court in Burr v. Duryee, 1 Wall. [68 U. S.] 531. It is true that the court there held that the Boyden patent for an improvement in machinery for forming hat-bodies was not an infringement of the Wells patent; but the case was tried and decided in reference to the Wells patent as it then existed. Since then there has been a surrender, amendments and corrections of specifications and claims, and a reissue; and, as I have already considered, that the claims of this reissue are not shown to have been added to or to have been different from the original invention, the complainant is at liberty now to test the validity of the Boyden improvement by comparing it with the claims of the last reissue of the Wells patent.

It will be observed that Boyden did not profess to invent a machine, but to improve an existing one; and his improvement related to a new "mode of directing or guiding the fur to the cone, whereby trunks and all other comparatively complicated appliances hitherto used for the purpose were dispensed with, and an exceedingly simple and efficient device substituted therefor."

In this single claim, he says: "I do not claim the cone or the picker; neither do I

claim the feed-apron; but I do claim as new the fur-director or plate F, curved or bent, substantially as shown and arranged, in relation with the cone B and picker D, to operate substantially as and for the purpose set forth."

Now, it may be conceded that the Boyden patent is all that the inventor claimed for it, as a new, useful, and patentable improvement, and yet its use may be an infringement, if it cannot, in fact, be operated except in connection with some of the combinations of the Wells reissue.

Upon this question the experts, as usual, differ. Mr. Waters, the complainant's expert, testifies that all the claims of Wells' patent are infringed by the machines used by the defendants. In order to reach this conclusion he treats the bottom board, the curved plate or fur-director, the tins or step-boards, of the Boyden machine, as mere mechanical equivalents for the bottom plate, the guides or deflectors, the side-guides, and the devices for guiding the fur fibre of the first, second, third, and fifth claims of the complainant's reissue. The defendants' expert, Mr. Hibbard, on the other hand, refuses to regard these devices of the two machines as equivalents; claims that the complainant is bound to use the trunk or tunnel with flap and hood, as exhibited in the model and described in the specifications, as an entirety, and is forbidden to separate the device into bottom plate, side guides, deflectors, etc., and distribute it into parts through her different claims. He further insists, and the whole theory of the defence seems to be based upon this, that there cannot be a patentable combination of a portion of the parts necessary to make up a complete machine, unless such distinct combination, acting independently of the other parts, will produce some new and practically useful result. This last proposition has been already considered, and reference is now made to it to afford the opportunity of observing that much of the testimony of the defendants' expert must be interpreted in reference to what the court holds to be this mistaken view of the law of the case.

If the first, second, fourth, and sixth claims of the complainant's reissue are patentable combinations, when construed in reference to the specification of the patent, as I hold them to be, and if Wells was the original inventor of these devices in combination, as there seems to be no reasonable doubt, I think the testimony in the case fully establishes the fact that the use of defendants' machines violates each of these claims, even if it should be held that Boyden's method of getting the fur from the picker to the cone and of distributing it upon the cone in proper quantities to make a merchantable hat-body was new and preferable to the trunk or tunnel of the Wells machine.

And this brings me to consider what was in issue in the suit of Wells v. Jacques before the jury in the circuit court in New York [case unreported], and how far the parties here ought to be concluded by that verdict.

An examination of Boyden's specifications to his patent clearly reveals how he distinguished the principle or mode of operation of his machine from the invention of Wells. Regarding the trunk or tunnel which conducted the aërial current, bearing the fur from the brush to the former, and, at the same time, regulated its distribution thereon, as the only new and patentable device of Wells, he dispensed with the trunk or tunnel, hood and flap, and claimed that instead of conducting the fur, he projected it by means of the strong current produced by the rapid revolution of the picker; that the fur was brought within the influence of the exhaust by projection and not conduction; that, by reversing the rotation of the picker, he caused the fur to be borne downward by the current until it struck the fur-director or plate, whose curved surface directed and regulated its proper distribution upon the cone; and, although the force of the current was somewhat interfered with and impeded by striking upon the bottom board, step-board, or tin guides, it was not sufficiently retarded to materially weaken the propulsion of the fur. His words are:

"The picker D, although of usual construction, is rotated in a reverse direction to those in ordinary machines. The fur from which the hat-bodies are formed is placed on the apron E, which conveys it as usual to the picker D. The picker, by its rapid rotation, conveys the fur around on the plate F, which, in consequence of being curved as described, causes the fur to be projected towards the cone B in a series of planes, * * * the velocity of the picker being sufficiently great to project the fur within the influence of the exhaust of the cone. This peculiar curve of the plate F not only gives the proper direction to the fur, so that the latter may properly cover the cone, but it directs the fur to the cone in proper quantity, etc."

The complainant insists that such an attempt to distinguish between the projection and conduction of the fur-bearing current is chimerical; and that practically no such difference exists; that the reversal of the operation of the picker, causing the current to strike on the plate or deflectors below, is mechanically the same as the rotation of the brush in the opposite direction causing it to strike upon the upper part of the trunk and the hood above, and that the distribution of the fur in both cases is effected by substantially the same means.

This is a question of fact, and, as I understand it, was the question which Judge Woodruff submitted to the jury in Wells v. Jacques. In that case, tin guides were used as deflectors or distributers of the fur, and the jury found that they infringed the complainant's reissued patent. Since then the defendants have substituted the wooden step-board for the tins; and their expert, Mr. Hibbard, states that he considers the two substantially the

same, and the one no more an infringement than the other. The verdict of the jury on the question of fact certainly estops one of the defendants, Jacques, as to the tin guides; the uncontradicted admission of his expert equally concludes him as to the step-board being their equivalent; and, after a careful examination of the testimony in the present case, I can see no reason to dissent from the correctness either of the verdict or the judgment of the expert, and must hold all the defendants, outside of any question of estoppel, to be infringers of the complainant's reissue.

In the argument, the defendants' counsel treated the sixth claim of the complainant as for a process for hardening the hats after they are formed. If it were for that it would not be proper for this court to inquire whether the invention of the process belong to Ponsford or to Wells, as the supreme court has decided that question in Burr v. Duryee [supra]. But in the reissue the means for removing the hat from the cone is separated from the process of hardening; and the claim, fairly interpreted, is for the means, not for the process. Here, again, it is sufficient to say that in the testimony the opinion of the defendants' experts stands unquestioned; that, as regards the mechanical means by which the process is carried out, the claim of the complainant is not anticipated by Ponsford's English patent.

It is not conceived that the result to which I have arrived is in conflict with the views of the supreme court, as expressed in the case of Burr v. Duryee, supra, as the issues were there presented. It is both the duty and inclination of this court to accept the conclusions to which the court came. But the surrender, the amendments of the specification and claims, and the reissue of the Wells patent since then, have more completely exhibited the extent of Wells' invention, and have placed some of his separate patentable combinations in such a position as to enable the courts to grant to the owner of the patent that protection which they were unable to do under his original defective specifications and claims.

In the present case there must be a decree for the complainant for an injunction and account against all the defendants, except Duryee, whose plea has been accepted by the complainant as an excuse.

[For other cases involving this patent, see note to Burr v. Cowperthwaite, Case No. 2,188.]

Case No. 17,399.

WELLS v. JACQUES et al.

[5 Fish. Pat. Cas. 136.] [1]

Circuit Court, D. New Jersey. Oct., 1871.

PATENTS — CONSTRUCTION — COMBINATIONS — PROVISIONAL INJUNCTION — HAT-BODY MACHINES.

1. The machine described in reissued letters patent for an "improvement in machinery for making hat-bodies," granted to complainant May 19, 1868, consists of a feeding apron to receive the fur, two endless rollers to carry it to the revolving brush, a picker, a revolving brush to separate and throw the fibers of fur, a perforated cone, with an exhausting cylinder beneath to receive the fur, and an intermediate tunnel or chamber to conduct the fur to the cone; the aperture of the tunnel chamber nearest the cone having a hinged hood at the upper extremity, and a hinged flap at the lower side, to regulate the deposit of fur upon the cone. These devices were separately well known before, but they were so combined by Wells that a concrete machine was contrived, capable, in the formation of hat-bodies, of performing a new and useful result.

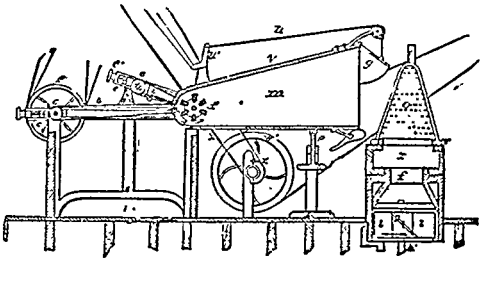
2. The machine described in letters patent for an "improvement in machinery for forming hat-bodies," granted to Seth Boyden, January 10, 1860, employs, in common with the Wells machine, various mechanical devices, such as the feed apron, rollers, pickers, and perforated vacuum cone, all well known before, and which Boyden had a right to use; but the patentee claims as new a curved or bent plate-board, in lieu of the Wells chamber or tunnel, with its hood and flap, for directing and guiding the fur from the brush or picker, and properly distributing the same upon the cone.

3. The supreme court held that such a machine was no infringement of the Wells patent, but that the combination of devices by which the result was effected was not identical in the two machines, but dissimilar. Subsequently to that decision, the Wells patent was again reissued, and a recovery was had, under the last reissue, against the defendants, in a suit at law, in the Southern district of New York. The bill, in the present case, alleged that the defendants were using the same machine against which the recovery was had, with trifling alterations in the deflecting apparatus, and prayed for an injunction: *Held*, that, under the circumstances, a provisional injunction must be refused.

In equity. Motion for a provisional injunction.

Suit brought [by Eliza Wells against Henry H. Jacques and others] upon letters patent for "improvements in the machinery for making hat-bodies, and in the process of their manufacture," granted to Henry A. Wells, April 25, 1846. This patent was reissued in two divisions, one dated September 30, 1858, and numbered 396, the other dated October 7, 1858, and numbered 400. Reissue 396, having been extended to Eliza Wells, administratrix of Henry A. Wells, deceased, for seven years from April 25, 1860, was by her assigned to Henry A. Burr, to whom it was reissued December 4, 1860, in two divisions, numbered 1086 and 1087.

The patent having been again extended by act of congress, for seven years from April 25,



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

1867, the complainant again surrendered reissue No. 1087, and obtained in lieu thereof a reissue, numbered 2942, and dated May 19, 1868.

A suit was brought by Burr, the then owner of the patent, against the defendants, upon reissues 1086 and 1087, which was tried in the circuit court for the district of New Jersey, in September, 1862. See Burr v. Duryee [Case No. 2,190]. The court dismissed the bill upon the ground that the machine used by the defendants was not an infringement of complainant's patent; and this decision was affirmed by the supreme court. See Burr v. Duryee, 1 Wall. [68 U. S.] 531.

The foregoing engraving of the Wells machine will be understood in connection with the claims and the opinion.

The disclaimer and claims of reissues 1086 and 1087 were as follows:

"Having thus described the mode of application of the said invention of the said Henry A. Wells, as the same was successfully reduced to practice by him, I do not wish to be understood as limiting the claim of my invention to such mode of application, as other modes may be devised having the same mode of operation or principle, and only differing from it in form, or in the substitution of equivalent means.

"Nor do I wish to be understood as making claim therein to the combined process of forming and hardening hat-bodies on pervious cones or other analogous 'formers,' preparatory to taking them off in a suitable condition for the after-process of sizing by felting, as this is the subject of another patent.

"What I claim as the invention of the said Henry A. Wells in machinery for forming bats of fur fibers in the manufacture of fur hat-bodies, is the mode of operation, substantially as herein described, of forming bats of fur fibers, of the required varying thickness, from brim to tip; which mode of operation results from the combination of the rotating picking mechanism, or the equivalent thereof, the pervious 'former' and its exhausting mechanism, or the equivalent thereof, and the means for directing the fur-bearing current, or the equivalent thereof, as set forth.

"I also claim the combination of the rotating mechanism, or the equivalent thereof, the pervious former, with its exhausting mechanism, and the lower reflector, substantially as described, to regulate the deposit of the fur fibers on the lower part of the former, as described.

"I also claim the combination of the rotating picking mechanism, or the equivalent thereof, the pervious former with its exhausting mechanism, and the upper deflector, substantially as described, to regulate the deposit of the fur fibers on the tip of the pervious former, as set forth.

"And, finally, I claim the combination of the rotating picking mechanism, the pervious former with its exhausting mechanism, and the means described, or the equivalent thereof, for inducing a current of air to aid in carrying and giving direction to the fur, and insuring its proper deposit on the surface of the pervious former, as required, as set forth."

The claim of reissue 1087 was as follows:

"What I claim as the invention of Henry A. Wells is the process of forming fur hat-bodies by depositing fur fibers to a suitable thickness on the surface of a pervious former of the required shape, and holding them thereon by the pressure of the surrounding air as they are deposited, and then hardening or partially felting the bat so formed, and while it is held by suitable pressure on the surface of the former, to give it the required consistency to admit of removing it therefrom in a suitable condition for the after-process of sizing by felting, as set forth."

The claims of reissue 2942, obtained after the decision in Burr v. Duryea [Case No. 2,190], and upon which the present suit was brought, were as follows:

"1. The combination of the rotating brush or picker, substantially such as described; the rotating pervious cone, provided with an exhausting mechanism, substantially as described, and the bottom plate or guide, substantially as described, for directing the fur fibers toward the lower part of the cone, and preventing the fibers going to waste, the said combination having the mode of operation specified, and for the purpose set forth.

"2. The combination of the feed apron, the rotating brush or picker, substantially as described; the rotating pervious cone, provided with an exhausting mechanism, substantially as described; and the guide or deflector, for directing the fur fibers on to the tip and upper part of the cone, substantially as described, the said combination having the mode of operation specified, and for the purpose set forth.

"3. The combination of the rotating brush or picker, substantially as described; the rotating pervious cone, provided with an exhausting mechanism, substantially as described, and the side guides, or either of them, substantially as described, to prevent fur fibers from getting out of the proper influence of the currents traveling to the cone, and to protect the traveling fibers from disturbing currents, the said combination having the mode of operation specified, and for the purposes set forth.

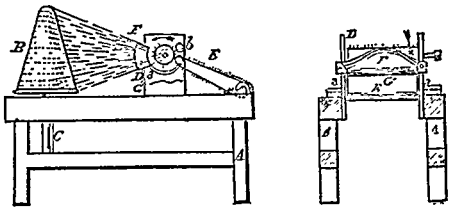
"4. The combination of the feeding apron, on which the fur can be placed in separate batches, as described; the rotating brush or picker, substantially as described; the rotating pervious cone or former, provided with an exhausting mechanism, substantially as described, the said combination having a mode of operation substantially as described.

"5. The combination of the feed apron, on which the fur fibers can be placed in separate batches, each in quantity sufficient to make one hat-body; the rotating brush or picker, substantially as described; the rotating pervious cone, provided with an exhausting mechanism; and the devices for guiding the fur-

fibers, substantially as described, the combination having the mode of operation specified, and for the purpose set forth.

"6. In combination with the pervious cone, provided with an exhausting mechanism, substantially as described, the covering cloth, wet with hot water, substantially as and for the purpose specified."

The defendants were using machines which they claimed to be constructed under letters patent for "improvement in machinery for forming hat-bodies," invented by Seth Boyden, and issued to him and H. H. Jacques, one of the defendants, January 10, 1860.



The Boyden invention, which is illustrated by the foregoing engraving, consisted in placing directly in front of the picker a plate so bent or curved that its surface would have a certain relative position to the axis of the picker and the surface of the cone, and give such a direction to the fur, as the latter is thrown upon it, by the rapid motion of the picker, that the fur will be drawn and deposited upon the cone by the exhaust or suction within it. The leading differences between the mode of operation of this machine and that of Wells will be understood by reference to the engravings, in connection with the explanations in the opinion of the court.

The claim of the Boyden patent was as follows:

"The fur director or plate, F, curved or bent, substantially as shown and arranged in relation with the cone, B, and picker, D, to operate substantially as and for the purpose set forth."

H. Traphagen and E. N. Dickersen, for complainant.

Courtland Parker, for defendants.

NIXON, District Judge. This case has been heard on motion for a preliminary injunction to restrain the defendants from the use of a machine for forming hat-bodies, alleged to be an infringement of the Wells patent.

The complainant is the widow of Henry A. Wells, to whom letters patent were granted and issued April 25, 1846, for "new and useful improvements in machinery for making hat-bodies." Wells having departed this life before the expiration of the term for which the said letters patent were granted, this complainant, as his widow and administratrix, made application to the commissioner of patents for an extension of the term, pursuant to the acts of congress, and the same was renewed and extended for the further period of seven years.

Before the end of this renewal, the complainant applied to the congress of the United States to grant to her, for an extended term, the exclusive right to make, use, and vend the said invention of Wells, for the benefit of his heirs; and an act was passed March 2, 1867, again extending the said patent to the complainant, as administratrix of Wells, for the period of seven years from April 25, 1867.

The complainant afterward surrendered the letters patent, thus extended, to the commissioner of patents, and new letters patent, numbered 2942, were reissued to her, May 19, 1868, for the unexpired period of the term granted to her by said act of congress, by virtue of which reissue she claims the exclusive right of making, using, and vending to others to be used, the said invention and improvement.

The allegations of the complainant's bill are, that she commenced a suit in the circuit court of the United States for the Southern district of New York, upon the said reissued letters patent, against Henry H. Jacques and Henry W. Duryea, two of the defendants in this cause; that, upon issue joined and trial had, the invention of Wells was found by the jury to be new; that a verdict was rendered for complainant, and judgment entered thereon; that the defendants have been using machines at Newark, New Jersey, ever since the granting of said reissued letters patent, and which are the same as those upon which said last-mentioned suit was brought, which machines were, and up to the time of the said trial, continued to be the property of the said Henry W. Duryea, and were by him leased or let to the said defendants, the Newark Patent Hat-Body Company, who were using the same in violation of the rights of said complainant; that said machines were the identical ones for the use of which, for the short period between the reissue of said patent and the commencement of said suit, said recovery was had; and that, since said recovery, trifling alterations in the deflecting apparatus have been made, not affecting the principle and mode of operation of said machine.

These allegations are met by various affidavits produced by the defendants, setting forth the state of the art at the time of the procurement of the Wells patent, and denying that Wells was the first and original inventor of the improvements claimed by him, alleging that the machines used by the defendants for several years past are of the Boyden patent, with some variations, in no wise changing the principle or mode of operation of said patent; that the supreme court of the United States, in the case of Burr v. Duryea, 1 Wall. [68 U. S.] 531, affirmed the decree of this court, holding that the said Boyden patent, for an "improvement in machinery for forming hat-bodies," was not an infringement of the patent granted to Wells for the same thing, and that since then the defendants have kept themselves strictly within the principle of that decision; that the trial in the circuit court of the United States for the Southern district of New York, in January last, between the complainant and two of the

defendants, turned mainly upon the fact that the machine introduced as the one then used by the defendants materially differed from the machine which was shown to have been in use by said defendants, in the case in the supreme court; that the utmost effect which can be given to the verdict of the jury and the judgment of the court in the case of Wells v. Jacques [case unreported], in New York, is that the defendants had no right to change the device or instrumentality of the Boyden patent for guiding and conducting the fur from the picker, and for properly distributing the same upon the perforated cone, from a curved mold-board, specified in the patent, or from the stepped mold-board, as exhibited in the argument of the case of Burr v. Duryea [Case No. 2,190], into a plate with projecting tins or strips of tins, whereby it was alleged the machine was made to perform the same office, and by substantially the same means as the Wells patent; and that, although the said defendants do not regard the judgment in that case as final, because a bill of exception has been prepared, and a motion for a new trial is pending, having ultimate reference to a writ of error, if the motion is denied, yet they at once discontinued the use of the deflecting tins in deference to the said judgment, and have since only employed the precise means of conducting the fur from the picker to the cone, which the court of last resort, in the case of Burr v. Duryea [supra], determined was not an infringement of the Wells patent.

I have carefully examined the huge mass of evidence—much of it the outgrowth of former litigation upon this subject—which the learning and industry of able counsel have placed in my hands, and I do not know that I can better give the reasons for the result to which I have arrived than to state briefly what I understand to be the Wells patent, under which the complainant claims, and the Boyden patent, under which the defendants claim, and then to inquire whether I ought, at this preliminary stage of the case, to undertake to settle by injunction the disputed facts, which, ordinarily, are only settled upon final hearing.

1. What is the Wells patent?

The original patent was issued April 25, 1846, to Henry A. Wells, the husband of the complainant, and through whom she derives her title. It was for a machine for forming, on hollow perforated cones, hat-bodies, and for a process for removing the bodies from the cones after they had been so formed, in such a condition that its fibers could be afterward felted together to a proper degree by hand.

In his original specifications, he alleged that his improvements consisted in feeding the fur, after it had been picked, to a rotating brush between two endless belts of cloth, one above the other, the lower one horizontal and the upper inclined, to gradually compress the fur and gripe it more effectually where it was presented to the action of the rotating brush, which, moving at great velocity, threw it in a chamber or tunnel which was gradually changed in form toward the outlet, where it assumed a shape nearly corresponding to a vertical section passing through the axis of the cone, but narrower, for the purpose of concentrating and directing the fur thrown by the brush into the cone, this casing being provided with an aperture immediately under the brush, through which a current of air entered in consequence of the rotation of the brush, and the exhaustion of the cone, for the purpose of more effectually directing the fibers toward the cone, which was placed just in front of the delivery aperture of the chamber or tunnel, which aperture was provided at the top with a bonnet or hood, hinged thereto, and at the bottom with a hinged flap, to regulate the deposits of the fibers on the cone, with a view to distribute the thickness of the bat whenever more was required to give additional strength.

Besides the machine, he also included a claim for a process for hardening the vat whilst on the perforated cone or former, and preparatory to its removal therefrom, by immersing it in hot water; and for covering the vat with felted or fulled cloth, before it was removed from the cone or former.

His machine, then, as described, consisted of a feeding apron to receive the fur, two endless rollers to carry it to the revolving brush or picker, a revolving brush to separate and throw the fibers of fur, a perforated cone, with an exhausting cylinder beneath, to receive the fur, and an intermediate tunnel or chamber to conduct the fur to the cone; the aperture of this tunnel or chamber nearest the cone having a hinged hood at the upper extremity, and a hinged flap on the lower side, which, acting in combination with the hood, increased the thickness of the vat upon the cone, where, in the formation of a hat-body, more thickness was required. In its construction, he used a combination of mechanical devices—the feeding apron, the endless roller, the revolving brush or picker, the perforated vacuum cone, the intermediate trunk or conductor, all of which were before well known in the arts, and not claimed by him, in themselves, as new; but so combined that a concrete machine was contrived, capable, in the formation of hat-bodies, of producing a new and most useful result.

The defect of former machines was that the deposit of the fur upon the cone could not be properly regulated. To make a good hat-body, the material requires to be distributed in unequal quantities—thicker where the brim joins on to the body to secure strength, and thinner at the top to secure lightness.

It is claimed for the Wells patent that he made such a combination of devices that the particles of fur, after their disintegration, were caused to pass from the brush to the cone in such varying density as to make the vat of varying thickness, according to the desire of the manufacturer, and that this result is produced by a tunnel or chamber, through which the fur is carried, by the currents of air, to the cone, with a flap underneath and a hood above, capable of such adjustment that distribution of

the fur upon the cone, as to thickness or density, is subject to the will and under the control of the operator. Besides the surrender and reissue of this patent, made by the complainant in May, 1868, above referred to, the same was first surrendered by the assignees of Wells, in September, 1856, and reissued to them in two separate patents—one for the machine, and the other for the process. Still another surrender was made in 1860; and, upon what was alleged to be amended specifications, letters patent, numbered 1086 and 1087 respectively, were reissued—the first for the process, and the latter for the machine.

2. What is the Boyden patent?

The letters patent for the Seth Boyden machine were granted January 10, 1860, and were for "improvement in machinery for forming hat-bodies." He thus describes his invention:

"This invention relates to an improved mode of directing or guiding the fur to the cone, as hereinafter fully shown and described, and whereby trunks and other comparatively complicated appliances, hitherto used for the purpose, are dispensed with, and an exceedingly simple and efficient device substituted therefor.

"The invention consists in placing directly in front of the picker a plate, so bent or curved that its surface will have a certain relative position with the axis of the picker and the surface of the cone, and give such direction to the fur, as the latter is thrown on it by the rapid motion of the picker, that the fur will be drawn properly on the cone by the exhaust or suction within it."

Then, after more specifically describing his invention by the use of a diagram, he proceeds:

"The peculiar curvature of the plate not only gives the proper direction to the fur, so that the latter may properly cover the cone, but it also directs the fur to the cone in proper quantities; for instance, the central or highest part of the plate is comparatively a short curve, and directs a small quantity of fur to the upper part of the cone, where but a small quantity is required; but it will be seen that the lower part of the plate has a double-curved surface to supply the cone, one at each side of its center, so that the cone will be properly fed or supplied, the supply gradually increasing from the top to the bottom of the cone.

"I would remark that, although the surface of the plate has been described as being in planes extending from the apex to the base of the cone, and all bisecting the axis of the picker, still a slight departure is made from this rule, and that is, the plate is slightly elevated at its outer edges or toward the cone, from the positions above stated, in order to compensate for quantity, the latter serving to counteract, in a measure, the power of the exhaust, and that of the picker, and give a downward movement to the fur. By slightly elevating the direction of the fur above its otherwise proper path, due provision is made for such a contingency."

He then disclaims the cone, picker, and feed apron, but claims as new the fur director plate, curved or bent, substantially as shown, and arranged in relation to the cone and picker, to operate substantially as and for the purpose set forth.

This is the description of the patent, as given by the inventor himself. He uses, in common with Wells, various mechanical devices, such as the feed apron, rollers, pickers, and perforated vacuum cone, well known before, and which he had the right to use, but claims as new a curved or bent plate-board, in lieu of a chamber or tunnel, with hood and flap, for directing or guiding the fur from the brush or picker, and properly distributing the same upon the cone.

Whether this machine, thus constructed, is an infringement of the Wells patent, was the precise question before this court in the case of Burr v. Duryea [Case No. 2,190], and it was held to be no infringement. The decree, upon an appeal, and after an able and exhaustive discussion by counsel, was affirmed by the supreme court of the United States. [Burr v. Duryee] 1 Wall. [68 U. S.] 531.

The court held that, although the Boyden machine might produce the same effect that was secured by the Wells patent, to wit, such a regulated deposit of fur upon the cone that a hat-body was the result, yet the combination of devices by which that result was effected was not identical, but dissimilar; and that the subject matter of the patent being a machine, the inventor had no right to surrender it, and, upon a reissue, claim for a "mode of operation," and thereby hinder other inventors from reaching the same end, or producing the same effect, by other substantially different mechanical parts or contrivances.

Adverting again to the bill of the complainant in this case, she substantially charges that the defendants have been using machines ever since the granting of her reissued letters patent, which are the identical ones for the use of which the recovery in the New York suit was had; and that, since said recovery, trifling alterations in the deflecting apparatus have been made, not affecting the principle and mode of operation of said machines.

The charge, then, is an infringement of the Wells patent—a colorable invasion being attempted by certain changes in the working apparatus of the machine, not affecting the mode of operation.

This charge is specially denied in the affidavits submitted by defendants. Without dwelling upon the depositions of Hibbard and Eliot, who are offered as experts, to exhibit and illustrate the difference between the machine of the defendants and the Wells patent, and without giving any weight to what they testify as to the want of novelty of the Wells patent, deeming it now too late to attempt to raise any such issue, the testimony of Campbell, the foreman of the corporation defendant, and of Jacques, one of the defendants, prove that the defendants ceased to use the projecting tin plates

immediately after the verdict in the New York case, and have confined themselves to the use of the Boyden patent, with curved or stepped mold-boards, of the nature and character which they exhibited and admitted that they used in the case of Burr v. Duryea [supra.]

The supreme court having decided that such a use of the Boyden machine is not an infringement of the Wells patent; and the complainant, in her bill, having alleged that the defendants have made trifling alterations in the deflecting apparatus of the machine that do not affect its principle or mode of operation,—which is denied by the affidavits of the witnesses of the defendants, a question of fact is raised, which I can not satisfactorily consider and settle at this stage of the proceedings, but can best determine upon final hearing.

I am therefore constrained, under the somewhat peculiar circumstances of this case, as now presented, to refuse the request of the complainant for a provisional injunction, and leave the whole case for a final hearing upon the merits.

The injunction is refused.

[For other cases involving this patent, see note to Burr v. Cowperthwaite [Case No. 2,188.]

Case No. 17,400.

WELLS v. JAQUES.

[Nowhere reported; opinion not now accessible.]

WELLS (JORDAN v.). See Case No. 7,525.

Case No. 17,401.

WELLS v. MAINE STEAMSHIP CO.

[4 Cliff. 228.] [1]

Circuit Court, D. Maine. April Term, 1874.

CARRIERS — LIABILITY FOR LIQUORS CONFISCATED UNDER STATE LAWS.

Packages of liquors, marked with the libellant's name, were shipped at New York, on one of the respondents' steamers, marked "Portsmouth, N. H., via Eastern R. R." While the goods were in the respondents' freight shed in Portland, Me., they were seized by a deputy sheriff as liquors kept, deposited, and intended for sale in violation of the state law. Seizure was made without process, but two days afterwards, complaint was made before the municipal judge of Portland, upon which the judge issued his warrant, under which the sheriff seized the liquors. The sheriff then filed a libel against the liquors, alleging that they were intended for sale in violation of the state law. After monition and service the liquors were declared forfeited, and were destroyed. Libel in the United States district court to recover the value of the liquors, on the ground that the respondents were liable as common carriers, notwithstanding the seizure and destruction. *Held*, that the seizure, forfeiture, and destruction of the liquors being made in conformity with the law of Maine, the libellant could not recover.

[Cited in The M. M. Chase, 37 Fed. 710.]

[Cited in Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 480. Cited in brief in Hamburg-American Packet Co. v. Gattman, 127 Ill. 605, 20 N. E. 662.]

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

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

Packages of liquors, the same as those described in the libel, and marked "John H. Wells, Portsmouth, N. H., via E. R. R.," meaning the Eastern Railroad, were, on the 17th of October, 1872, shipped at the port of New York, on board of one of the steamers of the respondents, plying between the port of shipment and the port of Portland, as evidenced by the receipt of the respondents, who it is admitted were common carriers, and the steamer arrived on the 19th of the same month, in safety, at her port of destination with the goods on-board. The respondents safely landed the goods and deposited the same in their freight shed situated on the steamer's wharf. Safe arrival and deposit of the goods were clearly shown, but a deputy sheriff on the same day seized the same, and removed the liquors from the custody of the respondents, for the alleged cause that the liquors were kept and deposited and intended for sale in the state, in violation of law. Such seizure was made by the officer without process, but two days afterwards he made complaint on oath against the liquors, before the judge of the municipal court of the city, and it appeared that the judge issued his warrant against the same, by virtue of which the same officer, on the same day, seized the liquors and the vessels in which the liquors were contained. Due seizure of the liquors having been made under the warrant, the same officer, on the same day, filed a libel against the same, alleging the seizure of the liquors, that they were intended for sale within the state in violation of law, and prayed for a decree of forfeiture, according to the law in such cases made and provided. Pursuant to the libel, the municipal judge issued a monition to all persons interested in the liquors and vessels, therein described, returnable on the 31st of the same month. Service was duly made of the monition, and no person appearing to claim the liquors, the court, on the return day, entered a decree, by which it adjudged the liquors and vessels forfeited to the city, and ordered the officer to destroy the same, and the action of the officer shows that he destroyed the same on the same day. Destroyed, as the liquors and vessels were, of course they could not be delivered or forwarded as stipulated in the contract of shipment.

Payment for the value of the liquors being refused by the respondents, the owner of the same filed a libel in the district court of the United States for this district, to recover the amount, upon the ground that they, the respondents, were liable as common carriers for the value of the liquors, notwithstanding the seizure and destruction of the same under the state law. Process was issued and served, and respondents appeared and set up the defence of the seizure, condemnation, and destruction of the liquors, as more fully set up in the answer to the libel filed in the district court. Hearing was had, and the district court en-

tered a decree dismissing the libel [case unreported], from which decree the libellant appealed to this court. Full proof of the shipment, safe arrival at Portland, unlading and deposit of the liquors in the freight shed of the respondents, was introduced by the libellant, and equally satisfactory proof of the seizure, condemnation, and destruction of the liquors was introduced by the respondents. Responsive to that defence, the libellant submits the following propositions:—

1. That the receipt of the liquors so marked imports a contract by the respondents, as common carriers, to transport the liquors to Portland, and then to deliver the same to the Eastern Railroad for transportation to Portsmouth, and that their duty as such carriers was not fulfilled when the liquors arrived here, and were safely deposited in their freight shed.

2. That they were bound to deliver the liquors to the next carrier, according to the terms of bailment, unless prevented by the act of God or the public enemy, or by the act of the shipper, and that for the fulfilment of that contract, they were insurers in all events against every loss not arising from one or more of those excepted causes.

3. That a common carrier can in no case be excused for the non-delivery of the goods entrusted to him for transportation, by the fact that the same were taken from his possession by an officer of the law, unless it appear that process and seizure were legal.

4. That the seizure in this case was not legal, as the liquors were in transit to a neighboring state, where the libellant resided, and were not intended for sale here, where the seizure was made.

5. That the seizure having been made without warrant was illegal, even if the same were liable to seizure under due process of law.

6. That the liquors, having been deposited as stated, could not be seized without search, and that the act of search and seizure without due process was a plain violation of the constitution.

7. That the law under which the seizure was made, if construed to authorize search as well as seizure, was void.

8. That seizure without warrant was not valid in any case unless the liquors were intended for unlawful sale, which must be within the actual knowledge of the officer making the seizure.

9. That the fact that the officer subsequently obtained a warrant affords no justification if his original seizure was unlawful.

10. That the process obtained two days subsequent to the seizure did not authorize search and seizure; if it had been a search and seizure process, it would not afford a justification to the officer, as neither the complaint nor warrant contained a special designation of the place to be searched.

11. That the process subsequently obtained is insufficient to show that the municipal court had jurisdiction of the case.

12. That the libel against the liquors was fatally defective, and insufficient to authorize the decree of condemnation and the order for the destruction of the liquors.

13. That the decree of condemnation is defective and insufficient.

14. That the original seizure of the liquors having been illegal, all the subsequent proceedings are null, as the court had no jurisdiction of the case.

15. That it was the duty of the respondents, in view of the circumstances, to have interfered and protected the property by preventing the seizure, defending the process, or suing the officer as a trespasser.

Strout & Gage, for libellant.

Nathan Webb, for respondent.

CLIFFORD, Circuit Justice. Courts of justice are reluctant to admit any exception to the rule of the common law, that common carriers are bound to deliver goods intrusted to their care for transportation from one port or place to another, according to the terms of shipment, unless prevented by the act of God, the public enemy, or by the act of the shipper. Common carriers, whether by land or water, contract in such case for safe custody, due transport, and right delivery of the merchandise, and the shipper, consignee, or owner of the goods contracts to pay the freight and charges as stipulated in the contract of shipment. There are reciprocal duties, and the law, in the absence of any repugnant or irreconcilable stipulation, creates reciprocal liens for their enforcement. The Eddy, 5 Wall. [72 U. S.] 494; The Bird of Paradise, Id. 558. Exceptions to the rule, that the carrier is bound in all events to fulfil the contract of shipment, do exist, as admitted by all the authorities, as where the loss of the goods or the failure to transport and deliver the same, arises from the act of the shipper, or from natural causes or irresistible force, over which the carrier has no control, and which could not be avoided by the watchful exertions of human skill and prudence. Niagara v. Cordes, 21 How. [62 U. S.] 24.

Such exceptions, it is admitted, exist, and the respondents contend that the carrier is also excused from liability for such failure to perform his contract if he is prevented from fulfilling the same by the law of the jurisdiction where the contract was to be performed. Different views are entertained by the appellant, and he insists that the carrier is the insurer of the goods entrusted to him for such a purpose, and that he is liable in all events, if he fails to fulfil the contract of shipment, unless he was prevented from so doing by the act of the shipper, or by the act of God, or the public enemy.

Before proceeding to discuss the propositions of law presented by the libellant, it may be well to refer to certain other matters of fact as necessary to a correct understanding of the rights of the parties. Due shipment of the liquors is admitted, and it appears that the

steamer, with the liquors on board, arrived here on Saturday, October 19, in the same year, and that the sheriff or his deputy seized the same on the same day, and also that the treasurer, on the Monday following, which was the next mail day, notified the libellant of the seizure, and advised him that if he wished to reclaim the merchandise he must apply to the sheriff. Other correspondence ensued between the same parties, which shows to the entire satisfaction of the court that the libellant was seasonably apprised of the legal proceedings for the forfeiture of the liquors, and that he has no just right to complain that the respondents were guilty of any negligence in affording him prompt information in that behalf. Separate examination of the several objections taken by the libellant to the defences of the respondents will not be attempted, as all those not founded on the charge of negligence, already shown to be groundless, may be condensed into three classes, which will cover the whole series of the other objections. They are as follows:—

1. That the obligation of the common carrier to keep safely, duly transport, and rightly deliver goods intrusted to his care, admits of no exception, unless he is prevented by the act of God, the public enemy, or by the act of the shipper.

2. That the municipal court had no jurisdiction either to enter the decree of condemnation or to order the liquors to be destroyed.

3. That the law of the state under which the proceedings took place, and under which the decree and order were entered, was unconstitutional and void.

Where the property is taken from the carrier by legal process, and the carrier gives due notice of the taking to the shipper, owner, or consignee, as the case may be, the respondents contend that he is discharged, and the decision of the supreme court in the case of Stiles v. Davis, 1 Black [66 U. S.] 101, appears to be an authority for the proposition. Clearly, it was decided in that case, that goods seized by a sheriff under an attachment, are in the custody of the law; that where goods are attached in the hands of a common carrier, to whom the goods have been delivered for transportation, the carrier is not justified in giving them up to the consignee while the proceeding in the attachment is pending, and that that rule holds good even where the merchandise is attached for the debt of a third person, and in a suit to which the employer of the carrier is not a party, for the reason that the right of the sheriff to hold the merchandise is a question of law, to be determined by the court having jurisdiction of the attachment suit, and not by the will of the carrier or his employer, and that the remedy of the consignee, if he can show title in himself, is not against the carrier but against the officer who has wrongfully seized the goods, or against the plaintiff in the attachment suit, if he directed the seizure.

Different views, in one or two respects, are expressed by the supreme court of Massachusetts in the case of Edwards v. White Line Transit Co., 104 Mass. 159, and that court decided in that case that it is no defence to an action against a common carrier for a breach of his contract to deliver goods that they were taken from him by an officer under an attachment against a person who was not the owner of the goods attached; but the court admit in the same case that the rule would be otherwise if the goods had been the subject of proceedings in rem, or the attachment had been against the person who was the true owner of the goods. Unquestionably, the case before the court comes within the first branch of the admission by that court, and, therefore, that decision is an authority in opposition to the views of the libellant, as expressed in the first class of his propositions, as the liquors in this were the subject of proceedings in rem, and, by the very terms of the admission, remained in the custody of the law from the time they were seized to the time when the order that they should be destroyed was executed.

Support to the rule, as modified by the decision of the supreme court of Massachusetts, is found in several English cases, and in the works of text-writers of high authority, to a few of which reference will be made. Barker v. Hodgson, 3 Maule & S. 270; Wynn v. Canal Co., 5 Welsb., H. & G. 440; Verrall v. Robinson, 2 Cromp., M. & R. 496; Davis v. Cary, 15 Adol. & E. (N. S.) 425; Chit. Carr. 276; Anglesea v. Rugeley, 6 Adol. & E. (N. S.) 114; Abb. Shipp. (5th Am. Ed.) 705.

Qualified as stated, the rule finds abundant support in the aforementioned cases, and the broader rule, as laid down by the supreme court in the case of Stiles v. Davis, also finds unequivocal confirmation, if any it needs, from very high authority. Bliven v. Hudson River R. Co., 35 Barb. 191.

It was decided in that case that it is a defence to a common carrier, for the neglect to deliver the goods intrusted to him for transportation, that the goods were taken from his custody by the authority of the law, exercised through regular and valid proceedings, that the bailee in such a case must be able to show to the court that the proceedings were regular and valid, but that he is not bound to litigate for his bailor, or to show that the judgment or decision of the tribunal issuing the process or seizing the goods, was correct in law or fact. Subsequently the case was removed to the court of appeals, where the judgment of the supreme court was affirmed, the court holding unanimously that when property is taken from a common carrier by legal process, and he gives notice thereof, he is discharged from all obligation to deliver the same to the shipper, owner, or consignee. Regular notice of the seizure was given in this case by the respondents, and I am of the opinion that they are discharged from any obligation to deliver the liquors to the next carrier or to the libellant, whether the rule laid down by the supreme

court of the United States is applied to the case, or the modified rule as assumed by the supreme court of Massachusetts, unless it can be shown that the municipal court had no jurisdiction of the case, or that the act of the legislature under which the seizure and condemnation took place was unconstitutional and void. Bliven v. Hudson River R. Co., 36 N. Y. 407.

Prosecutions against persons for manufacturing liquors in violation of law, or for keeping drinking-houses and tippling-shops, or for being common sellers of intoxicating liquors, must be by indictment; but the express provision of the state statute applicable to the case is, that in all other prosecutions under the statute, judges of municipal and police courts and trial justices shall have jurisdiction by complaint, original and concurrent with the supreme judicial court. Rev. St. 1871, p. 307.

Intoxicating liquors, kept and deposited in the state, intended for unlawful sale therein, and the vessels in which they are contained, are declared contraband, and forfeited, by the law of the state, to the cities, towns, and plantations in which they are so kept, at the time when they are seized by virtue of that statute. Rev. St. 1871, p. 304.

Such liquors, it is admitted, may be seized under a warrant duly issued by competent authority.

Seizure under a legal warrant being admitted to be lawful, it follows that seizure in the like case may be made without warrant, as the same section of the statute provides that in all cases where an officer under that statute is authorized to seize intoxicating liquors or the vessels containing the same, by virtue of a warrant therefor, he may seize the same without a warrant, and keep the liquors in some safe place for a reasonable time until he can procure such a warrant. Rev. St. 1871, p. 304.

Unquestionably the liquors in this case were seized in the first place under that provision, nor is there any reason for doubt that a warrant was obtained in a reasonable time, nor that the liquors in the mean time were safely kept in some proper place. When liquors and vessels are so seized, it becomes the duty of the officer immediately to libel the liquors and vessels, and to file the libel with the magistrate before whom the warrant is returnable, setting forth their seizure, and describing the liquors and their place of seizure, and that they were deposited, kept, and intended for sale within the state, in violation of law, and pray for a decree of forfeiture. All these requirements were strictly fulfilled, and it appears that the magistrate, as required by law, fixed a time for the hearing, and issued a monition and notice of the libel to all persons, citing them to appear at the time and place appointed, and show cause why the liquors and the vessels should not be declared forfeited. Due notice was given, and no one appearing as claimant, the decree of forfeiture was entered, and the order passed that the liquors and vessels should be destroyed. By the terms of the statute it is provided that if no claimant shall appear, such magistrate shall, on proof of notice, declare the same forfeited to the city, town, or plantation in which they were seized. Viewed in the light of these proceedings, it is clear that the magistrate had full jurisdiction of the case, and the statute further provides that liquors so seized, and the vessels containing them, shall not be taken from the custody of the officer by a writ of replevin or other process while the proceedings herein provided for are pending, and that final judgment in the proceedings shall in all cases be a bar to all suits for the recovery of any liquors seized, or the value of the same, or for damages alleged to arise by reason of the seizure and detention of the liquors. Rev. St. 1871, p. 307.

3. Enough has already been remarked to show that the theory of the libellant cannot be sustained, unless it can be held that the statute of the state under which the seizure, condemnation, and destruction of the liquors took place, is unconstitutional and void. Much discussion of that topic cannot be required, as the negative of the proposition has been decided by the supreme court of the state, and by the supreme judicial court of Massachusetts. State v. McCann, 59 Me. 385; State v. Miller, 48 Me. 581; Jones v. Root, 6 Gray, 435; Mason v. Lothrop, 7 Gray, 355.

Attempt is made to distinguish the case before the court from the cases cited, upon the ground that the officer, in making the original seizure, searched the premises where the liquors and the vessels were deposited by the carrier; but it is a sufficient answer to that suggestion, that the record contains no evidence whatever to support the theory. Unsupported by evidence, as the theory is, the suggestion may well be dismissed without further remark. Three counter suggestions are made by the respondents, which are entitled to weight, and which, under different circumstances, would receive much more consideration.

1. That the decree being a decree in rem against the liquors and vessels, is, in view of the statute of the state, a complete bar to the whole claim of the libellant for damages for the non-delivery of the goods.

2. That the decree in rem having established the allegation that the liquors were deposited in the state, and intended for sale in violation of law, it follows that the carriers were prevented from fulfilling the contract of shipment by the act of the shipper, owner, or consignee.

3. That the contract of the common carrier is always subject to the implied condition that he may lawfully comply with its terms, and that if its performance subsequently becomes unlawful without his fault, that he is not required to violate the law of the jurisdiction to complete his undertaking. Atkinson v. Ritchie, 10 East, 534; Story, Bailm. § 120; Edson v. Weston, 7 Cow. 278; Bradstreet v. Heron [Case No. 1,792]; Touteng v. Hubbard, 3 Bos. & P. 301; Morgan v. Insurance Co., 4 Dall. [4 U. S.] 455.

Much weight is certainly due to these several propositions, but having come to the conclusion to rest decision of the case upon the prior grounds mentioned, it is not necessary to express any decided opinion upon those propositions.

Decree affirmed with costs.

Case No. 17,402.

WELLS et al. v. MELDRUN.

[Blatchf. & H. 342.] [1]

District Court, S. D. New York. Oct. 22, 1832.

SEAMEN'S WAGES — CONDEMNATION OF VESSEL IN FOREIGN PORT—ACTION AGAINST MASTER.

1. Where an American vessel is condemned as unseaworthy, and is voluntarily sold in a foreign country on that account, and the voyage is relinquished, and the seamen are paid their wages only up to the time of the sale, they are entitled to two months' extra wages, under the 3d section of the act of February 28, 1803 (2 Stat. 203).

[Cited in Hoffman v. Yarrington, Case No. 6,580; The Wenonah, Id. 17,412.]

2. Whether the same rule would hold in the case of a sale of a vessel in invitum, as, by compulsory sale for the violation of a penal law, or where the sale was rendered necessary by disasters at sea, quere.

3. Where the two months' wages are due, and have not been paid to the foreign consul, as provided by the act, the seamen may recover them in an action against the master in their own names.

[Cited in Dustin v. Murray, Case No. 4,201; Gove v. Judson, 19 Fed. 524.]

In admiralty: This was a libel in personam, by [Joseph Wells and others] American seamen against [John Meldrun] the master of an American vessel, to recover two months' extra wages, under the 3d section of the act of congress of February 28, 1803 (2 Stat. 203), which provides, "that whenever a ship or vessel belonging to a citizen of the United States shall be sold in a foreign country, and her company discharged, it shall be the duty of the master or commander to produce to the consul, vice-consul, commercial agent, or vice-commercial agent, the list of his ship's company, certified as aforesaid," (in the manner prescribed in the 1st section) "and to pay to such consul, vice-consul, &c., for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months' pay, over and above the wages which may then be due to such mariner or seaman; two-thirds thereof to be paid by such consul or commercial agent to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund," &c. The libellants shipped on a voyage from New-York to ports in the bay of Mexico, and back. The vessel proceeded to Campeachy, and was there condemned as unseaworthy, and sold, and the libellants were discharged, receiving only their wages up to the time of discharge. They demanded, at the time, the extra wages for which this action was brought, but payment was refused, and they afterwards returned to New-York.

Edwin Burr and Erastus C. Benedict, for libellants.

Thomas L. Wells and Charles Bushnell, for respondent.

BETTS, District Judge. The question presented is, whether the case of the libellants comes within the 3d section of the act of congress of February 28, 1803 (2 Stat. 203). The libellants show themselves to be literally within the terms of the act in both of the particulars therein specified. The vessel was sold, and they were discharged; and the question raised is, whether the legislature intended to give the increase of wages on the mere facts that the vessel is disposed of and her crew are discharged. The respondent contends, that the sale was made ex necessitate, and was not one within the contemplation of the act; and that, to secure to a seaman the privilege of extra wages, the vessel must be sold voluntarily by the master or owner, as a subject of traffic, and for employment in navigation, and not as useless in that respect, or perishing. The provisions of the act may not apply to a compulsory and involuntary sale, as for the violation of a penal law at the place of sale (Oxnard v. Dean, 10 Mass. 143); or where the sale is rendered absolutely necessary by shipwreck, or other casualty, which has destroyed the navigable quality of the vessel, and against which no care or effort of the master could guard (The Saratoga [Case No. 12,355]). The necessity for the sale, in this instance, for unseaworthiness, was not the result of any casualty to the vessel; nor was the sale compulsory, under any coercion, judicial or administrative, at the foreign port, so as to take away the discretion and free action of the master. There is no proof that the vessel was even irreparable, or that the unseaworthiness was more than the result of the natural wear of the ship on her voyage, or of her imperfect condition when sent to sea.

I do not consider the statute as contemplating solely cases of the disposal of vessels abroad, by way of trade or traffic, and as articles of merchandise. The reason of its provisions would alike embrace those cases in which the master or owner abandons a voyage, and makes sale of the vessel, to avoid the expense of repairing her, or to escape an anticipated loss, beyond her value, by continuing the voyage. There seems to be no ground for a distinction, so far as the mariner is concerned, between a sale for the purpose of positive profit, and one for the purpose of avoiding a loss. In both cases, the owner, acting through his agent, makes the sale voluntarily. The property is, in neither case, dis-

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

posed of by act of law, in invitum as to the owner. I, therefore, consider the sale, in the present case, as one of the descriptions of sale to which the provisions of the statute apply.

The second requisite of the statute, that the seaman shall be discharged, is also satisfied by the relinquishment of the voyage and the payment of his wages without claim to his further service. Had the master, because of the unseaworthiness of his ship, provided another vessel, and insisted upon completing the voyage, the mariners would have been bound to continue its prosecution. They would have had no right to insist that their contract was with a specific ship, excluding any other that was supplied in her place under an exigency fairly justifying the change; and, if they had refused to proceed in such substituted vessel, they might be deemed deserters, and be subject to a forfeiture of wages. Hindman v. Shaw [Case No. 6,514]. No such call was made upon them, and they are to be regarded, on the facts in proof, as entitled to recover the two months' pay given by the statute, as wages legally due them. Hindman v. Shaw [supra]; Emerson v. Howland [Case No. 4,441]. The supreme court of this state, in Ogden v. Orr, 12 Johns. 143, held. that the act of 1803 created no obligation on the master to pay these extra wages directly to the seamen; and, that to allow a seaman to recover them, would deprive the fund intended to be created, of the proportion reserved by the statute, and the consul of his commission. See, also, Van Beuren v. Wilson, 9 Cow. 158. The authority of the case of Ogden v. Orr is of great weight; and, if it were not counteracted by high authorities, more appropriately entitled to lead this court on a question of seamen's rights, I might feel called upon to defer to it. It is manifest, however, that the decision of the supreme court rests upon close points of common law, which restricts the remedy of the party to the direct right conferred upon him by the statute. Here there is no engagement of the master binding him to pay the extra wages, nor is a right to them given directly to the seamen as against the master. But a court of admiralty acts upon the spirit and equity of the claim; and, finding that the act of congress imposes a duty on the master to pay the money to a public agent, and secures a portion of it to the crew, that court avoids the circuity of, first, a suit by the consul to compel the master to perform the duty, and next, another by the seaman to recover his share out of the hands of the consul. It effectuates the beneficent purpose of the statute, through the self-interest of the seaman, and does not make his privileges under the act depend upon the fidelity of the master in complying voluntarily with its requisitions, or upon the vigilance of the consul in enforcing it. To this end, it regards the money intended for the crew, as their wages, and the master as directly liable to them therefor, if he has not deposited it with a consul. I am satisfied that the statute admits of this construction, and, both because of the persuasive equity of such interpretation, and to maintain uniformity in the proceedings of the admiralty courts in the different districts of the United States, I shall adopt the practice already recognized and approved by those courts (Hindman v. Shaw [supra]; The Saratoga [supra]; Emerson v. Howland [supra]; Orne v. Townsend [Case No. 10,583]), and consider their decisions, in this respect, as of higher authority than the decision of the state court. See The Courtney, 1 Edw. Adm. 239. I am satisfied that the statute will, without this method of enforcing it, be, in effect, a nullity. The extra allowance being denominated wages in the statute, the portion of it which belongs to each seaman may be recovered in this court, against the master, as wages. Each libellant in this case is, accordingly, entitled to recover two months' wages, and his costs.

Decree accordingly.

Case No. 17,403.

WELLS v. NEVILLE.

[4 Wash. C. C. 209.] [1]

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

INTERNAL REVENUE COLLECTORS — PAYMENTS TO INSPECTOR.

Money collected by a collector of internal revenue, under the act of congress of March 3, 1791 [1 Stat. 199], and paid over by him to the inspector, cannot be recovered back by the collector as money had and received to his use.

At law.

WASHINGTON, Circuit Justice. This is an action of indebitatus assumpsit, for money had and received by the testator, to the use of the plaintiff. There are other counts in the declaration; but as they in no respect fit the case, they need not be noticed. The jury found a verdict for the plaintiff, subject to the opinion of the court, upon the following point: "It appearing on the plaintiff's testimony that the moneys he charges to General Neville were paid by the plaintiff as collector to said Neville as inspector; is the plaintiff entitled to recover the balance not paid by said Neville to the United States, as the said Neville remains liable to the United States for the same." To entitle the plaintiff to recover back money which he has once paid, it is essential for him to show that, ex equo et bono, the defendant ought not to retain it; as if he can prove that the money was paid under a mistake to a person having no authority to receive it, or where the consideration has failed, and the like. The equity of the plaintiff to call for restitution of the money, constitutes the whole of this case,

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

which he is bound to make out, or else the presumption of law is, that the payment was properly made.

The question is, whether the point reserved presents such a case to the court. It is contended by the plaintiff's counsel that the act of congress of the 3d of March 1791, for imposing duties upon spirits within the United States, under which it is alleged the money in question was collected by the plaintiff, conferred no authority upon the inspectors to receive from the collectors the amount of the duties which they might collect, and consequently, that the plaintiff in making this payment to the defendant, acted under a mistake; and is entitled to reclaim the money as so much received to his use. The sixteenth section of the law provides, that the duties shall be collected under the management of the supervisors of the revenue; and the fifth section directs that the supervisors, inspectors, and other officers, who shall be charged to secure the duties, and with the receipt of moneys in discharge of them, shall keep records of their transactions, and shall pay to the order of the officer who is, or shall be authorised to direct the payment thereof, all the moneys which they may respectively receive; and shall also transmit, at stated periods, their accounts for settlement to the officer, whose duty it shall be to make such settlement. Thus then it is obvious, that not only the collector, but the inspector, and even the supervisor, might receive these duties. But how? Certainly, the two superior officers were not to exercise the duties of the inferior, by collecting the duties from the distillers; or else his appointment would seem to have been in a great measure, if not altogether unnecessary. The moneys, therefore, which the inspector would have to account for, would be such as came into his hands from the collector, and the supervisor would be accountable for moneys received by him from one or both of the inferior officers. He might direct the payments to be made by the collectors directly to himself, or to the inspectors, subject, no doubt, as all his measures were, to the superior and controlling authority of the head of the treasury department. But as a power was vested by this act in the supervisor, and in the treasury department, to direct the duties to be paid over by the collector to the inspector, the court cannot say that the payment in question was unauthorized, and that the money was consequently received to the plaintiff's use, unless that fact had been found by the jury, or agreed by the parties; which, not being done, the plaintiff has no case upon which he can recover in this action.

It is stated in the case, that Neville, at the time the verdict was found, remained liable for this money to the United States; whether this liability arose from the authority vested in Neville by his superiors to receive from the plaintiff the money he might collect, or by his engagement to account for the same to the United States, he is certainly entitled, ex equo et bono, to withhold the money from the plaintiff, to enable him to discharge his responsibility. But although the court has thought proper to notice this fact, we desire that it may be distinctly understood, that our opinion is formed upon the construction of the act of congress, and that it would be in its result the same, if the latter words of the case had been omitted; our opinion being, that the defendant, by receiving in his capacity of inspector, from the plaintiff as collector, the duties which had come into his hands in his official capacity, is responsible for the same to the United States, and ought not therefore to be also liable to refund the same to the plaintiff.

WELLS (NEWSON v.). See Case No. 10,187.

WELLS (NIXDORFF v.). See Case No. 10,280.

WELLS (PRIETO v.). See Case No. 11,420.

Case No. 17,404.

WELLS v. RILEY.

[2 Dill. 566.] [1]

Circuit Court, D. Iowa. 1872.

OCCUPYING CLAIMANT — COLOR OF TITLE — GOOD FAITH.

1. The value of improvements made in good faith by an occupying claimant under color of title are allowed to him by the statute of Iowa in the manner and to the extent therein provided.

[Cited in Griswold v. Bragg, 6 Fed. 347.]

2. The Iowa statute in relation to occupying claimants construed, and applied to an occupant of lands falling within the Des Moines river grant.

[Cited in Litchfield v. Johnson, Case No. 8,387.]

This was originally an action of ejectment, and the plaintiff recovered in this court, and the judgment was affirmed by the supreme court as stated below. The present questions arise out of the application of the defendant, under the occupying claimant's statute of the state. Revision of Iowa, c. 97.

This statute enacts that "where an occupant of land has color of title thereto, and in good faith has made any valuable improvements thereon, and is afterwards in the proper action found not to be the rightful owner thereof," he may be allowed in the manner therein provided the value of the improvements.

The facts are as follows: The husband of the defendant, Hannah Riley, settled upon the premises in question in 1855, and in 1857 he died, leaving the defendant and several minor children. The defendant applied to the land officers to be permitted to enter the land. Her application was refused until the decision of the case of Litchfield against the Dubuque & Pacific Railroad Company, in 1860. She then renewed her application and was permitted to enter the land. She proved up in

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

1862, and obtained a patent in 1863. Plaintiff claimed title to the land under a deed from the Des Moines Navigation Company, and the navigation company claimed title from the state of Iowa, and the state of Iowa under act of congress of 1846, and subsequent acts. The circuit court of the United States held that the title was in the plaintiff, Wells. [Case unreported.] The defendant appealed to the supreme court of the United States, and the decision of the court below was affirmed. [154 U. S. 578, 14 Sup. Ct. 1166.] Then the defendant, Hannah Riley, filed a petition as an occupying claimant, asking for an appraisement of her improvements, and by agreement of counsel for both parties, the court appointed three commissioners to examine the premises and report to the court the value of the improvements made by the defendant, and in regard to the value of timber cut off and taken away by her, and the value of the rents.

The commissioners in their report found: 1st. Value of improvements, including taxes paid by the defendant, $2,823.89. 2d. Value of rent and use of said land, $300. 3d. Value of timber cut and destroyed by defendant on said land, $170.50. This leaves balance in favor of Hannah Riley of $2,353.39.

Plaintiff's counsel filed a motion to set aside the finding of commissioners, stating exceptions, and relying upon the following extract from the opinion of the supreme court in deciding the main case. The supreme court say: "That the land of which the lot in question was a part had been withdrawn from sale and entry on account of a difference of opinion among the officers of the land department as to the extent of the original grant by congress of lands to aid in the improvement of the Des Moines river, from the year 1846 down to the resolution of congress of March 2d, 1861 [12 Stat. 251], and the act of July 12, 1862 [12 Stat. 543], which acts we held (in the Wolcott Case) confirmed the title in the Des Moines Company. As the husband of the plaintiff entered upon the lot in 1855 without right, and the possession was continued without right, the permission of the register to prove up the possession and the improvements, and to make the entry under the pre-emption laws, were acts in violation of law, and void, as was also the issuing of the patent. The reason for this withdrawal of the lands from public sale or private entry are stated at large in the opinion in the case of Wolcott v. Des Moines Co., 5 Wall. [72 U. S.] 681, and need not be repeated. The point of reservation was very material in that case, and we have seen nothing in the present one, either in the facts or the argument, to distinguish it."

Mr. Withrow, for plaintiff.

Mr. Parsons, contra.

MILLER, Circuit Justice, orally overruling the exceptions, in substance, said:

Some of the exceptions taken by plaintiff relate to the question of color of title in the party in possession, and to her good faith in making these improvements. I am very clear that the defendant comes within the rule of the statute in both respects, and within any principle of equity that can be established on this subject. She had a patent from the United States, and had it for eight or ten years before this action was brought. She had been a settler upon the land and made a showing to the satisfaction of the land office, and received a certificate that she was entitled to pre-emption—the pre-emption commencing thirteen or fourteen years ago. That she has color of title, therefore, there cannot be a doubt.

It seems to be supposed that the question of good faith is precluded by the conclusion that she must have known that the title would be controverted. It cannot be contended, I think, that she did not make the improvements in good faith, believing that she had title. It may be questioned whether such notice as this suit, is, under the circumstances, sufficient evidence to convince a reasonable person that his title may be defective.

Throughout all this contest, up to the time that the case of Wells against Riley was decided in the United States supreme court, I think the fair, reasonable view of it was that she was the owner of this property. Certainly up to the time of that decision, or to 1861, plaintiff had no title to the property. He claims under the land grant of the Des Moines Navigation Company, and the supreme court of the United States has decided that the act of 1846 conveyed no lands to the state above Raccoon forks. The plaintiffs here in this action, according to the words of the decision, "must evidently rest their claim to title on the joint resolution of 1861."

They cannot claim title previous to the time the company took its title in 1861 or 1862. Some of the parties claim that rents should be allowed from 1857, and prior. I do not know how many cases of this character there may be, but if there is to be a contest about improvements before the court, some questions will arise which cannot be settled in this case.

As it is, my own conviction is that the defendant is entitled to pay for the improvements she has made.

As to the valuation of the improvements in this case, I must say that I have no doubt but that they are fair and just. As to the value of the timber cut, and the taxes paid, there is no controversy. The value of rents presents a question difficult always to determine. The books are full of decisions of judges modifying and varying the rules by which the value of improvements and rents are to be estimated in cases of this kind, and to deduce a rule which would be applicable to all cases is impossible. My own judgment is that in this case it is probable that enough has been allowed for rent.

The commissioners were selected by the parties and appointed by the court, and I have no doubt they have undertaken to do what

was right in the matter. I do not think there is cause for the court to set aside the report. I shall, therefore, overrule all the exceptions.

Exceptions overruled.

WELLS v. SHOOK. See Case No. 17,406.

WELLS (THOMPSON v.). See Case No. 13,980.

WELLS (UNITED STATES v.). See Cases Nos. 16,661–16,665.

WELLS (WOOD v.). See Case No. 17,967.

Case No. 17,405.

WELLS v. WRIGHT et al.

[3 Wash. C. C. 250.] [1]

Circuit Court, D. Pennsylvania. April Term, 1814.

EJECTMENT—SETTLEMENT UNDER WARRANTS—SURVEYS.

1. A party cannot set up a title to land by settlement, prior to the day stated for the commencement of his settlement, in the warrant issued to him for the land; but he may prove the land was never in the possession of the party who claims it from him by the right of settlement.

2. A survey made by order of the board of property, merely to mark the boundary of land claimed by the person for whom it is made, and not in execution of a warrant issued for the land, is not such a survey as will give title.

The plaintiff, to prove his title, gave in evidence, that some time in the year 1771, Samuel Wells, under whom he claims, went upon the land in dispute, girdled some trees, and collected together and burnt a parcel of brush, raised a cabin, but without a roof; and then retired to some other part of the country, where he remained until the next year, when he returned to the land with instruments of agriculture; and finding the land in the occupation of one Boggs, he demanded the possession, which Boggs refused, and forcibly drove Wells off, and burnt the half-finished cabin which Wells had erected. Wells then served an ejectment upon Boggs, and in 1774, he recovered a judgment and took out a writ of possession, which was continued down till some time in the year 1791. In 1774, Wells again went upon the land; erected a small cabin; placed in it some furniture; and during his absence in order to remove the remainder of his furniture, the cabin was burnt, and possession refused to Wells, on his return, by two men, of the names of Link and Backhouse; who, it appears, had settled on the land in 1772, and continued to live, and raise corn on it, until they sold their settlement right to the defendants. In 1791, Wells, the plaintiff, took out a writ of possession in the name of Samuel Wells, against Boggs, and had it executed; when the defendants agreed to consider themselves as tenants of the plaintiff, and to pay him a rent, until amicable ejectments, which the defendants agreed to bring against the plaintiff, could be decided; and that if they should be decided in favour of Wells, then, the defendants agreed to deliver him peaceable possession of the premises. These ejectments were tried in 1792, and decided in favour of the present defendants. On the 5th of March, 1785, a warrant issued to the plaintiff for four hundred acres of land, to include the improvements made by Samuel Wells; interest to commence from the 1st of March, 1771, and the consideration was paid in November, of the same year. In the year 1788, the plaintiff filed a caveat in the board of property, against grants issuing to some of the defendants; in consequence of which, the board directed the surveyor to lay off the plaintiff's claim, which was done; and a survey and plat returned, containing five hundred and twenty acres, including a part of each of the tracts claimed by the defendants. The board continued the caveat from day to day, until the ejectments above mentioned should be decided; and in the year 1795, they dismissed the caveat, and ordered patents to issue to such of the defendants as had been caveated.

The defendants claim under warrants, surveys, and patents, regularly obtained; the warrants being all prior in date to the plaintiff's, except the one to Wright, which issued in 1786. The warrants express, that interest is to run from a period subsequent to 1772.

The defendants offered to read depositions, to prove the possession of Link and Backhouse, in 1772, and continued down to the time of their sale to the defendants, or those under whom they claim; which was objected to, because a party can never prove a settlement in himself, or in the person under whom he claims, prior to the time of the settlement stated in his warrant, which is that from which the interest is to run. 2 Smith's Laws Pa. 177, 178.

BY THE COURT. The defendants cannot set up a title by settlement, prior to the day stated for its commencement in the warrant; but they may read the depositions, to show that the land never was in the possession of the plaintiff, by right of settlement.

The objections made to the plaintiff's title, were—(1) That he never had, at any time, made a settlement. (2) That the plaintiff's warrant was never regularly surveyed; and of course, that he does not come within the case of Sims v. Irvine, 3 Dall. (3 U. S.) 425. (3) That the plaintiff is barred, by not having brought his ejectment within six months after the caveat was dismissed. 2 State Laws, April 3, 1792; [Humphries v. Blight] 4 Dall. [4 U. S.] 370. Contra, 2 Smith's Laws, 207, 166; 2 Bin. 114. (4) That the plaintiff is barred by the act of limitations; the possession of the defendants, or those under whom they claim, having been uninterrupted from

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

1774. 2 State Laws, 282, passed March 26, 1785.

Many cases were cited on both sides, on the point of settlement. 2 State Laws, 487; 2 Smith's Laws, 173, 175, 186, 168, 174, 235, 237, 301, 224, 306; [Ewalt's Lessee v. Highlands] 4 Dall. [4 U. S.] 161; [Morris' Lessee v. Neighman] Id. 210; [M'Laughlin's Lessee v. Dawson] Id. 221; Balfour v. Meade, Id. 175; Add. 216.

WASHINGTON, Circuit Justice (charging jury). The substratum of the plaintiff's title, is settlement. If that be in his favour, and has been followed up with reasonable diligence in obtaining a legal title, he must prevail even against those defendants, whose warrants bear date prior to his. If he has failed in establishing a right by settlement, the verdict must be against him.

What constitutes a settlement, has been repeatedly decided in this, as well as in the state courts of Pennsylvania. It consists in actual occupancy of some part of the land intended to be appropriated, and the continuation of it; thereby manifesting an intention to make it the place of the party's abode, not at some future day, but at and after the day when possession is taken. If he mark off the land he means to settle, and builds even a habitable house, and then leaves it, intending at some future period to return and live in the house so erected, his settlement will commence only from the time when he does return; the building of the house amounts to an improvement only; and if, before he returns, with a view to take possession of the land, and to make it from that time the place of his abode, some other person shall have obtained possession and settled himself on the land, and is found so settled by the first improver, the latter cannot set up an improvement right, against the settlement right thus acquired by the former. Settlement upon these frontier lands, (which the state of Pennsylvania acquired by cession in 1768, at Fort Stanwix,) amounted to an equitable consideration, sufficient to entitle the settler to a grant, even prior to the act of 1786. But it was such a settlement as fulfilled the policy of the government, by presenting a barrier to the savages, and promoting the sale of the public lands to those who might not choose to settle. But vacant cabins, accompanied by declarations of intention to inhabit them at some future period, did not answer the public policy, and of course, amounted to nothing, until the settlement was in fact made. The act of the 30th December 1786, declares what kind of settlement shall give a title to the lands ceded by the treaty at Fort Stanwix—that it must be "an actual residence settlement, with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time, unless interrupted by the enemy, or by going into military service."

The question, then, for your consideration is, whether Wells made such a settlement as we have described, in 1771, or at any subsequent period. In 1771, he girdled some trees, collected and burned a parcel of brush-wood, raised the logs of a cabin, but without making it habitable; and then returned to his former residence, or retired to the settled parts of the country, intending most probably to return the next year, and to continue on the land which he had thus slightly improved. In 1772, he accordingly returns, with agricultural instruments; and the sincerity of his intention to remain, may fairly be conceded. But in the mean time, Boggs had taken actual possession of the land, having burned the logs of Wells's cabin, and erected another for himself, which he inhabited. Wells considered Boggs to be an intruder upon his land, and endeavoured to gain the possession; Boggs, with much greater propriety, considered Wells as an intruder, and compelled him to quit the premises. Upon what ground Wells obtained a judgment in his ejectment against Boggs, it is impossible to conceive; but, as it appears, that two other persons, Link and Backhouse, obtained the possession, and settled themselves upon the land some time in 1772, it is probable, that Boggs took no farther notice of the suit; in consequence of which, judgment was obtained against him. From 1772, the possession continued in those persons; and, except a temporary possession gained by Wells in 1774, under a writ of possession against Boggs, it does not appear, that Wells, at any period of time, was settled upon this land. He complains, that he was prevented by Boggs and these other men from doing so; but the answer is, that they had a right to keep the possession, because they had acquired a legal title by settlement, in opposition to Wells's claim by improvement, which gave no right whatever. This right, by settlement, being followed up by a regular office title, must prevail against the improvement and office title of the plaintiff.

But independent of the better right of the defendants, the plaintiff has not, in the opinion of the court, such a title as will support an ejectment in this court. In the case of Sims v. Irvine, 3 Dall. [3 U. S.] 425, the supreme court decided, that a warrant, survey, and consideration paid, vests a legal right of entry into lands lying in this state; but the survey ought to be in execution of the warrant, and such as would entitle the party to a patent. Now, in this case, the order of the board of property was to survey the claim, not to execute the warrant of the present lessor of the plaintiff; and in laying down this claim, it is made to cover five hundred and twenty, instead of four hundred acres; and this by interfering with all the defendants. Now, it may be admitted, that if the only title to this excess, adverse to the plaintiff's, had been that of a state, a patent would have issued, upon the plaintiff paying the sum demanded by the state; but not so, if it interfered with the claims of third per-

sons. One thing is clear, that the lessor of the plaintiff, if he had a title against the defendants, to any part, is not entitled to five hundred and twenty acres, and cannot obtain a patent for it; how, then, can this court locate for him, the quantity to which he claims to be legally entitled, so as to enable him to recover, in any one of these ejectments? Upon the first point, however, the court is of opinion, that the defendants are entitled to verdicts.

Plaintiff suffered a nonsuit.

WELLS (WRIGHT v.). See Case No. 18,101.

WELLS v. YATES. See Cases Nos. 17,393 and 17,394.

Case No. 17,406.

WELLS et al. v. SHOOK.

[8 Blatchf. 254.] [1]

Circuit Court, S. D. New York. Feb. 18, 1871.

INCOME TAX — RETURNS BY EXPRESS AND STAGE COACH COMPANIES—GROSS RECEIPTS.

1. Under section 9 bis of the act of July 13, 1866 (14 Stat. 147), a company, engaged in the express business, and also in transporting passengers by stage coach, which makes returns of its gross receipts, under section 109 of the act of June 30, 1864 (13 Stat. 277), and is subject to pay duty thereon, under sections 103 and 104 of the last named act, is required to declare, in such returns, whether such gross receipts are stated according to their values in legal tender currency, or according to their values in coined money, and is liable to pay such duty according to the values in coined money when reduced to their equivalent in legal tender currency.

2. The terms, "income or articles or objects charged with an internal tax," in said section of the act of 1866, are comprehensive, and include "gross receipts" of express companies, and "gross receipts" of stage proprietors.

3. "Objects" charged with an internal tax are not necessarily and only objects which are specific, tangible, and material in form, such as goods, or products of growth or manufacture.

[This was an action by Wells, Fargo & Co. against Sheridan Shook, a collector of internal revenue, to recover taxes alleged to have been illegally exacted.]

Grosvenor P. Lowrey, for plaintiffs.
Noah Davis, Dist. Atty., for defendant.

WOODRUFF, Circuit Judge. By section 109 of the act of June 30, 1864, "to provide internal revenue, &c." (13 Stat. 277), any person, company, or corporation, carrying on or doing an express business, is required to make a monthly return of the gross amount of his or their receipts respectively for the month next preceding, to the assistant assessor, &c. By section 104, such person, company, or corporation is declared to be subject to a duty of three per centum on the gross amount of all the receipts of such express business. Proprietors of stage coaches are, in like manner, by section 103, chargeable with a duty of two and one-half per centum on their gross receipts. By section 9 bis of the act of July 13, 1866 (14 Stat. 147), in amendment of the previous act of March 10, 1866 (Id. 5), it is declared to be the duty of all persons required to make returns or lists of income or articles or objects charged with an internal tax, to declare, in such returns or lists, whether the several rates and amounts therein contained are stated according to their values in legal tender currency, or according to their values in coined money; and, when stated in coined money, it is declared to be the duty of the assessor to reduce such rates and amounts to their equivalent in legal tender currency, and it is further provided that the lists to be furnished to collectors by assessors, shall, in all cases, contain the several amounts of taxes assessed, estimated or valued in legal tender currency only.

The plaintiffs are engaged in the express business, and have received therein large amounts in coined money and large amounts in legal tender currency. They are also engaged in the transportation of passengers, &c., by stage coach, and therein also have received coined money and legal tender currency. Being thereto required by the assessor of the proper district, but protesting that they were not bound by law so to do, the plaintiffs have made returns of such receipts, discriminating between coin and legal tender currency, and, having refused to pay the tax upon the amount of premium on coin, or excess of value of the coin over the value of the same sum in legal tender currency, the proper officer, clothed with authority from the defendant, as collector, appeared at their place of business, to levy upon their goods, and threatened so to levy, for the collection of the tax upon such premiums, whereupon, protesting that the execution was illegal, and that they were not, by law, chargeable with such tax on premiums, the plaintiffs paid to the defendant the amount, on the 16th of January, 1868, $12,598.52, and brought this action to recover back the same.

It is not insisted that the tax was illegally charged, if lists or returns of the gross amount of receipts, required to be made to the assessor by the above-mentioned section 109 of the act of 1864, and "gross amount of all the receipts of such express business," in section 104, and "gross receipts of such railroad, * * * stage coach, or other vehicle," in section 103, are within the requirement of section 9 bis of the act of 1866, above also cited. This last-named section requires, that "returns or lists of income or articles or objects charged with an internal tax," shall discriminate between receipts in coin and receipts in legal-tender currency. Whatever returns are included within this description, the things or values so returned are subject to the assessment which was made in this case. To that extent, at least, it is conceded the case of Pacific Ins. Co. v. Soule, 7 Wall. [74 U. S.]

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

433, is conclusive. The supreme court there held, distinctly, that the person receiving income or other moneys subject to tax or duty, in coined money, and making his return under section 9 bis of the act of 1866, is to pay the tax in legal tender currency, and that the difference in value between coined money and legal tender currency must be added to his return when made in coined money, and the tax or duty must be assessed and paid on the amount thus increased. It is, however, here insisted, that the plaintiffs' lists or returns of the gross amount of receipts, or the gross amount of all the receipts of such express business, and gross receipts of their stage coaches, are not included in section 9 bis of the act of 1866; and that the words, "returns or lists of income or articles or objects charged with an internal tax," do not embrace the receipts last named.

The plaintiffs' counsel has sustained the claim of the plaintiffs in this respect with great ingenuity and skill; but I am constrained to regard the words, "objects charged with internal tax," as used in a general sense, as equivalent to "subjects of taxation." It is insisted, with much plausibility, that the word "objects," in the law, has reference to something tangible or having an existence in form; and that, to hold it equivalent to any "entity" or "thing," is to render the two specific words "income" and "articles," surplusage, having no effect. To this it may be answered, that the construction claimed is liable to the same objection; for, if "objects" includes nothing but what is visible and tangible, then it is itself surplusage, for "articles" would include such objects. In lexicography, the word "object" includes whatever is presented to the mind, as well as what may be presented to the senses; whatever, also, is acted upon, or operated upon, affirmatively, or intentionally influenced by anything done, moved, or applied thereto. I do not regard very nice distinctions, in the argument used, or in my reply thereto, as conclusive. A better practical answer is, that the word is comprehensive enough to include the gross receipts of an express company; and, if it were true, that its use in its broad and comprehensive sense, made the word "articles" a redundancy, this is no unusual thing. Reference to the acts of congress imposing duties will disclose abounding redundancy, employed often without the least apparent necessity, and sometimes with evident intent to prevent doubt. Here, lists of "income" had a meaning distinct from gross receipts, "articles" might be deemed to apply to enumerated goods in use or on sale, or produced by manufacture, already specified in the law, and the addition of the word "objects" was to sum up the requirement, by a more general term, which would include what was not embraced in either of the others. Nothing is more common than this use of language.

The case of Pacific Ins. Co. v. Soule [supra], already referred to, clearly involved the same question. The controversy there related to the "premiums," "assessments," "dividends," "undistributed sums" and "income" of that company. The tax assessed and collected on the premiums on coin in which they were received by the company was sustained as legal. Every argument employed in this case was apt to that. No such point was, however, taken by counsel or discussed by the court. It is, therefore, insisted, that the case does not decide the question, so as to be deemed an authority. It may, perhaps, be replied, that the point was not deemed of sufficient doubt to invite discussion.

The review of the other sections of the internal revenue law, presented by counsel, to show that, in those sections, "objects liable to pay any duty or tax" does not include gross receipts, is liable to two suggestions—First, it begs the question; and, second, the distinction between the values which might be returned in coined money and those which were returned in legal tender currency, does not appear to have been the subject of express provision in the act of 1864, but was left to construction.

The manifest justice of the view which I have taken of this subject, and the general policy of the law to make taxation equal in like cases, confirms me in the construction given. No just reason can be given why an express company which conducts its business on the basis of receipts in coin, should, for that reason, pay a less tax or duty than one which receives its compensation in legal tender currency; and the law should not be construed to work such inequality, unless its terms plainly require it. I fully agree that laws imposing onerous burthens are, in cases of doubt, to be construed favorably to the citizen; but this rule of construction is not to be carried to the extent of defeating the ends of the law, or of working injustice among the citizens, in their relations to each other. This should not be allowed, unless the imperfection in the law is such as plainly to work these results.

In regard to any suggestion of hardship to the plaintiffs, in increasing their burthen, it is pertinent to say, first, that it only makes their tax the same as that of other companies whose dealings are exclusively in legal tender currency; and, second, that they are authorized to charge the tax to their customers; and, it might be added, that, as to money received from passengers, it is no violent presumption to say that they have done so, and, in that aspect, they are merely government agents, or collectors, now objecting to paying over the amounts collected.

The defendant must have judgment, with costs.

WELLSVILLE (ROBERTSON v.). See Case No. 11,930.

Case No. 17,407.

In re WELMAN.

[7 Law Rep. 25; 20 Vt. 653.]

District Court, D. Vermont. April, 1844.

STATUTES—TIME OF TAKING EFFECT—BANKRUPTCY.

1. The time when an act of congress, which is approved and signed by the president of the United States, takes effect, must appear, and can properly appear, only from the act itself.

2. A petition for a declaration of bankruptcy, presented on the third day of March, 1843, was too late, and must be dismissed.

3. The doctrine of this court in Re Howes [Case No. 6,788] restated and affirmed. But see In re Richardson [Id. 11,777].

[4. Fractions of a day are not to be noticed in determining the time of the passage of a law of congress. The law goes into effect from the beginning of the day of its date, unless otherwise provided.]

[Disapproved in Salmon v. Burgess, Case No. 12,262. Cited in Gardner v. Barney, 6 Wall. (73 U. S.) 510. Approved in Lapeyre v. U. S., 17 Wall. (84 U. S.) 198.]

[Cited in Westbrook Manuf'g Co. v. Grant, 60 Me. 89, 95.]

In bankruptcy.

This was a petition by Deluis Welman, representing himself to be unable to meet his debts and engagements, and praying for the benefit of the bankrupt law. The petition was filed March 3d, 1843, and no proceedings having been had upon it in consequence of the clerk's refusing to issue the usual order, the petitioner now filed his motion for an order of notice to creditors and others to show cause why he should not be declared a bankrupt.

PRENTISS, District Judge. In Re Howes [Case No. 6,788] it was determined by this court, that a petition for the benefit of the bankrupt law, presented and filed on the 3d of March, the day the law was repealed, was too late, and that no order could be taken upon the petition other than to dismiss it. An opposite decision having been recently pronounced in a neighboring circuit, I am now called upon to re-examine the question; and I can very freely say, that it is not at all a subject of regret, that an opportunity is thus afforded me to review my former opinion, and to overrule it if found to rest on mistaken principles or unsound reasoning. When Lord Hardwicke, having reason to alter his opinion on a particular occasion, said he was not ashamed of doing so, for he always thought it a much greater reproach in a judge to continue in his error than to retract it, he exhibited an example of true wisdom and real elevation of character which it would be well for all judges to take as a guide. I hope I am capable of appreciating, as it deserves, this high example of judicial intelligence and virtue, and that I shall never be so forgetful of what is due to an enlightened and scrupulous discharge of duty, as to fail to follow the example on every fit and proper occasion.

The question presented in this case first came before me at the last May term of this court, in Ward v. Slosson [unreported], a case of compulsory bankruptcy. I then considered the question, and came to the conclusion that the petition could not be sustained; but as the case involved property to a large amount, and the question raised was one of some novelty and much importance, I thought it would be advisable, especially as there were several other cases depending upon the decision, to adjourn the question into the circuit court for final determination. I accordingly did so; but no hearing being had upon the question in the circuit court, the counsel for the petitioning creditors at the October term declining to proceed further upon it, and the case of In re Howes [supra] coming up soon after, I delivered the opinion I have already mentioned. As to the correctness and soundness of that opinion, considering the question as a question of law depending upon rules and principles of law, I certainly entertained no doubt before the publication of the decision in Re Richardson [Case No. 11,777]. I have carefully read that case, and well weighed the authorities, principles, and reasoning urged in it. The decision, considering the high source from which it proceeds, is entitled to high respect and deference; but like all other decisions under the bankrupt law in other circuits, it is of no binding authority here. Notwithstanding all that is urged in the case, I am obliged to say, that I still remain of the opinion, that a petition, presented and filed on the day the act repealing the bankrupt law was passed, cannot be sustained.

It appears to me, that the rule that there are in law no divisions or fractions of a day, if applicable to any question whatever, is emphatically applicable to this. The rule, in my apprehension, is not to be treated as a mere unmeaning legal fiction, existing in speculation and theory only, and of no practical use or value. That there is no apportionment of a single day, or any account made of hours and minutes, besides being true by general habit and custom in the transaction of much of the business of life, is a rule or axiom of law founded in convenience and utility, and is of real practical efficacy, as far as it prevails, in avoiding the uncertainty and difficulties attending questions concerning minute and unimportant divisions of time. Still, the rule, though a general rule of law, does not apply in all cases, but, like most other general rules, is subject, in its application, to just and reasonable exceptions. It does not prevail in questions concerning merely the acts of parties, where it becomes necessary to distinguish and ascertain which of several persons has a priority of right; as where a bond and release are executed on the same day; where a bond is executed by a woman the same day she marries; where the disseisin is done the same day the writ is tested; where goods are seized under an execution on the same day the defendant commits an act of bankruptcy; where two writs of execution are delivered to the sheriff on the same day; or

where the question is as to the time of suing out a writ or delivering a declaration; in short, in most, if not all questions respecting private transactions, where priorities in a single day may exist, and it is practicable as well as essential to the purposes of justice, to inquire into them. But though divisions of a day are allowed to make priorities in questions concerning private acts and transactions, they are never allowed to make priorities in questions concerning public acts, such as legislative acts or public laws, or such judicial proceedings as are matters of record. When it was the law in England that every act of parliament took effect the first day of the session unless the act appointed another time for its commencement, it was held, that in case of two acts made at the same session, one could not have priority over the other, for being made at one day, and instant in contemplation of law, they should be construed as if all was in the same act. So in regard to judgments, while they were considered as rendered on the first day of the term unless there was some memorandum to the contrary, the same principle prevailed. In Pugh v. Robinson, 1 Term R. 116, Buller, J., said, there being no fractions of a day in judicial proceedings, where there are two judgments, both referring to the same day, the priority of one cannot be averred. The doctrine undoubtedly holds equally good under the modern regulations, which require an indorsement to be made upon every act of parliament of the day of its being approved by the crown, and an entry of record of every judgment of the day when signed. Lord Mansfield, in Combe v. Pitt, 3 Burrows, 1423, recognizes and admits the general rule. After observing that the law does not, in general, allow of the fraction of a day, he says it admits it in cases where it is necessary to distinguish, and he does not see why the very hour may not be shown, where it is necessary and can be done. To this I agree. But is it necessary, and can it be done in this case? That is the question. If it cannot be done, or is not proper to be done, then the case falls within the general rule, and the general rule must govern it. It seems plain to me, that the time when an act, which is approved and signed by the president, takes effect, must appear, and can properly appear only from the act itself. By a standing general enactment, the act, when approved and signed, is to be forthwith lodged in the department of state and published; and the act so lodged in the department of state, or a certified transcript or authorized printed copy of it, is of course the only proper evidence, not only of its existence as a law, but of the time of its commencement; though it may be necessary and admissible in some instances, particularly when an act becomes a law by not being either signed or returned with objections, or by being returned and repassed by congress, to carry back the inquiry to the legislative journals. But it would be as unsafe, as it would be unfit, to allow the commencement of a public law, whenever the question may arise, whether at a near or distant time, to depend upon the uncertainty of parol proof, or upon anything extrinsic to the law and the authenticated recorded proceedings in passing it. In the case of Latless v. Holmes, 4 Term R. 660, which arose upon an act to take effect from and after its passage, it was determined that the time when the act passed could be known only by reference to the statute book. That would seem to be the sound and true doctrine upon the subject; and it appears to be fully confirmed by the observations of Lord Tenterden in Rex v. Justices of Middlesex, 2 Barn. & Adol. 818, where, speaking in reference to the time when acts of parliament were considered as referring to the first day of the session, he says, that if two acts, passed in the same session, were repugnant, it was not possible to know which of them received the royal assent first, for there was then no indorsement, as there is now, of the actual day on the roll.

As already suggested, now, in England as well as here, the operation of every act commences from the time of its approval by the executive, unless it is otherwise provided in the act. By the statute (33 Geo. III. c. 13) it is enacted, that upon every act of parliament, the day, month and year of its receiving the royal assent shall be indorsed, and such indorsement shall be taken to be a part of the act, and to be the date of its commencement, when no other comment is therein provided. The matter here, under the provisions of the constitution, or the practice of the government, as to the time when a law takes effect on being approved and signed by the president, is, in my judgment, placed upon no different footing. Neither in such case, any more than in the case where a law takes effect on being returned by the president with objections and repassed by congress, or on not being signed or returned within ten days after being presented to him, are any divisions of a day either implied or contemplated. The president has a right to retain a bill ten days for consideration, and if he approves it on any day within that time, he indorses the day of its approval upon the bill. The hour of the day, according to uniform and uninterrupted usage, never appears—for the reason, undoubtedly, that it is considered the same in legal effect, and consequently immaterial, whether the approval is upon one moment of the day or another. All we know, or can judicially know, is what appears from the date of the approval, which is a part and an essential part of the act, and anything beyond that we have no legal means of knowing. It is legally impossible, therefore, to distinguish between different parts of the day, if it was admissible to do so; and I must add, that I cannot see either the fitness, propriety, policy, or necessity, of introducing into the law, if practicable, the anomaly of making a repealing act, and the act repealed, both in

force and operation on one and the same day —one act on one part of the day, and the other act on the other part of the day.

So far as it concerns the commencement or termination of public laws, a day is an indivisible portion of time; and, I repeat, it would be unfit, inconvenient, and serve no valuable purpose, in my opinion, to have it otherwise. Of what practical importance can it be, whether a law takes effect on one or another part of a particular day? If it be meant that no law should go into operation, before the people have had the means of knowing its provisions, the proposition is a plain one, and easily understood; but it is not so easy to see or understand how it can be very material, so far as it respects the people's knowing or having the means of knowing the law, whether it takes effect the first or last part of the day on which it is approved. Whether a law ought to be made to take effect immediately on its passage, is a matter very proper for the consideration of the legislature. All laws, before they become such, pass through several stages, and are usually very slow in their progress. While they remain in transitu in congress, which is commonly a considerable time, the various proceedings upon them are spread abroad over the country through the medium of the public journals; and as it is known and understood that laws, after passing through the different legislative stages, take effect, in general, and unless it is otherwise specially provided, the day they are approved and signed by the president, there is very little reason for saying there is any surprise upon the public.

It would seem, however, to be more proper, as being more agreeable to the spirit of our institutions, that criminal laws, especially such as create new offences, or augment the punishment of old ones, should be made to take effect on a fixed future day, in order that they may be published and promulgated before they go into operation; but if made to take effect immediately on their passage, as it is generally supposed they may be constitutionally, it would be of very little consequence, as to any purpose of notice or publicity, at what part or hour of the day their operation commences. The supposition that there may, by possibility, be in point of fact, if not of law, a retrospective or ex post facto operation in such a case, proves, if it proves anything at all, not that we should divide the day into parts and restrict the law to the precise moment when it was actually approved, which we have seen to be impracticable, but, rather, that we should exclude the day of passing the law, which would not be impracticable, altogether from its operation; thus making criminal laws an exception to the general rule which has long obtained in the construction of statutes in this particular, and which is expressly confirmed and settled, as we shall hereafter see, by a modern adjudication of the best and highest authority. But, then, if we are to reason from supposed possible cases, we ought not to overlook the possible one of a criminal law being repealed and an act prohibited by it being committed on the same day of its repeal; and we should not be unmindful of what would be the effect, in such case, of excluding the day, or, according to a late suggestion, of suspending the operation of the repeal in judicial construction until the last instant of the day. It is easy to suppose extreme cases; but remote bare possibilities, however ingeniously put, merit but little consideration in settling a general principle.

As I have already said, the question arising in this case was first presented to me in a case of compulsory bankruptcy, which, whatever it may be in form, partakes in some measure of the nature of a criminal proceeding. I was called upon to say, whether you could coerce a man into bankruptcy against his will, divest him of all his property and rights of property, put a stop to his occupation, and break up his business, under a proceeding instituted and commenced on the day the bankrupt law was repealed. The question comprehended not only this, but also whether you could prosecute, and punish criminally, false swearing, or any other forbidden act done under such proceeding. I thought the question a very grave one, and felt its weight and importance. I thought what I have stated could not be done consistently with established legal principles; and I did not feel authorized to introduce new rules or new principles of law, or at liberty to indulge in any subtlety or refinement on old ones, to enable me to sustain a proceeding involving such consequences.

All agree that the material point in this case is, when did the act repealing the bankrupt law take effect? The whole question depends upon that. Now, I think this point has long ago been decided and settled in this country. It was decided and settled, as it appears to me, by the supreme court of the United States, in the case of Arnold v. U. S., 9 Cranch [13 U. S.] 104. The question in that case was, whether a certain cargo of goods, imported into the United States, came under the operation of the act of 1812, imposing double duties. The act provided, that an additional duty of one hundred per cent. upon the permanent duties imposed by existing laws, should be levied and collected upon all goods, wares, and merchandise, which should, from and after the passing of the act, be imported into the United States from any foreign port or place. The act was approved and signed by the president on the 1st day of July, and the goods were imported into the United States on the same day. The question was, whether the goods were subject to the double duties imposed by the act; and this depended upon a decision of the question when the act took effect.

It is insisted by counsel, that the court ought to give such a construction to the act, as that no citizen could, by possibility, be sub-

jected to its operation before it had actually passed; and that to prevent this, the court must either exclude the 1st day of July altogether, or must admit fractions of a day and suffer an inquiry into the very moment of time when the act received the signature of the president; for, if a vessel had arrived in the morning of the 1st day of July, and the act was not in fact approved by the president until the afternoon of that day, it could not be pretended that the goods brought in such vessel were imported after the passing of the act; and it was argued, that the difficulties attending an inquiry into the time when a law was approved, as well as the impropriety of calling on the president for information as to the moment when it received his sanction, might induce the court to say, that when the act was to take effect from and after the passing of the same, they would, as a general rule, exclude the day on which it passed. Such were the considerations urged by the learned counsel in the case; and it will be perceived that they are substantially the same, as those which have been presented on this occasion. But the court repudiated the argument of the learned counsel altogether, and held the construction contended for to be entirely inadmissible. They said the statute was to take effect from its passage, and it was a general rule, that, when the computation was to be made from an act done, the day on which the act was done is to be included. This was a direct recognition, that, in a question as to the time when a law takes effect, there are no parts or divisions of a day. The day is to be included, because, there being no fraction of a day, the act relates to the first moment of the day on which it is done, and as if it were then done. This is the very reason given in the books for the rule the court rely upon. Instead of intimating, that there could be any fraction of a day in such a question, or that it would be proper to reverse the general rule of law and consider the act in force only from the last instant of the day, the court held, that the day on which the act was approved was to be included in its operation, and that goods imported on that day must be taken to have been imported after the passing of the act, and of course were liable to the double duties imposed by it. Such was the decision; and it surely could not have been supposed at the time that the decision was at all at variance with any of the provisions of the constitution, or in the slightest degree incompatible with any of its principles or objects.

The case to which I have just referred is certainly a very strong case, and appears to me to be exactly in point. It decides, that an act, which is to take effect from and after its passage, goes into operation the day on which it is approved, and includes the day. The determination is one of high and paramount authority, and, in my judgment, covers the whole question presented in the present case. Looking, then, both to principle and authority, I am not able to see that there is any substantial ground for doubt upon the matter. Still, as different views have been expressed elsewhere, and as I never wish the rights of any party to be conclusively bound by my opinion, when there is any way open for an appeal to a higher tribunal, I shall very readily allow the question, if the petitioner desire it, to be certified into the circuit court, to be there ultimately settled and finally disposed of.

WELSH, Ex parte. See Case No. 351.

WELSH (BLYDENBURGH v.). See Case No. 1,583.

WELSH (CAFIERO v.). See Case No. 2,286.

WELSH (The JULIET C. CLARK v.). See Case No. 7,580.

Case No. 17,408.

WELSH v. LINDO.

[1 Cranch, C. C. 497.] [1]

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

EVIDENCE—PRIOR JUDGMENT—PROMISSORY NOTE.

In an action against an indorser of a promissory note, a record of a judgment upon the same note between other parties cannot be given in evidence, unless the note itself be produced, and the defendant's indorsement proved.

Assumpsit against the defendant as indorser of a promissory note made by Kerchival to Lindo, who assigned it to Welsh, "without recourse," who assigned it to Hodgsett.

E. J. Lee, for plaintiff, offered no evidence but a transcript of a record of a suit between Hodgsett and Kerchival, upon the note described in the declaration, in which suit the defendant pleaded payment to Lindo, and obtained a verdict on that issue.

Mr. Swann objected—That the record was not evidence in this cause, unless the plaintiff satisfied the jury, by other evidence, that the defendant assigned the note to the plaintiff. The note should be produced, and the handwriting of the defendant proved.

E. J. Lee, contrà. The note is filed in the court of Woodford county in Kentucky, at a greater distance than one hundred miles. The plaintiff cannot have a subpœna duces tecum. He cannot obtain the note. Hodgsett and Welsh both claimed under Lindo. A verdict is evidence, if it concern the same point, though not between the same parties. It is the best evidence in the power of the plaintiff.

Mr. Swann, in reply. Upon application to the court in Kentucky, it is probable they would have suffered the original note to be taken out. Nothing appears to the contrary. Until the assignment of Lindo is proved, it does not appear that Lindo was privy to Welsh, or to either of the other parties.

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

THE COURT (DUCKETT, Circuit Judge, absent) instructed the jury that the record is not evidence until the assignment from Lindo to the plaintiff be first proved otherwise than by the record. A juror was withdrawn by consent, and the cause continued at the costs of the plaintiff.

[On a subsequent trial a verdict was rendered for defendant. The cause was then carried by writ of error to the supreme court, where the judgment of the circuit court was affirmed. 7 Cranch (11 U. S.) 159.

[See Case No. 17,409.]

Case No. 17,409.

WELSH v. LINDO.

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

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

EVIDENCE—DEBT ON PROMISSORY NOTE—FORMER RECOVERY.

1. A former recovery may be given in evidence upon nil debet.

2. A former recovery upon a count for goods sold and delivered, may be given in evidence in an action of debt upon a promissory note, with an evidence that judgment was confessed in the former action upon and for the note now declared upon.

[Cited in New York, L. E. & W. R. Co. v. McHenry, 17 Fed. 418.]

Debt on a promissory note for $382.47. The defendant pleaded nil debet.

Mr. Swann and Mr. Jones, for defendant, offered in evidence under the plea of nil debet, a record of Frederick county, Virginia, of a judgment upon a declaration for $10,000 for goods, wares, and merchandises sold and delivered, upon which judgment was confessed for £739 13s. and offered parol evidence to prove that the judgment was upon and for this note and another.

C. Simms and E. J. Lee, for plaintiff, objected that it ought to have been pleaded; that it cannot be for the same cause of action. Goods sold and delivered, and a promissory note are different causes of action, and cannot be averred to be the same. Rook v. Sheriff of Salisbury, 12 Mod. 412; Bredon v. Harman, 2 Strange, 701; 4 Bac. Abr. 114; Id. "Pleas and Pleading, I." 113.

THE COURT (DUCKETT, Circuit Judge, absent) was of opinion that the former recovery may be given in evidence on nil debet, and that parol evidence may be given to show, that although the action was indebitatus assumpsit for goods sold and delivered, the judgment was really confessed for and upon the notes, and that this parol evidence was not contradictory to the record.

The plaintiff became nonsuit, with leave to move to reinstate.

[See Case No. 17,408.]

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

WELSH (POOL v.). See Case No. 11,269.

WELSH (ROBBINS v.). See Case No. 11,887.

WELSH v. SEARS. See Case No. 7,494.

WELSH (SMITH v.). See Case No. 13,126.

WELSH, The J. M. See Case No. 7,327.

WEMPLE (PITTS v.). See Cases Nos. 11,194 and 11,195.

WENBERG (ATLANTIC DOCK CO. v.). See Case No. 622.

WENDELL (THAYER v.). See Case No. 13,873.

WENDELL (UNITED STATES v.). See Case No. 16,666.

WENDLINGER, Ex parte. See Case No. 2,235.

Case No. 17,410.

The WENONA.

[4 Ben. 207.] [1]

District Court, N. D. New York. May, 1870.[2]

COLLISION ON LAKE ERIE—STEAMER AND SCHOONER—VESSELS MEETING—LIGHTS—CHANGE OF COURSE IN EXTREMIS.

1. The steamer W. and the schooner F. came in collision on Lake Erie, on the night of November 29, 1869. The wind was about south. The F. was heading about southwest by west, close hauled, running five or six miles an hour. She saw the head-light of the W. nearly ahead, but a little on her starboard bow, and at once displayed a torch light. That light was displayed a second time before the collision. The F. was kept on her course till shortly before the collision, when her helm was put hard a-port. The W. was heading east three-quarters north. She saw the flash light of the F. a little on her port bow, and kept on till the green light of the F. was seen nearly ahead, when her helm was put to starboard, and she swung slowly to port, keeping on at her speed of eight to ten miles an hour, till the vessels were, as she claimed, from an eighth to a quarter of a mile apart, and the green light was on her starboard bow, when the green light disappeared, and the red light of the F. came in sight. The helm of the W. was at once put hard a-starboard, and her engine was stopped and backed, and several turns back were made before the collision. The W. struck the F. on her port bow, angling forward, and sunk her. It appeared that the lights of the F. were set on her pawl post, and were twenty-two inches apart, that being the diameter of her bowsprit. *Held*, that the steamer was in fault for not having taken earlier and more decided measures to avoid the schooner: that she should have starboarded more decidedly when she made the first change; that she should have slowed before she did, stopped and backed earlier; and that, on seeing the red light, she should have ported.

2. The schooner was not in fault for changing her course on seeing the near approach of the steamer, without any apparent change of her course, notwithstanding the exhibition of the two torch lights.

3. The lights of the F. were not placed in accordance with the statute, and their position was a fault on her part, but the W. was not

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

[2] [Reversed in Case No. 17,411. Decree of circuit court reversed by supreme court in 19 Wall. (86 U. S.) 41.]

misled by them, and that fault therefore did not contribute to the collision.

In admiralty.

B. H. Williams and Ganson, for libellant.
Geo. B. Hibbard, for respondents.

HALL, District Judge. This suit is prosecuted by William T. Fraser, the owner of the schooner Fremont, against the propeller Wenona, to recover the damages occasioned by a collision between those vessels on Lake Erie, about nine o'clock in the evening of the 29th day of November, 1869. The Fremont sunk soon after the collision, and, with her cargo of salt, was totally lost.

The libel alleges that, about nine o'clock in the evening, while the Fremont was on a voyage from Oswego to Sandusky, and near the middle of Lake Erie the masthead light of the Wenona was discovered nearly ahead, and apparently about a mile and a half distant; that the schooner was then moving southwest by west half west, about five or six miles an hour; that she was properly officered and manned, and had the proper lookout, and displayed the required signal lights; that as soon as the masthead light of the Wenona was discovered, a torch light was lighted, and conspicuously displayed on the Fremont, and that such torch was kept lighted and swung on the Fremont until on or about the moment of the collision; that after said masthead light was discovered, the Fremont kept her said course, and very soon after, the red and green lights of the propeller were discovered ahead of the schooner, and apparently about a mile off; that the schooner kept her course, and a few minutes afterwards the hull of the propeller was discovered on the port bow of the schooner, and the propeller seemed to be crossing the bow of the schooner; that the propeller continuing to approach the schooner with great velocity, and a collision being inevitable, and the propeller being about to run down the schooner, the master of the schooner, to lessen the force of the blow, ordered the helm of the schooner to be put to port; that the propeller immediately thereafter struck with her stem the port side of the schooner, on her weather bow, at an angle from eight to ten points, staving in the bow, and smashing the planks and timber of the schooner, so that the schooner and her cargo sank and were totally lost, about an hour after the collision took place. The libel also alleges that the weather was hazy, with rain, and that the wind was from the south.

The answer alleges that the propeller was properly officered, manned, and navigated, and had the proper lookout and signal lights, and was not in fault in respect to the collision; and it denies all the allegations of the libel, which are inconsistent with the statements of the answer. It then states that while the propeller was proceeding on a course east three-quarters north, a flash light was seen at a considerable distance off, about half a point on the propeller's port bow; that the flash light appeared alone for a short time, when a green light was seen from the propeller, dead ahead, or nearly so; that the wheel of the propeller was put a-starboard, and she swung and continued to swing to port; that the green light opened on the propeller's starboard bow, and afterwards the green light of the schooner disappeared, and her red light became visible; that the wheel of the propeller was put hard a-starboard, and her engine was stopped and backed; that soon afterwards the propeller and schooner came in collision, the schooner striking the propeller on her starboard bow, at an angle which the respondents were unable to state precisely.

These statements of the pleadings are meagre and indefinite, rather than full and precise; and there is, in some respects, considerable discrepancy between the allegations of the parties and their proofs. The proof, on the part of the Wenona, is, that although her general course was, by her own compass, east three-quarters north, as stated in the answer, her true and actual course was east by north half north, or three-fourths of a point to the northward of the course stated in the answer. The proofs on the part of the schooner are, that her heading was southwest by west half west, as stated in the libel, but her master testified that she was making about a point leeway. There was therefore, according to the proofs of the two vessels, only a single point between the lines of their respective keels, and still less difference in the lines of their actual progress, as they were proceeding in nearly opposite directions. There is little doubt that the speed of the propeller was about ten miles an hour, and the speed of the schooner about five or six miles an hour. The proof shows that the night was dark, with a drizzling rain; and although the witnesses state that there was no fog, they all agree that there was a haze upon the water. It was therefore a night not favorable to the early discovery of approaching signal lights, and for that reason great care and vigilant watchfulness, on the part of the lookout and officer in charge of each vessel, were required in order to prevent a collision.

(After giving an abstract of the statements of the principal witnesses from each vessel, the judge proceeded): Upon these pleadings and proofs, it is not difficult to reach a satisfactory conclusion in respect to some of the material facts of the case; but in respect to others, and particularly in respect to the distances between the vessels when the different changes of helm were made, and to the extent to which each vessel changed her course, there is much uncertainty and doubt. The general course, or rather heading, of the Wenona, before her course was changed to avoid a collision, was east by north half north, and that of the Fremont was southwest by west half west. They were therefore heading in nearly opposite directions, there being only a single point between the lines of their respec-

tive keels, and the leeway which the Fremont was making made the lines of their actual progress nearly parallel. The Fremont, when her torch light was first seen from the Wenona, was about half a point off the port bow of the latter. The Wenona was more nearly directly ahead of the Fremont, but probably about a quarter of a point off her starboard bow. But such bearings are only approximations to mathematical accuracy, for when a light is seen half a point or more off the bow of a moving vessel, and its bearing is deliberately and carefully estimated by the eye only, without the use of a compass or other instrument to determine its bearing, such estimate may be deemed a close one if it is within a quarter of a point of the true bearing. Estimates of time and estimates of distance—particularly the distance between vessels approaching each other in a dark, hazy, rainy night—are still more unreliable; but, nevertheless, it is upon such and similar estimates, and upon the conflicting testimony of witnesses not always disinterested and unprejudiced, that courts of admiralty are compelled to decide important collision suits, according to their views of the preponderance of the testimony and the probabilities of the case.

The estimates of the respondent's witnesses in respect to the distance between the vessels and the time that elapsed between the first exhibition of a torch light and the collision, if entirely reliable, would show that the vessels were then two miles or more apart; but their testimony in respect to the subsequent management of their own vessel and the angle at which the vessels struck, as well as the testimony on the part of the libellant, renders it most probable that when the torch light was first seen, the vessels were not more than a mile and a half apart. The wind was between south and south-south-east, and probably between south and south by east. The Fremont was nearly close-hauled, and was making considerable leeway; and her master, who alone testified in respect to the extent of such leeway, estimated that her actual course through the water was a point to the northward of the line of her keel. This estimate may be somewhat too liberal, and the propeller may have made a very little leeway; and it may therefore be safe to assume that the leeway of the schooner exceeded that of the propeller only half or three-fourths of a point. The heading of the Fremont being one point more to the southward than the northward heading of the Wenona, the former should show, as she did, her green light to the Wenona, while it is quite probable that the Wenona, from her being more directly ahead of the Fremont, and from the shorter screens of her signal lights would show both her colored lights to the Fremont. Almost immediately after first seeing the green light of the Fremont, and before any sufficiently careful observation of the continued bearing, or change of bearing, of her light had been made, the wheel of the Wenona was starboarded, and she continued to swing very slowly under a starboard wheel, until her wheel was ordered hard-a-starboard, a very short time prior to the collision. She was not steadied after her wheel was first starboarded, and her master testified that he thought she might have swung seven and a half points to port before the collision.

The slow but continuous change of the propeller's course, as she proceeded at a speed of about ten miles an hour, and as the schooner proceeded on her course at a speed of five or six miles an hour, and making a half a point or more of leeway, would probably keep the propeller's head so nearly directly towards the schooner, that both the propeller's signal lights would be seen from the schooner, although the schooner, from her heading being about half a point to the southward of the propeller's original heading and position, and still further to the southward of the propeller's heading after her wheel was put to the starboard, would continue to show her green light to the propeller until the schooner's wheel was put hard-a-port, to avoid the collision, or to lessen the effects of the blow. And this would be the more probable, because, as soon as the propeller's course was changed half a point under her starboard wheel, she would be running on a curved line which would carry her more and more to the northward of the heading of the schooner. When the schooner put her wheel hard-a-port and changed her course so as to bring her red light into view from the propeller, the propeller's wheel was put hard-a-starboard, and both vessels swung rapidly to the northward until they struck.

As before stated, it can hardly be doubted that most of the estimates of time and distance made by the witnesses of the respondents were too liberal, and that the changes of the helm of the propeller were not ordered until the vessels were nearer together than their estimates would indicate. If the vessels were two miles apart when the first torch light was seen by the lookout and master of the propeller, and her wheel was then starboarded, and afterwards put hard-a-starboard—both as soon after as should be inferred from their testimony—it is hardly possible that the propeller ran less than three-fourths of a mile while constantly swinging under a starboard wheel, or that she would not have swung to port more than seven and a half or even nine points before the collision. On the other hand, it is quite certain that some of the estimates of time and distance made by the libellant's witnesses are not sufficiently liberal, and it is most likely that the wheel of the schooner was ordered hard-a-port when the two vessels were as much as three or four and possibly five or six hundred feet apart.

The proof on the part of the schooner is positive that she kept steadily upon her general course, until her helm was put hard-a-

port just prior to the collision; and the proof on the part of the propeller does not tend to prove any change of her course until the change was made which brought her red light into view, a short time before the collision. The propeller's witnesses state that the vessels were then from an eighth to half a mile apart, but this distance, like the other distances, was doubtless overstated. On the other hand, the witnesses for the libellant who state that the vessels were not more than from 100 to 400 feet apart, when the schooner's helm was ordered hard-a-port—different witnesses giving different estimates of the distance—have probably under-estimated the distance. It was after this red light was seen from the Wenona that her wheel was ordered hard-a-starboard; and it was not until after that second change of wheel, nor until after the master of the Wenona (as he testified) saw that they could not clear the schooner, that the bells of the Wenona were rung to stop and back her engine. The engineer of the propeller testified that he stopped and reversed his engine in four seconds, and that the engine had made from six to eight and perhaps ten revolutions backward before the vessels struck. Her master's testimony in respect to giving and immediately repeating the signals to stop and back, and the striking of the vessels immediately after, as well as the great force and destructive effects of the blow, and the testimony of the libellant's witnesses that they heard the bells of the propeller just before the vessels struck, show that these signals were not given until the vessels were very near together, and no previous order to slacken the propeller's speed had been given. The master of the Wenona says that when he first saw the red light of the schooner, she was from a quarter to half a mile off, and then he ordered his wheel hard-a-starboard. If she was then even a quarter of a mile off, and he had instantly rung to stop and reverse his engine, it is believed that the headway of the Wenona could have been stopped, or so much lessened that the schooner would not have been struck, or would not have been very materially injured, even if the vessels had come in contact. But no signal to stop and reverse, or even to slacken speed, was then given, and it is evident that the signal to stop and back was given so late that the speed of the propeller had not been greatly reduced before the collision occurred.

The testimony on the part of the libellant shows that the propeller, as she approached the schooner, continued to head nearly on the latter, and that the schooner's helm was not changed until a collision seemed inevitable. A powerful propeller, approaching at full speed, and continually heading almost directly upon the schooner, without any apparent change of course tending to avert the threatened collision, until the vessels were not more than five or six hundred feet apart, although two successive torch-lights had been burned to warn her of the apprehended danger, would present such an appearance of great and imminent danger to the vessel and her crew, that the most experienced and least excitable officer of the deck might well feel that something must be done to avert the impending danger. As against the party whose fault had brought him into such danger, even an error of judgment should not, under such circumstances, be considered a fault. But it is by no means certain that there was any error of judgment. The propeller had the right to choose her side in passing the schooner, and she had not made a decided change of course, so as to show that her wheel had been changed. In ignorance of what change, if any, she would make, and with the imminent danger of being almost immediately run down by a propeller which had apparently given no attention to her two torch-lights, or her ordinary signal lights, the master of the schooner can hardly be deemed in fault, because he ordered his wheel hard-a-port; even if there was no reason whatever for preferring that order, to an order to put the wheel hard-a-starboard. But the more usual change of wheel to avoid a collision, when the approaching vessel is in imminently dangerous proximity, is to put it hard-a-port; and it is the habit, and it may almost be said to be the instinct, of a sailor to adopt that course, when there is apparently no reason to prefer the opposite change of helm. But, in this case, the proof shows that the Wenona, though coming almost directly towards the schooner, was on the schooner's port bow; so that the change of wheel made by the schooner was the proper change, under all the indications to which her master was obliged to look to determine its propriety. Besides, the vessels were then so situated, both in respect to their heading, and their dangerous proximity and speed, that it is impossible to say that the collision would have been averted, or the injury less, if the schooner had not changed her wheel, as it is most likely that the schooner would then have been struck on her side, nearly amidship and more nearly at a right angle.

The provisions of the 3d section of the act of congress of April 29, 1864 [13 Stat. 59], so far as the same relate to signal lights to be carried by sail vessels, and which require sailing ships or vessels, when under way, to carry, "On the starboard side, a green light so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles;" and, "On the port side, a red light, so constructed as to throw an uniform unbroken light over an arc of the horizon of ten points of the com-

pass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles;" and that "the said green and red lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bows," must be considered, as they prescribe the signal lights which the Fremont was bound to carry and display on the night of the collision. In addition to colored lights, such as the Fremont was bound to carry, the Wenona was bound to carry, and did carry, a bright mast-head light; but it is not necessary to refer more particularly to the provisions relating to the lights to be carried by propellers and other steam vessels, because it is not deemed necessary to discuss the question as to the sufficiency of the propeller's lights. It is entirely clear that the collision complained of was not caused by any deficiency in the propeller's signal lights; and there is scarcely any doubt that she carried and displayed all the signal lights required.

The 15th, 16th, 18th, and 19th articles of said act prescribe the duties which devolved upon the Wenona and Fremont, from the time that there was risk of a collision between them. These articles are the same, in substance, as the rules which had been often sanctioned and enforced by our courts of admiralty, in cases like those provided for in such articles, before the adoption of such articles by the act of congress. In the case of New York & Liverpool U. S. M. S. Co. v. Rumball, 21 How. [62 U. S.] 372, 383, the supreme court of the United States, after discussing the testimony in the case, and showing that the direct testimony of those on board a sailing vessel, in respect to an alleged change of her course, should generally prevail as against the statements or opinions of the witnesses on the approaching vessel, proceed to say, "The evidence clearly shows that the brig kept her course, without any change whatever, until the peril was impending and the collision inevitable. An error committed by those in charge of a vessel under such circumstances, if the vessel is otherwise without fault, would not impair her right to recover for the injuries occasioned by the collision, for the plain reason that those who produced the peril, and put the vessel in that situation, would be chargeable with the error, and must answer the consequences. Sailing vessels, when approaching a steamer, are required to keep their course; and steamers, under such circumstances, as a general rule, are required to keep out of the way. Many considerations concur to show that all those, engaged in navigating vessels upon the seas, are bound to observe the nautical rules, recognized and approved by the courts, in the management of their vessels on approaching a point where there is danger of collision. Those rules were framed and are administered to prevent such disasters, and to afford security to life and property exposed to such dangers; and public policy, as well as the best interest of all concerned, requires that they should be constantly and rigidly enforced in all cases to which they apply. Few cases can be imagined where it is more needful that they should be observed than when a steamer and a sailing vessel are approaching each other in opposite directions, or on intersecting lines, for the obvious reason that the negligence of the one is liable to baffle the vigilance of the other; and if one of the vessels, under such circumstances, follows the rule, and the other omits to do so, or violates it, a collision is almost certain to follow. Rules of navigation, such as have been mentioned, are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course, after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description, while they are yet so distant from each other that measures of precaution have not become necessary to avoid a collision. Sailing vessels approaching a steamer are required to keep their course on account of the correlative duty which is devolved upon the steamer in order that the steamer may know the position of the object to be avoided, and may not be led into error in her endeavor to comply with the requirement. Under the rule that the steamer must keep out of the way, she must of necessity determine for herself, and upon her own responsibility, independently of the sailing vessel, whether it is safer to go to the right or left, or to stop; and in order that she may not be deprived of the means of determining the matter wisely, and that she may not be defeated or baffled in the attempt to perform her duty in the emergency, it is required in the admiralty jurisprudence of the United States that the sailing vessel shall keep her course, and allow the steamer to pass either on the right or left, or to adopt such measures of precaution as she may deem best suited to enable her to perform her duty and fulfil the requirement of the law to keep out of the way. Repeated decisions of this court have affirmed the doctrine here laid down, and carried it out to its logical conclusion, and in so many instances that the question cannot any longer be regarded as open to dispute. Accordingly, it was held in the case of the steamer Oregon v. Rocca, 18 How. [59 U. S.] 570, that when a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precautions

to avoid a collision; and if this be not done, prima facie, the steamer is chargeable with fault." And see The Nichols, 7 Wall. [74 U. S.] 656, 666; The Carroll, 8 Wall. [75 U. S.] 302, 305, 306.

Under the rules of navigation cited from the act of congress, and under the well considered decisions of the admiralty courts, the Wenona must be held in fault.

1. She was sufficiently warned by the display of the first torch light on the Fremont that there was risk of a collision, and the result proves that the apprehensions which prompted that signal of danger were not unfounded. There was then, or almost immediately after, a risk of collision involved, as was admitted by the master of the propeller in ordering his wheel to be changed in order to avoid it. It was then, by the express and imperative language of article 16, the duty of the Wenona to slacken her speed; and the failure to obey the rule in this respect is considered a distinct fault.

2. The light of the schooner was on the propeller's port bow when the propeller's wheel was starboarded, and the actual course of the schooner, in consequence of her lee-way, was not then carrying her to the starboard side of the propeller. Only the green light of a vessel should be visible from an approaching vessel if the heading of the former be half a point or more to the starboard side of the latter, and as the wind then was, it was apparent that the vessels were running in nearly opposite directions. If a change of course, without checking the speed of the propeller, was to be relied upon to prevent a collision and the vessels were then so near together that there was not sufficient time to watch the schooner's light until it could be determined in which direction, and to what extent, the propeller's wheel should be changed, it should have been put hard over, so as to produce a rapid and marked change of course, not only sufficient to prevent a collision, if the schooner maintained her course, but sufficient also to relieve those in charge of the approaching vessel from such appearances of impending destruction as might reasonably induce a change of course. The change of the propeller's wheel was made without a sufficient knowledge of the schooner's course; it was in the wrong direction, and so slight that it increased the chances of a collision, and finally produced that complained of. If there was not sufficient time to ascertain the actual position and course of the schooner, so that the proper change of helm could be deliberately determined upon, the change made under such circumstances of doubt should have been so decided, that proper watchfulness on the part of the officer of the deck and lookout of the schooner would have secured them against reasonable apprehension of being run down by the propeller.

3. The second torch light of the schooner, the near approach of the vessels, and other indications of danger even before the red light of the schooner was seen, should have induced an order to stop and reverse the engine of the propeller; but this order was not given even as soon as the red light appeared. If it had been then given, and the vessels were as far apart as the master of the Wenona supposes, the Fremont would have escaped entirely, or without more than a trifling injury; and if, as is believed, the vessels were then so near together that the headway of the propeller could not have been nearly stopped, there is abundant reason for saying that the engine of the propeller was not stopped and reversed as soon as the rules require.

4. The proof shows that the schooner's light when first made was about half a point on the port bow of the propeller, and that although the propeller swung to port several points, under a starboard wheel, before the schooner's green light was shut in, and her red light appeared, she was still, as the master of the Wenona says, only about two points off the starboard bow of the propeller, thus clearly showing, that either from her leeway or other cause, her actual course was continually leading her to the leeward, and across the line of the original or general course of the propeller; and yet the master of the propeller continued to swing his vessel slowly to starboard, until her red light made it certain that she was passing rapidly across his bow to his port side, and then, (when, as he now says, he thinks she was a quarter to half a mile off), he ordered his helm hard-a-starboard, instead of stopping and backing, or ordering his wheel hard-a-port, to pass under her stern. It is true the vessels were probably so near together when the red light appeared, that an order to put the helm of the propeller hard-a-port, might not have prevented the collision; but taking the estimate and testimony of the master of the Wenona to be entirely correct, it is quite certain that the collision could then have been prevented, either by putting his helm hard-a-port or stopping and reversing his engine. Indeed, looking at the case as it would stand upon the testimony of the master of the Wenona alone, it is impossible to resist the conclusion that the Wenona was in fault; especially in not lessening her speed as soon as there was risk of collision, in not making a decided change of course when his helm was starboarded, and in failing to stop and reverse his engine when the circumstances required it. The importance of a strict observance of the rules which require steamers to slacken their speed and to stop and reverse their engines, and also of making decided, instead of very slight changes of helm, were fully discussed by this court in the case of the Arctic and the Scioto, and can hardly be over stated.

The conclusion that the propeller was in fault, renders it necessary to consider whether the schooner should also be held in fault, in respect to the collision. It appears that the signal lights of the Fremont were set on her pawl-post, and their sides were twenty-two inches apart, that being the diameter of her bowsprit; that they were square on two sides, and round on the other, so as to set in a corner, and were eight inches through the square part; that

there was a screen board an inch and a quarter thick, and eight or nine feet long, and a foot and a half wide at the pawl-post, set up between the lamps, and that the pawl-post was about five feet above the deck, and a foot above the rail. That this location of the colored lights of the schooner was improper, was insisted upon by the respondents, and it was urged that the collision was caused by the fault of the schooner, in not fixing and displaying her signal lights as required by statute; and by her change of course a short time before the collision.

On the other hand it was insisted by the libellant, that the schooner's lights were properly fixed and displayed; that there is no provision of the statute which required a different location; that the schooner's course was not changed until a collision was inevitable; and that such change of course did not contribute to the collision.

It can hardly be doubted that the schooner's lights were not located and fixed as the statute requires. Although no precise location is, or indeed properly could be, prescribed by the statute, the rule requires that vessels shall carry on the starboard side, a green light, and on the port side, a red light; and the language, and the reason of the rule alike require that these lights should be displayed substantially on their respective sides of the vessel, instead of being carried inboard and substantially on the centre line of the hull. Their location upon the pawl-post nearly over the keel of the vessel, and several feet abaft the stem, is not a compliance with the statute; and in that location they are much more likely to be obscured from the lookout of an approaching vessel, than when carried on the side or rail, or in the fore-rigging. The indications afforded by these colored lights are, and, to a certain extent, must be mainly relied upon to determine the course of a vessel, approaching another vessel in the night, and no court should relax the stringency of the statutory rule, which requires their location substantially upon the side of the vessel, and the fixing of their side screens of such form and length as the statute prescribes, so nearly parallel to the line of the keel, as to be in substantial if not in strict conformity with the act of congress. If properly located and sufficiently secured in the fore-rigging, with the required side screens carefully adjusted on lines parallel to the vessel's keel, they may be quite as efficient as when carried upon the rail; but to sanction their location upon the pawl-post would, it is believed, be extremely injurious to the interests of commerce. The schooner should therefore be held in fault, unless the testimony in the case satisfactorily shows, that the improper location of her signal lights, did not in any manner contribute to the production of the collision. This point in the case has therefore been very deliberately considered.

Notwithstanding the darkness, the haze upon the water, and the fine rain, which, together, prevented the colored lights of a vessel from being seen as far as in a dark night, with a clear atmosphere, the green light of the schooner, and the only one her heading and position required her to show to the propeller, was seen as soon as the first torch light went out, and at such distance that there was no difficulty whatever in the propeller's keeping out of the way of the schooner, by a decided change of helm, without stopping and reversing, or even stopping her engine.

It is quite certain upon the testimony that from that time forward one or the other of the schooner's colored lights were or might have been seen, except while her flash light was exhibited the second time; there is no proof that both were at any time obscured by sails, bowsprit, boom or rail; and there is no reason to believe that those in charge of the Wenona, were in any way misled by the improper location or any other defect, of such colored lights; —or that the proper colored light to indicate her heading, was not at all times visible from the Wenona. It will therefore be held that the improper location of the schooner's lights did not contribute to the collision.

The reasons why the change of wheel made by the schooner, when a collision was inevitable, and it was apparent that the propeller was taking no sufficient measures to avoid it, should not be considered a fault contributing to the collision, have already been sufficiently given.

On the whole case the propeller will be held in fault, and the schooner held to be without fault contributing to the collision.

[NOTE. On appeal to the circuit court, the above decree was reversed. Case No. 17,411. An appeal was then taken to the supreme court, where the decree of the circuit court was reversed, and the cause remanded, with directions to affirm the decree of the district court. 19 Wall. (86 U. S.) 41.]

Case No. 17,411.

The WENONA.

[8 Blatchf. 499.] [1]

Circuit Court, N. D. New York. June 20, 1871.[2]

COLLISION BETWEEN STEAMER AND SAIL — PRESUMPTIONS — CHANGE OF COURSE BY SAIL—LIGHTS.

1. Under the rule which requires a vessel propelled by steam to keep out of the way of a sailing vessel, the mere proof that the former collided with the latter, unaccompanied by circumstances exonerating her, raises a presumption of fault in the former, which she must overcome or be condemned.

2. In this case, which was one of a collision between a steamer and a schooner, it was found that the schooner changed her course and thwarted prudent and proper movements which the steamer, on seeing her, had made, to avoid her, and that the schooner was in fault and the steamer was not in fault.

3. When a steamer sees the green light of another vessel directly ahead, it is nearly certain,

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

[2] [Reversing Case No. 17,410. Decree of circuit court reversed by supreme court in 19 Wall. (86 U. S.) 41.]

that, if both keep their courses, there can be no collision; and, in such case, starboarding by the steamer, out of abundant caution, though unnecessary, is not reprehensible.

[Cited in The Excelsior, 12 Fed. 201, 203.]

4. Vessels approaching each other, and seeing the lights of each other, not only have a right, but are bound, to assume that the lights seen are properly set and screened.

[Cited in The Free State, Case No. 5,090.]

5. The location of the lights of the schooner, not approved.

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

[This was a libel by William T. Fraser against the propeller Wenona, William G. Fargo and others, claimants. From a decree of the district court in favor of libelant (Case No. 17,410), respondents appealed.]

John Ganson, for libelant.

George B. Hibbard, for claimants.

WOODRUFF, Circuit Judge. At about 9 o'clock in the evening of the 29th of November, 1869, the schooner Fremont, of which the libellant was master and owner, was on her voyage up Lake Erie, bound for Sandusky. Her course, by her compass, was south-west by west half west, with a six knot breeze from south or between south and south by east. It appears by the testimony, that she made some lee way, so that her movement in the water was somewhat more westerly than the line of her keel; and her speed was five or six miles an hour. At the same time, the steam propeller Wenona, from Chicago, bound for Buffalo, was coming down the lake, on a course, by her compass, east three quarters north, but the testimony is, that her compass varied, and that her true course was east by north half north, if it be assumed that she made no lee way; and her speed was about ten miles an hour. The two vessels came into collision, the schooner was sunk, the libel herein was filed by her master and owner, and, in the district court, he had a decree for the value of the schooner, her cargo, &c., from which the owners of the Wenona have appealed to this court.

The theories of the respective parties touching the manner and cause of the collision are in utter conflict, and the testimony of the witnesses, on some material points, cannot be reconciled. If full credence were to be given to all that is averred in the libel, and to what is testified by the witnesses for the libellant, it would seem that the schooner was in no fault; and yet their account of the transaction is so incredible, that, when met by the testimony for the claimants, the learned and experienced judge of the district court, as is manifest from his opinion herein, was constrained to reject the theory of the libel, and, to a large extent, that of the libellant's witnesses.

Under the rule which requires a vessel propelled by steam to keep out of the way of a sailing vessel, the mere proof that she collided with the latter, unaccompanied by circumstances exonerating her, raises a presumption of fault in the former, which she must overcome or be condemned. In this case, the claimants have assumed the burthen of discharging themselves, by showing that the Wenona did make proper effort, in the exercise of sound judgment and good seamanship, and that such effort was defeated by a change in the course of the schooner, in violation of the rule, which, while it imposed on the propeller the duty of keeping out of the way, with no less stringency required the schooner to keep her course, in order that the efforts of the propeller might not be defeated. This change of course the witnesses for the libellant deny; and their theory and statement of the manner in which the collision was caused by the propeller, is framed to account for the fact of collision consistently with the absence of such change.

Before bringing the testimony on either side to the test of credibility on this great point of difference, and, especially, before inquiring whether the propeller did, in fact, what it was her duty to do, it is of prime importance to ascertain the position and relation of each vessel to the other, when each was first sighted. This, I think, can be done by reference to facts that are not in dispute. When the propeller was first seen from the schooner, the mate of the schooner displayed a torch-light, which flashed for a very few seconds, and, very soon after, was re-lighted, and again displayed for other few seconds. The night was rainy, and a slight haze was above the water, so that this first flash light could be seen from the propeller before the colored lights of the schooner were visible. The light of the propeller first seen from the schooner was her white mast-head light, that also being visible before the colored lights of the propeller could be seen. The course of the schooner being south-west by west half west, (her actual motion in the water, by reason of leeway, being a little more westerly,) and that of the propeller east by north half north, their courses, by mathematical certainty, crossed each other at some point on the lake; and it is material to know where, in relation to these vessels. When the white mast head light of the propeller was first seen from the schooner, it bore a little on her starboard bow. The libel states it as nearly ahead. Her witnesses, however, state it as on her starboard or lee bow. The acts of these witnesses at the time prove that the propeller was seen to their starboard, for they exhibited their flash-light from and on their starboard side, aft, to signal to the propeller their presence. That side was the proper place for the exhibition of a torch-light to a vessel which was seen to starboard, and would not have been chosen for the exhibition of a light to a vessel seen to port. The libellant's witnesses from the schooner, who first saw the propeller's white light, are confirmed by their own impulsive contemporaneous acts, and, upon their testimony, I should regard the fact as established. It is, moreover, indirectly confirmed by the testimony of the witnesses from the propeller, in their observations upon the movements of the schooner.

On the other hand, the flash-light of the schooner was first seen one-half point on the port bow of the propeller. To this the testimony of those on the propeller is uniform; and there is nothing in the testimony of the libellant's witnesses which conflicts with it, but, as I think, it confirms it. From this it follows, without possibility of mistake, that the courses of the two vessels crossed each other at some point between the two. The vessels, on their respective courses, cannot be placed on the lake so as to be seen in the manner stated, unless those courses so crossed; for, if the schooner had passed the point of intersection, her flash-light must have been seen over the propeller's starboard bow, and, if the propeller had passed the point of intersection, her mast-head light must have been seen on the schooner's port bow. They were, therefore, at that time, approaching each other on converging lines, varying, however, from a parallel, less than one point, the propeller being to the starboard or leeward of the course of the schooner. They were about one and a half, or, possibly, two miles distant from each other. I think the proof shows the former distance most conformable to all the other facts. Next, the testimony of the witnesses from the propeller is uniform, that, shortly after the first flash-light of the schooner was seen, and before there was any change of course by either vessel, the green light of the schooner became visible. Some of the witnesses state that it bore slightly on the port bow. The master states his observation of it as directly ahead. Whether it was discerned through the haze a moment sooner by some than others, it is manifest that the schooner had then reached, or was on the verge of reaching, the point of intersection. The testimony of the mate and wheelsman of the schooner confirms this. The first flash-light was shown when the propeller bore on their starboard bow. After this flash-light, the colored lights of the propeller came into view. The schooner having reached the point of intersection, this would be true, and, as the green light is said to be visible a little further than the red, an instant would still elapse, when all three of the propeller's lights would be visible from the schooner, and the green light only of the schooner be visible from the propeller. This, I think, exhibits the position, and relative bearing, and actual relation, of the two vessels, before there is any ground to claim that either changed her course. The propeller bore a little on the starboard bow of the schooner, exhibiting to her all her lights. The schooner bore directly ahead of the propeller, (being at the point of intersection of the two courses,) exhibiting to the propeller her green light, and having, also, by closing in upon the port bow of the propeller, further shown, by her actual motion, that, though bearing ahead, she was crossing the propeller's bows.

The theory of the libellant is, that the schooner kept her course, but that the propeller passed to the port, or windward, side of the schooner, opening on her port bow, according to the testimony of her wheelsman, three to four points, and perhaps more; of her cook, four points; of her second mate, two points; of her master, two and a half points; and of her lookout, one and a half points; and then bore down directly for the schooner, with all her lights in full view; and that, at the instant before collision, and when but a few feet distant, the collision appearing inevitable, the master, to ease the blow, gave an order "hard-a-port," but, before the schooner had time to swing more than a point, or a point and a half, at most, the propeller struck the bow of the schooner, angling forward, at less than a right angle between the sterns, and broke in the schooner, shoving her around, as is testified, and, at that moment, the schooner's sails gybed over to the other, that is, the larboard side. The testimony of the master is, that the main boom went over.

The case of the libellant, as testified to, makes this the explanation of the occurrence, and imputes this conduct to the propeller, as the fault on her part and the cause of the collision: The libellant himself, the master, declares, that the propeller appeared to be steering wild, and adds, "I mean, by getting to leeward, and then trying to cross to windward, crossing my bows twice, and, the second time, striking my vessel." The lookout, "They seemed to be gaining a little to windward * * * then seemed to be coming down on to us." The mate, "She appeared to haul to the windward of us * * * then he seemed to starboard his wheel, so as to shut in his red light, and opened his green light the second time, and, almost immediately after, we collided"; after the second torch went out, "she got on our port bow; she must have put her wheel a-port; she must have done it to get to windward of us * * * then she must have put her wheel a-starboard, to cross our bows." The wheelsman, "I could see her three lights, before she put off to windward; then she put off to windward sudden, and she got off to windward three or four points, and perhaps more * * * when she went to windward, she went sudden, and then she came sudden back." The cook, "When I saw the three lights, they were about four points to windward, bearing down on us." Apart from the contradiction of this supposed impeachment of the conduct of the propeller, there are several grounds for discrediting it. It is intrinsically improbable, and, in a conflict of theories, or of testimony, improbability is of some importance. It represents the propeller as having gone suddenly off her course, to the windward of the schooner, and, after passing so far as not only to have crossed the bows of the schooner, but far beyond any appearance of danger of collision, to have, without conceivable motive, changed her course in a direction pointing not from but towards the schooner, and run directly for her till they struck. I shall have occasion to suggest hereafter, that most of the appearances which lie

at the foundation of this testimony would be produced by a change in the course of the schooner; but, that the propeller was, in fact, guilty of the movements thus testified to, is to impute incredible folly, not to say insanity, to those who managed her, which passes belief. And, in view of the allegation that the schooner did not at any time, even to the actual collision, change, under the order "hard-a-port," more than one point, or a point and a half, or, as one witness states it, "half a point," this alleged manœuvre of the propeller grows still more incredible. For, if the schooner did not change till the instant of collision, she stood heading south-west by west half west, and a change of one and a half points would bring her only to west by south. The blow was angling forward, making an acute angle between the sterns, which one or more of the witnesses thinks forty-five degrees. To accomplish this, the propeller, on this theory of the libellant's witnesses, after passing the schooner to windward, must have come back, and, at the moment of the blow, have been headed north-west by west. Let any one place the vessels on a diagram, and suppose the propeller performing this achievement, and its utter incredibility will be manifest, unless a motiveless and wilful purpose to run down the schooner existed; or, if the angle of their sterns was more than forty-five degrees, say, nearly a right angle, say, six points, still this requires that the propeller should have changed to north-west by north, in pursuit of the schooner. And, once more, as bearing on the question whether these were the manœuvres of the propeller, or were appearances created by a change in the course of the schooner, taking the time of the occurrence most favorably for the libellant, on receiving the blow, the schooner's sails gybed, her main boom went over. Now, the witnesses for the libellant say the wind was south, and the schooner would lie within four points of the wind, but, that she might have "a good full," she was eased off half a point; and this is in precise accordance with their testimony, that her course was southwest by west half west. Her main boom and her sails, therefore, were within half a point of being as close hauled as she could lie to the wind, and they were off the starboard quarter. As above stated, at the moment of the blow, her witnesses state that she had not fallen off more than one or one and a half points, which would have changed her course only to west by south. Now, it is clear, that, before the wind could strike in upon the other side of the sails, and throw the main boom over to the port side, she must be turned around more than ten points—I think, at least, as much as twelve; and this the claim of the libellant requires us to believe was forcibly accomplished by a blow angling forward, so that the sterns made an acute angle, and accomplished while a six knot breeze was blowing full against her sails, and resisting such a turn. Besides this, unless the vessels instantly separated, the stern of the propeller would itself have prevented so great a turn; and, in view of the evidence, that the main sheets were loosened and let off four or five feet, before the blow, the difficulty is rather increased. On the theory that the schooner had previously changed her course, all improbability disappears.

I have no hesitation, then, in saying that the account given by the libellant and his witnesses is, on the grounds stated, very incredible, apart from its conflict with the testimony from the propeller, and that a mode of accounting for the collision, which should be consistent and natural, especially if it accorded with the weight of the testimony on both sides in nearly all the particulars, would be better entitled to credit.

The opinion of the learned judge of the district court shows, that he entirely rejected the theory that the propeller first ported, went off to windward, and then, after she had passed clear of the schooner to windward, till either two or four points on her port bow, changed her course and came back on her own course, or partially so, heading for the schooner; and yet, without this theory, the case made by the libel, and by the libellant's witnesses, fails, and it becomes necessary to construct a new case, and convict the propeller of fault widely different from that alleged or attempted to be proved.

I cannot resist the conclusion that the propeller was in no fault whatever. This unquestionably involves the conclusion that the schooner did improperly change her course, and defeat the efforts made by the propeller to avoid her; and it requires that one, and possibly two, of the libellant's witnesses be somewhat discredited, in respect to that change of course. But, as to the others, what they saw was judged of without actual knowledge, and by appearances which that very change of course produced; and the residue of the testimony, some discrepancies of time and distance, generally uncertain, excepted, is in harmony with my conclusion. In view, then, of the considerations already suggested in regard to the case, on the testimony from the schooner only, and, next, in view of the consistent account given by the witnesses from the propeller, harmonizing not with the inferences of the libellant's witnesses, but with most of the observations which they made and testified to, I am constrained to believe that the schooner made the improper and unfortunate change of course which caused the collision.

First, then, as to the conduct of the propeller, as shown by her witnesses. Beginning with the position of the vessels, as shown without contradiction, and first above detailed, the propeller saw a torch-light a little over her port bow. About two minutes elapsed, and she saw the schooner's green light very nearly if not dead ahead. Here was nothing doubtful. The indication was clear, and the succeeding moments confirmed the necessary in-

ference, the inference which her captain actually drew, namely, that, on some course, and on some angle, greater or less, that vessel was in the act of crossing his course, to his starboard. Otherwise, she could not have so closed in on his bow. Otherwise, too, it was not possible to see her green light, if properly screened, and in proper position, which he was bound to assume. There was, therefore, no apparent danger of collision. With a green light ahead, it would pass by, even if he did nothing to make its avoidance more certain. But the lines of approach might be very nearly coincident. It could possibly do no harm to make a slight sheer to port, and open that green light on his starboard bow a little. It would apparently make collision impossible; and he did it. Out of abundant caution, he did what was not strictly necessary, but what it was eminently safe to do. This was not a fault. The moment after he gave the order, and, I think, before the propeller could have felt her helm effectively, the second flash light, followed by the further observation of the green light on his starboard bow, showed that he had judged correctly, and was clear of all conceivable danger, if the schooner kept her course. Nor did he act too soon. There was no reason for delay. It was enough that he had seen the flash light, waited two minutes, and then seen the green light crossing his course. What should he wait for? If it is answered, that he should have waited, on a conjecture that possibly the schooner might change, the answer is—he knew it was the duty of the schooner not to change her course, and he not only had a right, but was bound, to assume, in his conduct, that she would not. It is not true that he had not seen her position and learned her course; and it is most palpable, that, if he had delayed, and, especially, if he had ported, and a collision had ensued, he would have been utterly without excuse. More than this, he did what, under the circumstances, it was right to do. The actual course of the schooner, and the opening of her green light on his starboard, prove it; and it is not a fault that he did what in truth it now appears it was right to do, even if he did it sooner than was necessary.

Nor does the suggestion, that it was the sheer of his own vessel to port, under a starboard helm, that made the light of the schooner open on his starboard bow, change the conclusiveness of his reasoning. The propeller's going to port did not change the color of the light he had just seen ahead, or slightly on his port bow. It was green still; and opening it, by steering a little to port, only made it more certain that it would pass by, and equally as certain as if he had waited and seen it open by its own motion. If it did not open, it might seem to be stationary. So long as it was green, he might be safe in making no change; but he must be more surely safe by sheering to port. Going to starboard would have been the plainest want of seamanship, and a gross violation of the rules of navigation. Shortly after this sheer of the propeller, after observing the green light of the schooner opening on his starboard bow, he sees a change. The red light of the schooner appeared. It requires no reasoning to show, that his own change to port could not bring that light into view. Then, and only then, was there danger of collision, and then he did what must be regarded as presumptively the safest thing. He put the helm hard a-starboard, instantly. To have then ported, would presumptively have been running, on a swing from a starboard wheel to a hard a-port, directly into the schooner's head. It became a question of judgment, whether to instantly stop, or to hasten the propeller's motion to port, in the hope of clearing the schooner. To stop, might, before it could be completely effected, bring the schooner down upon her. Stopping by the screw of a propeller is not accomplished without some side-wise motion; and he judged a hard a-starboard helm to promise best for safety. But, almost immediately, he saw that his effort to escape by advancing was futile, and he then did his utmost to stop and back, diminishing thereby, as much as he could, the force of the blow. My conviction is clear, that the propeller's conduct, in all this, was skilful, and without negligence or fault. It may be possible, that if, after he saw the red light, he had ported, the vessels would have cleared; but even that is not free from doubt, even in the light now derived from a retrospective view of the transaction and its results.

How, then, did the vessels come together? I answer, the schooner improperly changed her course, and defeated a proper, and the only proper, effort of the propeller to avoid her. Whether there was more than one order given on the schooner to port the helm, or the one order was given when there was no excuse for it, or whether the wheelsman, from bad judgment or carelessness, suffered her to fall off, may be uncertain; but it is a significant circumstance, that the second mate of the schooner testifies positively that the captain of the schooner "gave orders to the man at the wheel to hard-a-port; it was after the second torch went out, and at the same instant." This was almost at the same instant that the propeller starboarded; and, in this view, what becomes of the suggestion that the propeller starboarded too soon, having the schooner's green light in view? The proof shows, rather, that the propeller had starboarded just as, or immediately before, the second torch was lighted, which was one or two seconds before the order to change the course was given on the schooner. I am aware that this statement of the second mate of the schooner is not in exact harmony with inferences drawn from the testimony of other witnesses on the schooner; but, if it were profitable, it would be easy to point out very many discrepancies in their testimony, and, on a question of the time when the schooner changed her course, made doubtful by conflicting statements, such ex-

plicit testimony from an officer of the schooner is of some significance. Unquestionably, the interval between the order and the time when the schooner fell off so as to show her red light to the propeller, made their proximity dangerously near when that red light was discovered from the propeller. Whether the second mate is accurate or not, the schooner having been in a position to show her green light after the second torch went out, and the propeller having starboarded and begun to sheer to port, all danger of collision, if there was any before, had ceased; and yet the schooner did exhibit her red light, which could not be done without a change of her course. I suggest here, also, that the propeller cannot be located on her conceded course, with the green light of the schooner in view, and, thereafter, by starboarding, bring the red light of the schooner into her view, unless, in fact, the schooner does change her course. This, of itself, and of necessity, establishes fault in the schooner, and in the schooner alone, unless we go back, in utter discredit of all the witnesses from the propeller, and take up the theory that the propeller had first ported, gone off to the windward of the schooner, and then turned almost back upon her course, in pursuit of the schooner, and deny wholly, that, when she starboarded the green light of the schooner was in view; for, obviously, the moment the propeller should get to the windward of the schooner, the red light of the latter, and not the green, would alone be visible, and that over the propeller's port bow.

Much of the testimony of the witnesses from the schooner as to what they saw is in no serious conflict with the view I have taken of the conduct of the propeller, or of its propriety. Their inferences were based on the assumption, that the schooner did not change her course till it was too late to avoid the collision. The observations to which they testify are, most of them, consistent with the testimony from the propeller, saving, always, discrepancies among themselves, already alluded to. Those who first saw the propeller's white light, saw it over their starboard or lee bow. When they reached the point of intersection of the two courses, where they showed their green light to the propeller, they must see, and did see, all three lights of the propeller, the green appearing, through the slight haze, a little before the red. Passing a little beyond this point of intersection, and changing her course by falling off, the three lights would seem to them to go to windward; and the second mate says, that, after the second torch light went out, he saw the propeller's masthead and green lights, plainly indicating that then the propeller had, as her witnesses testify she had, starboarded, and was on her sheer to port; and the master of the schooner, also, when he came up, saw her green and masthead lights. True, they several of them say, that the green light disappeared, and the propeller's red and white lights alone remained; but this was shortly before the collision, and the short turn of the schooner, on a helm hard-a-port, might produce that effect; and, when the propeller made a final struggle to avoid collision, by putting her helm hard-a-starboard, that would again bring her green light into view, as the libellant's witnesses say it was seen. It is quite certain, that there are some statements of the libellant's witnesses that cannot be harmonized with my conclusion, and no less true, that their testimony cannot be harmonized among themselves. It is in such contradiction on the point, how far the propeller seemed to them to get to their starboard, as almost to warrant a suspicion that it did not so appear at all; and the testimony of the master is so inconsistent with itself, as to create an apprehension that much that he said was supplied to him by a strong desire to place the propeller in the wrong, rather than by his memory of what he saw.

It is with great hesitation, and not until after the most careful and repeated examinations of the testimony, that I reverse the decree in this case, upon a conclusion of fact adverse to that of the district court; and yet, the view which was there taken of the course of the propeller, seems to me necessarily to require it, for it was not there deemed proved that the case stated by the libellant, or by his witnesses, could be sustained. The propeller did not go off to windward, then turn aside, and nearly backward, and run down the schooner. If not, then she did see the green light of the schooner ahead, and a sheer to port could not be improvident or negligent. The schooner could not get to her but by a change in her own course.

It is not material that I should say anything in regard to the place where the lights of the schooner were set. Without reference to them, I deem the collision the fault of the schooner. But I would not leave the impression that such a location of the lights is approved. On the contrary, I deem it a failure to comply with the statute, and, of itself, a gross fault. The bowsprit and its rigging are greatly liable to hide lights placed just above the deck, forward, very near the bow. The master himself does not, in his testimony, state that they are at all above the height of the rail immediately in front. His language on that point is very guarded. If this fault prevented the changes in the course of the schooner being sooner seen, which is quite possible, then this, also, contributed to the collision. But, if not, then the case rests upon the other grounds assigned for reversing the decree.

Let a decree be entered dismissing the libel, with costs.

[On appeal to the supreme court, the decree of this court was reversed, and the cause remanded, with directions to affirm the decree of the district court. 19 Wall. (86 U. S.) 41.]

Case No. 17,412.

The WENONAH.

[1 Hask. 606;[1] 22 Int. Rev. Rec. 49.]

District Court, D. Maine. Dec., 1875.

SEAMEN'S WAGES — DISCHARGE IN FOREIGN PORT —LOSS OF SHIP BY UNSEAWORTHINESS—PENALTIES.

1. American seamen, discharged in a foreign port on loss of the vessel from unseaworthiness existing at the inception of the voyage, may recover under Rev. St. §§ 4582, 4583, from the owners three months' extra wages.

[Cited in Brown v. Chandler, Case No. 1,998.]

2. They cannot recover the penalty provided by Rev. St. § 4529, for the non-payment of wages then due them, when the net proceeds from the sale of the vessel are insufficient to pay the officers and crew, and it does not appear that the master could have raised a sufficient sum for the purpose.

In admiralty. Libel in personam by American seamen discharged in a foreign port on loss of the vessel to recover wages and three months' extra wages under Rev. St. §§ 4582, 4583, and the damages for non-payment of one fourth of the wages then due them provided by Rev. St. § 4529, against the owners of the vessel, who denied by answer all liability in the premises. The cause was heard upon libel, answer and proofs.

Charles E. Clifford and William H. Clifford, for libellants.

Sewall C. Strout and Hanno W. Page, for respondents.

FOX, District Judge. This libel is promoted by the mate and steward of this vessel, a brigantine of 235 tons, against her owners to recover a balance of wages, and also three months' extra wages, allowed by the acts of congress, the vessel having been sold at Nassau, N. P., and her crew there discharged. The libellants, in August last, shipped at this port, on board this vessel, for a voyage to the Kennebec river for a cargo of ice, thence to Charleston, S. C., and thence where freight might offer. The vessel sailed on this voyage, delivered her cargo in safety, and proceeded to Darien, where she loaded for Philadelphia with pine lumber, both on and under deck. She reached Hatteras, and when about fifteen miles from that light, the weather became somewhat heavy, with more sea than usual, which caused the vessel to leak badly in her upper works. The most of her forward sails were split and torn, and the mainsail was in that state, that the master did not deem it prudent to hoist it, it being very much worn; the mainmast head was rotten at the hounds. Under these circumstances, the vessel was making so much water, that all that remained for the master was to run off before the wind and throw over his deck-load, which was done. At the end of three days he found himself about five hundred miles from any port, with his leak then under control, as by clearing his deck, he was able to caulk some of the worst leaks about his water ways. He then concluded to run for Nassau, where she arrived eleven days afterwards. Surveyors were called by the consul, and they reported the condition in which they found the vessel, and that it would cost over £500 for repairs, which they could not recommend to be made. A copy of the report was received by the managing owner, and he thereupon consigned the vessel to Darling & Co., with instructions to sell her, which they did at public auction, the gross amount of sales being £80, the balance of which sum, after deducting expenses and port charges, was paid to the American consul and by him distributed among the officers and crew, the latter being sent by the consul to Charleston, from whence they came to this port and instituted this libel.

By section 4525, Rev. St. U. S., the right of the crew to wages is no longer dependent on the earning of freight by the ship, and in case the vessel is lost the seamen are entitled to their wages to the time of the loss, if they have exerted themselves to the utmost for the saving of the ship and her cargo. No serious question therefore arises upon this branch of the case, and the libellants are clearly entitled to recover from the owners, the full amount of their wages up to the time of their discharge.

By sections 4582, 4583, Rev. St., it is further provided "that whenever a vessel belonging to a citizen of the United States is sold in a foreign country and her company discharged, or when a seaman, a citizen of the United States, is, with his own consent, discharged in a foreign country, it shall be the duty of the master to produce to the consul or officer the certified list of the ship's company and to pay such consul or officer for every seaman so discharged, designated on such list as a citizen of the United States, three months' pay over and above the wages which may then be due to such seaman. No payment of extra wages shall be required, upon the discharge of any seaman in cases where vessels are wrecked or stranded or condemned as unfit for service."

The controversy here is as to the right of the libellants to recover the extra wages provided for by these sections. This vessel, by the report of the surveyors, was condemned as unfit for service. Such is the legal effect of their findings, and the case, therefore, is within the letter of the exception. But it is claimed, in behalf of the libellants, that the cause of her condemnation was not on account of fortuitous injuries occasioned to her by the perils of the sea on her voyage, but that it was entirely by reason of the unseaworthy condition of the vessel at the inception of the voyage, and well known to her master and owners. The survey states, that the vessel was not then leaking badly, as she was pumped out in four and one half minutes; "that on examination we found the mainmast head decayed and sprung at the hounds, main-topmast backstays knotted and

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

spliced in several places, mainsail worn out, foresail, both topsails, main-staysail and jibs old and much patched, lower topsail-yard sprung and decayed, foretop-gallant backstay stranded, two fore-chain bolts, port side, drawn and loose, deck-ends forward very open, stanchions decayed in covering-boards and at the back, top sides decayed in places; in the hold the sides were wet by extensive leaking from waterway seams, and round the stanchions iron fastenings much corroded, knees gouged in a few places. * * * In order to make the vessel seaworthy, it will be necessary to thoroughly overhaul the top sides, when we fear it will be found necessary to put in several new planks, the most of the stanchions will have to be renewed, then re-bulwarked, thoroughly caulked from the light water line, or probably all over, chain plates refastened, new mainmast, new topsail-yard, a complete set of sails, top-gallant sail and royal gaff-topsail excepted, about two coils of rope to reeve off running gear. We estimate that the outlay for the above necessary repairs and supplies will exceed £500 and therefore cannot recommend them." The court cannot but approve of the cautious language of the surveyors in their statement as to the cost of such repairs, as no doubt is entertained that if they had been made at that port, as demanded by the survey, the owners would have found to their regret that they were much in excess of £500.

The report of the surveyors clearly establishes that these repairs were called for by reason of the age and decay of the vessel and her apparel and furniture, and were not, in any material respect, occasioned by any extraordinary perils of the sea to which she had been subjected on the voyage; that she was in fact unseaworthy in very many particulars when she began this voyage, and was not in a suitable condition to undergo the usual perils to be expected from such an enterprise. In almost every instance specified by the surveyors, the defect was from old age, decay, ordinary wear and tear, and not from extraordinary disasters; it was the natural decay which caused her to be in this miserable condition, and if she had been a new vessel, none of these repairs, to any considerable amount, would have been called for. Other testimony in the cause fully sustains the findings of the surveyors in these particulars, and in some matters establishes a worse condition of things than is set forth in their report. It does not appear that they had examined with much care her hull so as to be fully informed as to the extent of the decay as to her top-timbers. One of the owners resided at Gorham, but the managing owner lived at Richmond, in this state, and it is but just to state that he does not appear to have had much experience with shipping. He was, at one time, an owner of a moiety of this vessel, and afterwards disposed of it, but again the past summer became interested in her by a purchase of one half for one thousand dollars. She was then nineteen or twenty years old, was built on the Penobscot river, and had been employed in coasting and the West India trade. It is not shown that any extensive repairs had ever been put upon her since she was launched. Previous to sailing on this voyage she was taken on to the railway, her copper stripped, and her bottom caulked and painted but not sheathed; her upper works had been caulked the year before. The managing owner says he gave directions to the carpenter to make such other repairs as he found necessary, but it does not appear that any were made. $1,000 to $1,200 were then expended upon her. The master states, that he understood she was for sale, and he with some friends, entertained an idea of buying her, and therefore, while she was on the ways, he bored her in forty-two places, nineteen proved sound, the balance were more or less rotten and tender, and he concluded not to purchase, but he did not inform the owner of his discoveries as to her situation; that he did inform him about the mainmast-head, and the owner had it examined by a spar maker, who reported, as the master states, that it had better be spliced, or a new mast had; but the master thought it would answer for this trip, and that was the opinion of the spar maker as the owner testifies. The master also testifies that he informed the owner that a new mainsail was necessary, and he agreed to procure one when the vessel was in the Kennebec river, as he could get it made cheaper there than at Portland; but none was obtained, for the reason, as the owner alleged, that a brother of the sail maker was dead. From the master's testimony I gather, that while he condemned the mainsail as unseaworthy, he was of opinion that her forward sails would answer for the proposed voyage, but that they were old, worn and patched, and could not stand much heavy weather. From all the testimony, I can draw no other conclusion than that the vessel was not in a seaworthy condition at the inception of the voyage, and that such unseaworthiness was the real moving cause of her condemnation at Nassau, as unfit for service.

In Couch v. Steel, 3 El. & Bl. 402, it was determined in the king's bench that by the law of England, a warranty of the seaworthiness of the ship is not implied from the relation of ship owner and seaman. But such, I think, is not the law in this country, and in my opinion, most clearly ought not to be of any country interested in commerce. In Dixon v. The Cyrus [Case No. 3,930], Judge Peters says: "Law and reason will imply sundry engagements of the captain to the mariners. First. That at the commencement of the voyage the ship shall be found seaworthy." 2 Pars. Shipp. & Adm. 78; Hoyt v. Wildfire, 3 Johns. 518; Hindman v. Shaw [Case No. 6,514]; Savary v. Clements, 8 Gray, 155,—all maintain the same doctrine.

Although upon the principles of the maritime law, the seaman was not entitled to wages if no freight was earned, yet it has been repeatedly held, that if the failure to earn freight was occasioned by the fault or negligence of the master or owner, they were accountable to the crew for their wages. In 1808, Hoyt v. Wildfire above cited, Kent, C. J., said: "It is just, as well as agreeable to

the maritime law, to distinguish between the cases in which the services of the seamen have not been rendered, in consequence of the perils of the sea, and in which they have not been rendered by reason of the act of the master or owner. * * * A voyage, lost by the fraud or misconduct of the master, and that so palpable as not to be denied, is not within the reason of the maxim, that freight is the mother of wages." Hill v. Murray [Case No. 6,495].

In Hindman v. Shaw [supra], Judge Peters says: "In some cases there is a distinction between a voyage broken up by the default of the owner, in sending a vessel to sea, found to have been unseaworthy in the outset, and one rendered so by unavoidable casualty. In the former case, the merchant is delinquent and subjects himself to all consequences."

Parsons, in his 2 Mar. Law, 592, says: "It has been said at common law, that if a ship be not seaworthy at the outset of the voyage, and be abandoned for that reason before freight is earned, no wages are due. But this rule would subject the seaman to lose his wages for his services for no fault of his own, but for that, which generally is in fact the fault of the owner, and may almost always be supposed to be so, and which the seaman could not, by labor or care have prevented, and we think it would not now be considered as law in admiralty, if any where." Lord Ellenborough in the case referred to by Parsons (Eaken v. Thom, 5 Esp. 6) did decide that the sailor could not recover wages under such circumstances; he at the same time admitted, that if the owner thus sent the ship to sea unseaworthy, the sailor might have a remedy by a special action on the case, a distinction without a difference, on such a state of facts when brought before a court of admiralty.

By section 3, c. 9, Act 1803 [2 Stat. 203], the master was required whenever a ship or vessel should be sold in a foreign country, and her company discharged, &c., to pay the three months' extra wages to the consul. The language of this section includes all sales, whether voluntary or involuntary, as no exception is made of any kind; but the decisions are uniform, that it should be restricted to voluntary sales, and that the law was not designed to reach cases of sales in invitum, when the sale or discharge is rendered unavoidable by an imperious and overruling necessity, or to use the language of Judge Ware in The Dawn [Case No. 3,666], "when the whole enterprise is brought to a premature conclusion by a fortuitous event, for which neither party is responsible." When the necessity for the sale was occasioned by the natural decay and wear of the ship from natural causes and which existed at the inception of the voyage, which were in no manner occasioned by any peril of the sea or disaster during the voyage, it was held to be within the provision of the act, and the seamen were entitled to their extra wages. Such was the ruling of Betts, J., in 1832 in Wells v. Meldrun [Case No. 17,402].

The act of 1803, allowing the three months' extra wages remained in full force until 1840 (chapter 48 [5 Stat. 394]), which allowed the consul to discharge seamen upon application of the master and mariners if he deemed it expedient without requiring payment of the three months' wages. In 1855, by chapter 133, § 15 [10 Stat. 624], it was enacted, "that in cases of stranded vessels, or vessels condemned as unfit for service, no payment of extra wages shall be required." In 1856, c. 127, § 26 [11 Stat. 62] the provisions of the act of 1840, relieving the master from the payment of the extra wages at the consul's discretion were repealed, and such payments were again required, provided "that in cases of wrecked or stranded vessels, or ships or vessels condemned as unfit for service, no payment of extra wages shall be required." This language was more comprehensive than that of the act of 1855, as it embraced wrecked vessels, which were not included in the former law, and it is the precise language found in section 4583, under which the respondents claim their exemption in the present suit.

When we consider the nature of the seaman's contract, as construed by the courts of this country, that the law implies a seaworthy ship on the part of the owner, and that wages were always recoverable by the sailor, if by the neglect of the master or owner the freight or ship was lost, and also remember the construction given by the courts to the act of 1803, that owners were exonerated from liability for extra wages, although within the letter of the act, when the vessel was sold, because the damages she had sustained from the perils of the sea had rendered her sale necessary within the meaning of the maritime law, but were held accountable for extra wages, if the vessel was condemned and sold for unseaworthiness at the commencement of the voyage, I can not but think that a literal strict construction of the exemption provided for by section 4583 was not the intention of congress, but that it was rather its purpose only to exonerate the master and owner from this liability, when the enterprise is determined by a loss or condemnation of the vessel for which her owners are not directly responsible by their own neglect. If a ship was stranded by a master by collusion with the owners to defraud insurers, and the vessel was totally lost, could it be that the owners would be held exonerated from payment of the extra wages? The stranding of the ship would bring the case within the letter of the act, and nothing is there found which expressly authorizes any distinction to be drawn when the stranding is designedly had by the master, or when caused by the perils of the sea; but to give such a construction as would relieve the party under such circumstances

from extra wages by reason of his own criminal conduct would be so gross a perversion of justice that I can never assent to it, until I am instructed so to do by those who are authorized to review and correct the errors of this court.

It may be said, that in the instance supposed, a party is endeavoring to obtain an advantage by his own fraud, and that fraud vitiates and destroys all claims for any rights arising thereby. This is true; but still this supposed case is within the very letter of the statute. In the present case the condemnation was not occasioned by any fraud of the owners, but it was on account of their violation of their contract by exposing all on board to the perils of the sea, in an old worn out and rotten hulk, as the master well knew, and the owner could have known, if he had made the least examination. His negligence in this respect is beyond dispute, and he may well be considered as having sent his vessel to sea in this condition, ready to take the consequences of such gross neglect in matters of so great importance. The condition of the mainmast and mainsail, it is established, were well known to him before she left this port. The condemnation was clearly the result of his own act, in permitting his ship thus unseaworthy to become liable to condemnation on that account in a foreign country. He is the party, who is directly responsible therefor by reason of his own neglect, and the enterprise was not brought to a premature conclusion by any fortuitous event, as the master testified, that if he had had proper and fit sails, when off Hatteras he could have made Philadelphia, and would not have been obliged to run off the coast. "Nullum commodum capere potest de injuria sua propria. Frustra legis auxilium quaerit qui in legem committit."

In my opinion, it was never the intention of congress by this provision to modify the law, and exonerate ship-owners from liability for extra wages when their ship was lost or condemned on account of their own fraud or willful negligence. It is so contrary to justice and the best interests of all concerned in navigation, that a party should be permitted to avoid his accountability by his own wrong, that unless constrained so to do, we should not adopt a construction favorable to such a purpose.

My construction of this provision of the law is sustained by other provisions found in the same title relative to merchant seamen. By sections 4559-4561, it is provided that a complaint may be made of the unseaworthy condition of their ship by the officers and crew to a consul in any foreign port, and he shall appoint inspectors to examine into the matter of such complaint. In their report they shall state whether in their opinion, the vessel was sent to sea, unsuitably provided in any important or essential particular, by neglect or design, or through mistake or accident; and in case it was by neglect or design, and the consul approves of such finding, he shall discharge such of the crew as desire it, each of whom shall be entitled to the three months' pay in addition to his wages up to the time of discharge. There can be no question, that if such complaint had been made in the present case, the report of the inspectors would have convicted the owner of negligence in sending this vessel to sea in the condition she was, and that the consul would have approved of such report, and required the payment of the three months' wages, notwithstanding the vessel was condemned as unfit for service. The case would have been within the letter of section 4583, but would have been saved therefrom by section 4561, thus indicating that some limitation was intended to the general language of section 4583, and declaring that when such vessel is condemned by reason of her owner's neglect in her outfit, they are still held chargeable for the extra wages. It may be that this section submits the matter to the judgment of the inspectors and consul, and unless the neglect is found by them, that the liability for extra wages cannot be sustained under this section, and that it is not for the court to assume to discharge the duties by law specially devolved on other officers. The answer is, that a court of admiralty does not derive its authority to allow extra wages under this section; but these provisions may well be invoked in aid of the true construction of the other sections, and as indicative of the purpose of congress not to require a strict literal compliance with the words therein contained. The spirit and intent of the act is quite apparent from section 4561 that an owner's negligence shall not exonerate him from the general liability imposed upon him by other sections of this title, and I can have no doubt, that under these sections a court of admiralty, by its general power and authority inherent in this tribunal, may afford the seaman that redress to which he is entitled, although the consul may have failed to require the payment of the extra wages under section 4561. By the same title it is made the duty of the consul to collect the extra wages under section 4582; but if he neglects so to do, it is every day's practice for a court of admiralty to sustain suit therefor against master or owner.

The only case I have found having any direct bearing on this question is Hoffman v. Yarrington [Case No. 6,580]. In his opinion, the learned judge says: "The act of 1856 provides that in case of wrecked or stranded ships or vessels, or ship or vessels condemned as unfit for service, no payment of extra wages shall be required. The language seems to include all vessels condemned as unfit for service, whether their unfitness has arisen from wreck or stranding or any other cause. Without saying that it would apply when a vessel has been sent to sea in such a condition that her owners ought to have known she was unfit, or even to a case where there has been no extraordinary peril, as to which I shall speak

more at large hereafter, I hold this statute denies the extra wages, when the facts merely are, that a vessel needing repairs from a sea peril has been condemned, and the master has acted in good faith, and his conduct has been such as a prudent owner would have adopted in like circumstances, had he been uninsured." I am aware that in 2 Pars. Shipp. & Adm. 86, that learned judge is credited with a somewhat different statement of his opinion in Hoffman v. Yarrington [supra], one not altogether in harmony with the views here entertained by me, or with the language above given from his reports. This work of Mr. Parsons was published before the reports of Mr. Justice Lowell, and I am bound to adopt as his views the opinion carefully prepared by him and sent forth to the profession by his authority, rather than an abstract of the opinion by a third party, which is not shown to have received the sanction and approval of the learned judge.

I infer from the cautious and guarded manner in which Judge Lowell refers to the question here presented, that he was not convinced that the statute did apply to a case like the present to relieve the owner from his liability. Extra wages being given by the statute in place of damages for breach of contract, it is quite clear that in such cases the seamen are not entitled to the expenses of their return home in addition to the extra wages. Hoffman v. Yarrington, supra.

Claim is also made by the libellants under section 4529 for two days' extra pay for ten days after their discharge, for non-payment of one fourth of the wages then due. The language is, "every master or owner who neglects or refuses to make payment, &c., without sufficient cause, shall pay to the seamen, &c." There are two answers to this claim. The neglect, if any, was on the part of the master and not the owner, as he was not at Nassau, and the present suit is against the owners and not the master. Secondly, there was sufficient cause for non-payment; the net amount of sales, after payment of expenses at Nassau, was distributed by the consul among the officers and crew of the vessel, and the owner should not be required to forward funds to a foreign port to pay the seamen, in anticipation that the sale of the wreck would not prove sufficient for that purpose, and it is not apparent that the master could in any way have raised the necessary amount at that port. The condition of things at the time affords a sufficient excuse for the non-payment of anything beyond the net amount realized from the vessel. The cook is not shown to have been aware before sailing of the unseaworthiness of the vessel, and he is therefore, in my opinion, clearly entitled to the extra wages. The mate's case is of a much more doubtful nature, as he admits that he had sailed in the vessel the previous voyage, and of course must have been aware of the condition of her sails and rigging. It does not appear that he knew the state of the hull, and he had the assurance of the managing owner, that a new mainsail should be had, which was one of the most important and necessary articles to render her seaworthy. He knew the mainmast-head was defective, but the master was of opinion that it would answer for the voyage, and if she had been furnished with a new mainsail, I am rather of the opinion that the vessel would have been enabled to reach Philadelphia; with some hesitation I shall allow the mate the extra wages, notwithstanding he was aware of some matters in which the vessel was hardly to be deemed seaworthy, as I think she was unseaworthy in other respects of which he is not shown to have been cognizant, and especially as he has a right to depend upon the owner's promise of a new mainsail, the want of which was one of the most important elements of her unseaworthiness. The court cannot but fear that the Wenonah was only one of a large fleet of our American vessels which are kept at sea by reason of the cupidity of their owners, when they should be broken up and destroyed. The British parliament has lately taken measures to drive such rotten hulks from the ocean, and it is to be hoped congress will soon follow this example by such appropriate legislation as may be effectual to accomplish so desirable a purpose.

A claim for $13 for board, at Portland, of the mate after he joined the brig, but before she was ready for sea, is not allowed, as upon all the testimony I do not find that the owners at the time they contracted with the mate, agreed to pay his board. I allow the mate John Nicol, a balance of wages $103.21 and two months' extra wages $80, and that he also recover one month's extra wages $40, which will be retained in the registry for the use of the United States according to the regulations of the statute. To the cook Joseph Stanton, I allow the balance of his wages $95.20 and two months' extra wages $70, and wages for one month $35, for the use of the United States to be retained in the registry. Decree accordingly.

WENTWORTH (FALES v.). See Case No. 4,623.

Case No. 17,413.

WENTWORTH v. NICKERSON.

[See Case No. 3,054.]

Case No. 17,414.

WENTWORTH v. UNITED STATES.

[2 Story, 452.] [1]

Circuit Court, D. Massachusetts. Oct., 1843.

COLLECTORS AND NAVAL OFFICERS — SALARIES — OFFICE EXPENSES.

By Act May 7, 1822, c. 107, § 9 [3 Stat. 695], providing for the salaries of collectors and naval officers, the necessary expenses of the office are a primary charge upon the gross receipts or fund, and the officer is entitled to the remainder only, after such deduction; but he is not enti-

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

tled thereby to receive $3,000, and to charge any deficiency below that sum in the receipts, to the government.

Writ of error to the district court [of the United States for the district] of Massachusetts.

The original suit was debt, brought by the United States upon the official bond of Isaac O. Barnes, as naval officer for the collection district of Boston and Charlestown, upon which the plaintiff in error and one Gardner Nevens were sureties, conditioned, that Barnes had duly executed and discharged, and should continue to execute and discharge, all the duties of the said office according to law. The plaintiff in error (the original defendant,) after oyer of the bond and condition, pleaded several pleas, upon which issues were joined, and the trial had; but as none of them are material to the questions discussed upon the writ of error, it is unnecessary to recite them. At the trial, the plaintiff in error prayed the court to instruct the jury, "that the said Isaac O. Barnes is entitled to retain to his own use all the fees received during each year, that he held the office of naval officer, and for such fraction of a year as he might have held the said office, not exceeding the sum of three thousand dollars for such fraction of a year, exclusive and free from any deduction for clerk hire, or other expenses of his office;" which instruction the court refused to give. But the court did instruct the jury, "that the defendant Barnes was entitled to retain the fees of his office, not exceeding three thousand dollars per year, and a like sum for such fraction of a year as he held the office, provided the fees received during any year or such fraction of a year amounted to the sum of three thousand dollars, after deducting therefrom the clerk hire, and other expenses of his office for such year and fraction of a year;" and thereupon the judge left the cause to the jury, who found a verdict for the United States. [Case unreported.] To which refusal to give the instruction so asked, and also the instruction so given, the plaintiff in error filed his bill of exceptions.

Mr. Goodrich, for plaintiff in error.
Mr. Dexter, U. S. Dist. Atty.

STORY, Circuit Justice. The whole question in this case turns upon the true interpretation of Act March 2, 1799, c. 129, § 2 [1 Story's Laws, 665; 1 Stat. 627, c. 22], and of Act May 7, 1822, c. 107, § 9. The former act, after providing that certain fees and emoluments shall be paid to collectors and naval officers, to be equally divided between them, proceeds to declare, that the expense of fuel, office rent, and necessary stationery, for the collectors of Salem and Beverly, Boston and Charlestown, &c., shall be paid, three fourths by the said collectors, and the other fourth by the respective naval officers in those districts. So that under this act all the expenses of clerk hire, &c., were to be paid by the collectors and naval officers out of the fees and emoluments of their offices, without any charge whatsoever to the government. By the act of 1822 (chapter 107, § 9) the system was changed; and it was there provided, "that whenever the emoluments of any collector of the customs of the ports of Boston, New York, &c. (enumerating certain ports), or the emoluments of any naval officer of either of those ports shall exceed three thousand dollars, in any one year, after deducting therefrom the necessary expenses incident to his office in the same year, the excess shall in every such case be paid into the treasury of the United States." And in order to provide a suitable number of clerks, and no more, to be employed by the collectors and naval officers, and to limit and fix their compensation, so as to carry into complete effect the new system, it was provided in the same act (section 15) "that the secretary of the treasury may, from time to time, limit and fix the number and compensation of the clerks to be employed by any collector, naval officer, or surveyor, and may limit and fix the compensation of any deputy of such collector, naval officer, or surveyor." Now, the sole and real question between the parties, in the present case, is, whether, supposing the fees and emoluments of the office are not sufficient to leave three thousand dollars to the naval officer, after deducting the necessary expenses incident to his office (that is, his one-fourth of all the expenses stated in the act of 1799, c. 129, § 2), he is still to receive the three thousand dollars, and the deficiency is to be borne by the government; or whether the necessary expenses of his office are a primary charge upon the gross receipts or fund, and the naval officer is entitled only to so much as remains after such deduction. My opinion is, that the latter is the true interpretation of the 9th section of the act of 1822 (chapter 107). The special object of which is to provide that the emoluments of the naval officer shall never exceed three thousand dollars, although it may fall far short of it. In truth, the very terms of the section lead almost necessarily to this conclusion, the emoluments are not to exceed the stipulated sum, "after deducting the necessary expenses incident to the office;" so that the expenses are first to be deducted before any distribution or division of the emoluments.

The principal argument urged against this interpretation of the state is one ab inconvenienti, that it places the collectors and naval officers wholly within the power of the secretary of the treasury, as to the amount of their emoluments; for he may fix the number and compensation of clerks so as to take away a large proportion of all the emoluments of these officers. But if the law has vested this absolute discretion in the secretary of the treasury, I know of no right of courts of justice to limit or control it. We are not to presume, that the secretary will misuse or abuse the power. On the contrary, we are bound to presume, that he will exercise a sound and liberal discretion in the matter, so as best

to promote the public service, and at the same time to secure to all the officers, affected by it, a just and reasonable compensation for the performance of their official duties. I am not aware, that the subsequent acts of congress have in any manner changed or affected the amount of the compensation to be allowed to these officers. All that the subsequent acts, from 1834 downward, profess to provide, is to prevent any diminution of their emoluments founded upon the reduction of the duties, under Act 1832, c. 224 [4 Stat. 580].[3]

My judgment, therefore, is that there is no error in the district judge in refusing the instruction prayed for by the plaintiff in error, or in the instruction, which he absolutely gave to the jury. The judgment of the district court is therefore affirmed with costs.

Case No. 17,415.

WERK v. LEATHERS.

[1 Woods, 271.] [1]

Circuit Court, D. Louisiana. Nov., 1872.[2]

SHIPPING — PRESUMPTION OF SEAWORTHINESS — CHARTER PARTY—LIABILITY OF OWNER.

1. Ordinarily, a ship is presumed to be seaworthy. But this presumption is rebutted by proof that she is old and approaching the end of her life as a ship, and that she suddenly failed in a vital part without any apparent cause.

[Cited in The Lizzie Frank, 31 Fed. 480.]

2. The owner of a ship who charters her to another tacitly agrees that she is in suitable condition for the use to which she is to be put.

[Distinguished in The Lizzie Frank, 31 Fed. 479.]

3. If there is a defect in the ship by which she becomes disabled, even though it may not be apparent upon examination, the charterer cannot recover the charter money, and he will be liable for damages occasioned by the defect.

[Distinguished in The Lizzie Frank, 31 Fed. 479.]

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

In admiralty.

Thomas Hunton and Given Campbell, for libellant.

Wm. M. Randolph, Charles B. Singleton, and R. H. Browne, for respondent.

WOODS, Circuit Judge. On the 31st day of March, 1869, respondent chartered the steamer Vicksburg, of which the libellant was the then owner, for the term of two months from that date, at the price of $1,750 per month, and agreed to return her in the same condition in which he received her, and possession was given to respondent of the steamer on the same day. The respondent paid to libellant the agreed price for the first month and $500 on the price for the second month, leaving a balance of $1,150. Before the expiration of the second month of the term of the charter (and it is remarkable that neither the libel, answer nor evidence shows precisely when) the shaft of said steamer broke, and the cylinder head of one of her engines blew out, and her woodwork was thereby somewhat damaged. Thereupon respondent delivered the steamer to libellant and refused to make the repairs necessary to place her in the condition in which he received her, and has not paid the balance of the stipulated price for her use during the second month. The libellant claims $1,850, the amount which he says was required to repair his steamer; $5,000 damages, and $1,190 balance of her hire for one month, making in all $8,040, for which he asks a decree. The defense is, that the machinery of the Vicksburg was not in perfect order on March 31, the day she was chartered; that her starboard shaft was cracked at that time, although the defect was not apparent; that her boilers were in an unsafe condition, and that she was not seaworthy.

It is clearly established by the proof that the breaking of the shaft and other damage to the steamer occurred when she was running in smooth, deep water, and carrying only one hundred and ten pounds of steam.

The question to be solved by the court is, was the breaking of the shaft the result of an inherent defect existing at the date of the charter party, or not? If it was, then the libellant is not entitled to recover the balance of money stipulated by the charter party, nor the damage resulting from the breaking of the shaft.

I am satisfied from the evidence that the breaking of the shaft was the result of an inherent defect existing at the time of the charter party. Ordinarily the presumption is in favor of seaworthiness. Snethen v. Memphis Ins. Co., 3 La. Ann. 475. But this presumption is completely rebutted where the ship as in this case is shown to be old and approaching the end of her life, as a boat, and when she suddenly fails in a vital part, without any apparent cause. Thus Marshall, is decidedly of opinion that "where a ship is lost or is incapable of proceeding on her voyage and this cannot be ascribed to stress of weather or any accident on the voyage, the fair and natural presumption was that she was not seaworthy." Marsh. Ins. 367. In the first place it is in evidence that the shaft of the steamer was too small; two shafts of the same diameter had before been broken on this steamer. It is further in evidence that when the shaft snapped asunder, the section thus exposed showed that a part of the fracture was rusty and appeared old, while the rest appeared bright

[3] See appropriation acts of June 27, 1834, c. 92, § 2 [4 Stat. 698]; of March 3, 1835, c. 30, § 3 [4 Stat. 771]; of March 3, 1837, c. 30, § 2 [5 Stat. 157].

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

[2] [Affirmed in 97 U. S. 379.]

and new. This condition of the fracture cannot be accounted for as is attempted by any strain on the shaft occurring the day before. The appearance of the fracture as described by the witness evidently shows that the crack in the shaft was of older date.

We have these facts then. About five or six weeks after the date of the charter party, this ship having a shaft too small for the strain upon it is disabled by the breaking of the shaft in smooth deep water and without any extraordinary circumstances to account for it, and on inspection of the fracture, shows a defect that had existed for some time. I think these facts rebut the presumption of seaworthiness at the time of the charter party. "It is the duty of the owner of a ship when he charters her or puts her up for freight, to see that she is in a suitable condition to transport her cargo in safety, and he is to keep her in that condition unless prevented by perils of the sea or unavoidable accident. If the goods are lost by reason of any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the freighter upon the principle that he tacitly contracts that his vessel shall be fit for the use for which he thus employs her. This principle governs not only in charter parties and in policies of insurance, but is applicable in contracts of affreightment." Putnam v. Wood, 3 Mass. 485. "If there should be a latent defect in the vessel unknown to the owner and undiscoverable upon examination, yet the better opinion is that the owner must answer for the damage occasioned by the defect." 3 Kent, Comm. 205, note a; Lyon v. Mells, 5 East, 428; Whitall v. The Wm. Henry, 4 La. 223.

These authorities, in the view I take of the facts, dispose of the libellant's case. He has already been paid for the time his steamer was used by the defendant, and if he has suffered any damage, it was caused by a defect in his vessel, the consequences of which, whether known or unknown, he must bear.

Let the libel be dismissed, with costs.

[On appeal to the supreme court, the decree of this court was affirmed. 97 U. S. 379.]

WERK (TIGHLMAN v.). See Case No. 14,037.

WERK (TILGHMAN v.). See Case No. 14,046.

Case No. 17,416.

In re WERNER.

[5 Dill. 119.] [1]

Circuit Court, E. D. Missouri. 1878.

BANKRUPTCY—CHATTEL MORTGAGES—IMPEACHMENT BY ASSIGNEE.

The assignee in bankruptcy, as the representative and trustee for the general creditors, may impeach the validity of a chattel mortgage void by local statute as to creditors because not recorded, and has all the rights in this respect that an attaching or execution creditor would have had if bankruptcy had not supervened.

[In review of the action of the district court of the United States for the Eastern district of Missouri.]

The bankrupts, within sixty days of the proceedings in bankruptcy, made a chattel deed of trust upon their stock in trade, fixtures, and a leasehold interest, to secure a debt created at the time, in favor of Rumsey & Co. There was no actual fraud. The said deed of trust was never recorded, nor was possession ever taken under it. The mortgagors remained in possession, and carried on their business (plumbers) as before.

The question presented arises between the assignee in bankruptcy and the mortgagees. That question is, whether the security of the deed of trust (a mortgage in effect) is effectual as against the assignee in bankruptcy as respects the stock in trade, or the fixtures, or both. The district court held it invalid as to the stock in trade, but otherwise to be effectual. [Case unreported.] The mortgagees and the assignee bring cross-bills of review.

Collier & Muench, for assignee.

D. Dillon, for mortgagees.

DILLON, Circuit Judge. This case is different from Kirkbride's Case [Case No. 7,839], decided at this term, which involved a construction of section 1 of the statute of fraudulent conveyances. That section is as follows: "Every deed of gift and conveyance of goods and chattels in trust to the use of the person so making such deed of gift or conveyance, is declared to be void as against creditors, existing and subsequent, and purchasers."

This case involves a construction of section 8 of the same statute, which is in these words: "No mortgage or deed of trust of personal property hereafter made shall be valid against any other persons than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee, or cestui que trust, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded."

The bankrupt act declares that property disposed of in fraud of creditors shall pass to the assignee. It also contains a provision that no chattel mortgage "made in good faith and for present consideration, and otherwise valid, and duly recorded pursuant to the statutes of any state, shall be invalidated or affected by the bankrupt act." Under section 8 of the statutes of the state relating to fraudulent conveyances, above quoted, it is not denied by the counsel for the mortgagees, since the instrument was not recorded, nor possession taken under it, that it would be fraudulent

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

and void as to attaching or execution creditors. Such is the plain reading of the statute, and such is the settled construction of the statute in this state. But the point relied upon is that, since the instrument is good between the parties, the assignee, as the representative of the general creditors, having no lien of any kind, cannot impeach it. Such would seem to be the opinion of Mr. Justice Hunt, in Re Collins [Case No. 3,007], decided on the circuit, and there are some other decisions lending more or less support to this view. 6 Am. Law Rev. 50. But, on principle, as well as on the weight of authority, I think this view is erroneous. It was so decided in this court in Allen v. Massey [Case No. 231], in 1870, and the judgment was affirmed in the supreme court (17 Wall. [84 U. S.] 351). The bankrupt act "takes out of the hands of creditors, to a large extent, the ordinary remedial processes and suspends the ordinary rights which by law belonged to creditors, and substitutes in their place a new and comprehensive remedy, designed for the common benefit." Curtis, J., in Betton v. Valentine [Case No. 1,370]. And in this sense it is that an adjudication of bankruptcy has been said to be "a statute of execution for all the creditors." Ex parte Foster [Id. 4,960]. And on the precise point involved in this cause, Mr. Justice Strong says: "I think, notwithstanding some decisions to the contrary, an assignee in bankruptcy of the mortgagor stands in the position of such creditors (judgment or lien creditors) with equal rights, the adjudication of bankruptcy being equivalent to the recovery of a judgment and levy." Miller v. Jones [Id. 9,576]. To the same effect is the well-reasoned opinion of Drummond, J., in Re Gurney [Id. 5,873], of Woods, J., in Barker v. Barker's Assignee [Id. 986], of Woodruff, J., in Re Leland [Id. 8,234], and of Curtis, J., in Carr v. Hilton [Id. 2,436]. The briefs of counsel contain a reference to other cases to the same effect.

The order below will be reversed and the deed of trust declared to be wholly void, under the 8th section of the statute concerning fraudulent conveyances.

In order to have the point settled without delay in the administration of the estate, the district court ruled in favor of the claimant at the close of the term. The district judge, however, states that he is of opinion that his former ruling was erroneous, inasmuch as the mortgage was recorded after the proceedings in bankruptcy and other rights under the bankrupt act had intervened. Hence the doctrine laid down in Sawyer v. Turpin, 91 U. S. 114, is not applicable. The conclusion reached in this opinion meets with his full concurrence. Judgment accordingly.

WERNER (KING v.). See Case No. 7,809.

WERNER (KURSHEEDT v.). See Case No. 7,947.

Case No. 17,416a.

WERNER v. WASHINGTON.

[2 Hayw. & H. 175.][1]

Circuit Court, District of Columbia. Dec. 23, 1854.

INTOXICATING LIQUORS—SALES BY TAVERNS—TIPPLING HOUSES—MUNICIPAL ORDINANCES.

1. The law of the corporation of Washington, passed on the 8th of October, 1854, is null and void so far as it prohibits the sale of liquors to be drunk on the premises in ordinaries, taverns, or inns.

2. A keeper of a licensed ordinary, tavern, or inn has the right to sell liquors at his bar for the use and entertainment of his guests; and his right to sell liquors extends to his guests as well at their meals as at the bar.

3. There is no substantial difference in selling liquors to his guests at the bar, and selling to them at their meals.

4. Tippling houses are common drinking houses, kept for lucre and gain, where all people may, if they will, resort and drink ad libitum.

The appellant had taken out a tavern license and under it claimed a conferred right to sell spirituous liquors in quantities less than a pint, notwithstanding the law of the corporation to the contrary.

J. M. Carlisle, for appellant.

Joseph H. Bradley, for respondent.

MORSELL, Circuit Judge, on behalf of himself and colleague, DUNLOP, Circuit Judge, delivered a concurrent opinion in this case, as follows: This is the case of an appeal from a judgment of a justice of the peace, rendered on the 7th of November, 1854, in favor of the mayor, board of aldermen and board of common council, of the city of Washington, against Charles Werner, for twenty dollars fine, and fifty-eight cents costs, for the violation of a by-law of the corporation. The warrant charges that said Charles Werner, keeper of a tavern in the Fourth district, at the city of Washington, did sell and barter brandy, rum, gin, whiskey and other spirituous liquors, mixed and unmixed wine, cordial, strong beer and cider, in quantities less than a pint, on the 7th day of November, 1854, in the Fourth district, at said city of Washington, contrary to the acts of the mayor, &c., on that subject made and provided. The by-law under which this proceeding was had is entitled "An act to prohibit tippling houses, and to suppress the sale by the small, of spirituous and intoxicating liquors," and it enacts that, "from and after the first Monday in November then next, tippling-houses, or shops, be and the same are hereby prohibited in the city of Washington, and that it shall not be lawful after the said first Monday in November for any person or persons in any part of the city of Washington, to sell and barter any brandy, rum, gin, whiskey, or other spirituous liquors, mixed or unmixed wine, cordial, strong beer or cider in quantities less than

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

a pint, and every person or persons, who shall sell or barter as aforesaid, shall, on conviction thereof, forfeit and pay a fine for each and every offence of twenty dollars, to be collected and applied as other fines due said corporation, and on failure to pay said fine, or of securing the payment of the same, the person or persons so offending shall be committed to the work-house for a term not less, nor more than 60 days." By the second section, so much of the act approved respectively June 3, 1853, entitled "An act to license and tax and regulate taverns and ordinaries," and of the act regulating the sale of spirituous intoxicating liquors, as authorized the mayor to grant licenses for the sale or barter of the aforesaid liquors in quantities less than a pint; and all acts and parts of acts inconsistent with the provisions of this act were repealed. This act was passed the 8th of October, 1854. On the 1st of November the appellant obtained from the corporation a license to keep a tavern in the usual form, he having complied with all the requests of the corporation laws, under which he claimed the right, and did sell at the bar of his tavern in the usual way to his guests, &c., the liquors as charged in said warrant. No objection has been made to the form of the warrant.

The corporation claims the power to pass the by-law under the provisions contained in the charter of 1820 (section 7), which is in these words: "To provide for licensing, taxing and regulating auctions, retailers, ordinaries, and taverns, hackney carriages, wagons, carts and drays, pawnbrokers, venders of lottery tickets, money-changers and brokers and peddlers," and under the amended charter of 1848 (section 2, par. 2), which is in these words: "With power to punish those who may sell intoxicating liquors without obtaining licenses therefor, by fines not less than five dollars, and in default of the payment thereof, by imprisonment and labor in the work-house for a term not exceeding 90 days."

The questions involved in this case have been presented to the court in able arguments on both sides, the most important of which is, whether the corporation had power to pass the by-law mentioned in this case, so as to give it the supposed operation to prohibit the appellant, a regularly licensed tavern-keeper in the usual course of his business as such, from selling at the bar of his said tavern, to his guests the ardent liquors mentioned in said warrant, in quantities less than a pint? Many grounds have been urged in the arguments pro and con and they have had respectful consideration, some of the most material of which I shall endeavor to state.

The attorney of the corporation correctly assumes that congress had the power to prohibit such sales; and also that the states had a right to regulate their internal commerce and police institutions, not conflicting with the constitutional provisions on the subject, and for that purpose he referred to several decisions of the supreme court. Has that power been granted to the corporation? He supposes that to regulate a tavern and ordinary, and the power to restrain a tippling house, being in the same grant for the same purpose, must be construed together; that the power to regulate implies and carries with it the power to prohibit, to the extent necessary to regulate; similar to the power possessed by congress; that selling intoxicating liquors at the bar of a licensed tavern to the guests in such tavern, is a tippling in the offensive sense and expressly within the terms of the charter giving the power to prohibit. It is, however, conceded by him, that in such a tavern or ordinary the furnishing of liquors to the guests at their meals is not prohibited.

On the part of the appellant it is contended that the power to regulate licensed taverns extends only to the manner of carrying it on, not to prohibit it or change its nature; that the by-law is in restraint of a lawful trade, not within the power contained in the charter, in its terms so general and extensive as it involves absurd consequences, and that it being conceded that such tavern-keeper has the right to sell to his guests spirituous liquors by the small, to be used at their meals, the law is shown to be void in part, and being void in part, is void in toto. If the corporation had the power to pass the by-law in question, that power must be derived to it under the charter of 1820. The charter of 1848 has nothing else for its object than to add additional means to give complete effect to the pecuniary mode of punishing the offence of selling spirituous liquors without license, which it before had not exercised; no new offense is created or increase of power otherwise given.

It may be conceded that the paragraph, "to restrain tippling houses," may be taken in connection with that to provide for the licensing, taxing, and regulating ordinaries and taverns, without, however, admitting the conclusion that a licensed ordinary or tavern, in the sense it is used in the charter of 1820, selling at its bar ordinary liquors in quantities less than a pint, is a tippling house such as is described in the 10th paragraph. A corporation is the creature of the charter, and can possess no other or greater powers than such as are either expressly given or necessarily implied. The language used to express the terms is certainly different. The one is to regulate, the other to restrain or prohibit; and it may be reasonably supposed that congress intended the distinction which they impart. If prohibition or absolute control in both instances was intended, then it would have been so expressed. The unreasonableness of the position will appear by carrying out the idea in reference to some of the subjects standing in the same category and the same paragraph, as to license, &c., wagons, carts and drays. Can it be supposed that power was intended to be given entirely to suppress and break up that branch of trade? Again the same terms occur in the three preceding paragraphs, "to regulate public wharves, the manner of erecting and the rates of wharfage;" "to regulate the stationing, anchorage,

and mooring of vessels;" and so of subsequent paragraphs, as "to regulate and establish markets," the "weight and quantity of bread, &c.," in neither of which instances can any one suppose it was the intention to give a power to prohibit. The truth is that the terms were intended to be limited by the nature of the subject to which they were applied, which, though it was to be regulated, was not to be destroyed or deprived of its essential elements. It was a licensed tavern or ordinary which was to be regulated. The important inquiry then is, whether the right to sell spirituous liquors at the bar of a licensed ordinary or tavern for the use and the entertainment of the guests is not an essential ingredient in that employment or business?

The business indicated by the name "public inns," "taverns" and "ordinaries" will, therefore, be shown to be substantially the same. The responsibilities and obligations to the public and their guests to afford them entertainment and comfort, and for the security of their goods and effects are the same; and what has constituted the essential nature and character of the one has of the other. The establishment has been found indispensably needful for the public convenience from the earliest periods of time, and that the right to sell spirituous liquors, as above stated, is an essential part of the nature of their business. It has been admitted that it may be lawfully supplied to their guests at their meals. If so, I cannot perceive a sufficient reason for the difference between the selling it at the bar for that purpose and any other part of the tavern. The nature and meaning in a philological sense accords with what has been said. Webster says of inns: "A house for the lodging and entertainment of travelers, often a tavern where liquors are furnished for travelers and others. 'Tavern,' a house to sell liquors in small quantities, to be drank on the spot. In some of the United States, a 'tavern' is synonymous with 'inn' or 'hotel,' and denotes a house for the entertainment of travelers as well as for the sale of liquors, licensed for that purpose. 'Ordinary,' a place of eating where the prices are settled." To place this subject in a more conclusive point of view, it may be proper to notice as briefly as I can, a course of legal exposition respecting it. 3 Bac. Abr. tit. "Inns and Innkeepers"; the law is stated as to the extent of his duty.

It is said that the duty of an innkeeper extends chiefly to the entertaining and harboring of travelers, finding them victuals and lodging and securing the goods and effects of their guests; and therefore if one who keeps a common inn refuse either to receive a traveler as a guest in his house or to find him with victuals or lodging upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case at a suit of the party grieved, but also may be indicted and fined at the suit of the king. They are to sell at certain reasonable fixed rates. "So if an innkeeper sells corrupt wine or victuals, an action lies against him;" also if his servant sells such corrupt wine or victuals, the action on the case lies against the master, &c. Also it is agreed that the statute of 5 & 6 Edw. VI. c. 25, and other statutes concerning the licensing of ale houses, &c., do not extend to inns, unless an inn degenerates into an ale house by suffering disorderly tippling, in which case it shall be deemed as such. These past ages show at an early period the public nature and responsibilities of an innkeeper, and that spirituous liquors, as well as others, form a part of the entertainment of, and were furnished by the innkeeper to his guests. In Maryland, it became the subject of very early legislation, under the name of "ordinaries." The first act which I shall notice was passed March, 1780 (chapter 24), entitled "An act licensing and regulating ordinary keepers." By this act the justices of the peace of each county, in court sitting, were empowered and authorized at this their June and August courts on the eastern and western shores respectively, to grant licenses to such person or persons as they should think fit, "being persons of good repute, to be ordinary keepers for keeping of ordinaries in such, and so many places within their several and respective counties, except in the city of Annapolis, for the ease and convenience of the inhabitants, travelers and strangers, as to them respectively shall seem meet; for every of which licenses, except in the city of Annapolis, there shall be paid the sum of six pounds for every year such person or persons shall keep ordinary as aforesaid." By section 4, "the justices were, in the months of June and August, to set and assess in current money, the rates and prices of all liquors, and other accommodations whatsoever by ordinary keepers to be vended for the year ending, &c." Section 5. "Such ordinary keepers were bound to provide and maintain six good feather beds, more than sufficient for the private use of such ordinary, and covering and Indian corn and straw and stabling for ten horses at least (at the court-house) at other places than the court-house three spare beds and stabling for six horses." Penalties are imposed for selling without license. The 6th section provides "that such ordinary keeper shall enter into recognizance, with sureties, conditioned that if the person so obtaining such license shall keep good rules and orders, and not suffer loose, idle or disorderly persons to tipple, game or commit any disorders or other irregularities in such ordinary, &c., then such recognizations to be void, &c." Section 10 requires "that every licensed ordinary keeper should sell only by sealed measures, except bottled cider, perry, quince drink, and strong beer, of the product of the state, and such liquors as should come into the state bottled, and that any ordinary keeper who should neglect to keep a sealed quart, pint, half-pint, and gill measure, and shall refuse or neglect to sell by the same, shall forfeit and pay, &c."

The next Maryland statute which I shall take notice of is the act of 1784 (chapter 37, § 24). This statute is on the subject of the sale of

spirituous liquors. It prohibits the sale of any of the sprituous liquors or other liquors therein mentioned, except in the city of Annapolis and its precincts, without a license for that purpose obtained. "Every person so licensed and selling under the quantity of ten gallons, is deemed a retailer, and no person shall retail less than a pint, the maker, distiller, a brewer of any such liquors excepted; such excepted persons not selling less than a quart at a time. The court is authorized to suppress disorderly retailers, &c." Merchants were authorized to sell in quantities over ten gallons.

I have made full extracts from these statutes that a full view of the law might be seen on the subject of ordinaries, taverns and retailers of spirituous liquors at the time of the assumption by congress of jurisdiction over the District of Columbia, at which time they were adopted, so far as applicable, as the law of this district, and being statutes in pari materia they should be taken together with the charter in the construction on the subject now under consideration. These provisions shed a flood of light on the true nature of the business employment of the tavern, ordinary or inn. They show that they are substantially the same, and that the right to sell spirituous liquors under a pint is fully and clearly recognized as essentially making a part thereof; and the extent to which the terms licensing and regulating ordinary keepers are understood to affect the trade in the practical application of them, that is in the manner and not the change or prohibition; and that at that early period the right was considered to extend to the sale of them to the guests as well at the bar as at their meals, and that there was no substantial difference. They also show their obligations and responsibilities; also, what will be deemed disorderly and forbidden conduct, and how punishable.

There is a remarkable coincidence between the terms used in the title of the first act and those used in the charter. The statutes were practiced under by the circuit court (except such parts as had become obsolete) during the time the power was with that court—that is, until granted to the corporation. Such then was the state of the law when congress, by the terms used in the charter, transferred the power to the corporation, and the cotemporaneous acts and practice of the corporation under it. To which effect, also, is their joint resolution passed the 14th of May, 1853, providing for submitting to the voters of the city the question of license or no license of shops, taverns, and ordinaries, in the second of which it is said: "Resolved, that in case a majority of the votes cast at the next election shall be for license, then it shall be the duty of the committee who have charge of the interest of the city before congress to urge upon that body an amendment to the city charter, which will give their councils the power to pass such laws as will prohibit the sale of all intoxicating liquors within the city limits."

From the foregoing views, and for the reasons stated, I fell that I am brought necessarily to the conclusion that the corporation had not the power to pass the by-law in question so far as it relates to limiting and prohibiting licensing ordinary and tavern-keepers from selling, &c., the spirituous liquors mentioned in the warrant to quantities less than a pint; and that the said law as to that is inoperative and void, and that the judgment rendered against the appellant is erroneous and ought to be reversed. And here I might close the opinion, but for one ground taken in the defence, that if the by-law in question was void in part, it was so in toto. To avoid misapprehension as to the extent of the opinion in relation to that matter, it will be proper for me to say that such is not my opinion. The subjects, objects, and penalties are various, and the law cannot be considered, as contended for, to be entire. The law appears to have been made to prohibit tippling houses and to suppress the sale by small of spirituous and intoxicating liquors. There can be no doubt of their power to restrain and prohibit tippling houses, because it is expressly given by the charter as to what may be deemed a tippling house, in addition to what has already been said with respect to taverns and ordinaries. I shall adopt the description given in the learned opinion of the former attorney for the corporation to them August 3, 1853. It says that tippling houses are common drinking houses, kept for lucre and gain, where all people may, if they will, resort and drink ad libitum. To make a tippling house it is not necessary that in fact one or more shall have actually drank there frequently to excess. It is sufficient that the place be one which, for lucre or gain, is kept for common drinking or tippling, whether in fact it attracts customers or not, or whether such customers drink to excess or not, &c. And, although as I before said, a tavern or ordinary may degenerate into a tippling house, the nature and character of the one, as already shown and expressly stated in the statute differ very essentially from that of the other. The statute before recited authorizes but two classes who can be licensed to sell spirituous liquors under ten gallons—ordinary keepers, who are not limited as to quantity, and retailers in quantities under ten gallons and not under a pint. The by-law repeals the act of the 30th of June, 1853, authorizing shop licenses, and I have no doubt of its validity for that purpose. The law so repealed was inconsistent with the general law on the subject, and could, therefore, give no valid shop-keeper's license, as so called.

Case No. 17,417.

WESCOTT et al. v. COLE et al.

[4 McLean, 79.] [1]

Circuit Court, D. Indiana. May Term, 1846.

EQUITY JURISDICTION—SALE OF EQUITABLE INTERESTS—TITLE BONDS.

1. A court of equity may direct an equity to be sold, but in such case the interest sold should be ascertained, and made known at the time of the sale.

2. In Indiana a title bond is assignable.

[This was a bill by Wescott and Comblos against Cole and Shelby.]

Fletcher & Butler, for complainants.

Mr. Dunn, for defendants.

McLEAN, Circuit Justice. Cole gave his note to complainants 17th June, 1842, for —— dollars, and at the same time executed a mortgage to secure the payment of the note, on land in Clarke county. He also transferred a title bond held by him and given by Shelby and Shelby, for a piece of property in the same county, "conditioned" for making a deed on payment of eighteen hundred dollars. A title bond is assignable by the statute of Indiana. The bill prays for a sale of the mortgaged premises, and also of the interest assigned in the title bond. There was no answer filed by the defendant, and a decree pro confesso was taken against him.

The defendant objected, that there was no averment in the bill of the payment of the eighteen hundred dollars. There is no evidence of the payment of this sum, still in chancery whatever interest the assignor may have can be sold. The court will provide in the decree, that the purchaser at the sale of the master shall know what he buys.

It is also objected that unless Cole could sue in this court, his assignee can not sue. This is undoubted. But there is nothing in the bill to show that Cole was a citizen of Indiana at the time he made the assignment, and, consequently, the defendant being in default, is not in a condition to raise the question.

The court will direct a sale of the mortgaged property, and also of the equitable interest of Cole, under the title bond, giving special directions, etc.

Case No. 17,418.

WESCOTT v. FAIRFIELD TP.

[Pet. C. C. 45.] [2]

Circuit Court, D. New Jersey. Oct. Term, 1811.

JURISDICTION OF CIRCUIT COURTS — CITIZENSHIP.

A citizen of the District of Columbia is not entitled to sue in the circuit courts of the United States.

[Cited in Barney v. Baltimore, 6 Wall. (73 U. S.) 288; Cissel v. McDonald, Case No. 2,729. Cited in brief in McMurdy v. Connecticut Gen. Life Ins. Co., Id. 8,903.]

The declaration is in the name of Den, a citizen of the District of Columbia, on the demise of Wescott, also a citizen of the same district, against the inhabitants, &c., citizens of the state of New Jersey. The plaintiff moved for a rule on the defendants, to appear by the next court and confess lease, &c. This was objected to by Leake for the defendants, on the ground that the court could not take jurisdiction of the cause, the plaintiff being a citizen of the District of Columbia, and therefore not within the provision of the act of congress, giving jurisdiction to the circuit court. He cited Ash v. Hayman [Case No. 572].

BY THE COURT. The case cited is conclusive; and of course, the plaintiff can take nothing by his motion.

Case No. 17,419.

WESLEY et al. v. BIAYS.

[Brunner, Col. Cas. 254; [1] 4 Am. Law J. 275.]

Circuit Court, D. Maryland. 1812.

SEAMEN'S WAGES—CAPTURE.

Where a vessel is captured and finally acquitted, seamen are entitled to full wages, including the time of detention, even though the master offered to discharge them and send them home and they refused.

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

Libel for wages. The vessel was captured and sent in for adjudication. The master offered to discharge the seamen and find passages home for them, but they refused to quit the ship. She was condemned; but upon appeal the decree was reversed. The vessel then prosecuted her voyage and returned to Baltimore. The district judge decreed wages for the whole time, including the delay at the port, where the vessel was sent in for adjudication [case unreported], which sentence was affirmed by this court.

WESLEY, The JOHN. See Case No. 7,433.

Case No. 17,420.

The WESLEY SEYMOUR.

[7 Ben. 539.] [2]

District Court, S. D. New York. Jan., 1875.

COLLISION AT SEA — SAILING VESSELS — CROSSING COURSES AND OPPOSITE TRACKS—LIGHTS—LOOKOUT—CHANGE IN EXTREMIS.

1. A collision took place off Barnegat at night, between a schooner and a brig. The wind was about west. The schooner alleged that she was heading south by west, close-hauled on her starboard tack, and that she saw the red light of the brig a little on her port bow, and kept her course without change, till just before the col-

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

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

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

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

lision, when her helm was put down to ease the blow, if possible, but too late to affect the course of the schooner. The brig alleged that she was heading about north northeast; that she saw the green light of the schooner a little on her port bow; that she starboarded her wheel, and changed her course so as to bring the green light on her starboard bow; and that afterwards the schooner changed her course, and attempted to cross the brig's bows, when the helm of the brig was put hard down, but the collision could not be avoided. The vessels came together nearly at right angles, the brig striking the schooner on her port side: *Held*, that this was a case under the 12th article of the sailing rules, and, as the courses were crossing, and the schooner had the wind on her starboard side, while the brig had it on her port side, and was not close hauled, it was the duty of the brig to keep out of the schooner's way, and of the schooner to keep her course.

2. The brig, seeing the schooner's green light on her port bow, was justified in regarding it as on a vessel which was crossing from port to starboard of the brig, and her starboarding was a proper manœuvre, and was enough to have cleared the two vessels, if the schooner had held her course.

3. On the evidence, the schooner must be held to have changed her course after the brig had taken proper measures to avoid her.

4. Such porting by the schooner could not be held to have been a change of course in extremis, but it probably resulted from an inefficient lookout.

5. The brig was not responsible for the collision.

In admiralty.

W. R. Beebe, for libelants.

R. D. Benedict, for claimants.

BLATCHFORD, District Judge. This libel is filed by the owners of the schooner George W. Pettus against the brig Wesley Seymour, to recover for the damages sustained by the libellants, in consequence of injury to the schooner caused by a collision which took place between the two vessels, between 7 and 8 o'clock, p. m., on the 28th of January, 1873, in the Atlantic Ocean, off Barnegat. The schooner was bound from New York to the Chesapeake Bay. The brig was bound up the coast to New York.

The libel sets forth that the wind, at the time, was "to the southward and westward;" that the schooner was heading "about south by west," and was close-hauled on the wind; that the red light of the brig, headed for New York, with the wind free, was made on the lee bow of the schooner, about a point off; that the schooner continued her course until the brig had approached within hailing distance, when she was hailed from the schooner; that no attention was paid to the schooner's hail; that, when the brig had approached so close that a collision was unavoidable, the schooner put her helm down, "and her course was changed but a trifle, to ease the blow," and the brig hit the schooner on her port side, breaking into and damaging her in such a manner that she had to return to port; that the collision occurred through the want of care and attention of those on the brig, and their want of skill in, amongst other things, not keeping a good lookout, not keeping out of the way of the schooner, not keeping at a greater distance, not in time changing her course, and luffing as she did; and that the collision was not caused by the fault of those on the schooner.

The answer alleges that the brig had a proper lookout on duty; that the wind was blowing from about west; that the brig was proceeding on a course heading about north northeast, under the command of a pilot, and, while proceeding on such course, the green light only of the schooner was seen, some distance off, a little on the port bow of the brig, that the course of the brig was then changed more to the north, which brought the schooner on the starboard bow of the brig, the schooner still showing only her green light, and thus indicating that she would pass on the starboard hand of the brig; that, after continuing on that course for a short time, the schooner suddenly and improperly put her wheel down, and changed her course, and attempted to cross the bow of the brig, and thus caused the collision; that, as soon as the schooner so changed her course, it was discovered, on board of the brig, that a collision was imminent, and the helm of the brig was put hard down, but the collision could not then be avoided; that no collision would have occurred if the schooner had not so changed her course; and that the collision did not occur through want of care and attention of those on board of the brig, who did all in their power to avoid it, but it occurred through the negligence of those on board of, and in charge of, the schooner, in, amongst other things, not keeping a proper lookout, not seeing the light of the brig as soon as they ought, not keeping their course, as they were bound to do, luffing and attempting to cross the bows of the brig, and otherwise improperly and carelessly navigating.

On the part of the schooner four witnesses have been examined—the master, Frank W. McKay; a seaman, Daniel McKay, who was at the wheel; McCretchie, the mate; and McLeod, a seaman, who was forward, on the lookout. McLeod says, that he was forward of the windlass, keeping a lookout, and had been on the lookout over half an hour before the collision. The first that he saw was a red light, a point or a point and a half on the lee bow, that is, the port bow, and not over six lengths of the schooner away. He sung out, "a light on the lee bow," and McCretchie, the mate, then went forward to where McLeod was standing. McLeod says, that, after he made the red light, he kept it in sight until the collision; that he saw no other light but the red light until after the collision; that he saw no change in the course of the brig until she struck the schooner; that, when the schooner was about three lengths off, the mate sung out to her to keep off; that he saw no change in the course of the schooner; and that she was sailing close on the wind all the time, with her sails full. He also says that the light he saw did not change its position any, while he was looking at it, relatively to the schooner, but approached all the time. McCretchie, the mate, says, that he went forward to call a man in the forecastle,

and, while at the door of the forecastle, heard McLeod report a light, and then went and looked and saw a red light, about a point and a half on the lee bow, and 300 or 400 yards off; that he watched the movements of the brig from the time he first saw her red light until the collision, and saw no other light on board of her at any time but the red light; that the schooner did not come any into the wind; and that she was, at the collision, full on the starboard tack, with her booms on the port side. Daniel McKay, the man at the wheel of the schooner, says, that when he went to the wheel, the schooner was close-hauled on the starboard tack, headed south by west; that she was going so all the time he was at the wheel; that he could see all to the starboard of the point of the schooner's jibboom; that he saw no light, and saw nothing of the brig, until just before she came into the schooner, and then he looked under the boom, and to leeward, and saw her port or red light; that he heard her light reported about a minute and a half before the collision; that he ran on his course about a minute after that, before he got an order to hard down; that he put his wheel down, but the schooner had not changed her course at the collision; that the schooner's sails, when the brig struck her, were full on the starboard tack, with her booms on the port side. The master of the schooner had been below. He says he was "called on deck by the alarm about the light," and went from the cabin through the companion way opposite the wheel, to the port side of the deck alongside of the man at the wheel, and looked, and saw a red light that bore about a point on the lee bow; that, when the vessels were about thirty feet apart, he told the man at the wheel to put the wheel down; that the red light of the brig was still on his port; and that the schooner had not changed her course any before the collision, and was then headed about south to south by west, with her sails full on the starboard tack. The master says that the stem of the brig hit the schooner right amidships. Daniel McKay says that the brig came pretty near bow on, and struck the schooner amidships on the port side. The mate says that the brig struck the schooner about bow on, on the port side. McLeod says that the brig struck the schooner amidships, between the fore and main rigging, on the port side. Daniel McKay says that the wind was about west southwest. McLeod says that the wind was off shore.

On the part of the brig four witnesses have been examined—Brady, the pilot, who had charge of her; Riske, who was at her wheel; Zedke, a seaman, who was on deck, aft; and Spicer, the master. Brady says that he saw the green light of the schooner about a point on his weather bow, bearing north; that the wind was west; that, after that, he went below to light his pipe, and came on deck again, and then saw the green light right ahead; that, before he went below, he had told the man at the wheel to luff a point; that that order was obeyed, and brought the light ahead; that he should think the light was two miles away when he came on deck after lighting his pipe; that, after so coming on deck, he told the man at the wheel to luff another point; that that order was obeyed, and brought the light a point on the lee bow; that, when the schooner was distant twice her own length, he saw the collision was unavoidable, and ordered the man at the wheel to put his helm hard down; that the schooner was showing her green light; that that was the only light he saw, and he did not see her red light at all; that the brig struck the schooner just forward of her foremast, nearly at right angles, the brig heading northwest by north, and the schooner about southwest; that he heard a hail from the schooner just a moment or two before the collision; and that there was one man on the lookout, on the forecastle, and an officer on the quarter deck, and a man at the wheel. He also says, that, when he first saw the light, it was from two and a half to three miles off; that it was twenty minutes from the time he first saw the light of the collision; that he thinks there was time for the brig to change her course some after the order to hard down was given and before the collision; that when he gave the order to hard down, the schooner was about twice her length off; that he lost sight of her light when she was two of her lengths off under his bow, on account of the brig's being higher out of the water; that the last he saw of the light it bore the same, a point on his lee; and that he gave the order to hard down to break the force of the blow. Riske says that he was at the wheel of the brig; that he saw the light of the schooner—only one light—a green light, three quarters of a point on his port bow, the course of the brig being then north northeast; that he then got an order from the pilot to steer north by east; that he did so, and lost the light, because it got on his starboard bow; that he afterwards got an order from the pilot to put the wheel hard down, and did so, and got it hard down before the blow; and that the brig, at the time of the blow, was heading north. Zedke says that he was at the pump, and saw the green light of the schooner about three-quarters of a point on his port bow; that he saw the pilot come up out of the cabin, and heard him sing out "north by east;" that he afterwards heard him say "hard down;" that the man at the wheel obeyed these orders; that the course of the brig, when he first saw the light, was north northeast; and that he lost sight of the schooner's green light after the pilot gave the course "north by east." Spicer, the master of the brig, was below, lying down, partly asleep, and was aroused by hearing the pilot sing out to the man at the wheel to put his helm to starboard; that he heard the pilot sing out, two or three times, "hard a-starboard;" that he (the master) sprang on deck, and got about half way from the cabin forward when he heard the

crash; that the starboard bow of the brig struck the port side of the schooner amidships; that the schooner's booms were swung over on her starboard side, and her sails were full; that the wind was west by south; and that he thinks the brig was heading north northwest at the time of the blow, and the schooner northwest by west, three points difference, or perhaps four.

This case is one of difficulty. The people on the schooner say they saw the brig's red light a point or a point and a half on the port bow of the schooner, the schooner being headed south by west and close-hauled. Yet the people on the brig say they saw the green light of the schooner a point on the port bow of the brig when the brig was headed north northeast. These courses were crossing, and they crossed at a point ahead of each vessel and between the two vessels. Now, although the schooner may very well have seen the red light of the brig, yet it is difficult to understand how such red light could have been seen over the port bow of the schooner, at any time before the brig passed the point where such courses crossed each other. The red light of the brig ought to have been seen over the starboard bow of the schooner. And, if the schooner had seen the brig's red light over the port bow of the schooner, it is difficult to see why the red light of the schooner, and not her green light, was not visible to the brig.

This was a case under the 12th article of the steering and sailing rules. The vessels were crossing, so as to involve risk of collision. They had the wind on different sides, the brig having it on the port side and the schooner having it on the starboard side. The brig was not close-hauled. It was, therefore, the duty of the brig to keep out of the way of the schooner. The brig seeing a green light on her port bow, about a point, was justified in regarding such light as on a vessel which was crossing from port to starboard of the brig. Therefore, if the brig was to take measures to avoid such vessel, the proper manœuvre of the brig was to starboard, and let the other vessel pass to the starboard of the brig. The brig did starboard, so that she brought the schooner's green light a point on the starboard bow of the brig. This ought to have been sufficient to clear the two vessels, if the schooner held her course. Yet the stem of the brig hit the schooner amidships on the port side of the schooner. This being so, it would be supposed that the people aft on the schooner would see the green light of the brig, and that the people on the brig would see the red light of the schooner. Yet the former say, that they saw no light on the brig but her red light, and the latter say, that they saw no light of the schooner but her green light.

It is apparent, from the evidence, that the light of the schooner was seen from the brig a considerable time before the light of the brig was seen from the schooner. Probably, the brig had already starboarded, to avoid the schooner, before her light was discovered by the schooner. The schooner's lookout says, that the brig's light was not over six lengths of the schooner away when he first discovered it. He reported it. Some alarm ensued on board of the schooner, for her master says, that he was called on deck by the alarm about the light. The libel states, that the helm of the schooner was put down, that is, ported, and that her course was changed, though but a trifle, and that this was done to ease the blow when the brig had approached so close that a collision was unavoidable. The libel is sworn to by the master of the schooner. In his testimony, he says, that the vessels were about thirty feet apart when he told the man at the wheel to put the wheel down, that is, to port, and that the schooner had not changed her course any before the collision. The man at the wheel says, that he got the order to hard down, and put his wheel down, but the schooner had not changed her course at the collision.

It is impossible to see how the collision occurred, unless the schooner changed her course and threw herself across the bows of the brig at a time when, but for such change, the brig would, in consequence of the measures she had taken to clear the schooner, have succeeded in doing so. On the view that the schooner did so change, it is easy to see how the collision occurred. On the whole evidence, it must be held, that the schooner changed her course at such a time, and in such a manner, and to such an extent, as to thwart the efforts of the brig to avoid her, and as to cause the collision which would otherwise have been avoided. Daniel McKay, who was at the wheel of the schooner, says, that she was heading south by west, and that the wind was west southwest. This would make the vessel to head within five points of the wind. He also says, that she was close-hauled, and that, when the brig struck her, her sails were full on the starboard tack, with her booms on the port side. McCretchie, the mate of the schooner, says, that she did not come any into the wind, and that she was full on the starboard tack, at the collision, with her booms on the port side. He says nothing as to how the wind was. McLeod says, that the schooner was sailing close on the wind all the time, with her sails full. All he says about the wind is, that it was off shore, and that the schooner was running close-hauled. He also says, that the schooner made no sheer before she was struck, and that her sails were full all the time. The master of the schooner says, that she was headed about south to south by west; that, at the time of the collision, her sails were full on the starboard tack; and that her booms were off on the port side, and she was close-hauled, with the booms close in. If the schooner was heading south by west, when struck, the brig, if she struck the schooner a square blow at right angles on her port side, must have been heading west by north. This is incredible, on the evidence.

The pilot of the brig says that the brig had got around to head northwest by north, at the blow, and that the schooner was heading about southwest, at the blow. This would make the blow angle aft on the schooner one point from square across. It would involve a change of three points in the heading of the schooner. If the wind was west, the schooner, at south by west, was within seven points of it. If she changed only two points, or to southwest by south, she would have been, with the wind west, as much as five points from the wind, and the brig, at northwest by north, would strike her, angling aft on her, two points from square across. Exactly how the wind was, and how close the schooner could sail to it and keep her sails full, does not appear. If the wind was west, the schooner, at south by west, could, probably, have come closer to the wind, without gybing. The master of the brig testifies, that the schooner's booms were swung over on her starboard side, and her sails were full, that is, full to starboard, which puts her on her port tack; and so he says she was heading, at the blow, northwest by west, and the brig north northwest, which would make the blow angle forward on the schooner five points from square across. This testimony of the master bears marks of exaggeration. The testimony of those on the schooner is, that their booms were to port, and their sails full to port, at the blow. This, on the whole evidence, is not inconsistent with the schooner's having come up to the wind enough to throw herself across the brig's course, and is consistent with the libel. It is very certain, from the testimony of the persons on the schooner, that they did not see the brig till she was near them, that there was alarm on the schooner, that her master gave the order to port, and that that order was obeyed. The brig was, at the same time, in the discharge of her duty to avoid the schooner, starboarding. It was proper for her to do so, with a green light crossing her course from her port to her starboard, and she had, by starboarding, brought that light from being a point on her port bow to being a point on her starboard bow. Therefore, it was for the brig to keep on starboarding, which she did. Any porting by the schooner, under such circumstances, baffled the brig. Such porting cannot be regarded as a porting in extremis. It resulted from the fact, that the lookout on the schooner was inefficient, and that, consequently, the light of the brig was not seen as soon as it should have been. The brig was not crowding the schooner, but was manœuvring to pass her at a proper and safe distance.

I have given this case a great deal of consideration; and, while there are matters of evidence on both sides that are incapable of comprehension, I think the brig cannot be held responsible for the collision, and that the libel must be dismissed, with costs.

WESSELS (NISSOM v.). See Case No. 10,278.

WESSON (CHASE v.). See Case No. 2,631.

WEST (ALEXANDER v.). See Case No. 177.

WEST (BARTHOLOMEW v.). See Case No. 1,071.

Case No. 17,421.

WEST v. COLUMBIAN INS. CO.

[5 Cranch, C. C. 309.] [1]

Circuit Court, District of Columbia. May Term, 1837.

MARINE INSURANCE—DEVIATION.

In a voyage to Pernambuco, the vessel, when she arrived off Pernambuco, came to anchor off the port, when she might have gone directly in; *held*, that it was a deviation that discharged the underwriters.

The defendants insured the plaintiff [John West] $500 on his commissions as supercargo of the schooner Leonidas, from Alexandria to Pernambuco, until landed. The vessel and cargo were insured, by other policies, to Pernambuco, and two other ports. She arrived and came to anchor off Pernambuco, in the outer roadstead, at nine o'clock, a. m. The master went on shore to inquire of the market, and returned in a few hours. A storm came on; the anchor dragged, and the vessel was going ashore. They hoisted sail, and endeavored to crawl off, but could not, and she went on shore. There was evidence that she might have gone safely into the port, if she had not come to in the outer roadstead.

Mr. Semmes, for plaintiff, contends that the vessel never arrived at Pernambuco; but if she did, she did not remain twenty-four hours in good safety. Camden v. Cowley, 1 W. Bl. 417.

Mr. Taylor, contra, prayed the court to instruct the jury, in substance, that if they should find, from the evidence, that when the schooner arrived off Pernambuco, she could have proceeded to the port without coming to anchor in the outer road, the stopping there was a deviation which discharged the underwriters.

Which instruction the court gave (nem. con.).

Mr. Semmes then prayed the court to instruct the jury that if they believe, from the evidence, that the anchoring of the vessel in the outer road of Pernambuco, was an arrival at Pernambuco, then the plaintiff is entitled to recover, because she was not, twenty-four hours in safety after her arrival.

But THE COURT (nem. con.) refused.

Verdict for the defendant.

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

Case No. 17,422.

WEST et al. v. DAVIS.

[4 McLean, 241.] [1]

Circuit Court, D. Michigan. June Term, 1847.

VACATING JUDICIAL SALES.

Where no fraud or unfairness is alleged, a court will not set aside a judicial sale, on the ground of inadequacy of price.

Mr. Davidson, for complainants.
Mr. Romeyn, for defendant.

McLEAN, Circuit Justice. This is a petition representing that a decree of foreclosure entered on a certain mortgage, on a bill filed, being taken pro confesso, the mortgaged premises were ordered to be sold, and after notice given as required, they were sold for one hundred dollars; when the property is represented to be worth six hundred dollars. That it rents for seventy-five dollars per annum. The sale was confirmed by the court. Petitioner prays that the sale may be set aside on the ground of inadequacy of price, and some other circumstances alleged. No fraud or unfairness is suggested.

This application is opposed, first, on the ground that it asks the court to annul and set aside an order or decree entered at a previous term, which the court can not do. That this principle is fully recognized in [Cameron v. M'Roberts] 3 Wheat. [16 U. S.] 591; [Sibbald v. U. S.] 12 Pet. [37 U. S.] 490–492; [Jackson v. Ashton] 10 Pet. [35 U. S.] 480; and that the same point was settled in Medford v. Dorsey [Case No. 9,389]. It is also urged that the biddings will not be opened and a re-sale ordered except in cases of fraud, accident or mistake. [Duncan v. Dodd] 2 Paige, 100. This application does not affect the original decree, but, only the confirmation of the sale. This order is made, as a matter of course, where no objection is made, and the proceedings on their face appear to be regular. Such an order, it would seem, can not have attached to it the same dignity as a final decree on the merits. And if at any future time it should appear that the proceedings of the marshal had been irregular, the confirmation, we suppose, might be set aside.

There does not appear to be, in the present case, any irregularity, mistake or fraud. The only objection urged is, that the property sold for less than its value. We can not say that this inadequacy is so striking as to authorize the setting aside of the sale. The application is, therefore, rejected.

WEST (DOUGHTY v.). See Cases Nos. 4,028 and 4,029.

WEST v. DOUGHTY. See Case No. 14,986.

WEST (DUNLOP v.). See Case No. 4,170.

WEST (HARPER v.). See Case No. 6,093.

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

WEST (LUCKETT v.). See Case No. 8,593.

WEST (NEWELL v.). See Case No. 10,150.

WEST (PEIRCE v.). See Cases Nos. 10,909 and 10,910.

Case No. 17,423.

WEST et al. v. PINE et al.

[4 Wash. C. C. 691.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1827.

EJECTMENT—SOURCE OF TITLE—RECITALS IN DEEDS—LIMITATIONS—REPEAL OF STATUTES.

1. The plaintiff in ejectment need not go further back in deducing his title in the first instance, than the will of a person under whom he claims, who died seised of the land. The law presumes a fee simple estate in the devisor, unless the contrary is shown.

[Cited in Grubb v. Grubb, 74 Pa. St. 34.]

2. Recitals in a deed are binding on the parties to it, and those claiming under them; but not on strangers.

[Cited in brief in Hempstead v. Easton, 33 Mo. 146. Cited in Wiley v. Givens, 6 Grat. (Va.) 283.]

3. Construction of the acts of limitation of New Jersey.

4. A later statute, repugnant to a former one on the same subject matter, so that they cannot stand together, repeals it by implication.

[Cited in U. S. v. Fisher, 109 U. S. 145, 3 Sup. Ct. 156.]

This was an ejectment [by Elizabeth L. West and others against Daniel Pine and others] to recover two hundred and forty acres of land called the "Windmill Tract." After proving that Deborah West, and her husband, Thomas West, lived upon the premises until his death in 1770, and she continued to live on the land, during the residue of her life time, and that she died seised thereof sometime about December, 1778, leaving by her husband Thomas, three children, Charles, the eldest, Joseph and Mary; the plaintiffs' counsel gave in evidence the will of Deborah West, dated the 30th of March, 1777, by which she devises to her sons Charles and Joseph, all her fishing place and land belonging thereto, in fee simple; and, after some pecuniary bequests, she gives to her son Joseph, and to her daughter Mary, all the rest and residue of her estate in fee, to be equally divided between them. It was proved that the length of her residence on the land in dispute, during her marriage and widowhood, was from thirty to forty years. That after her death, her son Charles took possession of the land in dispute, and sold to Daniel Smith, who came into possession; and that the estate has been ever since in the possession of his family, or of those claiming under them. It was further proved, that Joseph died in November, 1779, aged about twenty-four years, leaving two sons, Thomas who died quite young and without issue, and Jo-

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

seph who was born after his father's death. That Joseph, the younger, died in the year 1814, leaving issue, the lessors of the plaintiff; then, and still, infants under the age of twenty-one. That there was, during the life of Thomas West, a fishery attached to the windmill tract; after which, another, near to the former, was cleared out; and that the two were afterwards united in one by Thomas West, during his life. The plaintiffs claimed the land in controversy under the residuary clause of Deborah West's will.

The defendants' counsel gave in evidence the will of Thomas West, the husband of Deborah, bearing date the 15th of April, 1770, whereby he devises the plantation whereon he lives (being the land in dispute) to his wife for her life, and after her death, to his son Charles, in fee. Also, the will of Joseph West the elder, dated the 21st of November, 1779, by which he devises his half the fisheries to his wife for life, and after her death, to his son Joseph, in fee. In this will, the testator takes no notice of the windmill estate. Also, a deed from Charles West to Daniel Smith, bearing date the 22d of October, 1782, which, after reciting a conveyance dated in the year 1714, from one Carpenter to Samuel Ladd, for four hundred acres of land, which after the death of Ladd, descended to Deborah West, his heir at law, and that the said Charles West claims title to the two hundred and forty acres conveyed by this deed to Smith, under the will of his father Thomas West, and also as heir at law to his mother Deborah, proceeds to convey the same, viz. the two hundred and forty acres by metes and bounds, except the fisheries, and an acre of ground which he reserves with a general warranty, for the consideration of £2000, for which sum a receipt is given on the deed by the purchaser. This suit was commenced in the year 1822.

The defendants' counsel contended: (1) That the plaintiffs had failed to make out a sufficient title to enable them to obtain a verdict. They have gone no further back than the possession and will of Deborah West, without having shown that Mrs. West had a fee simple interest in this land. So far from having shown this, it is manifest that Mrs. West claimed only a life estate under her husband's will; that Charles claimed under the same will; and it is clear, that Joseph, his brother, from the circumstance of his never having asserted a title to this two hundred and forty acres, nor even mentioned it in his will, did not consider himself as entitled to a moiety of it under his mother's will. From all these circumstances it may fairly be concluded by the jury that, whatever right Mrs. West may originally have had to this two hundred and forty acres, she must have transferred it to her husband, under whose will it passed to Charles West. (2) But if the plaintiffs have shown a good title, it is barred by thirty years' uninterrupted possession of Daniel Smith, and those claiming under him, under a fair bona fide purchase from Charles West in 1782, who was then in possession, and supposed to have a legal right to the land. See second section of the act of 1787 (Rev. Laws, p. 81). When this purchase was made, and possession taken by Smith, Joseph West, under whom the lessors of the plaintiff claim, was alive, and of full age.

Upon the second point it was insisted by the plaintiffs' counsel in reply—First, that after the 1st of January, 1803, the act of 1787 was repealed by force of the act of 1799 (Rev. Laws, p. 411, §§ 9, 10), and that under the latter act, the plaintiffs were not barred, seventeen years only having run from the death of Mrs. West to the bringing of this suit, after deducting all the years of disability which intervened by the infancy of Joseph West the second, and his children, the lessors of the plaintiff; but, second, the plaintiffs are not barred even by the act of 1787. (1) Because, as the recitals in the deed from Charles West to Daniel Smith were sufficient to put the latter upon inquiry, from which he would have seen that Charles West had no title at all, the purchase can not be said to be bona fide, nor can it be said that the grantor was supposed to have a legal title to the land. (2) The act of limitations did not attach till 1782, at which time, the first Joseph was dead, and his son Joseph being under age, he had five years to commence his suit after the expiration of the thirty years, which happened in 1812. But Joseph the second died in 1814, before the expiration of the five years, at which time, and ever since, his heirs, the lessors of the plaintiff, were, and yet are infants.

Mr. Kinsey and Richard Stockton, for plaintiffs.

Elmer & Wall, for defendants.

WASHINGTON, Circuit Justice (charging jury). There are two questions which arise in this cause. The first is, whether the plaintiffs have shown a sufficient title on which to recover in this suit? If they have, then second, whether that title is barred by the act of limitations.

1. The plaintiffs' title, as laid before you by their counsel, is soon stated. They have proved the uninterrupted possession of the land in dispute by Mrs. Deborah West, from the death of her husband in 1770, till the latter end of 1778, when she died seised, and by her will, after sundry bequests to others, none of which refer to the wind mill estate, she devised all the rest and residue of her estate to her son Joseph and her daughter Mary in fee, as tenants in common. Under this residuary clause, no legal doubt can exist, that Joseph was entitled to an undivided moiety of the land in controversy, and that this right is now vested in the lessors of the plaintiff, unless the objections made to the title by the defendants' counsel be well founded. I hold the general rule upon this subject to be, that a plaintiff in ejectment, who claims as devisee of another, is not bound to do more, in the

first instance, in deducing his title, than to show a valid will in his favour, duly made by a person in possession, who died seised of the estate devised. He is not required to go further, and to trace down the title from the proprietor, so as to show a legal title in the devisor, the defendant not setting up a paramount title under the proprietor. The law presumes the person so dying seised, to be entitled to a fee simple interest, unless the contrary be shown on the other side. The quantum of estate, even in a disseisor, is a fee simple, although he is in by wrong. But even if there were weight in the objection to the title of Mrs. West, as it was opened and shown by the plaintiffs' counsel, the defendants have entirely removed it by the evidence given on their part. The recitals in the deed, from Charles West to Daniel Smith, state that the land in controversy in this suit was part of four hundred acres which were conveyed in the year 1714, by one Carpenter to a Mr. Ladd, the father of Deborah West, who dying intestate, these four hundred acres descended to the said Deborah as the heir at law of her father. The facts thus admitted by these recitals, are evidence against the parties to that deed, and all others claiming under them, as much so, as if they had been proved by the plaintiffs in support of their title. It is true that the same deed recites that Charles West claimed under the will of his father, and as heir at law to his mother; but these recitals are no evidence against Joseph West and those claiming under him, they being strangers to that deed; and the deed itself shows that the title was not in the father of Charles West, but in his mother. The will of Deborah West shows, that if Charles supposed himself to be entitled to this land as heir at law to his mother, he mistook his rights, the same having passed by the will of Deborah West to her children, Joseph and Mary. As to the supposed divestiture of Mrs. West's title in favour of her husband, from the circumstances of his having devised the land to his wife for life, and after her death to his son Charles, the possession of Charles upon his mother's death, and the omission of Joseph to claim or to devise this land, there can be nothing in it. Because, if, instead of presumption of the fact from those circumstances, positive proof had been given that Mrs. West had conveyed this land to her husband in any manner not deemed valid by the laws of this state, and that Joseph had always declared his opinion to be that he had no title to this land, such evidence would be insufficient to vest a title to it in Charles, or to divest that of Joseph, if in point of law he was entitled. Titles to real property pass by something much more solemn than presumptions, or even admissions of legal conclusions, contrary to those which the law makes.

The opinion of the court therefore upon the first question is, that a sufficient title in the lessors of the plaintiff is made out to entitle them to recover, unless they are barred by the act of limitations.

There are two acts which have been brought to the notice of the court and jury, both of which are to be considered. The act of 1799 may be dismissed with a single observation, which is, that if this be the only act which is to govern this case, it does not operate as a bar to this suit; inasmuch as twenty years have not run from the time when the right of Joseph West accrued to the bringing of this suit, after deducting the years during which the second Joseph West and his children, the lessors of the plaintiffs, were under the disability of infancy. That this deduction is to be made according to the true construction of this act, we understand to be conceded by the defendants' counsel, and indeed we do not see any satisfactory ground upon which a different construction can be maintained.

There will then remain two questions for consideration. The first is, whether the act of 1787 was repealed after the first of January, 1803, by force of the tenth section of the act of 1799? and if not, then, secondly, whether the plaintiffs are barred by the act of 1787?

First. There is no express repealing clause in the act of 1799 of the preceding act of 1787. But it must be admitted that a latter statute may repeal a former by implication, provided it be a necessary one, from the circumstance that the two statutes are entirely repugnant to each other. But this repugnance must be obvious, and not merely apparent; for the law does not favour repeals of this nature, but requires that both laws shall stand, if they may do so by any fair construction. Now, where is the repugnance between the two acts under consideration? The length of possession prescribed by the first is thirty years, and by the latter twenty. But by the former this possession will not avail the defendant, unless it was commenced or was founded on a proprietary right, &c. or was obtained by a fair bona fide purchase of the land, of some person in possession, and supposed to have a legal title thereto. The saving too is in favour of those who were under the described disabilities at the time when their right or title first descended or accrued, so that if they were not under any disability at that time, the thirty years then began to run, and cannot be arrested in its course, or diminished, by any subsequent disabilities. The act of 1799 is entirely of a different character. It is unimportant under that, whether the defendant, or the person under whom he claims, entered into the possession under an apparent title or tortiously, and the limitation is arrested in its progress by any subsequent disability, the duration of which forms no part of the computation of time. Here then are two acts of limitation, applying to two different subjects, neither of which conflicts with the other, but both are open to the defendant, so that if either suits his case, and is sufficient to defend his possession, he is at liberty to avail himself of it, although the facts of his case may exclude him from the benefit of the other. What greater repugnance is there between the second section of the former and

the ninth section of the latter acts than between the two first sections of the former, the one making sixty and the other thirty years of uninterrupted possession equivalent to a valid title to the land? I confess I can perceive none. But what strongly shows that the act of 1787 has never been considered by the legislature, any more than by the profession, as having been repealed by the act of 1799 is, that in all the revisals of the laws the two acts have been incorporated. My brother judge informs me that the two acts have always been considered in this state as being in force since the 1st of January, 1803, and in the case of Den ex dem. Gardner v. Sharp, at the last October sessions, both the counsel and the court considered the act of 1787 as being in force.

Second. The next question is, whether this action is barred by the act of 1787? The enacting part of the second section of that act is substantially as follows, viz.: "that thirty years' actual possession, uninterruptedly continued by occupancy, descent, conveyance, or otherwise, which possession commenced, or is founded on a proprietary right, &c., or was obtained by a fair bona fide purchase of the land, of any person in possession, and supposed to have a legal title thereto, shall be a bar, &c., and shall also vest an absolute right and title in the actual possessor aforesaid, &c. Now it is not pretended by the plaintiffs' counsel but that the defendants have shown in evidence thirty years' actual possession of this land, in Daniel Smith, uninterruptedly continued from the year 1782, by occupancy or otherwise, which was obtained in that year by a purchase of the land of a person in possession.

But it is insisted, by the plaintiffs' counsel: (1) That the purchase was not bona fide, or of a person supposed to have a legal title to the land. And (2) that since the thirty years' possession could not begin to run but from the date of the deed to Smith in 1782, it could not then begin to run against the second Joseph West, inasmuch as he was then an infant of two or three years of age.

(1) The ground of the first objection is, that Daniel Smith was admonished by the recitals in the deed to him to look into the title he was purchasing; and that, if he had done so, he would have found that Charles had no title to the land he was conveying; and that his omission to make those inquiries placed him in the same predicament as if he were now shown to have been conusant of the defect in the grantor's title. But what part of this deed is it that could excite a suspicion of the validity of the vendor's title, or lead him to search into that title? The will of Thomas West would show that this land was devised by him to his son Charles, but then the recitals showed that Thomas West had no right to make the devise, but that the title was vested in his wife. The other recital, that Charles West claimed as heir at law to his mother was so far from putting Smith upon inquiry, that it was calculated to exclude from his mind any suspicion of a want of title in West, since the fact that he was the eldest son and heir at law to his mother, was indisputable. That his mother had made a will, or any other disposition of this estate, is not only not stated in the deed, but is kept entirely out of view by the title asserted in Charles West, as her heir at law. There is therefore no ground for the argument that it appears from the recitals in this deed that it was not bona fide, or that Charles was not supposed to have a legal right to this land. It may further be remarked, that the will of Thomas West, the conduct of his widow, of Charles West, and of Joseph West, all tended to induce a supposition, not only in Smith, but generally, that Charles West had a legal right to this land.

(2) Whether, if the construction of this act given to it by the plaintiffs' counsel were correct, it could, upon the facts in this case relieve the plaintiff from the bar of the thirty years' possession, it is unnecessary to lose time in considering; because we are clearly of opinion, that that construction cannot be maintained. It is quite clear from the enacting clause, that the thirty years began to run, not from the time when the possession was taken, but from that when the right commenced; being founded on a proprietary right, &c., or was obtained by a fair bona fide purchase of a person in possession, and supposed to have a legal right. That period, in the present case, was in 1782, when the deed to Daniel Smith was made. We have therefore taken no notice of the antecedent possession of Charles West. But that is by no means the period when the proviso in favour of persons under any of the disabilities operates to avoid the bar, so as to prevent the time from beginning to run in case the disability should have existed at that period. The words of the proviso are, "that if any person, &c., having a right or title to lands, &c., shall at the time of the said right or title first descended or accrued, be within the age of twenty-one years, &c., then such person or persons, and his and their heir and heirs, may, notwithstanding the aforesaid times are expired, be entitled to his or their action for the same; so as such person or persons, or his or their heirs commence or sue forth his or their action within five years after his or their full age, &c., and at no time after." Now the question under the proviso is not, when did the thirty years' actual possession begin to run, but when did the right of Joseph West (the person having right and title to this land) first accrue? There is no question that this was in November or December, 1778, upon the death of his mother Mrs. West, under whose will that title accrued. But Joseph West was at that time of full age, and under no disability. He was not entitled therefore to the benefit of the proviso, and since the limitation then began to run against him, it ran over all the subsequent disabilities, and after the expiration of the thirty years from 1782, the bar against the plaintiffs, or those under whom they claim, became complete.

If then the jury should be of opinion upon the evidence, that the actual possession commenced in Daniel Smith in the year 1782, under a bona fide purchase from one who was supposed to have a legal right to the land in dispute, and that it was continued down by persons claiming under Smith, by occupancy, or otherwise for thirty years before the bringing of this suit, their verdict ought to be for the defendants.

Verdict for the defendants.

Case No. 17,424.

WEST v. RANDALL et al.

[2 Mason, 181.] [1]

Circuit Court, D. Rhode Island. Nov., 1820.

EQUITY — PARTIES AND PLEADINGS — ADMINISTRATORS AND DISTRIBUTEES — MULTIFARIOUS BILL — WITNESSES — REGISTRATION OF DEEDS — LACHES.

1. It is a general rule in equity, that all persons materially interested in the matter of the bill, as plaintiffs or defendants, ought to be made parties to it, however numerous they may be.

[Cited in Trecothick v. Austin, Case No. 14,164; Bryan v. Stevens, Id. 2,066a.]

[Cited in Northwestern Cement & Concrete Pavement Co. v. Norwegian-Danish Evangelical Lutheran Augsburg Seminary, 43 Minn. 453, 45 N. W. 870. Cited in brief in Wing v. Cooper, 37 Vt. 171.]

2. But there are exceptions to the rule, as where the other party is without the jurisdiction, &c.; so part of a crew of a privateer, suing for prize money. So creditors suing in behalf of all creditors, &c.

[Cited in Wood v. Dummer, Case No. 17,944; Heriot v. Davis, Id. 6,404; Jewett v. Cunard, Id. 7,310; Harrison v. Urann, Id. 6,146; West v. Smith, 8 How. (49 U. S.) 410; Payne v. Hook, 7 Wall. (74 U. S.) 431; Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Case No. 2,990. Distinguished in Florence Sewing-Mach. Co. v. Singer Manuf'g Co., Id. 4,884. Cited in Omaha Hotel Co. v. Wade, 97 U. S. 21; Hamilton v. Savannah, F. & W. Ry. Co., 49 Fed. 419. Cited in brief in Chicago Trust & Sav. Bank v. Bentz, 59 Fed. 646.]

[Cited in Lawrence v. Rokes, 53 Me. 117; London, Paris & American Bank v. Smith (Cal.) 35 Pac. 1030; Norris v. Bean, 17 W. Va. 661; Oakley v. Hibbard, 1 Pin. 684; Smith v. Ford, 48 Wis. 145, 2 N. W. 150.]

3. And it seems the better opinion, that one heir or next of kin, suing for a distributive share of an estate, cannot maintain his bill in equity, without making the other heirs or next of kin parties, or shewing them to be without the jurisdiction, or within some other exception. But the rule on this subject does not seem to be inflexible.

[Cited in Cassidy v. Shimmin, 122 Mass. 410.]

4. But the administrator upon the estate, where the personalty is concerned, is a necessary party to such a bill, in ordinary cases.

[Cited in Cassidy v. Shimmin, 122 Mass. 412.]

5. A bill cannot be sustained in equity, which is multifarious and embraces distinct matters, affecting distinct parties, who have no common interest in the distinct matters.

[Cited in Society for the Propagation of the Gospel v. Hartland, Case No. 13,155; Pratt v. Thomas, Id. 11,377; Payne v. Hook, 7 Wall. (74 U. S.) 432; Baker v. Portland, Case No. 777.]

[Cited in brief in Sawyer v. Noble, 55 Me. 228.]

6. A co-heir or co-next of kin, is not a competent witness for the plaintiff, in a suit brought for an account of a trust fund, created for the benefit of all the heirs, or next of kin.

7. By the registry act of Rhode-Island, the recording of the deed is necessary to pass real estate as against third persons, but not as between the original parties or their heirs.

[Cited in Hoxie v. Carr, Case No. 6,802; Brown v. Brown, Id. 1,994; Mason v. Crosby, Id. 9,234.]

8. Effect of lapse of time in equity.

[Cited in Coles v. Vanneman, 51 N. J. Eq. 329, 18 Atl. 471.]

[9. The assignment of a bond of defeasance of a deed is good in Rhode-Island, as between the parties, though not attested by witnesses.]

[Followed in Randall v. Phillips, Case No. 11,555.]

This was a bill in equity, brought by William West, of Southridge, in the state of Massachusetts, one of the children and heirs of William West, formerly of Scituate, in the state of Rhode-Island, against Job Randall, a son-in-law of the last mentioned William West, and Jeremiah Phillips, both inhabitants of said Scituate. The bill set forth, that on the 10th day of July, 1792, the said last mentioned William West, was possessed in fee simple of a certain farm in said Scituate, and of a large quantity of personal estate, consisting of stock, farming utensils, and household furniture. That he was also possessed of the right of redemption in a certain other farm in said Scituate, called the Wheeler farm, of which one Simeon Potter, held a mortgage deed; and that he held also sundry notes, demands, and claims, against certain persons mentioned in the said bill; that the said West was also at the same time indebted to sundry persons, mentioned in the bill; that he was advanced in age, and laboring under bodily infirmities, and being desirous to settle all his affairs expeditiously and honestly, and to the satisfaction of all his creditors, and to have the residue of his estate free, and exonerated from all debts and claims, for the support of his family, and the benefit of his heirs at law, the said West, on the day and year abovementioned, entered into an agreement with the said Randall and Phillips, and one Gideon Smith, and one Joseph Battey, which two last mentioned persons had since deceased, all of them being friends and neighbors of the said West, by which agreement, the said four persons undertook to settle and adjust the affairs of the said West. And to enable them to do this, the said West constituted the said persons his agents, attornies, and trustees, and conveyed over to them, all his said property in trust, for the said purposes. And the said four persons at the same time executed a bond of defeasance to the said West, covenanting therein to perform all their agreements; that afterwards Joseph Battey died, and the sur-

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

vivors in whom the property then vested, sold to one William Battey, such a part of the said lands, as produced the sum of $7,000, and such a further part to one Nicholas Thomas, as produced the sum of $2,000, which said sums, the said Job Randall received as agent of the other trustees; that the said Gideon Smith afterwards died, leaving the said Job Randall and Jeremiah Phillips, the only survivors of the said trustees; that afterwards, the said Randall, with a part of the money in his hands, at the request of said West, paid off the mortgage on the Wheeler farm, and with the intent to defraud West, procured a conveyance of the said farm from Potter, the mortgagee, to himself and other persons, unknown to the complainant; that afterwards a bill in equity was filed in the state court of the state of Rhode-Island, against Zachariah Allen, for the purpose of redeeming the farm of West's first mentioned from a mortgage on the same, held by said Allen, and the said Randall and Phillips thereupon paid the amount due, out of the monies in their hands, as beforementioned, and took possession of the said farm, excepting so much thereof as they had previously sold; that on the 10th of March, 1801, the said West wrote a certain paper, recited at large in the said bill, wherein he stated, that on the 19th of July, he sold to said Phillips, Randall, Battey and Smith, his homestead farm, and gave them a warrantee deed, and that at the same time, the said persons gave back to him a deed of defeasance; and that now, by this instrument, in consideration of one thousand dollars, paid him by said Randall, he sold and assigned over to said Randall the said bond of defeasance, and all sums of money due or to grow due thereon, with all the said West's interest therein, and in the lands or real estate therein described. And in the same instrument, he appointed Randall his attorney irrevocable in the premises, with power to prosecute all necessary suits to final judgment, and to compromise, and discharge them, &c. And he therein also covenanted with the said Randall, to make all such further conveyances, covenants, and assurances, to the said Randall, as might be necessary, for the conveying and assuring to the said Randall, all the right, title, and interest, of said West, in the said bond, and in said real estate, and warranted the title of the said bond. And the said bill further set forth, that the said West signed the instrument, but did not call any witness to the signature, nor seal the same; and that he placed the same without delivery among his papers; that afterwards, in the year 1809, the said Randall having access to the said West's papers, clandestinely and fraudulently got possession of the said instrument, then being unsealed, unwitnessed, and unacknowledged, and in like manner caused the same to be sealed and recorded. And that the said West, during his lifetime, never knew or suspected that the said Randall had possessed himself of the said paper, or procured the same to be sealed or recorded.

The bill further stated, that the said Randall and Phillips, held an undivided and joint possession of all the lands mentioned, and of all the other property of said West, during the lifetime of said West, and since then; and that the said Randall and Phillips, when called on by said West to settle and conclude said trusts, and to convey and deliver said property, promised on the 10th day of July, 1810, so to do, but neglected to do it. That afterwards, in the year 1814, when the said West was on his death bed, he called the said Randall to him and recounted to him the said trusts, and the said Randall's obligations to a faithful surrender of the said property. And that the said West, then and there stated, that the said Randall and Phillips had been amply paid for all their costs and charges, trouble and labour therein, to all which the said Randall assented, and acknowledged the same to be true, and promised to settle said trusts, and forthwith to deliver up all the estates and property aforesaid to the heirs of the said West. And that the said West on the same day died.

The bill further averred, that the amount of the property thus recovered by the said Randall and Phillips, and the rents and profits of it, greatly exceeded the amount of all the costs, damages, trouble and labour sustained by the said Randall and Phillips, and the debts paid by them for the said West.

Phillips, in answer to this bill, admits that said West did convey to the persons mentioned in the bill his estate, on the 19th day of July, 1792; and that a bond of defeasance to him was executed by the same persons in return. And he further stated, that before the said deed and bond were executed, the said West was indebted to him in a large sum of money, lent to said West, by this defendant. And that said West expressly agreed with him, that the land as conveyed, should be held by him as a security for the amount so due, and that Phillips should hold all his right and interest in the farm, so conveyed, until he should be paid by said West, or his representatives after his death, all sums of money due to him from West. And also all sums, which might accrue from the costs, trouble, expense and charges, that he might be put to, in the settlement of a mortgage on the said farm, in favour of one Jencks, and in settling the other concerns of said West. And he averred, that he was put to great cost, trouble, and expense, in settling the business of the said West. He admitted, that he and the other two surviving trustees, (Joseph Battey having previously died,) did sell two hundred acres of said West's farm, to William Battey, for $6,000; and also thirty-six acres to one Nicholas Thomas, for $700, and alleged, that these sums were received by Randall, and had never been accounted for by him either to this defendant, or as he believed, to the other trustee. He further stated, that Randall and himself agreed to purchase out the

interest of Smith in the West farm, and to be jointly interested therein; but that Randall, with an intent to defraud him, took a deed from Smith to himself alone. And prayed, that if the complainant was not allowed to redeem the West farm, a specific performance of the contract between Randall and himself, in relation to the said purchase of Smith, might be decreed. He further stated, that he had never received any of the rents and profits of the said estates, but that Randall had always been in possession of the farm, and received all the profits of the same, and had never accounted with him for his portion of them. That while Randall and himself were contending against the Jenck's mortgage, in a court of equity, it became necessary to make use of the testimony of the said West, but that the testimony of said West could not be admitted, while the equity of redemption remained in him. It was therefore agreed between them, that the said West should release the equity of redemption in the premises to the said Randall and himself, for the purpose of qualifying said West as a witness; but that no consideration was given to said West for his assignment of said bond of defeasance. And that he had always understood from said Randall and West, that there was no other assignment of said bond ever made by said West. The answer further stated, that said West died in 1814, without making a will, and leaving seven heirs, besides the complainant, who ought to have been made parties to the bill. And finally the said Phillips insisted in his answer, that the heirs of said West should not be allowed to redeem said estate, until they had paid and allowed all the demands, and equitable claims, which the defendant might have individually, or as one of the purchasers of an undivided moiety of said estate.

Job Randall, in his answer, also admitted the conveyance made by said West, of the farm and property mentioned in the bill, the sale of a portion of said farm to Battey for the sum of money therein stated, and admitted the payment of the said consideration to him, partly in money, and partly in credits, for sums due from said West to the purchaser, and stated, that the said sums were credited in his account filed with his answer. He also admitted the sale of another portion of said farm to said Thomas, and the payment to him therefor of seven hundred and thirty-three dollars, credited in his said account. He further stated, that said Smith, at the time of the said conveyance, had a claim of $700 against the said farm. And that for the purpose of redeeming the farm from this debt this defendant paid the said sum to said Smith, and received a release and quit claim of all said Smith's interest in the said farm. He further admitted, that said West died intestate, and that the complainant was one of the heirs at law; but he denied, that there was any agreement between the said West, and said Smith, Battey, Phillips, and himself, at the time of making said conveyance, constituting them agents, attornies, or trustees of said West, or that there ever was any trust whatever in relation to the premises conveyed, excepting what was contained in the said bond of defeasance. He further stated, that after the execution and delivery of the said deed and bond of defeasance, to wit, on the 10th day of March, 1801, said West was largely indebted to him, for sums of money advanced to, and paid for, said West, for which he had no security. And that West, in consideration thereof, urged him to take an assignment of said bond of defeasance, and a release of all said West's interest in said farm, and the appurtenances, in satisfaction thereof. And on the same day, said West, with his own hand, wrote, signed, sealed, and delivered to him for the consideration of $1,000 an assignment thereof, which sum was then agreed by the said West, to be a just allowance for the monies so advanced. And the said West delivered the said assignment to him at that time; and he denied, that said West placed it as an escrow among his papers, or that he, the defendant, fraudulently obtained possession of it. And he maintained, that by virtue of said assignment he became possessed of an indefeasible estate in fee simple in his own right in said premises. He stated, that he paid the amount due on the Jenck's mortgage beforementioned, and that said Phillips, Smith, and himself thereupon entered into quiet possession of the premises. He stated, in relation to the Wheeler farm mentioned in the bill, that it was conveyed by said West to one Potter, reconveyed to West, and by West conveyed to this defendant and several other persons mentioned in the answer, for the sum of $5,000, which sum was paid to said West, by the defendant and the other persons mentioned. And he denied that the said farm was to be holden by them in trust for said West.

As to the acknowledgments and promises, alleged to have been made by the defendant to said West, whilst said West was on his death bed, the defendant protesting against the truth thereof, alleged, that if any cause of actions had arisen to the complainant in consequence of any such promises, the same accrued more than six years before the filing of the bill, and serving the defendant with any process. And that he never did promise, as in the bill declared, at any time within six years before the serving of this process upon him. He further stated, that in the year 1792, said West and his family were turned out of the possession of said West farm, by legal process, and all their furniture and goods were put into the highway; a part of which furniture and goods were carried away by the complainant, and a part removed with said West and his family to the defendant's house, from whence said West removed again in the course of eight or nine months, and carried with him the principal part of his said furniture and goods; and that the residue, left with the defendant, he had always been ready to deliver to any person authorized to receive it.

The said Randall then stated, what had been

done with the notes and demands, which said West held against other persons. And insisted, that by virtue of the assignment and release made to him as beforementioned, in the year 1801, by said West, all the demands and securities mentioned in said bond of defeasance were assigned and transferred to him. And that he could not be compelled to account in any manner for the same. And as to that part of the bill, which charged the said Randall with any promises or engagements to convey said lands and tenements to the said West, or his heirs at law, he pleaded the statute of frauds of the state of Rhode-Island, by which any such promise, or agreement respecting lands must be in writing, in order to be binding on the parties. He also explicitly denied, that he ever made any such promises or agreements either in writing or otherwise. He also insisted, that the other heirs set forth by him in his answer ought to have been made parties to this bill. An account of monies received and expended on account of the first mentioned deed was also filed; but he refused to render any account of the rents and profits of the said estates, because he asserted and maintained, that the just and equitable interest in the same was in him.

Tristram, Burgess & Bridgham, for plaintiff.
Mr. Searle, for defendants.

STORY, Circuit Justice. This cause came on to be heard at the last term of this court upon the bill, answers, and depositions, and other evidence, and was then argued by counsel. The bill is, in substance, a bill against the defendants, as survivors of four trustees, for a discovery and account of certain real and personal estate, alleged to have been conveyed to them by one William West in trust for the payment of his debts, and the charges of the trust, and the surplus to be held for his benefit. The plaintiff, as one of the heirs at law, of the said William West, claims title to an eleventh part of the surplus, and the bill prays general relief. There are other charges in the bill, which I will by and by notice. The other heirs at law of William West, are not made parties to the bill, nor is his personal representative. And no reason is assigned in the bill for the omission. The answer of Randall names all the other heirs, and alleges them to be within the jurisdiction of the court, and insists upon their being necessary parties. And this is the first question presented for our decision.

Before I proceed to consider this question, or any other presented in the case, I must beg leave to enter my protest against the irregularities and defects apparent upon the pleadings. There is some apology to be found for these in the fact, that there exists no state court of equity in this district; and that as yet the bar have had no great experience in causes of this nature on the equity side of this court. It is, however, indispensable, that the whole proceedings should assume more shape and finish, and attain that accuracy and precision, without which it is extremely difficult to administer the principles of chancery jurisprudence. I shall, therefore, for the future, insist upon more attention on these heads, and shall not hesitate to dismiss the bills, unless they assume more exactness. In the present cause, I shall proceed to the merits of the questions, which have been argued, without embarrassing it with doubts or difficulties arising from other sources.

And in the first place, as to the question already stated. It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be. The reason is that the court may be enabled to make a complete decree between the parties, may prevent future litigation by taking away the necessity of a multiplicity of suits, and may make it perfectly certain, that no injustice shall be done, either to the parties before the court, or to others, who are interested by a decree, that may be grounded upon a partial view only of the real merits. Mitf. Eq. Pl. 29, 144, 220; Coop. Eq. Pl. 33, 185; 2 Madd. 142; Gilb. Forum Rom. 157, 158; 1 Har. Ch. Prac. (New Ed.) p. 25, c. 3; Leigh v. Thomas, 2 Ves. Sr. 312; Cockburn v. Thompson, 16 Ves. 321; Beaumont v. Meredith, 3 Ves. & B. 180; Hamm v. Stevens, 1 Vern. 110. When all the parties are before the court, it can see the whole case; but it may not, where all the conflicting interests are not brought out upon the bill. Gilbert, in his Forum Romanum (page 157), states the rule, and illustrates it with great precision. "If," says he, "it appears to the court, that a very necessary party is wanting; that without him no regular decree can be made; as where a man seeks for an account of the profits or sale of a real estate, and it appears upon the pleadings, that the defendant is only a tenant for life, and consequently the tenant in tail cannot be bound by the decree; and where one legatee brings a bill against an executor, and there are many other legatees, none of which will be bound either by the decree, or by the account to be taken of the testator's effects, and each of these legatees may draw the account in question over again at their leisure; or where several persons are entitled as next of kin under the statute of distributions, and only one of them is brought on to a hearing; or where a man is entitled to the surplus of an estate under a will, after payment of debts, and is not brought on; or where the real estate is to be sold under a will, and the heir at law is not brought on. In these, and all other cases, where the decree cannot be made uniform, for as on the one hand the court will do the plaintiff right, so on the other hand they will take care, that the de-

fendant is not doubly vexed, he shall not be left under precarious circumstances, because of the plaintiff, who might have made all proper parties, and whose fault it was, that it was not done." The cases here put are very appropriate to the case at bar. That in respect to legatees probably refers to the case of a suit by one residuary legatee, where there are other residuary legatees; in which case it has often been held that all must be joined in the suit. Parsons v. Neville, 3 Brown, Ch. 365; Cockburn v. Thompson, 16 Ves. 321; Sherrit v. Birch, 3 Brown, Ch. 229; Atwood v. Hawkins, Finch, 113; Brown v. Ricketts, 3 Johns. Ch. 553. But where a legatee sues for a specific legacy, or for a sum certain on the face of the will, it is not in general necessary, that other legatees should be made parties, for no decree could be had against them, if brought to a hearing (Haycock v. Haycock, 2 Ch. Cas. 124; Dunstall v. Rabett, Finch, 243; Attorney General v. Ryder, 2 Ch. Cas. 178; Atwood v. Hawkins, Finch, 113; Wainwright v. Waterman, 1 Ves. Jr. 311); and in general no person against whom, if brought to a hearing, no decree could be had, ought to be made a party (De Golls v. Ward, 3 P. Wms. 311, note). And when a party is entitled to an aliquot proportion only of a certain sum in the hands of trustees, if the proportion and the sum be clearly ascertained and fixed upon the face of the trust, it has been held, that he may file a bill to have it transferred to him without making the persons, entitled to the other aliquot shares of the fund, parties. Smith v. Snow, 3 Madd. 10. The reason is the same as above stated, for there is nothing to controvert with the other cestuis que trust. I am aware, that it has been stated by an elementary writer of considerable character, that one of the next of kin of an intestate may sue for his distributive share, and the master will be directed by the decree to inquire and state to the court, who are all the next of kin, and they may come in under the decree. Coop. Eq. Pl. 39, 40. This proposition may be true sub modo, but that it is not universally true, is apparent from the authority already stated. See Bradwin v. Harpur, Amb. 374; 2 Madd. 146; Gilb. Forum Rom. 157.

The rule, however, that all persons, materially interested in the subject of the suit, however numerous, ought to be parties, is not without exception. As Lord Eldon has observed, it being a general rule, established for the convenient administration of justice, it must not be adhered to in cases, to which consistently with practical convenience it is incapable of application. Cockburn v. Thompson, 16 Ves. 321. And see Wendell v. Van Rensselaer, 1 Johns. Ch. 349. Whenever, therefore, the party supposed to be materially interested is without the jurisdiction of the court; or if a personal representative be a necessary party, and the right of representation is in litigation in the proper ecclesiastical court; or the bill itself seeks a discovery of the necessary parties; and, in either case, the facts are charged in the bill, the court will not insist upon the objection; but, if it can, will proceed to make a decree between the parties before the court, since it is obvious, that the case cannot be made better. Mitf. Eq. Pl. 145, 146; Coop. Eq. Pl. 39, 40; 2 Madd. Ch. Prac. 143; 1 Har. Ch. Prac. c. 3. Nor are these the only cases; for where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole; in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want of parties will be repelled, and the court will proceed to a decree. Yet, in these cases, so solicitous is the court to attain substantial justice, that it will permit the other parties to come in under the decree, and take the benefit of it, or to shew it to be erroneous, and award a re-hearing; or will entertain a bill or petition, which shall bring the rights of such parties more distinctly before the court, if there be certainty or danger of injury or injustice. Coop. Eq. Pl. 39; 2 Madd. 144, 145; Cockburn v. Thompson, 16 Ves. 321. Among this class of cases are suits brought by a part of a crew of a privateer against prize agents for an account, and their proportion of prize money. There, if the bill be in behalf of themselves only, it will not be sustained; but if it be in behalf of themselves, and all the rest of the crew, it will be sustained upon the manifest inconvenience of any other course; for it has been truly said, that no case can call more strongly for indulgence, than where a number of seamen have interests; for their situation at any period, how many were living at any given time, how many are dead, and who are entitled to representation, cannot be ascertained; and it is not a case, where a great number of persons, who ought to be defendants, are not brought before the court, but are to be bound by a decree against a few. Good v. Blewitt, 13 Ves. 397; Leigh v. Thomas, 2 Ves. Sr. 312. Contra, Moffatt v. Farquharson, 2 Brown, Ch. 338; Brown v. Harris, 13 Ves. 552; Cockburn v. Thompson, 16 Ves. 321. So also is the common case of creditors suing on behalf of the rest, and seeking an account of the estate of their deceased debtor, to obtain payment of their demands; and there the other creditors may come in, and take the benefit of the decree. Leigh v. Thomas, 2 Ves. Sr. 312; Cockburn v. Thompson, 16 Ves. 321; Hendricks v. Franklin, 2 Johns. Ch. 283; Brown v. Ricketts, 3 Johns. Ch. 553; Coop. Eq. Pl. 39, 186. But Sir John Strange said, there was no instance of a bill by three or four to have an

account of the estate, without saying they bring it in behalf of themselves and the rest of the creditors. Leigh v. Thomas, 2 Ves. Sr. 312; Coop. Eq. Pl. 39. And legatees seeking relief and an account against executors may sue in behalf of themselves and all other interested persons, when placed in the same predicament as creditors. Brown v. Ricketts, 3 Johns. Ch. 553. Another class of cases is, where a few members of a voluntary society, or an unincorporated body of proprietors, have been permitted to sue in behalf of the whole, seeking relief and an account against their own agents and committees. Such was the ancient case of the proprietors of the Temple Mill Brass Works (Chancey v. May, Finch, Prec. 592); and such were the modern cases of the Opera House, the Royal Circus, Drury Lane Theatre, and the New River Company (Lloyd v. Loaring, 6 Ves. 773; Adair v. New River Co., 11 Ves. 429; Cousins v. Smith, 13 Ves. 542; Coop. Eq. Pl. 40; Cockburn v. Thompson, 16 Ves. 321). There is one other class of cases, which I will just mention, where a lord of a manor has been permitted to sue a few of his tenants, or a few of the tenants have been permitted to sue the lord, upon the question of a right of common, or a parson has sued, or been sued by some of his parishioners, in respect to the right of tythes. In these and analogous cases of general right, the court dispense with having all the parties, who claim the same right, before it, from the manifest inconvenience, if not impossibility of doing it, and is satisfied with bringing so many before it, as may be considered as fairly representing that right, and honestly contesting in behalf of the whole, and therefore binding, in a sense, that right. 2 Madd. 145; Coop. Eq. Pl. 41; Mitf. Eq. Pl. 145; Adair v. New River Co., 11 Ves. 429. But even in the case of a voluntary society, where the question was, whether a dissolution and division of the funds, voted by the members, was consistent with their articles, the court refused to decree, until all the members were made parties. Beaumont v. Meredith, 3 Ves. & B. 180. The principle, upon which all these classes of cases stand, is, that the court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or grant it without making other persons parties; and the latter it deems the least evil, as it can consider other persons as quasi parties to the record, at least for the purpose of taking the benefit of the decree, and of entitling themselves to other equitable relief, if their rights are jeoparded. Of course, the principle always supposes, that the decree can, as between the parties before the court, be fitly made, without substantial injury to third persons. If it be otherwise, the court will withhold its interposition.

The same doctrine is applied, and with the same qualification, to cases, where a material party is beyond the jurisdiction of the court, as if the party be a partner with the defendant, and resident in a foreign country, so that he cannot be reached by the process of the court. There, if the court sees, that without manifest injustice to the parties before it, or to others, it can proceed to a decree, it acts upon its own notion of equity, without adhering to the objection. Coop. Eq. Pl. 35; Mitf. Eq. Pl. 146; Cowslad v. Cely, Finch, Prec. 83; Darwent v. Walton, 2 Atk. 510; Walley v. Walley, 1 Vern. 484, 487; Milligan v. Milledge, 3 Cranch [7 U. S.] 220. The ground of this rule is peculiarly applicable to the courts of the United States; and therefore, if a party who might otherwise be considered as material by being made a party to the bill, would from the limited nature of its authority oust the court of its jurisdiction, I should strain hard to give relief as between the parties before the court; as for instance, where a partner, or a joint trustee, or a residuary legatee, or one of the next of kin, from not being a citizen of the state, where the suit was brought, or from being a citizen of the state, if made a plaintiff, would defeat the jurisdiction, and thus destroy the suit, I should struggle to administer equity between the parties properly before us, and not suffer a rule, founded on mere convenience and general fitness, to defeat the purposes of justice. Russell v. Clarke, 7 Cranch [11 U. S.] 69, 98.

I have taken up more time in considering the doctrine as to making parties, than this cause seemed to require, with a view to relieve us from some of the difficulties pressed at the argument, and to show the distinctions (not always very well defined) upon which the authorities seem to rest. Apply them to the present case. The plaintiff claims as heir an undivided portion of the surplus, charged to be in the defendants' hands and possession. No reason is shown on the face of the bill, why the other heirs, having the same common interest, are not parties to it. The answer gives their names, and shows them within the jurisdiction of the court, and as defendants, they might have been joined in this suit without touching the jurisdiction of the court, for they are all resident in this state. As plaintiffs they could not be joined without ousting our jurisdiction, for then some of the plaintiffs would have been citizens of the same state as the defendants. Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267. Now in the first place, the other heirs might, if parties, controvert the very fact of heirship in the plaintiff, and that would touch the very marrow of his right to the demand now in question. The fact, however, is not denied or put in issue by the answer, and therefore as to the present defendants it forms no ground of controversy. But they insist, that the present suit will not close their accounts; and that the other heirs may sue them again, and controvert the whole matter now in litigation, and thus vex them with double inconveniences and perils. This is certainly true, and it is as certain, that they could not be made plaintiffs without ousting the present plaintiff of his remedy here.

They might have been made defendants; but the question is, whether the plaintiff is compellable so to make them, unless they deny his heirship, or they collude with the defendants. If there be no controversy between him and them, he could have no decree against them at the hearing; and it would be strange, if when he has nothing to allege against them, he must still name them as defendants in his bill. I agree to the general doctrine, that where a residuary legatee sues, he must make the other residuary legatees parties; and I think it analogous to the present case. But there the rule would not apply, if the other residuary legatees were in a foreign country, or without the reach of the jurisdiction of the court. The case of the next of kin put by Gilbert in the passage before cited is identical with the present. Gilb. Forum Rom. 157, 158. But there the same exception must be implied. And even in a case, where a mistake in a legacy of an aliquot part of the personal estate was sought to be rectified, and the next of kin were admitted to be necessary parties, —as to which, however, as the executor represents all parties in interest as to the personal estate, a doubt might be entertained, whether under the peculiar circumstances of this case, they were necessary defendants (Peacock v. Monk, 1 Ves. Sr. 127; Lawson v. Barker, 1 Brown, Ch. 303; 1 Eq. Cas. Abr. 73, p. 13; Anon., 1 Vern. 261; Wainright v. Waterman, 1 Ves. Jr. 311),—the court dispensed with their being made parties, it appearing, that they were numerous, and living in distant places, and the matter in dispute being small, and the plaintiff a pauper (Bradwin v. Harpur, Amb. 374). This rule is not then so inflexible, that it may not fairly leave much to the discretion of the court; and upon the facts of the present case, it being impossible to make the other heirs plaintiffs consistently with the preservation of jurisdiction of the court, or to make them defendants from any facts, which can be truly charged against them, I should hesitate a good while, before I should enforce the rule; and if the cause turned solely upon this objection, I should not be prepared to sustain it. Clarke v. Russell, 7 Cranch [11 U. S.] 69, 98. There is, indeed, a difficulty upon the face of the bill, that it shows no reason, why the other heirs were not made parties as plaintiffs; and if there had been a demurrer, it might have been fatal. But the answer seems to set that right, by disclosing the citizenship and residence of the other heirs; and in this respect, relying on the facts as a defence, it may well aid the defects of the bill.

There is, however, a more serious objection to this bill for the want of parties; and that is, that the personal representative of William West is not brought before the court, and for this no reason is assigned in the bill. Now it is to be considered, that the bill charges the defendants with trust property, personal as well as real, and prays an account and payment of the plaintiff's distributive share of each. I do not say, that the heir or next of kin cannot in any case proceed for a distributive share against a third person, having in his possession the personal assets of the ancestor, without making the personal representative a party; but such a case, if at all, must stand upon very special circumstances, which must be charged in the bill. The administrator of the deceased is in the first place entitled to his whole personal estate in trust for the payment of debts and charges, and as to the residue in trust for the next of kin. The latter are entitled to nothing, until all the debts are paid; and they cannot proceed against the immediate debtor of the deceased in any case, any more than legatees or creditors, unless they suggest fraud and collusion with the personal representative, and then he must be made a party, or some other special reason be shewn for the omission. Newland v. Champion, 1 Ves. Sr. 105; Utterson v. Mair, 4 Brown, Ch. 270; s. c. 2 Ves. Jr. 95; Alsager v. Rowley, 6 Ves. 751; Bickley v. Dodington, 2 Eq. Cas. Abr. 78, 253. It is, therefore, in general, a fatal objection in a bill for an account of personal assets, that the administrator is not a party: nor is this objection repelled, if there be none at the time, unless there be some legal impediment to a grant of administration. Humphreys v. Humphreys, 3 P. Wms. 348; Griffith v. Bateman, Finch, 334. Now upon the facts of this case it is apparent, that William West died insolvent, and if so, it would be decisive against the plaintiff's title to any portion of the personalty. And as to the real estate, as that is also liable in this state to the debts of the intestate, this fact would be equally decisive of his title to any share in the real trust property. This shews, how material to the cause the personal representative of the intestate is, since he is ex officio the representative in cases of this sort of the creditors. But upon the general ground, without reference to these special facts, I think, that the personal representative of William West, not being a party, is a well founded objection to proceeding to a decree. I am aware, that a want of parties is not necessarily fatal, even at the hearing, because the cause may be ordered to stand over to make further parties (Anon., 2 Atk. 14; Coop. Eq. Pl. 289; Jones v. Jones, 3 Atk. 111); but this is not done of course; and rarely, unless where the cause as to the new parties may stand upon the bill and the answer of such parties. For if the new parties may controvert the plaintiff's very right to the demand in question, and the whole cause must be gone over again upon a just examination of witnesses, it seems at least doubtful, whether it may not be quite as equitable to dismiss the cause without prejudice, so that the plaintiff may begin de novo. Gilb. Forum Rom. 159. If this cause necessarily turned upon this point alone, I should incline to adopt this course.

There is another objection to the bill of a different character; and that is, that it is multifarious, involving distinct matters, which do not affect all the defendants. For instance,

the bill only charges, that the West farm was conveyed by the trust deed to the trustees for payment of debts, and demands an account respecting this property from the defendants as surviving trustees. Then there comes a distinct charge against Randall, of having fraudulently procured a forged assignment of the bond of defeasance given by the trustees upon the execution of the trust conveyance for his own use and benefit, without any averment of a collusion, or any suggestion of participation by the other trustees. Then there is another distinct charge in the bill, that certain real estate of William West, called the Wheeler farm, was mortgaged to one Simeon Potter, and that Randall, at the request of West, from certain monies in his hands belonging to West, and at his request, paid off the mortgage, and fraudulently procured (not saying from whom) deeds thereof, conveying the same to himself (Randall), and other persons unknown, for his own benefit. Now there is not the slightest pretence or charge in the bill, or evidence, that the other deceased trustees, or the defendant Phillips, were parties to this transaction. It is a distinct matter inter alios acta, and most improperly put into the bill; for it is no where charged in the bill, that the Wheeler farm was ever conveyed to the trustees upon trust for payment of the debts of William West. Now, nothing is better settled, than that the court will not permit several matters perfectly distinct and unconnected, to be put into a bill against one defendant; a fortiori not where there are several defendants, and the matters do not apply to some of them. Mitf. Eq. Pl. 147; Coop. Eq. Pl. 182. The objection would be fatal on demurrer; and where it involves material interests, not properly before the court, or produces embarrassment and confusion in administering equity, I see no reason why it should not be deemed equally fatal at the hearing, at least to justify a dismissal of the bill without prejudice.

There is another charge in the bill, which it may be as well to dispose of in this connexion; and that is, that the defendants, in July, 1810, being called upon by William West, to settle and conclude their trusts, and re-convey and deliver the property remaining in their hands under the trust deed, promised so to do; but ever neglected so to do. And afterwards in 1814, in William West's last sickness, Randall admitted to West, that he ought to surrender up the property, that he and the defendant Phillips, had been amply paid for all their costs, charges and trouble, and promised to settle the trusts, and forthwith to deliver up all the estates and property to the heirs of William West; and then charges, that the defendants had in fact received more money than all their charges and disbursements, and all the debts paid by them for William West.

Now to this charge, (I meddle not with the question of its correctness in point of law, or precision in point of averment) the defendant Randall, in his answer to the amended bill in which they are contained, has interposed an express denial, and has further relied upon the statute of limitations as a bar to the supposed promise, it not having been made within six years before the filing of the bill. The defendant Phillips, has never answered to this charge, never having been required by the plaintiff to answer the amended bill; and the only answer by him in the case, is to the original bill. This is an irregularity, which, if any thing turned materially on this charge, or if the cause could be upon any grounds sustained by the plaintiff, would be fatal, unless cured by some further order of the court as to Phillips. I pass it over now, for the purpose of bringing another point into view; and that is, the charge itself is expressly denied by Randall, and there is no testimony in the case to support it, except that of Samuel West, one of the children and co-heirs of William West, whose deposition was read at the hearing, subject to all exceptions. The question is, whether he is a competent witness to prove the facts. I am of opinion, that he is not. He is directly interested in the facts he is called to establish; he is a co-heir, and claims the same rights as the plaintiff. It approaches very near to the case of one devisee, on a trial of an ejectment brought by another devisee against the heir at law, offered as a witness to prove the testator's sanity; and in such case, he has been held to be incompetent, although the verdict would not have been evidence for or against him, for he has a direct and immediate interest in establishing the facts. Phil. Ev. 50. And even if Samuel West were a competent witness, I cannot say, that his testimony is coupled with such circumstances as ought to outweigh the explicit denial in the defendants' answer. What would have been the effect of the plea of the statute of limitations to an original promise, like that stated, supposing it to be proved, it is not now necessary to consider. If it be considered merely as a recognition of a trust already legally created and existing, it is not perceived that the statute could well be applied to such a case, for the trust would continue to attach itself to the property conveyed. But if considered as an original promise creating a trust, or attempting to create one, it would be liable to other more powerful objections; for even independent of the statute of frauds, parol proof is never admitted to raise a trust standing in contradiction to the written conveyances of the parties. Roberts, Frauds, 10. And see Movan v. Hays, 1 Johns. Ch. 339. Upon the statute of frauds, the case is yet stronger; and even as a mere contract for a grant of an equitable estate in lands, it would be void for not being in writing, under the act of Rhode-Island on that subject. Rhode-Island Laws (1798) p. 473; Hughes v. Moore, 7 Cranch [11 U. S.] 176.

Having adverted to several objections to the bill in its original concoction, and to the materials for decision, I will now proceed to state the reasons, that the bill cannot be sustained upon the general merits of the case, as disclosed in the pleadings and testimony, even as to the defendant Randall. And first, all considera-

tion of the facts charged in the bill, in respect to the Wheeler estate, may be dismissed in a few words. (1) Because the proper parties are not before the court to make a decree, supposing the facts ever so distinctly proved; nor could they, as strangers to the other transactions in the bill, be properly joined as parties. (2) Because the facts themselves are denied by the answer of Randall, and are not proved by any sufficient testimony of the plaintiff. The case is exceedingly weak and defective in this respect.

And next as to the West farm. The bill charges, that this farm was conveyed by William West in fee simple, to the defendants and the two other deceased trustees or mortgagees, (it is immaterial which they are called) on the 19th day of July, 1792, and on the same day a bond of defeasance was executed by the trustees, whereby on re-payment of the sums which should be advanced by them on his account, and indemnifying them for their charges and expenses about the business of William West, as stated in the bond, they bound themselves to re-convey the same estate to West. It charges also, that the same farm, which was then under mortgage to one Allen, was redeemed from that mortgage by the defendants, by monies received upon the sales of parcels of the trust estate. Then comes the charge alluded to, respecting a certain assignment of the same bond, purporting to be signed and sealed by West on the tenth of March, 1801, and to assign and convey the same bond, and all the monies due thereon, and all his right and title to the lands mentioned therein, to the defendant Randall, and his heirs, &c., for the consideration of $1,000. This assignment the bill charges never to have been sealed by West, but to have been written and signed by him, and kept by him as an escrow unsealed, until January, 1809, when the instrument was fraudulently procured and sealed by Randall, and afterwards was recorded. This is a very serious charge, and it is matter of surprise, that there is not a tittle of evidence in the cause even to afford a coloring of suspicion to sustain it. The defendant Randall, expressly avers, that it was sealed, executed and delivered bona fide to him, for a valuable consideration, according to its purport. The other defendant, Phillips, in his original answer, averred its due execution and genuineness; but avers it to have been executed without consideration, and merely for the purpose of qualifying William West as a witness in a suit in equity brought by the defendant to redeem the West farm from the mortgage of Allen; and Phillips accordingly claims a right in it, as an instrument executed for his benefit as well as Randall's. Now it is perfectly clear, that the answer of one co-defendant, is not in general evidence against another; and there is nothing in the present case, to take it out of the general rule. Phoenix v. Assignees of Ingraham, 5 Johns. 426; Phil. Ev. 266; 1 Madd. Ch. Prac. 242; Field v. Holland, 6 Cranch [10 U. S.] 26; Clarke's Ex'rs v. Van Reimsdyk, 9 Cranch [13 U. S.] 156; Wych v. Meal, 3 P. Wms. 311; Coop. Eq. Pl. 200. The deposition of Phillips, too, has been taken in this cause, to the same effect. Under the circumstances of the case, he is not a competent witness, as he has a direct interest, and in his answer prays that interest to be sustained, as against Randall. His testimony, therefore, must be rejected. And if admitted, it would not outweigh Randall's answer; and certainly leaves wholly unsupported, the charge of fraud in procuring the assignment. Supposing the assignment made as Phillips has declared, it would deserve very grave consideration, whether a grantor or his heirs could ever, in any court of law or equity, be permitted to claim title to land which he had expressly released, to qualify him as a witness. It seems to me, that to entertain such a claim, would be productive of the grossest frauds, and defeat the very purposes of public justice. Upon the evidence before me, however, I am bound in point of law, to consider the assignment to have been made bona fide for a valuable consideration.

Supposing this to be true, still the plaintiff's counsel deny its sufficiency in point of law, to extinguish the title of the assignor in the equity of redemption of the trust property. The objection is, that no conveyance of real estate in Rhode-Island is valid, unless it be by deed executed in the presence of witnesses, and acknowledged by the grantor, and duly recorded in the town registry. The counsel for the defendants admit this to be true as to third persons; but not as to the grantors or their heirs. And my opinion is, that the distinction is well founded. The act of Rhode-Island declares, in the first section, "that no estate of inheritance or freehold, or for a term exceeding one year in lands or tenements, shall be conveyed from one to another by deed, unless the same be in writing, signed, sealed and delivered, by the party making the same, and acknowledged before an assistant, judge or justice, by the party or parties, who shall have sealed and delivered it, and recorded, or lodged to be recorded in the town clerk's office, where the said estates lie." The second section then declares, that all bargains, sales, and other conveyances of any lands, &c., whether for passing any estate of freehold or inheritance, or for term of years, and all deeds of trust and mortgages whatsoever, thereafter executed, shall be void, unless they shall be acknowledged and recorded as above said: "Provided always, that the same between the parties and their heirs, shall nevertheless be valid and binding. Rhode-Island Laws (Ed. 1798), pp. 263, 264." Now it is observable, that neither of these sections requires any witnesses. They require only, that the conveyance shall be by deed, which may well be without any witness, and as between the parties and their heirs, give complete effect to such deeds, with-

out any acknowledgment or recording. Nor does the fourth section of the act (Id. pp. 264, 265), in my judgment, control this construction. It only provides for compelling a party, if living, to acknowledge his deed, and after his death a mode of proving it, which shall be equivalent to the party's acknowledgment; and in each of these cases, the execution of the deed must be by subscribing witnesses to the deed. And then the deed is of efficacy, not only as to the parties and their heirs, but as to all other persons. If a conveyance be signed, sealed and delivered, and duly acknowledged by the grantor and recorded, it seems to me, that it is a good conveyance of the land against all persons, under the laws of Rhode-Island, even though there be no witnesses to the deed. The assignment in the present case, is sufficiently proved to have been signed, sealed, and delivered by the grantor, though there are no witnesses to the deed; it has not been duly recorded or acknowledged; but as between the present parties it cannot be deemed void, whatever might have been the case as to a subsequent purchaser without notice.

But supposing the assignment were not sufficient in point of law, to convey the land, it would form a title in equity sufficient to repel the plaintiff's claim. It would authorize a court to decree a conveyance of the legal estate from the heirs of William West, if the legal estate were in them; and at most they could here possess only an equity of redemption. There is too, in the assignment, an express covenant for farther assurance of the land. What pretence can there then be, to sustain the plaintiff's claim against a person having the legal estate, and an equitable assignment of the equity of redemption? There can be none. The very scintilla juris is extinguished.

This, then, puts an end to the case, and shews that the plaintiff has no merits in his claim, even if he could get over other serious, I had almost said, insuperable obstacles to success, which meet the court in every direction. Among these obstacles the lapse of time occupies no inconsiderable a place. The original conveyance and bond of defeasance, were executed in 1792. The assignment of the bond was made to Randall in 1801, and was publicly recorded in 1809. The testator died in 1814, and the original bill in this case, was filed in November term, 1816. No attempt was ever made during William West's life, to set aside the assignment, or to procure a settlement of the claims now urged by a suit at law, or in equity. This long acquiescence is too difficult to account for, upon any supposition inconsistent with the bona fide character of the assignment to Randall. I merely hint at this, not meaning to rely on it. Let the bill be dismissed with costs. Bill dismissed.

[See Case No. 11,555.]

Case No. 17,425.

WEST v. SILVER WIRE & SKIRT MANUF'G CO.

[5 Blatchf. 477; 3 Fish. Pat. Cas. 306; Merw. Pat. Inv. 320.] [1]

Circuit Court, S. D. New York. Sept. 18, 1867.

PATENTS—INVENTION—INFRINGEMENT—SKIRT AND BUSTLE STIFFENERS.

1. The patent granted to Edward F. Woodward, June 16th, 1857, and reissued September 29th, 1857, for "improvements in stiffening ladies' skirts, or bustles, and other articles of dress," claims the curving of the material into a spiral form, either with or without a core of a flexible character.

2. Whether a hoop so formed is patentable, in view of the prior existence, in stringed musical instruments, of strings formed of a cat-gut core, with metallic wire wound around it in a spiral form, quere.

3. In said patent, the elasticity of the hoop is due, almost wholly, to the spiral wire.

4. A hoop made of a plain strip of steel, covered with a fine, flexible, iron wire or thread, tinned or silvered, is not an infringement of said patent. In such hoop, the wire coating is not the hoop, but the strip of steel is the hoop, and the patent is for a hoop, and not for the covering of a hoop.

[This was an action on the case for the recovery of damages for the infringement of letters patent for "improvements in stiffening ladies skirts or bustles, and other articles of dress," granted to Edward F. Woodward, June 16, 1857 [No. 17,602], reissued September 29, 1857 [No. 501], and assigned to plaintiff [Joseph J. West]. The case was tried under a submission of the law and facts to Judge Shipman under the act of March 3, 1865 [13 Stat. 533]. The claim of the original patent was as follows: "The employment of the spiral or cord for stiffening ladies skirts, etc., together with the saturation thereof in the manner set forth, and for the purposes specified."] [2]

John B. Staples, for plaintiff.

George Gifford, for defendant.

SHIPMAN, District Judge. [On June 16, 1857, a patent was issued to Edward F. Woodward, of Brooklyn, New York, for "certain new and useful improvements in stiffening ladies skirts or bustles, and other articles of dress." This patent was soon surrendered on the alleged ground that it was inoperative because of a defective specification, and amended specification filed, and on September 29, 1857, a reissue was granted. Afterward, and before the commencement of this suit, this reissued patent was assigned to the present plaintiff, who has instituted this action of law thereon, charging the defendants with infringement, and claiming

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel Fisher, Esq., and here compiled and reprinted by permission. The statement is from 3 Fish. Pat. Cas. 306, and the syllabus and opinion, except as noted, are from 5 Blatchf. 477. Merw. Pat. Inv. 320, contains only a partial report.]

[2] [From 3 Fish. Pat. Cas. 306.]

damages therefor. The defendants pleaded the general issue. The issue was closed to the court by stipulation, under the recent act of congress, authorizing the parties thus to waive a jury and submit the question of fact as well as of law to the court.] [2]

In view of the result at which the court has arrived, no comparison of the original specification with that of the reissue is necessary here. The case will, therefore, be considered exclusively with reference to the latter. This specification says: "Heretofore, the mode adopted, in the present fashion of hooped skirts, to set them off, has been, to form the hoops of whalebone in strips, curved into hoops, or rattan, or brass or steel strips, and sometimes coarser and heavier materials. All of these, as employed before my invention, were defective. They were rigid in outline, and do not permit an easy flow of the drapery of a lady's dress, so essential to the beauty of costume; and, when a dress thus supported is acted upon by the wind, such hoops show conspicuously and inelegantly; besides which, in sitting down, it is impossible, with such hoops, to gather the dress in, and, by severe compression, the hoops are bent or broken, so as to spoil their shape. I effectually remedy these defects by my improvements, and form a light, pliable, elastic and buoyant hoop, which has all the necessary powers of extension for the purpose, and, at the same time, an elasticity and pliability not found in hoops heretofore found in market. The nature of my invention consists in forming hoops of spiral wire, strips of rattan, whalebone, or other suitable material, either with or without the interior support of a cord or strip of any kind, which hoops, when inserted in ladies' skirts shall have the effect of expanding said skirts, while they can be compressed, or bent short, without serious injury to their configuration. The construction is as follows: I take thin, narrow strips of rattan, (calamus ratang,) or whalebone, or metallic wire, or other stiff elastic material, proper for the purpose, and wind it round a cord of hemp or other material, or I form it into a spiral on a proper mandrel of any kind, making it into a cord of spiral construction. * * * The centre of this hollow spiral may be filled with such material as shall be found convenient, or it may be used without any, although I deem the centre support best. So, the spiral may be formed of one or more strands, without changing the device. When rattan strips are used, they are steamed, to soften them, before forming, and, after forming, they are dried, which sets them in place. To render this cord, thus formed, water-proof, I saturate it with a solution of gum-lac, which adds increased stiffness and durability, and prevents the material becoming limber by wear. Having thus fully set forth my new hoop for ladies' skirts, and the various modifications thereof, and the manner of making the same, what I claim as new, and for which I desire to secure the exclusive right, is the constructing hoops intended for ladies' dresses, substantially as and for the purposes set forth, consisting of a spiral formed of any proper material, metallic or vegetable, as described, with or without a core to support the same, which can be bent into the form of a hoop, and inserted into ladies' skirts, as hereinbefore fully made known."

The above paragraphs contain all that it is material to cite from the specification. It will be seen, by referring to the description of the state of the art and the defects to be remedied, as set forth in the first paragraph, that mere steel, brass, whalebone, or rattan strips, formed into hoops, or combined with a covering of any kind, are not claimed. Hoops made of the materials mentioned were old and well known. These materials were only claimed when curved into a spiral form, either with or without a core, or central cord, of a flexible character. The specimen presented on the trial, as an illustration of the invention covered by the patent, was a brass wire, in the form of a spiral, having a thread of cat-gut running through, forming a core. Whether such a hoop would be patentable, in view of the state of the mechanic arts, need not be now determined. But it may be remarked, as it is familiarly known, that the large strings of the bass viol and other stringed musical instruments, are nearly identical with this cord which formed the hoop of the skirt presented on the trial as one manufactured under this patent, with the exception, that the wire of the skirt hoop was heavier and stiffer than that on the viol string, and, therefore, more elastic. Both, however, had the same combination, and the same mechanical construction. Whether such an article, by simply using a stiffer wire, and inserting it in a lady's skirt in a circular form, could be legally the subject of a patent, without claiming it in combination with some new element, or as a part of some new combination, or whether it is the application of an old thing to a new use, and, therefore, not patentable, does not arise properly on the pleadings, and, therefore, will not be decided.

As already stated, the article presented on the trial, as an illustration of Woodward's invention, was a brass wire, in spiral form, with a cat-gut core. The elasticity of the hoop is almost wholly due to the spiral wire, the flexible core operating merely as a support to the spiral which encircles it. The core gives it greater coherence and firmness, and would tend to prevent it from stretching and thus opening the coil. But the patent does not claim the core as an element of the invention. It contemplates the use of the spiral without the core, though the patentee deems the presence of the latter preferable. The patent properly claims an elastic hoop consisting of a spiral formed of any proper material, either with or without a core. The body of the infringing hoop is made, not of a

[2] [From 3 Fish. Pat. Cas. 306.]

spiral wire or spring, but of a plain strip of steel. This steel is, however, covered with a fine flexible iron wire or thread, tinned or silvered, and wound around it spirally. The main body and elasticity of this hoop reside in the steel strip, which of itself, forms a spring. This strip alone constitutes a hoop, when curved in a circle. In other words, as the defendants use it, it is the old steel hoop, covered with fine tinned or silvered wire. This hoop, without the covering, is recognized in the specification as existing prior to the invention of the patentee.

Now, the patent is for a hoop, and not for the covering of a hoop. What was new in the alleged invention, if anything in it was new, was not covering hoops already well known, but forming hoops of spirals made from metal or vegetable strips. In such hoops, the core or central thread was no essential part of the invention, for they were to be made with or without it. The spiral wire or spring was the principal, and the only essential structure. But, in the alleged infringing article, the steel strip or spring is the principal thing. Without it, the wire coating would be good for nothing in a skirt. It would be spiral in form and flexible, but it would have almost no elasticity, and possess no adequate power to extend the skirt. This wire coating is, in no just sense, a hoop in the form of a spiral spring, bent into a circle. It is only an appendage or covering to the steel strip, which is the real hoop. It gives the latter greater neatness and finish, but does not add appreciably to its flexibility, or to its elasticity or expanding quality. It does not stand in the same relation, or possess the same practical qualities, or perform the same functions that are claimed for the metallic or vegetable spirals of the patentee, and is, therefore, no infringement of the rights of the plaintiff under this patent.

There must be a judgment for the defendants.

WEST (SPARKS v.). See Case No. 13,213.

WEST (SPRAGUE v.). See Case No. 13,255.

Case No. 17,426.

WEST v. TALMAN.

[4 Wash. C. C. 200.] [1]

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

SUIT FOR LAND—SERVICE ON TENANT.

Judgment by default and habere facias possessionem executed, set aside; the service not being made on the tenant in possession, but on the landlord.

Motion to set aside the judgment by default entered in this case and the habere facias possessionem returned executed; upon the ground of irregularity in the service of the ejectment. It appeared by the affidavit of the service, that the declaration was served upon Mr. White, the landlord, who acknowledged the service, and promised to have it acknowledged by the tenant in possession, the defendant, which was not done. It appeared by the affidavit of the plaintiff's attorney, that Mr. White, the landlord, had mortgaged the premises in question to one of the banks of this state, and that, after the institution of this suit, he conveyed the equity of redemption to one M. That White and M. were repeatedly informed that judgment would be entered by default unless an appearance was entered; and that frequent promises were made by White, that an appearance should be entered. That even after the judgment was entered, the plaintiff's attorney offered to open it, upon an appearance being entered, but that nothing was done indicating a disposition to have the cause tried.

Mr. Wall, for defendant.

Mr. Coxe, for plaintiff.

BY THE COURT. The court can notice no other party defendant in this cause but Talman, the tenant in possession; who was liable for the costs at least, although his term expired before the trial could take place. It was therefore essential to the regularity of the proceedings, that the declaration should have been served on the tenant in possession, although White, the landlord, might, upon motion, have been admitted a defendant. But the acknowledgment of the service by White, who was not a defendant in the action, was altogether irregular, and could not bind the tenant in possession.

Judgment, and the habere facias possessionem set aside.

Case No. 17,427.

WEST v. The UNCLE SAM.

[McAll. 505.] [1]

Circuit Court, D. California. Jan. Term, 1859.

CONTRACTUAL LIABILITY—EFFECT OF UNFORESEEN ACCIDENT—ADMIRALTY—PLEADING AND PROOF—SPECIAL DAMAGES.

1. Where a party creates a duty or charge against himself by express contract, he is bound to make it good, notwithstanding any accident through necessity, as he may have provided against such in the contract.

[Cited in Ye Seng Co. v. Corbitt, 9 Fed. 430.]

2. The pleadings in a court of admiralty are more simple and less technical than in a court of common law.

3. There are no technical variances or departures in pleadings in admiralty.

[4. In a libel against a vessel for breach of a passenger contract alleging detention, loss of time, and subjection to exposure and risk in a place designated as dangerous to human life, special damages need not be laid as in a com-

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

[1] [Reported by Cutler McAllister, Esq.]

mon-law declaration, but, under the general allegation, proof may be given of the detention, loss of time, and other facts showing the exposure and suffering of libelant and wife.]

[5. Cited in Simpson v. The Ceres, Case No. 12,881, to the point that torts upon the high seas are of admiralty cognizance.]

This is an appeal from the action of the district court of the United States for the Northern district of the state of California, where a decree was rendered in favor of the libelant for the sum of $800. [Case unreported.]

[For a libel by certain seamen of the Uncle Sam to recover extra wages for this voyage, see Cases Nos. 2,371 and 2,372.]

Thomas C. Hambly and H. J. Wells, for libelant.

Delos Lake and James T. Boyd, for respondent.

McALLISTER, Circuit Judge. The libel was exhibited to recover damages for the breach of a passenger contract which had been entered into for the transportation of the libelant and his wife from San Francisco to New York via the Nicaragua route; and the alleged breach consisted in not carrying them to Nicaragua; but transporting them against their consent to the Isthmus of Panama, and leaving them there to shift for themselves, and without the immediate means of escape therefrom. It appears that after leaving San Francisco with the libelant and his wife, and other passengers, on board, about five days out, the Uncle Sam was boarded by an agent from the owners, and after communication with him, the master of the Uncle Sam announced to the passengers that the destination of the vessel was changed from Nicaragua to Panama. The fact also appeared, that the steamer which was to have connected with the Uncle Sam at San Juan del Norte, and have taken her passengers to New York, had been withdrawn by the agents of her owners; and consequently libelants would have been unable, even if they had reached that place, to get away from it.

The defense set up for the breach of contract is, that the Costa-Rica army was in possession of the Nicaragua route, and that any attempt by the passengers to cross would be hazardous. In the case of Hand v. Baynes, 4 Whart. 204, defendant received for carriage certain goods from Philadelphia to Baltimore via Chesapeake and Delaware canal. On arriving at the mouth of the canal, the master was informed the locks were out of order, and that he could not be allowed to pass through the canal. He then went down to sea, and proceeded to sea, intending to go outside to Baltimore, but in a gale of wind struck on a shoal, and the ship, with the cargo, was totally lost. The following remarks are made by the supreme court of Pennsylvania, in that case: "There is no mistaking the intention of the parties;" "the route through the canal is part of the contract." There was no mistake about the intention of the parties in this case, the route was to New York via Nicaragua. But it is said, said the court, "that although the contract was to carry the goods by way of the Chesapeake and Delaware canal, yet that the deviation from the prescribed route arose from necessity. When the master discovered the impediments to the prosecution of the voyage, through the route called for in the contract, his duty was plain; he had one of two courses to pursue,—to remain in a place of safety until the obstructions were removed; or he should have returned and informed the shippers and owners, of the impracticability of proceeding through the canal. But suppose the contract to be express, to deliver the goods in a prescribed time (or, as it may be said in this case, by a prescribed route), would any temporary obstruction, or the impossibility of complying with the engagement, arising from the condition of the locks or any other cause, be a defense to a suit for a failure to perform the contract? When the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by the contract. This is founded in reason and authority."

The principles enunciated in foregoing case of Hand v. Baynes, are applicable to the one at bar.

But, there are other facts worthy of consideration. The existence of hostilities in Nicaragua had been known in San Francisco for some time, and the seizure by Walker of the property of the company was known at San Francisco at the time the agents of the company dispatched the Uncle Sam, entered into the contract, and pocketed the money of the libelant. When, a few days subsequently, the master of the Uncle Sam learned that the steamer that should have connected with the Uncle Sam at San Juan del Norte, had been withdrawn, and rendered impracticable the fulfillment of the contract, his duty was to have instantly retraced his course, and brought his passengers back to San Francisco. This he did not do, but consulting the wishes or what he conceived to be the interest of his owner, and treating his passengers as so much live cattle, he carried them to Panama and left them on the isthmus to shift for themselves. Had they been a drove of cattle, or a mass of merchandise, he should have had them forwarded at the expense of the owners to New York. At Aspinwall, the libelant and his wife, there being no steamer for New York, and no means of escape, were forced to remain seventeen days. A forced residence in a place whose pestilential horrors inflame the imagination of the most phlegmatic, whose unhealthiness is almost a by-word, and where illness almost unto death visited the libelant, and sickness fell upon his wife,—if not the result, certainly aggravated by the position in which they were placed by the breach of the contract by the master,—are facts, which entitle the

libelant to compensation. The amount of it was fixed by the district court at $800. This court has repeatedly decided that, as an appellate tribunal, it does not interfere with the decree of the court below on the ground of the amount of damages, unless such decree has been given as to show manifest injustice. It can perceive none such in this case.

But it is objected that no special damages are alleged in the libel, and that there is nothing but a general allegation, which is insufficient; that such allegation would not be sustained at common law; and that the pleadings in an admiralty court and in a common-law court, are the same. The libel alleges that the libelant and his wife were at Panama taken out of the Uncle Sam against their will; carried to Aspinwall, and then set down, without food, or sustenance, or accommodation of any kind; where, there being no means of leaving, no vessel to carry them away, they were detained seventeen days, at great expense; and from want of accommodation, and the well-known sickly character of the climate, were put to great expense from sickness; and that libelant has sustained, as he believes, damages thereby to the amount of two thousand dollars. Under this general allegation, the libelant gave evidence of the facts to show detention, illness, &c. That the allegation is inartificial, and not technically drawn, may be admitted. To ascertain its sufficiency, we must look to the character of the breach charged. It involved personal wrongs, constituting both mental and physical sufferings, which may be experienced and felt, but cannot be decimated into dollars and cents. One may, as the libelant did in this case, suffer from illness aggravated by the total want of accommodation and comforts, and the sickliness of the wretched place in which he was placed, and where he was forced to remain by the acts of another,—and the amount of damage can only be inferred from his detention and his situation; which facts are set forth in the libel.

In the case of Wade v Leroy, 20 How. [61 U. S.] 34, a common-law case, the allegation was general, and there was no special damage alleged. Objection was made to the proof of special facts, on the ground that the declaration contained no allegation of special damages; but evidence was admitted under the general allegation. The court say: "This evidence would certainly assist a jury to determine that the plaintiff had sustained an injury of no slight character,—an injury to his person; and which was followed by expense, suffering, and loss of time, which had for him a pecuniary value. These were the direct and necessary consequences of the injury; and sustained strictly and almost exclusively as an effect from it." That was a common-law case; and the allegation of damages was general, and mental and bodily suffering deemed sufficient for the court to act upon.

In Coppin v. Braithwaite, 8 Jur. 875, cited in Ang. Carr. (Ed. 1851) p. 508, note, a declaration in assumpsit, to carry the plaintiff in a ship to a certain place alleged, as a breach, that the defendants by their agents, caused him to disembark at an intermediate point; and the disembarkation to be conducted in a scandalous, disgraceful, and improper manner, whereby, and also by contemptuous usage and insulting language addressed to the plaintiff by the said agent, in effecting said disembarkation, the plaintiff sustained damage. Held: (1) The declaration was good, on motion in arrest of judgment. (2) That the judge had rightly received evidence of the language of the captain of the defendant's ship, in putting the plaintiff ashore. (3) That the judge had rightly directed the jury, that the defendants were responsible for any injury naturally resulting from the acts of the captain, when acting as their servant; and that the plaintiff was entitled to a fair compensation for the injury done to him in being put on shore at the intermediate place, so far as injury arose from the act of the captain in putting him on shore.

In neither of foregoing cases was the want of an allegation of special damages held to be fatal to the declaration. Both were common-law cases, where the more rigid and strict rules of that system of pleading obtain. In a court of admiralty, the question as to the sufficiency of pleadings stands on a different footing from what it does in a court of common-law. It has been earnestly urged, that the pleadings in courts of common-law and admiralty are the same, and the strictness which controls the one regulates the other. This would be strange, if true, considering the different sources from which the common law and the admiralty have arisen, and the different systems under which they have been fostered. It would be, in fact, to say there was no difference between the precise, minute, and logical mind of a special pleader of Westminster, and the expansive and capacious intellect of a Sir William Scott, or some other great advocate of admiralty practice and law.

In the case of Dupont de Nemours & Co. v. Vance, 19 How. [60 U. S.] 162, a libel was filed against the consignee of a vessel, to recover the contributory share of the salvage due from the goods which the master had voluntarily delivered to the consignee before the libel was filed; and the question arose whether the court could admit a claim for general average, in an action founded on a cause of affreightment. In that case it is clear that the promise implied by law in one case, is different from the promise to pay on the face of the bill. The causes of action were different. In a court of law it would have been difficult to have given judgment for a cause of action different from that alleged in the declaration; but in that case the court, considering the differences between the causes of action as technical, rendered a decree in favor of the libelants. Now, they rested their pow-

er to do so on the difference which existed between pleadings in courts of common law and admiralty; and in the fact, that there existed in the latter no technical rules of variance or departure.

After stating that the libelant may pray (Id. 171) generally or specially for the relief he asks, the court say: "Pleadings in admiralty are exceedingly simple, and free from technical requirements. * * * The proofs of each party must correspond substantially with his allegations, so as to prevent surprise. But there are no technical rules of variance or departure in pleading, like those of common law; nor is the court precluded from granting the relief appropriate to the case appearing on the record, and prayed for in the libel, because that entire case is not distinctly stated in the libel." This court cannot, therefore, consider that the general allegation in the libel in this case is to be deemed insufficient, which in such a case would be good, even in a declaration at common law. In a libel for the breach of a passenger-contract, consisting of personal wrongs, by way of detention, loss of time, and subjection to exposure and risk in a place designated as fraught with danger to human life, I cannot consider that special damages must be laid in analogy to a common-law declaration; but that proof under such general allegation may be given of the detention, loss of time, and any other facts to show the exposure and suffering of libelant and his wife.

A decree will be drafted affirming the decree of the court below, and handed to the judge for signature.

WEST (UNITED STATES v.). See Case No. 16,667.

WEST (VARNER v.). See Case No. 16,885.

WEST (VOWELL v.). See Case No. 17,024.

WEST (WRIGHT v.). See Case No. 18,102.

WEST, BRADLEY & CARY MANUF'G CO. (DOUGHTY v.). See Case No. 4,030.

Case No. 17,428.

WESTBROOKE v. ROMEYN.

[Baldw. 196.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1830.

CONSTRUCTION OF DEED—ESTATE TAIL—CONTINGENT REMAINDER—LIMITATION TO SURVIVORS.

1. A, by deed, in 1766 conveyed the premises in question to his son M, and the heirs of his body lawfully begotten, and in default of such issue to the surviving sons and daughters of A, in the following shares and proportions; two shares to a son and one share to a daughter, and the heirs of their bodies respectively: and in case either of the sons or daughters die without issue, their shares to go to the survivors in the same proportions, and in default of issue of the survivors, to the right heirs of A. A had four sons and three daughters who survived him; they all died before M except one daughter. M died without issue in 1818, leaving a sister (the mother of the defendant), who survived him. Held, that the plaintiff, a son of a deceased brother of M, was not entitled to any share of the estate, his father having died before M.

[Cited in Hill v. Rockingham Bank, 45 N. H. 273.]

2. The remainder to the surviving sons and daughters of A was contingent, the words of survivorship referring to the death of M without issue.

3. Whether the right heirs of A were entitled to any part, quære.

The cause came before the court on the following case stated by counsel: (1) Abraham Van Campen, Esq., the maternal grandfather of the defendant, by deed of gift, bearing date on the 26th day of November, A. D. 1766, conveyed, amongst other lands, the premises in question to his son Moses Van Campen, with the following habendum clause, that is to say: "To have and to hold the said messuage, plantation, and the several tracts or pieces of land above described, hereditaments and premises hereby granted or mentioned so to be, with the appurtenances, unto the said Moses Van Campen, and to the heirs of his body lawfully begotten or to be begotten; and in default of such issue, then to the surviving sons and daughters of the said Abraham Van Campen, Esq., in the following shares and proportions, namely, to a son two shares, and to a daughter one share, and to the heirs of their bodies lawfully begotten or to be begotten, respectively; and in case any or either of the said sons or daughters of the said Abraham Van Campen, Esq., shall die without legal issue, then their share or shares, proportion or proportions, to go to the survivors and their heirs, in the manner, shares and proportions aforesaid; and in default of issue in them, the said surviving sons and daughters of the said Abraham Van Campen, Esq., then to the right heirs of the said Abraham Van Campen, Esq., for ever." (2) That the said Abraham Van Campen, Esq., had three other sons, to wit: Abraham, John and Benjamin, to whom he gave lands, by like deeds of gifts, at the same time and with the same habendum clause as in the above deed to his son Moses. (3) That the said Abraham Van Campen, Esq., also left three daughters, and that the said Abraham Van Campen died, leaving the said four sons and three daughters him surviving. (4) That the said Moses Van Campen died in the month of July, A. D. 1818, without issue. (5) That at the death of Moses Van Campen, the sons and daughters of the said Abraham Van Campen, Esq., were all dead, except one daughter, Susan Romeyn, the mother of the defendant. (6) That the other two daughters of Abraham Van Campen, Esq., died in the lifetime of Moses Van Campen, each leaving children who are now living. (7) That Benjamin, the son of Abraham, died in the lifetime of Moses, without issue. (8) That Abra-

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

ham and John, the sons of Abraham, died in the lifetime of Moses, each leaving children, who are now living. (9) That the lessors of the plaintiff are the children of John, the son of Abraham Van Campen, Esq. (10) That the said Susan Romeyn, the mother of the defendant, died before the commencement of this action, leaving the defendant her eldest son, and other children.

It is agreed by the parties, that if, upon the foregoing statements of facts, the court are of opinion that the plaintiff is entitled to recover the premises in question, that judgment shall be rendered for the plaintiff, with costs; and if the court shall be of opinion that the defendant is entitled to hold the premises in question, that then judgment shall be rendered for the defendant, with costs, with liberty in either party to turn this case into a special verdict, for the purpose and benefit of a writ of error.

Mr. Frelinghuysen, for plaintiff.

It was evidently the intention of the donor to give the estate in question to his sons and daughters who survived him, in case Moses died without issue; he created an estate tail in Moses, which on his death devolved on the other children of the donor, without regard to their surviving Moses; provided they survived the donor, their issue take by descent in right of their parents, who had a vested remainder in tail. It is a fundamental rule that, in the creation of estates tail, the intention of the donor shall govern, whether the estate is created by deed or will. 7 Co. 137. The term "survivor," or "surviving," is not a technical term of fixed legal signification, but is to be taken subject to sound rules of construction, applied to all instruments, according to the subject matter and the sense in which they are used by the maker. If the time of survivorship is not definite, it will be referred to such time as, from a view of the whole instrument, shall appear to best comport with the intention, and the particular expression will be taken to have a meaning consistent with the context and other parts of the instrument. Thus a devise to "surviving" children will be construed to mean "other" children, when such appears to be the intent of the testator; and the word "survivor" will be referred to the death of the testator, rather than to the death of the first taker, or the expiration of the particular estate on which the remainder is limited (Roebuck v. Dean, 2 Ves. Jr. 265; Wilmot v. Wilmot, 8 Ves. 10; Barlow v. Salter, 17 Ves. 478; Drayton v. Drayton, 1 Desaus. 324, 331; Pettywood v. Cook, Cro. Eliz. 52); so the word "or" will be construed "and" to effect the intent. White v. Crawford, 10 Mass. 189. There is no distinction between deeds and wills on this subject, the intention of the donor shall prevail, when it violates no rule of law, and the court will supply words of grant which are omitted in a deed when there is an habendum. Bridge v. Wellington, 1 Mass. 219. So where a grant is made in futuro, which could not operate as a deed, the court construed it as a covenant to stand seised. Wallis v. Wallis, 4 Mass. 135. Here there was an apparent intention to provide for his grandchildren, as the issue of the sons and daughters who should survive him; they had a capacity to take the remainder on the death of Moses without issue, and a vested interest transmissible to their children. The case of the plural terms "sons" and "daughters" shows that the donor did not mean to confine the gift to one only, who should survive Moses, but to divide it among all his other children as tenants in common, which import partition, and shall control words of survivorship so as to refer them to the death of the testator, and thereby preserve the tenancy in common. Russell v. Long, 4 Ves. 551. "Ut res magis valeat quam pereat." By referring the survivorship in this case to the date of the deed, or the death of the donor, there is a vested remainder in tail in his children, which is not defeated by the death of any of them before the happening of the contingency on which it was to vest in possession. 10 Mod. 419; 1 Strange, 139; 2 Wils. 29.

Mr. Williamson and Mr. Wood, for defendant.

Where a remainder is limited to a determinate person, who has a present capacity to take, and is ascertained before the contingency happens, the remainder is vested; but if the remainder is limited to a person not ascertained before the contingency, he can have no present capacity to take, and the remainder is necessarily contingent. Here an estate tail is given to Moses, with remainder to the surviving sons and daughters of the donor, who cannot be ascertained till his death. Though the word "survivor" is not a technical term, it has a definite meaning, outliving another, as it here means those who outlive Moses. This is the general rule, to which there are exceptions, where the manifest intention of the will indicates a different meaning, and in cases where a different construction is necessary to preserve a tenancy in common, created in another part of the will, or to prevent a lapse by the death of the devisee in the lifetime of the first taker. Then the survivorship is referred to the death of the testator, otherwise it is referred to the period of enjoyment and distribution, at the expiration of the particular estate on which it is limited. 2 Ves. Jr. 265; 4 Ves. 551; Daniell v. Daniell, 6 Ves. 297; Jenour v. Jenour, 10 Ves. 562. There must be a special intention to refer the survivorship to the death of the testator, or a direct and immediate gift to take effect in interest, and the possession only postponed where no previous interest is given in the thing devised. Cripps v. Wolcott, 4 Madd. 11, 14; Davidson v. Dallas, 14 Ves. 576. In this case there can be no lapse, as the estate passed by a deed which took effect by delivery of the donor; there was no direct or immediate gift to the other sons, the enjoyment of which

was suspended during the life of Moses, or which could be defeated by referring the survivorship to his death; and there was a previous interest given to him in the thing granted: nor is there any special intent to be inferred from any part of the deed, to justify a departure from its plain words. Smith v. Parkhurst, 3 Atk. 136. The plaintiffs, being the grandchildren of the donor, are not entitled by the terms "sons" and "daughters;" there is no intention to provide for them in any way, expressed or to be implied; on the contrary, the intent is apparent, to provide only for the living children at the death of Moses. The limitation to his right heirs on the death of his sons and daughters, shows the intent that his grandchildren shall take only in that event, and were not included in the first clause. The time when the estate is to vest in the survivors is clearly the death of Moses; "then" it is to go to those who outlive him. Such is the settled construction of the word "then;" it relates to the last antecendent—to the death of the first taker, and not to the date of the deed or the death of the donor. Den v. Schenck, 3 Halst. [8 N. J. Law] 29, 39; Jackson v. Chew, 12 Wheat. [25 U. S.] 153; Hughes v. Sayer, 1 P. Wms. 534; Fearne, Rem. 358. To come within the description of persons entitled to this remainder, the plaintiff must be a son or daughter of the donor who outlives Moses, he must fill the character both of son and survivor, before any interest can vest; but the plaintiffs filled neither character, nor could their father be the survivor of Moses, when he died before him. The remainder was necessarily contingent, till some one could fill that character, and could never vest till the contingency happened, for till then no one could have a present capacity to take. As the defendant survived all her brothers, she is entitled to take the whole; the use of the words "sons" and "daughters" in the plural makes no difference. Fearne, Rem. 239, 312; 1 Show. 91. Where property is given to a class or description of persons, and there is one who comes within the description, he takes the whole. Doe v. Sheffield, 13 East, 526, 533; Jackson v. Myers, 3 Johns. 392; Den v. Crawford, 3 Halst. [8 N. J. Law] 99, 100. But it is immaterial whether the defendant is entitled as sole survivor or not; as the plaintiffs have shown no title in themselves, there must be judgment for defendant.

BALDWIN, Circuit Justice. It is admitted, and cannot be doubted, that an estate tail was vested in Moses Van Campen. The only question is, whether any interest passed on his death without issue to the children of his brothers who died before him, or whether the whole estate vested in his sister, who survived him.

1. Taking the words of the deed in their plain, obvious meaning, without regard to their legal signification, there would be no difficulty in understanding them. The plaintiffs are not sons or daughters of the donor, they cannot therefore take as the persons referred to and described as such; if they take, they must take by descent from their father, an estate which was vested in him in his lifetime, so as to be transmissible to his children by the act of the law. The words of the deed direct, that the estate shall go to the surviving sons and daughters, on the death of Moses without issue; the word "then" denotes the time when the interest vests in them to be at his death, as well as the persons to take, that is, those who shall then be the survivors of Moses. The mode of division, is also a clear indication that no provision could be made for grandchildren; the sons were to have two shares, and the daughters one share, and the next limitation is of the same nature, "if any of the said sons or daughters shall die without lawful issue, their shares to go to the survivors in the same manner and proportions." The limitation over to the right heirs of the donor, is also on the death of all the surviving sons and daughters, which must mean those who survive Moses in the first place, and next those who survive each other. In thus passing the estate from Moses to all the survivors, from survivor to survivor, and from the last survivor to the right heirs of the donor, there is no limitation in favour of the descendants of any son or daughter, until the death of all without issue. To prevent the estate from going to the right heirs, there must be in existence the issue of a surviving son or daughter of the donor; the issue of one who did not survive some one, could not prevent the right heirs from taking. As the estate passed by deed, it took effect by delivery, and would have vested in the sons and daughters who survived Moses, though they had all died in the lifetime of the donor. Had it been his intention to refer the survivorship to his own death, or to give an interest after the death of Moses to all his children who were alive at the delivery of the deed, or the donor's death, he would have omitted the word "surviving." But as he has used it in the three limitations, first, on the death of Moses, second, on the death of any survivor, and third, on the death of all the survivors, it is obvious that it was intended to have its well understood and natural meaning, and apply to those sons and daughters who should outlive or survive Moses. To give it any other meaning, would be in effect to erase it from the deed, as no other period of division is in any manner referred to in the deed, and no words or expression used which denote any intention of the donor that the estate should vest in interest before the death of Moses, to be enjoyed afterwards. Were we to substitute "other" for "surviving," it would be going further in a court of law in a deed, than courts of equity have done in a will; such substitution is made only where the plain intention of the testator, or some other provision of the will would be defeated, by giving the words their natural meaning. As a general rule, words of survivorship relate to the time or event when the thing devised is to be

distributed or enjoyed, and not to the time when the will took effect by the testator's death. Their reference to the latter period, is to effectuate some special intent, to preserve an estate previously given, or to prevent a lapse, which are exceptions to the rule; but none of them exist in the present case, and were it the will of Mr. Van Campen, we could not, consistently with the rules of courts of equity, give it the construction contended for by the plaintiff's counsel. 1 Rop. Leg. 426; vide Lambson v. Boileau [Case No. 8,030].

The plain effect of the deed is to create an estate tail in Moses, with remainder over to the surviving sons and daughters of the donor; here is a double contingency, the death of Moses without issue, and the survivorship of his brothers and sisters, on the happening of which the remainder depended. Both were uncertain, and must continue so till the death of Moses; and as the only right which could exist was to take the estate when the two contingencies took place, on which alone it depended, the remainder was necessarily contingent. Till the contingency vested the estate, the remainderman was not ascertained, and on one could fill the description of the donor, so as to be capable of taking a present vested interest, with the right of future enjoyment, till he became the survivor, which could not be till the death of Moses; it was uncertain who could be the survivor, nor could there be a capacity in any one to take during his lifetime, as he might survive all his brothers and sisters.

2. Testing this limitation by the established rules of law, we cannot doubt that the remainder is contingent. "The present capacity of taking effect in possession, if the possession was to become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." Fearne, Rem. 215. "A point common to all limitations of remainders, either by deed or will, and either by the rules of the common law or under limitations of uses, is, that no persons or class of persons can take under a remainder unless such persons or class of persons come in esse, or being in esse shall be capable of taking vested interests, before the determination of the prior particular estate, by which the remainder is supported." 1 Prest. Est. 59. The rule cannot be more accurately laid down than in the words of a distinguished jurist. "In every vested remainder the capacity to take the possession arises before the right to take it. That capacity exists as soon as there is a person in esse who meets the description of the remainderman, and nothing is interposed between him and the possession except the particular estate, while the right to take it is yet in suspense, till the determination of the particular estate. And as soon as a remainderman is presented who meets the description of the limitation, and between whom and the possession nothing stands but the particular estate, the remainder vests in interest, though it may chance never to come into possession." Mr. Wirt arguendo [Carver v. Jackson], 4 Pet. [29 U. S.] 62. As the father of the plaintiffs died in the lifetime of Moses, he did not meet the description of the limitation as a survivor, which was the only character in which he could have any capacity to take a vested interest. The terms of the limitation required that, on the death of Moses without issue, there should be a son or daughter of the donor in esse, to meet the description of the remainderman; we cannot so construe the deed as to make a deceased brother a surviving one.

3. If we felt at liberty so to construe this limitation as to give a vested remainder in tail to all the children of the donor who survived him, the other limitations would prevent our doing so. The donor has carried on the whole estate in remainder, from survivor to survivor, and on the death of all his surviving children, has limited it to his right heirs; these limitations will be defeated, if any part of the estate goes to the children of those who did not survive the contingency on which it was to be divided or carried over. Taking the limitations of the will in their legal acceptation, we are therefore clearly of opinion that there was no vested interest in those who died before Moses, for the want of a capacity to take a vested remainder. There are no words in this deed from which a shifting or springing use can be raised in favour of the plaintiffs; this could be done only after the first limitation had expired, for the want of persons capable of taking under it, and in order to preserve the estate. For where an estate can take effect as a remainder, a springing use will not be raised, nor can there be such a use in one part, and a remainder in the other. Here the whole estate could, and did vest as a remainder in the survivor, by the happening of the event on which it was limited, and no part of it can be shifted to the plaintiffs, either by right of descent or as purchasers under the deed. All the limitations to the survivors are in tail, the word "issue" is, throughout, used as a word of limitation, denoting the quantity of estate given, not the person to take, either by name, description or descriptive designation, so as to afford the least ground for considering the plaintiffs as purchasers. If they could take in any event, it must be by descent, but as no interest was vested in John Van Campden, their father, they can recover nothing.

It has been contended, that as Mrs. Romeyn was the sole survivor, she could not take the whole estate; but as the plaintiffs are not the right heirs, or heirs at law, of the donor, it can make their case no better, though the last limitation over to the right heirs may have taken effect, as the plaintiffs must recover on the strength of their own title.

We are happy in this case in being able to concur with the late learned chancellor of this state in his opinion on this deed; we should have departed from it only in obedience to higher obligations, our duty as well as

inclination being at all times to conform to the course of adjudication in state courts, unless they are clearly opposed to the settled rules of law.

Judgment must be entered for the defendant.

Case No. 17,429.

WESTCOT v. BRADFORD.

[4 Wash. C. C. 492.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1824.

SEIZURE BY COLLECTOR—SENTENCE OF CONDEMNATION—SUIT BY INFORMER—COMPENSATION—ADMIRALTY JURISDICTION — APPEAL AND WRIT OF ERROR.

1. After a sentence of condemnation upon a seizure by the collector for a violation of the revenue laws of the United States, and the proceeds being brought into court, a petition to the court by the informer to be paid the proportion of the forfeiture allowed him by law, is an original suit in the admiralty, and from the decree given therein an appeal lies to the circuit court.

[Approved in U. S. v. George, Case No. 15,197.]

2. If part of the fund in court be the produce of the coasting license bond, recovered by an action on that bond, the petition of the informer for his proportion of the penalty so recovered, is a proceeding at common law, and from the sentence on the petition no appeal lies. A judgment of the inferior court in a case at common law, cannot be reversed by the circuit court, but upon a writ of error.

[Cited in Ruddick v. Billings, Case No. 12,110; Wheaton v. U. S., Id. 17,487.]

3. If after seizure the informer is entrusted by the collector with the custody of the property, and he endeavours to defraud the revenue of the fruit of the seizure, by connivance with the party informed against, in which attempt he fails, this will not defeat his right to his part of the forfeiture. His right as informer cannot be affected by his misconduct as agent.

4. Courts of common law, as well as of admiralty, have jurisdiction over funds brought into court under their process, and to hear and determine the claims of third persons to a distribution of the fund. In case of money brought in under a sentence of condemnation, the court, before it is paid over to the collector, may decree to the informer his proportion.

[Cited in Hooper v. 51 Casks of Brandy, Case No. 6,674; 50,000 Cigars, Id. 4,782. Approved in U. S. v. George, Id. 15,197.]

[Cited in Lapham v. Almy, 13 Allen, 304; Rice v. Thayer, 105 Mass. 260.]

5. How far an information given to the collector, as to one thing, may or may not be considered as extending to others, so as to warrant the conclusion that the forfeiture was recovered in pursuance of such information?

6. If the information be in writing, the party may nevertheless give parol proof or other information given, leading to the seizure of articles not mentioned in the written information.

[Cited in The City of Mexico, 32 Fed. 106.]

7. Declarations of an agent, so far as they constitute part of the res gestæ, may be given in evidence to affect his principal. What constitutes a part of the res gestæ?

[Cited in Horner v. Fellows, 1 Doug. (Mich.) 54; Franklin Bank v. Pennsylvania, D. & M. Steam Nav. Co., 11 Gill & J. 34; Haven v. Brown, 7 Greenl. 424; Franklin Bank v. Steward, 37 Me. 526. Cited in brief in Crump v. U. S. Mining Co., 7 Grat. 364.]

8. After the money brought into court under the condemnation is paid over to the collector, the court has no power to decree in favour of the informer against the collector in personam, or against money of his in court, arising from some source other than the admiralty proceeding.

9. The appellate court may sustain the appeal in part, and dismiss it in part; on the ground that as to such part, the case could not be brought up for review upon appeal.

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

In admiralty.

Griffith & Halsted, for appellant.

Pennington & Elmer, for appellee.

WASHINGTON, Circuit Justice. This is an appeal from a decree of the district court. The appellee filed in that court five several petitions, claiming a right to one fourth of the proceeds of the sales of the sloop Boxer, the sloop Tonkin, ten hogsheads of rum, and two barrels of oil, three hogsheads of rum, and the penalty of the coasting license bond of the Tonkin; which sloops, rum, and oil, had been seized, condemned, and sold, for a violation of the revenue laws of the United States, in pursuance, as the petitions allege, of information given to the collector by the petitioner, and the proceeds paid into the hands of the clerk of the court; and which penalty had been recovered in pursuance of like information, and the amount collected by the marshal and paid into court. The petitions were separately applicable to these four separate forfeitures and the penalty, and prayed to be paid out of each fund one fourth of the same, after the costs and charges were deducted. To the three petitions which claimed one fourth of the proceeds of the sloop Tonkin, the two parcels of rum and the oil, the appellant, the collector who made the seizures, filed separate answers, in which he denied that Bradford was the informer, insisted that if he ever had any claim as such to a part of the proceeds, the same was forfeited by his misconduct in conspiring with the owners of the rum to destroy it, during the time that he was charged with the custody of it by the appointment of the collector, for the purpose of destroying all evidence of the illegal importation of that article, and of defrauding the revenue of the United States. And lastly, that subsequent to the condemnation, and to the filing of these petitions, viz. on the 4th of May, 1822, the petitioner had, for a valuable consideration paid to him, released to the respondent all his claim, as informer, to any part of the forfeitures of those articles. The answer to the petition respecting the Boxer,

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

denies that the petitioner was the informer, and insists upon the release stated in the other answer, which included his claim to a part of the forfeiture of this vessel. To the petition concerning the penalty of the license bond, the collector pleaded the same matters as are set forth in his answer to the petitions respecting the Tonkin, the rum, and the oil.

To these answers and plea the petitioner replied, that, on the 14th of February, 1822, he did, for a valuable consideration paid to him by Peter Cambloss, by an instrument under his hand and seal, assign to said Cambloss, all his right and title in and to all moneys which he was or might be entitled to from the sales of the said sloops, rum and oil, as informer against the same; and also to all moneys and penalties due, or to grow due, and to be recovered by reason of his said information given to the collector.

A number of depositions having been taken, the district court decreed in substance as follows: That Bradford was originally entitled, as informer, to one fourth of the sales of the sloops Boxer and Tonkin, the thirteen hogsheads of rum, and two barrels of oil, after expenses deducted; and also to one fourth of the penalty of the coasting license bond of the Tonkin. That having, by an instrument dated in February, 1822, assigned all his said interest to Peter Cambloss, he, the said assignee, is entitled to the same. That the sum of $250, then remaining in the hands of the clerk of the court, which had, by the order of the court, been detained out of the proceeds of the two sloops, the rum and the oil; and also the sum of $500 in his hands, arising from the suit of the United States against the obligors in the said license bond, after legal fees deducted, be paid to ——— Elmer, the then collector, to be by him disposed of as follows: viz. that he shall consider the five several prosecutions in the petitions mentioned as one connected transaction; that the proceeds of the sloops, rum, and oil, amounting to $2,037.34 cents, out of which Westcot received for the parties concerned, the sum of $1,787.34 cents, of which the United States was entitled to $1,018.67 cents, and said Westcot to $509.33 cents, and Cambloss, as assignee aforesaid, to $509.33 cents; and that said Westcot had in his hands, after paying himself and the United States, the sum of $259.33 cents, belonging to Cambloss, assignee as aforesaid. It was therefore decreed, that the said Elmer pay the said sum of $250. remaining in the hands of the clerk, on the sales of the sloops, rum, and oil, when the same shall be paid over to him by the clerk, to Cambloss, in part of his proportion of said sales; and that he pay to the United States one half of the sum paid over to him by the clerk in the suit of the United States on the license bond; and to Cambloss, as assignee, one fourth of the last mentioned sum; and the remaining fourth, being the proportion due to the said Westcot, as collector, be also paid to said Cambloss, in part of the sum due him on the sales of the sloops, rum and oil, and which has been received by said Westcot. And that the said Westcot pay to Cambloss the balance, which will, after the payments aforesaid, remain due to him on the net proceeds of the sloops, rum, and oil. Each party to pay his own costs.

The first question which I have to consider is one raised by the counsel for the appellee, in which is involved an objection to the jurisdiction of this court, upon the ground that these petitions were not in the nature of original suits, but were merely appendages to the suits which brought the funds in question into court, and that as no appeals were taken from the decrees in these suits, none will lie from the present decree, which was merely incidental, and dependent upon the discretion of the court below. That the decree made in these cases is final, was not in direct terms, controverted by the counsel, nor could it be with the slightest plausibility. The whole fund remaining in court, which formed the subject of these petitions, is finally disposed of by the decree, as concerns all the parties interested in it: the United States; the collector who made the seizure; and the assignee of the informer. Final judgment, in personam, is rendered against Westcot for the balance still due to Cambloss. Nothing remained to be done but to execute the sentence of the court.

The whole strength of the objection to the jurisdiction was rested by the counsel upon another ground; it was, that the petitions were not original suits, but that they were merely incidents, to be decided upon according to the discretion of that court; in like manner as that court would take cognizance of the manner in which its process to enforce its decree had been executed. But how can these petitions be considered as appendages, or incidents, to the original suits? They were totally unconnected with them; were instituted by a third person against the collector, for the purpose of controverting his right to the fund in court, the fruit of certain suits brought by the United States, to a proportion of which the petitioner claimed a right. They formed no part of the original suits, which were terminated by the fruits of them being brought into court; but were original suits to recover a part of those fruits; as much so, as a suit by petition or otherwise, in the admiralty, by material men, to be paid out of a surplus remaining in the registry, which had been brought there upon a libel to enforce a lien on the ship; which is unquestionably an original suit, from a final decree in which an appeal will lie.

This is quite unlike the case of The Hollen [Case No. 6,608], which came before the court upon a petition of the obligors in a stipulation bond for the appraised value of goods which had been seized and libelled, against whom judgment was rendered, as a matter of course, the appraised value not having been paid into court, according to a previous order of the

court. The prayer of the petition was, that the execution issued against the petitioners might be superseded; and from the decree upon the petition the petitioners appealed. The circuit court decided, very correctly, I think, that the subsequent proceedings on the bond, and the issuing of the execution, were but incidents to the original cause, to enforce the decree of condemnation, and that that court had no jurisdiction over those proceedings unless it had possession of the cause to which they belong. The stipulation bond is the representative of the subject upon which the decree of condemnation operates; and as well might the owner of the property condemned, appeal from an order of the court relative thereto, but distinct from the original suit in which the decree was made, as the obligors in the case referred to, where no appeal was, or would have been taken from the original decree. In this case the court has nothing to do with the original suits, but is confined to the right of the petitioner in the court below to a proportion of the fund, which had been brought into the court, as he alleged, in pursuance of information given by him to the collector. It must, however, be understood that this opinion is confined to that part of the decree which relates to the proceeds of the sloops, the rum, and the oil; the original proceedings against which being on the admiralty side of the district court, the subsequent suits against those proceeds in the court, must also be considered as suits in the admiralty, since to that side of the court the petitions were necessarily addressed. The decree, therefore, as to those proceeds, was properly brought before this court by appeal. But the other petition, which claimed one fourth of the penalty recovered on the license bond, was not, and could not be addressed to the admiralty side of the court, since the money was levied under a judgment at common law; and although it was in the hands of the same officer who had possession of the proceeds in the admiralty suits, still the petition in relation to that fund, was, in reality, a proceeding at common law; and the judgment of the court therein, is, of course, a judgment at common law. It follows, therefore, that the decree of the court upon this petition, cannot be carried by appeal into the circuit court. I entirely concur with Mr. Justice Story in the construction which he has given to Act March 3, 1803, § 2 [2 Stat. 244], in U. S. v. French [Case No. 15,165], that the term "judgment" is merely explanatory of, and equivalent to "decree," the other phrase used in that section; and therefore, that an appeal does not lie to the circuit court in common law suits.

I shall now proceed to the consideration of the various objections made by the appellant's counsel to the decree of the court below, upon the petitions for one fourth of the proceeds of the sloops, the rum, and the oil. The first is, that the right of Bradford as an informer, however well founded it might originally have been, was forfeited by reason of his subsequent misconduct. That his conduct after the seizure of the Tonkin and the rum, and during the time that they were left in his custody by the deputy collector, was in the highest degree perfidious, and was calculated and intended to defraud the revenue of the United States by putting it in the power of the owners of the property to destroy or secrete the rum, is clearly proved, and the fact does not stand in need of the confirmation afforded by his own confession contained in the disgraceful petition filed by him for the purpose of defeating the right of Cambloss, to whom he had assigned it for a valuable consideration, and for promoting that of Westcot, to whom he made a subsequent assignment. But the question is, could his right, if it once existed, be forfeited or lost by his subsequent misconduct, whether it consisted in acts of commission, or in omissions? What is the right of an informer, and when does it attach? The ninety-first section of the collection law of March 2, 1799, c. 22 [1 Stat. 697], enacts that all fines, penalties, and forfeitures, recovered by virtue of that act, and not otherwise appropriated, should, after deducting all proper costs and charges, be disposed of; one moiety to the United States, and the other moiety to be divided between the collector, the naval officer and surveyor, or such of them as may be in the said district. But in all cases where such fines, penalties and forfeitures shall be recovered in pursuance of information given to such collector by any person other than the naval officer or surveyor, then one half of such moiety is to be given to such informer. It is plain that this section requires no act whatever to be performed by the informer, subsequent to the information given to the collector. The mere information can vest no right whatever in him, unless in the case of a forfeiture it is followed up by a seizure, and unless a suit is brought, when a penalty is to be recovered. The collector seizes at his peril, and he may refuse to act upon the information he receives, and the informer has no remedy that I know of, to compel him to seize, or to bring suit. If he make the seizure in consequence of the information given to him, that act vests an inchoate right to the forfeiture, in the United States, the custom house officers, and the informer, in the proportions mentioned in this section, which right is consummated by condemnation. All this was decided in the case of Jones v. Shore's Ex'rs, 1 Wheat. [14 U. S.] 417. After the seizure, the subsequent proceedings, to consummate the rights of the several parties having an interest in the forfeiture, are under the exclusive management of the collector. The informer is not bound to aid in the prosecution by providing testimony to support it; much less is he bound to assist in the safe keeping, or conveying the property seized from one place to another. He may, undoubtedly, as might any other person, undertake, at the instance of the collector, to navigate the vessel seized, from one place to another, and in

the mean time to take care of the property. But in that case he acts in a new character that of a special agent of the collector, responsible, it may possibly be, to him or to the United States, in a proper form of action, for the faithful discharge of the trust reposed in him; but upon no principle with which I am acquainted, can his breach of faith involve the forfeiture of a right which had vested in him in his character of informer. I am quite at a loss to conceive how his merit as informer, to which the recovery of the forfeiture is mainly to be attributed, can be extinguished by his subsequent demerit as agent. Still less can there be a reason assigned for visiting him with the forfeiture of his rights in the former character, when his offence consists in intention only, or in vain efforts to do an injury to others, but which failed to produce the contemplated result, as happened in this case.

2. The next objection is, to the power of the district court to direct a distribution of the proceeds of the forfeited articles remaining in the registry. That courts of common law as well as courts of equity and of admiralty, possess a controlling power over money brought into those courts respectively by their process, is undeniable. It is every day's practice in the common law courts, upon rules to show cause, or upon motion, to examine into and decide the claims of third persons to money levied under execution, and paid into court. The same control is exercised by the court of admiralty over moneys in the registry, as upon petition of material men and privileged creditors, to be paid out of such fund, although it was brought in upon the suit of other creditors. The Jerusalem [Case No. 7,294]; Ex parte Lewis [Id. 8,310]; Gardner v. The New Jersey [Id. 5,233]; The Favourite, 2 C. Rob. Adm. 232; The John, 3 C. Rob. Adm. 288. But the main strength of the objection, as I understand it, rests upon the peculiar expressions of the eighty-ninth section of the collection law of March 2, 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 695, c. 22], which authorizes the collector to receive from the court or its officer, the sums recovered or collected, after costs and charges deducted, and enjoins upon him the duty of making the distribution. This is considered by the counsel as being imperative on the court, and ousts its general jurisdiction to direct the distribution. I think there is no ground for this argument. The above section merely points out the officer who is to receive the money from the court, and who is to distribute it, where no dispute exists respecting the distribution. But the jurisdiction of the court to examine into contested claims to the money, whilst under its control, and to direct the collector in what manner it is to be distributed, is not taken away, or even impliedly affected. If, upon general principles, this could be questioned, I consider the point to have been directly settled in the case of Jones v. Shore's Ex'rs, in 1 Wheat. [14 U. S.] 417, before referred to.

3. The next objection is to the quantum decreed to the informer, or rather to his assignee. It is insisted, that since the information was in writing, that instrument must regulate the amount of the forfeiture to which the appellee is entitled. The terms of this written information are, "that the informer verily believes that certain goods viz. seven hogsheads of rum, which have been brought into the United States contrary to law, are now on board the Tonkin, Seth Sharp, master, lying in Antuxit creek, and he engages to pay the costs of the prosecution for the same." If this were the only information which was given, I should certainly consider myself bound by its language, fairly and reasonably expounded; and I shall, for the present, consider the case as if there were no other evidence of information given by Bradford at the time this instrument was signed, or at any other time. What is its extent in legal contemplation? It is contended by the counsel for the appellee, that the seizure of the other six hogsheads of rum, and the oil of the Tonkin, and also of the Boxer, was consequential to the limited information thus given, and that therefore it entitled the informer to a share of the proceeds of those vessels, and the other articles on board the Tonkin. On the other side, it is insisted, that the right of the informer should be strictly confined to one fourth of the proceeds of the seven hogsheads of rum. My own opinion is, that the one construction is much too liberal, and the other too strict. The expressions of the ninety-first section are, that "in all cases where such penalties, &c. are recovered in pursuance of information given to such collector," he shall be entitled, &c. The question then is, what was recovered in pursuance of the above information? It is admitted that the forfeiture of the seven hogsheads of rum was so recovered. I think it equally clear that the forfeiture of the Tonkin was recovered in pursuance of the information, because, by the twenty-eighth section of the same law, it is enacted, that if any goods which shall have been unladen contrary to the other provisions of the act from on board any vessel, shall be put into any other vessel, except in a case of accident or distress, &c. such vessel shall be forfeited. Now it is clear that the information against the rum on board the Tonkin was, to all intents and purposes, an information against the Tonkin, since her forfeiture was necessarily the consequence of the forfeiture of the rum, and was therefore recovered in pursuance of the information given to the collector. But I do not think that the written information can fairly be construed to apply to the Boxer; which was, for aught that that instrument intimates, totally unconnected with the Tonkin, and in no wise implicated in her guilt. The effect of that information, taken in connection with the parol evidence, as to the remaining six hogsheads of rum and the oil, will be considered hereafter.

It remains now to inquire, whether, in point of fact, the collector received any infor-

mation from Bradford which led to the seizure of the Boxer, the residue of the rum, and the oil? For that he was at liberty to give evidence of parol information, more extensive than that contained in the written instrument alluded to, is unquestionable. Shaw deposes, that James D. Westcot, Jr., the deputy collector, stated to him, some time after the seizure, that Bradford had complained against the two sloops and seven hogsheads of rum; and that some time during the fall of 1821, he also stated that Bradford had informed him that the Boxer had brought in rum from Bermuda. Barret, another witness, deposes, that he was employed by the deputy collector to come in the Boxer from Antuxit to Bridgetown, where the collector's office was kept, about the middle of November, 1821, a day or two after she was seized, and that the Tonkin came round about the same time; that whilst they were unlading the Tonkin, Bradford mentioned to him that he was the informer; and that as they were returning from the store house where the rum had been deposited, the witness told the deputy collector what he had just heard from Bradford; to which he replied, that Bradford, a few days prior to this conversation, had informed him that the Tonkin was going down the creek with a load of wood, and that there was rum on board that came in the Boxer. John Elmer deposes, that he was at the collector's office the day the written information was signed by Bradford and the seizure made, and he thinks that the deputy collector stated that the rum came out of Cropper's store, and he understood, both from him, and from Bradford, that the latter had informed respecting the rum, but he cannot affirm that any thing was said about the Boxer. These are all the witnesses who have given evidence on this point, and the question to be decided is, can the declaration of the deputy collector be given in evidence against his principal? As hearsay evidence, it is inadmissible by the general rule of law. But this rule is subject to certain exceptions, one of which is, that the declarations of an agent, so far as they constitute a part of the res gestæ; or in other words, such as are made by him, either at the time he is engaged in making a contract on the part of his principal, or is performing some act within the scope of his authority; may be given in evidence to affect his principal. It is admitted as the representation or admission of the principal himself, whom the agent represents, whilst engaged in the particular transaction to which the declaration refers. Representations made by an agent, at the time he is contracting for his principal, constitute a part of the contract, as much so as if they had been made by the principal. And for the same reason, a fact admitted, or stated by an agent, in relation to a transaction in which he is then engaged, and whilst it is in progress, forms a part of that transaction, and is to be considered as the admission of the principal. This is well illustrated by the case of Mott v. Kip, 10 Johns. 478, which was an action on the case against the sheriff for a false return to a fieri facias, in which it was held by the court, that the acknowledgement of the sheriff's deputy, made to the plaintiff's attorney, in answer to inquiries respecting the execution, and while the execution was in force, was admissible evidence to charge the sheriff; for the declarations being made in relation to the business of the execution, and while the obligation to execute it remained in force, they were made in the course of the transaction, and were to be considered as part of the act of the deputy, touching the execution. Now to apply this principle to the present case. What was the transaction in which the deputy collector was engaged, and to which his admissions, stated by the witnesses, related? It was the seizure of certain property for an alleged forfeiture, and the security of the same in the mode deemed necessary by that officer. As soon as the Tonkin and the rum were seized, they were placed under the care of Bradford, to be safely kept and conducted to Bridgetown. Thither also the Boxer was brought; and I am therefore prepared to admit, that, until the vessels arrived at that place, and possibly until the rum, the cause of the alleged forfeiture, was stored; the transaction to which the admissions referred was open and continuing, and that admissions made during that time, as to the cause of the seizure, might be considered as part of the res gestæ, as explanatory of the ground on which the seizure was made. But evidence of subsequent declarations by that officer, I hold to come within the general rule of the law, and are therefore inadmissible. The evidence of Shaw is of an acknowledgement made by the deputy collector some time after the seizure, but without fixing precisely how long. Barret is more precise, and states that it was after the rum was secured in the store that the admission was made that Bradford was the informer. If the admission at that time could be regarded as evidence, I can perceive no reason why it might not be so, had it been made the next day, or the next week. Elmer speaks to the time when the written information was signed, but then he has no recollection that the Boxer was mentioned. I am of opinion, therefore, that there is no proof that the seizure of the Boxer was made in pursuance of information given by Bradford.

As to the remaining six hogsheads of rum not mentioned in the written information, I think there are many circumstances in the case to warrant the conclusion to which, after much hesitation, my mind has arrived; that the seizure of them was made in consequence, either of the written, or of some parol information given by Bradford to the deputy collector. The whole quantity of rum was found together in the hold of the Tonkin, and as it is not pretended that the marks upon them were such as to distinguish

any seven hogsheads from the remaining number, it is quite natural that the collector, acting upon the maxim "noscitur a sociis" was led to conclude that the whole were equally guilty. It was but a fair and reasonable construction of the information given to the collector, that it was intended to be against the rum on board the Tonkin, but that the former was mistaken as to the precise number of hogsheads that were on board. I will not say that, if there were no other evidence in the cause but the written information, I should come to this conclusion. But there are some circumstances attending this instrument, which, taken in connection with Elmer's testimony, incline me strongly to suspect that the parol information given by Bradford was not truly inserted by the deputy collector in the written one, probably from his having misunderstood what was stated. It is very obvious that Bradford is an ignorant man, at least in respect to the business he was engaged in, or he would have known that the law did not require him to verify his information by an oath, much less to bind himself to pay the costs of the prosecution, with which he had nothing to do. It is not to be supposed but that the officer knew better; yet he was the person who wrote the instrument, and who administered the oath. This suspicion, that the verbal information was not correctly taken down, is greatly strengthened by the evidence of Mr. Elmer, who was present when it was given, and who states that the deputy collector mentioned that the rum on board the Tonkin came from Cropper's store, and that he understood both from him and Bradford, that the latter had informed respecting the rum, and not any particular number of hogsheads. Now it was admitted by the counsel that the rum, after it was illegally landed from the Boxer, was placed in Cropper's store; and since it is obvious that the deputy collector proceeded, in the first instance at least, upon Bradford's information, it may fairly be inferred that the knowledge of the place whence the rum was taken was derived from the same source, and that the guilt of the article to be proceeded against, and not the number of hogsheads, was, in the view of both parties, the substantial matter of the information. I am therefore of opinion that Bradford ought to be considered as the informer against the thirteen hogsheads of rum and the Tonkin, but not against the Boxer and the oil.

The only remaining question is, whether the decree of the district court, which directs the collector to pay to the assignee of Bradford whatever sum he was entitled to, over and above the $250 retained by the court, out of the $509, the sum recovered in the common law suit, and that the appellant should pay the balance which might remain due to Cambloss, after the payment aforesaid, on the net proceeds of the forfeitures, be correct or not? I am clearly of opinion that it is not. The only ground upon which that court could, on its admiralty side, take cognizance of the petitions for a proportion of the forfeiture was, that the money was in its possession, and under its control. Those petitions were all suits in rem, and after the money was paid over to the collector, it was placed beyond the reach of the court, and no decree could properly be made in personam against Westcot, nor against money to which he was entitled in the hands of the clerk on the common law side of the court, which constituted no part of the fund in the registry of the admiralty arising from the sales of the forfeited property. As to the $250 remaining in the registry, the decree is right, unless it should exceed the sum to which Cambloss is entitled as his proportion of the proceeds of the Tonkin and the rum, and will be incorrect only so far as it may exceed such proportion, which excess, if any, ought to be decreed to be paid to the appellant. But should it turn out that the $250 are insufficient to satisfy the claim of the appellee, his only remedy, if any he has, will be an action at law against the appellant, as for money received to his use. I say nothing as to the decree on the petition to be paid one fourth of the penalty of the license bond, because that case, as before observed, is not before the court; and as to that, the appeal must be dismissed, but without prejudice.

Case No. 17,430.

In re WESTCOTT et al.

[6 Ben. 135;[1] 7 N. B. R. 285.]

District Court, S. D. New York. June 14, 1872.

ACT OF BANKRUPTCY—COMMERCIAL PAPER—BONA FIDE DEFENCES.

1. A mercantile firm gave promissory notes as vouchers or memorandums, in exchange for notes of like amounts simultaneously given to them, but not as obligations to be paid at maturity. They did not pay them when they became due on their face, entertaining a bona fide belief that they had a good defence to them. The party to whom they were given filed a petition in bankruptcy against the firm. *Held*, that the notes were not commercial paper, as between the firm and the petitioner.

2. Even if they were such, the refusal of the firm to pay them, entertaining the belief which they did, was not an act of bankruptcy.

J. M. Guiteau, for petitioner.

Starr & Hooker, for respondents.

BLATCHFORD, District Judge. The only act of bankruptcy set forth in the petition herein is, that the alleged debtors, as copartners, under the name of Charles S. Westcott & Co., made seven promissory notes, to the order of the petitioner, for various sums, which notes became due at various times in August, September and October, 1871, and that such notes have not been paid, the last of them having matured October 20th, 1871, and the petition having been filed November 8th, 1871.

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

1. The evidence shows that the notes were given merely as vouchers or memorandums, in exchange for notes of like amounts simultaneously given by the petitioner to the firm of C. S. Westcott & Co., and were not given as obligations to be paid at maturity by their makers. They had no United States internal revenue stamps upon them when given, and it is not shown that the makers had any intention that such stamps should be put upon them. They were in form negotiable, but, on the facts of the case, they cannot, in any proper sense, be called the commercial paper of the makers, as between them and the petitioner.

2. If they could be considered as commercial paper, the evidence is that their makers did not stop or suspend payment of them, in the sense of the statute. They entertained a bona fide belief that they had a good defence or set-off to them, and that, upon all the transactions between them and the petitioner, of which there were a large number, involving large sums of money, independently of the notes in question, the petitioner, even taking these notes into account, was indebted to them, instead of their being indebted to him. Whether this is in fact so or not, it is of no importance to determine, in this proceeding. It is enough that the alleged debtors could and did honestly entertain the belief that they were not legally bound to pay the notes till it should be so adjudged. The case is not one for an adjudication of bankruptcy, but for a suit on the notes in a proper tribunal. The principles applicable to it are those set forth in the recent decision in this court in Re The Hercules Mut. Life Assur. Soc. of the United States [Case No. 6,402].

The petition is dismissed, with costs.

Case No. 17,431.

WESTCOTT v. The ANN BARTON.

[1 Wkly. Notes Cas. 10.]

District Court, E. D. Pennsylvania. Sept. 22, 1874.

COLLISION BETWEEN SAILING VESSELS.

[Where a vessel, close hauled and on crossing courses with one sailing free, missed stays in going about, fell off, and went astern, and was struck by the other, *held* that the latter was bound to keep out of the way, and was in fault for failing to take the necessary action in time to avoid collision.]

[This was a libel by Westcott, master of the schooner Elva Davis, against the schooner Ann Barton to recover damages resulting from a collision.]

The schooners Elva Davis and Ann Barton, bound from Boston to Philadelphia, both light, were at 11:30 p. m., on the 22d November, 1872, off the coast of Massachusetts, between Chatham Light and Pollock Rip. The night was sufficiently clear, and the wind about W. N. W., blowing a brisk breeze, with a moderate sea running. The Elva Davis was standing inshore on her starboard tack, heading S. W. by S., a point or more free. The Ann Barton was standing on her port tack close hauled, heading N. by W. The courses of both vessels were therefore converging lines, and, if kept by both vessels, must cross at some point. When the vessels were about 250 yards apart, the Ann Barton attempted to tack to the southward, but missed stays, fell off, and went astern. At about the same time the Elva Davis also tacked, but, before she gathered headway, the collision ensued.

Mr. Edmunds, for libelant.

Mr. Coulston, for respondent, referred to Act April 29, 1864 [13 Stat. 58], arts. 11, 18.

Upon the hearing, it was the opinion of the nautical assessor that when the Ann Barton missed stays she became helpless, and it then devolved upon the Elva Davis to avert a collision; that she might have done so—first, by putting her helm hard up, dropping the peak of her mainsail, and letting run the main sheet, and so would have fallen off, and her bow would then have receded from the Ann Barton; or, second, by luffing a point, which the wind would have allowed her to do, before getting too close to the Ann Barton, instead of deferring this movement till the Ann Barton missed stays. In fine, that the Elva Davis was sailing with the wind free, and bound to keep out of the way of the Ann Barton, which was close hauled.

THE COURT (CADWALADER, District Judge), approving the nautical assessor's opinion, dismissed the libel, with costs.

WESTCOTT (HANFORD v.). See Case No. 6,022.

WESTCOTT (HOPKINS v.). See Case No. 6,692.

WESTCOTT (LAMSON v.). See Case No. 8,035.

Case No. 17,432.

WESTERMANN v. CAPE GIRARDEAU COUNTY.

[5 Dill. 112; 7 Reporter, 101;[1] 24 Int. Rev. Rec. 357; 7 Cent. Law J. 353.]

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

RAILWAY AID BONDS—CONFLICTING DECISIONS OF STATE AND FEDERAL COURTS—BONA FIDE PURCHASERS.

1. The supreme court of the United States having held the township railroad act of Missouri constitutional (Cass Co. v. Johnston, 95 U. S. 360), it is the duty of the circuit court to follow that judgment, notwithstanding the later decision of the supreme court of Missouri to the contrary.

[Cited in Douglass v. Pike Co., 101 U. S. 679.]

2. Where negotiable commercial securities are issued and negotiated before there are any decisions by the courts of the state against the validity of the act authorizing their issue, the supreme court of the United States does not consider itself bound to follow a subsequent

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 7 Reporter, 101, contains only a partial report.]

decision of the local courts invalidating such securities, but will decide for itself whether, under the constitution and laws of the state, such securities are valid or void.

3. The bond sued on being in the hands of a bona fide holder, containing a recital that it was issued to pay for a subscription to the Cape Girardeau and State Line Railroad, the county cannot be heard to say that the subscription therein specifically recited was not made.

4. The fact that the requirement of a two-thirds vote is contained in a provision of the constitution instead of a legislative enactment, makes no difference in principle.

Finkelnburg & Rassieur and Kehr & Tittman, for plaintiff.

Louis B. Houck, for defendant.

DILLON, Circuit Judge (orally). This is an action by the plaintiff on what are known in this state as township railroad aid bonds. The question now to be decided arises on a demurrer to several pleas or special defences. First, the petition does not set forth, as it is advisable to do, a copy of one of the bonds to which the coupons in suit were attached. The nature of the obligation, however, is stated in the petition: That in the year 1869, the defendant, the county of Cape Girardeau, issued a bond on behalf of Cape Girardeau township, negotiable in form, to the Cape Girardeau and State Line Railroad Company or bearer, and containing this recital: "This bond is issued pursuant to an order of the county court of said county, made by authority granted by an act of the general assembly of the state of Missouri, entitled 'An act to facilitate the construction of railroads in the state of Missouri,' approved March 23d, 1868, in payment of the subscription made to the capital stock of the said Cape Girardeau and State Line Railroad Company by the municipal township of Cape Girardeau, and authorized by a vote of more than two-thirds of the voters of said township, at an election held for that purpose in said township on the 13th day of April, 1869." That is the first act in this state, and I believe the only act, that authorized townships to aid railroads by subscriptions and the issuing of bonds.

Now, about six years ago the question of the validity of this subscription came before the supreme court of the state of Missouri, in the case of Ranney v. Baeder, 50 Mo. 600. The objection urged in that case against the validity of that subscription was, that the particular railroad to which the subscription was made was not specified with sufficient certainty in the petition of the tax-payers asking for the submission, and in the order of the county court making the subscription. In that case the petition, and all orders of the county court in reference to the subscription, were before the supreme court of the state, and the result was that it was adjudged a valid one. Judge Wagner, after referring to a case in the supreme court of Missouri, and one in the supreme court of the United States, says: "The two cases just referred to show that there must be reasonable certainty in the matter of voting and ordering the subscription, and that the subscription must be made to the road authorized in the power delegated to the agent. Tested by these principles, we think the subscription in this case was entirely valid. As no other fault is found with the proceedings, and as every step taken seems to have been done in a formal and regular manner, I entertain no doubt about the subscription. The objections urged are entirely too refined and technical." And the judgment of the court below, holding this an invalid subscription, was reversed. That was in 1872. That is the precise objection that is reproduced in the fifth plea in this case; and we are asked to say that these bonds are invalid because the particular railroad was not specified with sufficient certainty in the proceedings. There are two objections to holding this to be good: The first is that the supreme court of Missouri, in 1872, decided that these proceedings, in a case where the whole record was before it, were regular. But it is now urged that Judge Wagner was mistaken in reference to the charter and amended charter recited therein. I think it very doubtful whether he was; certainly a bondholder cannot be supposed to know more in relation to this matter than the supreme court of Missouri. However that may be, this bond recites on its face that it was issued to pay for a subscription made to the Cape Girardeau and State Line Railroad. The county court cannot be heard, when the bond is in the hands of a bona fide holder, to say that the subscription therein specifically recited was not made. That disposes of this plea.

Another defence is that the act of March 23, 1868, under which these bonds were issued, was unconstitutional, and that that has been held to be so by the supreme court of the state of Missouri in several recent cases, in two respects—one because the constitution requires the assent to this subscription to be given by two-thirds of the qualified voters of the township, whereas the act of 1868 authorizes that assent to be given and the subscription to be made if two-thirds of the qualified voters voting at the election shall assent. That presents a question upon which there has been a great conflict of judgment between the supreme court of the state and the supreme court of the United States. In the Linn County Case (1869) 44 Mo. 504, the question of the issue of bonds under this act came before the supreme court, and they actually compelled, by mandamus, a reluctant county court to issue bonds under this very act, and of course it was implied in that judgment that the act under which these bonds were issued was constitutional. The particular point, perhaps, now urged against the validity of this act was not before the court.

A hundred cases—and I do not think I exaggerate—have been brought on these township bonds in the federal courts of this state, and prior to the decision of Harshman v. Bates Co. [Case No. 6,148] 92 U. S. 569, none

of the able lawyers defending these cases ever made a point that the act of March 23, 1868, was unconstitutional. But when the case to which I have just adverted went to the supreme court of the United States, counsel did make that question, and that court, in its first decision, held that the point was well taken, and that the act of March 23, 1868, was unconstitutional.

The same question was brought before the supreme court in another case (Cass Co. v. Johnston, 95 U. S. 360), and more deliberate consideration was given to it; and it reversed its first judgment, and held that this act was not open to the constitutional objection urged. That is the last judgment of the supreme court of the United States on this question. Since that decision the supreme court of Missouri held that the act is in conflict with the constitution on that ground, and also that the 5th section, which in effect requires that the proceeds of state and county taxes on railroad property be applied to the liquidation of these bonds, invalidates it. And it is an undisputed fact that the law of the state of Missouri has been declared by its supreme court to be that these bonds cannot be enforced, and that if this action was in a state court instead of here, it is agreed that the defendant would have judgment.

Now, the question is, what is the duty of this court, with a judgment or the supreme court of the United States in full force and unreversed, declaring these bonds constitutional, and a subsequent judgment of the supreme court of the state holding that this act is in violation of the constitution of the state? That is not a new question in the history of bond litigation in this country. I had occasion to consider it in a case before me at the last term of the United States circuit court for the Western district of this state, and what I said there, on that occasion, expresses my views on this. Foote v. Johnson Co. [Case No. 4,912]. (The court here quoted at large from the opinion in the case just cited.) And this is our own judgment now.

There is another plea here, to the effect that, in point of fact, two-thirds of the qualified voters of the township did not vote for this subscription, but it alleges no notice of that fact to the bondholders; and the recital in the bond is that this subscription is authorized by a vote of more than two-thirds of the voters, and that the vote was duly taken. It is urged, however, that, inasmuch as there are provisions of law in force requiring the registration of voters, and this requirement was embodied in a constitutional provision, that makes a distinction between this case and the case decided by the supreme court, where the requirement of a precedent vote was by a mere statute. It makes no difference in principle that the requirement of a two-thirds vote is contained in a provision of the constitution rather than a legislative enactment.

The demurrer to the pleas will be sustained. Judgment accordingly.

Case No. 17,433.

WESTERN DIVISION OF WESTERN N. C. R. CO. v. DREW et al.

[3 Woods, 674.] [1]

Circuit Court, N. D. Florida. May, 1877.

RAILROAD MORTGAGE — SALE BY TRUSTEE — PRELIMINARY INJUNCTION—ISSUE OF BONDS—ACQUIESCENCE OF STOCKHOLDERS.

1. The granting of a preliminary injunction is within the discretion of the court, and in the exercise of this discretion it will look at the consequences which will ensue, on the one hand, from granting it, and on the other hand, from withholding it.

2. Upon a bill filed to restrain a sale of mortgaged property by a trustee, on the ground that the bonds to pay which the sale was to be made were void. *Held*, that the possibility that a favorable chance to sell the property would be lost by delay, was not a legal ground for refusing to restrain the sale, which would entirely destroy the rights of complainant, if he had any.

3. The real owner of the majority of stock in a railroad company who permits its affairs to be managed by others holding the legal title to the stock, and the officers elected by them, cannot claim as against innocent parties, that the company is exempted from any obligation which it has assumed through such officers and managers, or to which it may, through them, have become equitably liable.

4. The trustee, with power of sale, for certain parties holding bonds secured by a lien upon a railroad, has the right to decide, in the first instance, upon the sufficiency of the claim of the bondholders to have the property sold to pay the bonds which they profess to hold; at the same time, those representing the railroad company have the concurrent right of appealing to the courts for an adjudication upon the claims and rights of the alleged bondholders.

5. Where the evidence upon a motion for injunction raised grave doubts on the question, whether the bondholders in whose behalf the trustee was about to make a sale, were bona fide holders, an injunction to restrain the sale was allowed.

[Cited in Chaffraix v. Board of Liquidation 11 Fed. 646.]

In equity. Heard upon motion for preliminary injunction.

Joseph B. Stewart and E. M. Thompson, for the motion.

Henry R. Jackson and George P. Rainey, contra.

BRADLEY, Circuit Justice. The object of this suit, as set forth in the prayer of the bill, is to enjoin the governor of Florida from seizing the Florida Central Railroad, extending from Jacksonville to Lake City, and to have declared null and void certain bonds purporting to be bonds of the Florida Central Railroad Company, one thousand in number, for one thousand dollars each, dated January 1, 1870, which bonds are in possession of the treasurer of the state of Florida, and for nonpayment of interest on which the governor threatens to seize and sell the road. The bill further prays that the said treasurer may be decreed to surrender said bonds to the com-

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

pany, and that certain persons, made defendants, to wit, John Collinson and others, may be enjoined from harassing the company on account of said bonds. The governor having advertised the road for sale, motion is now made, on petition filed for that purpose, for a preliminary injunction against him to prevent his seizing and selling the road; against the treasurer from parting with the bonds pending suit, and against the parties claiming relief on account of the bonds from further interfering with the said railroad, or causing it to be seized, until final decree in the cause.

The motion for injunction is opposed by the defendants, the governor and treasurer of the state, on three grounds: First. That the complainant has no title and no right to interfere in the matter. Secondly. That if it ever had title, it has lost and waived it by laches, and by acts which estop it from claiming any relief. Thirdly. That the bonds are not void, but are in equity good against the company for the benefit of persons holding certain state bonds, which they purchased in good faith, and which were issued to the company in exchange for the said company bonds, but which, being void, the said purchasers have a right to resort to the bonds in question, and the state has a right to compel their payment for this purpose.

The bill has been demurred to, and the demurrer has been overruled after argument. The question of the complainant's title, and the question of laches, so far as appeared on the face of the bill, were fully discussed on the demurrer, and unless the aspect of the case on these points has been changed, the decision made upon that argument must be regarded as the law of the case. The defendants not having filed answers, the case still remains as before on the pleadings. But affidavits have been read on the present motion, both on the part of the complainant and the defendants, and various records and documents, either verified or conceded to be authentic, have been referred to. So far as these may have altered the complainant's case, it is necessary to examine them. Before doing this, however, it is proper to observe that it would be very unfair to the parties to decide the whole merits of the case on this motion upon mere affidavits. The granting of a preliminary injunction is in the discretion of the court, and in exercising this discretion it will look at the consequences which would ensue on the one hand by granting it, and on the other by withholding it. In the present case, it is apparent that if the complainant has the rights claimed by the bill, and if the bonds are really void, or there are plausible grounds for supposing them to be so, a very serious, if not irreparable, injury would ensue by seizing and selling the road in the summary manner proposed. On the other hand, if it should turn out that the complainant's title is defective, or that the company bonds are amenable to the claims of the bondholders referred to, a temporary suspension of the sale cannot materially injure them. The property is there, and will remain there, and its earnings can, in the mean time, be employed in keeping it in repair. The possibility that a favorable opportunity of disposing of it, known to exist, may be missed by the delay, can hardly be deemed a legal ground for precipitating a sale which would most certainly destroy the rights of the complainant, if he has any. These are considerations necessary to be borne in mind in disposing of the present motion.

I am fully aware of the great importance to the people and business of the state, that the vexatious litigation respecting this and the connecting railroad should be terminated; and that the road should come into the possession of responsible parties clothed with a secure title, in order that they might feel encouraged to improve and extend it, and make it what it should be, a first-class line of communication. But however desirable it may be that this result should be hastened, it is very questionable whether it would be hastened by disregarding those obvious principles of justice of which all parties litigating in good faith have a right to enjoy the benefit. Looking, then, at the affidavits laid before me, I do not see that the title of the complainant has been materially affected by anything new which has been evolved. In truth, the allegations of the bill have rather been corroborated than weakened. It seems to be indisputable that Swepson and Littlefield, between them, did procure the stock of the Florida Central Railroad Company with the proceeds of North Carolina bonds, which they had no right to dispose of in that way; and that the complainant, as soon as the fraud was discovered, endeavored to hold them and their confederates accountable; and after pursuing the wrongfully converted funds through much litigation, and after many ineffectual attempts at compromise, the complainant finally procured an acknowledgment of its equitable claim to this stock, which Littlefield, who is a party to this suit, and holds the principal part of it, does not deny. The affidavits of Rollins, the president of the complainant, and of Mr. Stewart, the solicitor, are to the effect that in December last, previous to the commencement of this suit, Littlefield recognized the rights of the complainant to the stock of the Florida Central Railroad Company, and made a full and complete transfer thereof to the use of the complainant.

The suggestion made by defendants' counsel, that the North Carolina bonds, the proceeds of which were embezzled, were void, and were repudiated by the state, and, therefore, that the complainant had no title to call Swepson and Littlefield, and their confederates, to account, and that the parties who purchased the bonds are the real beneficiaries entitled to pursue these funds, may possibly be well founded, and may govern the rights of the parties on the final hearing of the cause on the merits. But I do not feel justified, at this stage of the cause, in assuming that the

facts on which this suggestion is grounded are sufficiently made out. All the negotiations, agreements of compromise and litigations which have taken place between the complainant and the parties having possession of the bonds, have either proceeded upon a concession of the plaintiff's right, or have resulted in adjudications confirmatory of it. So far as appears by the disclosures in this cause, the complainant is the only party equitably interested in the principal part of the stock of the Florida Central Railroad Company.

The next question is, whether, conceding this to be so, the complainant has not, by permiting Littlefield, Swepson and their associates to appear as the owners of the stock, made them its agents and trustees so as to be bound by their acts as apparent stockholders and as directors of the company, at least so far as regards innocent parties dealing with them as such? On this question, without going into the evidence in detail, I shall do little more than state the conclusion to which I have arrived—a conclusion based, it must be remembered, only on affidavits and the documents which have been presented on this hearing. It seems to me that the question proposed must be answered in the affirmative, to wit, that the complainant has permitted Littlefield and his associates so to deal with the property as to make their acts performed in their capacity of stockholders and officers of the Florida Central Railroad Company binding, except as to those persons who had notice that they were acting in any transaction in fraud of the rights of the complainant. It is sufficient, in this connection, to refer to the agreement made on the 16th day of April, 1870, between the Florida Central Railroad Company, George W. Swepson, president; the Jacksonville, Pensacola & Mobile Railroad Company, Milton S. Littlefield, president, and Littlefield, majority owner of the stock of the Tallahassee Railroad Company, of the first part, and the Western Division of the Western North Carolina Railroad Company, represented by N. W. Woodfin and others, commissioners appointed by act of the legislature of North Carolina, approved by the stockholders of said corporation (that is, the complainant), of the second part. The agreement recites that, whereas G. W. Swepson, late president of the Western Division of the Western North Carolina Railroad Company, had made certain investments of the funds of said company in securities of and interests in the said Florida Central Railroad, Jacksonville, Pensacola & Mobile Railroad, and the Tallahassee Railroad of the state of Florida, as per report made by said Swepson to said commissioners, amounting in the aggregate to $1,287,436.03, to bear interest from the first of November, 1869, at eight per cent. per annum; and, whereas, Swepson had theretofore conveyed to Littlefield, subject to the payment of the above claim, his interest in the above railroads; and, whereas, Littlefield had received authority from the legislature of Florida and said several railroad companies, to receive bonds to be issued by and for account of the several railroad companies, which bonds were to be exchanged for the bonds of the state of Florida, to be issued for the purpose of aiding the finances of the said several railroad companies, all of which bonds were then in a state of preparation; and, whereas, Littlefield had made a contract with S. W. Hopkins & Co., for the disposition of said bonds, as the same might be issued, the proceeds of the issue of the bonds of the Central Railroad Company of Florida, amounting to $960,000, were to be applied to the payment of existing liabilities of the several railroad companies, including $150,000 to be paid to the commissioners aforesaid for the purpose of paying existing liabilities of the Western Division of the Western North Carolina Railroad Company; it is therefore agreed by the parties that the proceeds of the sale of said bonds to be issued by the Florida railroad companies and the state of Florida, are to be equally divided between the Western Division aforesaid and the Florida railroads, until the entire amount of $1,287,436.03, with interest as aforesaid, is fully paid. It is further agreed, that all the interest owned or claimed by Swepson and Littlefield, or which, as individuals, they had a right to control in the Florida railroads, is pledged for the faithful fulfillment of this contract, without the right on the part of any party to interfere with their management or control of the affairs of the roads. This agreement was signed by Swepson and Littlefield, and by the North Carolina commissioners, who assumed to act for the complainant, and had been appointed by the legislature, and, as they declare, by the complainant, so to act. As the state of North Carolina was the largest stockholder of the complainant, and as it is conceded that the affairs of the complainant—the Western Division—were for a long time administered by these commissioners, I must assume on this hearing that they had proper authority to represent the complainant in this transaction. At all events, the complainant company had full notice of it, and must be regarded as bound, so far as innocent third parties are concerned.

This agreement is important, not only as showing that the complainant acquiesced in the management of the affairs of the Florida railroads by Littlefield and Swepson as the apparent stockholders and officers thereof, but that it acquiesced in the issue of the very bonds which are involved in this case, and in their exchange for the Florida state bonds, and in the disposal and sale of the latter. And, although subsequent agreements may have been made between the parties (as there were more than once), yet the whole subsequent conduct of the complainant with regard to the Florida railroad property was in affirmation of the authority of Swepson and Littlefield to represent the stock and affairs of the Florida companies. At all events, nothing seems to have been done by the complainant during the long period that followed to put the public

on its guard against dealing with those persons as the proper and lawful stockholders and officers of these companies.

Upon the whole case, therefore, as it stands before me on affidavits, I come to the conclusion that the complainant can claim no rights except such as the Florida Central Railroad Company itself can claim in view of the acts of its known and apparent stockholders and officers. After permitting the affairs of the company to be managed by those stockholders and officers for so many years, it cannot claim to have the company exempted from any obligations which it has assumed, or to which it may be equitably liable. It cannot claim to stand in a better position than the corporation itself, and especially is this true in reference to bona fide purchasers of the Florida state bonds, issued in exchange for the bonds of the corporation. But my conclusion is, that it is entitled, as the case now stands, to represent the interests of the corporation, and to ask that its just rights may be protected.

Then, lastly, the question arises, whether the parties at whose instance and in whose behalf the governor of the state of Florida proposes to sell the Florida Central Railroad are bona fide purchasers of the Florida state bonds, issued in exchange for the bonds of the corporation? On this question I must confess that I am not entirely free from doubt. The papers presented to the governor were undoubtedly sufficient to authorize him to take the initiatory steps which he has done in advertising the property for sale. He considered them sufficient, and the law makes him the judge, at least in the first instance, of their sufficiency. Parties adversely interested, of course, have the right to a judicial investigation and determination of the question. The governor's power in the matter is analogous, though in some respects superior, to that of a mortgagee with a power of sale. Such a mortgagee is not obliged to resort to the courts, but may sell on default of payment by giving notice according to the terms of the mortgage. But any person interested adversely to such a sale, may apply to the courts and have his rights adjudicated therein. Whilst, therefore, the governor had the right, in the first instance, to decide on the sufficiency of the proofs laid before him, the complainant, as representing the interests of the Florida Central Railroad Company, had the concurrent right of appealing to the courts for an adjudication upon the claims of those in whose behalf the governor assumed to act. And it seems to me that all that is requisite on the part of the railroad company is to show a probable ground of defense against those claims in order to invest the court with a jurisdiction of the controversy. It would deprive parties of the benefit of a judicial determination of their rights, and would impose upon the governor a responsibility which, I doubt not, he would be very unwilling to assume, if the court, on the presentation of such a case, should decline to assume jurisdiction of the controversy. Whilst it must be assumed, therefore, and whilst, on examination, there appears no doubt that the proofs laid before the governor were prima facie sufficient to justify the proceedings undertaken by him, the facts which have now been disclosed by the complainant are calculated to raise grave doubts whether the parties claiming to be purchasers of the state bonds in question are really and bona fide such. At all events, a sufficient probable ground of defense has been raised to entitle the complainant to a judicial examination and to render it inexpedient that the property should be sold until such an examination can be had.

Entertaining these views as to the relative rights of the parties, and being convinced by the showing which has been made that there is at least ground for questioning the rights of the bondholders, it is unnecessary that I should examine the affidavits and papers in detail, as that will be more proper on the final hearing of the cause.

Without expressing any opinion on the question whether the bondholders are entitled, in any event, to set up an equity to have the bonds of the corporation enforced for their benefit—a question which has been somewhat discussed, if not decided, by the supreme court of Florida—I am of opinion that a temporary injunction ought to isssue in this case to prevent the governor from selling the road or other property of the company, and from taking possession of the same, until the further order of the court. The parties, however, will have leave at any time to move for a dissolution of this injunction, on filing answers and showing positively the fact that they are bona fide purchasers of state bonds, unless, on further consideration, the court should be of opinion that it would prejudice the rights of the parties to make a sale before final decree.

[For subsequent proceedings in this cause, see Case No. 17,434.]

Case No. 17,434.

WESTERN DIVISION OF WESTERN N. C. R. CO. v. DREW et al. (two cases).

SCHUTTE et al. v. FLORIDA CENT. R. CO. et al.

[36 Leg. Int. 328; 3 Woods, 691.] [1]

Circuit Court, N. D. Florida. May 31, 1879.

FOREIGN DEPOSITIONS — ORAL EXAMINATION OF WITNESSES—CONSOLIDATION OF RAILROAD COMPANIES—EFFECT ON PREVIOUS LIENS—CONVERSION OF TRUST FUNDS — INVESTMENT IN RAILROAD STOCK—RIGHTS OF BENEFICIARIES—STATE BONDS IN AID OF RAILROAD — INVALIDITY — RIGHTS OF HOLDERS—SUBROGATION TO STATE'S MORTGAGE—RAILROAD BONDS—RECEIVERSHIP.

1. Depositions of Dutch bondholders, complainants, in a suit in equity, were taken in

[1] [Reported by Hon. William B. Woods, Circuit Judge. The syllabus and statement are here reprinted by permission from 3 Woods, 691. The opinion is republished by permission from 36 Leg. Int. 328, where it is given in extenso.]

Holland. Before the depositions were actually taken by the examiner their counsel had read to them the interrogatories, and had prepared their answers in the English language. *Held* (1) that the fact that the witnesses had heard the interrogatories in advance was not a ground for suppressing the depositions; and (2) that examination of witnesses should be made by the examiner, and not by counsel, in advance, and because this was not done in this case the depositions should be suppressed.

2. Equity rule sixty-seven authorizes the court to appoint examiners for the taking of depositions orally, outside as well as inside its territorial jurisdiction.

[Cited in Bate Refrigerating Co. v. Gillette, 28 Fed. 676; Re Steward, 29 Fed. 813; Arnold v. Chesebrough, 35 Fed. 16; Celluloid Manuf'g Co. v. Russell, Id. 17; Johnson Steel Street R. Co. v. North Branch Steel Co., 48 Fed. 192.]

3. Equity rule seventy-eight does not change the English practice, and does not allow, generally, the oral examination of witnesses on the trial; it permits witnesses to be so examined merely to verify some document referred to in the pleadings, or to establish some fact of a formal character which has been inadvertently omitted in the testimony.

4. Certain parties purchased a railroad and received a deed therefor, but left a part of the purchase price unpaid, and then procured an act of the legislature, by which they, as purchasers and owners, were incorporated. *Held*, that the company so formed took the railroad, subject to the vendor's lien for the unpaid purchase money.

[Cited in Central Trust Co. v. Florida Ry. & Nav. Co., 43 Fed. 753.]

[Cited in Bloxham v. Florida Cent. & P. R. Co. (Fla.) 17 South. 923.]

5. The consolidation of said company with another did not discharge said lien. The notice of the lien with which the first company was charged affected also the consolidated company.

6. Where trust funds were fraudulently used by a trustee to purchase stock in a railroad company, and said company was afterwards, in pursuance of authority granted by the legislature, consolidated with another company; *held*, that the beneficial owner of the trust funds, having knowledge of the misappropriation, and suffering the trustee to retain possession of the stock in the new company, must seek the enforcement of his equities arising from such misappropriation against the stock in the consolidated company, held by the unfaithful trustee.

7. Where such beneficial owner promoted and acquiesced in the issue and sale of bonds by the new consolidated company, it could not except to the bona fides of the issue and sale, and the holders of the bonds so issued had a better equity as against the property of the railroad company than such beneficial holder.

8. A railroad company issued its bonds, which, by virtue of an act of the legislature, the officers of the state received in exchange for an equal amount of state bonds. The same act created a statutory mortgage in favor of the state, to secure the payment of the bonds of the railroad company, for which the state bonds were exchanged. It was decided by the supreme court of the state, that said state bonds were issued without constitutional authority, and the state was not bound thereby. *Held*, that under these circumstances the holders of the state bonds, given in exchange for the railroad bonds, had a right to enforce, for their own benefit, the said statutory mortgage in favor of the state.

[Explained in Knevals v. Florida Cent. & P. R. Co., 13 C. C. A. 416, 66 Fed. 230.]

9. The fact that the bonds of the railroad company were issued and exchanged for state bonds, in order that the stockholders of the railroad company might use the proceeds of the state bonds for their own private advantage, and they were so used, and not for the purposes contemplated by the statute which authorized the exchange, is no defense against the railroad bonds in the hands of a bona fide holder.

10. The possession of a negotiable bond is strong prima facie evidence of just title, and, in ordinary cases, throws upon the party questioning it the burden to show that the holder had notice of some vice or defect which vitiates his title.

11. Where the lien of bondholders on railroad property is created by statute, the statute regulates their rights, notwithstanding the fact that without its aid a resulting equity would have arisen in their favor.

12. Where, at the instance of bondholders secured by a mortgage lien upon a railroad, a receiver has been appointed to take possession of and preserve the railroad and conduct its business, the proceeds and profits of the business in the hands of the receiver are subject to the charges of administration and management and the liens and trust in behalf of which the receiver was appointed. Neither the railroad company itself nor any party whose claim is based on the company's rights, can demand any of the income in the receiver's hands until the prior liens have been satisfied.

13. The act of the legislature of Florida, of January 8, 1853, relating to mortgages, was not intended to prevent a court of equity from taking possession of mortgaged property, where, by the negligence or misfeasance of the mortgagor it was being wasted so as to jeopard the security of the mortgagee.

[2] [In equity. The cases above mentioned being intimately connected, were argued and decided together, upon the pleadings and evidence. They related to two railroads in Florida; the Florida Central, extending from Jacksonville to Lake City, and the Jacksonville, Pensacola & Mobile, extending from Lake City to the Chattahoochee river, with the branch from Tallahassee to St. Mark's. Suit No. 1 related to the Florida Central Railroad, suit No. 2 to the Jacksonville, Pensacola & Mobile Railroad, and suit No. 3 to both. The complainants in suit No. 3 were Hollanders, who had purchased over $3,000,000 of Florida state bonds, issued in 1870, in exchange for the bonds of the two railroad companies above mentioned. The whole amount of state bonds issued was about $4,000,000. Of these $3,000,000 were issued in exchange for bonds of the Jacksonville, Pensacola & Mobile Railroad Company, and $1,000,000 in exchange for the bonds of the Florida Central Railroad Company. The railroad bonds were by the statute authorizing the exchange made a lien on the railroads of the companies issuing them, respectively. They were not to exceed sixteen thousand dollars per mile. The $4,000,000 being in excess of this, some of the state bonds, two hundred and twenty-four in number, were returned and canceled, and certain of them were never sold. The supreme court of Florida decided that the state bonds referred to

[2] [From 3 Woods, 691.]

were issued contrary to the provisions of the state constitution, and were void, but that the state held the bonds of the railroad companies as trustee for those who had purchased its own bonds, and that these purchasers, for the amount of state bonds purchased by them, had a right to the lien of the companies' bonds held by the state. Hence, Schutte and others, as holders of the state bonds, brought their bill against the two railroad companies, to foreclose this lien and recover their money, by a sale of the roads. With regard to the Jacksonville, Pensacola & Mobile Railroad, there was an outstanding lien upon it of $472,000 and interest for unpaid purchase money due to the trustees of the internal improvement fund of Florida, who had sold the road in 1869 to parties from whom the Jacksonville, Pensacola & Mobile Railroad Company subsequently acquired it. Therefore, the said trustees were made parties to the suit.

[The two suits, number one and number two, were brought a short time prior to suit number three, by the Western Division of the Western North Carolina Railroad Company, claiming an interest in the two Florida railroads prior and superior to that of Schutte and the other Dutch bondholders. The circumstances on which this claim was founded were these: In 1868, or 1869, the state of North Carolina granted to the Western Division of the Western North Carolina Railroad Company $6,000,000 of North Carolina state bonds, the state taking a large portion of the capital stock of the company. George W. Swepson, the president of the company, co-operating with Milton S. Littlefield, who succeeded him as president, disposed of these bonds in New York, and fraudulently used a large part of their proceeds in purchasing a controlling interest in the Florida railroads above mentioned. The companies owning these roads were in default in the payment of former issues of bonds, which had been guaranteed by the internal improvement fund of Florida, and under a law of the state, the Florida Central Railroad was sold in 1868, and the Jacksonville, Pensacola & Mobile, consisting, originally, of two roads, was sold in 1869, and new companies were organized by the purchasers to carry them on. Swepson and Littlefield, with the North Carolina funds of which they acquired the possession in the manner above stated, purchased a large majority of the new stock of the Florida Central Railroad Company, and furnished the means for purchasing the Jacksonville, Pensacola & Mobile road, when it was sold in 1869; that is, they bought up and furnished the old bonds with which the purchase money was paid by the nominal purchasers, amounting to $960,300 of said bonds. The North Carolina Company alleged that this fraudulent appropriation of its money was not discovered for a long time, and that a resulting trust arose in its behalf to recover and have the property procured thereby. The principal question in the case was, whether the North Carolina Company, after its discovery of the fraud, did not deal with Swepson and Littlefield in such a manner as to ratify their action as stockholders and officers of the Florida roads, in issuing the bonds of the two Florida companies for which the Florida state bonds held by the Dutch bondholders were exchanged. The court was of opinion that the evidence in the case showed such a ratification. The latter company, however, contended that the Dutch bondholders knew of certain fraudulent practices used in putting out these bonds, and that hence they were not bona fide holders and ought to be postponed to it.

[J. B. Stewart and J. K. Herbert, for Western Division of the Western North Carolina Railroad Company.

[M. H. Carpenter, W. G. M. Davis, and C. D. Willard, for J. Fred. Schutte and others.

[J. M. Baker and J. T. Walker, for Florida Central Railroad Company.

[G. P. Rainey, Atty. Gen., of Florida, for trustees of the internal improvement fund.

[Henry R. Jackson, for holders of bonds of the Pensacola & Georgia Railroad Company.

[Before the final hearing, certain preliminary questions were raised and decided.

[Mr. Stewart, for the Western Division of the Western North Carolina Railroad Company, moved to suppress certain depositions taken by the Dutch bondholders in Holland, on the ground that the witnesses came before the commissioners who took the depositions with prepared answers in writing in the English language, and on being questioned why they used such prepared answers, said that it was more convenient and would save time. Another ground for the motion was, that the interrogatories had been read in advance to the witnesses by the counsel for the bondholders. In support of his motion, he cited 3 Greenl. Ev. § 324; Shaw v. Lindsey, 15 Ves. 380. See Case No. 17,433.

[BRADLEY, Circuit Justice. The objection to the depositions, that the witnessess had seen the interrogatories before being called on to give their testimony, is not a good one. According to the American practice, the showing of the interrogatories to the witnesses in advance of their answers, is not open to objection. The fact, however, that the answers of the witnesses were prepared in writing by their counsel in advance, is fatal to the depositions. The examination should be made by the examiner, and not by counsel, before the witnesses are brought before the examiner to give their testimony. The depositions must be suppressed.

[Mr. Carpenter moved to suppress certain depositions taken for complainant in suits numbered one and two, in the city of New York, on the ground that they were taken before an examiner appointed by the United States circuit court for the Northern district of Florida, and under equity rule sixty-seven, the court had no authority to appoint an ex-

aminer beyond its own territorial jurisdiction.

[BRADLEY, Circuit Justice. The rule should be literally construed. It was intended to authorize the appointment of examiners outside as well as inside the territorial jurisdiction of the court. The taking of testimony before an examiner, orally, in the presence of the parties, is much more satisfactory than taking it by commission, and the rule should be construed so as to allow this to be done whenever a party desires it. The motion to suppress the depositions is overruled.

[Counsel proposed to examine witnesses, orally, before the court upon the trial of the causes.

[BRADLEY, Circuit Justice. I can not allow this to be done, except for the purpose of verifying documents referred to and set out in the pleadings. A court of equity will not sit and try causes by the examination of witnesses in open session, as if it were trying a case by a jury. It is not the purpose of the seventy-eighth equity rule to allow this to be done. That rule only reserved the power in the court to verify documents set out in the pleadings, or to establish some fact of a formal character which had been inadvertently omitted in the evidence, and which would not require an extended examination. In other words, the seventy-eighth rule does not alter the English practice on the subject. The substantial evidence in the case should be taken according to equity rule sixty-seven.] [2]

BRADLEY, Circuit Justice. These cases involve vital questions relating to the title of and incumbrances upon two railroads, namely, that called the Florida Central Railroad, extending from Jacksonville to Lake City, and that called the Jacksonville, Pensacola & Mobile Railroad, extending from Lake City to the Chattahoochee river, including the branches from Tallahassee to St. Mark's, and that leading to Monticello. It is conceded by all the parties that both roads were duly sold by the trustees of the internal improvement fund, under the internal improvement act, in 1868 and 1869, and those sales constitute a starting point upon which all the claimants rely. The Florida Central was thus sold on the 4th day of March, 1868, to William E. Jackson and his associates; and the Pensacola & Georgia Railroad, being the road from Lake City to Quincy, and the Tallahassee Railroad, being the road from Tallahassee to St. Mark's (which two roads constitute the greater part of the Jacksonville, Pensacola & Mobile Railroad), were sold on the 20th day of March, 1869, to Franklin Dibble and his associates. Conveyances were made to the purchasers in pursuance of these sales. No question is made about the title acquired by the purchasers of the Florida Central Railroad, nor of its subsequent devolution to the present company, called the Florida Central Railroad Company. The legislature of Florida, by an act passed on the 29th day of July, 1868, on the application of the purchasers, incorporated them into a body politic by the name aforesaid, and as purchasers and owners of the road. As such purchasers and owners they were made a corporation, and authorized to organize as such, and "to declare the amount of which the stock in said Central Railroad Company should consist, and to divide the same into shares." They did organize, and created capital stock to the amount of 5,500 shares, took possession of their road and commenced to operate it. It is not denied that the greater portion of the capital stock was subsequently purchased by George W. Swepson, of North Carolina, who had the same transferred to Milton S. Littlefield. At least as early as the early part of 1870, Swepson and Littlefield, or one of them, held nearly all the stock of the road, and controlled and managed the company. The Western Division of the Western North Carolina Railroad Company has since claimed that it was the money of that company which Swepson and Littlefield used in the purchase of this stock, and that they misappropriated the same in making such purchases, and therefore became the holders of said stock for the use and benefit of said company. This has been conceded by Swepson and Littlefield, and the stock is now understood to be held for the use and benefit of the Western North Carolina Railroad Company, which has been substituted to the rights of the said Western Division. Thus far, therefore, we are not met by any controversy which calls for the adjudication of this court.

The history of the Jacksonville, Pensacola & Mobile Railroad Company, and the roads which it claims to have acquired, is more complicated. As before stated in that case, there were two roads purchased by the same parties, that of the Pensacola & Georgia Railroad Company, extending from Lake City to Quincy, with the branch at Monticello, and that of the Tallahassee Railroad Company, extending from Tallahassee to St. Mark's. Each of these companies had issued bonds under the internal improvement act, which were guarantied by the internal improvement fund. Default in paying the interest on these bonds, and the installments due to the sinking fund, was the occasion of the roads being sold by the trustees. The sales were for amounts nearly equal to the principal of these outstanding bonds. The amount bid for the Pensacola & Georgia Railroad was $1,220,000, and the amount bid for the Tallahassee Railroad was $195,000, and the purchasers were allowed to pay the purchase money, if they could, in the said guarantied bonds. They did bring in and surrender such bonds to the amount of $806,600 of the Pensacola & Georgia Railroad Company, which were received at par, and $153,700 of the Tallahassee Railroad Company, which were received at ninety-four and ninety-five cents to the dollar. It is conceded that a balance remained still to be paid of $472,065, and that that amount of the bonds of the said two companies

[2] [From 3 Woods, 691.]

are still outstanding. For this amount a draft or check was given, which was never paid, and which the parties giving it did not intend to pay. But by giving this check as cash, the purchasers prevailed upon the agents of the trustees to deliver deeds for the property. It was a sheer fraud, and a lien for the balance of the purchase money, amounting to $472,065, immediately arose in favor of the trustees, and has ever since attached to the property.

The holders of the outstanding bonds referred to are interested in this lien, because the purchase money which it represents is the fund on which the trustees rely for the payment of said bonds in relief of the internal improvement fund itself, so far as it is liable therefor; and, also, because the said purchase money is the proceeds of the property which constituted the security of the said bonds. The holders of the said outstanding bonds have, in divers ways, attempted to enforce their indirect claim to this purchase money, and to the lien for its payment; but the supreme court of the United States, in the case of Florida v. Anderson, 91 U. S. 667, decided that in view of all the complicated rights of the parties, the lien must be enforced by the state, or the trustees of the internal improvement fund, which the latter have endeavored to do, and which they seek to do in the suits now under consideration. As against the Jacksonville, Pensacola & Mobile Railroad Company, the existence of this vendor's lien was adjudicated by the Duval county circuit court, by a judgment rendered, on the second day of April, 1874, and a recovery was had by the trustees for the principal and interest then due, amounting to $661,845.55. This judgment was rendered in a suit brought by the state of Florida and the trustees of the internal improvement fund, against the Jacksonville, Pensacola & Mobile Railroad Company and Milton S. Littlefield; and although that judgment was subsequently reversed in part, yet, in a subsequent report of the same case in 16 Fla. 708, the supreme court declare that, on this point, the judgment of the Duval county circuit court was final, and that the matter was res judicata. But if it were not so, I have no hesitation in saying that the vendor's lien for the said unpaid purchase money, with interest and costs, was valid and binding on the Jacksonville, Pensacola & Mobile Railroad Company. The purchasers, Franklin Dibble and his associates, clearly held the railroads subject to the lien. They became incorporated as purchasers and owners of the property, by an act of the legislature of Florida, passed the 24th day of June, 1869, by the name of the Tallahassee Railroad Company; and this company, therefore, being constituted of the same persons, only clothed with corporate powers, received the property subject to the same lien. On the 25th day of May, 1870, the Tallahassee Railroad Company became consolidated with the Jacksonville, Pensacola & Mobile Railroad Company, under and by virtue of the 14th section of the act incorporating the latter company, passed June 24, 1869, entitled "An act to perfect the public works of the state;" and one of the terms of the consolidation was that the consolidated company, under the name of the Jacksonville, Pensacola & Mobile Railroad Company, should, and it did thereby assume all the debts and obligations of the Tallahassee Railroad Company, since its organization. This consolidation, by which the two companies joined their properties together, did not discharge the lien. The property of the Tallahassee Company was brought into the common concern with all pre-existing equities attaching thereto. The consolidated company having, as one of its component parties, the Tallahassee Company, which held subject to the lien, cannot be regarded as a bona fide purchaser without notice. The notice with which that company was affected, in relation to the property brought with it into the common fund, affected also the consolidated company. Besides, the persons who held the principal part of the stock in and controlled the one company, likewise held the principal part of the stock in and controlled the other company. As to the other parties in these suits, the Western Division of the Western North Carolina Railroad Company concedes the existence and priority of the said lien, and the holders of the state bonds, issued in 1870, in exchange for the bonds of the Jacksonville, Pensacola & Mobile Railroad Company, and of the Florida Central Railroad Company, who are represented by the complainants in the bill of J. Fred. Schutte and others, do not contest the lien, having entered into amicable arrangement with the greater portion of the holders of the outstanding bonds, who are interested therein. I shall, therefore, hold, for the purposes of this case, that the trustees of the internal improvement fund are entitled to the first lien on the property of the Jacksonville, Pensacola & Mobile Railroad Company, extending from Jacksonville to Quincy, and from Tallahassee to St. Mark's, including the Monticello branch of the roads.

I will now proceed to the controversy which subsists between the Western Division of the Western North Carolina Railroad Company and the holders of the state bonds issued in 1870. The former claims to be entitled to certain equities arising from the fraudulent use of its moneys by George W. Swepson and Milton S. Littlefield, in purchasing the bonds and property of the Pensacola & Georgia Railroad Company and the Tallahassee Railroad Company, before the devolution of said property to the Jacksonville, Pensacola & Mobile Railroad Company. The latter, namely, the holders of the state bonds, claim that they are bona fide holders of said bonds, without any notice of the frauds committed by Swepson and Littlefield, or of the equities of the North Carolina Company, and that they are, therefore, entitled to have the railroad and property of the Jacksonville, Pensacola & Mobile Railroad Company applied to the payment of their bonds, before any relief is granted to the

North Carolina Company. This is the real controversy in these cases, although the said bondholders (who, being mostly residents of Holland, may, for convenience, be called the "Dutch" bondholders), affect to ignore the claims of the North Carolina Company, and seek to have a decree irrespective thereof.

It is established beyond controversy, that the bonds which were used by F. Dibble and his associates, in payment of the bid for the two railroads in question, namely, that of the Pensacola & Georgia Railroad Company and that of the Tallahassee Railroad Company, were furnished to them by George W. Swepson, and that Swepson procured the same by a fraudulent use of money in his hands, produced by the sale of North Carolina state bonds belonging to the Western Division of the Western North Carolina Railroad Company, of which he, Swepson, was president. After the roads were bid off at the said sale thereof by the trustees of the internal improvement fund, and before any payment was made, on such bid, the purchasers, F. Dibble and his associates, on one part, and Swepson on the other, entered into a written agreement, dated March 26, 1869, by which, after reciting the fact of the sale and the amounts respectively bid for said railroads, it was, amongst other things, agreed that Swepson should deliver, as he should come into possession thereof, to be surrendered to the trustees of the internal improvement fund, the first mortgage bonds of said roads, purchased by him, amounting to about $900,000 of the Pensacola & Georgia bonds, and about $150,000 of the Tallahassee Railroad bonds—the former to be surrendered at par, and the latter at their pro rata of the amount bid for said road at said sale, and the balance of the purchase money to be supplied by said F. Dibble and his associates. Secondly, it was agreed that as soon as might be after the title should be acquired from the trustees, first mortgage bonds should be issued, secured by a mortgage or trust deed on said roads, their equipments and franchises, to be given to said F. Dibble and Swepson as trustees. Thirdly, it was agreed that the bonds so to be issued should be delivered to Calvin B. Dibble and George W. Swepson, to be sold or negotiated, and the amount thereof for that purpose should be paid to George W. Swepson, to reimburse him for the amount of money paid out by him in purchasing the first mortgage bonds aforesaid, and for commissions and attorney's fees, together with interest, and the additional sum of $100,000. Fourthly, it was agreed that the stock was to be divided and owned as follows: Swepson to have one-third, Calvin B. Dibble to have enough, with Swepson's share, to constitute a majority, and F. Dibble and his associates to have the remainder. Fifthly, it was agreed that Swepson should appoint four directors; F. Dibble and associates four, and that Calvin B. Dibble should be the ninth director, which arrangement was to last until Swepson was fully paid. In pursuance of this agreement Swepson shortly after furnished the first mortgage bonds which were delivered to the trustees of the internal improvement fund, namely, $806,600 of the Pensacola & Georgia Railroad bonds, and $153,700 of the Tallahassee Railroad bonds, in all $960,300 of said bonds, leaving still due as beforesaid the sum of $472,065. The deeds for the property were executed by the trustees in the name of the purchasers on the 8th of April, 1869, but delivery of them was withheld until the balance should be paid. An arrangement was made that two of the trustees should go to New York with the deeds, and there receive the said balance in cash. As before remarked, a worthless check was palmed off upon the trustees, who gave a receipt for the amount and delivered the deeds. In the consummation of this device Swepson bore the principal part. The deeds were subsequently recorded in Florida on the 22d day of April, 1869. On the same day, Dibble executed to Swepson a trust deed as security for the fulfilment of the engagements entered into by the agreement of 26th of March, which trust deed was never recorded, its purpose being accomplished by carrying out the arrangement contemplated. This trust deed recited that Swepson had paid for Dibble and associates, in purchase of said roads, bonds to the amount of $960,300, and that he had paid to the trustees for the same parties the sum of $472,065, being the full amount due for said roads; it also recited the engagements of Dibble made in the agreement of 26th March, and after formally conveying the property of the two railroads as conveyed by the trustees to Dibble, it declared the object of the trust deed to be to enable Swepson—which he bound himself to do—to convey the same to the corporation to be formed consisting of Dibble and his associates, as soon as they should have granted to them such or similar relief as the legislature had granted William E. Jackson and his associates by the act of July 29, 1868; it was also declared to be for the purpose of securing Swepson in all advances made as specified and agreed upon in the agreement of March 26, 1869, and the advancement of said sum of $472,065 until such time as said relief shall have been granted, and said Swepson should have conveyed said property to said corporation.

The counsel for the North Carolina Railroad Company places great stress on this trust deed, insisting that it enured to the benefit of the said company, whose money had been fraudulently used by Swepson, in purchasing the $960,300 bonds; and that it conveyed the legal title of the property to Swepson, in whom it still remains, inasmuch as he never executed any deed in pursuance of the trust. But this trust deed was never

recorded, and was never heard of by any of the parties to these suits until since the commencement thereof; and as all the terms of the deed were complied with, which made it the duty of Swepson to convey the property to the company thereafter formed; and as the title (as we shall presently see) was sufficiently transferred to the company in other ways, it is to be presumed that this deed was either looked upon by the parties to it as having no further office to perform, or the execution of a deed in pursuance thereof, was purposely omitted in order to perpetrate further frauds on some other innocent parties. The fact is, that an act was soon after procured, similar to the act passed in behalf of William E. Jackson and his associates, in relation to the Florida Central Railroad, and bonds were given, and the stock was disposed of amongst the parties, in accordance with the agreement of March 26, 1869. The act referred to was passed on the 24th day of June, 1869, and is entitled "An act for the relief of Franklin Dibble, A. Huling, E. M. Cheyney, and their associates, purchasers of the railroad from Tallahassee to St. Mark's, and of the railroad from Quincy to Lake City, and incorporating the Tallahassee Railroad Company." It recites the sale of the two roads on the 20th day of March, 1869, by the trustees of the internal improvement fund, to Franklin Dibble, A. Huling, E. M. Cheyney and their associates, and that it was essential for the interests of the people of this state, that the parties aforesaid should be invested with such corporate powers as were needful for the operations of said road, as well as more accurately to define their powers and duties. It then enacted as follows:

"Section 1. That the said Franklin Dibble, A. Huling, E. M. Cheney, and their associates, and their successors and assigns, are hereby made a body politic and corporate, under the name of the Tallahassee Railroad Company, and they, their associates and assigns, as such body politic and corporate, are hereby vested with, and shall be entitled to exercise and enjoy the like powers, franchises and privileges as were granted to the Pensacola & Georgia Railroad Company and the Tallahassee Railroad Company, by the several acts incorporating said Pensacola & Georgia Railroad Company and said Tallahassee Railroad Company, and with the right to hold, operate and enjoy the said railroad, under the name of the Tallahassee Railroad Company, subject to the conditions annexed to the sale of said roads by the trustees of the internal improvement fund, and by and in the name of the Tallahassee Railroad Company, they, their associates, successors and assigns, may purchase, receive and hold lands and tenements, goods and chattels, of whatsoever character that shall be necessary or useful for the purposes of said railroads, and the same to grant, sell, mortgage or dispose of, and to sue and be sued, implead and be impleaded, to make a common seal, and at pleasure to break and alter the same, and to establish and put in execution such by-laws and regulations as may be necessary and expedient, not inconsistent with the constitution and laws of the state of Florida.

"Sec. 2. Be it further enacted, that the provisions of the act incorporating the Pensacola & Georgia Railroad Company, for the protection of its roads from trespass, injury or intrusion, and providing for the punishment of persons who shall trespass upon or injure the same, be, and they are hereby made applicable to all cases of trespass, injury or intrusion on, to, or upon the aforesaid railroads, and the said Tallahassee Railroad Company shall be entitled to all the benefits and protection thereof and therefrom.

"Sec. 3. Be it further enacted, that said Franklin Dibble, A. Huling, E. M. Cheney, and their associates, shall be entitled to declare the amount of which the stock in the said Tallahassee Railroad Company shall consist, and to divide the same into shares, which shares, however, shall not be less than one hundred dollars each.

"Sec. 4. Be it further enacted, that said Tallahassee Railroad Company may, when they shall see fit, rent, lease, farm out or sell, any part of the said railroad to any person or persons, corporators or corporations, upon such terms as may be agreed on, provided said sale, renting or leasing, shall not be made to any person or persons, or corporation, owning any railroads out of the state of Florida.

"Sec. 5. Be it further enacted, that the board of directors of the said Tallahassee Railroad Company shall consist of nine directors, of whom the president of said company shall be one. The first directors shall be elected or appointed within one month after the passage of this act, and annually thereafter, at such time as may be fixed by resolution or law, but the said company shall not be dissolved for failure to elect or appoint its directors, so long as the said railroads shall be kept running and in operation, but the directors may be elected or appointed at the next meeting thereafter.

"Sec. 6. Be it further enacted, that said company shall have the right to issue coupon bonds in such denominations and at such rate of interest, annual or semiannual, and payable at such time and place as they may determine, and may secure the same by mortgage on said railroads, their equipments, depots, workshops, property and franchise, executed in such form and manner as may be determined: Provided, that any deed of trust, mortgage, conveyance, bond or bonds, or security, which may have been executed, made, created or contracted for, as a lien on said railroads or otherwise, by said Franklin Dibble, in behalf of himself and his associates, prior to the passage of this act, shall be valid and effectual to all intents, either at law or in equity, as a lien or mortgage, or

security on said railroad, as if the same had been made by virtue of this act, and shall in nowise be effected by any provisions thereof.

"Approved June 24th, 1869."

It seems to me, from a careful examination of this statute, that it intends to clothe with corporate powers the said Dibble and his associates, as purchasers and owners of the roads, and that no further conveyance from them to the corporation into which they were constituted was contemplated. As a corporation they are invested with the rights to hold, operate and enjoy the said railroad, under the name of the Tallahassee Railroad Company; and in the enjoyment thereof, free from molestation, they are to have the benefit of the provisions of the original charter of the Pensacola & Georgia Railroad Company. Instead of a subscription to capital stock, they are authorized to declare the amount of which the stock shall consist, and to divide the same into shares. They are authorized to lease or sell the "said railroad," and to issue coupon bonds and secure the same by mortgage on said railroads, their equipments, franchise, &c. The counsel for the North Carolina Railroad Company supposes that the concluding part of the last section was a notice to any persons dealing with the corporation of the trust deed executed to Swepson. But I do not think that this follows. That deed is not mentioned, and the provision itself is a proper one to prevent the operation of the act in transferring the title to a new personality from affecting the previous conveyances or mortgages, which it might be thought to do. Such previous conveyances or mortgages, however, would stand on their own inherent validity and effect, and would not, if unrecorded, operate to the prejudice of those dealing with the company without notice of them. But the parties did not stop here. Fearing that the title so conferred by the statute might be questioned, a deed of confirmation and release was subsequently executed by Dibble and his associates to the Tallahassee Railroad Company. It is not dated, it is true, except by the year (1870), but that does not interfere with its effect and operation. Having to be executed by a number of parties and their wives, it is probable that the date was left to be inserted when it was completed, and was then overlooked.

I am clearly of opinion that the statute, and this deed of confirmation and release, are sufficient for the protection of all parties dealing with the company, without any knowledge of the trust deed to Swepson.

It is pertinent to remark that the North Carolina Railroad Company, in its original bill, which is sworn to, expressly and without qualification, states that the railroads were duly conveyed to the corporation. The averment is as follows: "That pursuant to said acts of incorporation, or one of them, the said Franklin Dibble and associates, did convey and transfer said Pensacola & Georgia and Tallahassee Railroads according to the terms of said trust agreement, when, and from and after which time, the said Pensacola & Georgia Railroad, and the said Tallahassee Railroad, as separate properties, and the said Tallahassee Railroad Company, as incorporated in the name of said F. Dibble and associates, on the same 24th day of June, 1869, became and now are the railroad owned by the corporation defendant, the said Jacksonville, Pensacola & Mobile Railroad Company, as aforesaid." It is true the complainant has obtained leave to amend its bill, by adding an averment that no such title ever was conveyed to the corporation. Had this positive averment in the original bill been called to the attention of the court, it is doubtful whether the amendment would have been allowed. Standing as it does, however, in the bill, it shows that it was always the understanding of all parties that the title of the roads had been regularly passed to the corporation. The Tallahassee Railroad Company being duly organized according to the plan proposed by the parties, took possession of the railroads and operated or leased them to others. It maintained a separate existence for only eleven months, when it became amalgamated with the Jacksonville & Mobile Railroad Company, as will be mentioned hereafter. It appears that its officers executed bonds to the amount of $1,500,000, which were delivered to Swepson, but were never used, and, if still in existence, have never been regarded as bona fide or valid issues of the company, being superseded by subsequent transactions effected by and through the Jacksonville, Pensocola & Mobile Railroad Company, after the two companies were consolidated. No relief based upon these bonds is sought by any of the parties.

We are next brought to the consolidation of the Tallahassee Railroad Company with the Jacksonville, Pensacola & Mobile Railroad Company. The charter of this company was granted by the legislature of Florida on the 24th day of June, 1869, by an act entitled "An act to perfect the public works of the state." As this act as amended has an important bearing on the questions to be decided in these cases, I will state the substance thereof in some detail. The corporators were Geo. W. Swepson, Milton S. Littlefield, J. P. Sanderson, J. I. Requa and William H. Hunt. The company was authorized to construct a railroad from Quincy, the terminus of the Pensacola & Georgia Railroad, westward to the Alabama line in the direction of Mobile, touching certain specified points, to aid the company in the construction and equipment of its road. By the 9th section of the act, as amended in January, 1870, the governor of the state was directed to deliver to the president thereof, coupon bonds of the state to an amount equal to $16,000 per mile for the whole line of road and length of railroad owned by or belonging to the company, in exchange for first mortgage bonds of said company, when the president should certify upon his oath, that the road, or parts of road, was completed and in good run-

ning order. By the 10th section of the act it was provided that in exchange for the bonds of the state, the president of the company should deliver to the governor coupon bonds of the company, payable to the state of Florida, signed by the president, sealed with the corporate seal, and payable at the same time and place as the state bonds. By the 11th section, as amended by the act of January 28, 1870, a statutory lien was given to the state, valid as a first mortgage, duly registered, on the part of the road, for which the state bonds were delivered, and on all the property of the company appertaining to that part of the line, which it might then have or thereafter acquire, together with the powers and franchises, &c., and on failure of the company to pay either principal or interest for twelve months after due, the governor was empowered to enter and take possession of said property and franchises, sell the same at public auction; and it was directed that all moneys arising from such sale should be promptly and exclusively applied to the payment and satisfaction of the bonds issued by the state, or if the bonds should not be presented, to be invested and held by the state of Florida as trustee for the bondholders, until they should demand the same, and then to be paid to them by the treasurer. By the 14th section of the act it was declared that it should be lawful for the several companies owning the road or parts of roads from Quincy to Jacksonville, from Tallahassee to St. Mark's, and the branch to Monticello, or either of them, by a vote of the owners of a majority of the stock in interest, and with the consent of the owners of a majority of the stock in interest of the Jacksonville, Pensacola & Mobile Railroad Company, to consolidate with the latter company, so as to become one corporation under its name, on such terms as might be agreed on; and after such consolidation the Jacksonville, Pensacola & Mobile Railroad Company were authorized to raise money by way of mortgage, &c., of the railroad and property, franchise and effects acquired by such consolidation, and issue coupon bonds; and to each of said companies was granted the same privileges as those granted to the Jacksonville, Pensacola & Mobile Railroad Company. By the 4th section of the amended act of January, 1870, it was enacted that the governor should for the purpose of aiding the Jacksonville, Pensacola & Mobile Railroad Company, in the speedy construction of its road, deliver to the president of said company coupon bonds of the state to the amount of $16,000 per mile, upon receiving from the president of the company first mortgage bonds of like amount, on any part of the road between Quincy and Jacksonville, but not for a greater length than 100 miles of any part of railroad between Quincy and Jacksonville: Provided, the said railroad company or companies should not issue first mortgage bonds to a greater amount than $16,000 per mile. Under the 14th section of this act the Tallahassee Railroad Company, on the 25th day of May, 1870, was consolidated with the Jacksonville, Pensacola & Mobile Railroad Company, by the unanimous vote of the stockholders of both companies. From the minutes of the stockholders' meeting on this occasion, it appears that Littlefield, who had succeeded to Swepson's interest, held 18,000 shares of the 30,000 of the Tallahassee Railroad Company, and 9,930 of the 10,000 shares of the Jacksonville, Pensacola & Mobile Railroad Company, and that by the consolidation the stock of the two companies was increased to 60,000 shares, of which Littlefield held 38,433. The consolidated company was duly organized and the road from Quincy to Lake City went into its possession. I have no doubt that the effect of this consolidation was to vest in the consolidated company the property and franchises of both the companies, who were parties thereto.

In my judgment, therefore, the North Carolina Railroad Company must seek for the enforcement of any equities it may have by reason of the misappropriation of its moneys by Swepson and Littlefield, through its right to the interest which they acquired as stockholders in the Jacksonville, Pensacola & Mobile Railroad Company. So far as the public was concerned, Littlefield was the apparent owner of this stock. In dealing with the company the public had a right to regard him as the owner of the stock. The corporation could only act by its officers. The action of those officers, unless known to be fraudulent, bound the company and its stockholders, and all those who claimed any equitable interest in the stock. If the North Carolina Railroad Company knew of the destination which its moneys had taken, and suffered Swepson and Littlefield to retain possession of the stock and control of the Florida corporation, they must abide by their acts as such. It had a remedy in the Florida courts to prevent the continuance of this state of things, and if it did not choose to resort to this remedy it must not call third parties in question for dealing with the corporation as a duly organized body, capable of transacting business.

Under the powers conferred by its charter and the amendments thereto, the Jacksonville, Pensacola & Mobile Railroad Company, in May or June, 1870, issued its bonds to the state of Florida to the amount of $3,000,000, and received therefor the bonds of the state to the same amount, which were delivered to Littlefield, the president of the company, for disposition and sale. Littlefield had already made an agreement with S. W. Hopkins & Co., of New York and London, for the disposal of the said bonds which he expected to receive from the state. This agreement purported to treat for $4,000,000 of state bonds, to be issued to the railroad company, of which $1,000,000 were to be issued by the Florida Central Railroad Company, of which Swepson had the control. Only three days after this arrangement with Hopkins & Co. to dispose of bonds not yet is-

sued, Swepson and Littlefield, whose peculations had now been discovered by the agents of the North Carolina Railroad Company, entered into an arrangement with them, on April 16, 1870, for a participation in the proceeds of the Florida state bonds. This agreement was made at the city of Washington, on the 16th day of April, 1870. It has such an important bearing upon the controversy in this case, that I think it proper to state it in full. It is as follows: "Memorandum of agreement and settlement between the Florida Central Railroad Company, Geo. W. Swepson, president, and the Jacksonville, Pensacola & Mobile Railroad Company, Milton S. Littlefield, president, and Milton S. Littlefield, majority owner of the stock of said companies, and also of the stock of the Tallahassee Railroad Company, of the first part, and the Western Division of the Western North Carolina Railroad Company, represented by N. W. Woodfin, W. G. Candler, W. Pink Welsh and W. W. Rollins, commissioners appointed by an act of the legislature of North Carolina, approved by the stockholders of said corporation, of the second part, witnesseth: That whereas, George W. Swepson, late president of the Western Division of the Western North Carolina Railroad Company, made certain investments of the funds of said company in securities of and interest in the said Florida Central Railroad, Jacksonville, Pensacola & Mobile Railroad, and the Tallahassee Railroad, of the said state of Florida, as per report made by the said George W. Swepson to the said commissioners, amounting in the aggregate to the sum of one million two hundred and eighty-seven thousand four hundred and thirty-six dollars and three cents, to bear interest from the first day of November, 1869, at the rate of eight per cent. per annum. And whereas, the said George W. Swepson, heretofore conveyed to the said Milton S. Littlefield, subject to the payment of the above recited claim, his interest in the above recited railroads; and whereas, the said Littlefield has received authority from the legislature of the state of Florida and the several railroad companies, to receive bonds to be issued by and for account of the several railroad companies, which bonds are to be exchanged for the bonds of the state of Florida, to be issued for the purpose of aiding the finances of the said several railroad companies, all of which bonds are now in a state of preparation. Whereas, the said Milton S. Littlefield has made a contract with S. W. Hopkins & Co., No. 71 Broadway, for the disposition of said bonds as the same may be issued, the proceeds of the issue of the bonds of the Florida Central Railroad Company of the said state of Florida, amounting to nine hundred and sixty thousand dollars, are to be applied to the payment of the existing liabilities of the said several railroad companies, including the sum of one hundred and fifty thousand dollars to be paid to the commissioners aforesaid for the purpose of paying existing liabilities of the said Western Division of the Western North Carolina Railroad Company. It is understood and agreed by the parties of the first and second parts, that the proceeds of the sale of the said bonds so to be issued by the said Florida railroad companies and the state of Florida, are to be equally divided, dollar for dollar, between the Western Division of the Western North Carolina Railroad Company and the said Florida railroads, and as the commissioners aforesaid receive by this first sale of bonds only the sum of one hundred and fifty thousand dollars, it is further understood and agreed, that out of the proceeds of the sale of the issue of the bonds of the Jacksonville, Pensacola & Mobile Railroad, there is first to be received by the commissioners aforesaid a sum sufficient to be equal to the amount received by and on account of the said Florida railroads, and then an equal amount is to be received by the said commissioners and the said Florida railroads, dollar for dollar, until the entire amount of one million two hundred and eighty-seven thousand four hundred and thirty-six dollars and three cents, with interest at eight per cent., as aforesaid, being the sum reported by the parties of the first part as due to the Western Division of the Western North Carolina Railroad, is fully paid. It is further understood and agreed by the parties of the first and second parts, that all the interest owned or claimed by the said parties of the first part, George W. Swepson and Milton S. Littlefield, or which they, as individuals, have a right to control in the said Florida railroads, are hereby pledged for the faithful fulfilment of this contract, without the right on the part of any party to interfere with our management or control of the affairs of the road. (Signed) George W. Swepson, President of Florida Central Railroad Co. M. S. Littlefield. M. S. Littlefield, President J., P. and M. Railroad Co. N. W. Woodfin, W. W. Rollins, W. G. Candler, W. P. Welch, Commissioners. Witnesses: M. W. Ransom. R. R. Swepson."

After this agreement, it seems to me impossible to contend that the North Carolina Railroad Company did not accept the situation and acquiesce in the organization of the Florida railroad companies by Swepson & Littlefield, the issue of stock therein to them, and the issue of the bonds in question in this suit. It has been strenuously argued by the counsel of said company that the issue of these bonds was a fraud upon it, and done without its knowledge, and against the interests and will. On the contrary, the fact is plain that the North Carolina Company acquiesced in their issue, and stipulated for a large portion of the proceeds of the sale thereof. If a fraud was committed in the issue of these bonds, it was rather committed on the state of Florida and on the small minority in interest of the other stockholders of the Florida companies; and it is hardly possible to refrain from observing that the North Carolina Company itself was a particeps criminis. What right had that company to make a private stipulation with Swepson and Littlefield, its own officers and agents,

to take to its own use the proceeds of bonds issued by the state of Florida, with the fond, but mistaken expectation that they should be employed in developing its own resources upon its own soil.

It is idle to contend that the North Carolina corporation was not represented in this transaction. The authority of the commissioners appointed by the legislature of North Carolina to act in behalf of the company cannot be questioned. The state was much the largest stockholder, and the legislature had repealed the charter of the company on the 14th of February preceding, and had appointed these commissioners to settle up its affairs. They were the only representatives of the company then existing. Littlefield himself was president of the company at the time of the repeal of its charter, and Rollins and Camden were directors. The commissioners acted in the company's name, and no one can justly challenge their right so to do. Besides, from that time onward, throughout the year 1870, and afterwards, the same commissioners continued to represent the company, as well as the state in many ways, and always in affirmation of the issue of the bonds. Actions were brought and actions defended in the company's name in asserting its claim to the bonds, or the proceeds thereof. One of the commissioners, Col. Woodfin, was sent to London to secure their rights in this regard, and then made another final settlement there with Littlefield, by agreement dated November 10, 1870, on the part and behalf of the Western Division of the Western North Carolina Railroad Company. which agreement, throughout, purported to provide ways and means for carrying out the agreement of April 16, 1870, and securing to the said company the proceeds of the bonds sold and to be sold; amongst other things, providing that an order should be given to said company on S. W. Hopkins & Co., for 800 of the bonds still in their hands, but with the condition that the bonds should be sold by Hopkins & Co. and the proceeds paid to the company. Such order was in fact given and accepted, and £10,000 sterling were subsequently received by the company on account thereof. Calling these settlements conditional settlements, compromises, &c., is a new thought, the result of new light. No such language is used in the original bill. Besides, though they were conditional settlements, or compromises, they were entered into and had the same effect in misleading the public and inducing a sale of the bonds, as if they had had no conditions attached to them. They were not like unaccepted offers of compromise, which, it is true, cannot be used to the prejudice of the party who makes them. They were executed agreements, and show the position which the North Carolina Railroad Company deemed it expedient to assume.

It is useless to go into all the evidence on this subject in detail. The truth is too evident that not only did the North Carolina Company acquiesce in the issue of the bonds, but that they urged and promoted the sale thereof. The principal contest of this company consisted in endeavoring to get the proceeds of the bonds after they were sold, and this contest was continued until the three thousand state bonds issued to the Jacksonville, Pensacola & Mobile Railroad Company, in exchange for its own bonds, had been sold and disposed of. In view of these facts, the North Carolina Railroad Company is to be held as participating in putting out these bonds on the money markets of the world, and it cannot be heard to except to the bona fides of their issue and sale.

Having reached this conclusion, I must hold that the complainants in the case of J. Fred. Schutte, who have produced these very bonds, are bona fide holders, there being not the slightest evidence to the contrary. As such, they are entitled to relief as against the railroad and property of the Jacksonville, Pensacola & Mobile Railroad Company, notwithstanding and prior to any equities the North Carolina Company may be entitled to. The equities of the latter company are to be affected as equitable owners of the stock held by Swepson and Littlefield in the Jacksonville, Pensacola & Mobile Railroad Company, and can rise no higher than the rights of that company itself as against third parties dealing with it in good faith.

The court then proceeded to consider the question whether the holders of the state bonds had, by reason of being such, any lien, legal or equitable, against the railroad and property of the Jacksonville, Pensacola & Mobile Railroad Company.

It has been decided by the supreme court of Florida that the state bonds which these parties hold were created and issued in violation of the constitution of the state, and that they are for that reason absolutely void. But the same court has also decided that the bona fide holders of such bonds are entitled to the benefit of the bonds issued by the Jacksonville, Pensacola & Mobile Railroad Company, in exchange for them, and to have such company bonds and the first mortgage lien created thereby enforced for their protection. In the case of Holland v. State, when this question was involved, the court held that the state of Florida occupied two distinct relations to the holders of the state bonds and to the railroad company,—the first being that of a primary debtor on its own bonds, and mortgage creditor of the company for its indemnity; the second that of a trustee for the holders of the state bonds. "In this relation," says Mr. Justice Westcott (in which the other justices concurred), "the lien created by the statute was for the benefit of the holders of the state bonds. The proceeds of the sale, if he declined to surrender his bonds, were to be invested for him, and he was to have the beneficial interest of a cestui que trust. The

lien of the statute and the company bond, viewed in this light, was for his benefit, and the property and franchises of the company were to be his security for payment. And as the company received his money and the state received nothing, the company was to be held to the obligation of common honesty in the matter of payment and satisfaction." 15 Fla. 534. In the subsequent case of State v. Florida Cent. R. Co., 15 Fla. 723, the court further defines its position on this subject. It then says: "In the case of Holland v. State, we held that while the state bond, as an obligation against the state, as a simple and primary debtor, was void for want of constitutional power in the legislature to authorize such obligation, yet that, under the statute, the state held the bonds of the company and the mortgage lien enuring thereby for the benefit of the holder of the state bonds; that the state, under the statute, was to occupy these two relations, and that while the one failed for want of constitutional power in the legislature to authorize it, the other must be sustained, because the legislature did have the constitutional power to create it, and it was the duty of the court to enforce it. This court did not hold that the relation and rights of the state as 'trustees' were the result of any equity springing from the circumstances, independent of the statute, but that its relation as a trustee was a creature of the statute; that, viewed in this light, the lien created by the statute and the company's bond was for the benefit of the bondholders, and the property and franchises of the company were to be his security for payment." The court then proceeds to hold that, under this view, the bondholder is not restricted to the amount paid by him for his bonds, but has all the rights of a "holder" of bonds, including that of recovering the full amount thereof. The same views were again repeated in the recent case of Trustees of Internal Improvement Fund v. Jacksonville, P. & M. R. Co., and also reported in 16 Fla. 719.

A careful examination of the statute leads me to concur in this view of the subject. But the decision of the state court on a question of the construction of a state statute, if not absolutely binding on this court, is, at least, entitled to the very highest consideration and respect, and is to be regarded as of great authority. I feel compelled, therefore, to hold that the holders of the state bonds have a right to the enforcement of the mortgage lien created by the statute by virtue of the bonds of the Jacksonville, Pensacola & Mobile Railroad Company given in exchange therefor. As pertinent to this question, see Young v. Montgomery & E. R. Co. [Case No. 18,166]. The result of this opinion is, that next to the lien for the balance of purchase money due to the trustees of the internal improvement fund, the complainants in the case of J. Fred. Schutte and others are entitled to a mortgage lien upon the Jacksonville, Pensacola & Mobile Railroad, extending from Lake City to Quincy, and from Tallahassee to St. Mark's, including the branch to Monticello, with all its equipment, property, and franchises, for the payment of such portion of the bonds held by them, and the interest accrued thereon, as are to be considered as having been exchanged for the bonds of that company, and a first mortgage lien for the payment of the same bonds and interest upon the railroad extending from Quincy to the Chattahoochee river, and its equipment, property, and franchises, reserving, however, for the present, further consideration of the claims of J. W. Gibbes, who has intervened pro interesse suo, in respect to that portion of the line. The said J. Fred. Schutte and others, holders of said state bonds, will also be entitled to a decree dismissing the bill of the Western North Carolina Railroad Company which relates to the Jacksonville, Pensacola & Mobile Railroad.

I will now proceed to the consideration of the case relating to the Florida Central Railroad Company and its property. I have already stated that in this case there is no question about the status of the Western Division of the Western Railroad of North Carolina. Its interest arises altogether from its equitable right to the stock of the Florida Central Railroad Company, and its equities rise no higher than those which belong to the rights of a stockholder. This stock, during the period of the transaction under consideration, was held either by Swepson or Littlefield, or by those to whom they transferred it from time to time, for their own purposes. Parties dealing in good faith with the Florida Central Railroad Company as a corporation have nothing to do with the manipulations of this stock. The main question in this controversy was whether the corporation itself became bound by the bonds which were issued in its name, the amount of which, as before stated, was $1,000,000. The first inquiry naturally was, whether the said company had power to issue such bonds. The act which incorporated the purchasers of the road, passed 29th July, 1868, was in the same general form as that which incorporated the purchasers of the Jacksonville, Pensacola & Mobile Railroad Company, already recited. It did not, however, contain any section corresponding to the sixth section of that act, authorizing the issue of coupon bonds and the securing of the same by mortgage; but it gave the company the general power to grant, sell, mortgage, or dispose of any property acquired for the purposes of the railroad. It will be recollected, however, that the act entitled "An act to perfect the public works of the state," which incorporated the Jacksonville, Pensacola & Mobile Railroad Company by its 14th section, not only authorized the several companies owning the road or roads from Quincy to Jacksonville, &c., to consolidate with the

Jacksonville, Pensacola & Mobile Railroad Company, but gave to each company the same privileges as were granted to the latter company by the act; and by the 4th section of the amended act, passed January 28, 1870, it was enacted as follows, namely: That the governor shall, for the purpose of further aiding the said Jacksonville, Pensacola & Mobile Railroad Company in the speedy construction of its road, deliver to the president of said company coupon bonds of this state, of the same character as those above described in this act, to the amount of $16,000 per mile, upon receiving for and from the president of said company first mortgage bonds of like amount on any part or portion of the road between Quincy and Jacksonville: provided, however, the state bonds under this section shall not be exchanged for first mortgage bonds for a greater length than 100 miles of any part of railroad between Quincy and Jacksonville, provided the said railroad company or companies shall not issue first mortgage bonds to a greater amount than $16,000 per mile." Now there were only two roads between Quincy and Jacksonville, a part of the road belonging at the time of the passage of this act to the Tallahassee Railroad Company, extending from Quincy to Lake City, and the road of the Florida Central Railroad Company. The act, therefore, must necessarily have referred to these roads and to the companies owning the same. The supreme court of this state so decided in the case of State v. Florida Cent. R. Co., 15 Fla. 704, 705, and held that this section authorized the Florida Central Railroad Company to issue coupon bonds to be exchanged for state bonds by the president of the Jacksonville, Pensacola & Mobile Railroad Company. Taking the two acts together, that of June 24, 1869, and its amendatory act of January 28, 1870, I have no doubt that the Florida Central Railroad Company did have all the requisite powers for issuing such bonds as were issued in this case in the name of said company, and that they might be issued for the purpose of exchanging them for a like amount of state bonds, in aid of the Jacksonville, Pensacola & Mobile Railroad Company. Of course, it would be for the Florida Central Railroad Company to prescribe the condition or consideration on or for which it would issue such bonds. It had the power to do it. If done, and the exchange should be made, and after this the state bonds received by the president of the Jacksonville, Pensacola & Mobile Railroad Company in lieu thereof should be misappropriated by the agents of that company, this would not relieve the Florida Central Railroad Company from its obligations arising upon its bonds to the bona fide holders of the state bonds.

Much stress has been laid in this case upon the fact that the bonds issued in the name of the Florida Central Railroad Company were not regularly executed, but were made and executed in the city of Washington, and signed by George W. Swepson, as president of the company, and by one H. H. Thompson, as treasurer, when the latter was not treasurer, and no authority having been given by the directors for the issue of any such bonds. But, before the bonds were issued, the following action was taken by the board of directors, on the 25th day of May, 1870, to wit: "General Littlefield stated that Mr. Swepson, late president, had appointed H. H. Thompson, Esq., as secretary and treasurer of this company for the past year, and moved that the action of the late president in this respect be approved and confirmed, which was agreed to." A few days later, on the 2d of June, 1870, a meeting of the stockholders was held, representing a very large majority of the stock, when it was unanimously resolved that bonds to the extent of $16,000 per mile be issued by the company, to be a first lien or mortgage on the Florida Central Railroad, its equipments, franchise, &c., and thus reciting that George W. Swepson, the late president, had caused to be prepared bonds to be issued by the company, preparatory to an order of the board of directors to that effect, and which bonds were signed by said Swepson, as president, and countersigned by H. H. Thompson, treasurer. It was therefore unanimously resolved that the said bonds be adopted as the bonds to be issued, and that, when issued, they be a first lien or mortgage on the Florida Central Railroad, its equipment, franchise, &c., except the lots in Jacksonville not used for depot purposes. It was further resolved that the bonds be placed in the hands of Edward Houston, for the purpose agreed upon by an arrangement between himself and Milton S. Littlefield, "who, it was declared, was owner of nearly all the stock in the company," and the bonds, or their proceeds, to be held and applied according to said arrangement, except the proportion thereof applicable or apportionable to the stock owned by other parties; and, upon the satisfaction otherwise of the terms of said arrangement with said Houston, the said bonds were to be by him transferred to Littlefield, or according to his direction, to the extent of the stock owned by him at the time. On the same day the directors adopted the same resolution, and, further, a resolution that the president be authorized to do all acts, and, if necessary, to execute and deliver any proper deed, under the seal of the company, that might be deemed needful to make the first lien or mortgage in favor of the bonds.

In view of these resolutions, all talk about the irregular execution of the bonds, or of the application of the seal thereto, would seem to be irrelevant. It cannot be denied that the bonds were executed and placed in the hands of Littlefield for disposition according to the arrangement between him and Houston. That arrangement, as it stood at this

time, was that there should be placed in Houston's hands, as collateral security for $163,000 due to him from Littlefield, $1,000,000 of bonds of the state of Florida, to be exchanges for said bonds of the Florida Central Railroad Company. After paying himself, the balance of the proceeds of said bonds was to be distributed and paid as follows, to wit:

To Edward Houston.....	$163,000
To John P. Sanderson.....	57,000
To M. D. Papy.....	16,000
To T. Brevard, attorney for holders of Pensacola and Georgia bonds.....	50,000
To John P. Sanderson, president of the Florida Central Railroad Company..	340,000
	$626,000

—the balance, if any, to Littlefield.

The arrangement further provided that if Littlefield should pay his debt of $163,000 to Houston, the latter should place the bonds in the hands of S. W. Hopkins & Co., to be sold, and the proceeds to be held subject to the other claims, above specified, and the balance to be paid to Littlefield. Houston, in January, 1871, placed the bonds in the hands of T. B. Coddington on substantially the same trusts as he held them. On the 13th of April, 1871, at a stockholders' meeting of the Florida Central Railroad Company, he was authorized to place them in the hands of S. W. Hopkins & Co., subject to the same trusts as to the proceeds thereof.

Now the counsel for the North Carolina Railroad Company and for the Florida Central Railroad Company, contend that the bonds executed by the company, and exchanged for state bonds, were executed for an unlawful purpose, namely, for the purpose of paying private debts or for speculation, and not for the purpose of aiding the Jacksonville, Pensacola & Mobile Railroad Company in the speedy construction of its road, nor for any corporate purpose of the Florida Central Railroad Company itself. Supposing this to be true, how can the corporation itself, or any one claiming under it, raise this objection after having actually executed its bonds and procured the state bonds in exchange therefor, and authorized them to be sold to the public? It seems to me that there is a clear estoppel in the case. It would be to allow the company to perpetrate a fraud upon the public to allow such a defense to prevail. If the stockholders have used the money produced by the state bonds for their own purposes, instead of using it in aid of the Jacksonville, Pensacola & Mobile Company, or for the corporate purposes of their own company, neither they nor the corporation can be permitted to allege their own dishonesty as a reason for avoiding the binding obligation of their bonds. The fact seems to have been that the arrangement for making this issue of bonds had in view a distribution of their proceeds amongst the stockholders in proportion to their several interests. If there was not a fair deal; if some got more than their share, and others less, they must look to one another for an adjustment of their respective equities. They ought not to be permitted, at this late day, after the state bonds procured in exchange have been sold to purchasers, to plead that their bonds were created for an unlawful purpose. The Florida Central Railroad Company itself is clearly estopped from making such a defense. The North Carolina Company is also estopped, because in the agreements and proceedings which have been referred to, in which it was a party, it acquiesced in the issue of the bonds, and only claimed to share in the proceeds thereof. The agreement of April 16, 1870, before recited, expressly recognized the issue of bonds by the Florida Central Railroad Company, and provided that $150,000 of the proceeds thereof should be paid to the commissioners. And in a supplemental complaint of the said North Carolina Company, filed in August, 1871, in a suit instituted by said company against Sidney W. Hopkins and others in the supreme court of New York, the said company alleged and insisted as follows, to wit: "And the said plaintiffs further show that said S. W. Hopkins & Co. have in their hands, as plaintiffs are informed and believe, a very large amount of the proceeds of the sales of said 4,000 bonds which belong to these plaintiffs, and to other parties interested therein, and that they intend to conceal and fraudulently retain such proceeds to their own use, &c.," and they then invoke the equitable interposition of the court in respect to the proceeds of said bonds. This is but a casual instance of the manner in which the North Carolina Company ever treated the transactions relating to said bonds. Here, it will be observed, the company speaks of the entire issue of 4,000 bonds in one category, thus including those issued in exchange of the Florida Central, as well as others. As late as July, 1873, a consent decree was entered in the case of John Collinson v. S. W. Hopkins and others, in the city of New York, to which the North Carolina Railroad Company was a party, whereby it was provided that $200,000 should be paid to said company out of the proceeds of the bonds which formed the subject of that litigation, being the last 1,200 bonds issued of the 4,000, and including the 1,000 bonds issued in exchange for those of the Florida Central Railroad Company.

It is useless to pursue this subject further, or to examine in detail all the voluminous testimony and documents which have been adduced in relation to it. It is too plain for doubt or question that the North Carolina Company acquiesced as well in the issue of the Florida Central bonds as those of the Jacksonville, Pensacola & Mobile Railroad Company. The truth is, that the agents of the North Carolina Company seem to have been very well satisfied with the issue of the bonds, thinking, by means thereof, to be able to snatch something out of the fire by way of indemnity for the losses sustained by

that company through the malfeasance of Swepson and Littlefield, and I think that said company is concluded from disputing the validity of the bonds as against those who have, in good faith, purchased the state bonds issued in exchange therefor. They may have been unfortunate in their endeavors to get the proceeds of the bonds after they were sold, but that was not the fault of the purchasers, and is no reason for depriving them of their property.

The question then arises, whether the complainant in the suit of J. Fred. Schutte and others are bona fide holders of the bonds, which they produce in this litigation. The possession of the bonds is strong prima facie evidence of just title, and in ordinary cases, throws upon the party questioning it the burden of showing that it is not bona fide, that the holder had notice of some vice or defect which vitiates the title. No such notice is shown in this case. On the contrary, it appears from the evidence of Collinson and Collins that the bonds were sent to Holland to be sold. Collinson says that the bonds were purchased by him of S. W. Hopkins & Co. in London; that they were put on the Dutch market, and were sold there, as he was informed; that the transactions were conducted by Messrs. Boissevain & Milders and Mangay, of Holland, who purchased the bonds from him for the purpose of putting them on the market and selling them. Collins corroborates this testimony, and says that Mr. Woodfin, the agent of the North Carolina Company, whilst in England, did all he could to promote their sale. Dr. Wertheim, who has been present at the hearing of these cases, was examined at the instance of the North Carolina Company after the cases were called, and testified to having been a purchaser of some of the bonds himself in Amsterdam, and to the fact that some of his friends were purchasers at prices which forbid the supposition that they were conscious of anything wrong in the sale of the bonds. He says that he was so stupid as to invest some of his money in these bonds at the rate of 80½ per cent., believing in the good faith of the state of Florida and the managers of the railroads; that he was bitterly deceived, and was unhappy enough to have more of the bonds out of the inheritance of his father; and not himself alone, but a great many widows, orphans, and charity institutions in Holland, purchased them, believing them to be a good and safe investment. In an affidavit made by him in May, 1877, which was exhibited to him by the counsel of the North Carolina Company on the examination, he says distinctly that after examination and such information as could be obtained in Holland, the loan was issued there, and the bonds were bona fide purchased in the market. He says the belief there was that the whole line from Jacksonville to Chattahoochee was consolidated into one line, and that all the bonds had respect to the line as one entirety. This was undoubtedly the impression that was given abroad, and had some foundation in the representations which were made by Littlefield and others.

In my judgment, upon the whole case as presented by the evidence and pleadings, the said bondholders are to be regarded as bona fide purchasers and holders of these bonds, and are entitled, by reason thereof, to a first mortgage lien therefor upon the Florida Central Railroad, so far as any of the bonds held are to be deemed as exchanged for its bonds. This also seems to me to be in accordance with the justice of the case. These parties have parted with their money, relying on the good faith of the state and the companies. It is not their fault that this money did not reach the proper hands. Had it been properly applied, the Florida railroad companies and their stockholders, and those having an interest in the stock, including the North Carolina Railroad Company, would have reaped the benefits. If the money has been squandered or misapplied, it is their misfortune, and should not be visited upon the purchasers of the bonds.

It remains to determine what portion of the bonds raise a lien on the Jacksonville, Pensacola & Mobile Railroad, and what portion a lien on the Florida Central. This branch of the subject is invested with some difficulties. I think it is pretty clear, from the evidence in the case, that the first three thousand state bonds were, in fact, issued in exchange for the bonds of the Jacksonville, Pensacola & Mobile Railroad Company, and that the last one thousand, numbered from three thousand and one to four thousand, respectively, were issued in exchange for the Florida Central Railroad Company's bonds, the latter not being issued until April, 1871, when they were procured by Coddington. It is urged, on the part of the bondholders, that they had no knowledge of this distinction, and ought not to be affected by it. But I am not satisfied that their ignorance on the subject can affect the question. The lien of the bondholders is created by the statute. A resulting equity would have arisen without the aid of the statute, but the statute takes the place of this and regulates the right. Now, the 11th section of the "Act to perfect the public works of the state," passed June 24, 1869, as amended in January, 1870, declares that, "to secure the principal and interest of the said company's bonds, the state of Florida shall, by this act, have a statutory lien, which shall be valid, to all intents and purposes, as a first mortgage duly registered, on the part of the road for which the state bonds were delivered," &c. When, by the 4th section of the amending act, passed in January, 1870, authority was given to issue state bonds in exchange for first mortgage bonds on any portion of the road between Quincy and Jacksonville, it cannot be supposed that such bonds

were to be security for any other state bonds than those which should be given in exchange therefor.

The question is not so much what the bondholders ought to have, as what the statute gives them. If they stood on grounds of mere equity, they might not be able to recover more than the amount paid by them for the bonds. I think, however, that the matter is to be governed by the statutes. I am of opinion, therefore, that the bondholders cannot claim to have a lien on the Florida Central Railroad for any bonds except those whose numbers exceed the number three thousand. Of these, it appears, they hold one hundred and ninety-seven. For these bonds, therefore, and the interest due thereon, they are entitled to a first lien on the said railroad, its equipments, franchise and property. For the remaining bonds held by them, whose numbers are three thousand and under, of which they have produced two thousand seven hundred and forty-nine, they will have a lien, as before expressed, on the Jacksonville, Pensacola & Mobile Railroad.

This disposes of the most important questions in these causes, and a decree will be made in conformity with this opinion, with such qualifications as may be agreed upon by the trustees of the internal improvement fund and the holders of the old first mortgage bonds of the Pensacola & Georgia and Tallahassee Railroad Companies on one part, and the holders of the state bonds on the other, as expressed in the memorandum plan which has been referred to, or otherwise. A decree will also be made for a sale of the several railroads for the purpose of raising the amount due to the respective parties according to the respective liens. The bills of the Western Division of the Western North Carolina Railroad Company will be dismissed, with costs. I have not deemed it necessary to advert to a great deal of the voluminous evidence taken in the cases. The ground taken in the opinion covers all the material points at issue between the parties, and I have stated the conclusions to which I have come from the most careful consideration which I have been able to give to the whole case.

Decree in favor of Holland bondholders against the Jacksonville, Pensacola & Mobile Railroad Company, for $2,751,000, with interest, amounting to $1,655,001.60, and against the Florida Central Railroad Company for $197,000, with interest now matured, $118,515.20, and that railroads of said companies be sold to satisfy.

[4] [In addition to the questions above disposed of, the counsel for Daniel P. Holland, James G. Gibbes and various other parties, submitted the questions arising upon interventions for their several interests in relation to the fund arising from the property of the Jacksonville, Pensacola & Mobile Railroad Company. By the petition of D. P. Holland, it appeared, that on the 2d day of December, 1872, he obtained a judgment in this court against the Jacksonville, Pensacola & Mobile Railroad Company for the sum of $62,533.33, issued an execution thereon, and sold the railroad and its appurtenances, and became the purchaser at such sale, and received a deed from the marshal, and took possession of the road. This sale was afterwards adjudged illegal and was set aside. Holland now claims to have the moneys in the hands of the receiver applied to the payment of this judgment, on the ground that said moneys are the property of the company, being produced by the earnings of the road, and are not subject to the lien of the complainants, or of the trustees of the internal improvement fund.]

BRADLEY, Circuit Justice. [5] [This claim cannot be allowed. The money realized by the receivers is a part of the fund as it stood when the receivers were appointed and put in possession. It is as much a part of the mortgaged premises as are the rails or the cross-ties of the road. It is the product and fruits of the property produced since the court took it in hand for the use of the liens and trusts by which it is bound. The property was taken possession of by the court by its receivers, in order to preserve it for the use of those liens and trusts. The fruits arising therefrom whilst thus in custody of the court, do not belong to the Jacksonville, Pensacola & Mobile Railroad Company in any such sense as to be liable to any other claims than those of the parties for whose protection the road was taken into custody, and such charges as appertain to its management and administration. It would be a strange doctrine to contend, that the Jacksonville, Pensacola & Mobile Railroad Company itself could appear before the court and demand the money in the receiver's hands. And if the company cannot do this, neither can any party whose claim is based as Holland's is, only upon the company's rights.

[The petition urges the statute of January 8, 1853, amending the laws relating to mortgages, which declares that the antiquated claim in favor of the mortgagee to the right of possession of the property specified in the mortgage, by reason of any alleged failure of payment, or breach of promise, or other default, shall in no case be recognized or admitted in a court of justice until all other steps and forms prescribed by law for the foreclosure of mortgages be complied with and observed, and which also declares, that a constructive possession by the mortgagee shall not be allowed to impair the actual, and for ages admitted, right of possession of the mortgagor until deprived thereof by decree, and that the mortgage shall be held a specific lien on the property, and the mortgagee incapable of acquiring possession until after decree of foreclosure.

[4] [From 3 Woods, 691.]

[5] [From 3 Woods, 691.]

This act was evidently intended to abolish the practice which prevailed in England and some of the older states, of allowing the mortgagee to take possession of the mortgaged premises, or to recover the same in ejectment, the moment a default of payment occurred. It cannot apply to prevent the interference of a court of equity in a case where, by the voluntary negligence or misfeasance of the mortgagor, the property is being wasted and consumed so as to peril the security intended by the parties. It cannot apply to prevent such a court from appointing a receiver of a railroad where the railroad company is notoriously insolvent, and is using up and wasting the property. When such a case occurs, as it did in the present case, it is perfectly competent for the court to appoint a receiver to keep and preserve the mortgaged premises, and to enjoin the railroad company from further interfering therewith. And when this is done, it cannot be pretended that the company will be entitled to the receipts of the road whilst in the hands of the receivers, further than to be credited with the amount thereof, after deducting expenses. Besides, the present is not the case of a mortgage, so far as the trustees of the improvement fund are concerned; but of a lien for purchase money, which the company or its predecessors, for whose acts it is bound, failed to pay. The continued possession of the property without paying the consideration is a quasi fraud against the vendor, and the purchaser is a trustee for him, and a court of equity is not restrained by anything contained in the statute from appointing a receiver if there is danger of the property being wasted or deteriorated.

[I am of opinion, therefore, that neither the Jacksonville, Pensacola & Mobile Railroad Company, nor any party claiming under it, as Holland does in this case, can demand the moneys which the receivers have realized from the management of the property, until the liens established by this decree have been satisfied. The application of the petitioner is denied.] [6]

[From final decrees dismissing the bills of the Western North Carolina Railroad, that company appealed to the supreme court. The decree in each case was affirmed, with costs. 103 U. S. 118.]

WESTERN FEMALE SEMINARY (BLAIR v.). See Case No. 1,486.

Case No. 17,435.

In re WESTERN INS. CO.

[6 Ben. 159.] [1]

District Court, N. D. New York. June, 1872.

INSOLVENCY OF INSURER—RETURN OF PREMIUM—DEDUCTION FROM PREMIUM NOTE.

An insurance company, which had issued a policy, and received the promissory note of the assured for the premium, dated April 1, 1871, became insolvent on October 9, 1871. The note passed into the hands of the assignee in bankruptcy. On the 13th of October, 1871, the assured surrendered the policy. After the note became due, they petitioned for an order directing the assignee to receive, in full of the note, an amount proportionate to the time the note had run before the surrender of the policy. *Held*, that the petitioners were not entitled to any return of premium, or to any deduction from their note.

[In the matter of the Western Insurance Company, a bankrupt.]

HALL, District Judge. Daniel D. Harnett, Joseph Kimball, and Joseph Waltman, at the time of the great fire in Chicago, on the 9th of October, 1871, held a marine policy issued by the bankrupt, and dated April 1, 1871, by which they were insured to the amount of $4,500 against loss or damage to the bark J. S. Austin, by reason of certain enumerated perils. The bankrupt then held, and the assignee in this case now holds, the promissory note of the assured, given for the premium upon said policy, and the assignee has demanded payment of such note. The assured have refused payment, and have now presented their petition, in which they allege and insist, that, by reason of the insolvency of the bankrupt, caused by such fire in Chicago, and its consequent inability to fulfill its contract of insurance, there was a partial failure of the consideration of said promissory note; for the reason that said policy did not, by its terms, expire until the 5th day of December, 1871, and was surrendered by them on the 13th day of October of that year, in consequence of such insolvency, and of their inability otherwise to effect any further insurance upon their vessel; and they, therefore, pray that the assignee in this case may be directed to receive, in full of such premium note, such proportion of the amount thereof, as the time said policy had run before its surrender bears to the whole time the said vessel was thereby insured. The facts are not controverted, and the petition is, in substance, an application for a return of a portion of the premium, as unearned.

There is no ground upon which this petition can be maintained. The petitioners are not, in my judgment, legally entitled to any return of premium, or to any deduction from their note given therefor. The risk had commenced, and the policy had been operative for several months before its surrender, and no case has been cited in which there has been an adjudication that the assured were entitled to a pro rata return of premium under similar circumstances.

It was insisted, on behalf of the petitioners, that, upon the surrender of the policy, there was an implied contract to repay the unearned portion of the premium, but no authority was cited in support of the position so assumed, and no reason was stated which should take the case out of the general rule that there is to be no return of premium, except under express agreement, in any case where the policy has attached, and the risk has commenced. See Hendricks v. Commercial Ins. Co., 8 Johns. 1; Waters v.

[6] [From 3 Woods, 691.]

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

Allen, 5 Hill, 421; Insurance Co. v. Roberts, 4 Duer, 141; Columbian Ins. Co. v. Lynch, 11 Johns. 233; Phil. Ins. c. 22, §§ 1820, 1832. The ordinary time policy of insurance is a contract of indemnity, for the time specified, as a single and indivisible period, during which the character and danger of the risk is subject to frequent change; and the assured has no right, by his own act, after the commencement of the risk, to determine that he will no longer pay the agreed rate of premium on the insurance, and then surrender or cancel his policy, and receive back a portion of the premium as unearned. No such contract to repay any portion of the premium received is implied, under the circumstances stated in the petition.

It was also insisted, that the consideration of the note had partially failed, by reason of the insolvency of the insurance company, and the subsequent surrender of the policy; and that this was a partial defence to the premium note; but their counsel failed to cite any authority, and I am unable to discern any acknowledged principle of law or equity jurisprudence to sustain the point thus made. If the petitioners had become insolvent, in consequence of the Chicago fire, and the insurance company had remained solvent, and had surrendered their note to the petitioners, because it was deemed for the interest of the company to do so,—either in reference to some business arrangement with other parties, or because they thought an attempt to collect it would require a useless and unwise expenditure,—it would hardly be contended that the company was not liable for a subsequent loss, unless there was some express provision in the policy upon which such a claim could be based.

In every view which I have been able to take of the case, the petitioners are liable for the full amount of their promissory note, and their petition is, therefore, dismissed, with costs.

Case No. 17,436.

WESTERN INS. CO. et al. v. The GOODY FRIENDS.

[1 Bond, 459.] [1]

District Court, S. D. Ohio. June Term, 1861.

COLLISION—RULES OF RIVER NAVIGATION—LOOKOUT ON DECK—PRESUMPTION OF FAULT.

1. By the well-established rules of navigation on the Western rivers, an ascending boat has the right to indicate a preference as to her course of navigation, and having done so, the descending boat is bound to conform to her choice as indicated by her signals, unless there are circumstances rendering it improper to do so.

2. If there are such circumstances, it is the duty of the descending boat so to indicate that the other boat may be navigated accordingly.

3. It is a paramount law of navigation that a collision must be avoided when it is practicable to avoid it.

4. The errors and faults of one boat will not justify another boat in the infliction of an injury to her, unless it was the result of an inevitable necessity.

5. In a case arising from a collision of boats, it is not enough to relieve from an imputation of fault that there was a pilot in the wheel-house, but there must be some one on deck, charged with the special duty of keeping a vigilant lookout, not in the wheel-house, but on the forward part of the deck, where the best opportunity is offered for observing approaching and passing boats, and who will be able to communicate promptly to the pilot such information as he may need to insure the safety of his boat.

6. The absence of such lookout justifies a prima facie presumption of fault and makes it incumbent on the party against whom the presumption arises, to repel it by clear proof that the fault was on the other side.

Lincoln, Smith & Warnock, for libellants.
Dodd & Huston, for defendants.

LEAVITT, District Judge. This is a suit in rem against the steamboat Goody Friends, prosecuted in the names and for the use of the Western Insurance Company and the Firemen's Insurance Company, both doing business at Cincinnati, to recover damages for a collision, by means of which the steamboat South Bend was sunk, and is a total loss. The libellants were insurers to the amount of $9,000, on the boat, and also on portions of the cargo, and both having been abandoned by the owners, the libellants have paid the amount of their respective risks, being in the whole about $10,000. The libel contains the usual allegations, that the collision was the result solely of the fault of those having the management of the Goody Friends. The owners of this boat have intervened, and in their answer aver that there was no fault in the navigation of their boat, and that the collision is chargeable solely to the unskillful management of the South Bend. Although the parties have taken a large mass of evidence, to which I have given a very careful consideration, the points involved in this controversy are not numerous; and in stating the conclusions at which I have arrived, I do not propose a very full or critical analysis of the facts. As usual in collision cases, there is conflict in the evidence adduced by the parties, as to the course of the boats immediately preceding, and at the time of the collision, and also as to the place at which it occurred.

The collision took place between five and six o'clock, in the morning of December 13, 1860, in the Mississippi river, some forty miles above Memphis, nearly opposite the lower end of Island No. 36. The South Bend, a stern-wheel boat of about 275 tons burden, and having on board a cargo estimated at about two hundred and fifty tons, had been laden at Cincinnati, and was destined for different ports on the Arkansas river. The Goody Friends is also a stern-wheel boat, of about the same class as the South Bend, and was on an upward trip from New Orleans to Cincinnati, and other ports and places above, fully laden with a cargo of cotton and other products of the South. The morning in

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

which the collision happened was dark and misty. The stage of water at the time was sufficient for safe navigation, there being between thirteen and fourteen feet in the shoalest channels of the river. The Mississippi, at the place of collision, was at that stage of water, something more than four hundred yards in width. On the Arkansas side, there was a bar some five miles in length, and on the Tennessee shore, there was a deep bend corresponding nearly to the curvature of the bar on the opposite side. The proof is full and clear, that from the outer line of the bar to the Tennessee shore, the water is deep, and sufficient for the safe navigation of boats of a much larger size than the South Bend or the Goody Friends. The depth of the river where the South Bend sank is not less than thirty feet.

The theory of the collision, as claimed by the libellants, is, that when the boats were distant from each other about one mile, or a mile and a half, the pilot of the South Bend noticed the Goody Friends ascending, as he supposed, along or near to the Tennessee shore, and shortly after he heard from her a signal of one blow of the whistle, indicating her intention to keep up that shore, and that the South Bend should take the other side; and that the pilot of the South Bend responded to this signal by one blow of his whistle, signifying his acceptance of the Goody Friends' signal; and that in accordance with these signals, he steered his boat quarteringly toward the bar on the Arkansas side, and that while thus steering, the Goody Friends turned nearly square across from the Tennessee shore, and struck the South Bend with her stern on the larboard bow between the forward hatch and the fire-doors, making a large hole in her hull, which admitted such a rapid inflow of water that she sunk in from two to three minutes after the collision.

On the other hand, the respondents allege and insist, that they have clearly proved that the Goody Friends, when her pilot first saw the South Bend, the boats then being a mile and a half apart, was coming up the Arkansas shore, the usual place of an ascending boat, and gave two distinct blows of his whistle to indicate his wish to keep up that shore, and that the South Bend should keep the other side. This signal, the respondents allege, was replied to by two distinct blows of the whistle of the South Bend, indicating the acceptance of the signal of their pilot, and that under these signals it was the plain duty of the South Bend to have kept down the bend near the Tennessee shore; but that in violation of the signals and the rules of navigation, her pilot steered his boat along the bar, and at a point not exceeding one hundred yards from the bar, and very near the proper place for an ascending boat, came in contact with the Goody Friends, thereby making a hole in her bow which caused her to sink immediately.

From this statement, it is apparent the theories of the parties, as to this collision, are in direct conflict; and, it is clear, that both can not be true. And it becomes the duty of the court, in the light of the evidence, to determine which way the scale shall preponderate. In this inquiry it is important to ascertain what signals passed between these boats. The only witness on this point for the libellants is Squire Patterson, the pilot of the South Bend, on duty before and when the collision took place. He states, in substance that he discovered the Goody Friends when a mile or a mile and a half below, coming up, as he supposed, in the Tennessee bend. He says he thought then she was in the wrong place for an ascending boat, and supposed it was her intention to land at a wood-yard in the bend; and that he heard one whistle from the ascending boat, to which he replied by one blow of his whistle; and according to these signals, steered his boat quartering toward the bar, supposing it was the purpose of the other boat to keep the Tennessee shore. And this would have been correct navigation if the signals had been as he states he understood them. But the court is forced irresistibly to the conclusion, that Patterson, either from misapprehension or design, has not stated the truth in regard to the signals that passed between these boats. Harrison, who was the pilot of the Goody Friends, states that the signal from his boat was two distinct blows of her whistle, indicating his wish to keep the usual place of an ascending boat, near to the Arkansas bar. Logan, who was with Harrison in the wheel-house, a pilot of long experience on the river, states that he gave two loud and distinct whistles, by the direction of Harrison. And both these witnesses say that the response to their signal from the South Bend, was two loud and distinct whistles. These statements are corroborated by other witnesses—one of whom was on the South Bend—and leave the evidence of Patterson wholly without support. It is also clear that he was altogether mistaken in his conclusion that the Goody Friends was coming up the Tennessee bend when her pilot first gave his signal. The testimony, as well as the probabilities of the case, sustain the inference that she was on the Arkansas side when the signal was given.

By the well-established rules of navigation on the Western rivers, the ascending boat has a right to indicate her preference as to her course of navigation. And, having done so, the descending boat is bound to conform to her choice as indicated by her signals, unless there are circumstances rendering it improper for her to do so. And if there are such circumstances, it is her duty so to indicate, that the other boat may be navigated accordingly.

This view of the evidence leads to the conclusion, beyond any reasonable doubt, that the pilot of the Goody Friends gave the proper signal, at the proper time, indicating his purpose of keeping up the Arkansas shore, and his desire that the descending boat should run down

on the other side. There is no controversy as to the right of the ascending boat thus to make known her preference; and it is clear that the descending boat, having accepted this signal, was bound to run in accordance with it. That the South Bend was not so navigated is established by the testimony of the witnesses before referred to, who concur in saying that she did not keep down the Tennessee shore, but kept nearer the Arkansas bar than the other shore. Indeed, it would result from the evidence of Patterson, the pilot of the South Bend, that such was his course of navigation. It was in accordance with what he says he understood the signals to require.

But if there was any doubt upon this point, there is one fact in the case that renders it entirely certain. I refer to the position of the wreck of the South Bend. It is true, there are several witnesses—some eight or nine in number—who express the opinion that the wreck is near the middle of the river, somewhat nearer the Arkansas than the Tennessee shore; but, on the other hand, there are eleven witnesses who locate the wreck at from seventy-five yards to one hundred yards from the Arkansas bar, and between three and four hundred yards from the Tennessee side. And they concur in the statement that it lies very near the usual track of an ascending boat. The great discrepancy in the estimates of the distance of the wreck from the bar as given by some of the witnesses for the libellants, and those examined by the respondents, is not easily accounted for. There is undoubtedly a wide difference in these estimates. And there is no reason to infer that the witnesses for either party have intentionally falsified the truth. Of the eleven witnesses who were offered by the respondents and interrogated on this point, there is an entire concurrence of opinion that the wreck lies much nearer the Arkansas than the Tennessee shore; and while they differ to some extent in their estimate of the distance, they are unanimous in the opinion that the place of the wreck is very near the line of navigation of an ascending boat, in that part of the river. This is really the material point of the inquiry; for it results inevitably that if the collision happened upon or near the usual track of an up-stream boat, the South Bend, as a descending boat, was out of her proper place. I can see no sufficient reason for rejecting the testimony of the numerous witnesses for the respondents who have testified on this point. They are men of great practical knowledge and experience in the navigation of the Mississippi, who passed the wreck frequently, both in ascending and descending the river. They had the best means of forming a correct judgment of its location, and of deciding whether it was, or was not, near the course of an up-stream boat. And they have testified on this point, with great intelligence, and without any motive, from interest or otherwise, to misrepresent the facts. Some of them state distinctly that the wreck was so near to the Arkansas bar that they deemed it unsafe in ascending to run their boats between the wreck and the bar. Without, therefore, going into a more minute examination of the evidence on this point, I can not hesitate to conclude that with reference to the signals, as proved to have passed between these boats, the South Bend was in fault in not keeping down the bend, at a distance not exceeding one hundred and fifty yards from the Tennessee shore.

To avoid the inference of fault in the navigation of the South Bend in not keeping the proper course of a descending boat, as indicated by the place of the wreck, it is insisted by the libellants that the South Bend was moved by the force of the blow received from the other boat some yards or more from the place of the collision toward the bar, and that this explains, in part, the proximity of the wreck to the bar. The witness, Patterson, states that the South Bend moved from fifty to one hundred yards after the collision before she sank. But this statement is not sustained, either by the evidence or the probabilities of the case. While it is undoubtedly true that the Goody Friends struck the South Bend with great violence on the larboard side, a little forward of the boilers, and as the result her stern swung quickly round, so that the boats were side by side, with their bows pointing up stream, it is impossible to conceive that the effect would be to move the stricken boat any considerable distance toward the bar. She was heavily laden, and sunk in two or three minutes after the boats came together. The intelligent experts who have been examined on this point state explicitly that the South Bend could not have moved half her length between the time of the collision and the time she sunk.

It is insisted by the proctor for the libellants, that the pilot of the South Bend navigated his boat in accordance with the signals as he understood them, and therefore was not in fault in keeping down near the bar. But as already remarked, Patterson is not sustained in his statement as to the signals; and as other persons on both the boats swear positively that there were two loud and distinct whistles from each of the boats, I am slow to believe that he had any ground for inferring that the signals were as he says he understood them. But, if it is conceded that he was at the moment under a misapprehension as to the signals, he failed in his duty as a vigilant pilot in not sooner ascertaining and rectifying his mistake. He states that the boats were about a mile or a mile and a half apart when he first discovered the Goody Friends, and that in a minute or two after he heard her signal. After the signals had passed, they were probably near a mile apart. Whatever may have been his impression before as to the position of the ascending boat, an attentive observation of her course would have satisfied him that she was coming up the bar shore; and, if he had a doubt on this subject, he should have stopped his engine and repeated his signal. There was time enough

to have done this before the boats were in dangerous proximity. But he failed altogether to repeat his signal, and only gave the order to stop and back when the boats were but four hundred yards apart, and when it was too late to avoid the collision. There was in this a failure of vigilance and of prompt action, that puts him clearly in the wrong.

It is urged, however, by the libellants, that if the South Bend was in fault in the particulars referred to, there were also faults in the management of the Goody Friends of sufficient magnitude to constitute this a case of mutual fault calling on the court for a decree apportioning the damages to each of the boats, in accordance with the familiar doctrine of admiralty in such cases. I will therefore briefly consider this point. It has already been stated that the Goody Friends, in coming up the Arkansas bar, was navigated not only in accordance with the signals which passed, but according to usage of the river as observed by pilots at that place. It seems clear, however, that the pilot is justly chargeable with the same want of vigilance and promptness, which is imputed as a fault to the other boat. When he noticed, as he was bound to notice, that the South Bend was pointing toward the Arkansas bar, and not going down the Tennessee bend, as the signals required, it was his duty to have repeated his signals, and to have stopped his boat, until he should obtain a proper understanding of the intention of the pilot of the descending boat. As in the case of the South Bend, so in that of the Goody Friends, there was time enough to have done this, and there is no sufficient excuse for not having done it.

But there is another question of graver import, and, perhaps, of more difficulty than any of those which have been noticed. That question is, whether the Goody Friends was not in fault in not stopping and backing before the boats were so nearly in contact, as that a collision was inevitable. The evidence is very clear, that the orders of the pilot first to stop, and then to back, were not given until it was too late to put the latter order in execution. The engineer of the Goody Friends states positively, that when the order to back was received by him, there was no time to back, as the boats were then in close proximity, and that his engine was not reversed at all. There seems to be no reasonable ground for doubt, as to the course and position of the boats at the time of the collision. It is impossible to account for the character of the injuries to the boats, without supposing that when they came together, the South Bend was quartering toward the Arkansas bar, and that the Goody Friends in her upward course, at a greater or less angle, was pointed toward the bar. There is, therefore, no foundation for the theory urged by the respondents, that the bows of both boats were quartering up stream when they came together. It is impossible from the evidence before the court to conceive that the boats could have been in such a position. Patterson swears that the Goody Friends struck his boat nearly at right angles, and that her course was nearly square across the river at the time. In this, however, he is contradicted by the witnesses for the respondents. And, if the manner of their approach, and the angle at which these boats came in contact, depended on the evidence solely of those who profess to have been eye-witnesses of the transaction, I should have been in great doubt as to these facts. Probably the weight of the testimony would have preponderated in favor of the respondents. But there is evidence in the case, which, if credible, must be conclusive of two facts: first, that the Goody Friends was nearly, if not altogether, under full headway when she struck the South Bend; and second, that she came into her nearly at a right angle. The evidence to which I refer is that of the witness Rooney. He was in the employ of the Missouri Wrecking Company, as a submarine diver, and with a boat and the usual apparatus for that purpose, visited the wreck a few days after the collision, with the view, if practicable, of raising the boat, and recovering the cargo. In this capacity, by means of a diving bell, Rooney made repeated visits to the sunken boat, fully explored every accessible part of the wreck, and succeeded in saving parts of the cargo. He states that he examined the breach made in the South Bend by the collision, and describes it as extending from fifteen to twenty feet along the larboard guard and upper portion of the deck, and downward some four feet below the water-line, and within a short distance of the knuckle, and inward about twelve feet, or two-thirds of the distance from the outer edge of the boat to the kelson, and that the whole breach is triangular in shape, the widest opening being at the top. He also states that the point where the Goody Friends struck the South Bend was on the larboard side, between the front end of the boilers and the forward hatch. He also testifies that the planks of the boat along the outlines of the break were not smashed or pushed in, and that, in his language, it is a clean cut. He gives it unequivocally as his opinion, that the South Bend was struck by the stern of the Goody Friends, nearly square, or at a right angle, and moreover, that she struck with great force. This he infers from the character of the cut or break, and the effect produced on such parts of the cargo as were struck by the stern of the boat in its inward progress. He states that a box on the deck of the South Bend, containing hardware, being mostly tools and implements of iron, was penetrated and split by the force of the blow, and also other facts, tending to prove the great violence of the collision.

These are probably all the facts stated by this witness to which it is material to refer. If he is credible, the facts which he states justify the conclusion already indicated as to the character of this collision. And there is nothing before the court impeaching the credibility of his evidence. His manner as

a witness indicated intelligence and candor. He has no interest in the event of this controversy, and so far as the court can know, no motive to depart from the line of truth. From his own statements, he has been long employed, as a diver, in raising sunken boats and cargoes, and seems to be entirely familiar with such operations. It is true, that in his explorations in this department, he has not the advantage of an ocular sight of the objects with which he has to deal in the water. The turbid water of the Mississippi does not enable him to see those objects, and he is necessarily guided in his explorations and labors solely by the sense of feeling. But an intelligent and experienced diver would probably find no difficulty in determining the forms and dimensions of the submerged subjects of his examination. In a word, I can perceive no sufficient reason for repudiating the evidence of the witness Rooney. That this testimony has an important bearing on a vital question connected with this controversy, is too clear for doubt. It throws a strong light on the inquiry as to the actual position of the boats at the moment of collision, and the probable angle at which the Goody Friends approached and ran into the South Bend. And thus viewed, it relieves the case from some of the doubts, in which the other evidence involved it.

It is too clear for controversy, that although the previous navigation of the South Bend was faulty, and she was not in the proper place of a descending boat, yet if it was in the power of the other boat to have avoided the collision, and from negligence or want of skill her pilot failed to do so, she must be held responsible for the consequences. It is a paramount law of navigation, that a collision must be avoided when it is practicable to avoid it. That one boat has been guilty of errors or faults will not justify another boat in the infliction of an injury to her, unless it was the result of an inevitable necessity. If, therefore, in the present case, the pilot of the Goody Friends, as these boats neared each other, and the danger of a collision was imminent, neglected any measure of precaution within his power, which, if resorted to, would have prevented it, or rendered it harmless, his boat must bear a portion of the responsibility of the injury. As before noticed, the respondents' theory of the collision is that the South Bend suddenly came out from the Tennessee shore, and steered nearly straight across the river, striking the Goody Friends nearly at right angles. But Rooney's evidence clearly contradicts this theory. It is impossible the break he describes could have been made in that way. On such a supposition, the break would have been made in the starboard side of the Goody Friends by the stern of the South Bend striking and cutting into her, whereas, the break was on the larboard side of the South Bend, between the fire-doors and the forward hatch. This strongly sustains the claims asserted by the libellants. The South Bend must have been pointed down stream at the time, quartering, perhaps, toward the bar, and while in this position the Goody Friends must have struck her, with force sufficient, and at such an angle, as to have made the clean inward cut described by Rooney. This conclusion is fortified by the fact which is clearly proved, that the South Bend, at least three minutes before the collision, had been backed, and had very little, if any, headway when struck. On the other hand, it is clearly established that the headway of the Goody Friends had not been checked, and that the entire force expended in the collision proceeded from her.

And now the question presented is, was it in the power of the pilot of the Goody Friends to have prevented the collision by stopping and backing his boat at the proper time? In this connection, it may be remarked that it is in accordance with the expressed opinion of one witness, sustained by the strong probabilities of the case, that if the latter boat had stopped and backed as soon as did the South Bend, either the collision would not have occurred, or, if it did occur, would have produced no injury to either boat. The witnesses, Harrison and Logan, who were in the pilot-house, say they did not notice when the South Bend started across from the Tennessee side. This certainly proves a want of vigilance on their part. It was their duty to have watched every movement of the descending boat till all danger of collision had passed away. But a still more glaring neglect of duty is found in the fact that when they became aware that the South Bend was crossing toward them, and that there was danger of a collision, they waited one minute before the order was given to stop and back. Now, if the Goody Friends was running at the rate of seven miles an hour, she would have run about two hundred yards in that minute, and would have been by that distance nearer the other boat than when the danger was perceived. The value of one minute of time, under these circumstances, can be readily appreciated. If the order to back had been given and obeyed one minute sooner, the headway of the boat would have been nearly, if not wholly, checked, and this disastrous collision would have been prevented. When the order was given, the boats were so near that the engineer of the Goody Friends states there was no time to back, and that his engine was not reversed. I can come to no other conclusion than that this delay in backing was the immediate cause of the collision, and that there is nothing in the facts of the case which excuse it. It involved the omission of a plain duty, and was not a merely harmless error.

In addition to the evidence referred to, sustaining, in my judgment, the conclusion that there was a culpable want of promptness in stopping and backing the Goody Friends, there are two collateral considerations which have significance as warranting the presump-

tion of fault in the management of that boat. The first is, that there was no sufficient look-out or watch on her deck prior to and at the time of the collision; and second, that the pilot was not competent or trustworthy.

As to the first point stated, there is no controversy as to the facts. It appears clearly from the evidence, that from the time the boats came in sight until after the collision, there was no one on the deck of the Goody Friends, except Harrison, the pilot, and Logan, and they were both in the pilot-house. Although the night was very dark, and the signals had given notice that a boat was approaching, the master was in his berth, and was only roused from his slumbers by the crash of the collision. The mate, whose watch it was, had deserted his post on deck, and was below warming himself at the stove, apparently giving no attention whatever to the navigation of the boat. Now, it has been several times ruled by the supreme court, and recognized by this court as law in collision cases, that it is not enough that there is a pilot in the wheel-house, but there must be some one on deck charged with the special duty of keeping a vigilant lookout, and that his proper position is not in the wheel-house, but on the forward part of the deck where the best opportunity is offered for observing approaching and passing boats, and who will be able to communicate promptly to the pilot such information as he may need to insure the safety of his boat. The cases sustaining this rule have been so often cited by this court as to render a special reference to them altogether unnecessary. The importance and pertinency of the rule, as applicable to the case before the court, will be apparent from the fact stated by Harrison and Logan as the only reason for not having sooner given the order to back, that in the wheel-house the view of the South Bend was temporarily intercepted by one of the chimneys of the Goody Friends, so that they were unable to determine the exact course of the former boat. While it is most probable this fact is stated as a mere excuse for the delay which occurred in giving the order to back, it is obvious that if such a difficulty had any existence in fact, it would have been obviated by the vigilance of a faithful lookout stationed on the forward part of the deck.

In regard to the incompetency of the pilot Harrison, there are some pertinent facts in evidence. It is in proof that he has a good deal of experience and knowledge as a pilot, and in former years was regarded as entirely competent and trustworthy in his profession; but for several years past his habits have been those of a very intemperate man, and as a result of his habits he has not been able to find regular employment as a pilot. This fact, of itself, casts suspicion on his competency and trustworthiness. In addition to this, it is proved that he was in a state of great excitement when he went aboard of the Goody Friends at Memphis, in the evening of the 12th of December, and was then, as some of the witnesses thought, in a state of intoxication. It is also proved that he was continuously on duty as pilot from the time the boat left Memphis, between seven and eight o'clock in the morning, until the occurrence of the collision the next morning, between five and six o'clock, with the exception of some seven or eight miles, during the running of which Logan had charge of the wheel, but Harrison stood by his side in the wheel-house. It is also proved by a witness, who was master of a boat which passed the Goody Friends during the night, that his attention was drawn to her by the wildness and unsteadiness of her movements. It may be proper to remark, that the facts that there was no sufficient lookout on the Goody Friends, and the doubtful competency and trustworthiness of the pilot, are not referred to as conclusive evidence that the fault of this collision is to be charged to that boat. They would not be sufficient to repel or overcome clear evidence that the collision was due solely to the mismanagement of the other boat. But, in the light of the authorities referred to, they justify a prima facie presumption of fault, and make it incumbent on the party against whom this presumption arises, to repel it by clear proof that the fault was on the other side.

As already intimated, the facts in this case prove with reasonable certainty that there were faults in the management of both of these boats, and that it is a proper case for the division of the damages which resulted from the collision. The specific acts of unskillfulness and negligence fairly chargeable to each, may be briefly stated as follows: The pilot of the South Bend was in fault: first, in crossing toward the bar on the Arkansas side, and attempting to descend at or near the place of an ascending boat, in violation of the signals which had been given, and of the usages of navigation applicable to that part of the river; second, if he misapprehended the signals and supposed them to have been different from what the evidence shows they were, he was in fault in not having sooner ascertained his mistake, and in not stopping his boat at once, and calling for a repetition of the signals to ascertain what was desired and intended by the ascending boat. The pilot of the Goody Friends was also in fault: first, in not exercising a proper vigilance in correcting the apparent misapprehension in regard to the signals, by stopping his boat in time and repeating his signals until there should be right understanding between the boats; second, in continuing under full headway until the boats were so near that a collision was inevitable, and neglecting to give the order to back until from the close proximity of the boats it was impossible to execute it; third, it is clear from the evidence, that there was no one on the deck of the Goody Friends for some time prior to, and at the time of the collision, charged with the

special duty of keeping a vigilant lookout, and giving the pilot timely information of any obstruction, difficulty, or danger in the navigation of his boat.

A decree will therefore be entered on the basis of mutual fault. But as it appears there was some injury sustained by the Goody Friends, and also some detention resulting from the collision, in relation to which I am not aware that there is any evidence before the court, the court will either now hear the evidence, or refer it to a commissioner to ascertain the injury suffered by that boat. If, however, the counsel can agree upon the amount, it will supersede the necessity of either course. This amount will be deducted from the loss sustained by the libellants, and a decree will be entered against the Goody Friends for one-half of the balance, with interest from the date of the collision.

Case No. 17,437.

WESTERN INSURGENTS' CASE.

[See Case No. 15,443.]

WESTERN MASS. INS. CO. (NORWICH & N. Y. TRANSP. CO. v.). See Case No. 10,363.

Case No. 17,438.

The WESTERN METROPOLIS.

[2 Ben. 212.] [1]

District Court, S. D. New York. March, 1868.

LIBEL FOR SEAMAN'S WAGES—ANSWER—PAYMENT AND RELEASE.

Where a libel was filed for seaman's wages, and the answer set up that the libellant had been paid in full before suit brought, and had released the vessel and her master and owners from all claim by a release under seal, and the libellant excepted to the answer because the date of the release was not set forth, nor the time when it was made, nor the consideration for which it was given, *held*, that the defence was payment, and the release was only evidence of it, and it was not necessary to state its date or consideration, or when it was given.

A. Nash, for libellant.

J. K. Hill, for claimants.

BLATCHFORD, District Judge. This is a hearing on exceptions to an answer. The libel is for seaman's wages. The answer sets up, that the libellant had, prior to the filing of the libel, been paid in full for all services rendered by him as seaman on the vessel, and, by a release, under seal, released the vessel and her master and owners from all claim and demand. The answer is excepted to because the date of the release is not given, or the time stated when it was made, or the consideration for which it was given. The claim in the libel is wholly for services rendered by the libellant as seaman on the vessel. The answer sets up, in proper form, payment in full to the libellant therefor, before the filing of the libel. The release is merely evidence of the payment, and is as good to that end, whether it was given at one time or another, or whether it bears one date or another. It was not necessary to state its date, or when it was given, or its consideration. On the trial, the claimants will be held to prove the payment as and when alleged. The release will not be conclusive evidence of such payment. The question which the proctor for the libellant seems to desire to raise, as to a settlement having been made in fraud of the rights of such proctor, cannot be raised by exception to this answer. His rights, if they have been violated, will be protected on the trial. The exceptions are overruled, but without costs.

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

Case No. 17,439.

The WESTERN METROPOLIS.

[2 Ben. 399.] [1]

District Court, S. D. New York. May, 1868.[2]

COLLISION — STEAMER PORTING IN IGNORANCE OF SCHOONER'S COURSE—LOOKOUT—SPEED.

1. Where a schooner, heading west-southwest on her starboard tack, running over from Horseshoe shoal, near Nantucket, toward the Cross-Rip light, was struck on her starboard side by a steamer which had come up, bound east, till near the schooner, the steamer's helm having been at once ported, when the schooner was seen ahead, and kept so till the collision occurred: *Held*, that the steamer was in fault in porting, whether it was done wilfully, or in ignorance of the schooner's course, for, by that porting she followed up the schooner and struck her.

2. The evidence of the pilot of the steamer, that he saw the schooner from a quarter to a half mile off, is more reliable than that of other witnesses who came out suddenly into the darkness, that she could not be seen so far off.

3. On the evidence, the night was light enough to have enabled the steamer to discover the schooner sooner than she did, if a good lookout had been kept, and, if it was not light enough, the steamer was running at too great speed.

4. The schooner had a light set, and kept her course, and was not in fault; and that the steamer was liable for the collision.

Benedict & Benedict, for libellant.

W. R. Beebe and C. Donohue, for claimants.

BLATCHFORD, District Judge. This is a libel for a collision, which occurred about four o'clock a. m., on the 17th of March, 1864, between the schooner Triumph, owned by John Low, Jr., which was bound from Gloucester, Massachusetts, to New York, with a cargo of fish, and the steamer Western Metropolis, a side-wheel steamer, bound from New York to Boston. The collision took place a short distance east by south, or east-southeast, from the Cross-Rip lightship, near the Nantucket

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

[2] [Affirmed in Case No. 17,441.]

shoals. The schooner was, at the time, close-hauled on her starboard tack, for the purpose of beating through the channel to the northward of the lightship, the wind being northwest by west, and the schooner heading west-southwest, which was one point to the leeward of what would have been her proper course at that place with a fair wind. The steamer struck the schooner on the starboard side of the schooner, and the schooner very soon sank and was totally lost. The crew of the schooner consisted of her captain, a mate, a steward, and three seamen. The captain was at the wheel. Two of the seamen were killed, or drowned by the collision. The captain, the mate, and the remaining seaman, have been examined as witnesses.

The person who had charge of the steamer, in the capacity of pilot, at the time, and who was at her wheel in the pilot-house, giving orders as to steering her, was not a licensed pilot, and was hired as pilot for the steamer for that particular trip. He had never been permanently employed on a steamer as a pilot, and it does not appear that he had ever before piloted a vessel through the passage where the collision took place, or ever before been through that passage. He says, that, at the time of the collision, it was dark and hazy; that the man on the forecastle reported a sail right ahead; that he then told the quarter-master, who was with him at the wheel, to port the wheel, and rang the bells to stop and back the engine, and did this as quickly as it could be done; that he saw the schooner one and a half or two minutes before she was struck, and that the schooner was not more than from a quarter to a half of a mile off when he first saw her; that he used his night glass, and with it got a full view of the schooner; that, as soon as he heard the report of the lookout, he rang the bells, and put the glass to his eye; and that he saw the schooner with the naked eye, before he used the glass.

The master of the steamer says, that the night was dark and hazy; that he was in his berth in the pilot-house, awake, when he heard the report of the lookout, "Sail on the port bow;" that the pilot gave orders to port the helm instantly, and then rang the bells to stop and back; that he, the master, jumped to the wheel, and found it hard-a-port; and that the collision took place about the time the last bell was struck.

The quarter-master, who was at the wheel with the acting-pilot, says, that the night was dark, thick, and hazy, at the time; that the lookout on the forecastle cried out, "A sail ahead;" and that the order was then given, as quickly as possible, to port and to stop and back.

A hand, who was on the bridge, says, that the report was "A sail;" that the night was dark and cloudy; that, when the sail was reported, the schooner was the steamer's length off; and that the wheel of the steamer was ported, and her engine stopped and backed.

The lookout on the forecastle, who reported the sail, says, that the night was rather foggy, and there was quite a vapor arising from the water; that, when he caught sight of the vessel, it was too thick for him to tell what sort of a vessel she was; and that, just before the steamer struck her, he saw that her boom was over to her port side.

It is manifest, on this evidence, that the steamer's helm was ported in entire ignorance on the part of those on board of the steamer as to which way the schooner was heading, or even what sort of a vessel she was. This was a fault on the part of the steamer, and it was a fault which led to the collision, for, it is apparent, that, if the steamer had not ported, she would have gone under the stern of the schooner. The schooner kept on her course, close-hauled, heading west-southwest, and the steamer, by porting, and keeping her helm hard-a-port, persistently followed up the schooner, and ran into her and sank her. Whether this was done by the steamer wilfully or ignorantly makes no difference. If she knew how the schooner was heading, and then ported, the act was wilful, and was a fault, as she was bound to keep out of the way of the schooner. If she did not know how the schooner was heading, and ported in ignorance, the act was equally faulty. It grew out of the incompetence and mismanagement of the man at the wheel.

The story as to the porting is fully confirmed by the testimony of those on board of the schooner. They saw the steamer's lights some distance off, bearing west half south, just after the schooner had changed to the tack she was on at the collision. They first saw her two white lights, one high up and one on the bow, the two being in range. Then, as the schooner went on heading west-southwest, the steamer's green light came into view, then her red light came into view, so that both the green and the red were visible, and then the green disappeared and the red alone was visible, and this continued so till the collision. This shows that the steamer was swinging to her own starboard on a port helm, and swinging toward the schooner as the schooner went on close-hauled. The testimony from both vessels entirely concurs, and shows that this porting of the steamer's helm caused the collision. This is sufficient to condemn the steamer in damages. The Louisiana [Case No. 8,537].

The only defence set up in the answer is, that the schooner changed her course, and that, as soon as the schooner could, with all proper caution, be seen from the steamer, the steamer was stopped and backed, and every exertion made to avoid the collision. It is proved that the schooner did not change her course.

An effort was made on the part of the claimants to show that the night was so dark and thick and hazy that the schooner could not have been seen at any greater distance than she was seen. There are several answers to this position: (1) She was, in fact,

seen at a distance far enough off to have avoided her, if the steamer's helm had not been wrongfully put to port. (2) The night was not so dark or hazy as to prevent the schooner being seen at a greater distance, if a proper lookout had been kept on the steamer. (3) If the night was as thick and hazy as claimed, the steamer was running too fast.

I regard the evidence of the passenger, the engineer, and the storekeeper, as to the thickness of the night, as of very little weight. They came out suddenly into the darkness, under circumstances which made it impossible for them to judge as to how far a vessel could be seen. The evidence of the pilot, as to how far off he did in fact see the vessel, is much more reliable. He had been out in the night, and his eyes were gauged to its condition. He does not pretend, nor does any one on the steamer, that the collision would have happened if the steamer had not ported, after seeing the schooner, in ignorance of her course.

That the night was not a foggy one, is shown, also, negatively, by the fact that the steamer was not using her steam-whistle. No witness pretends that she was, except the lookout on the steamer, who, on his examination in open court, after the case had closed, he not having heard any of the testimony of the other witnesses, or any part of the trial, fabricated the story that the steamer kept blowing her fog whistle because the fog was so thick.

I am also satisfied, from the evidence, that the schooner had a light set in her starboard fore-rigging, and properly burning at the time of the collision.

There must be a decree for the libellants, with a reference to a commissioner to ascertain the damages.

[NOTE. On appeal to the circuit court the above decree was affirmed. Case No. 17,441. An appeal was taken to the supreme court, and, on motion and affidavit, commissions were issued therefrom to take further testimony. See 12 Wall. (79 U. S.) 389. It does not appear, however, that the cause was ever brought to a hearing.]

Case No. 17,440.

The WESTERN METROPOLIS.

[6 Blatchf. 210.] [1]

Circuit Court, S. D. New York. Oct. 9, 1868.

COLLISION—STEAMER AND SAILING VESSEL—ONUS OF PROOF—CHANGE OF COURSE IN EXTREMIS.

1. Where it is the duty of a steamer to avoid a sailing vessel, the onus is on the steamer to show, in case of a collision, that the sailing vessel did not keep her course, or to show some other fault on the part of the sailing vessel, that contributed to the collision.

[Cited in The H. P. Baldwin, Case No. 6,812; The Cyclops, 45 Fed. 124.]

2. Where the change of course by the sailing vessel is made under impending danger and in extremis, the steamer is responsible for it.

[Cited in The H. P. Baldwin, Case No. 6,812; Farr v. The Farnley, 1 Fed. 637; Ladd v. Foster, 31 Fed. 831.]

3. The duty of a steamer, at night, not to approach too near to a sailing vessel, in meeting her, when there is room to give her a wide berth, enforced.

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

This was a libel in rem, filed in the district court, by the owners of the schooner Mary C. Town, against the steamer Western Metropolis, to recover for the damages sustained by the schooner, in a collision which happened between the two vessels, about 8 o'clock p. m., on the 10th of February, 1864, on the Potomac river, a few miles above Blackstone's Island and lighthouse. The district court dismissed the libel [case unreported], and the libelants appealed to this court.

Dennis McMahon, for libelants.
Charles Donohue, for claimants.

NELSON, Circuit Justice. The steamer was coming up the river. The schooner was going down, with the wind northerly, so that she had it nearly full, and was moving at the rate of about eight knots an hour. The steamer was going at half speed, about five knots, intending soon to anchor. The night was not dark, the steamer having been seen some four or five miles ahead, by the hands on the schooner, and the schooner having been seen by the steamer some one and a half or two miles off, though there is some diversity of opinion among the hands on board of the steamer. Each vessel, however, saw the other in time to adopt, and follow out, proper measures to avoid the disaster. As it was the duty of the steamer to avoid the schooner in passing, assuming that the latter kept her course, the onus rests on the steamer to show that the schooner did not keep her course, or to show some other fault that contributed to the collision. This the steamer has undertaken to do; and she insists, that the schooner changed her course, as the two vessels approached each other, and thereby defeated the movement of the steamer, by starboarding her helm, to pass the schooner in safety, and go under the schooner's stern, the latter porting about the same time, and giving way in the same direction. The whole defence turns upon this position. The court below found the schooner in fault, and dismissed the libel on this ground. After the best examination I have been able to give to the case, I regret to say, that I cannot concur in this opinion. I am forced to the conclusion, that this movement of the schooner was made under impending danger, and in extremis, and was one for which the steamer must be held responsible.

The clear weight of the proofs is, that the

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

steamer was within from 300 to 400 yards of the schooner, and nearly dead ahead, when the latter ported her helm. The combined speed of the two vessels was about 12 or 13 miles an hour. They must have come together in a minute and a quarter, or less than two minutes, after the change of course by the schooner. There were five hands on the schooner, including the master, all of whom were on deck and witnessed the collision, and maintain this account of it. In addition to this, five of the hands on board of the steamer, including the pilot, have been examined for the libellants, and confirm it. So do the master, the second mate, and the wheelsman of the steamer, who were examined for the claimants. The master, Hilton, says that the schooner was a mile, more or less, off when he discovered her, but he would not name the distance; that it was a very short time afterward, but he would not say how short, that the collision occurred; and that it occurred a very short time after the schooner changed her course, but he would not say how short, although pressed by the counsel for the libellants. This master seems to have been quite uninformed as to his duties. He says that if two vessels, one a steamer and the other a sailing vessel, are approaching head and head, it is the duty of each to port and go to the right; and that there is no distinction between a steamer and a sailing vessel and two steamers, as to the duty. The second mate, Cowen, says, that he went up on the forecastle, on hearing the schooner reported; that he then first saw her; that it was about five minutes after he saw her that the collision occurred; that the schooner was about a quarter of a mile off when he first saw her; and that she was very close when she crossed the steamer's bows. He adds: "As near as I can judge, she, the schooner, was not more than the length of our ship, 250 or 300 feet off, when she altered her course." Again, he repeats, in answer to the question: "Q. About how far off was the schooner from you when she commenced to put her helm to port? A. I judge somewhere between 250 and 300 feet." The quartermaster, Kain, who was at the wheel, says, that the schooner was a very short distance off when he first saw her; and that the master blew the whistle a very short time after this. To the question, "Q. How long was it after blowing the whistle, that the schooner kept away," he answers, "A. Right away. Q. How soon? A. Quick as thought. Q. She had not kept away before that, had she? A. No, sir." The same witness states: "I put the wheel hard-a-starboard by his, the captain's, orders. Q. Before or after the whistle blew? A. Immediately after the whistle blew."

Now, this testimony strongly corroborates the account of the collision given by the hands on the schooner. To them the steamer appeared to be approaching nearly ahead, and, as she neared them without any indications of a change of course, it is not surprising that some alarm should have existed on board of the schooner. Her master says, that, in this state of anxiety, and when a collision seemed almost inevitable, he heard the whistle of the steamer—one long blast—which he took to mean, or indicate, that the schooner should go to the right, and that he immediately ported her helm and bore away. The hands on the schooner say, that, at this point of time, the steamer was only some 300 or 400 yards off. The master of the steamer says, that the collision was a very short time after the change of the course of the schooner. The second mate of the steamer says, that the schooner was only 250 or 300 feet off when the change took place; and the quartermaster, who was at the wheel on the steamer, says, that the schooner did not change her course till after the captain blew the whistle. This last witness also says, that the schooner was but a very short distance off when he first saw her; that the whistle was blown a very short time after this; that it was still later when the schooner first changed her course; and that he did not starboard his helm, or make any change in the course of the steamer, until after the whistle was blown. The pilot of the steamer agrees with the hands on the schooner, that the latter was not over 300 yards off when she changed her course. According to his account of the transaction, the schooner, when her light was first discovered, was supposed by him, and the master, to be a vessel at anchor, and they steered directly toward her, till they discovered she was under way, when they starboarded their helm.

Upon the whole, I feel a very strong conviction, on the evidence, that the steamer, before changing her course, had approached so near to the schooner, that there was not only a well-grounded fear of a collision, but actual danger of it. This must be so, whether the weight of it be regarded as establishing that the change of course by the steamer took place when the distance between the two vessels was 300 or 400 yards, or according to the master of the steamer and some of her hands, a very short time after the schooner changed her course, or when the schooner was some 250 or 300 feet off, as stated by the wheelsman. It is not surprising, when we take into account the disparity in the size and momentum of the two vessels, the steamer being of 2,500 tons, and the schooner of 150, that, on their approaching within 300 or 400 yards distance of each other, which, at their combined speed, would cause them to meet in less than two minutes, or, according to the distance as fixed by the wheelsman of the steamer, within about as many seconds, some alarm should exist on board of the schooner; and, even if her change of course was in a direction that contributed to the disaster, which is doubtful, the fault must be attributed to the steamer. The river, at the place of the collision,

is from four to five miles wide. There was, therefore, no excuse for the near approach of the steamer to the schooner, in passing her. There was abundance of room, clear of all obstructions, for the steamer to pass, and give to the schooner a wide berth. The truth seems to be, that the schooner was not discovered by the steamer until she was very near. The master, though strongly pressed, would not say that she was a mile off; and some of the hands say half a mile. The evening was not dark, and a vessel's lights could have been seen two or three miles without difficulty. Some ill feeling seems to have existed between the master and the pilot of the steamer. Both of them, according to the proofs, were engaged in giving orders at the time of the disaster; and the master strongly intimates that the pilot was incompetent. Still, the wheelsman says that he took his orders from the pilot, and the lookout says that he communicated with the pilot, and even the master, Hilton, says, that he obeyed the pilot's orders.

The decree below must be reversed, and a decree be entered for the libellants, with a reference to ascertain the damages.

Case No. 17,441.

The WESTERN METROPOLIS.

[7 Blatchf. 214.] [1]

Circuit Court, S. D. New York. April 23, 1870.[2]

COLLISION—SCHOONER AND STEAMER—CHANGE OF COURSE—SPEED.

1. Where a schooner, closehauled, was crossing the course of a steamer, *held*, that it was the privilege and duty of the schooner to keep her course, and the duty of the steamer to avoid the schooner.

2. The following conclusions arrived at in respect to the collision in this case, which occurred at night, between a schooner and a steamer: If the night was either so dark or so foggy that the steamer, by slowing, stopping and backing as soon as she discovered the schooner, could not avoid the collision, then the steamer was moving at too great speed.

[Cited in The Colorado, Case No. 3,028; The City of Panama, Id. 2,764; The Alberta, 23 Fed. 812; The Oregon, 27 Fed. 755.]

3. It was a fault in the steamer, when she saw the schooner and the danger of collision, to port her helm, in ignorance of the direction in which the schooner was heading.

4. If the helm of the steamer had been kept steady, the fact that the course of the schooner was across the course of the steamer, to the starboard of the steamer, would soon have appeared, and also the fact that the proper change, if any, was for the steamer to starboard.

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

[This was a libel by John Low, Jr., owner of the Triumph, to recover damages for a collision with the Western Metropolis. From a decree of the district court in favor of libelant (Case No. 17,439), an appeal was taken to this court.]

Erastus C. Benedict and Robert D. Benedict, for libelant.

William M. Evarts, for claimant.

WOODRUFF, Circuit Judge. It is quite unnecessary to recapitulate the evidence in this case, or discuss the questions of fact in relation to which there is any conflict of testimony. The schooner Triumph, of which the libellant was owner, laden with fish, was, at about four o'clock in the morning of the 17th of March, 1864, on her voyage from Gloucester, Massachusetts, to New York, at a place eastwardly from the Cross Rip Light, near Nantucket Shoals. The wind was northwest by west, and, after beating out her port tack, she had tacked to the southwest, and, while on that starboard tack, closehauled, she was seen by the lookout on the steamer Western Metropolis, which was then on her passage from New York to Boston, and was running on a course about east. She was immediately reported to the pilot, and seen by him and the man at the wheel dead ahead, or a little on the steamer's port bow. The evidence of all the witnesses, as well those produced by the libellant as those produced by the claimant, establishes very satisfactorily that, if the steamer had kept her proper course, she would have passed to the windward of the schooner, at a perfectly safe distance astern of her. Although there is much discrepancy as to the state of the atmosphere, and the distance at which a sailing vessel could be seen, and, also, as to whether the schooner had a light burning in her rigging, the testimony of the pilot himself shows that he in fact saw the schooner in season to take the proper manœuvre, had he known whether any change of course was necessary. In entire ignorance whether the schooner was approaching him or going from him on a direct line, or was crossing to the southward or to the northward, the pilot of the steamer gave the order to port her helm, and it was hove hard-a-port. Seeing the danger of collision, he next ordered the engine to be slowed, stopped and backed, which was accomplished, but the headway of the steamer was such that a collision ensued, which sank the schooner, and she with her cargo were wholly lost, and with her two of her seamen.

The grand mistake of porting the helm of the steamer swung her around to starboard, so as to place her in pursuit of the schooner, or to bring her on a line converging to the schooner's course, and meeting it precisely at the place of collision. Whatever view be taken of various aspects of the case, the steamer was wholly and solely in fault. The schooner was closehauled on her starboard tack, and it was not merely her privilege, but, in such circumstances, in the night, in

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

[2] [Affirming Case No. 17,439.]

view of the near approach of the steamer, it was her duty to keep her course, in order that the steamer might not be embarrassed in doing her duty, which was to avoid her, and this the schooner did.

1. If the night was either so dark or so foggy that by slowing, stopping and backing as soon as the schooner was discovered the collision could not be avoided, then the steamer was moving at too great speed. The proof is, however, I think, decidedly, that she saw the schooner at a distance quite sufficient.

2. When she saw the schooner and the danger of collision, it was a palpable fault to port the helm, not knowing which way the schooner was heading.

3. If the helm of the steamer had been kept steady, an observation of much less than a minute would have shown that the course of the schooner was, as in truth it was, across the course of the steamer, to the southward, and would also have shown that, if any change was necessary or prudent, it was to heave the helm to starboard.

Independently of the conflict as to whether the schooner had a light or not, or whether there was a fog or not, the case seems to me too clear to demand further discussion.

The decree must be affirmed, with costs.

[An appeal was taken to the supreme court, and, on motion and affidavit, commissions were issued from that court to take additional testimony. 12 Wall. (79 U. S.) 389. It does not appear, however, that the case was ever brought to a hearing.]

WESTERN METROPOLIS, The (TOWN v.). See Case No. 14,114.

WESTERN R. CORP. (AYRES v.). See Case No. 689.

Case No. 17,442.

In re WESTERN SAV. & T. CO.

[4 Sawy. 190; [1] 17 N. B. R. 413.]

District Court, D. California. Feb. 15, 1877.

PETITION IN BANKRUPTCY — ALLEGATION OF INDEBTEDNESS—INSUFFICIENCY—TRANSFER OF CLAIM—DISMISSAL OF PETITION.

1. Where the petition contained an allegation that the debtor owed a debt, but no allegation that it was owed to the petitioning creditor, *held*, insufficient.

2. Where the petition of a petitioning creditor has been dismissed for insufficiency, but leave has been given him to file with the other creditors an amended petition, which has been filed accordingly, and it appears that at the time of signing such amended petition he had ceased to be a creditor, having assigned his demand, *held*, that the amended petition must be dismissed.

Thompson & Hart and J. Naphtaly, for petitioning creditors.

T. B. Bishop, Geo. Cadwalader, and H. H. Haight, for respondents.

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

HOFFMAN, District Judge. A petition having been heretofore filed against the above corporation, a motion was made to dismiss it on various grounds particularly set forth in the papers. The motion having been fully argued and submitted, the objections raised on behalf of the respondent were in part sustained, and the petition was ordered to be dismissed, unless the petitioner should, within ten days, file an amended petition. The amended petition has accordingly been filed, together with amended proofs of debt, and a motion to dismiss the proceeding has been again made, argued and submitted.

The first objection is to the allegation in respect to the indebtedness due C. W. Sherwood, one of the petitioning creditors. The petition avers that "the demand of the said C. W. Sherwood consists of a deposit made with the Western Savings and Trust Company, amounting to the sum of $580.17, in United States gold coin, and interest thereon, and is wholly unpaid." This allegation is obviously insufficient. The object of the averment is to show to the court: (1) That the alleged bankrupt owes the debt; and (2) that the debt is owed to the petitioning creditor. The allegation above cited may be sufficient to show that a deposit of $506.17 was made with the company, and that it is unpaid; but it does not aver that Sherwood made the deposit, or that the original depositor has assigned the demand to him, or any other fact which connects him as owner with the indebtedness. The averment thus wholly fails to establish the fact that Sherwood is a creditor of the company.

It is contended, on the part of the petitioning creditors, that this objection should have been taken on the previous motion to dismiss, and that it is now too late to urge it. To this the counsel for the company reply, that in point of fact it was so taken and insisted on. I consider the inquiry immaterial. By leave of the court, a new and amended petition has been filed. It in effect supersedes, and is a substitute for, the original petition. Any objection to which it is obnoxious can now be taken, irrespective of the fact that the former petition was open to the same objection, and whether that objection was or was not made on the former motion. The amended petition forms now the foundation of the whole proceeding; not in the sense that the proceeding is to be deemed to have been commenced at the date at which it was filed, but in the sense that all subsequent proceedings must rest upon it, and that its allegations must be sufficient in law to authorize the adjudication which it prays for.

2. It is objected that the proof of debt of the petitioner, E. W. Bradford, is not in accordance with form fifty-five, prescribed by the supreme court. The deposition avers that the said company was, on the second day of October, justly indebted unto the said deponent, etc. It does not state that the company still is so indebted to him. The allegations of

the petition are equally defective. It is alleged "that the demand of the said E. W. Bradford consists of several deposits made at various dates, with the said Western Savings and Trust Company as a bank, amounting to $64.60 in United States gold coin, and that the same is wholly unpaid." Neither the petition nor deposition states that the petitioner is now a creditor of the company. For the reason already given, the objection must be sustained. But, in this instance, the question is not merely whether the petition and deposition have been drawn with technical precision and certainty of averment.

It appears, that subsequent to the filing of the first petition, and after the court had given leave to the petitioning creditors to file an amended petition and proofs of debt, Bradford assigned his demand to one Matthews, who is now its admitted owner. Matthews thereupon gave notice of his purchase of the claim to the attorney for the creditors, and advised them that he declined to avail himself of the permission to amend, or to participate any further in the proceedings; and that he withdrew from them all authority to use his name or that of Bradford in the matter, and he forbade the attorneys from acting in any manner for himself or Bradford with reference to the claim, of which he had become the owner and holder. It seems that notwithstanding this transfer, Bradford has joined the other creditors in signing the amended petition, but has necessarily modified the allegations of his deposition and of the petition to conform to the actual facts. Matthews thereupon obtained an order upon the petitioning creditors to show cause why the amended proof of debt filed by Bradford should not be stricken from the file, and why the proceedings, so far as Bradford is concerned, should not be dismissed, and his name stricken from the amended petition. The question thus presented was fully argued by counsel, and submitted simultaneously with the motion to dismiss on the part of the company. The petition of Matthews, on which the order to show cause was issued, sets forth the facts already detailed, and in addition, states the circumstances which induce him to believe that the interests of the creditors will not be promoted by a further prosecution of the proceedings in bankruptcy. It avers that the affairs and assets of the company are now in the hands of a receiver, appointed by the district court of the Nineteenth judicial district of this state, on the seventh of July, 1876. That said receiver is engaged in disposing of the property of the company for the purpose of dividing the proceeds among its creditors; that he has become familiar with its affairs, and can much more speedily and satisfactorily than any other person wind up and settle them; that the receiver has commenced an action against the late president of the company and his bondsmen for the sum of $16,000, alleged to have been improperly taken from said corporation. That Grigley, a petitioning creditor, is one of the bondsmen sued, and that he believes the object and motive of the proceeding in bankruptcy is to prevent the prosecution of the said action on this point by taking the affairs of the corporation out of the hands of the receiver. The petitioner further represents that the necessary result of an adjudication in bankruptcy against the corporation will be a suit between the assignee in bankruptcy and the receiver, which will cloud the title to real estate, which should be sold as soon as practicable, and consume the assets of the estate in unnecessary litigation. No affidavits in denial of these allegations have been filed, and the case has been argued on the assumption of their substantial correctness.

It is contended on the part of the petitioning creditors that Bradford, having signed the petition with full knowledge of the facts, could not thereafter be allowed to withdraw from the petition and have the proceedings dismissed as to him, and thus break up the quorum and deprive the court of jurisdiction; and that Matthews, who has succeeded to his rights, stands in the same position. In support of this view, In re Heffron [Case No. 6,321], In re Sargent [Id. 12,361], In re Frost [Id. 5,134], and In re Mendenhall [Id. 9,424], are cited.

The question, whether a creditor, who has united in the petition, has, up to the moment of adjudication, the absolute right to defeat the proceedings by withdrawing his name from the petition, it is unnecessary to discuss. No authority has been cited to show that the court may not, in its discretion, permit him to do so. And if a decision on that point were requisite I should be compelled to regard this case as presenting very strong circumstances for the exercise of the discretionary power of the court.

But the conclusive answer to the objection of the petitioning creditors is, that Bradford has never acquired the status of a petitioning creditor. He has attempted to do so, but he has failed to advise the court by apt and appropriate allegations and proofs that he has any right to intervene in the proceeding. His petition was therefore ordered to be dismissed, unless within a given time he should, in conjunction with the other creditors, file an amended petition sufficient to support the proceeding.

An amended petition has accordingly been filed, and his signature attached to it. But it appears by his proof of debt and by testimony aliunde that at the time the deposition was signed and filed he had ceased to be a creditor. The amended petition, therefore, on which an adjudication is prayed for, and on which the adjudication and all future proceedings in the case must rest, is not only not drawn in the form prescribed by the supreme court, but it cannot now be so drawn consistently with the admitted facts of the case.

I consider this objection fatal to the petition. I do not deem it necessary to examine

particularly the objections to the allegations of the petition in respect to the demands of other creditors, and the proofs of debt filed by them. I may observe, however, that, in my opinion, where the petition and proof of debt show that a petitioner is the holder and owner of a certificate of deposit issued by the bank upon a deposit made with it by him, or by a party who has assigned the certificate and claim to him, and that the sum so deposited remains due and unpaid, no further statement of the consideration of the debt need be made, nor any more particular description of it given.

The petition must be dismissed.

Case No. 17,443.

WESTERN TRANSP. CO et al. v. The GREAT WESTERN et al.

[4 West. Law Month. 281.]

District Court, N. D. New York. June, 1862.

DISTRICT COURTS — ADMIRALTY JURISDICTION — FOREIGN VESSELS—ALLOWANCE OF SALVAGE.

1. Under the constitution of the United States and the judiciary act of congress of 1789 [1 Stat. 73], the district courts of the United States have plenary jurisdiction in admiralty of all cases arising on the Great Lakes, and other waters connected with them and the ocean, wherever practicably navigable, as well above as below the flow of the tide from the sea.

[Cited in The Leonard, Case No. 8,256.]

2. The restriction in the judiciary act of 1789, confining jurisdiction to waters navigable from the sea by vessels of 10 tons burden or more, applies, exclusively, to seizures under the laws of impost, navigation, or trade, in matters of revenue only.

3. This general jurisdiction is not abridged by the act of 1845 [5 Stat. 726], which was passed to extend the jurisdiction of district courts. It is possessed entirely independent of that act. The jurisdiction of the district court of the United States in case of salvage is not confined to American property, nor to cases occurring in American waters. The amount to be allowed for salvage is not prescribed by any rule, or limited to any proportional part of the value of the property saved, but rests entirely in the sound discretion of the court; and is dependent on the labor, perils, and dangers incurred by the salvors, and the good faith that they exercise towards the owners of the property saved. The want of good faith may be such as to reduce the salvage to a very small sum, or to destroy all claims to it.

I. Hubbell and E. Cook, for libelants.

G. B. Hibbard, for respondents.

HALL, District Judge. This is a cause of salvage, prosecuted by the owners, the master, and a portion of the crew of the steamer propeller Illinois, an American vessel of about 500 tons burden. The schooner Great Western, a Canadian vessel of about 192 tons burden, whilst on a voyage from Kincardine, Canada West, to Montreal, in Canada East, with a full cargo of wheat, collided with the American schooner Milwaukee Belle, of about 368 tons burden. The collision occurred in Canadian waters, about 25 miles east-northeast from Rondeau, on the northern shore of Lake Erie, on the 5th of June, 1861, about half-past two o'clock in the morning. The night was very dark and rainy, and the signal lanterns of the Western were broken and their lights extinguished when the vessels struck. The Western was struck on her port bow by the luff of the starboard bow of the Belle, and the sterns of the two vessels then swung around until the two vessels lay side by side. The wind was blowing hard from the northeast, and there was a heavy sea. The two vessels were chafed and pounded together by the wind and sea, and the boat and one of the davits of the Great Western, and also a portion of her headgear, were carried away. The bowsprit was probably strained or sprung by the collision, but was not carried away until after the vessels finally separated. Immediately after the collision, and while the vessels were chafing and pounding, the pumps of the Western were tried, and it was found that she had taken in considerable water. After the pumps had been in operation for a very few minutes, one of the crew of the Western, after an examination of the fore peak, reported to her master that there were three inches of water over her ceiling. Efforts were made to separate the vessels, and in a short time the Belle, which was light—having only about 100 tons of coal on board as ballast—commenced ranging ahead of the Western. The officers of the latter then requested the master of the Belle to throw them a hawser and take them in tow. A hawser was accordingly sent on board the Western, and made fast to the foremast, and her mate, following most of the crew who had, without orders, already gone aboard the Belle, in the belief that the Western was so much injured and was taking in water so rapidly that there was danger of her going immediately down, endeavored to make hawser fast to a timberhead of the Belle. The master of the Western followed his mate on board the Belle, and desired the master of the latter vessel to take the former in tow. This was assented to, but, in the darkness, hurry, and confusion, the mate and those assisting him failed to get more than a single turn of the hawser around the timber-head, and, as the Belle ranged ahead, the hawser slipped, and for that reason was not made fast to the Belle. The vessels then separated, the hawser of the Belle still remaining fast to the foremast of the Western, and the master and the whole crew of the Western being on board the Belle. The master of the Western then requested the master of the Belle to keep near the Western until daylight. This he at first consented to do; but, on examining his vessel, and finding that two of the bolts of his chain-plates had been broken, he declined to do so, fearing he might lose his masts, and perhaps his vessel. He therefore told the master of the Western that it was sufficient to lose one vessel, and, putting his vessel before the wind, he proceeded up the lake. The Western was thus left by her master and crew, about three o'clock

in the morning, without any light or any person on board, and with the scuttle covering the entrance to the forecastle, and one of the slides covering the entrance to her cabin open. Through these openings she took in considerable water, as the waves broke over her; and it is possible, and indeed probable, that she was leaking slightly near the stem. In the morning she was out of sight from the Belle, and it is quite apparent that her master and crew believed there was scarcely a possibility that she was still above water, and that they entertained no expectation of again returning to the wreck. About two o'clock in the afternoon of the same day, or about eleven hours after she was thus abandoned, the Western was discovered by the officers of the Illinois. She was about 15 or 20 miles southeasterly from Rondeau Point, and was probably from 6 to 10 miles southeasterly of the line of the proper course of the Illinois, and of the ordinary track of vessels proceeding to Buffalo, to which port the Illinois was bound. The Illinois at once proceeded to the Western, and the mate and four men were immediately sent on board the wreck. They found her deserted, the bowsprit broken off near the stem, and floating alongside, her main gaff broken, her wheel broken to pieces, her rigging partially carried away, with spars, rigging, sails, and other things in a confused mass on deck, where they had been rolling and sliding about, chafing the Western's deck. The vessel was clearly in an unnavigable and most dangerous condition, and, if not fallen in with, would soon have gone down. On further examination, it appeared that there were about five feet of water on the floor of her forecastle, her cabin floor was wet, and she was so full of water that at her waist her sides were but little above the water of the lake. Though the wind had gone down, the dead sea still broke through her scuppers, and ran across the deck. She had settled down considerably by the head, and the water was running into her forecastle through a small opening made by the starting of the hood ends from her stem. In her then condition she would not probably have lived more than six hours in a perfectly calm sea, and she might have gone much sooner. The pumps of the Western were rigged and worked. Some other assistance was sent from the Illinois, and, after pumping two or three hours, she was considered safe to tow. She was then—between 4 and 5 o'clock in the afternoon—taken in tow by the Illinois, and the two vessels reached Port Stanley between 11 and 12 o'clock the same evening. Her pumps were kept in operation almost continually until the next day, and at intervals afterwards. The Illinois, as before stated, was a propeller of about 500 tons burden, and she was of the value of about $17,000. She had on board a cargo valued at more than $21,000, which consisted in part of live hogs; and in consequence of the previous storm, and the towing of the Western, the Illinois was short of fuel and needed food for the hogs on board. For this reason, among others, it was thought expedient to go into Port Stanley for fuel, to leave the Western there, and to proceed to Buffalo with the Illinois and her cargo. The Illinois left Port Stanley towards morning, and proceeded to Buffalo. When she arrived, her owner sent the propeller Mary Stewart to Port Stanley, to tow the Western to this port. The Mary Stewart reached Port Stanley early in the morning of the 7th of June, and, taking the Western in tow, brought her to Buffalo, reaching here about 4 o'clock in the morning of the 8th of June. The dry wheat on board, amounting to about 6,089 bushels, was immediately stored in an elevator, and about 3,000 bushels of wet wheat were taken out, and put in a drying kiln, in order to preserve it from further injury. This suit was commenced soon after. The value of the Western when brought to Buffalo was about $4,600, and the net proceeds of the sales of her cargo amounted to $3,600, after deducting all charges and commissions.

The prominent and most important facts of this case have now been briefly stated, and its general characteristics sufficiently set forth; but other facts and circumstances, upon which the question now to be discussed may in part depend, will hereafter be noticed in more immediate connection with the questions to which they may respectively relate. It is not insisted, on the part of the claimants, that the services rendered to the Western were not in their nature and character salvage services; but it is insisted that they were rendered without personal risk, or extraordinary effort; and that, therefore, the libellants are not, in any court, or before any tribunal, entitled to ask more than a very slight salvage compensation. It is also strenuously insisted that this court has no jurisdiction to award any salvage to the libellants, and that the libel must therefore be dismissed for want of jurisdiction. It is not urged that the fact that the vessel and cargo proceeded against were the property of British subjects, and the fact that she was found by the salvors in the waters of Canada, necessarily deprive this court of jurisdiction. The jurisdiction of a court of admiralty to award salvage for the rescue of a foreign vessel from impending danger, is well established, and is not, at this time, to be questioned. In the case of The Two Friends, 1 C. Rob. Adm. 271, which was a case of salvage on the recapture or rescue of an American ship by the crew, a part of whom were British seamen, Sir William Scott, in 1779, decided this question in favor of the jurisdiction. The Two Friends had been captured by the French, and the crew having rescued her from the captors, and brought her into England, the British seamen belonging to the crew libelled her for salvage. It was objected that the English court of admiralty had no jurisdiction, as the Two Friends was an American ship, but the objection was overruled. Sir William Scott, in delivering his opinion overruling the objections, referring to the allegation that the libellants were to be

considered as American seamen, said: "I will say without scruple that I can see no inconvenience that would arise if a British court of justice was to hold plea in such a case, or, conversely, if American courts were to hold pleas of this nature respecting the merits of the British seamen on such occasion; for salvage is a question of the jus gentium, and materially different from the question of a mariner's contract, which is a creature of the particular constitutions of each country, to be applied and construed and explained by its own particular rules." In the course of his opinion he also said: "As to those British seamen having no connection with America, and having rescued foreign property, I have no doubt that they are entitled to have their services rewarded here; for it would be but a mere mockery and derision of their claims to send them back to America, to hunt out their redress against each individual owner of separate bales of goods. It were better to inform them that they were entitled to nothing, than to remit them on such a wild pursuit. I should therefore think it a reproach to the courts of this country if they are not opened to lend their assistance in such a case." And although he desired to be understood to deliver no decided opinion, whether American seamen rescuing an American ship and cargo, brought into England, might not maintain an action in rem in the admiralty as a court of the law of nations, he added: "But if there was British property on board, and American seamen were to proceed against that, I should think it a criminal desertion of my duty if I did not support their claim." And in the subsequent case of The Good Intent, an English vessel recaptured from the French by an American armed ship, without resistance, on account of the larger force of the American vessel, he awarded salvage; no opposition to the jurisdiction having been made. 1 C. Rob. Adm. 286. In subsequent cases, both the English and American courts of admiralty have maintained their jurisdiction against foreign vessels, in cases of salvage, of bottomry, of collision, and even of seamen's wages, by clear and unquestionable arguments (see 1 Conk. Adm. pp. 34–39, and cases there cited), and it is now so firmly established that the learned counsel of the libellants, in questioning the jurisdiction in the present case, did not urge that this court had no jurisdiction, in case its jurisdiction in admiralty cases was plenary, and was not circumscribed or limited by the acts of congress by which the jurisdiction of this court had been conferred and regulated. The objection to the jurisdiction in the present case is based upon the act of congress passed in 1845, for the declared purpose of extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same; but the proper determination of the question thus raised requires an examination of the provisions of the constitution of the United States in respect to the admiralty and maritime jurisdiction of the national courts, the judiciary act of 1789, the act of 1845, and some of the decisions of the supreme court of the United States upon the subject of admiralty jurisdiction. The constitution declares that the judicial power of the national government shall extend to all cases of admiralty and maritime jurisdiction; and the judiciary act of 1789 (section 9) provides that the district courts shall have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, when the seizures are made on waters navigable from the sea, by vessels of ten or more tons burden within their respective districts, as well as upon the high seas," &c. The act of 1845, before referred to, is entitled "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same," and provides that "the district courts of the United States shall possess and exercise the same jurisdiction in matters of contract or tort, arising in, upon, or concerning steamboats or other vessels of twenty tons burden or upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between ports and places in different states or territories upon the lakes and navigable waters connecting the said lakes, as is now possessed and exercised by the said courts in cases of like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States," &c.

It is insisted by the claimants that this court now has jurisdiction of cases arising on the Great Lakes only under this act of 1845; that therefore it cannot have jurisdiction in this case, because the Western was not enrolled or licensed for the coasting trade, because she was not, at the time of the salvage rendered to her, employed in the business of commerce or navigation between ports and places in different states or territories, but from one port to another in Canada, within the same jurisdiction, and because the act of 1845 limits the jurisdiction to matters of contract and tort, and a salvage case belongs to neither of those classes. The provisions of the constitution which define the limits of the judicial power of the national government does not, per se, confer jurisdiction upon any of the national courts, other than the supreme court, which is provided for by the constitution itself; and it was left to the national legislature to define and limit the power and jurisdiction of such inferior courts as the constitution authorized congress "from time to time to ordain and establish." This court must therefore exercise its authority within the limits of its jurisdiction, as declared and defined by congressional legislation. Congress might have conferred all original jurisdiction in admiralty cases upon the circuit courts, to the entire exclusion of the district courts, for the constitution leaves to the discretion of congress the distribution of the subjects and cases which they may

think proper to establish. In the exercise of that discretion, congress, in 1789, by the provisions of the judiciary act already quoted, declared that the district courts should have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction"; thus conferring upon the district courts, in respect to civil causes, to which class this case belongs, as full and ample and unlimited original jurisdiction, in admiralty, as it was in the power of the national government to confer upon the national courts.

If the act of 1845 was not now in force, it would not, at this day, be seriously contended that this court had not jurisdiction of this case under the judiciary act of 1789; and yet, prior to 1845, the admiralty jurisdiction upon the Great Lakes of the Northwest had not been asserted or exercised, except in revenue cases. The reason of this, familiar as it now is to every admiralty lawyer, need not be given at length. It is to be found in the history of the administration of admiralty and maritime law by the courts of this country, and is set forth, very concisely, in the opinion of the learned and estimable chief justice of the supreme court of the United States in the case of The Genesee Chief, decided in that court in the December term, 1851 (12 How. [53 U. S.] 443). See, also, [The Magnolia], 20 How. [61 U. S.] 296, 299; 1 Conk. Adm. (2d Ed.) pp. 1–18.

The Genesee Chief was a case of collision. The collision occurred on Lake Ontario, and the libel was filed, as was supposed, under the act of 1845. It was insisted by the claimant in that case that the act of 1845 was unconstitutional; that the admiralty jurisdiction of the courts of the United States was limited by the constitution to tide waters; and that the district court had therefore no jurisdiction in the case.

In disposing of the question of jurisdiction thus raised, the learned chief justice said: "Before, however, we can look into the merits of the dispute, there is a question of jurisdiction which meets us at the threshold. When the act of congress was passed under which these proceedings were had, serious doubts were entertained of its constitutionality. The language and decision of this court, whenever a question of admiralty decision had come before it, seemed to imply that, under the constitution of the United States, the jurisdiction was confined to tide waters. Yet the conviction that this definition of admiralty powers was narrower than the constitution contemplated has been growing stronger every day with the growing commerce on the lakes and navigable rivers of the Western states. And the difficulties which the language and decisions of this court had thrown in the way, of extending it to those waters, have perhaps led to the inquiry whether the law in question could not be supported under the power granted to congress to regulate commerce. This proposition has been maintained in a recent work upon the jurisdiction, law, and practice of the courts of the United States in admiralty and maritime causes, which is entitled to much respect, and the same ground has been taken in the argument of the case before us. The law, however, contains no regulations of commerce, nor any provision in relation to shipping and navigation on the lakes. It merely confers a new jurisdiction on the district courts; and this is its only object and purpose. It is entitled 'An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same'; and the enacting clause conforms to the title. It declares that these courts shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in or upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories, as was, at the time of the passage of the law, possessed and exercised by the district courts in cases of like steamboats and other vessels employed in the navigation and commerce on the high seas or tide waters within the admiralty and maritime jurisdiction of the United States. It is evident, therefore, from the title, as well as the body of the law, that congress, in passing it, did not intend to exercise their power to regulate commerce, nor to derive their authority from that article of the constitution. And if the constitutionality of this law is supported as a regulation of commerce, we shall impute to the legislature the exercise of a power which it has not claimed under that clause of the constitution, and which we have no reason to suppose it deemed itself authorized to exercise. Indeed, it would be inconsistent with the plain and ordinary meaning of words to call a law defining the jurisdiction of certain courts of the United States a regulation of commerce. This law gives jurisdiction, to a certain extent, over commerce and navigation, and authorizes the courts to expound the laws that regulate them. But the jurisdiction to administer the existing laws upon these subjects is certainly not a regulation, within the meaning of the constitution. And this act of congress merely creates a tribunal to carry these laws into execution, but does not prescribe them.

"Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the constitution by separate and distinct grants. The extent of the judicial power is carefully defined and limited, and congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations. And limits fixed by the constitution to the judicial authority of the courts of the United States would form an insuperable objection to this law, if its validity depended upon the commercial power.

This power is as extensive upon land as upon water. The constitution makes no distinction in that respect, and if the admiralty jurisdiction, in matters of contract and tort, which the courts of the United States may lawfully exercise on the high seas, may be extended to the lakes under the power to regulate commerce, it can, with the same propriety, and upon the same construction, be extended to contracts and torts on land when the commerce is between different states. And it may embrace also the vehicles and persons engaged in carrying it on. It would be in the power of congress to confer admiralty jurisdiction upon its courts over the cars engaged in transporting passengers or merchandize from one state to another, and over the persons engaged in conducting them, and to deny to the parties the trial by jury. Now, the judicial power in the cases of admiralty and maritime jurisdiction has never been supposed to extend to contracts made on land and to be executed on land. But if the power regulating commerce can be made the foundation of jurisdiction in its courts, and a new and extended admiralty jurisdiction, beyond its heretofore known and admitted limits, may be created on water under that authority, the same reason would justify the same exercise of power on land. Besides, the jurisdiction established by this act of congress does not depend on the residence of the parties; and, under the admiralty powers conferred on the district courts, they are authorized to proceed in rem or in personam, in the cases mentioned in the law, although the parties concerned are citizens of the same state. If the lakes and waters connecting them are within the admiralty and maritime jurisdiction, as conferred by the constitution, then undoubtedly this authority may be lawfully exercised, because this jurisdiction depends upon the place, and not upon the residence of the parties. But if the admiralty jurisdiction is confined to tide waters, the courts of the United States can exercise over the waters in question nothing more than ordinary jurisdiction in cases at law and equity. In cases of this description they have no jurisdiction, if the parties are citizens of the same state. This being an express limitation in the grant of judicial power, no act of congress can enlarge it, and, if the validity of the act of 1845 depended upon the power to regulate commerce, it would be unconstitutional, and could confer no authority on the district courts. If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the constitution was adopted. If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are in truth inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made, and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and, if the one cannot be established, neither can the other. Again, the Union is formed upon the basis of equal rights among the states. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures, and questions of prize or no prize, in a judicial proceeding; and it would be contrary to the first principles on which the Union was formed to confine these rights to the states bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the Western states. Certainly, such was not the intention of the framers of the constitution; and, if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the great objects of the framers of the constitution; that is, a perfect equality in the rights and privileges of the citizens of the different states, not only in the laws of the general government, but in the mode of administering them. That equality does not exist if the commerce on the lakes and on the navigable waters of the West is denied the benefits of the same courts and the same jurisdiction for its protection which the constitution secures to the states bordering on the Atlantic.

"The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them, and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the constitution was adopted, was confined to the ebb and flow of the tide. Now, there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states and nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it. In England,

undoubtedly, the writers upon the subject and the decisions in its courts of admiralty always speak of the jurisdiction as confined to tide water, and this definition in England was a sound and reasonable one, because there was no navigable stream in that country beyond the ebb and flow of the tide, nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, 'tide water' and 'navigable waters' are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones, and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river; hence, the established doctrine in England that the admiralty jurisdiction is confined to the ebb and flow of the tide,—in other words, it is confined to public navigable water. At the time the constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which has been adopted in England was equally proper here. In the old thirteen states, the far greater of the navigable waters are tide waters. And in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation. And, indeed, until the discovery of steamboats, their could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide water, and that definition, having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated, as cases occurred, without particularly examining whether it was as universally applied in this country as it was in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably here, as well as in England, tide waters must be the limits of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it were limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described, and, under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters. It was under the influence of these precedents and this usage that the case of The Thomas Jefferson, 10 Wheat. [23 U. S.] 428, was decided in this court, and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide. The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175, afterwards followed this case, merely as a point decided. It is the decision in the case of The Thomas Jefferson which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled, but at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question, as it now presents itself, could not be foreseen, and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the West and on the lakes was in its infancy, and of little importance, and but little regarded, compared with that of the present day. Moreover, the nature of the questions concerning the extent of the admiralty jurisdiction, which have arisen in this court, was not calculated to call its attention particularly to the one we are now considering. The point in dispute has generally been, whether the jurisdiction was not as limited in the United States as it was in England at the time the constitution was adopted. And, if it was so limited, then it did not extend to contracts for maritime services when on land, nor to torts and collisions on a tide-water river, if they took in the body of a county. The attention of the court, therefore, in former cases, has been generally strongly attracted to that question, and never, we believe, until recently, drawn to the one we are now discussing, except in the case of The Thomas Jefferson, afterwards followed in The Orleans v. Phoebus, as already mentioned. For, with this exception, the cases always arose on contracts for services on tide water, or were upon libels for collisions or other torts committed within the ebb and flow of the tide. There was therefore no necessity for inquiring whether the jurisdiction extended further in a public navigable water, and, following the English definition, tide was assumed and spoken of as its limit, although that particular question was not before the court. The attention of the court was, however, drawn to this subject in the case of Waring v. Clark, 5 How. [46 U. S.] 441, which was decided in 1848. The collision took place on the Mississippi river, near the Bayou Goulah, and there was much doubt whether the tide flowed so high. There was a good deal of conflicting evidence, but the majority of the court thought there was sufficient proof of tide there, and consequently it was not necessary to consider whether the admiralty power extended higher. But that

case showed the unreasonableness of giving a construction to the constitution which would measure the jurisdiction of the admiralty by the tide; for, if such be the construction, then a line drawn across the Mississippi would limit the jurisdiction, although there were ports of entry above it, and the water as deep and navigable, and the commerce as rich, and exposed to the same hazards and incidents, as the commerce below. The distinction would be purely artificial and arbitrary, as well as unjust, and would make the constitution of the United States subject one part of a public river to the jurisdiction of a court of the United States, and deny it to another part, equally public, and but a few yards distant.

"It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable waters, including lakes and rivers, in which there is no tide; and certainly there can be no reason for admiralty power over a public tide water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters, and we think are within the grant of admiralty and maritime jurisdiction in the constitution of the United States. We are the more convinced of the correctness of the rule we have now laid down, because it is obviously the one adopted by congress in 1792, when the government went into operation; for the ninth section of the judiciary act of 1789, by which the first courts of admiralty were established, declares that the district courts 'shall have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas.' The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable, it was deemed to be public; and, if public, was regarded within the legitimate scope of the admiralty jurisdiction conferred by the constitution. It so happened that no seizure was made, and no case calling for the exercise of admiralty power arose, for a long period of time upon any navigable water where the tide did not ebb and flow. As we have before stated, there were no navigable waters in the United States upon which commerce, in the usual acceptation of the word, was carried on, except tide water, until the valley of the Mississippi was settled and cultivated, and steamboats invented; and no case therefore came before the court during the early period of the government that required it to determine whether this jurisdiction could be extended above tide. It is perhaps to be regretted that a case did not arise, for we are persuaded that if one had occurred, and attracted the attention of the court to this point before the English definition had become the settled mode of describing the jurisdiction, and before the courts had become accustomed to adhere strictly to the English mode of pleading, in which the place is always averred to be within the ebb and flow of the tide, the definition in the act of 1789, which is so evidently the correct one, would have been adopted by the courts, and the difficulty which has now arisen would not have taken place. This legislative definition, given at this early period of the government, is certainly entitled to great consideration. The same definition is, in effect, again recognized by congress by the passage of the act we are now considering. We have therefore the opinion of the legislative department of the government, twice deliberately expressed, upon the subject. These opinions, of course, are not binding on the judicial department, but they are always entitled to high respect. And in this instance we think they are founded in truth and reason, and that these laws are both constitutional, and ought therefore to be carried into execution. The jurisdiction under both laws is confined to vessels enrolled and licensed for the coasting trade; and the act of 1845 extends only to such vessels when they are engaged in commerce between different states or territories. It does not apply to vessels engaged in domestic commerce of a state; nor to vessels or boats not enrolled and licensed for the coasting trade under the authority of congress; and the state courts, within the limits embraced by this law, exercise a concurrent jurisdiction in all cases arising within their respective territories, as broadly and independently as it is exercised by the old thirteen states, whose rivers are tide waters, and where the admiralty jurisdiction has been in full force ever since the adoption of the constitution.

"The case of The Thomas Jefferson did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it, notwithstanding the opinion we have expressed; for every one would suppose that, after the decision of this court, in a matter of this kind, he might safely enter into contracts, upon the faith that rights thus acquired would not be disturbed. In such a case stare decisis is the safe and established rule of judicial policy, and should always be adhered to; for if the law, as pronounced by the court, ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it. But the decision referred to has no relation to the rights of property. It was a question of jurisdiction only, and the judgment we now give can disturb no rights of property, nor interfere with any contracts heretofore made. The rights of property and of parties will be the same by whatever court

the law is administered; and, as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public, as well as private, inconvenience and loss, it becomes our duty not to perpetuate it.

"The principal objection made to the admiralty jurisdiction is the want of the trial by jury, and it is this feature in the admiralty practice which made it the object of so much jealousy in England in the time of Lord Coke, and enabled him to succeed in his efforts to restrict it to very narrow limits. But experience in England has proved that a wider range of jurisdiction was necessary for the benefit of commerce and navigation, and that they needed courts acting more promptly than courts of common law, and not entangled with the niceties and strictness of common-law proceedings; and, during the reign of the present queen, the admiralty jurisdiction has been extended to maritime services and contracts, and to torts in navigable waters, although the place where the service was performed, or the contract made, or the tort committed, was within the body of a county, and within the jurisdiction of the courts of common law. A concurrent jurisdiction is reserved to the last-mentioned courts, if the party complaining chooses to select that mode of proceeding. But in the new and extended jurisdiction of the English admiralty, the old objection remains, and neither party is entitled to a trial by jury. The court, in its discretion, may send the question of fact to a jury, if it thinks proper to do so, but the party cannot demand it as a matter of right. Yet the English people have certainly lost nothing of their attachment to the trial by jury since the days of Lord Coke, and this recent and great enlargement of the admiralty power is strong proof that the want of it has been felt, and that experience has shown its necessity where the interests of an extensive commerce and navigation are concerned. But the act of congress of which we are speaking is free from the objection to which the English statute is liable. Like the English statute, it saves to the party a concurrent remedy at common law in any court of the United States or of a state which may be competent to give it. But it goes farther. It secures to the parties a trial by jury as a matter of right in the admiralty courts. Either party may demand it. And it thus effectually removes the great leading objection, always heretofore made to the admiralty jurisdiction. The power of congress to change the mode of proceeding in this respect in its courts of admiralty will, we suppose, hardly be questioned. The constitution declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by congress. But the extent of the power, as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of congress, except where that power is limited by the terms of the constitution, or by necessary implication from its language. In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and congress may therefore, in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice. And in the proceedings under the act of 1845, the right of a trial by jury is undoubtedly secured to either party, if he thinks proper to demand it."

All the justices of the supreme court, with the exception of Mr. Justice Daniel, who dissented, concurred in this opinion of the chief justice; and the case of The Genesee Chief, in effect, determined that, prior to the passage of the act of 1845, the admiralty jurisdiction of the United States courts extended to all the public navigable waters of the United States, and consequently to the great Northwestern lakes; and, if the act of 1845 were repealed, there would be no ground for questioning the jurisdiction of this case.

In the case of Fretz v. Bull, 12 How. [53 U. S.] 466, decided immediately after the case of The Genesee Chief, the court maintained the admiralty jurisdiction in a case of collision occurring on the Mississippi river above tide water; and the same court has since maintained the jurisdiction in cases arising on the rivers of the West and Southwest, above the tide waters, when no jurisdiction could have been asserted under the act of 1845. Culberton v. Shaw, 18 How. [59 U. S.] 584; The Magnolia, 20 How. [61 U. S.] 296; Nelson v. Leland, 22 How. [63 U. S.] 48. See, also, the following cases in the circuit and district courts: Lucas v. The Thomas Swan [Case No. 8,588]; McGinnis v. The Pontiac [Id. 8,801]; Raymond v. The Ellen Stewart [Id. 11,594]; Sinnot v. The Dresden [Id. 12,908]; Franconet v. The Backus [Id. 5,048]; Parmlee v. The Charley Mears [Id. 10,766]; Eads v. The H. D. Bacon [Id. 4,232].

I have said that the case of The Genesee Chief, in effect, decided that prior to the act of 1845 the admiralty jurisdiction extended to all the public navigable waters of the United States, and consequently to the great Northwestern lakes. The district courts, therefore, had, from their first organization, original jurisdiction in all civil causes of admiralty and maritime jurisdiction arising on those lakes, by the express and unequivocal language of the judiciary act of 1789, already quoted. 1 Conk. Adm. (2d Ed.) p. 89. I am aware that this has been questioned, and that the case of The Genesee Chief does

not appear to have been decided under that impression. And I know that there are dicta of learned justices of the supreme court which give countenance to the opinion that jurisdiction in admiralty upon the great Western lakes was first conferred by the act of 1845, and that the learned author of Conkling's Admiralty has avowed the opinion that the act of 1845, although intended by congress to enlarge the jurisdiction of the admiralty, must, if not void, be held to restrain and limit it, and to take away, except in the cases provided for in the act of 1845, the admiralty jurisdiction on those lakes, which the district courts, before its passage, had had the right to exercise, under the judiciary act of 1789.

In the case of The Genesee Chief, the construction and effect of the judiciary act, conferring original jurisdiction upon the district courts in all civil causes of admiralty and maritime jurisdiction, do not appear to have been considered either by the counsel or by the court. The libellant's counsel did not assume that the supreme court had, for half a century, maintained erroneous doctrines upon the extent of the admiralty jurisdiction, but they insisted that the act of 1845 was constitutionally passed in the exercise of the power to regulate commerce granted to congress by the constitution. This doctrine the court repudiated, and they maintained the jurisdiction, upon a ground that counsel would hardly have been at liberty to assume the ground that the decisions of that court which declared that the admiralty jurisdiction provided for in the constitution was limited to tide waters were erroneous, and ought to be overruled. I shall not attempt either to criticise or confirm the language of the opinion in the case of The Genesee Chief. That the case was properly decided is now universally conceded, and if, as has been contended (1 Conk. Adm., 2d. Ed., pp. 1–18), the learned chief justice was mistaken in supposing "that congress, in passing it (the act of 1845), did not intend to exercise their power to regulate commerce, nor to derive their authority from that article of the constitution," that fact neither impairs the authority of the decision, nor weakens the force of the logical and convincing arguments by which the judgment of the court, reversing their former decision, was justified and sustained. Nor is it strange that the construction and effect of the judiciary act of 1789, and the effect of the act of 1845, upon the jurisdiction under the judiciary act, were not considered by the court, for the course of the argument had not brought these questions under consideration. The case, therefore, really decides nothing in regard to those questions; for, although the chief justice says "the act of 1845 confers a new jurisdiction on the district courts," it is evident that the question whether they had jurisdiction upon the lakes, under the judiciary act, prior to the act of 1845, had not been carefully considered. If it had been, it is quite apparent the expression quoted would not have been used. The dicta of Justices Grier and McLean in the case of The Magnolia, 20 How. [61 U. S.] 296, are perhaps more direct and unequivocal expressions of opinion in regard to the question whether the act of 1845 conferred a new jurisdiction upon the district courts, although it is probable that those dicta had their origin in the dictum of the chief justice in the case of The Genesee Chief. It may be presumptuous to question the accuracy of the opinions expressed by those learned judges, but I cannot believe that they had carefully examined the provisions of the judiciary act, and deliberately considered the questions, before using the expressions found in their opinions. At all events, the question was not in controversy in the cases under consideration, and the opinions thus expressed cannot therefore be regarded as binding authorities in this court. Nevertheless, they are entitled to great respect, and they have weakened my confidence in the correctness of my own views, although I am not able, after deliberate consideration, to concur in the views thus expressed. In the opinion referred to, Mr. Justice Grier, referring to the act of 1845, says: "As congress had never before 1845 conferred admiralty jurisdiction over the Northern fresh water lakes not navigable from the sea, the district courts could not assume it by virtue of this clause in the constitution. An act of congress was therefore necessary to confer this jurisdiction on those waters," &c. Mr. Justice McLean, in the same case, in reference to the act of 1845, says (page 203): "This act was considered by congress as extending the jurisdiction of the district courts, and it was so very properly treated by the court in the case of The Genesee Chief. * * * It is said in that case the act of 1845 extended the jurisdiction of the admiralty; and this was so, as, by the act of 1789, it was limited to rivers navigable from the sea by vessels of ten tons burden and upwards."

It is quite clear that Mr. Justice Grier and Mr. Justice McLean had not carefully considered the language of the judiciary act, for it appears to me to be too plain to be open to controversy that the limit of the jurisdiction to "waters navigable from the sea by vessels of ten or more tons burden," applies to cases of seizure only, and not the ordinary civil causes of admiralty and maritime jurisdiction. This is the fair, and it seems to me to be the only reasonable, construction of the act; for the language first used, in reference to civil causes, &c., is substantially the language of the constitution, and was intended to be distinct, full, and complete in respect to such causes. The subsequent language was clearly intended to refer to and affect seizure cases only, and had no application to other cases. Indeed, I did not un-

derstand the learned counsel for the claimants to insist that the admiralty jurisdiction under the judiciary act was limited, in other than seizure cases, to "waters navigable from the sea by vessels of ten or more tons burden." His argument was based mainly upon the idea that the act of 1845 was restrictive of the jurisdiction conferred by the judiciary act, and that taking the two statutes together, the jurisdiction upon the Great Lakes is limited to the cases provided for in the act of 1845. He insisted those acts are in pari materia; that effect must be given to both as though all their provisions were contained in one act; and, thus construed, it was clear the act of 1845 must control in regard to the jurisdiction upon the Great Lakes.

The object to be attained in the construction of all statutes is to ascertain the intention of the legislature, and all rules of construction are intended to conduce to that end. In respect to the judiciary act, it is entirely clear that it was the intention of congress to give to the district courts unrestricted original jurisdiction in all ordinary civil causes of admiralty and maritime jurisdiction: to confer on them as broad and ample original jurisdiction in regard to those causes as could be conferred under the constitution. It is equally clear that the congress of 1845 did not intend to restrict the jurisdiction, but supposed that they were extending it. If the actual intention of the legislature is to govern, the act of 1845 cannot be held to take away any jurisdiction conferred by the judiciary act of 1789. There are no words declaring that any other statute is repealed, or that the jurisdiction shall extend only to the cases provided for in the statute of 1845.

The view which I have thus taken of this question is not unsupported by authority. In this district it has had, in practice, the general sanction of those who practice in this court; for during the last ten years I have exercised the jurisdiction in a considerable number of salvage cases, without question, and in many other cases, in which no jurisdiction could be asserted under the act of 1845, I have taken jurisdiction under the judiciary act of 1789, without the jurisdiction being seriously questioned. In some of these cases, appeals have been made to the circuit court—probably without the jurisdiction being questioned in that court, and my decisions affirmed, and I do not doubt that such has been substantially the course of decisions in other districts bordering on the Great Lakes.

In the case of Franconet v. The Backus [Case No. 5,048], the learned judge of the Michigan district declared that the jurisdiction of this court in admiralty cases did not rest on the act of 1845; and in the case of Parmlee v. The Charles Mears [Id. 10,766], the learned judge of the Northern district of Ohio declared that the supreme court in the case of The Genesee Chief had "placed the admiralty jurisdiction on the lakes on the same basis as that of the tide and salt waters. Hence now, independent of the act of February, 1845, the maritime law has the same application to the cases upon the lakes as it has upon the tide waters, not only in matters of jurisdiction, but also in forms of procedure and practice." In 1860, in the case of The Revenue Cutter No. 1 [Id. 11,713], the same learned judge held that "admiralty and maritime jurisdiction is possessed by the district court of the United States on the Western lakes and rivers, under the constitution and act of 1789, independent of the act of 1845, and unrestricted thereby." The question of jurisdiction has been fully argued, and Judge Wilson, in his opinion, among other things, says: "But the law of 1845 does not repeal or otherwise abrogate the ninth section of the law of 1789, or any part of it. At most, it can only be regarded as affording remedies which are cumulative upon former laws. It designates a class of vessels of twenty tons burden and upwards, that are enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories upon the lakes. It makes no provision in relation to vessels engaged in the foreign trade, nor does it embrace remedies upon a large variety of maritime contracts having no connection with the navigation and trade between different states. We know of no rule of construction by which the act of 1845 should be held to have the effect of repealing any portion of the ninth section of the judiciary act, or to abridge any of the admiralty powers conferred upon the district courts by the statute of 1789. Its purpose, as avowed in its title, is 'to extend the jurisdiction of the district courts,' and it certainly cannot be so construed as to limit or abridge an existing jurisdiction. This interpretation and construction of the act of 1845, as to its effect upon previous legislation, is amply sustained by authority. When a statute gives a new remedy, without impairing or denying one already known to the law, the rule is to consider it as cumulative, allowing either the new or the old remedy to be pursued. 15 Ohio, 65; 3 Hill, 41; 15 Johns. 222. To repeal a statute by implication, it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by the prior law, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy, and, even then, the old law is repealed only pro tanto, to the extent of the repugnancy. [Wood v. U. S.] 16 Pet. [41 U. S.] 362; 3 Hill, 646. There is no repugnancy between the acts of 1789 and 1845. Under the former law, the district courts have jurisdiction of vessels under 20 tons burden, whether enrolled and licensed or not, and also of vessels employed in the foreign trade, and they have jurisdiction of those exceeding 20 tons burden that are enrolled and licensed and engaged in navigation between different states, not only by virtue and under the authority of the act of 1789, but also

of the act of 1845; and yet the right of trial of facts put in issue to a jury is secured in all cases. This we believe to be the true import and legal effect of the two acts of congress, when considered and construed together." But it is considered that the case of Allen v. Newberry, 21 How. [62 U. S.] 244, and McGuire v. Card, Id. 248, are authorities against the jurisdiction of this court in the present case. The question of jurisdiction was not discussed on the argument of Allen v. Newberry, but the learned judge who delivered the opinion, taking it for granted that the admiralty jurisdiction upon the Great Lakes depended upon the act of 1845, held that a suit could not be maintained in admiralty upon a contract of affreightment for the transportation of property from one port to another in the same state. In the case of McGuire v. Card [supra] it was held that the admiralty had no jurisdiction to enforce the claim of a material man for supplies to a vessel employed wholly within the state of California, and in the purely internal trade of that state, and both these cases were apparently decided on the ground that cases arising out of, and concerning only the purely internal commerce of a state, should be left to the adjudication of the state courts. The same doctrine is again adverted to in Nelson v. Leland, 22 How. [63 U. S.] 48, and in Bondies v. Sherwood, Id. 217.

I confess that I am not able to perceive any solid ground for thus restricting the admiralty jurisdiction of the national courts. The constitutional grant of admiralty jurisdiction has no such limitation. It is an independent grant of judicial power or jurisdiction, unconnected with the grant of commercial power, and, to adopt the language of Mr. Justice Grier, in the case of The Magnolia, 20 How. [61 U. S.] 301, when it is used for another purpose: "The admiralty jurisdiction surrendered by the states to the Union had no such bounds as exercised by themselves, and is clogged with no such conditions in its surrender." In The Genesee Chief, it was said by the chief justice: "Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the constitution by separate and distinct grants. The extent of the judicial power is carefully defined and limited, and congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations." It was conclusively shown in that case that the power of regulating commerce could not be made the foundation of jurisdiction in the courts of the United States, and I cannot satisfy myself that the courts of the Union are justified in interpolating the language or limits of the grant of the commercial power into the grant of judicial power and jurisdiction, for the purpose of restricting, any more than of enlarging, their jurisdiction. That jurisdiction must rest upon the constitutional grant of judicial power, and upon the acts of congress passed in pursuance thereof; and, if neither the constitution nor the acts of congress have prescribed a particular limitation to a power conferred in unrestricted terms, such limitations should not be interposed by judicial construction.

Although entertaining these views, I shall cheerfully recognize paramount authority of the supreme court, decline the exercise of admiralty jurisdiction in every case, and like that of Allen v. Newberry, or like that of McGuire v. Card, when the supreme court has deliberately decided any question before it, whether of jurisdiction or otherwise, I shall always hold this court to be conclusively bound by such decision. But the Western was not engaged in the purely internal trade of a state. She was engaged in a foreign voyage through the waters of the United States and those of a foreign government, and no question of state rights, or of the greater propriety of the determination of this case by the state courts, is therefore involved in its determination. It is a case which had its origin beyond the limits of the United States, and is one peculiarly of admiralty jurisdiction. It is true, the jurisdiction cannot be maintained under the act of 1845, but it was certainly conferred by the act of 1789, and I cannot think it was taken away by the act of 1845. It is not to be denied that the dicta above referred to afford strong grounds for urging upon this court the dismissal of this suit for the want of jurisdiction, but, in the hurry of writing opinions, the ablest judges will sometimes express erroneous opinions, or mistake the facts of a particular case. In the case of The Genesee Chief, the chief justice, at page 458, says, in reference to the judiciary act and the act of 1845: "The jurisdiction under both laws is confined to vessels enrolled and licensed for the coasting trade," and yet for more than half a century the district and circuit and supreme courts have exercised jurisdiction in numerous cases against registered and foreign vessels. Probably not more than three-fourths of the vessels arrested under the process of our admiralty courts have been enrolled and licensed for the coasting trade, and I am wholly unable to conjecture upon what grounds the chief justice supposed he was making this assertion in respect to the provisions of the judiciary act. As the supreme court, in the case of Bondies v. Sherwood, before cited, expressly refused to decide the question of jurisdiction in a salvage case when the vessel was engaged in the purely internal trade of a state, as the question now presented has never in fact been decided in that court, and as I cannot myself doubt that this court has jurisdiction, I shall maintain the jurisdiction in the present case, notwithstanding the cases of Allen v. Newberry and McGuire v. Card, and the dicta above referred to.

It was urged upon the hearing that the libelants had forfeited their right to a salvage compensation in this case by their misconduct in bringing the Western and cargo from Port

Stanley to Buffalo. The question thus raised will now be considered. It is undoubtedly true that any culpable disregard of their duty on the part of the sailors will justify, and, indeed, require, a reduction of the salvage compensation which would otherwise be awarded. This reduction will be more or less in proportion to the misconduct, whether slight or aggravated, and the degree of injury or inconvenience resulting therefrom, to those interested in the property saved, and gross misconduct or wilful negligence will, in many cases, work an entire forfeiture of salvage. There is, however, no inflexible rule that salvors must take the property saved to the nearest convenient port, or retain the property for adjudication at the first port at which it arrives in safety. Post v. Jones, 19 How. [60 U. S.] 150. In all their proceedings, they should act in good faith, and with reasonable skill and judgment; and, while they are entitled to protect their own interests by proper means, they must not forget or disregard the interests of the owners of the property saved. In view of these principles, it is proper to refer to the particular facts of this case. It was near midnight when the Western and cargo reached Port Stanley, a port at which scarcely any wheat is received from vessels, and in which there was no elevator for taking grain from on shipboard. The storehouses in which grain is received by land carriage were some distance from the pier, and the water in front of them was probably so shallow that the Western could not be taken there until a portion of her cargo was discharged. There was no drying kiln for drying wet grain, and no shipyard or dockyard for the examination or repairs of the vessel. In short, the master of the Illinois had good reason to suppose that Buffalo was a much better port than Port Stanley for the discharge of the vessel, and the security and sale of her cargo, as well as much better place for the repairs of the Western. Besides, it was necessary he should proceed at once with his own vessel, or subject his owners to inconvenience and loss, and he proceeded to Buffalo, that he might discharge his freight. His owners then sent another vessel to bring the Western to Buffalo, that the cargo might not be injured by unnecessary delay. If the master of the Illinois had known that the Western could be discharged at Port Stanley by hand labor, and that storage for dry wheat could be obtained at one storehouse, and for the wet wheat on the floor of another; that there were there two or three ship carpenters without capital, but who worked as such by the day, and could repair vessels when the injuries were above water, if the necessary material were furnished them; that there were distilleries within a distance of three to five miles, whose owners might, perhaps, buy the wet wheat,—in short, had he known all the facts proved on this trial,—he would not have been guilty of misconduct, and I am not prepared to say he would have erred in judgment had he decided that it was for the interest of all parties to bring the Western and cargo to Buffalo. He had found the Western abandoned and water logged. The interest of the salvors was, prima facie, not much less than one third of her value. The salvors' compensation might, in case of the sale of vessel and cargo, depend very much upon the amount for which the property could be sold; and, in all reasonable probability, it could be better secured, and sold on more favorable terms, at Buffalo than at Port Stanley. Besides, there was no admiralty court in Canada West, and the salvors had a right, if it could be done without great prejudice to the owners of the property, to bring the vessel and cargo within the jurisdiction of an admiralty court, for the purpose of prosecuting their claim for salvage, unless the owners thought proper to offer a fair salvage compensation, in order to entitle themselves to the possession and control of the property. If a fair salvage compensation had been tendered at Port Stanley, and had been refused, the case would have been entirely different. But no compensation was tendered, no offer to pay or secure, or in any form provide a compensation to, the salvors was made or apparently thought of. In addition to all this, the owner of the Western, when he arrived at Port Stanley, expressed his regret that the vessel and cargo had not been taken to Buffalo or Cleveland, rather than to Port Stanley, and, when informed that they would probably be taken to Buffalo, he did not object. He afterwards came with the vessel to Buffalo without objection. Indeed, it is quite apparent he approved the course taken by the salvors in this removal of the Western from Port Stanley, the agents of the insurance company alone objecting.

It was insisted that the salvors were so intent on securing an undue salvage compensation, that they acted in utter disregard of the rights of others, and it may be true that they regarded their own interests as paramount; but, on the other hand, there was, on the part of the insurance agent at Port Stanley, an apparent disposition to act in entire disregard of the salvors' just and legal claims, and of their undoubted right to hold possession of the property until their compensation, as salvors, had been paid or provided for. It is not improbable that both parties looked most earnestly to their own interests, in preference to interests directly opposed to theirs; but I can see no evidence of any intention on the part of the salvors to do any act in clear violation of the legal rights of others, or to seek, by physical strength, to carry out a purpose which could not be justified upon the principles of law or of moral or commercial ethics. I shall therefore hold that there has been no forfeiture of the rights of the salvors in this case.

The only remaining question which I deem it necessary to discuss relates to the amount and disposition of the salvage compensation to be awarded. It was said by the counsel for the libellant that it was desirable that some general rule should be laid down in this

case, in order that vessel and steamboat owners might know what to depend upon in salvage cases, and be able to instruct their masters accordingly; but this is impossible, for the amount of salvage must always rest almost wholly in the discretion of the court. It must necessarily depend upon the peculiar circumstances of each peculiar case. No definite rule can be applied in these cases, and, though the general principles upon which courts of admiralty proceed may be gleaned from the cases decided, the application of those principles must, in almost every case, require the exercise of an almost unlimited judicial discretion. Any general rule that could be adopted would be almost necessarily as indefinite as the provisions of the laws of Oleron, which directed that salvage should be awarded "according to right reason, a good conscience, and as justice shall appoint." The supreme court of the United States has said, in respect to the amount of salvage compensation: "On this subject there is no precise rule; for it must, in every case, depend upon peculiar circumstances, such as peril incurred, labor sustained, value saved, &c.; all which must be estimated and weighed by the court which awards the salvage." The Adventure, 8 Cranch [12 U. S.] 221. It is true that it was formerly said "that the rate of salvage on derelicts ought not, in ordinary cases, to range below a third or above a moiety of the value of the property" (Rowe v. The Brig [Case No. 12,093]; 3 Hagg. Adm. 167–221); but exceptions to this rule were allowed in numerous cases, and the rule itself has now been abrogated. The supreme court of the United States and the high court of admiralty in England have respectively sanctioned the doctrine that the reward in derelict cases should be governed by the same principles as other salvage cases, namely, danger to property, value, risk of life, skill, labor and the duration of service; and that no valid reason can be assigned for fixing the reward for salving derelict property at a moiety, or any given proportion, and that the true principle is adequate reward, according to the circumstances of the case. The Florence, 20 Eng. Law & Eq. 622; The Sarah Bell, 4 Notes Cas. 144; Post v. Jones, 19 How. [60 U. S.] 161. And, in view of this abrogation of the rule of giving one third to one half of the proceeds of the property saved in a case of derelict, the question whether this is a case of derelict which was under discussion at the hearing is of little practical consequence. That in the English admiralty it would be held to be a case of derelict seems to be established by the late case of The Coromandel, Swab. Adm. 205. As a salvage compensation is never awarded when the efforts made for the purpose of rescuing a ship or other property from an impending danger have not been attended with success, courts of admiralty have, with great propriety, generally allowed very liberal compensation in salvage cases. But in cases where the property saved has remained in the possession of its owners or their agents, and in which there has been no unusual fatigue or effort or risk on the part of those rendering assistance, the compensation allowed has not ordinarily greatly exceeded a fair and liberal compensation for the service rendered and risk encountered. In cases of a wholly different character, when the value of the property saved was very large, the peril extreme, and the danger pressing; when its complete rescue from total loss was accomplished at the imminent risk of the lives of the salvors, and after long continued, severe, and exhausting labor, requiring abstinence from accustomed rest, and extraordinary exposure and suffering, as well as daring enterprize and superior skill; and when a valuable ship and cargo, or a steam vessel of great value and power, were put in jeopardy by the salvors to secure the lives and property of others,—courts of admiralty have uniformly allowed a most liberal and generous rate of salvage, not only as the just remuneration for noble and chivalric effort and highly meritorious service, and as an ample reward for the risks encountered and sufferings endured, but also as an incentive to the rendition of similar services in like cases. Such liberal allowances are dictated by an enlightened and enlarged public policy; and the interests of commerce, no less than the general interests of humanity, require that such policy be steadily adhered to in the admiralty courts.

In the case of The Henry Ewbank [Case No. 6,376], the late Mr. Justice Story most eloquently and truly said: "Salvage, it is true, is not a question of compensation pro opere et labore. It rises to a higher dignity. It takes its source in a deeper policy. It combines with private merit and individual sacrifices larger considerations of the public good, of commercial liberality, and of international justice. It offers a premium by way of honorary reward for prompt and ready assistance to human suffering, for a bold and fearless intrepidity, and for that affecting chivalry which forgets self in an anxiety to save property, as well as life." But salvors must be assiduous, discreet, and skillful, and they must not be regardless of the interests of the owners of the property saved, if they seek to merit this most liberal compensation. Negligence or misconduct will always reduce their claims to a salvage compensation, and gross misconduct or willful negligence may work a forfeiture of their claims. They must not be rapacious or grasping, and, though entitled to protect their rights as salvors, any attempt to appropriate the property of others to their own use without proper authority will be followed by merited and severe punishment. The duty of courts of admiralty to protect the interests of the unfortunate owners whose property has been subjected to salvage claims was well stated by the late Judge Hopkinson in the case of Hand v. The Elvira [Id. 6,015], when he said: "We must

not teach a salvor that he may stand ready to devour what the sea may spare. He must not be permitted to believe that he brings in a prize of war, and not a friend in distress. If he has offered his assistance to the distressed in a proper spirit, he will be satisfied with a just and fair remuneration for the labor, hazard, and exposure he has encountered in the service, and it is only a proper spirit that we should seek or desire to satisfy. To the manner of compensation, the judge, governed by a liberal policy, will add a reasonable encouragement, which the generous or humane will hardly need to prompt men to exertion to relieve their fellow men in danger or distress." In this case all the persons entitled to salvage have not been made parties to the suit, and, of course, only the services of those who have been made parties can now be compensated. The master and crew of the Illinois were hired and paid by the month, and that vessel was supplied and navigated solely at the expense of the owners. The wages of the crew, and all of the expenses of the vessel, during the time they were employed in the salvage service, were therefore paid by the owners; they also paid for extra hands to work the pumps, and they furnished the propeller which towed the Western from Port Stanley to Buffalo. They took the risk, so far as risk was incurred, of a propeller worth $17,000, and a cargo worth more than $21,000, and it was mainly by the use of the steam power of the propeller that the salvage service was rendered. This entitles them to a liberal compensation.

A wise commercial policy, as well as the interests of humanity, require that owners of steam vessels having valuable cargoes on board should feel assured that, if such vessels render important salvage service to vessels in distress, they will be generously remunerated. Steam vessels are generally much the most efficient aids to vessels in distress, and courts of admiralty should therefore be careful to compensate their service, in a proper case, with sufficient liberality, that their owners may not feel bound, for the protection of their own interests, to forbid their masters undertaking the rescue of vessels in distress. The immediate responsibility of undertaking a salvage service must, until his action is approved by his owners, rest mainly upon the master. The master is therefore entitled to a fair compensation for his services, and a liberal allowance for his responsibility; but it should not be so large as to appear to offer any temptation to masters to forget the interests of their owners in a too eager and energetic pursuit of their own.

After much consideration, I have determined that 22½ per cent. of the value is a fair allowance for the salvage of the Western and cargo. As all the parties originally entitled to salvage are not before the court, I shall award to the parties to this suit, for services and saving the Western the sum of $840; for their proportion of the salvage of her cargo, $657,—total, $1,497. These sums must therefore be paid into court within thirty days after the entry of the decree, and will be distributed to the libelants as follows, or in the following proportions, if a greater or less sum shall ultimately be paid into court, viz.:

To the Western Transportation Co., as owner of the propeller Illinois..	$1,100 00
" Henry W. Thorp, her master....	200 00
" Peter F. Low, second mate.....	45 00
" William S. Brown, watchman....	45 00
" Henry Fleming, wheelsman.....	45 00
" Richard Lee, second engineer.....	30 00
" Michael Ryan, fireman.....	17 00
" John Kinsey, porter.....	15 00
	$1,497 00

The libellants will recover their costs to be taxed, and the claimants of the Western and their stipulators will be decreed to pay, within thirty days from the entry of this decree, 45-82d parts thereof; and the claimants and stipulators for the cargo, 56-82d parts thereof.

WESTERN TRANSP. CO. (HOUGH v.). See Case No. 6,724.

WESTERN TRANSP. CO. (MALONE v.). See Case No. 8,996.

WESTERN UNION R. CO. (STEWART v.). See Case No. 13,438.

Case No. 17,444.

WESTERN UNION TEL. CO. v. AMERICAN UNION TEL. CO. et al.

[9 BISS. 72;[1] 19 Am. Law Reg. (N. S.) 173.]

Circuit Court, D. Indiana. July, 1879.

RAILROAD RIGHT OF WAY — EXCLUSIVE USE FOR TELEGRAPH—VALIDITY OF GRANT—RIGHTS OF OTHER COMPANIES.

1. Since the act of congress of July 24, 1866 (Rev. St. § 5263 [14 Stat. 221]), a railroad cannot grant to a telegraph company the sole right to construct a line over its right of way so as to exclude other telegraph companies which have accepted the provisions of said act of congress, and whose lines would not disturb or materially obstruct the lines of the company to which the use has first been granted.

[Cited in Western Union Tel. Co. v. Baltimore & O. Tel. Co., 19 Fed. 662, 23 Fed. 12. Distinguished in Mercantile Trust Co. v. Atlantic & P. R. Co., 63 Fed. 519.]

[Cited in American Tel. & Tel. Co. v. Pearce, 71 Md. 545, 18 Atl. 910.]

2. A telegraph company having a grant from a railroad of such exclusive right to construct a line along the right of way is entitled to an injunction against actual interference with its line, but not against such interruption of its business as results from mere competition by other companies constructing rival lines along said railroad.

In equity. This was a motion for an injunction against the American Union and Central Union Telegraph Companies and the Wabash Railway Company, to restrain the construction of the lines of the American Union Telegraph Company along the right of

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

way of the Wabash Railway Company, upon the ground that the railway company, by a contract made in 1870, had granted to the complainant, the Western Union Telegraph Company, the exclusive right to construct a line along said right of way.

Harrison, Hines & Miller, McDonald & Butler, and Williams & Thompson, for complainant.

Baker, Hord & Hendricks, C. B. Stuart, Wager Swayne, and H. S. Greene, for defendants.

HARLAN, Circuit Justice. I am of the opinion:

First—That the Wabash Railway Company, by its numerous acts of ratification subsequent to its organization, became bound by the contract of May 2, 1870, as fully as the Toledo, Wabash & Western Railway Company would be if it were in existence and operating the lines of railway in question.

Second—Notwithstanding the relations which some of the promoters of the American Union Telegraph Company hold to the Wabash Railway Company, the former must be regarded in this suit as an entirely distinct corporation, duly organized under the laws of Indiana, with power to construct and operate lines of telegraph in that state.

Third—It was competent for the railway company which entered into the contract of 1870, to grant to the Western Union Telegraph Company the privilege, for a term of years, of using its right of way for the purpose of constructing, maintaining and operating lines of telegraph.

Fourth—But consistently with the provisions of the act of congress approved July 24, 1866, and with the principles announced in the case of Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 19, the railway company could not, by contract, put it in the power of the Western Union Telegraph Company to exclude from such right of way other telegraph companies, which like the Western Union Telegraph Company accepted the provisions of the act of 1866, and whose lines when constructed and in operation would not disturb the possession or materially obstruct the operation of the lines of that company. The defendant railway company interposes no objection to the occupancy of its right of way by the American Union Telegraph Company; on the contrary, it has assented thereto and waived, or does not demand, compensation therefor. It was unnecessary, therefore, to institute the proceedings against the railway company to condemn its right of way for telegraph purposes. I am satisfied that the new line can be constructed and operated on the railroad company's right of way without interfering with ordinary travel thereon, and without substantially interfering with the successful operation of any lines which complainant has erected or is likely to erect, or need on and over the same right of way. The complainant is entitled to full protection against interference with the use of its lines, but it is not entitled to be protected by injunction in the exclusive use of the railway company's right of way assumed to be granted by the contract of 1870, contrary, as I think, to the public policy declared in the act of congress and recognized and enforced in the foregoing decision of the supreme court of the United States.

It may be true that the defendant railway company has violated the terms of the contract of 1870 by voluntarily assenting to the use of its right of way by the American Union Telegraph Company without compensation. Still the court cannot make that violation the basis of an injunction against the new company, without putting it in the power of railway companies operating the post-roads of the United States, by private agreement with a telegraph company, to defeat the purposes of the act of 1866, c. 230 [14 Stat. 221], which was to make the erection of telegraph lines on the post-roads of the United States (the consent of the owners of the right of way being obtained, or such right of way being condemned for telegraph purposes and compensation therefor made), free, even against hostile state legislation, to all corporations submitting to the conditions imposed by congress. If, in such cases, state legislation cannot prevent the occupancy of post-roads for telegraph purposes, by such corporations as are willing to avail themselves of the act of congress, much less could such results be rightfully obtained through private contracts of corporations. Complainant may have an injunction against all interference with the operation and use by it of its present lines of telegraph, upon and along the roads of the defendant railway company, other than such interference as may arise or result from mere business competition with other companies constructing rival lines; and further orders will, in that event, be made during the pendency of this suit, as may be necessary to prevent such interference. But the application for an injunction to prevent the construction and operation by the defendant telegraph company of any and all lines of telegraph whatever, upon such right of way, is denied. Such order will be entered as may be consistent with what is here said.

Case No. 17,445.

WESTERN UNION TEL. CO. v. ATLANTIC & P. TEL. CO.

[7 Biss. 367.] [1]

Circuit Court, D. Indiana. Feb., 1877.

RAILROAD RIGHT OF WAY — EXCLUSIVE USE FOR TELEGRAPH PURPOSES—CONDEMNATION PROCEEDINGS—RECEIVERSHIP.

1. A contract between a railroad company and a telegraph company, that the former will allow no other telegraph company to construct

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a line along its road, is not inoperative as against public policy.

2. When a railroad is in the possession of a receiver of the United States court, a telegraph company can acquire no title to its right of way by condemnation proceedings in a state court.

[Cited in Ex parte Tyler, 149 U. S. 186, 13 Sup. Ct. 791.]

3. If the receiver ratifies a contract previously made with the company, the rights under such contract are not affected by the foreclosure proceedings.

In equity. Motion to dissolve injunction.

McDonald & Butler, Williams & Thompson, and Harrison, Hines & Miller, for complainants.

Matthews, Ramsey & Matthews and Baker, Hord & Hendricks, for defendants.

DRUMMOND, Circuit Judge. The Ohio & Mississippi Railroad Company executed mortgages upon its line of road in this state, and afterwards a contract was made by the railroad company with the plaintiff, the Western Union Telegraph Company, by which a telegraph line was to be established on the line of railroad, on the terms agreed upon between the parties.

The contract declared that no other telegraph company should establish a telegraph on the line of the railroad. The telegraph line was constructed by the plaintiff under this contract, and it was used for the benefit of the telegraph company, and also for the railroad company, according to the stipulations agreed on. Proceedings of foreclosure were commenced against the railroad company, on the mortgages already mentioned, and a sale took place, and under the sale there was a re-organization, and the name changed to the "Ohio & Mississippi Railway Company," which executed other mortgages upon the road, and default having been made in the payment of interest on those mortgages, a bill was filed in this court for foreclosure, and for the appointment of a receiver. Receivers were accordingly appointed, who took possession of the railway after the foreclosure of the first mortgages, and before the filing of the bill against the Ohio & Mississippi Railway Company. The receivers ratified, confirmed and adopted the contract made between the Western Union Telegraph Company and the Ohio & Mississippi Railroad Company, and seem to have acted upon the theory that the contract was still in force as against the railway company. The Western Union Telegraph Company was not a party to the foreclosure suit which resulted in the re-organization of the Ohio & Mississippi Railway Company.

In this condition of affairs, the Atlantic & Pacific Telegraph Company was organized under the general laws of this state, and was proceeding to construct a telegraph line on the railway of the Ohio & Mississippi Company, in direct competition with the telegraph line of the plaintiff. The receivers seem to have acquiesced in this action of the Atlantic & Pacific Telegraph Company which, it is to be observed, was apparently nothing but an agent of the telegraph company of the same name, of New York, and was organized simply for the purpose of extending the line of the New York company to the Mississippi river.

The Atlantic & Pacific Telegraph Company commenced proceedings in the state court, while the railway was in the possession of the receivers of this court, with a view to condemn the right of way, or any interest which the Western Union Telegraph Company might have had on the line of road of the Ohio & Mississippi Company. This was done without application to or the authority of this court. Thereupon the Western Union Telegraph Company filed a bill in this court on the 28th day of December, 1876, claiming that the defendant company had no right to construct a line of telegraph on the right of way of the Ohio & Mississippi Company, neither had the latter any right to permit such a telegraph line to be constructed, for the reason that it was a violation of the contract which the Ohio & Mississippi Railroad Company had made with the plaintiff.

An injunction was granted by the district judge, and the motion is now made upon answer and affidavits to dissolve the injunction, and to allow the defendant company to go on with its condemnation proceedings in the state court, with the view of constructing its telegraph line on the roadway of the Ohio & Mississippi Company.

In the argument on the part of the defendants, various objections have been taken to the continuance of the injunction, and to the enforcement of the rights of the plaintiff under the contract made with the Ohio & Mississippi Railroad Company. It is said that such a restriction as was contained in the contract for the construction of the telegraph line of the plaintiff, to prevent other lines from being established on the roadway, was in violation of public policy, and therefore inoperative. If the effect of this clause in the contract was to prevent to any considerable extent the construction of competing lines of telegraph between important points, and thus prevent that kind of communication, there might be something in the objection; but it is to be recollected that there are numerous lines of railway between Cincinnati and St. Louis, which are the two important points of communication, and between which the Ohio & Mississippi Railway offers a very direct line of road. And then, while it is true that it is more convenient to construct telegraph lines on railways than on the common highways of the country, or through fields and wood lands, still it is quite possible to construct them otherwise than upon a line of railroad. A telegraph line, for instance, could be constructed immediately and adjoining the roadway of the Ohio & Mississippi Company, but outside its boundaries. And besides, if it were indispensable that another telegraph line should be constructed upon the Ohio & Mississippi Railway, the right of property which the railway company or the Western Union Telegraph Company might have, and with which the other telegraph company would interfere in the construction of its line, might be acquired as stated hereafter by proceedings for condemnation under the laws of the state. For these rea-

sons, therefore, this restriction in the contract cannot be said to be so contrary to public policy as to render that part of the contract between the Western Union Telegraph Company and the Ohio & Mississippi Railroad Company inoperative.

It was objected also that the sale of the road under the foreclosure proceedings put an end to the contract, but, as has already been stated, the purchaser confirmed, ratified and adopted the contract, and so became a party to it, by ratification, and although in one sense it was a different company from that which originally made the contract, still, as it operated the same line of road, the same necessity existed for the use of the telegraph line, and it availed itself of the benefits of that line by ratifying the contract, and it thereby became bound by whatever obligations rested upon its predecessor by that act of ratification and of use. The proceedings which took place in the state court upon the part of the telegraph company of this state to condemn the right of way, or whatever interest the Western Union Telegraph Company had in the right of way of the Ohio & Mississippi Company were inoperative. The property to be affected by these proceedings was in the possession of this court through its officers, the receivers, and that being so, no action could take place in the state court affecting it without the consent first obtained of this court. An application should have been made to the receivers, and they should have come to this court, or the application might have been made directly to this court by the Atlantic & Pacific Telegraph Company for leave to proceed in the state court, and it would then have been a question whether it was proper to grant that leave. No rights therefore have been acquired by the institution of these proceedings in the state court. They must be considered as invalid, the rule being well established in the federal courts that when property is in its possession through its receivers, all proceedings in the state court affecting it, without the authority of the federal court, are invalid. It is not necessary to decide whether this fact would alone have authorized the issuing of the injunction, or, whether existing, it alone would warrant its continuance.

It was also objected that the Western Union Telegraph Company had not complied with the law of the state, of June 17th, 1852, as to foreign corporations doing business in this state, though it had its principal place of business, and an office in Indianapolis. It may be important to ascertain with a view to the future consideration of this question, whether this contract was made in this, or another state, as preliminary merely to the construction of a line of telegraph in this state. There is nothing either in the pleadings or in the proofs to show what the fact may be as to this, and therefore without dissolving the injunction, which we think under the peculiar circumstances may stand for the present, the court will permit the pleadings to be amended in order to show the fact, the truth being, as is said, that the contract was made out of this state. Ordered accordingly.

WESTERN UNION TEL. CO. (BEHM v.). See Case No. 1,234.

WESTERN UNION TEL. CO. (BELUN v.). See Case No. 1,234.

WESTERN UNION TEL. CO. (COLGATE v.). See Cases Nos. 2,994 and 2,995.

WESTERN UNION TEL. CO. (PENSACOLA TEL. CO. v.). See Case No. 10,960.

WESTERN UNION TEL. CO. (STEPHENS & C. TRANSP. CO. v.). See Cases Nos. 13,370 and 13,371.

WESTERN UNION TEL. CO. (STRAUSE v.). See Case No. 13,531.

Case No. 17,445a.

In re WESTERVELT.

[3 N. J. Law J. 279.]

District Court, D. New Jersey. 1880.

BANKRUPTCY—RENT OF PROPERTY BELONGING TO WIFE OF BANKRUPT—RIGHTS OF ASSIGNEE.

A note given to a bankrupt in his own name for rent of a house belonging to his wife cannot be obtained by the assignee. If he thinks the house was fraudulently conveyed to the wife, he must file a bill to set aside the conveyance.

[In the matter of C. C. Westervelt, a bankrupt.]

Mr. W. O. Sayles, for assignee.

Collins & Corbin, for bankrupt.

NIXON, District Judge. This is an application to the court by the assignee of the bankrupt estate for an order directing the bankrupt to deliver up a certain promissory note, dated February 1, 1876, for three hundred and sixty-nine 95/100 dollars, given to him by one James King for rent due for the occupancy of a house and lot, the title of which stood in the name of Catherine Westervelt, the wife of the bankrupt. The husband had the possession and control of the note at the time the petition in bankruptcy was filed; but he did not include the same in his schedule of assets of his estate, on the ground that it was for the proceeds of his wife's property and belonged to her. He has recently instituted a suit in her name in the marine court of the city of New York to collect the money due upon the note. This fact coming to the knowledge of the assignee, he has deemed it his duty, acting in the interest of the general creditors, to take this step to obtain the custody or the proceeds of the note.

I have read the testimony with care, and do not see my way clear to make the order asked for. If the real estate belonged to the wife at the time the rent accrued, the rent did not cease to be hers, because her husband, while acting as her agent, took the note in his, rather than in her, name. The assignee seems to be desirous of determining in this proceeding the question of the real ownership of the house and lot whence the rent issued; but it cannot be done in such a collateral way. If the assignee had grounds for believing that the putting of the title of the

real estate in the name of the wife was a fraud upon the creditors, and the testimony tends strongly in that direction, it was his duty to the creditors to take the proper steps to have the transfer set aside. As long as the legal title is in her name, she is entitled to the rents; and it must remain in her until a court of competent jurisdiction acting in the case decides otherwise.

The application must be denied, but, under the circumstances, without costs.

WESTERVELT (UNITED STATES v.). See Case No. 16,668.

WESTERVELT (VANDEWATER v.). See Case No. 16,846a.

Case No. 17,446.

WESTERWELT v. LEWIS et al.

[2 McLean, 511.] [1]

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

JUDGMENT OF ANOTHER STATE—CONCLUSIVENESS—PLEA OF NUL TIEL RECORD.

1. Under the constitution and act of congress, the judgment of a court in any state is conclusive; and the same effect is given to it in every other state as it had in the state where rendered.

[Cited in Tenney v. Townsend, Case No. 13,832.]

[Cited in Melhop v. Doane, 31 Iowa, 400.]

2. This question arises under the constitution of the United States and act of congress, and the decision of the supreme court of the Union is consequently binding. Indeed that court can exercise appellate jurisdiction on the subject.

[Cited in Lincoln v. Tower, Case No. 8,355.]

3. A plea of nil debet, in an action brought on a judgment, is bad on demurrer.

4. The record, when duly authenticated, contains absolute verity, and is conclusive.

[Cited in Lincoln v. Tower, Case No. 8,355.]

5. Where no process was served on the defendant, and there has been no appearance, the judgment is a nullity.

[Cited in Wetherill v. Stillman, 65 Pa. St. 115.]

6. A proceeding by attachment is a proceeding in rem, and only binds the defendant to the extent of the property levied on.

[Cited in Horner v. Doe, 1 Ind. 133. Cited in note to Doe v. Bowen, 8 Ind. 200.]

7. Where it appears, from the record, that process was served, or that there was an appearance, the fact cannot be controverted.

[Cited in U. S. v. Walsh, 22 Fed. 648; U. S. v. Gayle, 45 Fed. 107.]

8. Nul tiel record, the only proper plea in such a case.

[Cited in Westcott v. Brown, 13 Ind. 86.]

Mr. Krum, for plaintiff.

Mr. Logan, for defendant.

McLEAN, Circuit Justice. This is an action of debt brought on a judgment obtained against the defendants, by the plaintiff, in the state of New York.

The defendants filed two pleas: First. Nil debet. Second. That no notice was served on the defendants before the rendition of the judgment. To these pleas the defendants demurred.

The 1st section of the 4th article of the constitution of the United States declares, "that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every state. And congress may, by general laws, prescribe the manner in which such acts, records and proceedings, shall be proved and the effect thereof." In the act of the 26th of May, 1790 [1 Stat. 122], it is provided "that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court, within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And such records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the court of the state from whence the said records are or shall be taken." On reading this act and the constitution, it would scarcely be expected that any difference of opinion could arise on the construction of either. It is still more extraordinary, that after the supreme court, by repeated adjudications, had settled the construction of both, that any state court should adhere to a different opinion. This is so opposed to the course of the supreme court, in following the construction of the state constitutions and statutes, by the state courts respectively, that it was not anticipated. In fact, as regards the construction of the constitution and the act of congress, the supreme court have appellate powers over the supreme court of a state.

In the case of Mills v. Duryee, 7 Cranch [11 U. S.] 481, the court held that a record authenticated as required by the act of congress gives the same effect to the record, as evidence, as is given to it in the state where the judgment was rendered. That the only inquiry is, what is the effect of the judgment in such state. That whatever might be the effect of a plea of nil debet to an action on a state judgment after verdict, it is bad on demurrer. That an exemplification of the original record was sufficient without the original.

In Hampton v. M'Connel, 3 Wheat. [16 U. S.] 234, the chief justice says: "This is precisely the same case as that of Mills v. Duryee [supra]. The doctrine there held was, that the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced; and that whatever pleas would be good to a suit thereon in such

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

state, and none others, could be pleaded in any other court in the United States." That case was brought before the court by a writ of error to the circuit court of the United States, in New York. A nil debet was pleaded to which there was a demurrer. And the court again decided, as they had done in the case of Mills v. Duryee [supra], that the plea was bad.

In pursuance of these decisions the courts of the United States have uniformly acted. And the same rule has been adopted by many of the state courts. The plea of nil debet puts in issue the existence of the debt at the time of pleading. And if this be a good plea in an action on a judgment, it puts in issue the debt evidenced by such judgment. This cannot be done if any effect be given to the act of congress and the constitution. The judgments of a sister state were, at first, treated in New York as foreign judgments. They were considered only as prima facie evidence of indebtment, liable, of course, to be impugned. And although this ground has been somewhat receded from, yet it is difficult to determine what has been given up when a defendant is still at liberty to take issue upon the fact of his appearance, which is stated on the record. The adjudications in Massachusetts are not materially different, on this point, from those of New York. 5 Wend. 148; 9 Mass. 467. Where, from the face of a record, it appears that the defendant has not been served with process, and has entered no appearance in the case, the judgment is treated as a nullity. And where, under the laws of some of the states, an attachment is the first process, and that being levied on any article of property, however small, gives jurisdiction to the court, a judgment is obtained, it is only considered as a proceeding in rem.

It is not in the power of a state court or a court of the United States, by process of attachment, to take cognizance of an individual who is not within its jurisdiction, and bind him personally by a judgment. Such a proceeding binds the property attached; but beyond that the defendant is not bound. It is a proceeding in rem, and, except the property levied on, the court have no more power to affect the interests of an individual than if no process had been issued against him. That the court had jurisdiction of the person of the defendant must appear from the record, and where such fact does appear it cannot be controverted. As well might any other fact in the record be denied as this. The record is made out under the authority of the court, and purports absolute verity. As evidence it cannot be questioned. If, in making up the record, through the inadvertence of the clerk, a mistake has occurred, the only mode of correcting it is by application to the court who gave the judgment, and who have a right, at all times, to correct clerical errors. By a statute in New York, where individuals are sued as co-partners, and process is served on one, judgment may be entered up against all of them, which operates only against the partnership property. And the partners on whom the process was not served, are permitted to come in on certain conditions, to contest the right of the plaintiff. And it is insisted that on one of the present defendants notice was not served, and on that ground the defendants have filed the second plea. To this it may be answered in the first place, that the record shows a notice to the defendants. And in the second, that, admit the truth of the plea, the defendant could not ask to be placed in a more favorable position here than he could have claimed in the state of New York. This would seem to result from the decisions adverted to, under the act of congress. If the same effect is to be given to this record, as evidence, as would be given to it in New York, it must be conclusive of all the matters adjudged, unless they shall be opened up in the manner provided. In giving a judgment on this record we give to it the same effect that it had in New York. Nul tiel record is the only plea, perhaps, which can be filed to an action founded on a record. We do not speak of fraud which vitiates all transactions, judicial as well as others, and which may be set up by third parties, but not as between the parties on the record.

The demurrer to the pleas is sustained. Judgment.

Case No. 17,447.

WESTFALL v. BARNEY.

[See Case No. 17,448.]

Case No. 17,448.

WESTFALL v. SHOOK.

[5 Blatchf. 383;[1] 5 Int. Rev. Rec. 54.]

Circuit Court, S. D. New York. Feb. 11, 1867.

INTERNAL REVENUE—TAX ON IMPORTED SPIRITS—GOODS IN BONDED WAREHOUSE.

1. Under the 7th section of the act of March 7, 1864 (13 Stat. 16), an additional duty of forty cents per gallon was imposed on all distilled spirits imported from foreign countries prior to the passage of that act.

2. The fact that such spirits were in a bonded warehouse at the time of the passage of that act does not exempt them from such tax.

3. Under that act, such duty is to be collected in such manner as the secretary of the treasury may direct, and he has power to direct it to be paid to a collector of internal revenue.

[2] [The plaintiff, in January, 1864, imported and entered at this port a quantity of gin

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

[2] [From 5 Int. Rev. Rec. 54.]

from Rotterdam, and entered it the same month. The duty on this gin was $1 per gallon, under the act of July 14, 1862 [12 Stat. 543]. On the 29th of April, 1864, the plaintiff went to Collector Barney and tendered this money as duties, and demanded the goods. The collector refused to deliver the goods, claiming that by virtue of section 7, Act March 7, 1864 [13 Stat. 16], entitled "An act to increase the internal revenue," an excise tax of 40 cents per gallon, in addition to the above tax, was levied upon this gin, and that before he (the collector) would surrender it, the plaintiff must go to Mr. Sheridan Shook, and pay this 40 cents per gallon additional, bring back his receipt, and then he (Mr. Barney) would accept the import duty of $1 per gallon, and surrender the merchandise. The plaintiff went to Mr. Shook as directed, paid under protest, received his goods from Mr. Barney, and now brings this suit against both parties.

[The question was one purely of law, and was fully argued on both sides. Mr. Sidney Webster and Mr. Malcomb Campbell for the plaintiff contended that by the warehouse act, there was an implied contract between the government and importer that the latter should pay only the import duties, hence the exaction of 40 cents was illegal, it being an interference with vested rights.

[Second. That this tax was an excise, and would not lie against goods in the custom house, and before they passed into the possession of the importer; that the law was really levying an excise tax on foreign goods, which was against statute and judicial decisions.

[Third. That the tax laid was an "additional tax," and if it was an "excise" there was no preceding "excise tax" to add it to; and if it was held by court to be an "impost" tax, that then Mr. Shook was not the proper officer to collect it.

[Mr. Ethan Allen, Associate U. S. Dist. Atty., argued the case for the government, and contended:

[First. That if any contract existed between the government and the importer, under the warehouse act, this was, at best, only an implied contract, and could at any time be changed by statute; that the power of congress was supreme and absolute, under the constitution, and they could even abolish the warehouse act if so disposed. If they could abolish the warehouse system, they could surely regulate it.

[Second. That even if the tax in question was an "excise" and not an "import" tax, it fell within the power of congress to levy the same, and the same attached to the foreign goods so soon as they entered the port; that as to the collection by Mr. Shook, at best it could only be a question of form (if the right to levy the tax was sustained), and this inferior question as to the mode of collecting the tax, could not be held in any way to interfere with the right to make it; that the secretary of the treasury designated Mr. Shook, as he had a right to do, under the statute, and no question could be against it.

[Third. That the tax being a lien upon the goods so soon as they arrived in the port, the government had a right to collect this lien in its own way, and was entitled to it before the goods passed into the possession of the importer.

[Fourth. That assuming the government to be wrong in all the above positions, that this suit would not lie against Mr. Shook, because he did not exact the duties, but only received them when tendered; and, therefore, as to him, it was a voluntary payment; and he, having paid the money over to the United States, he could not be compelled to pay it back; that the suit would not lie against Mr. Barney because he had not received the money, and no protest was made to him and no appeal taken to the secretary of the treasury conditions precedent by the statute, before a suit will lie against the collector of the port for the recovery of duties.] [2]

Sidney Webster and Malcomb Campbell, for plaintiff.

Ethan Allen, Asst. Dist. Atty.

SMALLEY, District Judge. It does not appear that the defendant made any claim for the money paid, or that he had the property in his possession, or had, or attempted to exercise, any control over it. It is urged, on the part of the plaintiff, that this tax was in violation of law because it was an impost tax, and because, if it was an internal revenue tax, the property was not in a condition to be taxed, being at the time in a bonded warehouse [not withdrawn or offered for sale.] [2]

The act under which the tax is claimed is very clear and explicit in its provisions. It is the 7th section of the act of March 7th, 1864 (13 Stat. 16). The first clause of that section provides, "that, from and after the passage of this act, in addition to the duties heretofore imposed by law, there shall be levied, collected and paid, on spirits distilled from grain or other materials, whether of American or foreign production, imported from foreign countries previous to the first day of July next, of first proof, a duty of forty cents on each and every gallon, and no lower rate of duty shall be levied or collected than upon the basis of first proof, and shall be increased in proportion for any greater strength than the strength of first proof." If the section stopped here, I might be disposed to say, that, as the goods had been imported, and placed in a bonded warehouse, before the passage of the act, this first section did not apply to them, and I might be disposed to read the act as if the words "to be" were interpolated before the word "imported." But the second clause of the section leaves no room for doubt. It was clearly the intention of congress, by adding the second clause, to go further than in the first. The second clause reads thus: "And that, upon

[2] [From 5 Int. Rev. Rec. 54.]

all such spirits imported prior to the passage of this act, there shall be levied, collected and paid an additional tax of forty cents per gallon, to be collected under the direction and according to regulations established by the secretary of the treasury."

The application of the act to these goods must depend on the simple question—were they imported? If they were, does the fact of their being in a bonded warehouse, subject to withdrawal, and with the duties on them unpaid, put them in a better condition, to exempt them from this tax, than if they had been entered for consumption and the duty on them had been paid, and they had been stored in a private warehouse?

That the goods were imported, within the meaning of the act, both parties agree. The language of the act does not leave any room for doubt. It applies to all spirits "imported prior to the passage of this act." The construction I should be disposed to give to the first clause of the section would make it apply only to goods imported between the 7th of March and the 1st of July. That, too, would seem to have been the view taken of it by congress, for, in the second clause of the section, they make a sweeping provision in regard to all spirits "imported prior to the passage of this act."

It is argued, for the plaintiff, that, as these goods were in a bonded warehouse, they were entitled to greater privileges than other goods not similarly situated. I cannot see the force of that claim. The assumption can rest only on the ground that bonded warehouses are established as a matter of contract between the government and the importer, which the government has no right to change without the consent of the importer. It is true, that some senators went almost, though not quite, as far as that, in the discussion which was had upon the passage of the act. But the opinion of an individual member of a legislative body would be a bad criterion by which to decide what the law-makers themselves intended. Members of legislative bodies frequently differ in opinion among themselves. If congress have the power, as they have if they choose, to destroy the warehouse system at once, without any notice, they surely have the power to impose additional burthens upon goods in warehouse. In other words, it was within the power of congress to do precisely what they did in this case. Whether it is wise for them to do this, or that, or the other thing, is a question for legislative discretion, not for judicial construction.

[It is argued that there was a treaty with Belgium, and that the construction given to this warehouse system, as claimed by the government, would be a violation of that treaty. That is a question, however, which can hardly arise in this case. If the Belgian government made a contract with our government—for it must be a contract as a treaty is nothing more than a contract between nations—and the Belgian government claims that we violated it, our government may be called upon to make redress; but for citizens of our own country to avail themselves of a treaty of this kind, in this way, is beyond my conception to understand.] [2]

I think it very clear, that congress intended to tax these spirits; and they have used most explicit language to carry out that intent. It is said, that, as the spirits had been taxed in another district, and under other circumstances, they ought not to be subject to the additional tax imposed in this case. With that the court has nothing to do. It is a question for the action of other officers of the government, and not for judicial action at all.

The act authorizes the secretary of the treasury to collect the tax in such manner as he may direct, and he chose simply to issue a circular ordering it to be paid to the collector of internal revenue. That was in strict compliance with the act. Congress might have thrown other guards about it, if they chose, but they left it to the discretion of the secretary of the treasury, and he ordered the collection of the tax in the manner prescribed. The law authorized the collection of the tax, and it was the duty of the secretary of the treasury to see that it was collected. He prescribed this mode, and I cannot see any wrong that the plaintiff has sustained from the payment of the tax thus levied upon his goods. There must, therefore, be a verdict for the defendant.

Case No. 17,449.

WESTHOFF v. The OLUF.

[3 Woods, 667.] [1]

Circuit Court, N. D. Florida. March Term, 1879.

COLLISION.

A tow which is itself without fault is not liable for damages resulting from a collision caused by the fault of the tug.

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

J. P. Jones and S. R. Mallory, for libelant, cited: 1 Pars. Mar. Law, 208, and note; The Gray Eagle, 9 Wall. [76 U. S.] 505; The Granite State, 3 Wall. [70 U. S.] 310; Strout v. Foster, 1 How. [42 U. S.] 89; The Express [Case No. 4,598]; The Maria Martin, 12 Wall. [79 U. S.] 31; The Brothers [Case No. 1,969]; The Scioto [Id. 12,508]; The B. S. Sheppard [Id. 2,072]; The Palmetto [Id. 10,699].

G. R. Stanley, for claimant, cited: The Express [Case No. 4,596]; Owners of the James Gray v. Owners of the John Fraser, 21 How. [62 U. S.] 184; Sturgis v. Boyer, 24 How. [65 U. S.] 110; 1 Pars. Shipp. & Adm. 434.

WOODS, Circuit Judge. The libel was filed to recover damages sustained by the schooner Zenobia, of which the libelant was master, resulting from a collision between her and the bark Oluf. The facts were as follows:

[2] [From 5 Int. Rev. Rec. 54.]

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

About five o'clock on the morning of January 1, 1876, the Oluf, in tow of the steam tug Seminole, approached the harbor of Pensacola, where, about one-quarter of a mile from the wharf, and in the usual and proper place, the Zenobia was lying at anchor. The Oluf was towed astern of the tug by a hawser between forty and fifty fathoms long. The tug passed the Zenobia without collision, but the Oluf ran into the Zenobia, causing damage to the amount of about $325.

The libelant claims that the Zenobia, being at anchor, it was the duty of the Oluf, on entering her harbor, to take every reasonable precaution to avoid a collision; that instead of doing this the Oluf was managed without skill, that she had but one lookout, and she was towed into the harbor at too high a rate of speed, namely, seven or eight knots an hour. The answer of the respondent claims that the Oluf was skillfully managed, that she had a proper lookout, and that the collision was caused by the rate of speed at which she was towed, and the want of the light upon the Zenobia required by the sailing regulations for vessels at anchor.

The evidence satisfactorily establishes that the Oluf was towed into the harbor by the Seminole, at the rate of seven or eight knots an hour, and that the Zenobia, at the time of the collision, did not have up her lights, and that the collision was the result of these two causes combined. The evidence does not, in my judgment, show any neglect or want of skill on the part of the Oluf. She had the proper lights, sufficient lookouts, and, as directed by the master of the Seminole, kept astern of the tug. She was directly astern just preceding the collision. As there was no light on the Zenobia, and as the Oluf was being towed at the rate of seven or eight knots an hour, she did not discover the Zenobia in time to change her course so as to avoid the collision. The Oluf not being herself in fault, the question is, is she liable for the damage resulting from the fault of the tug of which she was in tow? If she is, then both parties being in fault, the one for recklessness in coming into the harbor at such a high rate of speed, and the other for not having her lights set, the damage must be equally divided. If the Oluf is not liable for the fault of the tug, the libelant should have proceeded against the tug, and the libel against the Oluf must be dismissed. The authorities upon the question, whether the tug or the tow is liable for the damages resulting from a collision, are very conflicting. See Pars. Mar. Law, 208, note. The true rule on this question is laid down by the supreme court of the United States, in The Maria Martin, 12 Wall. [79 U. S.] 31. "Cases undoubtedly arise," says Mr. Justice Clifford, in that case, "where both the tug and tow are jointly liable for the consequences of a collision, as where those in charge of the respective vessels jointly participate in their control and management, and the master and crew of each vessel are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Where the officers and crew of the tow, as well as the officers and crew of the tug, participate in the navigation of the vessels, and a collision with another vessel ensues, the tug alone, or the tow alone, or both jointly, may be liable for the consequences according to the circumstances, as the one or the other, or both jointly, were deficient in skill, or were culpably inattentive or negligent in the performance of their duties." To apply this rule to this case, it seems to me that no fault can be found with the management of the Oluf. She had out her lights, green and red, properly set, was fully manned, had a competent and sufficient lookout, and followed implicitly the directions and signals of the tug. The collision was the result of no neglect, unskillfulness or misconduct of her officers and crew. It was caused in part by the high rate of speed of the tug, and in part by the want of a light on the Zenobia. To hold the Oluf responsible, under the circumstances of the case, would not, it seems to me, be in accordance with the rule laid down by the supreme court. My opinion is, therefore, that the libel ought to be dismissed at libelant's costs.

Case No. 17,450.

WESTINGHOUSE v. GARDNER, ETC., AIR-BRAKE CO.

[2 Ban. & A. 55;[1] 9 O. G. 538.]

Circuit Court, N. D. Ohio. April, 1875.

PATENTS FOR INVENTIONS — AIR BRAKES — PRIOR INVENTION—INFRINGEMENT—VALUABLE IMPROVEMENTS.

1. Although defendant's apparatus is a valuable additional improvement to prior inventions, he is not thereby justified in appropriating and using such of said prior inventions as have been patented to others.

[Cited in Strobridge v. Lindsay, 2 Fed. 694.]

2. A prior description of a part cannot invalidate a patent for the whole.

[Cited in Bundy Manuf'g Co. v. Columbian Time-Recorder Co., 59 Fed. 295; Id., 12 C. C. A. 442, 64 Fed. 852.]

3. The words "substantially as described," must necessarily be implied; and being so implied they involve a reference to the specification.

[Cited in Bortree v. Jackson, 43 Fed. 138.]

In equity.

George H. Christy and W. Bakewell, for complainant.

John Coon, J. J. Coombs, James Parsons, and George Willey, for defendant.

Before SWAYNE, Circuit Justice, and WELKER, District Judge.

WELKER, District Judge. This is a bill in equity, for injunction and account, filed

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

by George Westinghouse, Jr., alleging infringement by defendant of certain patents for improvements in air-brake apparatus. Of these patents two are reissues, viz.: No. 5,504, dated July 29, 1873, of original patent No. 88,929, granted to complainant April 13, 1869, and No. 5,506, dated July 29, 1873, of original patent No. 117,841, granted to complaint August 8, 1871. Both of these are for improvements in steam-power car-brake apparatus. A third patent is for improvement in hose coupling, granted to Barney Mee, on May 7, 1867, No. 64,437, and assigned to complainant.

Defendant filed one original and three supplemental answers. After the proofs were all in, the case was argued exhaustively and at great length, by able and eminent counsel. The importance of the case, however, and the large interests involved, as well as the value of the invention itself to the patentee and to the public at large, fully justified the elaborate discussion which the case received, and rendered necessary the careful consideration which we have given to it. The printed record covers about seven hundred and eighty pages; and nearly thirty patents and provisional specifications offered in evidence by the defendant on the issue of novelty and priority of invention, and not included in the printed record, were discussed at the hearing. On account of a pressure of other duties since the hearing, it is impossible for us now to do more than state generally and briefly the conclusions arrived at by the court.

1. The claims alleged to be infringed by defendant are claims 1 to 7 of reissue 5,504, the third claim of reissue 5,506, and claims 1 to 4 of the Mee patent. The proofs in the case fully sustain the allegation of infringement, by the defendant, of each of three patents embraced in this suit.

The defendant claims to be protected in the manufacture of its air-brake apparatus by letters patent No. 133,847, granted to Gardner, Ranson & Martin on December 10, 1872, for improvement in steam-pumps, reissue No. 4,879 to J. W. Gardner of original patent No. 122,884, dated January 23, 1872, for improvement in steam and air brakes, and patent No. 128,220, to Gardner & Ranson, dated June 25, 1872, for coupling valves for steam and air brakes. These devices are claimed by defendant to be valuable improvements on the apparatus of Westinghouse and Mee, as was ably argued by defendant's counsel; and while we are not disposed to dispute the ingenuity and utility of these devices, and particularly the defendant's apparatus for releasing the brakes, and which may be, and no doubt is, a valuable additional improvement, we are nevertheless of opinion that the air-brake apparatus, as constructed and used by defendant, although embracing these alleged improvements, does infringe the Westinghouse and Mee patents above referred to, and that these improvements will not justify the appropriation and use by the defendant of that which has been patented to others. The right granted under complainant's patents is exclusive, and the infringement clearly proven.

2. As to reissues 5,504 and 5,506, a second defence is that they are for substantially different inventions from those constituting the subject matter of the original patents. A comparison of the original and reissued patents satisfies us that this defence cannot be maintained. No material change has been made in the specifications of these patents, and the reissued claims are clearly warranted by the specifications of invention, as contained in the original patents. It is a legitimate and important function of a reissue to modify or change the claims of the original patent so as to cover the invention set forth therein.

3. Defendant also avers that the second and third claims of reissue 5,504 are void, for ambiguity. Read in the light of the specification and drawing, we fail to see any ambiguity such as would justify us in declaring them void on that account. This defence must also be overruled. The words "substantially as described" must necessarily be implied; and being so implied, they involve a reference to the specification, which is sufficiently clear to prevent any misunderstanding of the scope and meaning of the claims in question. Seymour v. Osborne, 11 Wall. [78 U. S.] 547; Mitchell v. Tilghman, 19 Wall. [86 U. S.] 391.

4. The issue of novelty was most vigorously contested. As already stated, nearly thirty United States and English patents and English provisional specifications were offered in evidence on part of the defendant, and voluminous expert testimony was taken with reference thereto. Special attack was made on the fourth and fifth claims of reissue 5,504, the patents chiefly relied on being those of Walber, March 16, 1852, No. 8,812; Goodale, May 30, 1865, No. 47,943; Wright, January 17, 1855, No. 12,263; Fullerton, December 29, 1868, No. 85,377; Weeks, January 5, 1869, No. 85,712; Carson, December 9, 1856, No. 16,220; Harris (English), Nos. 216 of 1857, and 2,163 of 1861; Du Trembly & Martin (English), No. 1,737 of 1860, and provisional specification of Michael Siegrist, No. 2,015 of 1863.

We are satisfied that none of these patents or specifications can have the effect claimed for them by defendant. Some are later in date than complainant's invention (even if otherwise sufficient); some are too general, indefinite, and ambiguous in their descriptive parts to constitute an anticipation of that which the complainant has patented and introduced into general public use almost the world over, with most marvellous results in point of increased safety to life and property; and those that are clear and intelligible in their terms fall short, in one or more material respects, of containing the subject matter of the claims referred to. The same patents

and provisional specifications, as well as a number of others, are relied upon by defendant as anticipatory of the first three and the sixth claims of reissue 5,504; and particularly among such additional references were the patents of Miller, January 2, 1855; Hollingsworth (English), No. 2,886, of 1853; McInnis (English), No. 2,594, of 1860, and Kendall (English), No. 3,083, of 1864. As to all of these, in their bearings on the claims last above referred to, our opinion is the same as above stated. They go to show that Westinghouse was not the first to conceive the idea of operating railway-brakes by air-pressure, and that he was not the inventor of the larger part of the devices employed for such purposes. But such fact does not detract at all from his merit or rights as a successful inventor. The organisms covered by the fourth and fifth claims of his patent, reissue 5,504, seem to have been entirely new with him; and the incorporation of these elements, together with that of graduating the air pressure in the brake-cylinders—also shown to be new and of the highest importance and utility—in claims 1, 2, 3, and 6, with other substantial and material differences not necessary to enumerate, fully substantiate his pretensions as an original and meritorious inventor, and entitle him as such to the amplest protection of the law.

Suggestive as these prior patents and provisional specifications may have been, they do not any of them embody that which Westinghouse has invented and claimed; and a prior description of a part cannot invalidate a patent for the whole. The same rule applies in patent law as in mathematics. So far as appears from the testimony in this case, none of the alleged prior inventions of air-brake apparatus have ever successfully been applied to practical use; and when we consider the immense importance of the introduction of the air-brake on railroads, and the incalculable benefit which it has conferred on the public in the readiness and certainty with which the trains can thereby be controlled, and comparative immunity from accidents thus secured, and also the number of devices which have been patented for this purpose, in connection with the fact that Westinghouse was the first, so far as appears in the record and proofs, to put an air-brake into successful actual use, such considerations only strengthen and confirm the soundness of the conclusions to which a careful examination of these prior patents has led us, that there are substantial and essential differences between these prior patents and the Westinghouse apparatus, and that to these differences we may justly attribute the successful and extensive introduction of the Westinghouse air-brake.

In this connection, we need only refer to the language employed by Justice Swayne in Wood v. Cleveland Rolling Mill Co. [Case No. 17,941]. See, also, Clark Patent Steam & Fire Regulator Co. v. Copeland [Id. 2,866].

As anticipatory of the seventh claim of reissue 5,504, some of the prior patents already cited are relied on, as also the patents of McLaughlin, August 15, 1854, No. 11,527; Lee, July 28, 1868, No. 80,290; and Peddle, February 5, 1867, No. 61,860. As the chief question here is one of legal construction, it will suffice to say that the construction given to the claim by the complainant's counsel seems to be the proper one, and, thus construed, the claim must be held valid.

The only citation in defendant's briefs, as anticipatory of reissue No. 5,506, was the Peddle patent of February 5, 1867; but as Peddle neither describes nor shows in his patent any means whatever of effecting a release of the brake, the defence necessarily fails.

Our conclusions as to the novelty of the invention claimed in the Mee patent are the same as those in reference to the others. The patent of Heneage, of August 16, 1859, No. 25,117, in some respects closely resembles it; but it, as well as the other prior patents cited in the defendant's supplemental brief—Kreuter, Frazer & Dunbar—fails to embody the complete invention, and hence necessarily fails to invalidate the claims of Mee.

5. The only remaining defence necessary to be considered is that of patentable subject-matter. It is somewhat difficult, and perhaps impossible, to draw a clear and well-defined line between what is termed a mere aggregation of devices and what is regarded as a patentable combination. It certainly is not necessary to do so in the present case, for we are clear in our view that the claims of the complainant's patent fall within the latter class. The usual decree for complainant will be entered for injunction and account, with costs.

Case No. 17,451.

WESTLAKE v. CARTTER et al.

[6 Fish. Pat. Cas. 519;[1] 4 O. G. 636.]

Circuit Court, E. D. Missouri. Oct. 11, 1873.

PATENT SUITS—NOTICES OF SPECIAL DEFENSES—FILE-WRAPPER AS EVIDENCE—QUESTIONS FOR JURY—SUFFICIENCY OF SPECIFICATIONS—UTILITY—NOVELTY—INFRINGEMENT—COMBINATIONS—DAMAGES AND PROFITS.

1. The thirty days' notice of special matter of defense in an action for infringement of a patent, required by law, is thirty days prior to the beginning of the term of trial.

2. Such notice need not specify the particular portion of the patent to which it is designed to apply.

3. Patents may be given in evidence to show the state of the art without notice, but printed publications can not.

4. The file-wrapper and contents, in the matter of the application for the patent sued upon, is not admissible evidence for the purpose of limiting the construction of the patent.

5. The first question for the jury is, whether the description and specification of the patent are in such full, clear, and exact terms as to enable one skilled in the art to construct the thing patented.

6. The second question for the jury is, whether the patent is void for want of usefulness.

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

7. If the invention is not frivolous or prejudicial to the public, and has any degree of usefulness, no matter how slight, it is not void for want of utility.

8. The third question for the jury is that of novelty.

9. The patent having been duly issued, is presumed to be valid, and whoever assails it must show by competent evidence that it is void.

10. The first, third, and sixth claims of complainant's patent construed by the court.

11. Whoever adopts the patentee's plan, and works out the same result, by merely substituting for one or more mechanical devices their mechanical equivalents, is just as guilty of an infringement as if he servilely copied the patentee's device in all its parts.

12. The action of official experts at the patent office in granting defendants' patent is entitled to some consideration, as indicating their opinion that it was for a different invention from complainant's.

13. Where a combination is claimed, the patentee can not abandon part of said combination and maintain a claim to the residue, nor prove any part thereof immaterial or useless without destroying the whole.

14. A patent for a combination does not rest upon the novelty of the parts, but upon the novelty of the mode of combining the parts.

15. Where the patentee gave his consent to the manufacture of some of the alleged infringements by defendants, he can recover no damages for these; for those afterwards manufactured he is entitled to manufacturer's profits.

[Cited in Bigelow Carpet Co. v. Dobson, 10 Fed. 387.]

Action at law.

Suit brought upon letters patent [No. 30,577] for "Improvements in truss-bridges." granted Jonathan L. Jones, November 6, 1860, and assigned to plaintiff [James V. Westlake]. The defendants [M. S. Cartter and others] plead the general issue, and gave notice of special matter of defense. Defendants' counsel offered in evidence patent granted Geo. S. Avery, July 28, 1857, No. 17,864, to which plaintiff's counsel objected, "on the ground that the particular portion of the plaintiff's patent it referred to was not specified in the notice." The notice was as follows: "The said defendants will further prove, upon said trial in bar of said action, that the plaintiff's assignor was not the first and original inventor of the invention described and claimed in said letters patent No. 30,577; but that long prior to said pretended invention, the same was fully described and shown in the following letters patent—to wit, letters patent of the United States, No. 17,864, granted Geo. S. Avery, July 28, 1857, for 'improvement in segmental truss for bridges.'"

THE COURT overruled the objection, holding the notice sufficient.

Plaintiff's Counsel. Now, I ask the court to take these patent papers (the Avery patent) and look at them, and see whether they have any bearing on this invention (the Jones patent.)

TREAT, District Judge. You have chosen to make this a jury case, and it must go there. When you chose to have a jury, you chose to have this question determined in the light of expert testimony, and the jury will have to ascertain, from what the experts say in regard to it, what the facts are. I can not take it away from them. If I were sitting as a chancellor, then I would pass my judgment individually on them; but as I am not doing that, and you chose to have a jury, the jury will have to pass upon all these things. I can not say whether they are alike or not, or what light they would throw on it. The experts will have to do that. It is for the court to construe the patent under consideration here; but as far as any questions of fact are to be determined in the light of expert testimony, the jury are the judges of that. Consequently, we call in those who are skilled in this department to enlighten the jury in the one case or a chancellor in the other. There are two patents presented, and they require a large amount of mechanical skill outside of pure propositions of law, and this has to be obtained from this source—the experts.

Defendants' counsel offered in evidence the patent granted Wm. Howe, August 28, 1846, numbered 4,726, for "improvement in bridges," being the same set up in his third notice of special matter, of which a copy has been filed and served on the plaintiff's counsel on August 25, 1873, to which plaintiff's counsel objected as not having been filed within thirty days of the first day of the term. THE COURT sustained the objection, holding that, as in the Eighth circuit, the first day of the term was the "day of trial," the notice must be filed thirty days before the first day of the term, in order to be available. The first day of the term was September 15th, but the trial of the case did not begin till the 7th day of October. Defendants' counsel then offered the same patent in evidence, for the purpose of showing the state of the art.

Plaintiff's counsel objected "that the patent could not be put in evidence for any purpose without notice; and, if it went in at all, it should go in merely to show priority of invention.

TREAT, District Judge. I will only admit it to show the state of the art at the time of its date, not to impeach the validity of the plaintiff's patent.

Defendants' counsel then offered in evidence under the same notice a reference to "Mahan's Civil Engineering," which, being ruled out, was then offered as showing the state of the art. THE COURT refused to admit it, holding that a scientific work could not be received for such purpose.

Defendants' counsel offered in evidence certified copy, file-wrapper, and contents of plaintiff's patent, "for the purpose of showing that when the application was orig-

inally presented the plaintiff's assignor endeavored to cover flat or square heads on the chord-bars; that such claim was rejected, and subsequently amended by withdrawing all claim to flat or square heads, and leaving only a claim for the curved heads, as showing what was really patented, and what was the agreement, as it were, between the applicant and the government as to the extent of his patent."

Plaintiff's counsel objected, and the objection was sustained, THE COURT holding that the correspondence was not admissible.

Defendants' counsel was allowed, against the objection of plaintiff's counsel, to put in evidence letters patent Nos. 104,110 and 127,564, dated, respectively, June 14, 1870, and June 4, 1872, granted defendants for "improvements in truss-bridges."

The claims relied upon are quoted in the charge of the court.

M. Kinealy, for complainant.
Samuel S. Boyd, for defendants.

TREAT, District Judge (charging jury). This is a suit by plaintiff, as assignee of patent No. 30,577, dated November 6, 1860, to recover of defendants damages for the alleged infringement by them of said patent. The issues raised by the pleadings and notices filed are, as touching the validity of said patent:

First. Are the descriptions and specifications in said patent in such full, clear, and exact terms as to enable one skilled in the art of bridge-building to construct a bridge according to said alleged invention, with the aid of the drawings attached? or, on the other hand, are they so indefinite, uncertain, and ambiguous as not to enable a person so skilled to construct a bridge in accordance with the plan of the patentee? This principle rests on the doctrine that, while the inventive genius of the patentee is to be rewarded by a monopoly for a term of years, the public is to be compensated for such monopoly by having, after its expiration, the free and unrestricted use thereof, which free and unrestricted use can not be enjoyed unless the description of the invention is sufficiently clear and exact to enable those skilled in the art to construct the same. On this point, under the testimony, it is supposed you will have very little difficulty, if any. If the description is not so uncertain, indefinite, and ambiguous in its terms (which the defendant must prove), then the patent is not invalid for the first cause assigned.

Second. Is the patent void for lack of usefulness? If the invention is not frivolous or prejudicial to the public, and has any degree of usefulness—no matter how slight the practical utility—then, within the meaning of the law, it is useful, and consequently not void for lack of utility.

Third. Is there want of novelty in the invention? Under this branch of the inquiry, your attention is confined to the devices of the Whipple patent, No. 2,064, April 24, 1841; of the Avery patent, No. 17,864, July 28, 1857; of the Osborne patent, issued in England, No. 11,501, December 21, 1846; and of the description of the Stephenson iron bridge, in Appleton's Engineers' Journal (No. 10, vol. 2, October 1, 1852), as received in evidence. The defendants can assail the Jones patent for want of novelty only on the grounds that some one or more of those patents or published descriptions had, prior to its date, covered the same ground. Under the law of the United States governing this matter—so that the patentee may not be taken by surprise—the defendant, if he wishes to assail the validity of the patent on the ground of lack of novelty, must specify precisely what patent or published description covered the ground of this alleged invention, so that he may have his attention specifically attracted at the time of the trial to the allegation as made; otherwise the patentee may come into court and have to meet anything likely to come from any book or the world at large concerning particular inventions. Hence these instructions confine you, as the law does, to those patents of which he gave notice, which he insisted already covered the ground occupied by the patentee. In this list no others come before you except the Howe patent.

I may state the plaintiff's patent can not be assailed from any supposed imitation of that. That is introduced as a mere illustration, that the jury may see the condition of the art of bridge-building at that time. Whether plaintiff's patent covers any ground occupied by that is immaterial.

The foregoing inquiries appertain to the validity of the Jones patent. That patent, having been duly issued, is presumed to be valid, and whoever assails it must show, by competent evidence, that it is void for some of the reasons alleged. If the defendants have not so done in this case, then the jury should consider it valid, and proceed to the next inquiry—viz., whether the defendants have been guilty of an infringement of it? If, on the other hand, the jury find it invalid under the evidence for any one of the three reasons mentioned, no further inquiry on their part will be necessary, and they will find for the defendants.

It is essential to the inquiries under the foregoing heads, and also to the question of infringement, that it should first appear distinctly what the Jones patent covers. The specifications and claims, there being no separation of the new from the old, as generally appears in a specification, call for a construction by the court. There are six distinct claims in this patent, each of which is patented. The plaintiff states to the court, however, that he does not rely on any other than the first, third, and sixth. Although the court, in order to ascertain what is embraced in the specified claims said to

be infringed, must look to all the claims and the whole specifications in order to ascertain what is specifically patented in the first, third, and sixth, the attention of the jury under the evidence should be limited to what is embraced in these three claims as defined by the court. The first claim is for the "flexile curved splice in the lower chord, when said splice is formed of broad flat plates, with lateral curved offsets or lugs formed on their ends, said offsets pulling against one another, and allowing a free and independent movement of each plate in the path of a vertical circle, substantially as set forth in the drawings and specifications."

This is not a patent under this claim for the splicing of broad flat plates, with lateral offsets or lugs formed on their ends irrespective of their construction or intended functions. The object sought by the patentee was to secure such splicing by means of the indicated curving, so that the same may be flexile, to allow a free and independent movement in the path of a vertical circle. That first claim is not for any mode of interlocking by the use of lateral offsets or lugs other than this, which should be so curved as to allow a free and independent movement of the plates, as mentioned. The patent is not designed to cover any other device than that thus restricted—namely, "the flexile curved splice, allowing a free and independent movement in the path of a vertical circle." In other words, gentlemen, this contrivance of interlocking by offsets and lugs at the head is not what is patented. There is no claim in the patent for that as a specific thing; but it is in the curved flexile mode of splicing to secure this free and independent movement, so that when one of the plates moves it shall not necessarily move the other. That is the particular device patented in that connection.

The third claim is for "the metallic clamps or recessed blocks for retaining and holding together the tension-joints of the upper and lower chords or stringers, in the manner and for the purposes set forth." It is obvious where several stringers are used to constitute the upper or lower chord, and are to be spliced at intervals, especially if the splicing is to be effected by interlocking with lateral offsets or lugs, it is important to have some mechanical contrivance to prevent a lateral and longitudinal displacement, whether caused by a change of temperature, loading the bridge, or from any other cause. This patent covers a specified device for that purpose—namely, recessed blocks, which served these and other supposed beneficial purposes, as sufficiently described by the testimony. That special device has its marked peculiarities. These are upper and lower blocks to be fitted together, each to be recessed, flared from the center outward, so that, in connection with the curved surfaces of the upper part of the upper block and the curved termination of the braces resting thereon, the bridge structure may, in its different parts, adjust itself automatically, as it were, to the various changes of camber.

The sixth claim is to the shoe at the abutment, "as constructed and combined with the lower ends of the tubular diagonal brace and the extreme ends of the lower chord, substantially as and for the purpose set forth." This is a claim not for the specified parts of the combination separately, but for the combination itself. It is composed of three elements, viz., the shoe, diagonal brace, and extreme ends of the lower chords passing through the shoe, each to be constructed as set forth, and all combined in the manner indicated, so as to work out a given result. There is no infringement of the sixth claim, if the shoe is not the same, or the brace, or the ends of the lower chords passing through the shoe, for some, if not all, of these were covered, in whole or part, in combinations with other devices, by other claims in the patent.

This sixth claim covers a combination of mechanical contrivances or devices to produce a given effect, and the question is, did the defendants infringe that combination?—not, was any one of the many devices in the combination used? In determining the several questions of infringement, the jury must not judge about mere similarities or differences by the names of things, but must look to the whole structure and its several devices or elements in the light of what office or function they perform, and how they perform it, and find that a thing is substantially the same as another, if it performs substantially the same functions or office, in the same way, to attain the same result; but the devices are substantially different if they perform different duties or in a different way, or produce a different result. The substantial equivalent of a device is the same as the device itself—that is, if the patent mentions a specified mode of effecting a prescribed result, the substitution of any one or more mechanical equivalents for those specially mentioned will none the less work an infringement. The object sought by the modes of effecting the same, substantially as stated in the patentee's specifications, is covered by the patent, and whoever adopts the patentee's plan and works out the same result by merely substituting for one or more mechanical devices their mechanical equivalents or devices, is just as guilty of an infringement as if he servilely copied the patentee's device in all its parts. Hence, if the Jones patent is valid, and defendants have adopted his plan for accomplishing the result he sought, and also the mechanical devices he contrived therefor, or their equivalent, they are guilty of an infringement. If, on the other hand, the result sought by the defendants was different, or if they sought the same result by an entirely different device, or one that is

not the same or equivalent, as in the patent, then they have not infringed.

The jury will bear in mind that plaintiff insists that defendants have infringed the first, third, and sixth claims; consequently, if they infringed any one of said three claims, they are guilty, and damages should be assessed accordingly. The fact that the defendants have had granted to them patents since the issue of the Jones patent, the jury have a right to consider and weigh. The issue of a patent follows the decision of official experts specially appointed and qualified to examine and pass on the claimed invention for which the patent is sought; hence, plaintiff's patent is, prima facie, valid. But the same official experts have also granted defendants' patent, thereby expressing their opinion that the latter did not interfere with the former. Their opinion, however, is not conclusive. The plaintiff has a right to rely on the presumption springing from his older patent, and it is for the jury to decide, in the light of the testimony produced on the trial, whether that presumption as to validity has been overthrown, and also whether defendants' patent interfered or infringed on plaintiff's patent. In doing so, they can take into consideration the fact of the issue of defendants' patent; so, if there be doubt or difficulty in reaching a conclusion, they may have the benefit of such official expression.

Of course, a valid patent can not be overthrown by the issue of a subsequent patent to another person for the same thing; but when the question of infringement is under consideration, and expert testimony is necessary, the action of official experts on the subject is entitled to some consideration, especially where doubt exists.

The jury should bear in mind that the object sought by plaintiff in his patent, was the adjustability of the various parts of the bridge structure on his plan, by means of flexile curved splices and convex and concave surfaces, respectively, of the top angle-block, bridge-seats, and brace-ends. Where a combination is claimed, the patentee can not abandon part of said combination and maintain a claim to the residue, nor prove any part thereof immaterial or useless without destroying the whole. For the combination is an entirety, and if one of the elements is given up, the combination disappears. From what has been said, the jury will understand that several propositions are to be considered. As to the validity of the Jones patent, on the ground of novelty, let it be borne in mind that it is not necessary that a patent for a combination should rest on novelty of parts or elements combined, but on novelty of the mode of combining the parts.

As to the infringement, the main points are: What is the Jones patent? and next, did defendants use any of the three plans named as new in the first, third, and sixth claims thereof? As to some of the first bridges built by defendants, the jury should consider the testimony presented, viz., that the plaintiff gave his consent thereto or sold some of the parts thereof. As to those to which he gave his consent, no damages can be recovered; as to the others, if any, he is to receive manufacturer's profits thereon.

The jury found for the defendants.

WEST NEW JERSEY SOC., COMMITTEE OF, v. MORRIS. See Case No. 3,065.

WESTON (BABCOCK v.). See Case No. 703.

Case No. 17,452.

WESTON et al. v. FOSTER et al.

[2 Curt. 119.] [1]

Circuit Court, D. Massachusetts. Oct., 1854.

CHARTERED SHIPS — AUTHORITY OF MASTER — AMOUNT OF CARGO.

Though the honest opinion of a competent master, that he has taken on board all the cargo his vessel will safely carry, is not absolutely binding on the charterer, it is entitled to very great weight, and can be controlled only by decisive evidence of a mistake on his part.

[Cited in Boyd v. Moses, 7 Wall. (74 U. S.) 319.]

[This was a libel by Gershom B. Weston and others against Jacob Foster and others on a charter party.]

E. D. Sohier, for libellants.

Mr. Thaxter, contra.

CURTIS, Circuit Justice. This is a libel on a charter-party certified into this court from the district court, on account of the judge's relationship to one of the parties. The case is this: In March, 1853, the libellants let to the respondents their brig Smyrna, for a voyage from Boston to Pernambuco, and thence back to Philadelphia, New York, or Boston, at the option of the charterers. The whole of the vessel, except the cabin and room for the crew, sails, cables, and provisions, was let, and the owners covenanted to receive all such lawful merchandise as the charterers should choose to put on board. The charterers covenanted to pay for the round voyage, the sum of twenty-six hundred dollars, and fifty dollars more if New York should be elected as the return port. The brig carried a cargo to Pernambuco, and there delivered it; and the agents of the charterers then elected to load her with guano, which had been discharged from a vessel put in there in distress. Guano was received on board by the master of the brig, and stowed, partly in bags, and partly in bulk, until the master gave notice that he could take no more. The charterers' agents called a survey, and upon their report insisted that the master should receive more, to the extent of fifty tons. The master declined to receive more, upon the ground that no more could prudently be car-

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

ried. The brig sailed, arrived at Philadelphia, and delivered her cargo. The charterers insist that there should be deducted from the freight money remaining due, the amount they would have received for bringing fifty tons more of guano from Pernambuco to Philadelphia, which is shown to be six hundred dollars.

The principal question in the case is, whether the libellants have kept their covenant by receiving on board at Pernambuco, all the cargo which the charterers had a right to require the master to receive there. The libellants assert a right to the entire freight. They must show that they have entitled themselves to it, by performing all that, on their part, was to be done, to earn it. It is therefore incumbent on them to satisfy the court that the refusal of the master to receive more cargo was justifiable. To do so, they have produced the testimony of the master and mate, and of the builder of the brig, and of two marine inspectors at Philadelphia. The master testifies that he had sailed the brig eight years. That she is a deep and narrow vessel, and would not safely bear to be loaded deeper than twelve feet aft, and eleven feet forward. That she was loaded to that depth when she sailed from Pernambuco. That guano stowed in bulk, as the top part of this cargo was, hardens, and cannot be broken out, in case of necessity, to relieve the vessel at sea. And that he refused to take any more cargo, because he considered the vessel loaded with all she could safely carry to the United States. The mate testifies substantially to the same effect as the master. Captains Pedric and Gallagher, who appear to have had ample experience as shipmasters, and have long been marine inspectors, in the employment of the district court of the United States, for the Eastern district of Pennsylvania, and of underwriters in the port of Philadelphia, were called by the master of the Smyrna, on her arrival in that port, to examine her, and report on the sufficiency of her lading; and they then reported, and now testify, that in their opinion she was laden as deep as prudence would permit. The builder of the Smyrna also testified, that she ought not to be laden deeper than eleven feet six inches aft, and ten feet six inches forward, and he gives her dimensions, and states the elevation of her deck and transom timbers above the water when thus laden, in support of his opinion. On the other hand, Captain Hunt, who was one of the survey called at Pernambuco by the shippers, and Captain Hooper, who lay alongside the Smyrna there, depose that she was not fully laden; that she could have taken fifty tons more, and the former says, if he had commanded her, he should have loaded her at least a foot, and the latter says, at least two streaks deeper. Captain Hunt also testifies that when he examined her, which was before her anchors, chains, provisions, and water were in, she drew only eleven feet six inches aft, and ten feet three inches forward.

Upon these proofs, I think the weight of the evidence in favor of the plaintiff. Corroborated as it is, I attach much importance to the master's deposition. Being of competent skill and experience, as it is not questioned he is, and being well acquainted with the brig, his judgment fairly and deliberately exercised, should go far to settle the case. How deep a particular vessel may safely and prudently be laden with a particular cargo, is a matter of judgment. Both the owner and charterers know, when the contract of affreightment is made, that the master, in a foreign port must, at the time, decide this question. They know also, that inasmuch as differences of model and spars, and perhaps other circumstances, affect this question, a master who knows his particular vessel, and her performance at sea, can judge better than a stranger what cargo she will safely carry. And though the master is the agent of the ship-owner in receiving and transporting cargo, yet he may be considered, as relied on by the shipper not to receive too much cargo, and thereby subject it to risk of damage and loss. Not to overload his vessel, is a duty which the master owes to all concerned. They have a right to expect him to have competent skill and judgment in this particular, and fairly and carefully to exert them. They are not absolutely bound if he makes a mistake. But when he is a person of sufficient skill and judgment, and peculiar knowledge of the vessel, and decides honestly and faithfully, very clear evidence of a mistake should be required before his act is pronounced against by the court.

I do not find reason seriously to doubt that the master did act honestly, and was possessed of due skill and knowledge. He had sailed this brig eight years, and must have been peculiarly well acquainted with her capacity and performance at sea. He had no interest, so far as I perceive, to refuse to bring a proper amount of cargo. Though he may be supposed to look to the interest of the owners, rather than of the charterers, and to desire to make a quick passage, yet he must have known that it was not for the interest of the owners, that he should bring less than a proper cargo, and thus entitle the charterers to have a deduction made from the freight money. The mate, who appears to have testified with fairness, supports the master. The marine inspectors at Philadelphia give an opinion to the same effect, which seems to me entitled to quite as much weight as the opinion of Captains Hunt and Hooper.

But it is strongly urged that there are facts in the case which prove that if the master acted fairly, he made a mistake. The argument is, that both the master and mate say, that the brig might be safely loaded down to twelve feet aft and eleven feet forward. And though they testify she was so loaded, yet that in point of fact she was not. That Captain Hunt deposes, when he examined her, she drew only eleven feet six inches aft and ten feet three inches forward; and though this was before her provisions, water, anchors, and chains were put on board, they could make but a slight difference. And that this is corroborated by the fact, that, according to the testimony of the marine inspectors, she drew only twelve feet aft when she arrived at Philadelphia; and as she was there in fresh water, less buoyant than sea water, she must

have drawn four inches less than twelve feet, when she left Pernambuco.

Now, as to the discrepancy between her depth at Pernambuco as sworn to by the master and mate, and by Captain Hunt, it is to be observed that they are speaking of different times. The latter, before, the former, after her provisions, &c., were taken on board. It is true, Captain Hunt says, these would produce scarcely a perceptible effect on her draft; but the master of the Smyrna, who certainly had better means of knowledge than Captain Hunt, says it would affect her draft nine inches. This statement of the master of the brig is supported by her builder, who speaks to the effect on her draft of increasing her burden when brought to her bearings; and says she would then go down rapidly. Captain Hunt and Captain Sprague, the master, and Mr. Barbour the mate of the brig, may all have testified truly, if the weight of the anchors, chains, provisions, and water is sufficient to account for the discrepancy. The anchors weighed 2,300 pounds; the provisions about 3,500 pounds; the water, at eight pounds to the gallon, 5,600 pounds; and there were 160 fathoms of chain, the weight of which does not appear. Upon this state of the evidence I cannot declare, that laden as this vessel was, when these things were taken on board, it is so clear they cannot account for the discrepancy, that the master and mate are discredited.

As to the four inches on account of fresh water at Philadelphia, it must be admitted that if her draft at Philadelphia is taken to have been exactly twelve feet, and the difference between the effect of salt and fresh water is admitted to have been precisely four inches, and the weight of all on board the brig was the same at Philadelphia, as at Pernambuco, it would follow that the vessel drew at Pernambuco, four inches less than the master and mate swear she drew there. But these assumptions are not so certainly correct, as to induce me to pronounce the testimony of these two witnesses to be untrue. In the first place, the inspectors at Philadelphia do not say the brig drew precisely twelve feet. The expression in their report is, "full twelve feet," and one of them uses the same phrase twice in his deposition. In the next place, though it is proved that four inches is the usual allowance for the difference between the effect of the water at Philadelphia and at sea, I cannot suppose this is ascertained, or intended to be spoken of with entire precision, as being exactly that amount of effect on all vessels. Again, the weight of what was on board the brig was not the same at Pernambuco and Philadelphia. Her provisions and water certainly were not the same. Whether a cargo of guano loses weight on such a voyage I do not know. I am not informed by the evidence, and there is no presumption that it does not; and it must be borne in mind that the respondents have to lay the foundation for this argument to discredit the master and mate by assuming that the weight of what was on board was not lessened. Let it be considered that we are dealing with a discrepancy of four inches only; that the water must be very smooth to enable an observer to speak with entire precision; that substantial accuracy is all that can be expected; and I think it would be going too far to say that the master and mate are not to be believed, when they testify to her draft of water, at the time the brig sailed from Pernambuco.

One other fact is relied on by the respondents. The mate deposes, on his cross-examination, that the brig brought from Philadelphia to Boston one hundred and seventy-nine tons of coal. This is twenty-six tons more burden than her cargo of guano. But he also says she drew twelve feet aft and eleven feet four inches forward; that she was too deep, and not in proper trim. I do not perceive how any inference can be drawn from this, except that the master, on this summer passage from Philadelphia to Boston, did overload his vessel. And so in reference to the passage from Rio, when he brought one hundred and seventy-seven tons of coffee in bags; it is obvious from the master's statement that this cargo could not have prudently been taken on board if it had been guano in bulk. Coffee in bags can be broken out and shifted; guano in bulk cannot. It requires to be picked up with pickaxes. On this coffee voyage it was found the vessel was out of trim, and it was necessary to fill the cabin with coffee bags, leaving only just room enough for the master and officers to live there. To sail from Pernambuco for Philadelphia with a cargo of that burden, which could not be handled to trim or lighten the ship in case of necessity, and which is so peculiarly liable to damage by sea water, does not appear to me to have been demanded of the master, by his duty to the charterers. My conclusion is, that the brig did take on board at Pernambuco, such cargo as the charter-party required, and consequently that the whole charter money was earned.

One other question is raised. The consignees of the guano in Philadelphia refused to receive it in bulk. The master got bags in which to land it. It does not appear in this case whether the refusal of the consignees to receive the cargo in bulk was rightful or not. If wrongful, the master could not, by yielding to it, impose this charge on the charterers. It is therefore disallowed.

WESTON (GREGG v.). See Case No. 5,800.

Case No. 17,453.

WESTON et al. v. MINOT et al.

[3 Woodb. & M. 437; [1] 10 Law Rep. 305.]

Circuit Court, D. Massachusetts. Sept., 1847.

CHARTER PARTY—DEPTH OF LADING—AUTHORITY OF MASTER—DISPUTE WITH CHARTERERS — SURVEY—APPORTIONMENT OF FREIGHT—EXPENSE OF TOWAGE.

1. Where a vessel is chartered to another for a voyage to Calcutta and back, to carry all lawful goods placed on board, and for a gross sum for freight out and back, to the entire capacity of the vessel, it must be considered to mean all goods not contraband nor diseased, and as many of them as can be put on board without making the vessel draw too much for safety.

[Cited in Boyd v. Moses, 7 Wall. (74 U. S.) 319.]

2. If the goods put on board are heavy articles, and before the ship is full sink her as low as is usual and proper without extra danger, the owners or master of the vessel may refuse to take more without violating the charter party.

[Cited in Boyd v. Moses, 7 Wall. (74 U. S.) 319; The Giles Loring, 48 Fed. 469.]

3. The test of safety is the depth the vessel was built to draw, the depth her officers in several years' experience had found to be sufficient, the depth those of experience on the spot, after careful examination, reported to be proper, and the depth which several other vessels at the same time and place loaded to, considering their comparative tonnage.

4. If the vessel took on board in weight nearly double her measured tonnage, and was in good repair and well manned, she was not a defective or imperfect vessel, though she would not bear filling up entirely with a cargo, most of which consisted of such heavy articles as saltpetre and linseed.

5. Freight contracted for in gross for a voyage out and in, cannot be apportioned and recovered for a part of the cargo, or a part of the voyage, unless, from some expression in the contract, or nature of the voyage, or act of the hirer of the vessel, or measure of the government, an apportionment becomes feasible and just.

[Cited in Perkins v. Currier, Case No. 10,985.]

6. A survey of the vessel by other sea captains, who reported and swear to the truth of the result, is not conclusive as to her proper depth, but is a sound measure of precaution in a dispute between the master and the charterers.

7. The inclination of courts should be to sustain what seems prudent and watchful over life and property in such cases by a master, if it be done openly, after full notice to the other party, and under circumstances not indicating either groundless timidity or selfishness.

[Cited in Jelison v. Lee, Case No. 7,256.]

8. Where goods are landed at the wrong place by a master, and then reloaded, the expense must be borne by him or the owners; but if, during his illness, they are so landed by the mate, and at the request of the supercargo, the agent of the charterers, the latter must pay the expense.

9. If the charterers were to pay the expense of steam to tow the vessel to sea, if drawing over seventeen feet of water, and if they ordered the use of steam, they were not held liable when the vessel drew over eighteen feet and used steam, if giving no such order by words or letters, and if vessels after went down and to sea without steam, though drawing over seventeen feet.

This was a libel transferred from the district court without any decree there, as the judge was related to one of the parties. It alleged that the libelants [G. B. Weston and others] were owners of the ship Mattakeeset, and in August, 1843, chartered her to the respondents for a voyage from Boston to Madras and Calcutta, and back to Boston. That the plaintiffs were to keep the vessel in good condition, and take on board such goods as the respondents offered, to her entire capacity. That she did take a full cargo of ice at Boston, with certain other articles, and delivered them safely to the agents of the respondents at Madras, and brought back for them to Boston safely another cargo of saltpetre, linseed, &c., and they were entitled by the charter to receive therefor the sum of $13,000, in five days after her return, with charges and pilotage in foreign ports. That as the vessel drew over seventeen feet, the expense of taking her down the river from Calcutta by steam was properly incurred and chargeable to the respondents [G. R. Minot and others], which, with the other charges and freight, amounted to $13,856. It alleged that this, though demanded, had not been paid, and asked judgment for the amount. The answer admitted the charter party, and the amount to be paid therefor, if allowed to use the whole room of the vessel, and admitted, also, the liability to pay the expenses in foreign ports, not exceeding one hundred rupees. But it denied that the respondents were liable for the cost of towing the vessel to sea by steam, and it further denied that the vessel received at Calcutta such goods as they offered to put on board, or enough to fill her up, but left vacant forty or fifty tons weight, and a large space within decks, sufficient to cover $1,920 worth of freight from Madras to Boston. The answer also claimed a forfeiture of all freight by means of this refusal to let the vessel be filled up. It denied, also, $28.99 for damages to some domestic cottons on board, caused by neglect in stowing them, and $45.49 more for expense incurred in landing improperly one hundred and twenty-eight bales of cloth at Madras, which were shipped for Calcutta, and not Madras, $414 more for damage on the return cargo, and $40.42 for articles missing. It further alleged that $2,020.07 had been advanced to the libelants in India on account of freight. The charter party was given in evidence dated August 15th, 1843. It was in substance as set out in the libel, including the usual printed clause in the forms, to receive on board "all such lawful goods and merchandise" as the charterers "think proper to ship," and after the agreement to

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

pay $13,000 for freight, a written clause was added, "in full for the entire capacity of the ship out and home." The provision in the charter party as to pilotage, was not to pay for the use of steam up and down the river, unless ordered by the respondents. Much evidence was put in as to the fact, whether the vessel was loaded homewards as full as was safe, and as to the actual depth of water she drew out and back, how near her decks were to the water's edge, how much of her was not filled up, the propriety of towing her to sea by steam, the size and form of the vessel, the damages done the cargo, the negligent landing of some goods at Madras, and various other matters bearing on the points in controversy. On some of these topics the testimony was contradictory, and on others, uniform. So much of it as may be useful to state will be given in the opinion of the court.

E. D. Sohier and Charles P. Curtis, for libelants.

W. Minot and F. C. Loring, for respondents.

WOODBURY, Circuit Justice. It may be well in the outset to separate the points in case which are not now in controversy from those which are, and, among those which are, to dispose of such first, as are least difficult and least important. The plaintiffs are now willing to allow the $28.99 for damages on the cloths, the $414.01 for damages on the home cargo, the $40.42 for articles missing, and $2,007.20 for money advanced to them abroad towards freight. The evidence and law in relation to these need not, therefore, be examined. The claims left and still contested, are the $45.49 for expenses by the respondents in reloading certain articles at Madras, which should not have been put ashore there, and the two claims made by the libelants for a steamboat to tow the vessel to sea, and for the general balance for the freight and charges in foreign ports, after deducting the expenses and advances by the libelees. In respect to the first matter in controversy, it is true that the master of the vessel should not, of his own accord, have landed articles at Madras, which, by the papers on board, were to be delivered at Calcutta. But in relation to this, it appeared in evidence that the master was then indisposed, and these articles were put on shore at Madras, by the mate, under the request of the supercargo of the respondents. As the official cause of the mistake was a request from the supercargo, the agent of the respondents, and the delivery was made in the master's necessary absence, it would be inequitable to consider a compliance with this request by the mate as such a neglect as ought to relieve the respondents from the expense of the wrong of their own agent. They should not devolve it on the plaintiffs, whose subordinate officer did nothing but attempt to oblige the respondents and those in charge of their concerns.

In regard to the claims by the plaintiffs:

The first one, for payment for the use of steam, I think must be disallowed. It was beforehand expressly provided in the charter that no payment should be made by the respondents for such steam, unless it was directed by themselves. Thus, "if steam is used up and down the river, it is at the owner's expense, unless ordered by the charterers." There is no pretence here that they gave any such direction verbally or in writing, but only that it was virtually given by their acts in loading the vessel at Calcutta so deep as to draw eighteen feet and a half on an even keel, where the regulations of the port did not require a pilot to take a vessel to sea without steam, if she drew over seventeen feet. One may become liable by his acts different from his words. 10 N. H. 538. But it was proved as a farther fact, that pilots might, if they pleased, take vessels to sea without steam, though drawing over seventeen feet; that this was frequently done, and that most of the vessels in the Calcutta trade, with full cargoes, went to sea drawing over seventeen feet. Under these circumstances, presumed to be known to both parties, it cannot be inferred that the respondents, by loading the vessel so as to draw over seventeen feet, meant to request the use of steam and thus become liable for it. It was not an unusual depth, not one always accompanied by steam, and not one where steam was indispensable. Being then not ordered by words or acts of the respondents, the expenses of it must, under the provision of the charter party, looking either to a strict or liberal construction, be considered as incurred on the responsibility of the owners of the vessel rather than the charterers.

The next, which is the last and most important question, is the liability of the defendants to pay the sum for freight stipulated in the charter. This question becomes one of more interest here, as the defendants contend that they are not answerable pro rata for the full freight out, and for that home, after deducting the space or number of tons left vacant, but are exonerated entirely from the whole, because something short of the whole was not filled up when requested by them. Their reasons assigned for this apparent strictness, are, that the contract of affreightment for the voyage out and back was one, or a single contract, and cannot be apportioned, the contract having been for all the ship, her "entire capacity," and not a portion of it. They contend further, that in case of freight, usually the whole engaged to be delivered is to be delivered as a condition precedent to receive freight, and the failure, even by perils of the sea, to carry safely all, is a loss or forfeiture of freight for all when the price payable was a single or gross sum, and not so much per pound, barrel or ton.

In support of this, see 3 Kent, Comm. 227; 2 Holt, Shipp. 145; 10 East, 295; 7 Durn. & E. [Term R.] 381; 2 Lev. 124; Abb. Shipp. 246. By some cases nothing is considered due for carrying a part of the whole which was stipulated. [Caze v. Baltimore Ins. Co.] 7 Cranch [11 U. S.] 358; 2 Mass. 147; The Nathaniel Hooper [Case No. 10,032]; 2 Johns. 356; 1 Johns. 24; 15 Johns. 332. Carrying the whole, and for the whole voyage, is regarded often as a condition precedent. 1 Bulst. 167; 8 East, 457; 2 Barn. & Ald. 17; [6 Whart. 442.] [2] It may be such a condition, if, in its nature, it precedes what is to be done, or is the root of it. Abb. Shipp. 253, 266; 12 East, 381; 10 East, 555; 3 Bing. N. C. 355; 21 Pick. 438. While, on the contrary, the plaintiffs insist that where an apportionment in such cases is feasible, it is equitable to make it, and that a court of admiralty is to be governed by equitable rather than strict common law principles. Brown v. Lull [Cas. No. 2,018]; Dean v. Bates [Id. 3,704]. Indeed, Spence on Equity Jurisprudence (page 17) says that admiralty powers were once exercised in the courts of chancery. It is further insisted here, that the full freight out can be assessed on the ratio it bears to a full freight home, if considering the former as less valuable in voyages of this kind. And that the freight home can be apportioned for the quantity filled up, compared with the whole, or with such as ought to have been filled up. This last course certainly seems the more just, and is less penal and technical. Compensation is to be made, rather than a forfeiture, if it can be legally. 2 Story, Eq. Jur. §§ 1313–1316. This, at the same time, would allow a recovery by the respondents, or a deduction for any peculiar damage they may have sustained for not being allowed to send in this vessel, or so soon, or on so good terms, the quantity of merchandise not taken, which ought to have been taken. Abb. Shipp. 253, 270, 480, note; 6 Munf. 34; 10 East, 530; 1 Camp. 377; Poth. Chart. Parties, 25; 2 Holt, Shipp. 37; 8 Taunt. 516. This would seem peculiarly proper, as the rule, rather than a forfeiture of the whole freight for a very small omission, or departure from the contract to carry all the vessel could. And this departure happening, not from willfulness, caprice, neglect or malice, but a mere error of judgment, or mistake in fact, yet candor compels me to say that the cases in point which support this last view are those, however plausible in appearance may be some of the appeals in it to equitable considerations.

Perhaps if the contract be indivisible in terms, and the parties make no express exceptions, the true rule will be found to be, that the voyage must be treated as a whole, and the cargo as a whole, and no freight be recoverable, if not all, with only such exceptions as will soon be enumerated. Abb. Shipp. 406, 455, note; 3 Johns. 335; 1 Dod. 317; [Columbian Ins. Co. v. Catlett] 12 Wheat. [25 U. S.] 383; Sampayo v. Salter [Case No. 12,277]; 3 Greenl. 1; 5 Mass. 252. An attempt in parliament by statute to exempt owners from liability for goods, &c., unless injured or lost by default of owners, officers and crew, has been made but failed. Abb. Shipp. 383. It is truly said that generally the parties are competent to make their own contracts, and if not choosing to insert proper limitations and restrictions adapted to ordinary events, should not complain if they are required to abide by the consequences of their own neglect. But, on the contrary, if relief can be extended without violating the spirit or equity of the contract, it certainly should be, and so if the case come within any of the exceptions just referred to. Thus if the vessel is prevented by a blockade from completing her voyage, still the owners may recover freight. The Friends, 1 Edw. Adm. 246. Or if that cargo be lost by leakage, decay naturally, &c. 2 Johns. 327. Or if it be sold by the shippers or accepted short of completing the voyage. See former cases. Hurtin v. Union Ins. Co. [Case No. 6,942]; 4 N. H. 261; 2 Conn. 394. Or if there be a refusal to permit its landing by government. [Morgan v. Ins. Co. of North America] 4 Dall. [4 U. S.] 455; 3 Kent, Comm. 222. So if it be not full freight, or if it be not delivered by default of the shipper, freight may be recovered. Abb. Shipp. 406, note; Jordon v. Warren Ins. Co. [Case No. 7,524]; Bork v. Norton [Id. 1,659]; The Nathaniel Hooper [supra]; 3 Kent, Comm. 228; 11 Mass. 229; 16 Johns. 346. Or if it be properly thrown overboard in a storm. 1 Speers, 321; 2 Johns. 327. Some cases hold, as between owners and shippers, if parts of the cargo are lost at sea, the owners of the ship may recover freight for them pro rata itineris. 4 Mass. 221; 5 Mass. 225; Park, Ins. p. 70, c. 2; Abb. Shipp. 443, 455, in notes. This is perhaps, if the rest reaches the shipper's hands, or is accepted. 1 Johns. Cas. 377; 2 Johns. Cas. 443; 2 Caines, 13; 2 Johns. 323; 9 Johns. 186; 1 Johns. 24; [Caze v. Baltimore Ins. Co.] 7 Cranch [11 U. S.] 358; 6 Cow. 504; 3 Pick. 20. Some cases also allow a recovery in a proper action quantum meruit, though not able to sound on the special terms of the charter. Abb. Shipp. 457; Bing. N. C. 555. But it is not necessary to go into this further and settle this point definitely here, as, in my view, under all the facts and circumstances of the case, the plaintiffs appear to have substantially fulfilled the charter party.

So another question might arise, not mooted, and hence not decided, whether a party can recover back what has been advanced in a case like this, if the contract has not all been fulfilled. On this, see Abb. Shipp. 408; 3 Pick. 20; 3 Johns. 335. But believing it was fulfilled, I hasten to see what was mainly required by the terms of the contract, and then to show that those requirements were complied with sub-

[2] [From 10 Law Rep. 305.]

stantially. That part of the contract stipulating to receive all such lawful goods as the defendant should offer to put on board, is an ordinary one in the printed forms, and, in my view, refers to the kind, rather than the amount, of goods—to their quality, and not quantity. If lawful or not contraband, (Abb. Shipp., last Ed., 347,) nor diseased, they were to be received, whether heavy or light, bulky or compact, agreeable or disagreeable, and this must be the only reasonable signification applicable to that provision. If it meant otherwise and subjected the owners to receive any quantity of goods, however heavy, which the shippers might choose to offer, the vessel might be so overloaded with heavy articles as to sink at her anchorage before full, or go down in the first gale, and she might, when not insured, be an irremediable loss to the owners, while the charterers might risk and escape suffering by a high insurance on their goods. And otherwise the absurdity would be involved in the stipulation, that both parties had agreed to the insertion of a clause, and that an ordinary one, with a meaning attached to it, open and likely to produce at times a total loss of both vessel and cargo. This shows, also, the proper signification and limitation belonging to the other provision, paying freight for the "entire capacity" of the vessel. That, of course, means her entire capacity without danger to her safety. This construction, in case of light goods, might fill her entirely, without such danger and without making her too deep, whereas, in case of very compact and heavy goods, if filled entirely, she might be so deep as probably to sink in the first gale or strong swell. We must start, then, with the construction of this charter, which is reasonable and proper, holding that the owners could not reject any goods offered, on account of their character, if not contraband or diseased, but were not obliged to take a greater quantity on board than the vessel, looking to her tonnage, shape and draught, could carry in safety. Hunter v. Fry, 2 Barn. & Ald. 421. The place and season where and when the voyage was to be performed, the ordinary depth of loading vessels of that size and character, when employed in that business, are some elements to be considered in forming a correct judgment what a vessel can carry safely. These help to indicate what both parties probably meant, and certainly what they ought to have meant, in using such language. The usual forms of charter parties, in some places, provide, likewise, expressly, that the vessel shall be required to receive no more than she can safely carry. See Appendix to Lawes on Charter Parties; Woolr. Com. Law, 98, 99. But this, I think, is only what the law itself should imply as reasonable, when nothing is expressed on the subject.

On this construction of the charter, then, how are the facts? The vessel, it is conceded in all the evidence, was of about four hundred and eighty tons burthen; in shape of kettle bottom; well built; about thirteen years old; marked on her rudder no higher than eighteen feet draught by the builder; and he testifying that she was designed for no more than that draught, when loaded. She was constructed with a view, more particularly to the cotton trade, and when full of bales of cotton drew only about fifteen feet. Her character and capacity were open to be known to the respondents before hiring her, as she was built at East Boston or Medford, had been in business seven or eight years, and was lying in the port of Boston, where the respondents reside, when the charter party was entered into. It did not appear, from any evidence, that she was out of repair, or had any secret defect, or was in any way incompetent to perform what any one had a right to expect from her size and shape, or what vessels of her tonnage and form can and do usually perform. There was no failure, then, in this respect, on the part of the plaintiffs or their vessel, as has been argued by the respondents. Nor is it understood that the plaintiffs claim any exemption or excuse on that, or similar ground, from carrying all the merchandise which it was proper to put on board of her. Defects in the ship which lead to taking in less merchandise than is usual, might sometimes defeat the recovery for freight. Abb. Shipp. 340, 341; 3 Kent, Comm. 205; 5 East, 428; 3 Mass. 481; 10 Johns. 1; Silva v. Low, 1 Johns. Cas. 184. Nor is there any evidence here of fraudulent representation by the owners as to the capacity and powers of the vessel, and which, if proved, might be fatal to this libel. Johnson v. Miln, 14 Wend. 195.

On these facts, then, the quantity proper for her to take on board was manifestly all she could hold, if it did not sink her below her usual and proper and safe depth in the water. But when her freight on board did sink her to that depth, then it was her right to refuse more. Then the point of safety and duty under the charter was reached, and then the plaintiffs could, if they pleased, pause and decline any increased risk from increased depth, and consequently increased exposure to danger in swells of the sea and gales. It is optional with the owners of the vessel to go further or not, but no right exists in the charterers to require a risk and exposure beyond that. It further appears that on her voyage out, commencing in September, though some of the witnesses think her draught, loaded with ice, was, when starting, nineteen feet, others swear it did not exceed eighteen feet forward, and eighteen feet ten inches aft, and all agree that by the use of water and provisions, and the melting of the ice, it was well known to be likely to become, and did soon become, lighter, and by the end of the voyage she was nearly two feet less in draught. The owners, on learning from the pilot that her draught out at starting was considered by him nineteen feet, wrote at once to the captain, that if it had been so, it was too much, and he must not load back so as to draw over eighteen or eighteen and a half. Sending their letter to England and then to India by overland mail, it reached Calcutta before the vessel, and the captain immediately upon his arrival at Calcutta obtained it and informed the agents of the respondents accordingly, as to the depth he could take in. It therefore became the duty of those agents to select and put on

board a cargo which should draw no more, if that was the safe maximum draught of the vessel. They were bound to see to this, whether at such a depth the whole inside of the vessel should become full or not, and it was their business, if they wished to fill up the whole space, as they might with a larger proportion of light articles, without drawing over that depth, to send on board from time to time such an assortment as would accomplish this object. But they put on board, first a large quantity of one of the heaviest articles in commerce, viz. three hundred and eighty-seven tons of saltpetre, then a large quantity of linseed, another heavy article, being three hundred and thirteen tons more, and while in the progress of doing this, they were cautioned by the captain that the vessel would reach her proper depth before being full, if more light articles were not substituted. But nothing of this last character was put in, unless forty or fifty tons of goat-skin may be so considered. The blame, then, in not making a change, and in not filling the vessel before reaching a suitable depth, rests on the charterers and their agents, provided the vessel had reached that depth when the captain refused to take more. Major v. White, 7 Car. & P. 41; 3 Conn. 9. The captain neither bought the articles, nor sent them on board, but merely received and stowed such as came. By the charter he was to receive them at the vessel, and his duty begins with the receipt of them, and not before. Abb. Shipp. 346; Moll. de J. Mar. p. 231, bk. 2, c. 2, § 2. He therefore executed his whole duty, in this respect, in first notifying them expressly of the depth to which the vessel might be safely loaded, and in afterwards informing them that such quantities of heavy articles as were coming on board would load her deep enough before filling her. If this mode of stowing or distributing the cargo, putting too much dead weight below, was more dangerous and made the vessel labor more, it arose from the course pursued by the agents in sending the articles on board; and bad stowage in this or other respects, about which there is some testimony, did not affect the real draught with the same articles, and thus have any influence on the question now under consideration. Bad stowage only affects responsibility for injuries or damage to the cargo caused by it. Abb. Shipp. 345, and cases in note; The Paragon [Case No. 10,708]; The Rebecca [Id. 11,619]; The Reeside [Id. 11,657]; 22 Pick. 108.

The only remaining question then is, whether the depth to which he allowed her to be loaded, viz. eighteen feet, three inches in salt water on an even keel, or when trimmed six inches deeper aft, as was her proper trim, eighteen and a half feet there, and eighteen feet forward, or making a foot's difference, as some testified, nineteen feet aft at Calcutta, and eighteen feet forward, both less by three inches when in blue water, whether this depth was all which the charterers had a right to claim, and beyond which the owners had a right to refuse to go. The space left unfilled, it is agreed, was about one hundred and thirty tons measurement, and which the agents had prepared to fill with gunny bags, weighing from fifty to sixty tons dead weight, and which would have increased the depth of the vessel four or five inches and which the captain declined to receive. The question is not whether she might not have taken in more, and might not have escaped loss with it. Many vessels so escape with large chances against them. But the question is whether the captain or owners were bound to take more, whether that was not the proper depth under all the circumstances to stop at, if they pleased, and whether their contract or any general principles obliged them to risk any depth beyond that.

Now on the side of the plaintiffs, to show that this was as much as her proper depth, there is, not only the oath of her builder that she was designed to draw only eighteen feet, and of her officers in former voyages, that she had not on any occasion been loaded so deep as that, and the testimony of some, that, when starting out in this voyage, she drew no more, and of all, that she drew less soon on her voyage, and that her owners, when hearing that she drew more, wrote at once it was too much, and must be corrected in her return, but there is much other testimony which remains to be specified. Most of her officers in former years testify that this draught of eighteen and a half feet even keel was as much as should be considered safe. Several other experienced ship masters agree with them in opinion. Several testify that such a depth is sufficient for such a class of vessels. Three American vessels then lying at Calcutta, and, of course, bound homeward with Calcutta cargoes, were actually loaded so as to draw little or no more depth than the Mattakeeset, compared with their different sizes. Thus the Carthage, Captain Archer, four hundred and twenty-six tons, had a draught of seventeen feet, eight inches when loaded. The Argo, Captain Crowninshield, of four hundred and forty-nine tons, had a draught of eighteen feet, three and a half inches. The Plymouth, Captain Fuller, of four hundred and twenty-five tons, had a draught of seventeen feet, six inches; and the Mattakeeset, Captain Weston, four hundred and eighty tons, had a draught of eighteen feet six inches on even keel. This is very strong practical and cotemporaneous evidence, of the depth being in this case near what was proper. Charles Pearsons, also, an inspector of ships, testified the Mattakeeset had been recorded in his books as a vessel of eighteen feet draught, with a common cargo. The agents of the shippers not agreeing in opinion with the captain and owners, that this depth was sufficient, and insisting on the right under the charter party to fill the vessel full of lighter articles, and which would have increased her draught four or five inches more, the captain also called a survey by three American captains.

This course had been recommended to him by the owners in case of any difficulty.

Two of the captains examined the vessel and the loading, and reported and placed their opinions on the consular files there, open to the inspection of the agents and others, stating that the load on board deepened as much as was safe, considering the state of the monsoons at that season, in May, and the dangers of navigation generally after at sea, as well as for eighty miles down the river against head winds. Their oaths since have been given to depositions, verifying this survey, as that of the captain of the Mattakeeset in support of his own views, concurring with theirs, and formed from his own experience in the vessel during the whole voyage out and back. He testifies, also, that he sent to the agents a copy of the survey the day it was made. The pilot at Calcutta, whose deposition was taken by the respondents, but not being used by them, was read on the part of the plaintiffs, sustained, in some respects, the captain, and swore this vessel went to sea so deep as is usual there. And the third captain named on the survey, but not then attending, it is testified by two witnesses, informed them that the vessel was loaded deep enough. It was an admitted fact, too, that she actually had on board nearly double the weight of her measured tonnage; about eight hundred and sixty-nine tons to a measurement of four hundred and eighty. Opposed to this, and in favor of the safety and propriety of loading the vessel deeper, are the depositions of several sea captains residing in this neighborhood, who have seen the vessel, some before, and some since, her return. A portion of them think she would have worked better if filled up. Some think the monsoons at that season did not increase much the danger. Some, judging from her height out of water, and some from her draught, that more loading would not have rendered her unsafe. The agents of the shippers in Calcutta testify to a like opinion, and that the captain of the Mattakeeset was not sufficiently communicative, and did not consult them as to any survey; and their evidence renders it probable he might have sent to them a copy of his protest, rather than of the survey. They further swore that the pilot had informed them vessels often went to sea drawing more than this one did. The third captain named on the survey, but not attending to it; testified that the Mattakeeset might, in his opinion, have safely taken in more loading. So thought and testified also the inspector here, who had sworn to her being rated on his books at eighteen feet draught.

Now, weighing this and the previous testimony, though quite in conflict, I feel constrained to come to the conclusion that the balance is in favor of the plaintiffs, whether the burthen of proof be considered on them or not. They have the weight of the builder himself of the vessel, who ought to know her design and capacity and dangers, the great weight of those who had actually sailed in and navigated her for years, the oath of the captain then in her, the oaths of two others called in as advisers and quasi umpires on this very subject at Calcutta, the opinion of the pilot himself, who took her to sea, and the corroborating views of several other experts. All these united must preponderate over the general views of some other experts, without any personal sailing in the vessel, or any examination of her at Calcutta, (except the third captain,) but only seeing her here before her voyage, or after she had been lightened, not only three inches by salt water, but eight inches by the consumption of her water and provisions on the voyage home. The actual fact of this vessel never having been so loaded in former voyages for a series of years as to draw more, that when suspecting more had or would be put in by the charterers, the caution was at once given to them against it, the precaution, under the difference of opinion, to have a survey on the spot, which resulted in favor of the plaintiffs, the fact that the agents of the respondents attempted no new survey, though the other, if not formally reaching them from the captain on the 20th of April, was on the public files of the consul fourteen days before the sailing of the vessel on the 4th of May, the striking circumstance that the three other American vessels then and there loading did not in fact take in cargoes to draw more, in proportion to their size, are, when united, very decisive, that this vessel carried as much as she was bound to do by her contract, when fairly construed. The survey is not referred to as a conclusive measure, or one entitled to official weight, or indeed any beyond that of statements made by experienced and intelligent men on matters with which they are familiar, under attention specially turned to them at the time, and afterwards supported by their testimony duly taken; but like other nautical usages, such as conferences with the crew as to steps to be pursued in sailing in a storm, or in throwing over goods for safety (Abb. Shipp. 352, note), it often indicates prudence and commendable caution. It is no answer to this result, that other vessels from Calcutta sometimes go to sea drawing more, as the ships in the India trade are large, and from England are frequently over double the size of the Mattakeeset, drawing as much or more water than some heavy frigates. But there is no proof—on the contrary, it is disproved that other vessels of a like size usually load there to a greater depth. To avoid difficulty, the maximum depth to which a vessel may be loaded, when so chartered, had better always be inserted in the contract, and the proviso, likewise, that freight be paid pro rata, though a full cargo should not, by accident or other unblamable cause, be delivered.

Another source of controversies in these

cases, and especially in the present, is the want of full, friendly and frequent communication between captains and the agents. Such communications tend to prevent trouble from want of seasonable information, and foster a disposition on both sides to be accommodating, and not particular as to going a little beyond, or falling a little short, of what strict law may require. But it is proper to add here, that in this case no evidence or appearance exists of management, concealment or fraud on the part of the respondents or the captain, to avoid their contract or their duty. Their objections to loading with a deeper draught were made promptly, openly and sustained in a fair and manly form by the survey called. This is commendable, and entitles them to a liberal construction of their conduct. Again, a course marked by due caution and care against dangers and losses, as was the captain's in this case, deserves approbation, when not carried to an extent indicating timidity or mere selfishness in behalf of himself or owners. One of our national failings may be deemed rashness, or daring and risking too much, and its calamities are often a warning to others, not lightly to be disregarded, and at least not to be encouraged in cases of difficulty or doubt by courts of justice in not upholding the side of safety, of prudence and caution.

I think, therefore, that the full freight stipulated should be paid.

Case No. 17,454.

WESTON et al. v. NASH et al.

[Holmes, 488; [1] 2 Ban. & A. 40; 7 O. G. 1096.]

Circuit Court, D. Massachusetts. April, 1875.

PATENTS — CONSTRUCTION OF CLAIMS — INFRINGEMENT — CENTRIFUGAL SUGAR-DRAINING MACHINES.

1. The specification of a patent for improvement in centrifugal machines for draining sugar and other substances, described several improvements. One of the claims was for certain devices "in such machines." *Held*, that the words "such machines" referred to centrifugal machines so constructed as to admit of the operation of the claimed devices in substantially the described manner, and not merely to machines containing all the improvements described in the patent.

2. The invention described in the specification and claimed in the fifth claim of the reissue patent granted David M. Weston, Jan. 14, 1868, for improvement in centrifugal machines for draining sugar and other substances, is not anticipated by the English patents of Hardman and Alliott, dated respectively Oct. 5, 1843, and Feb. 3, 1851.

3. A patented improvement in centrifugal machines for draining sugar and other substances consisted in providing openings in the bottom of the revolving cylinder, for the discharge of the drained sugar, &c., and a cover, moving up and down, inside, and on the shaft of, the cylinder, for the purpose of closing the openings during the operation of draining, and uncovering them for the discharge. *Held*, that the patent was infringed by the use of a centrifugal sugar-draining machine, in which the openings in the bottom of the cylinder were closed and uncovered by a cover turning upon the shaft as an axis, instead of moving up and down upon it.

Bill in equity [against Nathaniel Nash and others] to restrain alleged infringement of reissued letters-patent [No. 2,845], granted David M. Weston, Jan. 14, 1868, for improvement in centrifugal machines for draining sugar and other substances. [The original letters patent, No. 63,770, were granted April 9, 1867.]

George L. Roberts, for complainants.
James B. Robb, for defendants.

SHEPLEY, Circuit Judge. Letters-patent, reissue No. 2,845, issued Jan. 14, 1868, to David M. Weston, for improvement in centrifugal machines for draining sugar and other substances. Centrifugal machines had been long known and used, prior to the date of his invention, for the purpose of separating liquid from solid constituents, when mechanically intermixed in the same masses. A metallic drum, with cylindrical periphery perforated to form a strainer to retain the solid matter, while permitting liquids to escape, when subjected to centrifugal action, is so arranged and operated as to rotate with great velocity on its axis. The cylindrical strainer is surrounded by a casing which receives and carries off the liquids thrown through the apertures of the strainer.

When used for purging sugar from the menstruum of syrup or molasses, in which it had been crystallized by boiling, the mass of syrup and sugar was introduced into the rotary perforated cylinder, or basket, and revolved at a high rate of speed. The centrifugal force, in a few minutes, eliminated all the syrup through the sieve, leaving the crystals of the sugar standing in a perpendicular wall around the inner surface of the cylindrical sieve. The invention of Weston embraced two contrivances: one to obviate the tendency of the basket to vibrate in its bearings when carrying an unbalanced load; and the other, means for the rapid and easy removal of the sugar from the basket after it had been purged from the syrup.

The inquiry in the present case relates to the complainants' mode of "construction of the cylinder by means of which the contents of the same may be more readily discharged than by the method usually employed, and consists in forming openings in the bottom of the cylinder around the shaft, which are closed by a valve or cover, as will be more particularly described."

The method usually employed to discharge the sugar had been to take it out of the

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

same opening at the top of the cylinder, through which the syrupy mass had been introduced to be operated upon. Weston constructed openings in the bottom of the cylinder, in the annular space surrounding the shaft, and between the shaft and the perpendicular wall of the sugar. These openings are closed by a movable cover, which surrounds the shaft, and is formed with a sleeve extending upward around the shaft a sufficient height to prevent any liquid matters that may be put into the cylinder from escaping between the valve and the shaft. The valve, with its sleeves, slides loosely up and down on the shaft which it surrounds. After the materials contained in the revolving cylinder have been acted upon, and the liquids separated and discharged through the apertures in the sides by the centrifugal force thus created, the valve is raised, sliding upwards freely on the shaft out of the way, and the contents of the cylinder are discharged through the openings in the bottom.

The centrifugal cylinder in the Weston machine is suspended from a flexible elastic bearing which supports the rotating parts of the machine and its contents in such a manner as to permit them to revolve about an axis varying in position according to the weight of the material in motion. The rotary cylinder is actuated on a hollow shaft, which is supported and runs upon a spindle or axle within it, suspended from the elastic bearing above. These contrivances for suspending and rotating the cylinder, which form a separate and important portion of the Weston improvements, are not in controversy in this case, and are only alluded to in this connection from the incidental connection they have with the means of discharging the cylinder, by reason of the fact that this mode of suspending the cylinder leaves a free and unobstructed space beneath the openings in the bottom of the cylinder, so that when the contents are discharged through the openings they fall by gravity entirely clear of the machine.

The claim in the patent is as follows: "5. The construction of the openings, I, in the bottom of the cylinder, in such machines, and the valve, J, for the purpose of closing the same, substantially as described." The words "in such machines," in this claim, undoubtedly refer to centrifugal machines. It is claimed by defendants that they refer to such centrifugal machines only as are constructed in all respects like those described in the specification. This, I think, is too narrow a construction of the claim. The true construction of the claim is that which makes it coextensive with the invention. "Such machines" means such centrifugal machines as are so constructed as to admit of the application and operation of the claimed devices in substantially the described mode and by substantially the described means. The unauthorized use of the complainants' openings and valve would be an infringement if used in centrifugal machines, to which they could be usefully applied by reason of there being an unobstructed space at the bottom of the machine into which the sugar could fall, although the cylinder were not suspended from a flexible elastic bearing like that described in the complainants' patent. The claim covers the application to centrifugal machines so constructed in other respects as to be adapted to the application and proper working of the patented devices hereafter named, of openings in the bottom of the cylinder, and a valve for closing such openings; such openings and such valve being constructed substantially as described.

The British patent, granted to Hardman, Oct. 5, 1843, shows a bottom plate, with openings or valves for the discharge of the sugar. A disk or plate is kept up against the under side of the bottom, so as to close the openings when the machine is in operation, by means of a nut and spring, and, by the same means, is withdrawn after the operation is completed, giving vent to the discharge-valves. There is no evidence that this Hardman machine ever went into practical use. It did not possess any advantage in construction over the centrifugal machines, in the use of which the sugar was discharged by lifting it over the top of the basket. The evidence proves that it would take more than double the time to discharge the sugar in this mode than by the old way of discharging over the top, and ten times as long as to discharge from the Weston centrifugal cylinder. It differs from the Weston contrivance in the essential particulars of being without a practically unobstructed place for the discharge of the sugar. The plate, when withdrawn as far as possible from the openings, still remains directly under them, so much so as to obstruct the free discharge of the sugar. This is an important element in the operation; for the crystals of sugar, when first discharged, are moistened on their surface with some adhering syrup, and do not glide or fall freely away from inclined plates, but accumulate and remain at rest. The manipulation of the nut from below the cylinder, and the keeping the plate clear from the falling mass below the cylinder, while, at the same time, the operator must be concentrating the sugar over the openings from the upper side of the bottom plate, would be attended with great difficulty and inconvenience; and various other differences make this an impracticable contrivance. Many of these observations apply with equal force to the Alliott patent, also an English patent, granted Feb. 3, 1851, though in some particulars the Alliott device more nearly resembles that of Weston. But the Alliott cylinder had the bearings of the shaft and its foundations directly under the cylinder. Consequently,

there was no free, unobstructed space below the cylinder into which the sugar could be discharged. A funnel is arranged in the pan, or casing, to receive the sugar, and this is too contracted to allow the sugar to flow freely through it. The cylinder must be rotated to bring the hole over the funnel, and held there while the sugar is being discharged, otherwise the sugar would fall into the syrup in the pan. Without the aid of the drawings, or a model, it is not easy to point out intelligibly all the differences between the Hardman and Alliott devices and the invention of Weston. But an inspection of models and drawings exhibits readily to the eye not only the diversities between Weston's device for discharging the sugar and those which preceded it; but also shows the impracticability of both Hardman's and Alliott's. This entire failure of either of those devices to accomplish the result aimed at by them, and arrived at in the Weston device, is proved by the fact, that, while there is no evidence that either Hardman's or Alliott's device went into practical use, the Weston device has been almost universally adopted in this country, and extensively in Great Britain, France, and Germany, and to a very considerable extent in all sugar-producing countries.

The proof of infringement in this case depends upon the question whether the valves and openings of the defendants are substantially like those of the complainants in construction and operation, differing only in form. The Weston and Hepworth devices for discharging the sugar are alike in the following characteristics of construction and mode of operation: Each has central openings around the shaft, through which the sugar is discharged into a space below it practically free and unobstructed. These apertures in each are opened and closed from the interior of the basket, and not below the bottom. Each has a central opening through the bottom of the casing, or curb, to permit the discharge of the sugar into a receptacle below the machine. The apertures in both are opened and closed by a central valve surrounding the shaft, extending above the surface of the liquid mass when introduced into the machine. The construction and mode of operation in discharging is substantially the same, differing only in the manner of opening and closing the valves, by turning the Hepworth valve on the shaft, while the Weston valve is raised and lowered. This is not a substantial difference, even if it be an improvement. It is but another form of the same device, with the same mode of operation, so far as the operation is concerned, to which the whole device relates, that of discharging through the bottom of the cylinder the purged contents of the charge.

Decree that defendants infringe the fifth claim of complainants' patent, and for injunction and account.

Case No. 17,455.

WESTON v. PENNIMAN.

[1 Mason, 306.] [1]

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

SHIPPING—REGISTRY ACTS—TRANSFER OF TITLE—EQUITABLE TITLES—NEGOTIABLE INSTRUMENTS—DRAFTS.

1. The ship registry acts of the United States have not changed the common law as to the mode, in which ships may be transferred; but only take from any ship not transferred according to those acts the character of an American ship.

[Distinguished in The Amelie, 6 Wall. (73 U. S.) 30. Cited in Leland v. The Medora, Case No. 8,237.]

[Cited in Stearns v. Doe, 12 Gray, 486.]

2. By the general maritime law, a transfer of a ship should be evidenced by a bill of sale.

[Cited in brief in Rice v. McLarren, 42 Me. 160. Cited in Sprague v. Thurber, 17 R. I. 459, 22 Atl. 1058.]

3. The legal title in a registered ship, may, consistently with the acts, exist in one person, and the equitable title in another; and the disclosure of such equitable title is not required by the acts, unless one party be an alien.

[Cited in U. S. v. The Fideliter, Case No. 15,088; Scudder v. Calais S. B. Co., Id. 12,566; U. S. v. The F. W. Johnson, Id. 15,179.]

4. If a draft not negotiable, be accepted by the drawee, with an agreement to pay the amount to any person to whom it is assigned; the assignee after notice, may maintain an action for money had and received to his use against the acceptor.

[Cited in Bank of U. S. v. Jackson, 9 Leigh (Va.) 228; Burnham v. Wood, 8 N. H. 337; Tenny v. Sanborn, 5 N. H. 557.]

Assumpsit. 1st. For money had and received. 2dly. On an order dated on the 8th of September, 1814; drawn by Silas Penniman, payable to Amos Penniman, or order, and accepted by the defendant on the 8th day of September, 1815, and endorsed to the plaintiff [Asahel Weston]. Plea the general issue.

The order produced on the trial, was as follows:

"Boston, September 8th, 1814. Mr. James Penniman, Sir,—Please to pay Amos Penniman, or order, all the net proceeds, which you may realize on a certain note of hand, signed by me, of this date, payable to you, for five thousand five hundred dollars, and secured by mortgage on real estate in Newbury street. Also all the net proceeds, which you may realize on a certain note of hand signed by me, of this date, payable to you, for six thousand five hundred dollars, and secured by mortgage on real estate in Broad Street. Silas Penniman.

"Boston, September 8th, 1815. Accepted, to pay the proceeds of the above, after deducting all expenses, and what may be due to James Penniman and Co. James Penniman."

It was admitted, that the defendant had received on the account of Silas Penniman, as the proceeds of the property mentioned in the

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

order, the sum of $2639.60. But he claimed a right to appropriate the whole proceeds, in discharge of certain demands due to him from the said Silas. These demands were as follows. On the 17th of June, 1815, the defendant had contracted for the purchase of a ship, and the said Silas agreed to become interested in a moiety of her; and until he should make due payment for his share, it was agreed, that the plaintiff should hold the ship in his own name. The agreement or contract of the parties was evidenced in the following writing:

"Boston, June 17th, 1815. Messrs. James Penniman and Co. Gentlemen,—I hand you twelve hundred dollars, and authorize you to invest it in a new ship on North river, built by Mr. Sampson, near the bridge on said river. And you are authorized to purchase one half said ship at twenty-three dollars per ton, for me, and on my account; and fit her for sea, to sail in your names, for your security for the future payments, until my payments to you are completed for said half. And I authorize you to make insurance, and employ her in freighting, as you shall judge best. And in case I fail to make the future payments, in due season for you to meet your payments for the said ship, I authorize you to sell her on my account for the payment of the same. Silas Penniman."

It was in evidence, that the sum of $1200 referred to in the above letter was again drawn out of the hands of James Penniman and Co. by a draft of the said Silas Penniman upon them for that amount. On the 20th of July, 1815, the defendant took out a register for the ship, in his own name, as sole owner; and continued to employ her in his own name, until October, 1816, when she was sold at a considerable loss. The defendant's demands were for expenses and disbursements beyond the earnings of the ship; and for a moiety of the purchase-money, after deducting therefrom a moiety of the proceeds of the sale; which demands, if admissible in point of law, and duly proved in point of fact, were sufficient to absorb all the money received by the defendant.

Webster & Peabody, for defendant,

Contended, that the laws of the United States did not prevent the assertion of an equitable interest in American ships, notwithstanding the registry was in the name of others, if those setting up this equitable interest, or in whom it was alleged to exist, were American citizens. The object of the law was to prevent the privileges of American ships from being enjoyed by foreigners; and it had been accordingly decided, that no foreigner could set up an equitable interest in such ship, because that would be permitting the end of the law to be entirely defeated. Maybin v. Coulon, 4 Dall. [4 U. S.] 298; Duncanson v. M'Lure, Id. 308; Id. 342. But American citizens, although not named in the registry, might have an interest in American vessels, which they could assert against those, who are named in it. As between the parties themselves, equitable rights and interests might be regarded, without any infringement upon the law. The defendant, it is true, has sworn, on obtaining the registry, that he was the sole owner. But this means no more than that he was the sole legal owner. The law requires him to aver, in explicit terms, that "there is no subject or citizen of any foreign prince or state, directly or indirectly, by way of confidence, trust, or otherwise, interested in such ship or vessel, or in the profits or issues thereof." 2 Colvin's Laws, c. 146, § 4 [1 Stat. 289, c. 1]. But it does not require him to deny, in like manner, that any citizen of the United States is interested in the vessel, by way of trust or confidence. If the bare declaration, that he was sole owner, had been understood to negative the existence of any sort of interest in any other persons, this subsequent provision would have been unnecessary. But the act requires an express denial of any trust for the benefit of foreigners. By making this provision for the case of foreigners, the legislature has put a construction on the former part of the oath; and by confining it to the case of foreigners, it has permitted the existence of equitable interests in American ships, in American citizens. There is an essential difference between the law of the United States and the British registry act, in relation to this question. The British statute requires the person applying for registry, not only to make oath, that he is the sole owner, but also that "no other person or persons whatever, hath or have any right, title, interest, share, or property therein, or thereto." 26 Geo. III. c. 60, § 10. This latter provision seems to have been purposely omitted by those, who framed the act of congress, and who incorporated into it the principal provisions of the British act. The British statute also provides, that the sale of a registered ship can only be made by a bill of sale, which shall truly and accurately recite the certificate of registry; and declares that, any bill of sale, without such recital, "shall be utterly null and void, to all intents and purposes." But the act of congress contains no such provision. An American ship may be legally transferred by any proper written instrument, although it does not recite the registry. The property will pass. But the difference is, that although the purchaser becomes owner of the ship, she is not, in his hands, entitled to a new registry, nor to the privileges of an American vessel. These can be obtained only by taking a bill of sale, in which the certificate of registry is recited at length. 2 Colvin's Laws, 321 (Act Concerning Registry of Vessels) § 14 [1 Stat. 287].

The learned author of the treatise on ships and seamen, refers to the American registry act, which, he says, contains provisions, corresponding in the greater part, with those of the statute of 26 Geo. III.; but he does

not notice the differences between the two acts in relation to the question arising in this case. Abb. Shipp. (4th Lond. Ed.) p. 28. His American annotator takes notice of this difference. Id. (Am. Ed.) 58. Following the express and unequivocal declaration of the act of parliament, the English courts have holden, that no equitable interests, even in British subjects, can be alleged, in contradiction to the statement contained in the register. Camden v. Anderson, 5 Term R. 709; Curtis v. Perry, 6 Ves. 739; Ex parte Yallop, 15 Ves. 60; Ex parte Houghton, 17 Ves. 252. This provision seems to have been a favorite object with parliament, for in consequence of some doubts said to have been expressed in regard to the case of Hibbert v. Rolleston (3 Brown Ch. 571), the act of 34 Geo. III. c. 68, was passed, re-enacting the provision of the former act, in the strongest and most comprehensive forms of expression. Curtis v. Perry, ut supra; Abb. Shipp. 542. The congress of the United States appears to have entertained no such purpose. They have made no such provision. On the contrary, it is the necessary inference from the whole act, that they intentionally departed, in this respect, from the English statute, which was their general model; and, having provided against equitable interests in foreigners, left such interests nevertheless to be asserted, as in other cases, by American citizens. A ship, entitled to the privileges of an American vessel, cannot be legally owned by a foreigner; nor can a foreigner claim any right or interest therein, in law or equity. But such ship may be owned by an American citizen. And she may be owned by one American citizen in trust for another; because other chattels may be so owned, and because such trust is not prohibited by the provisions, nor in opposition to the policy of the law. If the purchase in this case had been profitable, Silas Penniman might have compelled the defendant to permit him to partake in the profits; and as there was a loss, it is competent for the defendant to call on the said Silas Penniman to bear that portion of the loss, which he ought to bear, according to his agreement.

But there is another ground, on which the evidence is admissible. The agreement in this case was executory. It was not a purchase, but an agreement to purchase; and no case is produced, in which it has been decided under the English act of 20 Geo. III., that an agreement to sell was void, unless such agreement recited the registry. On the contrary, in Addis v. Baker, Anstr. 223, M'Donald Chief Baron, says, "The question, whether St. 26 Geo. III. attaches on an agreement for the sale of a ship, as well as on the actual sale, is very important. I am not at present prepared to say, that it does extend so far." It does not appear from the report, whether a final decision of the question was made in that case. Shortly after this opinion was intimated, by the court of exchequer, the statute of 34 Geo. III. c. 68, was passed, which provides, in explicit terms, that no transfer, contract, or agreement for transfer of property, in any ship or vessel, shall be valid or effectual for any purpose whatsoever, either in law or equity, unless such transfer, or contract, or agreement for transfer, shall be made by bill of sale or instrument in writing, containing a recital of the certificate of registry. This act left no room for further question in the English courts. But if the question had rested solely on the 26 Geo. III., it is probable from the case of Addis v. Baker, that it would have been decided, that an agreement to sell was not within the provisions of that act. As before observed, the laws of the United States contain no provision similar to those in this act of the British parliament. There is nothing in the oath, taken by the defendant at the custom house, at all inconsistent with the present defence. He made oath, that he was the sole owner. Upon the supposition, that this was a denial of all sorts of interest in any body else, by way of trust or otherwise, which is not admitted, still the averment would be true. Silas Penniman at that time did not own any part of the vessel. He had agreed to buy one half; but it still rested in contract. He afterwards refused to take and pay for, that half; and this breach of contract forms the ground of the defendant's complaint. If the defendant had sworn at the custom house, that Silas Penniman owned one half of the ship, it would not have been correct. He did not own any part of it. But that does not prevent the defendant from charging him with one half of the cost of the vessel, and one half the loss incurred on it; because such was the agreement of the party, and there is nothing in the oath taken by the defendant, either in any degree inconsistent with the facts of the case, or with his defence in this action. Silas Penniman, he says, agreed to become owner of one half of this ship, and to share, in that proportion, in the profits and losses which might arise from the purchase; and he insists that he has a right to enforce this agreement, and to retain out of this fund, a sum equal to what he has lost by Silas Penniman's failing to comply with his contract.

Mr. Welsh, for plaintiff.

All maritime nations have been extremely careful in enacting, from time to time, strict laws in relation to the evidence of property in vessels; and all have excluded foreigners from any participation in the ownership or emoluments, derived from the employment of them. They have carried their jealousy on this subject so far as to require, that all, who are interested in ships or vessels, should appear so by the legal evidences of such property. It is evidently the policy of the state to prevent secret trusts or secret ownership, in regard to vessels. And so it was consid-

ered in England; for while the case of Addis v. Baker, Anstr. 223, was under the advisement of the court, the parliament passed an act, putting at rest the question, which was raised in the case, viz. whether the statute of 20 Geo. III. extended to agreements to sell, as well as to actual sales. There is every reason to suppose, that if that act had not passed, until after the decision in the case of Addis v. Baker, that that decision would have been in conformity with the spirit of it. The legislature of this country had a like opinion of the importance of this subject to the nation; and in the 4th section of the act of 31st of December, 1792, we find it pointed out, in what manner a citizen of the United States, wishing to obtain a certificate of registry, must proceed; and what things must be done, before he shall become entitled to it. It is there declared, that a register shall be granted on condition, that the person applying for it shall, among other things, declare on oath, "his or her name and place of abode, and if he or she be sole owners of the said ship or vessel, that such is the fact; or if there be another owner, or other owners, that there is, or are such other owners, specifying his, her, or their name or names and place or places of abode; and that he, she, or they, as the case may be, so swearing or affirming, is or are citizens of the United States." There is no necessity for recurring to English authorities to ascertain the meaning of our own laws on this subject. It has been argued in the argument, that our statute does not contain a provision, which is found in the English statute on the same subject; and that the American statute does not require, that all the owners of a registered vessel of the United States, should be mentioned in the bill of sale and register. It is true, that no positive provision, requiring the mention of all the owners' names in the register, is found in our laws; but there are provisions, from which it must undeniably be inferred, that such was the intention of congress. In the 4th section, which prescribes the form of the register, there are words, which evidently imply such an intention. It is there required, that, where there is more than one owner, the name or names of such other owners shall be inserted in the register. This requirement in the form of the register is as effectual, as if the statute had declared, that the names of all the owners should be inserted in it. This cannot apply to foreign citizens; they are by another section excluded from all participation in property in American vessels; of course their "name or names" could not be here intended. The only way, in which this provision of the statute can have effect, is by applying it to American citizens; then to make an American citizen a legal owner, entitled to the privileges and subject to the liabilities of that character, his name should be inserted in the register. The defendant has sworn at the custom house, that he was the sole owner, and Silas Penniman's name was not inserted in the ship's register; he, therefore, cannot be charged, as such, with his proportion of the sums lost in her voyages; and they ought not to be deducted from the proceeds of the property, which the defendant has by the obligation declared or acknowledged, that he had received, and promised to account for.

Although there was an extensive authority given by Silas Penniman's letter of the 17th of June, 1815, to the defendant, to employ the ship in freighting, in any way he might judge best, it certainly cannot be pretended, that there was to be no limitation to this authority; and that all right to information, as to the success of the employment of the ship, was waived by Silas Penniman. If, after the first voyage, it appeared, that a loss had been incurred, and that there was no prospect of employing the ship profitably in future, why was he not advised of it. If he had been consulted, he might have thought it most prudent to put up with the first loss, dispose of the ship for the most she would produce, and thus end a ruinous concern. It would have been the grossest injustice to have told him, that, by his agreement to become interested in the ship, which was then building, he had entrusted the management of her to the defendant, and that he had no right to terminate his interests in her, although he was satisfied, that she could not be profitably employed in the manner contemplated by the agreement. If the agreement be only executory, and resting in contract, the claim for indemnification against Silas Penniman would not be for his proportion of the losses sustained in the use of the ship in freighting, but merely the difference between the amount of the payment necessary to the completion of this ship, and her real value when finished; that is, if in consequence of any event, such as a depreciation in the value of vessels, she was worth less when finished, than it cost to build her; because Silas Penniman agrees to become interested in one half of the ship, and in case he should not make the necessary payments in due season, authorizes James Penniman to sell her, to reimburse the sums expended by him on account of the half, which the former engages to take. There was no demand made on him for his proportion of the costs, when she was finished, and entitled to a register, and no notice of an intention to sell until October, 1816, when it was ascertained, that it had been a losing concern. There is no evidence to show, that she was not worth at the time she went to sea, what it cost to build her. It was at this time, that the right to sell vested by the agreement in the defendant, in case it appeared, that Silas Penniman was unable or unwilling to perform his engagement.

There is no equity in the defendant's claim, to set off one half of the loss incurred by him in the employment of his vessel, because he allowed Silas Penniman to draw on him for

the sum of $1200, shortly after the payment of that sum, on the 17th of June, 1815; and as there is no evidence of any other money transactions between them at that time, there is strong reason to suspect, that by accepting to pay that sum, it was understood, that the agreement to become concerned in the ship was waived by James Penniman.

STORY, Circuit Justice (after summing up the facts). There are some questions of law in this cause, upon which it is my duty to give an explicit instruction. The first is, whether the legal title to a ship can, since the registry acts of the United States, be transferred, without complying with the forms prescribed in those acts. Acts Dec. 31, 1792, c. 1 [1 Stat. 287], and Feb. 18, 1793, c. 8 [Id. 305]. Upon this question the right of the defendant to set off or deduct his own demands for expenses and disbursements from the proceeds in his hands, materially depends. And I am of opinion, that the registry acts have not, in any degree, changed the common law as to the manner of transferring this species of property. To be sure, a bill of sale is necessary to pass the title of a ship. But this does not depend upon any enactment peculiar to our municipal law; but it grows out of the general maritime law, which requires such a document as the proper muniment of the title of the ship. The Sisters, 5 C. Rob. Adm. 155. To entitle ships to be registered, and to be deemed ships of the United States, with the privileges and exemptions of such ships, it is necessary, that the transfer should be made according to the form prescribed in the registry acts; that is to say, that it should be by some instrument in writing, which shall recite at length the certificate of registry; but the acts do not declare any other transfer void and illegal; but simply deny to ships transferred in any other manner the privileges of ships of the United States, and deem them alien or foreign ships. In this respect our acts differ from the English registry acts (26 Geo. III. c. 60, § 17; 34 Geo. III. c. 68, § 14; Abb. Shipp. pt. 1, c. 2, § 16), which declare, that all transfers, or agreements for transfers, made without reciting the certificate of registry at length in the bill or instrument of sale or agreement for transfer, shall be utterly void to all intents and purposes whatsoever.

In the next place it is contended, that the defendant cannot set up, in this case, any title to one moiety of the ship in Mr. Silas Penniman, and charge him with a moiety of the expenses, disbursements, and purchase-money, because the defendant had the ship registered in his own name as sole owner, and made oath to such sole ownership before the collector, and he is, therefore, estopped to set up a fraud upon the registry act, to sustain his claim. But it is to be considered, that the title set up in Mr. Silas Penniman is a merely equitable title; and the sole legal title was, by the agreement of the parties, to remain in the defendant. The oath required by the registry act of 1792, c. 1, § 4, to be taken by the owner, respects only the legal ownership of the property; and does not require a disclosure of any equitable interests vested in the citizens of the United States; but only a denial, that any subject or citizen of any foreign prince or state, is directly or indirectly interested by way of trust, confidence, or otherwise in the ship, or in the profits or issues thereof. It is sufficient, that the legal interest is truly stated; and if there be any equitable interest or trust in favor of any other citizen of the United States, no fraud is committed upon the law. Suppose a mortgage made of a registered ship, may not the mortgagee truly declare himself the legal owner, notwithstanding an equitable right of redemption in the mortgagor? See, as to equitable interests under the British registry act, Addis v. Baker, 1 Anstr. 222; Speldt v. Lechmere, 13 Ves. 588; Ex parte Houghton, 17 Ves. 252; Camden v. Anderson, 5 Term. R. 709.

There is another point in this case, which has been urged by the defendant's counsel, viz. that the instrument sued on is not negotiable, and that, therefore, the plaintiff is not entitled to recover, even if the set-off or deductions claimed by the defendant cannot be sustained. It is certainly true, that the instrument is not negotiable, and therefore it cannot be declared on as such. But by his acceptance the defendant undertook to hold the proceeds, after deducting his own demands, for the account of such person as should, by the endorsement or order of Mr. Amos Penniman on the draft, entitle himself to the proceeds. The plaintiff is the regular endorsee or appointee of Mr. Amos Penniman; and after notice of this fact, the defendant must be considered as holding the money for his use; and under such circumstances the law will imply a promise to pay the same over to him. The money counts are therefore fully sustained, if the set-off does not absorb the whole proceeds. The cases of Fenner v. Meares, 2 W. Bl. 1269, and Innes v. Dunlop, 8 Term R. 595, are strongly in point.

Case No. 17,456.

WESTON et al. v. TRAIN et al.

[2 Curt. 49.] [1]

Circuit Court, D. Massachusetts. Oct., 1854.

CHARTER PARTY—EMIGRANT PASSENGERS—LIABILITY FOR VICTUALLING—DETENTION AT PORT OF DISTRESS.

1. Construction of a charter-party for the conveyance of emigrant passengers; and the reciprocal rights and duties of the owners and charterers, growing out of a disaster on the voyage.

[2. A charter party provided for the carriage of steerage passengers, "charterers to find bread stuffs, berths, water casks, water and fuel," etc. The charterer sold passenger tickets, which required the vessel to be victualled during the voyage, and during time of detention at any place, according to a scale subjoined to the ticket. This schedule contained items not mentioned in the charter party. *Held* that, as between charterers and owners, the charterers were liable, both for the articles of diet men-

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

tioned in the charter party, and those not mentioned; and this both for the usual period of the voyage, and for the time of detention in a port of distress, through the springing of a leak during a gale.]

[3. The giving of a bond by the master conditioned to perform all the requirements of the British passenger act created no privity between the owners and passengers, and did not, as between owners and charterers, impose on the owners a liability for victualling.]

[4. The ship was liable, in such case, for the expense of landing and embarking the passengers at the intermediate port, and for housing them on shore, during the period of detention, while the ship was being repaired, this being a substitute for room on shipboard.]

[5. The charterers were liable for the reasonable and necessary cost of raising such money at the port of distress as was spent by the master for their account.]

[6. The law of average has no application to the expense of caring for and maintaining passengers at a port of distress.]

The charter-party on which this libel was founded, was as follows: "Memorandum for Charter. It is mutually agreed this day between Captain Weston, of the good ship or vessel called the 'Hope,' of the burden of nine hundred tons, now lying in the Port of Liverpool, whereof —— Weston is master, and Train & Co., of Liverpool, merchants and freighters of the other part. That said ship being tight, staunch, strong, duly provided with houses, ventilators, passengers' lanterns, and cabooses, and every way fitted for the voyage, shall, with all convenient speed, be made ready, and receive and take on board a cargo of lawful merchandise, and a full complement of steerage passengers (say, not less than a legal complement of heads), exclusive of infants. Charterers to find breadstuffs, berths, water casks, water, and fuel, and to pay the commutation money; the vessel to be loaded to seventeen feet six inches even keel, or equal thereto. Fourteen days, exclusive of Sundays, are to be allowed for loading, to commence on the vessel being in a proper loading stage berth (the time occupied in discharging the ballast not to be included in the lay days), and ready to commence loading in Waterloo or Victoria Dock, at the charterers' option. In all not exceeding what she can reasonably stow and carry over and above her cabin, tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to Boston, United States of America, or so near thereunto, as she may safely get, and deliver the same agreeably to bills of lading, and so end the voyage (restraint of princes and rulers, the dangers of the seas and navigation, fire, pirates, and enemies during the said voyage always excepted). The passage money to be insured by charterers for and on account of the ship, against the risks incurred under clauses of the amended passenger act, passed 1849 [9 Stat. 399], the cost of which to be paid by the ship. The passengers to be admitted on board the vessel, if required by the charterers, at least two days before the appointed day of sailing. And the said charterers do hereby promise and agree to load the said vessel with said cargo and passengers at Liverpool as herein stated, and also agree to pay freight as follows: For the hire of the vessel as above mentioned, the sum of twelve hundred and fifty pounds, with privilege of touching at Queenstown for passengers, charterers paying all expenses. The freight and primage, as per bills of lading, to the extent of this amount, to be taken in payment of four dollars eighty cents per pound, the deficiency, if any, to be paid in Liverpool, before sailing, less three months' interest. Demurrage if detained by either party beyond the above time, to be paid at the rate of six pounds, British sterling, per day, but the vessel not to be required to remain on demurrage longer than fifteen days; but if head winds prevail at the expiration of said lay days, preventing vessels of similar size and drafts from sailing, then the vessel to continue taking cargo and passengers to the extent herein named, without the charterers being liable to demurrage. The vessel to be consigned to Messrs. Enoch Train & Co., allowing them two and one half per cent. commission on the account of freight payable there. The ship to be discharged by consignees' stevedore, at Lewis's Wharf, or such other wharf as they may direct. Penalty for non-performance of this agreement, £500. Brokerage in Liverpool, five per cent. (Signed) Train & Co. G. B. Weston, Jr."

CURTIS, Circuit Justice. This is a libel in a cause of contract, certified into this court by the district court, because the district judge is related to one of the parties. The libel alleges that the respondents hired the ship Hope, belonging to the libellants, for a voyage from Liverpool to Boston, by a charter-party, a copy whereof is annexed to the libel. By the charter-party it is provided that the ship shall receive and take on board at Liverpool a cargo of lawful merchandise, and a full legal complement of steerage passengers, and proceed therewith to Boston, and there deliver them, dangers of the seas, &c. excepted. The ship was to be duly provided with houses, ventilators, passengers' lanterns, cabooses, and be in every way fitted for the voyage. The charterers were to find breadstuffs, berths, water casks, water, and fuel, and pay the commutation money of the passengers. It is further alleged in the libel, and appears in proof, that the charterers having put on board a large number of steerage passengers and a cargo of merchandise, the ship sailed from Liverpool, and in the course of the said voyage encountered a violent gale, and sprung aleak, which rendered it necessary to put into the island of Fayal, where she was obliged to be hove down, and to discharge her cargo to make repairs, and was detained for the space of about one

hundred days; that the passengers could not, reasonably, and with a just regard to their health and safety, be kept on board the vessel while the ship was thus undergoing repairs, and were, therefore, necessarily landed; and that large expenses were incurred by the master in conveying the passengers to and from the shore, in supporting them, and providing nursing and attendance for the sick, and burial for the dead. It is also alleged in the libel, but denied by the answer, that the charterers were bound to bear these expenses, and the libel is filed to compel their payment. This presents a general view of the matters in issue between the parties. And the main inquiry is, whether the charterers are liable, and if so, upon what ground, for a part, or the whole, of these expenses.

It is much to be regretted, that in contracting upon a subject-matter so peculiar, more care was not taken to define the respective liabilities of the owners and charterers by express stipulations in the contract, instead of leaving them to be worked out by the application of principles of law which were designed to govern cases distinguishable from this by important differences. But I must take the contract as I find it, and apply to it those rules of the maritime law which seem to me may be applicable, and thus arrive at the most satisfactory result in my power.

Before looking at the charter-party, it is important to have a clear view of the subject-matter of that instrument. Besides the carriage of a cargo of merchandise, which is the ordinary subject of one of those charter-parties, by which the charterer does not become owner for the voyage, this charter-party contemplates the transportation from Liverpool to Boston of a large number of emigrant passengers. These, together with their luggage, are to be put on board by the charterers, and carried for their profit. They were to occupy a part of the room on board the ship, and were to be conveyed therein, as the merchandise put on board by the charterers occupied another part of the space on board, hired by the charterers; but these passengers, no more than the merchandise, paid any thing to the owners of the ship. They paid to the charterers passage-money; and the charterers contracted with them to furnish to them and their luggage a passage, together with provisions and supplies. This contract between the charterers and each passenger, was evidenced by a ticket, delivered to each passenger by the charterers, pursuant to an act of the imperial parliament, by which the charterers engaged, that the holder shall be provided with a steerage passage to the port of Boston, in this ship Hope, together with not less than ten cubic feet for luggage, for each adult; and shall be victualled during the voyage and the time of detention at any place before its termination, according to a scale subjoined to the ticket. And it is expressly declared by the ticket, that the sum paid as passage-money includes government dues, and head-money at the place of landing, and every other charge, except freight for excess of luggage. This was the relation between the passengers and the charterers; and it was persons standing in this relation to the charterers, and having these claims upon them, that the latter obtained by the charter-party a right to put on board the ship. Now it is obvious, that in the events which actually occurred, the passengers had a right to be supplied by the charterers, with all which the charterers had stipulated by the passage ticket, to provide for them. That ticket, in terms, covers a case of detention at any port, during the progress of the voyage. When they came on board, they came with that right. The first inquiry, then, must be, whether the charterers have, by the charter-party, imposed upon the owners of the ship, the performance of any and what part of the obligation to the passengers, which the charterers assumed by the passenger tickets. To a certain extent it is clear they have. According to the tickets, passengers were to be provided with a passage, and with supplies during its continuance. By the charter-party the owners have stipulated to afford room on board, and that the ship should be so fitted and found with houses, ventilators, passengers' lanterns, and cabooses, as to be in a suitable condition to transport the passengers; and further, that the ship shall be properly victualled, manned, and officered, and sailed by them so as to make the voyage to Boston, dangers of the seas excepted. But the important question is, if the obligation of the ship-owners stops here. The charter-party contains a covenant by the charterers with the owners that the former will find breadstuffs, berths, water casks, water, and fuel. This does not cover all the articles embraced in the dietary scale subjoined to the passenger ticket, such as tea, salt, and sugar; and consequently the express terms of the charter do not make provision for the performance, by the owners, or by the charterers, or by both, of the whole contract with the passengers. And it will be found of much moment to inquire, on whom rested the burden of supplying these things. On the one side it may be urged that the owners of a ship, in which passengers are conveyed, are, prima facie, bound to supply the wants of the passengers on the voyage, and that this charter-party is framed upon that assumption, and an express covenant of the charterers inserted to restrict this duty of the owners; that so far as this covenant extends, the charterers are bound to provide for the passengers; but this obligation arises solely from their covenant, and cannot be extended beyond its terms. That if the charterers were liable to the owners for the supplies of the passengers generally, it would have been wholly unnecessary to insert a covenant to that effect; and that at all events, an express covenant to provide certain things, to the exclusion of others, impliedly negatives a liability for those other things not embraced in the covenant.

It must be admitted, there is great force in these suggestions. But, on the other hand, it may be answered, that the duty of owners to supply passengers arises from their contract with

the passengers, and from their payment of passage-money to the owners; that, in this case, the owners made no contract with the passengers, except through the charterers; that they only let to the charterers the vessel, for the transportation of merchandise and passengers, on the charterers' account, and for their profit; that the charterers were under an express contract with the passengers to supply them, as well as transport them in this vessel; that they have hired the vessel to enable themselves to perform one part of their contract only, that is, transportation; that all the arguments in favor of a restricted liability of the charterers, which can be drawn from the insertion of an express covenant by them to furnish certain articles to the passengers, apply with equal force in favor of the owners, because there is also inserted an express covenant by them to supply certain other specific things, to the passengers. I consider this answer satisfactory. It brings my mind to what I believe to be the truth of the case, that the charter-party, by inadvertence, did not make provision for the performance, either by the owners or the charterers, of the entire duty of the charterers to the passengers. That it made no provision for certain articles included in the dietary scale, and not embraced in the covenant of the owners, or of the charterers, nor for the just claims of the passengers during the detention which happened on the voyage. And, consequently, inasmuch as the duty of supplying the passengers was incumbent on the charterers, by reason of their contracts with the passengers, and as they have not imposed this part of that duty on the owners, by the charter-party, it remained upon the charterers, as between them and the owners. To apply these views to the different claims which are made, it is necessary to divide those claims into distinct classes. First. So far as the expenditures were for articles mentioned in the express covenant of the charterers, contained in the charter-party, or incurred for substitutes therefor, the charterers are liable for them. That covenant was not performed, by putting on board, before sailing, such quantities of those articles as were then thought sufficient. They were bound to find those things throughout the voyage, however long it might be protracted. Second. They are also liable for expenditures made at Fayal for any other articles embraced in the dietary scale, and for any substitutes therefor. Third. They are not liable for landing and embarking the passengers, or for housing them on shore, or for any expenses incurred in consequence thereof. These are substitutes for the room on shipboard, which the owners covenanted to furnish; and the passengers were landed; to enable the master to repair his vessel, and complete the voyage and earn his freight. Fourth. If there were any expenses beyond these (besides the cost of the bottomry bond), which the master was necessarily obliged to incur for the passengers, pursuant to a legal claim which the passengers had on him as the representative of the charterers under their contracts with the passengers, and which did not arise in consequence of the passengers being landed, they must be borne by the charterers. I believe these principles will enable the assessor to dispose of all the items except the cost of the bottomry bond.

In respect to the claim for the cost of raising money at Fayal, I am of opinion that the owners are entitled to be paid the reasonable and necessary cost of raising so much money there, as was spent by the master there on account of the charterers. Whether these funds could and ought to have been obtained at a less cost than was actually paid by the master, is a question to be passed on by the assessor, to whom the accounts will be referred. He will allow to the libellants the necessary and reasonable expenses, incurred on this account. I do not adopt, nor do I reject, the cost of the bottomry loan, as the standard to be applied to the case. If the master could reasonably have obtained the necessary funds in some other way, at a less expense, only that lesser expense is to be allowed. On the other hand, if he adopted a reasonable mode of raising the necessary amount, and paid no more for it than, under the circumstances, it was fairly worth, and had not the ability to raise funds there, on the credit of the owners, then the cost of the bottomry loan affords the proper rate of charge. I do not consider the owners of the vessel bound to send funds from hence to Fayal, to pay the charges which the charterers were bound to pay. These charges were their burden; and the master, in raising the money to pay them, acted for their account, and so far as he acted reasonably, the charterers are bound. Nor do I consider the charterers exempted from this charge by the failure of the owners to call upon the firm of Train & Co. here, to send funds to Fayal. If Train & Co. had admitted their liability for any part of these charges, the case would have been different. But having assumed the ground that the charterers were not liable at all, I have no reason to suppose they would have made any provision for funds in Fayal, if they had been requested to do so.

It was argued that, as the master, before sailing, gave a bond to the crown, conditioned to perform all the requisitions of the British passenger act, this placed him, and the owners, upon the same footing, as the passenger tickets given by the charterers. But I do not so consider it. The passenger tickets were evidences of an actual contract between the charterers and passengers, in consideration of the passage money received by the former from the latter. The bond is merely a security, required by positive law, for reasons of public policy, creating no privity between the owners and the passengers; it is founded on reasons of public policy, and not on any consideration received by the owners from the passengers; and is in its nature collateral to the actual contract between the passengers and charterers. I have not, therefore, allowed to the bond any weight, in considering the relative rights and duties of the owners and charterers.

It was also urged, that the clause in the charter-party respecting insurance, showed that the ship took the risks which caused the expenses

in question. The meaning of this clause is not clear; but I am not satisfied it has any bearing on this case. The best interpretation I have been able to place upon it is, that inasmuch as the owners and the master, by force of the British passenger act, might be subjected to expense, equalling the passage money, to send forward the passengers, in case of detention of the vessel at an intermediate port, for a longer period than six weeks, during the voyage, it was agreed that they should be insured against this risk at the cost of the ship. It may be, also, that there were other risks of a like kind, intended to be covered by such a policy. I have not thoroughly examined the passenger acts, to see what they were, if any: because it does not seem to me, that obtaining such insurance, against risks imposed by positive law, has any tendency to prove, that as between the owners and charterers, the former were to supply the passengers during the voyage or any part of it. The owners might well say, though it is your duty to supply the passengers, yet for reasons of public policy we are also made liable to do so by positive law; against the effects of this liability, we shall insure at our own cost, and you, as our agents, shall obtain the policy.

It was also insisted, that all the expenses incurred at Fayal on account of the passengers were general average charges. There can be no doubt, if the passengers had been so many bales of merchandise, the expenses incurred at a port of necessity, would have been general average charges. But as they were men, women, and children, who neither receive, nor contribute in general average, the law on that subject has no application to them, or to the expenses incurred in their behalf.

The case must be referred to an assessor to determine the amount which the libellants are entitled to recover upon the principles above declared.

Case No. 17,457.

WESTON v. UNITED STATES.

[5 Cranch, C. C. 492.] [1]

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

LARCENY—WHAT CONSTITUTES—INSTRUCTIONS.

It is error in the judge to instruct the jury that certain facts constitute larceny, unless the animus furandi be expressly stated as one of those facts; and unless the fact be also stated that the goods were taken without the consent of the owner.

[Cited in State v. Slingerland (Nev.) 7 Pac. 281.]

Error from the criminal court of the District of Columbia.

The prisoner [Clement B. Weston] was indicted for stealing twenty-six silver coins of the value of fifty cents each, sixteen silver coins of the value of twenty-five cents each, and nine silver coins of the value of one dollar each, of the goods and chattels of one Sophia Brasey.

Upon the trial the attorney for the United States, prayed the following instruction, namely: "If the prisoner is believed, by the jury, to have come into the witness's house and found her counting money; and that he then conceived the intention to obtain the money under a fraudulent and false pretence of changing it for her into gold, meaning at the time to appropriate it to himself under this pretence; and that, having falsely stated himself to be a clerk in the post-office, of the name of Wilson, he thereupon, in pursuance of his said intention, talked and acted, in relation of the said money, so as to induce the witness to believe that he had the gold about him, and would then give her the gold for the money; and thereupon the witness being so induced to believe that the prisoner was about to give her gold, in exchange for her money, allowed him to take the money from the table and put it into his pocket; and that after he had so taken it up and put it into his pocket, he said he would go and bring her the gold, and was permitted by her to go away with it, upon his promise to return and bring her the gold; then the taking up and pocketing the money, under the circumstances of the case above stated, if believed by the jury to be true, with the intent and in the manner above stated, is larceny." Whereupon, the defendant's counsel prayed the court that the following addition be made to said instruction, if given, namely: "But should the jury believe, from the evidence, that the prosecutrix proposed to the defendant to take the money and get gold for it, and that he said he would try to do it, but as gold was hard to be got, or words to that effect, he did not know if he could, and that said money was delivered to him for that purpose, with the consent of the prosecutrix, notwithstanding the defendant may not have returned the money so proposed to be changed, it is not larceny, and the defendant is entitled to a verdict of acquittal." The instruction, with the addition, as prayed, was given by the judge, and the defendant's counsel took a bill of exceptions, upon which the cause was brought up to this court by writ of error.

Two objections were made to the instruction granted at the prayer of the district attorney: 1. That it does not require the jury to find that the money was taken animo furandi, or feloniously. 2. That the facts stated in the prayer, do not show that the taking was without the consent of the owner of the money, or, as the books say, "invito domino."

R. J. Brent and Mr. Carlisle, for defendant, cited 2 Russ. 93, 107–110, 112, 114, 117, 122, 135, 187; Rosc. 487, 491; Rex v. Walsh, 4 Taunt. 281; Dane, Abr. 164, 187; U. S. v. Pearl [Case No. 16,022], in this court, at

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

March term, 1838; Rex v. Pratley, 5 Car. & P. 533; Six Carpenters' Case, 8 Coke, 146a; 1 Russ. Crimes, 52; Young v. Rex, 3 Term R. 98.

Mr. Key, for the United States, contra, cited 2 Russ. 118, etc.; 2 Chit. Bl. 108, note. See, also, 2 Russ. 113; Phineas Adams' Case.

CRANCH, Chief Judge, after stating the case, delivered the opinion of the court (THRUSTON, Circuit Judge, dissenting).

The facts stated in a bill of exceptions are to be considered by the court exactly as if they had been found in a special verdict; for the court tells the jury what the law is upon the facts to be found by them; and the only difference is, that if a special verdict be found, the court decides the law after the facts are ascertained by the jury; and in giving an instruction at the trial, the court decides the law before the facts are found. And the court, in giving an instruction, can no more infer any fact not expressly stated in the prayer, than they can infer any fact not expressly found in a special verdict. A court cannot instruct a jury that certain facts constitute a certain offence, unless every essential fact necessary to constitute the offence be included in the statement. And every instruction given to the jury upon an hypothetical statement of facts, must be as strictly justified by the hypothesis, as an opinion given upon a special verdict must be by the facts found by the jury; and in neither case can the court infer any fact from the facts stated, or found. Every fact to be inferred from facts stated, must be expressly found or stated. There is no definition of larceny, to be found in the books, which does not include the fact of a felonious intent, or the animus furandi, as an ingredient necessary to constitute the offence. No other intent can be substituted. An "intention to obtain money under a fraudulent and false pretence," "meaning at the time to appropriate it to himself under this pretence," is evidence from which the jury may, when connected with other circumstances, infer the animus furandi, but it is not the animus furandi itself. There may be a fraudulent intent to obtain money, which may not be a felonious intent. So there may be a taking of money by a man, with intention to obtain it under a fraudulent and false pretence, and to appropriate it to himself under that pretence, which might not be a felonious taking, or a taking animo furandi. An instruction that such a case is larceny, without finding the felonious intent, or the intent to steal, is not perfectly correct in law.

There is a great difference between an instruction to the jury, and a demurrer to evidence. In the latter case the question is, whether the evidence, with the aid of all the inferences which the jury may lawfully make from the facts proved, is sufficient to justify the jury in finding the defendant guilty. The same question arises upon a motion for a new trial on the ground that the verdict is against evidence. In such cases, the judges have been in the habit of saying that such and such facts amount to larceny; when it is evidently their meaning, that the convictions were right, that is, justified by the evidence; or, in other words, that the evidence was sufficient to justify the jury in convicting the prisoner, because it justified them in finding the animus furandi. It is in this way that all the English cases which have been so profusely cited, came before the courts. In all of them the question was, whether the jury could in law, find the prisoner guilty, upon the evidence stated as in a demurrer to evidence; and, of course, leaving the jury to draw all the inferences which they could lawfully draw from the facts given in evidence; and in almost every one of them the jury was left to find the felonious intent. Not one of them was upon a bill of exceptions taken to an instruction to the jury by the court upon an hypothetical state of facts. In some of them the judges were of opinion that the facts stated justified the jury in finding the felonious intent, and, consequently, in finding the prisoners guilty. The English cases, therefore, do not apply to this part of the case now before this court; which is not upon a demurrer to the evidence, nor on a motion for a new trial; but is upon a bill of exceptions to an instruction given by the judge, that certain facts, per se, are larceny, without finding a felonious intent, or the animus furandi; instead of instructing the jury that the facts stated were evidence from which the jury might infer that the original taking of the money by the prisoner was with the felonious intent to steal it, and that if they should so find, they might find him guilty of larceny, as charged in the indictment. Upon this bill of exceptions, the question is not whether the evidence was sufficient to justify the general verdict of guilty. If such were the question, I should think there was no error as to that part of the instruction to which the defendant has excepted, for which we could reverse the judgment. But as the judge did not make it a condition of the instruction that the jury should find the felonious intent, or the animus furandi, we think there is error, in the instruction, for which the judgment should be reversed and a venire de novo awarded.

2. The second objection to the instruction is, that the facts stated in that part of it to which the defendant excepted, do not show that the taking of the money was without the consent of the owner. Before the judge could correctly instruct the jury that the case stated constituted larceny we think he should have inserted a condition that the jury should find from the evidence that the

defendant took the money without the consent of the owner. The finding of facts from which that inference might be drawn, is not a sufficient finding to constitute the case stated, per se, larceny. Judgment reversed, and venire de novo awarded.

Case No. 17,458.

WESTON v. WHITE et al.

[13 Blatchf. 364; [1] 9 O. G. 1196; 2 Ban. & A. 321.]

Circuit Court, D. Connecticut. May 29, 1876.

DURATION OF PATENTS — EFFECT OF PROCURING FOREIGN PATENT—PATENT AS EVIDENCE OF PUBLIC USE.

1. English letters patent were granted to W., April 25th, 1859, and published October 22d, 1859. He applied for a patent in the United States, for the same invention, in 1866, and it was granted to him August 6th, 1867. *Held*, that the latter patent would expire October 22d, 1876, 17 years from the publication of the English patent, and not before.

[Cited in De Florez v. Raynolds, 8 Fed. 443.]

2. The effect of the 16th and 17th sections of the act of March 2d, 1861 (12 Stat. 249), upon the 6th section of the act of March 3d, 1839 (5 Stat. 354), was to give to an American patent a duration of 17 years from the date of a foreign patent previously granted to the patentee for the same invention.

[Cited in American Diamond Rock Boring Co. v. Sheldon, Case No. 297; Goff v. Stafford, Id. 5,504; Siemens v. Sellers, 16 Fed. 861; Canan v. Pound Manuf'g Co., 23 Fed. 187.]

3. The fact that a patent has been issued by the United States for an invention, does not, of itself, prove the introduction of the invention into public and common use in the United States.

[This was a bill in equity by Thomas A. Weston against William H. White and others.]

Edmund Wetmore, for plaintiff.

John S. Beach and Stephen W. Kellogg, for defendants.

SHIPMAN, District Judge. The facts which are disclosed by the record are, that English letters patent were issued to Weston for the same invention described in the letters patent on which this suit is brought, bearing date April 25th, 1859, and published October 22d, 1859. Letters patent for substantially the same invention were granted by the United States to J. J. Doyle, bearing date January 8th, 1861. The patent in suit bears date August 6th, 1867, and was granted in pursuance of an application dated October 3d, 1866, and received at the patent office December 1st, 1866. The main question which is thus presented, is—did the plaintiff's American patent expire at the end of fourteen years from the date of the publication of his English patent?

In my opinion, the 16th and 17th sections of the act of March 2d, 1861 (12 Stat. 249), were intended to change all pre-existing statutory provisions by which American patents were limited to fourteen years, and to provide thereafter a term of seventeen years, without extension. This being the intent of the legislature, the proviso of the 6th section of the act of March 3d, 1839 (5 Stat. 354), that, where a foreign patent had been granted to the patentee, prior to his American patent, the latter patent should be limited to the term of fourteen years from the date of such foreign letters patent, was, by the operation of the 16th section of the act of 1861, necessarily amended, so that American patents subsequently issued and embraced within such proviso should extend for the new term of seventeen years from the date of the foreign patent. The proviso was not based upon the idea that American patents should expire at the same time with the foreign patent. It is true, that, when an English patent had been taken out, such would be the practical result, but it would not be the result when a patent had been granted by the government of a foreign nation whose laws provided a term of five, ten, or fifteen years. The intent of the 6th section of the act of 1839 was, that, in case a foreign patent had been issued, while the American patent was to be issued for the term of fourteen years (which had been previously provided as the duration of the life of all American patents, subject to extension), the American patent should be considered, for the purposes of the duration of the term, as antedated to the commencement of the term of the foreign patent. The act of 1861 made no alteration in this general system of legislation, but, having altered the term of American patents to seventeen years, and having provided for a repeal of all laws inconsistent therewith, the 6th section of the act of 1839 was changed accordingly, by force of the new provision of the statute of 1861. The act of July 8th, 1870 (16 Stat. 198), introduced a new principle, and provided that the American patent should expire at the same time with the foreign patent, but should not exceed a term of seventeen years. The plaintiff's patent will not, therefore, expire until October 22d, 1876.

The mere fact that letters patent of the United States were issued to J. J. Doyle in 1861, for substantially the same invention which was patented to Weston, does not show that the invention had been introduced into public and common use in the United States prior to Weston's application. It may have been thus introduced, but, the fact that a patent had been issued, does not, of itself, prove the introduction into common use, without the necessity of other testimony. The parties will proceed and be heard in regard to the questions of fact which arise upon the motion of the plaintiff. [Case No. 17,459.]

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

Case No. 17,459.

WESTON v. WHITE et al.

[13 Blatchf. 447; 2 Ban. & A. 364.] [1]

Circuit Court, D. Connecticut. July 8, 1876.

PATENT SUITS—PRELIMINARY INJUNCTIONS—ABANDONMENT OF INVENTION—LACHES—PULLEY BLOCKS.

1. The validity of the letters patent granted to Thomas A. Weston, August 6th, 1867, for differential pulley blocks, seems to be generally conceded in the United States, although no adjudication has ever been had in our own courts.

2. Where no question is made as to infringement or priority, or as to the novelty or patentability of the invention, and where the public generally have acquiesced in the claim of the patentee to a monopoly, an adjudication by a court of law or equity is not required before a preliminary injunction will be granted.

3. In December, 1859, W. filed a caveat, which, by renewal, was in force until December, 1861. In January, 1861, D. obtained a patent for the same invention, W. not having been notified of D.'s application. In December, 1861, W. applied for a patent, which was rejected because of D.'s patent. In July, 1862, W., who had been in England since 1858, first heard of such rejection. In July, 1863, his attorneys, who were also D.'s attorneys, obtained a declaration of interference, but gave no notice of it to W., and the matter was decided in favor of D., by default, but W. was not notified of the result. In July, 1865, such attorneys applied for a second interference, which was declared in November, 1865. In July, 1866, W. returned from abroad, and employed other counsel, but no testimony was taken on the part of W., and the matter was decided in favor of D., by default. In October, 1866, W. withdrew his application of December, 1861, with the intention and for the purpose of filing a new application, which was done in December, 1866. In January, 1867, a new interference was declared, which, in June, 1867, was decided in favor of W. When the first two interferences were applied for W. was detained in England by a writ of ne exeat, and was not aware that his attorneys were D.'s attorneys. Articles containing the patented invention were made and sold by others than W. in 1863, 1864, and 1865. *Held*, that the application of 1866 was intentionally in continuation of the prior application; that W. had not been guilty of laches; that he had not abandoned his application or his invention; and that such public use of the invention did not avoid the patent.

[This was a bill in equity by Thomas A. Weston against William H. White and others. Heard on motion for a preliminary injunction. For a prior hearing, see Case No. 17,458.]

Edmund Wetmore, for plaintiff.

George E. Terry and Stephen W. Kellogg, for defendants.

SHIPMAN, District Judge. This is a motion for a preliminary injunction to restrain the defendants from an infringement of letters patent granted to Thomas A. Weston, on August 6th, 1867, for differential pulley blocks. English letters patent bearing date April 25th, 1859, and published October 22d, 1859, had been issued to Mr. Weston, for the same invention. It has been decided by this court [Case No. 17,458] that the American patent will expire on October 22d, 1876. The defendants do not deny infringement, and do not substantially deny the patentability of the invention, or that Weston was the first and original inventor. The validity of the patent seems now to be generally conceded in this country, although no adjudication has ever been had in our own courts. In the case of Tangye v. Stott [14 Wkly. Rep. 128], which was tried before Sir W. P. Wood, Vice Chancellor, and a special jury, in December, 1865, the priority of Weston's claim to originality, and the validity of the English patent, were sustained by the verdict. Where no question is made as to infringement or priority, or as to the novelty or patentability of the invention, and where the public generally have acquiesced in the claim of the patentee to a monopoly, an adjudication by a court of law or of equity is not required before a preliminary injunction will be granted.

The objection to the validity of the patent is upon the ground that, prior to the application upon which the patent was issued, and which application was dated October 3d, 1866, the patented article had been in public or common use in this country. The history of the invention, and of the various applications by Weston for a patent, and of the use of the invention in this country, is as follows: Weston, on December 31st, 1859, filed in the patent office a caveat for this invention, which was renewed, and was in force until December 31st, 1861. On December 6th, 1860, J. J. Doyle filed his application for a patent for substantially the same invention, and a patent was issued to him on January 8th, 1861. The commissioner of patents did not give Weston the notice required by the 12th section of the act of July 4th, 1836 (5 Stat. 121), of the existence of Doyle's application. The examiner of the patent office, in his decision of June 8th, 1867, upon an interference between Doyle and Weston, says: "Notwithstanding the fact that Weston had a caveat properly filed and in full force, Doyle files an application and obtains his patent for the pulley which is fully described in said caveat, without the slightest reference being had to the latter. The fact cannot be denied, that Doyle's patent, under the circumstances, no notice having been taken of Weston's caveat, was improperly issued, and that an act of great injustice, unintentionally, of course, was perpetrated towards Weston." On December 14th, 1861, Weston made an application for a patent for the invention described in his caveat, which application was refused on December 18th, 1861, on account of the existence of Doyle's patent. In July, 1862, Weston, who had been in England since the year 1858, first heard of the rejection of his application. In March, 1863, he took meas-

[1] [Reported by Hon. Samuel Blatchford, District Judge, reprinted in 2 Ban. & A. 364, and here republished by permission.]

ures, through his attorneys in New York, who had renewed his caveat, and who were also Doyle's attorneys, to obtain a patent. The attorneys, on July 14th, 1863, asked the patent office to declare an interference, which was declared July 16th, 1863, and the first Monday of September, 1863, was appointed for the hearing. No notice was given to Weston of this interference, and nothing was done by the attorneys prior to the day of the hearing, on which day judgment went, by default, in favor of Doyle, but no notice of this result was communicated to Weston, who was still in England, and whose presence there was demanded. Early in 1865, Weston communicated with his attorneys, who, on July 12th, 1865, asked of the patent office the declaration of a second interference, which was declared on November 20th, 1865, and the hearing was appointed for the first Monday of May, 1866. No steps were taken on behalf of Weston by his attorneys, who were still attorneys also for Doyle, to prepare for this hearing. In July, 1866, Weston returned to this country, and employed other counsel, who asked for a postponement of the hearing, on August 28th, 1866, which request could not be granted. He was obliged to let the case go by default, and, on October 17th, 1866, judgment pro forma was given in favor of Doyle, in the absence of testimony on the part of Weston. On December 1st, 1866, Weston made another application for a patent, and, on January 1st, 1867, a new interference was declared, and a decision was rendered June 10th, 1867, in favor of Weston. At the time of making the first two applications for interference, Weston was detained in England by a writ of ne exeat, issued in proceedings growing out of the suit in favor of Tangye, and was unaware that his attorneys were also the attorneys of Doyle, and they, as might be expected, neglected the business of one of their clients. The laches of the attorneys should not be visited upon Weston, by reason of the fact that their conduct was, at least, constructively fraudulent. Neither was he, by reason of his compulsory detention in England, and his ignorance that his interests in this country were in jeopardy, guilty of laches in the prosecution of his application. The application for a patent was withdrawn about October 17th, 1866, for the purpose of filing a new petition, and with that intention at the time of the withdrawal. The new application was for the same invention as the one which was claimed in his original application and caveat. This invention and the original application have never been abandoned by Weston.

In 1863, Samuel Hall's Son & Co., a firm in the city of New York, made and sold differential pulleys, which were exact imitations of the patented invention, although they were stamped as if made under Doyle's patent. The Doyle pulley was not successful. In 1864, the firm removed to Newark, and engaged in the business upon quite a large scale. James Bird, of New York, also made the same pulleys in 1865. The defendants base their objection to the validity of the patent upon the ground that the manufacture and sale of the Weston pulleys, in 1863, 1864 and 1865, constituted a public or common use of the patented article, prior to the application of Weston for his patent in 1866, and that, therefore, the patent is invalid, under the 6th and 7th sections of the act of March 3d, 1839 (5 Stat. 354).

There is no doubt that the Weston pulleys were in public or common use in this country as early as the year 1863, and, if no application had been made by Weston prior to December, 1866, or if the prior application which he did make had been abandoned, it is true that the patent would be invalid. But, it is found that an application was made in 1861, which was improperly rejected, and which was not withdrawn until October, 1866, when it was withdrawn for the purpose of filing a new application for the same invention which was originally claimed, and that the application of 1866 was intentionally in continuation of the previous application for substantially the same invention, and that no laches or fault is attributable to Weston for this apparent delay after the first rejection of his application, and that he had neither abandoned his application nor his invention. "If an applicant for a patent choose to withdraw his application for a patent, intending, at the time of such withdrawal, to file a new petition, and he accordingly does so, the two petitions are to be considered as parts of the same transaction, and both as constituting one continuous application, within the meaning of the law." Godfrey v. Eames, 1 Wall. [68 U. S.] 317. This statement of the law presupposes that the original application is an existing, and not an abandoned, application. For, it is believed that the supreme court "did not intend to decide that every subsequent application for a patent should be deemed, in judgment of law, to relate back to the first, whatever the interval of time, or the intervening acts of the applicant between them," although the applicant might have wished or intended that such result should take place, when he filed his new application. Bevin v. East Hampton Bell Co. [Case No. 1,379]. The continuity of the two applications is a question of fact, to be determined, in each case, upon an examination of its own circumstances. In order to ascertain this fact, the trier will find whether the inventor has abandoned his original application, either by his own will, or by his acts, and whether the new application is substantially for the same invention which was originally claimed. If the two applications are found to be continuous, and it has been therefore proved that the delay in making the new application, after the rejection of the first, has not been unreasonable,

under the circumstances of the case, and if the invention has not been abandoned to the public, the public use, in order to invalidate the patent, must be a use prior to the original and continuing application. Public or common use subsequent to the date of the original application, if that has been a continuing one, and the two petitions are "parts of the same transaction," will not avoid the patent. Godfrey v. Eames, 1 Wall. [68 U. S.] 317; Dental Vulcanite Co. v. Wetherbee [Case No. 3,810]; Adams v. Jones [Id. 57]; Howe v. Newton [Id. 6,771]; Blandy v. Griffith [Id. 1,529]; Smith v. Prior [Id. 13,095]; Singer v. Braunsdorf [Id. 12,897]; Bevin v. East Hampton Bell Co. [supra]. In this case, it is not claimed that there was any common or public use in this country, of this invention, prior to the original application.

The invention of Weston has been of great utility and has gone into extensive use. The defendants have recently engaged in the manufacture of pulleys, and were early warned of the consequences of infringement. There seems to be no equitable reason why a preliminary injunction should be refused. The motion for a preliminary injunction should be granted.

WESTON, The LIZZIE. See Cases Nos. 8,424 and 8,425.

Case No. 17,460.

The WESTPHALIA.

[4 Ben. 404.] [1]

District Court, E. D. New York. Dec., 1870.

COLLISION IN THE ENGLISH CHANNEL — STEAMER AND SAILING VESSEL—SPEED—FOG SIGNALS—PRESUMPTION.

1. The steamer W. and the brig P. came in collision in the English Channel, in the daytime, in a dense fog. When the fog came on, the lookout on the steamer and the wheelsman were doubled, the passengers were directed to keep quiet, and the whistle was blown every fifteen seconds, and her speed was slowed to a rate of from seven to nine miles an hour. The lookout reported the brig right ahead, about 150 feet off, when the engines of the steamer were stopped and backed, and her wheel hove hard-a-port, but the vessels came together, the steamer striking the brig near the fore-rigging, and sinking her. The brig had a lookout and a man at her wheel. She was barely moving through the water, the wind being very light. Her mate and captain had been in the cabin, working out the ship's position. Shortly after they came on deck, the steamer's whistle was heard, when a fog-horn was blown, answering the blasts of the steamer's whistle, four or five of which were heard before the collision. No fog-horn had been blown on the brig till the whistle was heard, and no horn was heard at all on the steamer. *Held*, that the steamer was in fault, in running at too great a speed.

[Cited in The City of Panama, Case No. 2,764; The Hansa, Case No. 6,037.]

2. The brig was in fault, in not blowing a horn from the time the fog came on till the steamer's whistle was heard.

3. It could not be inferred, from the fact that no horn was heard by those on the steamer, that it would not have been heard if it had been blown before—the presumption must be that it would have been heard.

4. Both vessels were in fault, and the damages must be divided.

In admiralty.

J. D. Reymert, for libellants.
W. C. Barrett, for claimants.

BENEDICT, District Judge. These are two actions, brought to recover of the steamship Westphalia the damages occasioned by the sinking of the Norwegian brig Procis, in a collision, which occurred between these two vessels, in the daytime, on the 9th of July, 1870, off the Casketts, in the English Channel. The brig was sailing north by east, close hauled, with a very light breeze, just enough to move her through the water. The Westphalia was steering to westward, bound from Havre to New York. The sea was calm. The evidence, on the part of the steamship shows that at 12½ o'clock, when the watch changed, and the second officer took his station on the bridge, the weather showed signs of fog, which by one o'clock shut in so thick that objects could not be seen at any considerable distance. The lookout and wheelsman were then doubled, the passengers, of which some one hundred were on deck, were directed to keep quiet, and orders were given to whistle every fifteen seconds. At one o'clock, the captain, having first slowed the speed of the steamer, went on the bridge, and there remained. No vessel was seen or heard by those on the steamship until a few minutes after two, when the lookouts reported a vessel right ahead, which proved to be the brig Procis, then from 150 to 160 feet distant, presenting her starboard side to the steamship, and moving very slowly. The engine of the steamship was at once stopped and reversed, and the wheel hove hard-a-port, but the vessels were in contact before the steamship could be stopped, or her course materially changed. The brig was struck near her fore-rigging, and sank almost immediately. Fortunately, however, all her crew were saved, being picked up in the water by the boats of the steamer. Some eleven witnesses from the steamer have been examined, who substantially concur as to the facts above stated, and all say that no fog-horn was heard, nor was any notice given by the brig, until she was seen right under the steamer's bows, when outcries were heard from her crew.

On the part of the brig, it is shown that she was close hauled, going about half a mile an hour, with all her sails set; that she had a man at the lookout and a man at the wheel; that the mate and captain were in the cabin, engaged in working out the ship's posi-

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

tion, until nearly two p. m., when they came on deck, and shortly after the steamer's whistle was heard, whereupon the mate at once blew the fog-horn, answering the blasts of the steamer's whistle, and also blowing between the whistles, until the steamship came out of the fog close upon them, and almost immediately ran them down.

The faults charged against the steamship are, that she was running at too high speed in such a fog, and that she ported her helm, instead of starboarding, when the brig was seen. On the part of the claimants, it is contended that the steamer was running at a proper speed, with all possible caution; that the brig was seen at the earliest possible moment, and all efforts made to avoid her, but it was then impossible; and that the sole cause of the collision was the omission of those on the brig to notify the steamer of their presence by blowing a fog-horn.

Upon the proofs, I consider it clear that the steamship was not in fault for porting when she did, instead of starboarding, but that she was in fault for running at a speed of nine or ten knots an hour in a dense fog. There is some evidence tending to show that the speed of the steamer, before she was slowed by the captain, was thirteen miles an hour over the ground, but that she had a tide with her running some three knots, making her speed through the water ten knots, which was reduced three knots when she was slowed; and in this way it is claimed that her speed through the water was only seven knots. The more reliable evidence is, however, to the effect that she was running from eight to ten knots an hour through the water, when the brig was seen. The log showed the speed through the water, and the man who hove it says she was running ten knots. The captain says, "At that time, she was running about eight to nine miles, I believe"; and I notice that the log-book, which would show the marking of the log, although called for, is not produced, nor is the engineer called as a witness, or his absence accounted for. Such a rate of speed in such a fog is unlawful; indeed, a speed of seven knots could not be justified.

I have not overlooked the testimony which has been introduced to show that this steamer, which was sailing to the west, the tide, as she claims, running with her three miles an hour, at a distance of ten miles or more off the Casketts, in the English Channel, and which stopped for half an hour to pick up the crew of the brig, was compelled, in order to keep her course, to maintain a speed of seven or eight knots, under all circumstances, owing, as it is said, to the strong currents of the locality; but this testimony has failed to convince me that such is the fact. I know that the steamer would answer her helm more quickly, when going at eight or ten knots, than at six, but she could not stop so quickly. In such a dense fog, she was bound to be going as slow as was possible for her to go, consistent with steerage way, in order to enable her to stop in proper time. This I am satisfied she was not doing, and, for the omission, I hold her in fault.

There remains to consider the fault charged upon the brig, that she omitted to blow her fog horn. It cannot be doubted, upon the evidence, that no horn was heard by those upon the steamer. The precautions taken on the steamer indicate a state of watchfulness, and render it difficult to understand how a horn could fail to have been heard, if blown; while, on the other hand, to hold that a horn was not blown, is to disregard the positive evidence of six different witnesses from the brig, who testify affirmatively to the fact that their horn was blown. Moreover, the brig had a man on the lookout, and a man at the wheel. She was in a dangerous locality, enveloped in a dense fog, and, under such circumstances, it seems hardly possible that a steamer's whistle would not have attracted their attention, if it did not even occasion alarm. The master and mate were also on deck part of the time of the fog, and all say that the whistle did attract their attention, and that it was at once replied to by the horn. To omit that signal would be to greatly increase their peril, and no reason can be assigned for such an omission. It seems impossible, therefore, upon the evidence, to hold that the horn was not blown, when the whistle was heard. But it is admitted that the horn was not blown until the whistle was heard, which was some time after the fog set in, and when the steamer was quite near. The evidence for the brig, that the whistle was heard from three to five times only, shows this. The evidence of the number of times the horn was blown tends to show the same thing. According to the account given by the libellants themselves, therefore, the steamship was running within hearing distance of the brig, for some minutes before the horn was blown, the fog then being very thick. To omit sounding the horn until they heard something, when in such a fog, and in that locality, was great neglect. The horn should have been continually sounded from the moment the fog set in. It is true that when the horn was sounded, it was not heard on the steamer, owing, it may perhaps be, to some passing current of air which carried the sound away; but it cannot be inferred from that circumstance, that, if blown when the steamer first came within hearing distance, it would not then have been heard. The presumption must be that it would have been heard at that time. My conclusion, therefore, is, that this is a case of fault in both of the colliding vessels. The fault on the part of the steamer being that of running at too high speed in a thick fog; on the part of the brig, that of omitting to blow the horn from the time the fog set in, instead of from the time of hearing the steamer's whistle at no very great distance. I cannot dismiss the case without remarking, in addition, that if the not very unreasonable

supposition be made, that the witnesses for the brig, in their zeal for their own vessel and their own case, have been led to overestimate and overstate the time which elapsed between hearing the whistle and the collision, the failure of those on the steamer to hear the horn would be explained. Under such a hypothesis, the case would show the master and mate remaining in the cabin, while the vessel was in a thick fog, and coming out at the last moment only to find the steamer upon them. The horn blown at that time would naturally be unnoticed on the steamer, in the excitement attendant upon the discovery of the brig close under their bows. But this hypothesis would impute to the lookout and man at the wheel of the brig, who were both on deck from the commencement of the fog, such an extraordinary neglect of duty, such disregard of their own personal safety even, and would be so greatly opposed to the whole tenor of the evidence given for the brig, that I hesitate to adopt it as the explanation of the case, but rest my decision upon the other ground above stated. This being a case of mutual fault, the damages will, of course, be apportioned. Let decrees be entered accordingly, and references ordered, to ascertain the amount due the libellants.

Case No. 17,461.

WESTRAY et al. v. The MILETUS.

[2 Int. Rev. Rec. 61.]

District Court, S. D. New York. Aug., 1865.[1]

AFFREIGHTMENT—DAMAGE TO CARGO—INTEREST—DAMAGE BY STEVEDORES.

[1. Ship held liable for damage done to a cargo of tea by defacement of the labels by cockroaches.]

[2. Interest is allowable on damage occasioned to cargo by the fault of the ship; and the court may enter a decree for such interest on the coming in of the master's report, although the interlocutory decree did not provide for interest.]

[3. The ship is not liable for damage done to cargo, in unlading, by stevedores appointed by the consignees under an express provision therefor in the charter party.]

[This was a libel in rem by Fletcher Westray and others against the ship Miletus to recover for damage to cargo.]

SHIPMAN, District Judge. This suit was instituted to recover damages for injuries to a cargo of tea shipped at Amoy, China, in September, 1861, on board the ship Miletus, and consigned to the libellants at the port of New York. On arrival here, the packages were found to be in a damaged condition, some from seawater, and others from defacement of the labels by cockroaches. On the original hearing before this court no claim was made by the libellants for any damage done by water. They did claim, however, to recover for the injury done by the defacement of the labels by the cockroaches, and also for damage done to the packages while they were being unladen, in consequence of their being cut open by the stevedores and others. The claimants insisted that the ship was not liable for any damage resulting from either cause. The court pronounced in favor of the libellants, holding that they were entitled to recover whatever damage had been done to the packages by cockroaches. No written opinion was filed, but the court held the case to be covered by the principle decided in the case of Kirkland v. The Fame [Case No. 7,845], determined in this court in December, 1861, and referred the counsel to the opinion in that case, and the authorities there cited. But the court reserved its decision on the question of damages resulting from cutting open the packages, until the return of the report of the referee, to whom the case was referred, with direction to ascertain the damage done to the cargo by other causes than sea-water, and to distinguish, in the report, the damage done by the stevedores cutting open the packages during the unlading of the ship, from that done by vermin. The commissioner's report is now before the court, in which he finds damages done to the cargo (other than by sea-water and the stevedores) amounting to seven thousand one hundred and fifty dollars sixty-three cents, to which he has added interest one thousand one hundred and twenty-six dollars and twenty-two cents, making a total of this item of eight thousand two hundred and seventy-six dollars eighty-five cents. The report set forth the damage done by the stevedores in cutting open the packages, at one thousand four hundred and thirty dollars and thirteen cents, to which he has added two hundred and twenty-five dollars and twenty-two cents interest, making one thousand six hundred and fifty-five dollars and thirty-five cents, as the amount of this item. To this report the claimants have filed exceptions objecting to the assessment of damages made by the commissioner. The exceptions go both to principal and interest of both items of damage—that resulting from the alleged injury by the vermin, and that from cutting the packages. After an examination of the proofs, I have concluded not to disturb the report so far as the first item is concerned. I think the evidence, on the whole, sustains the amount found in the report. So far as the question of interest is concerned, I understand the rule heretofore adopted by this court is to sustain the allowance. The suggestion made, that the interlocutory decree does not call for an allowance of interest, is not very material. The interest would be added, by direction of the court, on the coming in of the report, if the commissioner had omitted to compute it. The Joshua Barker [Case No. 7,547]; The Gold Hunter [Id. 5,513].

The remaining question is, whether the ship is liable for the damage done by the stevedores in cutting open the packages, during the unlading of the teas. This depends upon the fact whether or not the stevedores were the agents of the ship or master. Ordinarily the master employs the stevedores, and of course selects them. In that case the well-settled law of agency re-

[1] [Affirmed in Case No. 9,545.]

gards them as his agents, as well as the agents of the ship, in performing that particular service, and holds that he impliedly warrants their fidelity and competency. But here the stevedores were, in pursuance of an express provision of the charter party, selected by the consignees and libellants. The law will not imply that one, who has no choice in the selection of an agent, warrants his competency and fidelity to the party who does select him. Here the master had no voice in the selection of the stevedores. They were named exclusively by the libellants, and that nomination was never withdrawn or revoked. The law therefore raises no implication of a warranty of their fidelity to their libellants by the master, and consequently neither he nor the ship can be held liable for their failure to perform in a faithful and careful manner the service for which the libellants selected them.

For these reasons the report of the commissioner is affirmed so far as the first item is concerned only. Let a decree be entered for the libellants for that amount. No costs are allowed on the exceptions to either party, as the report could not, according to the terms of the interlocutory decree, settle the whole question of damages without a further hearing before the court.

[On appeal to the circuit court the above decree was affirmed, without costs. Case No. 9,545.]

WEST ROXBURY (ADAMS v.). See Case No. 67.

Case No. 17,462.

WEST ST. LOUIS SAV. BANK v. SHAWNEE COUNTY BANK et al.

[3 Dill. 403;[1] 2 Cent. Law J. 46.]

Circuit Court, D. Kansas. Nov., 1874.[2]

BANKS AND BANKING—ACCOMMODATION ENDORSEMENT BY CASHIER.

A cashier without special authority cannot bind his bank by an official endorsement of his individual note, and the onus is on the payee to show the cashier's authority.

The defendant [George F.] Parmelee, made his individual note payable to the order of the plaintiff, and endorsed it, "G. F. Parmelee, Cashier," and gave the plaintiff as collateral security a certificate of stock in the Shawnee County Bank, issued to and owned by him (Parmelee). The consideration of the note was a loan of money by the plaintiff to Parmelee, who, at the time of obtaining the loan, advised the plaintiff that he intended to use the money borrowed to pay for the stock he had subscribed for in the Shawnee County Bank. The defendant, Parmelee, has failed to pay the note, and the question in the case is whether the Shawnee County Bank is liable on the indorsement of the cashier above mentioned.

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

[2] [Affirmed in 95 U. S. 557.]

Ennis & Foster, for plaintiff.

Guthrie & Brown, for Shawnee County Bank.

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

DILLON, Circuit Judge. The form of the note as well as the evidence aliunde shows that the plaintiff made the loan to the defendant, Parmelee, who gave his own note for the amount and pledged his own stock as security. The note was indorsed by him thus: "G. F. Parmelee, Cashier." It is established by the proofs that the directors of the defendant bank did not know of this indorsement and never ratified it.

The defendant bank did not receive the proceeds of the discount of the note of Parmelee except in payment of his stock. Under these circumstances we are clear in the opinion that Mr. Parmelee's indorsement of the note as cashier of the defendant bank did not bind it. The plaintiff had notice of the presumptive want of authority of Parmelee, both by the form of the instrument (Lemoine v. Bank of North America [Case No. 8,240], and cases there cited), and the facts of the transaction of the loan to him. The cashier of a bank has no implied authority to indorse officially his individual note, thus by his own act making the bank an accommodation indorser for his own benefit. As this was done in this instance, the plaintiff bank had notice of it, and to hold the defendant bank on such indorsement the onus to show authority, express or implied, from the directors of the defendant bank, is upon the plaintiff. It has failed to establish such authority. On the other hand, the defendant bank has affirmatively established that the cashier had no such authority. The suit must be dismissed as to the defendant bank. The plaintiff is entitled to a decree against the defendant, Parmelee, for the amount of the note and for a sale of the collateral. Decree accordingly.

[On appeal to the supreme court, the above decree was affirmed. 95 U. S. 557.]

NOTE. Notice to Director When Notice to the Bank. The leading cases on this subject are collected and well commented on in Morse on Banks and Banking (page 108 et seq.) where the author expresses the rule (Id. p. 111) in this language: "Whatever knowledge a director acquires within the scope of his official employment, he is bound to communicate to his co-directors, that is to say, to the bank itself."

The case of Bank of U. S. v. Davis, 2 Hill, 451, is one in which a bill of exchange was sent to a bank director with the request to procure a discount upon it. This director, at the directors' meeting in which he participated, falsely asserted that the discount was for himself, and he received the proceeds of it, and it was held that the bank was affected through the director with knowledge and could not recover the amount of the bill from the party defrauded.

Knowledge possessed by a director, who was also one of the trustees of bonds assigned to an innocent third person, does not charge the latter with the knowledge of the director who only

nominally represents them. Curtis v. Leavitt, 15 N. Y. 9.

When notice to the president is notice to the bank, see Porter v. Bank of Rutland, 19 Vt. 410.

"Corporations having common officials are not," says Mr. Brice in his treatise on Ultra Vires (Eng. Ed.) 350, "necessarily affected through these with a knowledge of each other's transactions." He cites In re Marseilles Ry. Co., 7 Ch. App. 161; In re European Bank, 5 Ch. App. 358. Compare In re Contract Corp., L. R. 8 Eq. 14; Gray v. Lewis, Id. 526.

WEST SIDE ELEVATED PATENT RY. CO. (CURRIER v.). See Case No. 3,493.

WETHERBEE (DENTAL VULCANITE CO. v.). See Case No. 3,810.

WETHERILL (BURROWS v.). See Case No. 2,208.

WETHERILL (JONES v.). See Case No. 7,508.

Case No. 17,463.

WETHERILL et al. v. NEW JERSEY ZINC CO.

[1 Ban. & A. 105;[1] 5 O. G. 460.]

Circuit Court, D. New Jersey. March, 1874.

CONTEMPT OF COURT—VIOLATION OF INJUNCTION—EVIDENCE—PATENTS—INFRINGEMENT—PROCESS FOR MAKING OXIDE OF ZINC.

1. This was a motion for an attachment against the defendants for contempt, by reason of their alleged violation of the perpetual injunction decreed in this suit, enjoining the defendants from constructing, using or selling the complainants' patent for a process for making white oxide of zinc. The affidavits of the complainants used upon the motion, fully sustained the alleged violation of the injunction, which was denied by the affidavits read by defendants, who urged, that, as the proofs were conflicting, the motion should be denied, and the question of infringement involved, be determined upon a new bill. *Held*, that where application is made to the court for summary correction for violation of an injunction, if the violation has been wilful, the summary method of correction is imperative; but if the violation, either as to its character, or the fact of its commission, is doubtful upon the proofs, such mode of interposition ought not to be applied. The court must weigh the conflicting evidence, and as it establishes clearly, or falls short of establishing, a substantial transgression, it must act or forbear to act accordingly. The summary exercise of the power of the court will not be arrested by the mere fact that the proofs of violation are conflicting, or that the thing used by the defendants is in some respects different from the thing whose use is interdicted.

2. A patent for a process for making white oxide of zinc, by spreading mingled ore and coal, in a comminuted form, upon a thin layer of chestnut coal, placed upon perforated grate bars, and forcing air through the grate and the mass above it to keep up combustion, and also supply the vaporized zinc with sufficient oxygen in the furnace chamber to convert it into white oxide; and, when the metallic zinc is expelled from the ore, removing the scoria or slag, ready for a repetition of the process, is infringed by spreading upon a bed of coarsely broken slag, without grate bars, a layer of charcoal, upon which is placed pea coal, finely crushed ore, dust coal and marble, and forcing a blast of air through the broken slag and the mass above it; and, when the metallic zinc is ejected, withdrawing a sufficient amount of the slag from the bottom to allow a fresh charge of ore, coal and marble, to be placed on the top of the remaining slag, while still in a heated condition and broken into fragments.

3. It is not less an infringement, because air is introduced above the charge, after the zinc vapor appears, in order to supply any deficiency in the blast through the slag, for oxidizing the zinc.

4. The defendants, who had been enjoined, by the decree, from infringing the complainants' patent, adjudged guilty of contempt.

5. An attachment awarded against the president of the defendant corporation, he having been served with the injunction, and having devised and practised the transgressing process.

[These were two suits in equity by Samuel Wetherill and others against the New Jersey Zinc Company for alleged infringement of letters patent No. 13,806, for a process of making white oxide of zinc. Complainants now move for an attachment for contempt, for alleged violation of an injunction heretofore granted.]

George Harding, for complainants.

Benjamin Williamson, for defendants.

McKENNAN, Circuit Judge. At a final hearing of this cause, it was adjudged, that the defendants had infringed letters patent [No. 13,806] granted to Samuel Wetherill, on the 13th of November, 1855, and extended for seven years, for a process for making white oxide of zinc, and they were perpetually enjoined "from the further constructing, using, or selling in any way or manner, directly or indirectly, the said patented improvements or any part or parts thereof." They are now alleged to have violated this injunction, in the use of a process substantially the same as Wetherill's, or at least embracing its essential features, and a motion has been made for an attachment against them for contempt.

The affidavits presented in support of this motion, fully sustain the alleged violation of the injunction. This is controverted by counter affidavits, and hence it is urged that the motion should be denied, and the question of infringement involved, investigated and determined upon a new bill.

It is certainly desirable that any adjudication by the court, touching interests of such magnitude as are involved in this proceeding, should be in such form that it may be susceptible of revision by a superior tribunal. But that is no sufficient reason for withholding from a litigant the benefit of a remedy to which he is entitled, if he establishes a meritorious claim to it, nor would it justify the court in abdicating the discharge of a duty which the law imposes upon it. Not only has a party, in whose favor judicial process has been awarded, a right to demand the full measure of protection it was intended to afford him, but, in a more general sense, it is essential to the due administration of justice, that obedience to it should be enforced. If its requirements are wilfully unheeded, a summary method of correction is

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imperative; on the other hand, if the delinquency, either as to its character or the fact of its commission, is doubtful upon the proofs, such mode of interposition ought not to be applied. This is the import of all the authorities. It is not enough, therefore, to arrest a summary exercise of the power of the court, that the proofs of the violation of its decree are conflicting, or that the thing used by the respondent is, in some of its features, different from the thing whose use is interdicted. The evidence must be carefully weighed, and as it establishes clearly or falls short of establishing a substantial transgression, it is the duty of the court to act or forbear to act accordingly.

The decisive inquiry here, then, is whether a violation of the injunction is satisfactorily proved. Before Wetherill's invention metallic ores were reduced by means of blast and muffled furnaces; and at the final hearing of this cause, the methods of operation in both of these were fully described to illustrate the state of the art, and to establish the novelty of Wetherill's method. To contradistinguish these processes, as well as to indicate the points of resemblance between the process used by the defendants and claimed to be an infringement, and Wetherill's, the characteristic features of Wetherill's process were stated to consist in the employment of a thin bed-fire of chestnut coal and of a superincumbent layer of pulverized ore and pea coal of the approximate thickness of three inches; the enforced passage of atmospheric air in numerous jets through the mass, by which its combustion is maintained; the vaporization of the zinc and its oxidation in the furnace above the charge, when the zinc in the ore is expelled, and the repetition of the process. In the blast-furnace—to which alone, as a prior device, it is necessary to refer—the fuel and ore are not comminuted, nor is the charge spread in a thin layer, and when its working is begun it must necessarily be continued without interruption until the furnace is blown out. In all these particulars the Wetherill process is different. The bed-fire consists of fuel in a comminuted form; so also does the charge of mingled ore and carbon. This charge is spread in a layer of the maximum depth of eight or nine inches, and through it, is diffused a blast of air, not only to keep up combustion, but to supply the vaporized zinc with sufficient oxygen in the furnace-chamber to convert it into white oxide, and, when the metallic zinc is expelled from the ore, the scoria or slag is removed, and the process repeated. It is thus an alternating process, inasmuch as it is susceptible of temporary suspension and repetition, whereby it is distinguishable from the operation of the blast-furnace, which is continuous and incapable of interruption.

The process used by the defendants, is claimed to differ essentially from Wetherill's, first, in the character of the charges employed, and, second, in the continuity of their treatment; and upon the determination of these facts the result of the present application depends.

The bottom of the furnace-chamber described in Wetherill's patent is composed of perforated iron grate-bars. The double function of these bars is to support the burden of the bed-fire and the charge, and to diffuse through it a blast of air forced into the closed ash-pit below. When the furnace is to be put in operation, a thin bed of comminuted coal is placed upon the grate-bars, and when this is ignited, the charge of mixed ore and coal is superimposed, and is spread out evenly through a wide door provided for that purpose, so as to cause an equable diffusion of the air through it. As soon as the vapors of zinc are observed to come off, the connection with the collecting-chamber is opened, into which the oxide passes and is gathered in bags. When the charge is brought to the condition of clinker, or is "slagged up," the process of reduction is at an end, and the clinker is then removed and the furnace recharged as before.

The furnace used by the defendants has a like large superficial area, into which a wide door opens, and is provided with a blast underneath the charge, but it is without grate-bars. When it is to be put in operation, the bottom is filled to the depth of about two and a half feet with scoria or slag, coarsely broken, "upon this is put a bed of charcoal, then pea coal upon the burning charcoal, and then, when the pea coal is all on fire, is put finely-crushed ore, dust coal, and marble," of the depth of about six inches. Through the wide or charging door, the blow holes in the charge are filled, and it is thus made of uniform thickness. The first products of combustion are discharged into the air, until the green flames of burning zinc are observed, when a supplemental blast is introduced above the charge, and the oxide is conducted to the collecting-chamber. When the charge is slagged, the scoria is thoroughly broken through the opened charging door, a portion of the lower stratum of scoria, equal to that produced by the worked-off charge, is drawn off from below, and a new charge similar to the previous one is introduced directly upon the red-hot scoria.

In starting the operation of the furnace, the defendant's method is, in the main, indistinguishable from Wetherill's. The preliminary bed-fire is the same in both, and so also is the charge in every essential particular. In the one case, however, the charge is supported upon a bed of perforated iron grate-bars, and in the other upon a bed of coarsely broken clinkers. But are not the functions performed by both these beds exactly the same, and are not the clinkers, therefore, only the equivalent of the grate-bars? The office of the bars is to support the burden of the charge, and, at the same time, not only to permit the passage of air from the blast into the charge, but also to diffuse it throughout the charge so

as to insure the equable combustion of it, and supply the resulting zinc vapor with oxygen to convert it into white oxide. Now, it is manifest that the charge rests upon, and is sustained by the clinker-bed, and that the air, forced into the latter by the blast, passes up through it and into the charge. But does it diffuse it throughout the charge? The air does not permeate the body of the clinker, because it is a hard, incombustible substance, composed chiefly of iron. It can only escape through the crevices in the disintegrated clinker, and as the fragments of scoria are reduced in size, so the number of air-passages is increased. The result, then, is that these crevices, distributed through the mass of broken clinkers, are filled with air, which is conveyed diffusively, by means of them, into and through the superincumbent charge. As a physical fact, this is self-evidently plain. And so the effect must be to promote diffusive and equable combustion and oxidation of the vapor evolved by it.

But, after the first charge is worked off, the residual scoria is not taken out of the furnace, but is broken up into smaller fragments, and a quantity of the cinder below, equal to it, is withdrawn from the bottom of the furnace, so that a uniform depth of bed-cinder is maintained. Now, suppose the grate-bars employed in the Wetherill process were so arranged that they could be drawn out of their place, and so permit the residuum of the charge to fall into the ash-pit below, to be thence taken out as occasion might require, would it not be as effectually removed from the furnace, as if it were withdrawn through the charging-door? All that Wetherill's patents require is the removal of the residuum, so as to give place for a new charge, and the use of his process, with only such a modification, would be a palpable infringement. Is not this just what is done in the defendants' method? The slag of the reduced charge is not actually taken out of the furnace, but an equal portion below it is taken out, and it is removed from the place occupied by it before, to afford space for another charge. Without this displacement, the new charge could not be introduced and worked, and it is only that this may be done, that the slag is withdrawn in the Wetherill process. The defendants, however, introduce a supplemental blast into the furnace-chamber above the charge. No such blast is used in the Wetherill process, and the proof, at the final hearing of the cause, demonstrated that the results were perfect without it. Now, if the means employed by the defendants to supply the charge with air beneath it operate less efficiently than Wetherill's, although they are identical in function and mode of operation, does it follow that a necessary supplement of air in one case and not in the other, renders the processes different? We think clearly not. But, in point of fact, the oxidation of the zinc fumes is effected by the lower blast in the defendants' method, as in Wetherill's. This is the import of Mr. Renwick's testimony, in which he says that vapors fit to go to the collecting-chamber were coming off the charge before the supplemental blast was turned on. But, in view of the preponderating weight of the proofs taken before the final hearing, if the product is not perfect without this additional supply of oxygen, it must be ascribed to the defective application of the lower blast, and not to any essential difference in the character of the method of introducing it.

We are, therefore, drawn to the conclusion, that a preliminary bed-fire, or thin charge of comminuted ore and carbonaceous matter, and the enforced passage of the air in numerous jets through the mass, by which its combustion is maintained and vaporization and oxidation of the zinc above the charge, when it is expelled from the ore, are effected, are features common to both Wetherill's and the defendants' methods.

It remains, then, to consider, whether the defendants' process is a continuous, such as is practised in blast-furnaces, or an alternating one. In the treatment of the metallic ores in blast-furnaces the operation, when it is once begun, must go on uninterruptedly. There is no suspension during the process of recharging, nor can there be. "Slagging up" would occur, and as an unavoidable consequence, stoppage of the draft and of combustion. Not so, however, with regard to the process in question. Mr. Renwick's testimony clearly establishes that it may be interrupted or suspended, and resumed, without the injurious consequences which follow in the blast-furnace. And it shows also that the very result, the slagging up of the charge, which must be avoided in the blast-furnace, is necessarily produced. It proves more than this. As an intelligent expert, he was taken to the defendants' works, that he might witness a practical exhibition of the contested method, and describe it as it really is.

The inference, therefore, is unavoidable that it was shown to him as the defendants usually practised it, and as they intended it should be practised. He thus describes the consecutive steps of the process: After a charge was worked off, the blast was shut off, and the operation of the furnace stopped; a portion of the clinker, equal to the slag of the last charge, was withdrawn through the lower doors provided for that purpose; the slag of the worked-off charge was thoroughly broken up, and, by reason of the withdrawal of a portion of the lower contents of the furnace, its top level was seven or eight inches below the level of the bottom of the charging door; a new charge about six inches in depth was introduced; the upper and lower doors were closed, and the blast was turned on; the upper or charging door was opened, and the blow-holes covered with fresh charge; all the doors being closed and the blast on, the products were permitted to go to waste until the vapors of zinc, fit to go to the collecting-chamber, were observed to come off, when the sup-

plemental blast was turned on, and the connection with the bag-room opened.

Now, the process thus described is not an uninterrupted one. From the time when the blast is shut off, until it is turned on again, the operation of the furnace is suspended. Its operation is continued only until the condition of the charge indicates the exhaustion of its metallic ingredients, as far as this can be accomplished. When slagging occurs, and while it lasts, the production of the oxide ceases. To restore it, the exhausted charge must be displaced, its form changed, and new material introduced in its place. The condition, which it is necessary in the blast-furnace to avoid, simply indicates, in the defendants' method, the termination of the operation and the time for its renewal. In the one, it is abnormal, and disastrous; in the other, it is a necessary and desired result. Obviously, the breaking up of the exhausted charge, and the depression of its top level, are only a preparation for the reception and working of a new charge; and whatever time may be thus occupied is the measure of the interval between the complete treatment of one charge, and the renewed treatment of another.

This is not the method pursued in the blast-furnace, nor is it capable of such treatment, but in the necessary suspension and renewal of its operation, it is notably different from the continuous process.

We are, then, satisfied that the method complained of is, in substance and character, the same with the method pursued by the defendants before the injunction, for the use of which they were adjudged to be infringers.

A bailable attachment must, therefore, be awarded against the president of the defendant company, upon whom the injunction was served, and who is shown to have devised and practised the transgressing process.

[For other cases involving this patent, see Wetherill v. New Jersey Zinc Co., Case No. 17,464; Wetherill v. Passaic Zinc Co., Id. 17,465; Jones v. Wetherill, Id. 7,508.]

Case No. 17,464.

WETHERILL et al. v. NEW JERSEY ZINC CO.

WETHERILL et al. v. SAME.

[1 Ban. & A. 485.] [1]

Circuit Court, D. New Jersey. Oct., 1874.

INFRINGEMENT OF PATENTS—DAMAGES AND PROFITS—RULES FOR COMPUTATION—PROCESS PATENT—LIMITATION OF ACTIONS.

1. An infringer of a patent is, in equity, a trustee of the patentee, of the gains derived by him from the infringement.

2. Where the infringed patent is for an art, a fair measure of the infringer's actual profits is the saving in cost of production by the use of the appropriated invention, over the cost of production by the use of cognate means, used and available.

3. The infringed invention consisted of an improved process of reducing zinc ores, and of thereby producing white oxide of zinc. *Held*, that the measure of the infringer's liability was the difference in cost of producing the white oxide of zinc obtained by the infringer by the use of the patented invention, and the cost of producing a similar quantity of the oxide by the old method.

[Cited in Sargent v. Yale Lock Manuf'g Co., Case No. 12,367.]

4. The infringer of a patented process of reducing zinc ores for the production of white oxide, cannot be charged with the value of an increased residuum, obtained by using the process, available for renewed treatment, which residuum fluctuates with the varying richness of the ore, and results, from its inherent natural properties, and is not imparted to it by the direct operation of any contemplated function of the process.

5. Where a patented process of reducing zinc ores for the production of white oxide of zinc, required for its successful practice, a furnace of special aptitude, and the furnaces in use at the time of the invention of the process were inapplicable to its successful or profitable practice, and the infringer employed another furnace, of special aptitude to the distinctive requirements of the patented process, the property of another, from whom he secured the right to its use, *held*, that the infringer's liability to the patentee of the process, estimated by the rule before enunciated, must be diminished by the contributive value of the furnace to the result produced. *Held*, also, that although the evidence supplied no data by which the contributory value of the furnace could be accurately estimated, yet, as the furnace and the process are indispensable coefficients in producing the result, the court, upon an accounting of the infringer's equitable accountability, would treat them as co-equal in their contribution to the joint result.

6. State statutes of limitation have no application to cases affecting statutory rights, cognizable, exclusively by the federal courts. Such rights can be affected only by laws of congress.

[Cited in McGinnis v. Erie County, 45 Fed. 91.]

[In equity. These were two suits by Samuel Wetherill and others against the New Jersey Zinc Company for alleged infringement of letters patent No. 13,806, for a process for making white oxide of zinc. Heard on exceptions to the master's report of profits.]

George Harding, for complainants.
Benjamin Williamson, for defendant.

McKENNAN, Circuit Judge. Equitable accountability for the unauthorized use of a patented invention, proceeds upon the hypothesis of a trust. An infringer, although technically a trespasser, is treated as a trustee of the gains resulting from the use of the patent property, and is held accountable accordingly. The benefit thus accruing to him is regarded as the patentee's contribution to his profits, and is the primary measure of his accountability. To obtain a just account of these profits, is, therefore, the special object of a master's researches, but it is not attainable by a uniform pursuit of the same methods. Different modes of computation are indicated by differ-

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ent subjects and circumstances, but they must be appropriate means of ascertaining the actual benefit derived from the use of the patentee's exclusive property. Where the appropriated invention is an art, the simplest method of attaining this, is, perhaps, by a comparison between it and cognate means used and available for the production of the same result. The saving in cost of production, due to the new process, is a fair measure of the infringer's actual profits.

This is substantially the rule applied by the supreme court in Mowry v. Whitney, 14 Wall. [81 U. S.] 620. The patent, in that case, was for a process of manufacturing cast-iron railroad wheels, and the court says: "The question to be determined in this case is, what advantage did the defendant derive from using the complainant's invention, over what he had, in using other processes, then open to the public, and adequate to enable him to obtain an equally beneficial result. The fruits of that advantage are his profits."

The application of this test, in the ascertainment of the respondent's profits, is especially appropriate in this case. The complainant's invention consisted of an improved process of reducing zinc ores, and of thereby producing white oxide of zinc. Before its discovery the same result was accomplished by means of what are known as muffled furnaces. This was the method in use by the respondents, and after a protracted comparative trial of the complainant's invention, it was adopted, and the old process was abandoned. If "an equally beneficial result" was thereby obtained, and a saving was made in the cost of accomplishing it, a corresponding advantage accrued to the respondents, the obvious measure of which, is the difference in the cost of production, between the old and the new method.

The master has, however, instituted a very laborious inquiry into the operations of the respondents, involving a minute examination of their books, and intricate and voluminous computations, with a view of ascertaining the quantity of coal and labor saved in the manipulation of the ore treated by the complainants' process, the increased proportion of oxide obtained by it, and the quantity of residuum available for renewed treatment when the Wetherill process was adopted. The value of these items is taken as gains, upon the basis of which, the master has adjusted the respondents' accountability. The decisive objections to this are, that the result necessarily fluctuates with the varying richness of the ore treated, and that the respondents are charged with the residual value of the ore, resulting from its inherent natural properties, and which is not imparted to it by the direct operation of any contemplated function of the complainants' process. The simplest and most appropriate method is, to ascertain the quantity of oxide obtained by the use of the complainants' process, and the cost of its production, and comparing this with the cost of producing a like quantity by the muffle process, the difference is the saving due to the former.

The complainants' invention was avowedly adapted to the production of white oxide from the ores of zinc, and, as a novel and useful instrumentality for that purpose, a patent was granted for it. Other methods were in use before it, but its essential superiority over them consists in its economical capability of effecting the common result. This was the scope of its ostensible design, and exclusive adaptability; and, hence, it was adopted by the respondents, and the old method was discarded. For the value of this econimical advantage, then, the respondents are accountable; and, the appropriate measure of it, is, the difference in the cost of obtaining the same product by means of the new process, and of the old one which it superseded.

From the evidence taken by the master, it appears, that for the years 1853–54–55, the cost of obtaining each 100 pounds of oxide, by the muffle process, was $2.05½; and for the years 1857–58–59, the cost of obtaining the same quantity, by the Wetherill process, was $1.63, showing a saving by the latter of 42½ cents per 100 pounds. Under all the circumstances, I think this is sufficiently accurate to furnish a just standard of computation of the respondents' gains, according to the rule before indicated.

During the time of the original patent, the quantity of oxide obtained by the use of the Wetherill process was 79,545,757 pounds, which, at 42½ cents per 100 pounds, gave a gain to the respondents of $338,069.47. Since the extension of the patent, 17,635,806 pounds of oxide have been produced, the gain upon which, at the same rate, is $74,952.17. These are the gross economical results of the use of the complainants' invention, in the production of white oxide of zinc. But are they wholly, or only in part, due to the agency of that invention? Whatever fruit was borne by it, the complainants are entitled to gather. But they cannot appropriate the entire value of advantages, which they have been only partially instrumental in securing. In proportion to their contributory efficiency in the production of beneficial results, they are entitled to participate in the consequent gains.

Now, it is an indisputable fact, that without a furnace of special aptitudes, the process in question cannot be successfully or profitably practised, and it is so found by the master. The muffle was entirely unsuitable to it, and, hence, another furnace was employed, with exclusive adaptation to its distinctive requirements. Without such furnace the process is an unfruitful abstraction. By their co-operative efficiency a profitable result is attained. Both are thus essential agencies in the production of this result. The complainants did not supply this indispensable co-efficient, but it was ostensibly the property of another, from whom the respondents secured the right to use it.

Upon what basis, then, ought the value of the result to be apportioned between these contributory agencies? The whole of it is claimed by the complainants, for the reason that the respondents have not furnished any data by which the contributory value of the furnace can be accurately determined. But, it does appear, that the furnace, indispensably contributed to the result, and that the process was only partially instrumental in securing it. To credit the process, then, with the whole value of this result, would award to it what it did not earn, and this, no consideration touching the burden of proof merely, could justify. In the very nature of things, it is impracticable to adjust the relative value of these instrumentalities, by any exact arithmetical standard. They are inseparable co-efficients, one, constituting the abstract method of reaching the desired result, the other, the mechanical instrument to effectuate it, each unfruitful without the co-operation of the other, and so, they must necessarily be treated as co-equal in their contribution to the joint result. Upon this basis, but one half of the gains, above stated, is due to the complainants' patent, and, for that proportion only, are the respondents to be adjudged liable.

It is urged that the accountability of the respondents must be confined to a period of six years before the filing of the bills. State statutes of limitation are authoritative in the federal courts, in cases only where the federal and state tribunals have concurrent jurisdiction of the cause of action. Statutory rights, which are cognizable, exclusively by the federal courts, can be affected only by the laws enacted by congress. The claims asserted here are in that category, and, as there is no act of congress applicable to them which limits the remedy, the respondents are without the protection of any statutory limitation of their liability. Nor, is there any sufficient reason, in equity, why their accountability should be thus circumscribed. The exclusive ownership of the invention in question was secured to the complainants by a patent, and of this the respondents had full knowledge. Without the remotest implication of assent by the complainants, but in manifest hostility to their right, the respondents appropriated their property, and have realized large profits from its use. For the consequences of this deliberate and persistent infringement, the respondents ought justly to be held fully accountable.

In the case of M. M. Jones, administratrix, and others, a final decree will be entered for the payment, by the respondents, of the sum of $169,034.73, with interest from October 2, 1871, and costs. And in the case of Wetherill & Gilbert a like decree will be entered for $37,476.08, with interest from the same date, and costs.

[For other cases involving this patent, see note to Wetherill v. New Jersey Zinc Co., Case No. 17,463.]

Case No. 17,465.

WETHERILL et al. v. PASSAIC ZINC CO. et al.

[6 Fish. Pat. Cas. 50;[1] 2 O. G. 471; 4 Leg. Gaz. 329; 9 Phila. 385; 29 Leg. Int. 357; 16 Int. Rev. Rec. 156.]

Circuit Court, D. New Jersey. Oct. 14, 1872.

CONSTRUCTION OF CONTRACTS — LICENSES UNDER PATENTS—EXTENSION OF PATENT—INJUNCTION—BOND.

1. The interpretation of a contract is to be determined by the sense in which the parties intended to use the terms employed to express it; and this must be gathered from the instrument itself, irrespective of declarations, written or oral, by either party, as to his understanding of its meaning, or as to his motives in making it.

2. A sale of two-thirds of a certain lease of land, including steam-engine, tools, and all appurtenances, and also of "two-thirds of all his machinery, furnaces, engines, retorts, buildings, and materials whatsoever, now on or about the premises of the Wetherill Zinc Company, in the town of Wetherill, Pennsylvania, with rights to use all his patents and processes for the manufacture of zinc oxide, metallic zinc, retorts, etc., which said Wetherill now has, or has in contemplation to obtain, it being understood that the patents heretofore referred to mean only those which he holds in his own right," *held* to be a license to use the process in those buildings only and not a general license.

3. The words restricting the grant to such patents as the grantor "holds in his own right," apply to such as he was the apparent, but not the real owner of, and a patent of which he holds only a part interest will, nevertheless, pass under the conveyance.

4. The words "all patents and processes which he has, or has in contemplation to obtain," merely serve to individuate the patents, and do not convey the extended term.

[Cited in Johnson v. Wilcox & G. S. M. Co., 27 Fed. 691.]

5. A license to use an invention "for the whole term of the patent which may be granted," given before the patent was issued, does not authorize the use of it under the extended term.

6. The case of Wilson v. Rousseau, 4 How. [45 U. S.] 669, must be considered as determining the construction of section 18 of the act of 1836 [5 Stat. 124].

7. The right to use a patented process, during the original term of the patent, under section 18 of the act of 1836, re-enacted in the act of 1870 [16 Stat. 198], does not authorize the use of it after the patent is extended.

8. There is a broad distinction between the use of an invention and the use of a patented machine. While the right to use the invention expires with the end of the term of the original patent, the right to the continued use of the machine, which embodies it, is protected.

9. Wilson v. Turner [Case No. 17,845] and Day v. Union India-Rubber Co. [Id. 3,691] commented on.

10. A bond with sufficient security allowed, instead of final injunction.

[This was a suit by Samuel Wetherill and others against the Passaic Zinc Company and others for alleged infringement of letters

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

patent No. 13,806, for a process of making white oxide of zinc. Final hearing on pleadings and proofs.]

[The validity of the plaintiffs' patent was not disputed, nor the fact of the use of the plaintiffs' patented process; but it was insisted that by reason of certain contracts the defendants were licensed to use the invention, during the extended term of the patent, at their New Jersey works.] [2]

George Harding, for complainants.

E. W. Stoughton and George Gifford, for defendants.

McKENNAN, Circuit Judge. There is no contention as to the complainants' title to the invention described in the patent set up in the bill, or as to the use of such invention by the defendants. The patent is for an improved process in the manufacture of white oxide of zinc, which Manning and Squier claim to have acquired a license to use during the term of the original patent, and the real and decisive inquiry in the cause is whether, by the true construction of this license, or by operation of section 18 of the act of July 4, 1836, re-enacted by section 67 of the act of July 8, 1870, the use of this process was authorized after the term of the extended patent began.

The construction of the agreement of March 17, 1860, between Manning and Squier and Wetherill, is not altogether free from difficulty. Its phraseology is peculiar. It provides for the sale, by Wetherill, to Manning and Squier, of two-thirds of his mineral lease of land in Lehigh county, from Jacob Correll, including the steam-engine, tools, and all appurtenances, and also of "two-thirds of all his machinery, furnaces, engines, retorts, buildings, and materials whatsoever, now on or about the premises of the Wetherill Zinc Company, in the town of Wetherill, Pennsylvania, with rights to use all his patents and processes for the manufacture of zinc oxide, metallic zinc, retorts, etc., which said Wetherill now has, or has in contemplation to obtain * * * it being understood that the patents hithertofore referred to mean only those which he holds in his own right." The interpretation of this contract is to be determined by the sense in which the parties intended to use the terms employed to express it; and this must be gathered from the instrument itself, irrespective of declarations, written or oral, by either party, as to his understanding of its meaning, or as to his motives in making it. But in and of such an inquiry it is proper to consider facts cognate to the subject of the contract and within the knowledge of the parties, to which it may, therefore, be presumed that the stipulations of the contract were intended to be applied, and by which their effect and meaning were to be governed.

The subject-matter of the first clause of the contract was the Correll mineral lease, two-thirds of which is sold to Manning and Squier; "and also" a two-thirds interest in the machinery, furnaces, engines, buildings, and materials then on or about the premises of the Wetherill Zinc Company, at Wetherill, "with" rights to use Wetherill's patents and processes for the manufacture of zinc oxide, etc., which he then had, or had it in contemplation to obtain. Now, it is clear that the interests conveyed in this lease, and the machinery, etc., are separate and independent, because that is expressed in unambiguous and appropriate words. But are the rights to use the patents and processes dissociated from the use of the machinery, etc., by terms of like import? They are granted together, apparently as inseparable parts of a single subject-matter, or, at least, as if they had some understood dependency upon each other. Two-thirds of the ownership of the buildings, machinery, etc., are transferred not as a distinct subject, but "with" rights to use certain patents and processes related to the uses for which the buildings and machinery were designed and employed. They are thus associated in the same clause, and are conveyed together in terms implying that the right to one is necessary to the appropriate enjoyment of the other. Where, then, were these processes to be used, and in what connection? Where else than at the place at which the appliances were provided, which might be adapted to the employment of all the processes comprehended in the grant, as they already were to some of them? For what other purpose can it be supposed the parties understood Wetherill to unite Manning and Squier with him in the ownership of the premises, unless it was to secure their continued and successful use in the production of zinc in some of its forms, and what more conducive to this purpose than to authorize the use of necessary methods, of which he had the monopoly? I do not, therefore, think it an unwarranted inference, from the words and tenor of the contract, that the parties intended the right to use Wetherill's patents and processes to be exercised in connection with the buildings, machinery, furnaces, engines, retorts, and materials granted with it, and consequently that such use was intended to be local and restricted.

It is urged, however, that a right to use Wetherill's patented process for the manufacture of zinc oxide was not conveyed by the contract. This conclusion is founded upon the alleged effect of the concluding sentence of the first clause of the contract, which is, "it being understood that the patents hithertofore referred to mean only those which he holds in his own right." Before the date of the contract Wetherill had transferred interests in his process patent to Chas. J. Gilbert and others, and was then only part owner of it; and it is therefore argued that he did not

[2] [From 2 O. G. 471.]

hold it in his own right. That he was owner in part of this patent is undoubted, and that to the extent of his interest he held it in his own right is also clear. Now, the qualifying words above quoted apply only to such patents as he was the apparent but not the real owner of, nor do they exclude patents of which his tenure was not exclusive. He was the patentee of the process for manufacturing white oxide of zinc, and to the extent of his untransferred interest he was competent to dispose of it, because he held it in his own right. He did dispose of part of this interest, expressly limiting the operation of his conveyance to such interests as he was the real owner of. But it must be further observed that this process patent was the only one for the manufacture of zinc oxide then held by Wetherill. The right to use it was clearly conveyed by the contract, and it was the only patent then to which the words of the grant would apply. To exclude it from the operation of an unambiguous conveyance by giving this effect to the restricting clause, which its terms do not clearly require, would violate a familiar rule of construction, which assigns to a proviso the office only of qualifying the context, not of withdrawing from a grant a subject plainly embraced by it.

But assuming that the construction given to the contract is erroneous, and that the license in dispute was unrestricted as to the place of its enjoyment, it is necessary to inquire whether it extended beyond the terms of the original patent by the stipulation of the contract, or by operation of section 18 of the act of 1836.

A license or contract for the use of an invention is subject to the same rules of construction which apply to any other contract. The intention of the parties, as expressed in the contract, is to be ascertained, and effect must be given to it accordingly. A transfer of an interest in a subsisting patent will not extend beyond the term of the patent, unless there are words indicating an intention to convey more than a present interest. This rule was applied in Wilson v. Rousseau, 4 How. [45 U. S.] 646, and in numerous other cases, and, I think, is clearly recognized in Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. [77 U. S.] 367, and in Nicolson Pavement Co. v. Jenkins, 14 Wall. [81 U. S.] 452. In Philadelphia, W. & B. R. Co. v. Trimble, the language of the contract manifestly embraced an extended term of the patent. In reference to it, the court say: "The language employed is very broad; it includes alike the patents which had been issued and all which might be issued thereafter. . . . The entire inventions and alterations and improvements, and all patents relating thereto, whensoever issued, to the extent of the territory specified, are within the scope of the terms employed. No other construction will satisfy them. Upon the fullest consideration, we have no doubt such was the meaning and intent of the parties." The language employed in Nicolson Pavement Co. v. Jenkins [supra] is not so broad, but the court held it to be equally significant of an intention to convey an interest in the extended term. "Manifestly something more was intended to be assigned than the interest then secured by letters patent. The words 'to the full end of the term for which the said letters patent are or may be granted' necessarily import an intention to convey both a present and a future interest, and it would be a narrow rule of construction to say that they were designed to apply to a reissue merely when the invention itself, by the very words of the assignment, is transferred."

The words of the contract in this case are, "with rights to use all his patents and processes for the manufacture of zinc oxides, metallic zinc, retorts, etc., which said Wetherill now has or has in contemplation to obtain." Now, I think the significance of the words "now has or has in contemplation to obtain," is merely to individuate the patents which the contract was intended to embrace, and has no reference to the renewal or extension of such patents. Two classes of subjects are referred to: patents for the manufacture of zinc oxide, metallic zinc, and for retorts, which Wetherill then held, and patents for the like subjects, which he intended to obtain, but which had not been granted. They were intended, then, to show that not only processes of which he held the monopoly by patent, but also those of which he proposed to secure the monopoly by obtaining patents therefor, were to be covered by the contract. And this interpretation is confirmed by the fact that he had shortly before filed caveats for inventions relating to the manufacture of zinc, which he had not then perfected, and for which, of course, when matured, he contemplated obtaining patents. In the absence of any words, therefore, indicating an intention to deal with more than a present interest in the patent in question, the license stipulated for must be held to run only during the term of the original patent.

And the same conclusion is applicable to the scope of the license granted by S. T. Jones to the Passaic Zinc Company, because by the terms of agreement between him and Wetherill, he was authorized to sell licenses to use "the invention of the improvement in the process for manufacturing the white oxide of zinc, for which he (Wetherill) has applied for letters patent," only "for the whole term of the patent which may be granted." This is an express limitation of Jones' authority to sell licenses to the term of the patent for which Wetherill's application was then pending; and no one, therefore, purchasing a license from him would acquire a larger interest than he had the power to convey.

But is the right to use the process in question secured to the licensees, during the term of the extended patent, by section 18 of the act of 1836? It is thereby enacted that "the benefit of such renewal shall extend to as-

signees and grantees of the right to use the thing patented, to the extent of their respective interests therein." The construction and effect of this clause have been considered by the supreme court in several cases, involving the right to use machines after the end of the original term of the patent, but in no case has the effect of the clause, upon a license to use a process, been expressly determined by that court. But if the court has defined the meaning of the statute, a loyal respect for its authority demands that it should be followed, although the subject-matter to which its ruling was applied may be different from that out of which the present controversy has grown.

In Wilson v. Rousseau, 4 How. [45 U. S.] 669, the question was presented, whether, by force of section 18 of the act of 1836, an extended patent, granted to Woodworth's administrator for his planing-machine, inured to the benefit of an assignee under the original patent, and the court held that it did not, but that it protected only purchasers or owners of machines during the original term, in the mere use of them after the end of that term. This conclusion necessarily involved a determination of the true meaning and scope of section 18, and in reference to it the court say: "The extension of the patent, under section 18, is a new grant of the exclusive right or monopoly in the subject of invention for seven years. All the rights of assignees or grantees, whether in a share of the patent or to a specified portion of the territory held under it, terminate at the end of the fourteen years, and become reinvested in the patentee by the new grant. From that date he is again possessed of the 'full and exclusive right and liberty of making, using, and vending to others the invention,' whatever it may be. Not only portions of the monopoly held by assignees and grantees as subjects of trade and commerce, but the patented articles or machines throughout the country, purchased for practical use in the business affairs of life, are embraced within the operation of the extension. This latter class of assignees and grantees are reached by the new grant of the exclusive right to use the thing patented. Purchasers of the machines, and who were in the use of them at the time, are disabled from further use immediately, as that right became vested exclusively in the patentee. Making and vending the invention are prohibited by the corresponding terms of his grant."

And again: "Against this view it may be said that 'the thing patented' means the invention or discovery, as held in McClurg v. Kingsland, 1 How. [42 U. S.] 202, and that the right to use 'the thing patented' is what, in terms, is provided for in the clause. That is admitted; but the words, as used in the connection here found, with the right simply to use the thing patented, not the exclusive right, which would be a monopoly, necessarily refer to the patented machine and not to the invention; and, indeed, it is in that sense that the expression is to be understood generally throughout the patent law, when taken in connection with the right to use in contradistinction to the right to make and sell.

"The 'thing patented' is the invention; so the machine is the thing patented, and to use the machine is to use the invention, because it is the thing invented, and in respect to which the exclusive right is secured, as is also held in McClurg v. Kingsland [supra]. The patented machine is frequently used as equivalent for the 'thing patented,' as well as for the invention or discovery, and no doubt when found in connection with the exclusive right to make and vend always means the right of property in the invention—the monopoly; but when in connection with the simple right to use, the exclusive right to make and vend being in another, the right to use the thing patented necessarily results in a right to use the machine and nothing more. Then, as to the phrase, 'to the extent of their respective interests therein,' that obviously enough refers to their interests in the thing patented, and in connection with the right simply to use, means their interests in the patented machines, be that interest in one or more, at the time of the extension.

"This view of the clause, which brings it down in practical effect and operation to the persons in the use of the patented machine or machines at the time of the new grant, is strengthened by the clause immediately following, which is, 'that no extension of the patent shall be granted after the expiration of the term for which it was originally issued.'"

To the same effect is Bloomer v. McQuewan, 14 How. [55 U. S.] 547. The opinion of the court was delivered by the chief justice, and, while he adopts fully the reasoning of the opinion in Wilson v. Rousseau [supra], he expounds, at some length, the reasons for which the distinction is made in the act of 1836, between assignees of a share of the monopoly and the purchasers of machines to be used in the ordinary pursuits of business.

A broad distinction is thus indicated between the use of an invention and the use of a patented machine. While the right to the use of the invention expires with the end of the term of the original patent, the right to the continued use of the machine, which embodies it, is protected. The law did not intend to revive an assignment or grant which expired with the term of the original patent, but to protect a species of tangible property, sold by the patentee, the value of which depended chiefly upon the owner's right to use it, and which, without some saving provision, would fall within the grasp of the exclusive rights vested in the patentee by the extension. It was manifestly, then, something less than the entire right to use the invention which the act contemplated. What that is, is clearly stated in the opinion of the court, not as a dictum of the judge who de-

livered it, but as an exposition of the meaning of the act, which was necessary to a decision of the cause. "The thing patented" is the subject of the use, and the court say, where these words are employed in the act in connection simply with the right to use, they refer only to the patented machine, and not to the invention. This, then, is an authoritative definition of their significance in the clause in question, and they must therefore be taken to mean a specific machine, and, in connection with the other words of the clause, to confer a right to use it, "nothing more." And it has since been held that this right is restricted to the mere use, and does not cover the reconstruction of the machine. It necessarily follows that this saving clause is applicable only to inventions which are susceptible of embodiment in a substantial and tangible form, and not to those which consist in a formula for producing prescribed results, and when those results are obtained, there is an end of the thing patented, and which, as often as it is employed in practice, involves the renewed use or reproduction of the entire invention.

But it is urged that where a process requires the use of a peculiar machine or apparatus for its practice, the right to use the process until the apparatus is worn out is within the protection of the act. If the title to both was concentrated in the same person and by the same patent, the argument would have, perhaps, unanswerable force. But where it is held by different persons and under distinct patents, it is difficult to see how a grant of an interest in one can carry with it any interest in the other. Burrows was the patentee of a furnace adapted to the use of Wetherill's process, and by Burrows' assignment the respondents acquired a right to use it. But that assignment did not touch Wetherill's invention, and they had no right to practice it in the Burrows furnace without Wetherill's authority. When they obtained his authority, the contract which granted it was the sole source of their right, and had no dependent relation to a distinct contract with another. If Burrows' assignment conveyed an interest in his invention alone, and gave no right whatever to the use of Wetherill's, an extension of the patents for either or both of them could not operate to establish an inseparable connection between them. The only effect of the saving clause in question is to continue the right to use a patented machine after the renewal of the patent, where such right was derived from an assignment or grant by the patentee, and it can not, by any constructive expansion, be made the source of a right in the creation of which the patentee had no agency.

Two cases have been referred to, in which a broader effect is given to the act of 1836 than is ascribed to it in Wilson v. Rousseau, and which demand only a brief notice.

The first of these is Wilson v. Turner [Case No. 17,845], in which the defendant was the owner of a Woodworth planing-machine, by virtue of an assignment of an interest in the original patent, and claimed the right to use it after the extension of the patent. Chief Justice Taney delivered the opinion of the circuit court, dismissing the bill on the ground that the act of 1836 extended the entire right vested by the assignment during the term of the renewed patent. The cause went to the supreme court, and was there heard in connection with Wilson v. Rousseau. Although the decree of the circuit court was affirmed, it was expressly for the reasons stated in Wilson v. Rousseau, the chief justice concurring in the opinions in both cases. The restricted operation there given to the act is irreconcilable with the construction of it in the court below, and the judgment must therefore be taken as a distinct rejection of the broad views of the chief justice in the circuit court, as indicative of a change of opinion on his part.

In Day v. Union India-Rubber Co. [Case No. 3,691], the learned judge of the circuit court adopted the views of Chief Justice Taney in Wilson v. Turner [supra], and held that the act of 1836 protected the continued use of a process by a licensee under the original patent. Upon this interpretation of the act the judge rested his decision of the cause, and supported it by an elaborate and impressive argument. This case also went to the supreme court, and is reported in 20 How. [61 U. S.] 216. The same judge who delivered the opinion in Wilson v. Rousseau also delivered the opinion of the court in this case, and he puts its decision upon the ground that the license set up by the defendants in terms covered the extended term of the patent, and he does not advert at all to the view taken in the circuit court of the act of 1836. It is obvious, therefore, that the effect of the act was an immaterial question, and that the silence of the court in regard to it does not imply any approval of the views of the judge of the circuit court. Thus unimpugned by any authorized doubt or denial of its soundness, Wilson v. Rousseau must be regarded as determining the meaning of the act, and its consequent inapplicability to the defense of the respondents.

The patent of Wetherill was extended on November 13, 1869. The Passaic Zinc Company used his processes after that date, and so was an infringer. It is unnecessary, therefore, now to determine the effect of its agreements with Manning and Squier upon its liability as an infringer after their date.

The complainants are entitled to an injunction and an account, and a decree will be entered therefor; but if the respondents, within twenty days, give bond in such sum, with security, as the court or judge thereof shall approve, to secure the payment of the profits and damages hereafter decreed against them, the issuing of the injunction will be suspended until the further order of the court.

[For other cases involving this patent, see note to Wetherill v. New Jersey Zinc Co., Case No. 17,463.]

Case No. 17,466.

In re WETMORE et al.

[16 N. B. R. 514.] [1]

District Court, E. D. Michigan. 1877.

BANKRUPTCY—ELECTION OF ASSIGNEE—CONFIRMATION BY COURT—RIGHTS OF MINORITY.

1. Where the assignee chosen had been for several years the bookkeeper of one of the bankrupts, and said bankrupt and his attorney endeavored to control the action of the meeting in electing him, and both voted for him on powers of attorney, confirmation was refused, although the election was almost unanimous, as it appeared that a large number of individual creditors of said bankrupt were not and could not, under the law, be represented at such meeting.

2. The district judge is bound to see that the rights of the minority are protected, and to refuse confirmation where he has good reason to suspect the assignee has been chosen in the interests of the bankrupts, or if the circumstances are such as to indicate that the election was not a fair one.

[In the matter of Wetmore & Bro., bankrupts.]

On objections to confirmation of assignee. On the 25th of August a meeting was held before the register, at which thirty-five creditors, representing thirty-five thousand nine hundred and fifty-five dollars, voted for Mr. Williams, and three creditors, representing one thousand and forty-four dollars, voted against him. The matter came before the court upon objections filed by these three creditors, certified by the register with his opinion that the election should be approved by the judge.

George W. Moore, for objecting creditors.

D. H. Ball and H. W. Montrose, for assignee.

BROWN, District Judge. While the choice of an assignee is vested by law in a majority in number and amount of the creditors, it is subject, nevertheless, to the approval of the district judge—a provision which implies a discretionary power to disapprove the choice so made. While the judge ought not arbitrarily, capriciously, or from dislike or partiality, to overrule the decision of the creditors, he is bound to see that the rights of the minority are properly protected, and to refuse confirmation where he has good reason to suspect the assignee has been chosen in the interest of the bankrupts. In re Bliss [Case No. 1,543]. I think he is not bound to find as a fact that the assignee is incompetent, corrupt, or unfit, but may decline to approve if the circumstances are such as to indicate the election was not a fair one, or that the assignee will not truly represent the body of the creditors. In re Clairmont [Id. 2,781]. For example, any interference of the register in the election is wholly unwarrantable and improper. In re Smith [Id. 12,971]. A creditor who has received an unlawful preference is ineligible by the statute. A near relative of the bankrupt is regarded as objectionable. In re Powell [Id. 11,354]; In re Bogert [Id. 1,598]. And the practice of soliciting votes by a candidate who was a stranger to the creditors, and made it a regular business to seek out creditors and persuade them to vote for him, has been held to vitiate an election. In re Doe [Id. 3,957]; In re Mallory [Id. 8,990]. And in one case the fact that the assignee was the confidential clerk of the bankrupt's attorney was considered good reason for withholding approval of the choice. Id. In cases of common law assignments, wherever like relationships are shown, the parties are held to stricter proof of the fairness of the transaction. "Any relation which gives rise to confidence, though not a badge of fraud, strengthens the presumption that may arise from other circumstances, and serves to elucidate, explain or give color to the transaction." Bump, Fraud. Conv. p. 96. Indeed, cases under the bankrupt law are numerous where judges have refused to confirm, though no evidence was produced of incapacity or want of integrity.

In the case under consideration, Mr. Williams, the choice of the creditors, had been for several years the bookkeeper of Mr. William L. Wetmore, one of the bankrupts. Mr. Wetmore and his attorney were present at the first meeting of the creditors and procured an adjournment, urging as a reason that many additional claims would be proved. Several of those claims were subsequently proved, and the vote of the creditors, except in three instances, cast for Mr. Williams. Mr. Wetmore and his attorney attended the adjourned meeting, endeavored to control its action, and both voted under powers of attorney received from different creditors, and made an effort to have the bond fixed at five thousand dollars, which, considering the assets are eight hundred thousand dollars, may be regarded as a merely nominal amount. It also appeared that five depositions in proof of debts were made upon blanks obtained by Wetmore from the register, all of whom voted for the same candidate; that one creditor to the amount of over ten thousand dollars, more than one-quarter of the amount represented at the meeting, voted with the majority, and that it had a claim against the bankrupts only as endorser upon paper, the makers of which were responsible; that an attorney representing one of the larger creditors was a relative by marriage, and had been in the employ of the bankrupt as clerk; that the son, wife, and brother-in-law of one of the bankrupts also proved debts and voted with the majority; that the wife of a partner of a bankrupt in another company also proved a large claim and cast her vote in the same direction; that a short time prior to the institution of proceedings, one of the bankrupts executed to his son and also to his partners deeds of land acknowledged before Mr. Wil-

[1] [Reprinted by permission.]

liams as notary public. I am satisfied, too, from the testimony, that one of the bankrupts, prior to the meeting, was actively engaged soliciting votes for his candidate, and made some efforts to secure his election.

While perhaps none of the above facts standing alone would justify a refusal to confirm, taken together they raise in my mind a very grave suspicion that the election was really in the interest of the bankrupts. It is true the majority in number and amount was very large. Out of forty-three creditors, representing thirty-nine thousand three hundred and eighty-eight dollars, thirty-five representing thirty-five thousand nine hundred and fifty-five dollars voted for Mr. Williams, and but three, representing one thousand and forty-four dollars, voted against him. In fact, the election was so nearly unanimous I should feel almost justified in refusing to listen to the protest of the minority, were it not that the individual creditors of William L. Wetmore, aggregating some eight hundred thousand dollars, were not, and under the law could not be, represented at the meeting. In re Scheiffer [Case No. 12,445]. They are, however, entitled to the protection of the court, and the very fact of their inability to vote renders it the more necessary that the assignee thus chosen by a small fraction of the creditors should be not only above cavil, but beyond suspicion. While there is not the slightest imputation upon the character of the assignee, the evidence that he was elected in the interest of the bankrupt is too strong to justify my approval of the choice.

An order will be entered referring it to the register to call a new election. The register is further instructed to receive no votes cast by the bankrupts or their solicitors of record under powers of attorney from other creditors, and to fix the bond at not less than fifty thousand dollars. There is also a discretion in the register to postpone the proof of debts about which there is any doubt until after the election of an assignee, and I think this discretion should be exercised where claims are presented by the wife or son of the bankrupt, unless it be made entirely clear that they are just debts against the estate. In re Northern Iron Co. [Case No. 10,322]; In re Jackson [Id. 7,123].

Case No. 17,467.

WETMORE v. LAIRD.

[5 Biss. 160.] [1]

Circuit Court, N. D. Illinois. July, 1870.

DEEDS—ACKNOWLEDGMENT—NOTARY'S SEAL.

1. Nothing will be presumed in favor of a notary's certificate of acknowledgment. He must state all the facts necessary to show a valid official act, and that he has affixed his notarial or official seal.

[Cited in Muncie Nat. Bank v. Brown, 112 Ind. 477, 14 N. E. 358.]

2. A certificate which fails to show that the seal affixed is his notarial or official seal, is insufficient.

This was an action of ejectment which was tried before a jury at the May term, and verdict found for the plaintiff. Motion for new trial was interposed on the part of the defendant and two errors assigned: First, that the court erred in admitting in evidence on the part of the plaintiff a certified copy of a deed from Julius O. Harris to Nathan D. Elston. The objection made to that deed was, that there is no seal to the notary public's certificate of acknowledgment. The attesting clause to the notary's certificate simply reads as follows: "Witness my hand and seal this day," etc.; and the certified copy contains merely a scrawl. The defendant claimed that the deed must show affirmatively that the notary public has a seal and that he has affixed his notarial seal to the certificate.

BLODGETT, District Judge. Plaintiff contended that when a notary public says, "Witness my hand and seal," he means his notarial seal. But after an examination of the authorities touching this question, I have come to the conclusion that nothing should be presumed, in favor of a notary public's certificate of acknowledgment to a deed of conveyance; he must state all the facts necessary to show a valid official act on his part, and, inasmuch as the statute expressly provides that a notary public must authenticate his certificate of acknowledgment to a deed by his notarial seal, it seems clear to me that the certificate itself must expressly affirm and show that he has so authenticated it; in other words, he must state he has affixed his official or notarial seal; and it must appear from the inspection of the original paper that there is such a seal affixed to the deed. In this case, inasmuch as only a certified copy was used, and as the recorder has probably not made a fac simile of that seal on the record book of the deed, we are of course in the dark as to just what the original deed did express on its face. It may have had merely a scrawl; it may have had a regularly cut, engraved or stamped seal of the notary public; but, be that as it may, I do not think you are to stand by the seal alone. I think you must have also the certificate of the officer that what purports to be his seal is his official seal. Inasmuch as this deed is wholly barren of any statement of this kind, and fails to show affirmatively that the seal affixed to the instrument is his notarial or official seal, I think it was erroneously received in evidence by the court. As this was one of the material deeds making out the plaintiff's chain of testimony, without which he was unable to attain title, prima facie, to himself, of the property, it is sufficient to dispose of this motion for a new trial.

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

The other error assigned, the refusal on the part of the court to receive in evidence the auditor's deed, which was offered as proving a connected title under the limitation law of 1835, I do not deem it necessary to pass upon. New trial granted.

Consult Booth v. Cook, 20 Ill. 129.

Case No. 17,468.

WETMORE v. RICE.

[1 Biss. 237.] [1]

Circuit Court, E. D. Michigan. June, 1858.

FEDERAL COURTS—ORIGINAL JURISDICTION—MARSHAL'S BOND.

1. Under the act of April 10th, 1806 [2 Stat. 372], and on the general principle that where the courts of the United States have original jurisdiction, whether from the character of the claim, or the citizenship of the parties, they may entertain proceedings against the marshal and his sureties, the circuit courts have jurisdiction of suits on marshal's bonds without reference to the citizenship of the parties.

[Distinguished in Pierson v. Philips, 36 Fed. 837; Hagood v. Blythe, 37 Fed. 251.]

2. The cases where such jurisdiction may not be exercised, are exceptional.

3. After judgment has once been entered for the penalty, it remains as security for all persons injured by default of the marshal. Complaints may be made, damages assessed, and executions issued, until the whole penalty shall have been recovered.

This is an action brought against George W. Rice as marshal, and his sureties, for the penalty of twenty thousand dollars, the penalty of the marshal's bond on the ground that he permitted a certain vessel, in his custody by legal process, to go a voyage up the Lakes by reason of which she was lost in a storm, and the plaintiff failed to recover his claim against the vessel which had been attached at his instance. The defendants demurred and assigned several grounds of demurrer: 1. That it does not appear that the court has jurisdiction, the parties not appearing to be citizens of different states. The other grounds it is not necessary to mention.

Walker & Russell, for plaintiff.

The subject matter of the suit, and not the citizenship of the parties, nor the amount in controversy, determines the jurisdiction, as in causes of admiralty and patents. 2 Stat. 373; Conk. Prac. 65; Gwin v. Breedlove, 2 How. [43 U. S.] 29; U. S. v. Myers [Case No. 15,844]; Gwin v. Barton, 6 How. [47 U. S.] 7. The first and second sections of the act of April 10, 1806, speak of suits upon these marshal's bonds, evidently meaning in the federal courts—congress does not undertake to confer jurisdiction upon state courts. Before this statute these bonds, running to the United States, could be sued in the name of the United States in the federal courts,—the only effect of the statute of 1806, in this respect is to change the plaintiff, and authorize the party in interest to sue, the tribunals remaining the same.

Goodwin & Goodwin, for defendants.

McLEAN, Circuit Justice. As the plaintiff and defendants are citizens of Michigan, there is no ground for jurisdiction from the citizenship of the parties. But it is contended that the jurisdiction may be maintained from the character of the case and the act of congress, on the same principle as suits under the patent laws and in admiralty. Jurisdiction is given exclusively in the district courts of the United States in all cases of admiralty, and express provision is made by law for the exercise of jurisdiction in patent cases. But there is no such provision in regard to suits on marshal's bonds.

In the second section of the act of 1806, "relating to marshal's bonds for the faithful performance of his duties" (2 Stat. 372), it is provided, that any one injured by a breach of the condition of the bond may institute a suit upon it, in the name and for the sole use of such party; and thereupon to recover such damages as shall be legally assessed, with costs of suit, &c. And the third section declares that said bond, after a judgment, shall remain as a security for the benefit of any one injured by the misconduct of the marshal, and the same proceedings shall be had as above stated. Such suits are required to be commenced within six years after the right of action shall have accrued.

The question of jurisdiction as raised in this case seems never to have been made or decided in the supreme court or in any of the circuit courts. The case of Bispham v. Taylor [Case No. 1,443] was founded upon a marshal's bond, but the question of jurisdiction was not made, and, of course in the report of the case, no reference was made to it. The inference that, as the citizenship of the parties was not noticed by the court, it was deemed unnecessary to be alleged, is not sustained, as it appears in the declaration there was an averment of the citizenship of the plaintiff which gave jurisdiction. And the same remark applies to the case of Sperring v. Taylor [Id. 13,235], referred to in the same volume. Neither of these cases brought before the court the question of jurisdiction.

In the case of Postmaster General v. Early, 12 Wheat. [25 U. S.] 136, there was no point ruled which has a direct bearing on the question before us. In that case the court says, "The postmaster general cannot sue in the federal courts under that part of the constitution which gives jurisdiction to those courts, in consequence of the character of the party, nor is he authorized to sue by the judiciary act [1 Stat. 73]. He comes into the courts of the United States under the authority of an act of congress, the constitutionality of

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

which rests upon the admission that his suit is a case arising under a law of the United States." The act referred to is that of the 30th April, 1810, which authorizes the postmaster general to bring suit.

The case of Gwin v. Breedlove, 2 How. [43 U. S.] 29, was a writ of error to revise the proceedings of the circuit court of the United States, in the state of Mississippi, against Gwin, as marshal of that state, under a statute of the state authorizing a procedure against sheriffs and their sureties, which had been adopted by the circuit court. The court sustained the summary proceedings, as incidental to the suit of Breedlove v. Gwin, in which a judgment had been rendered. But the point did not come up in that case, whether a suit on the bond could have been sustained as an independent action by parties living within the state in which suit was brought.

In a dissenting opinion, Mr. Justice Daniel said that the marshal would also be liable upon his official bond, because the judiciary act confers a right of action thereon without restriction as to citizenship, on all persons who may be injured by a breach of the condition of that bond. But he remarks, if a further or different recourse is sought against the marshal, one which may be supposed to arise either from the inherent power of the court over its officer or its judgments, then it is presumed that those who seek such recourse must show their right as arising out of the character to sue in the federal courts; they must show themselves by regular averment to be citizens of a state other than that of him whom they seek to implead.

So far as regards any procedure against the marshal as an officer of the court, for a failure in the performance of his duty, whether under a rule of court or by attachment, there can be no doubt of the power of the court. But the proceeding under examination is by an action on the marshal's bond, with the view of making his sureties responsible. This action is founded, not on any default of the marshal, under process issued by this court, but by a proceeding in admiralty in the district court. It does not then arise as an incident to any action in this court. It is an independent action in this court between citizens of the same state.

The argument ab inconvenienti is a strong one, but on such ground the jurisdiction of this court has never been exercised. It has often been held that the consent of parties cannot confer it, as it is a matter of law. The sureties who are sought to be made liable are strangers to the proceedings in admiralty, out of which this case has arisen. They have a right to be heard in their defense untrammeled by any previous proceeding, except the matters of record which show the delinquency of the marshal. He being the principal and a party to such proceeding, it is binding on his sureties.

The act of 1806 (2 Stat. 372), in relation to marshal's bonds, provides that suit may be brought thereon, and that the judgment shall remain as a security for others who may be injured by the acts of the marshal. From these and other provisions in the act, it is argued that on a marshal's bond suit may be brought without reference to the citizenship of the parties as on a patent right or in admiralty. The jurisdiction is expressly given in both these cases under express provisions, whilst in regard to marshal's bonds there is no such provision.

It may be assumed that in all cases where the courts of the United States have original jurisdiction, whether from the character of the claim or the citizenship of the parties, there may be a procedure against the marshal and his sureties, so far as such procedure may be incident to the original suit. And as this view brings the marshal's bond generally within the jurisdiction of the court, the cases where such jurisdiction may not be exercised form an exception to the general rule, and for which no special provision is made.

I am inclined to believe that all cases may be brought under the provision of the 3d section of the act of 1806, which provides that the bond, after judgment, shall remain as a security for others who shall be injured by breach of its condition, until the whole penalty shall have been recovered. Beyond this the sureties are not responsible, but the marshal is bound on common law principles.

A judgment having been rendered for the amount of the penalty, it stands as a security to all who may be injured by the default of the marshal. Complaints may be made subsequent to the judgment in proper form, and the amounts being ascertained on issues made to the court or jury, executions may be ordered until the penalty shall be exhausted. In this form every case may be legally embraced, with little expense, and speedily.

Case No. 17,469.

WETMORE et al. v. ST. PAUL & P. R. CO.

[See 3 Fed. 177.]

WETMORE, The A. R. See Case No. 569.

Case No. 17,470.

WETTER et al. v. SCHELL.

[11 Blatchf. 193.] [1]

Circuit Court, S. D. New York. June 13, 1873.

CUSTOMS DUTIES — PROTEST AS TO FUTURE IMPORTATIONS.

A valid prospective protest against the payment of duties, made on a particular importation of merchandise, and expressing the intention of the importer that the protest shall apply to

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

all future similar importations made by him, is, under section 5 of the act of March 3d, 1857 (11 Stat. 195), as well as under the prior act of February 26th, 1845 (5 Stat. 727), valid as to subsequent importations of similar merchandise, on which like duties are exacted, as respects not only future exactions of like duties from the protesting party by the same collector, but as respects future exactions of like duties from him by a succeeding collector.

[Cited in Ullman v. Murphy, Case No. 14,325; Davies v. Miller, 130 U. S. 287, 9 Sup. Ct. 561; Schell's Ex'rs v. Fauché, 138 U. S. 572, 11 Sup. Ct. 380.]

[This was an action by A. Wetter and others against Augustus Schell, collector of customs for the port of New York, to recover back certain duties paid under protest. Heard on motion of the defendant to open a judgment heretofore rendered against him, and to set aside the verdict of the jury.]

Henry E. Tremain, Asst. Dist. Atty., for the motion.

Almon W. Griswold, opposed.

BLATCHFORD, District Judge. The question must be regarded as settled in this district, that, under the act of March 3d, 1857, § 5 (11 Stat. 195), as well as under the prior act of February 26th, 1845 (5 Stat. 727), a valid prospective protest against the payment of duties, made on a particular importation of merchandise, and expressing the intention of the importer that the protest shall apply to all future similar importations made by him, is valid as to subsequent importations of similar merchandise, on which like duties are exacted. Steegman v. Maxwell [Case No. 13,344]; Hutton v. Schell [Id. 6,961].

But, in reference to the present case, it is urged, on the part of the defendant, that a prospective protest made during the term of office of his predecessor in the office of collector, is not applicable to duties paid during the term of office of the defendant. It satisfactorily appears, that all the duties embraced in the refund covered by the judgment in this case were paid to the defendant, and it is by no means clear that a prospective protest covering exactions of the character of those embraced in this judgment was not made by the plaintiffs during the term of office of the defendant. It does appear, however, that all the items of refund covered by the judgment in this case fall within the terms of a prospective protest in regard to the exaction of the same, made by the plaintiff to Mr. Redfield, the predecessor of the defendant in the office of collector. Although there is no reported case covering this question, the point has long been regarded as settled in this court in favor of the validity and sufficiency of such a protest, as respects not only future exactions of like duties from the protesting party by the same collector, but as respects future exactions of like duties from him by a succeeding collector. The records of this court show that the question came before Mr. Justice Nelson, in this court, in March, 1863, in the case of Chouteau v. Redfield [Case No. 2,696], where the district attorney, acting for the defendant, as collector, excepted to a report in favor of the plaintiffs, on the ground that a prospective protest made in the time of Collector Bronson, the predecessor in office of Mr. Redfield, was not good as against the latter, or against any other collector than the one in office at the date of the protest. The exception was argued by the counsel for the parties respectively, and Mr. Justice Nelson decided in favor of the plaintiffs, and overruled the exception, and confirmed the report, by a decision signed by him, and now on the files of this court, embodying the foregoing statement of the point decided. This decision has been followed and applied in many cases since, and I am satisfied it is a correct one. The motion of the defendant to open the judgment herein, and to set aside the verdict and the report, is denied.

Case No. 17,471.

WETZELL v. BUSSARD.

[2 Cranch, C. C. 252.] [1]

Circuit Court, District of Columbia. Oct. Term, 1821.[2]

PRACTICE—PLEA OF LIMITATION.

If the defendant instructs his attorney to plead the statute of limitations, and he pleads it after the rule-day, the court will refuse to order the plea to be stricken out if the attorney, having been recently admitted to practice, was ignorant of the rule which requires that such a plea should be filed strictly within the rule-day.

[Followed in Union Bank v. Eliason, Case No. 14,350.]

The plea of limitations was filed in this cause after the rule-day, and the issue was made up by the clerk.

Mr. Redin and Mr. Swann, for plaintiff, moved the court to order the plea to be stricken out, because not filed before the expiration of the rule to plead; and cited the case of Thompson v. Afflick [Case No. 13,939], in this court at June term, 1812, in which the court decided that they would not receive the plea after the rule-day, unless upon affidavit showing that it is necessary for the justice of the case.

Mr. Jones, for defendant, opposed the motion, and produced the affidavit of Mr. Turner, the defendant's attorney, stating that he was admitted to practice at June term, 1820, which was the return term of the writ in this cause. That his appearance for the defendant was entered at that term; and that during that term he was instructed by the defendant to plead the statute of limitations. That upon inquiring of some of the practitioners at what time it was necessary to plead, he was informed and understood that all pleas would be in time if filed during the second or imparlance term. He did not ask particularly

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

[2] [Affirmed in 11 Wheat. (24 U. S.) 309.]

as to the plea of limitations, and did not know that it was an exception to the general rule; and therefore did not file the plea until the second term. There was also an affidavit of the defendant himself, confirming that of Mr. Turner, and stating facts tending to show that the plea was necessary to the justice of the case.

THE COURT (nem. con.) refused to strike out the plea, principally on the ground stated in the affidavit of Mr. Turner.

There was a demurrer to the evidence, upon which this court rendered judgment for the defendant at October term, 1822, which was affirmed by the supreme court of the United States. 11 Wheat. [24 U. S.] 309.

WETZELL (YOUNG v.). See Case No. 18,176.

Case No. 17,472.

The WEXFORD.

[6 Ben. 119.] [1]

District Court, E. D. New York. May, 1872.

SALVAGE—INEQUITABLE AGREEMENT—COSTS.

1. A brig, dismasted and in distress, was fallen in with at sea, by a pilot boat. The master of the brig had been hurt and was confined to his bed. Her owner was on board. The pilots boarded her and demanded $5,000, to tow her into port. This was refused, and they came down to $2,500, threatening to leave the brig if an agreement to pay that sum was not made. The master and owner thereupon agreed to pay them the $2,500, and the pilot boat took hold of the brig, and after nine days' towing, brought her in safety into the port of New York. The brig and her cargo were worth $3,800. *Held* that, considering the value of the property, the agreement, under the circumstances, was an inequitable one, and would not be enforced.

[Cited in Brooks v. The Adirondack, 2 Fed. 393.]

2. $1,500 was as liberal a reward as could be awarded to the salvors.

[Cited in The Marie Anne, 48 Fed. 748.]

3. Costs would be awarded to them, because the claimants offered no particular sum before suit brought.

In admiralty.

Barney, Butler & Parsons, for libellants.

Beebe, Donohue & Cooke, for respondents.

BENEDICT, District Judge. The libel is filed in this action, to recover salvage of the brig Wexford and her cargo. The material averments are, that on the 14th day of October, 1871, the pilot boat Isaac Webb, while cruising in about lat. 41° 11′ and long. 66° W. discovered the brig dismasted and in distress; that at the request of the master, the pilot boat took the brig in tow, and, after nine days' towing, brought her in safety into New York; that the brig was helpless and unmanageable and short of provisions and her crew exhausted; that the master and owner of the brig, at the time of the request aforesaid, agreed to pay the libellants the sum of $2,500, for the services they might render in towing the brig to a port of safety; that said sum was a reasonable sum for the services, but payment of it is now refused. Wherefore, the libellants pray the court to decree payment of said sum or such sum as the court shall consider reasonable for the salvage services.

The claimants of the brig and cargo, set up in their answer that at the time the captain agreed to pay $2,500 to the pilot, he was disabled and unfit to make a contract; that the pilots, to induce the bargain, refused to afford assistance without such a promise, and threatened to leave the vessel and captain, and that the bargain is unjust and inequitable, and not available to fix the amount of salvage which should be paid. That the claimants have always been willing to pay a fair salvage, but the pilots refuse to accept any less than $2,500.

Upon these pleadings, and the evidence adduced in support thereof, the first question is, whether the agreement to pay $2,500, which it is conceded was made by the master and owner of the brig, is to be taken for a guide, in determining the amount of the reward which should be paid to these salvors. Such contracts are not obligatory, unless it be made to appear that the rate is just, and was agreed to without pressure of any sort.

The circumstances under which the agreement was made, therefore, become important. It appears that the brig was dismasted and helpless at sea, some hundreds of miles from any port, but yet in the track of steamers, and tight. Her master had been hurt and was confined to his bed. The pilots boarded the vessel and offered to tow the vessel, if their compensation should be fixed at $5,000; but finally, after some hours of negotiation, came down to $2,500; and they plainly notified the master and the owner, who was on board, that they would leave the wreck, unless an agreement was made to pay them that sum.

In the condition the master was, the suggestions to leave him, in a vessel dismasted and without sails, must have had a forcible effect in bringing him to agree as he did to the amount demanded. The owner declined for some time to agree to pay more than $1,000; but finally agreed to $2,500, with a plain intimation, that he considered the sum excessive.

The value of the property, for the towing of which this $2,500 was to be paid, did not exceed $4,000.

The vessel was a British vessel, built in 1869, of 267 tons registry, worth no more than $2,000—some say only $1,000—when brought to New York, and her cargo of coal was worth some $1,600, as I must suppose, for the evidence does not disclose its exact value. The value of the property saved, is

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

always an important element in determining what is a proper salvage.

This feature was not sufficiently considered by the pilots, when they demanded $5,000 nor when they agreed on $2,500. The latter is a larger sum than could be justly given for the salvage of property valued at $3,600, accomplished under the circumstances shown here. The labor of the pilots was considerable through nine days, nor was it unattended with peril, and they might well receive for it $2,500, or a larger sum, if only the property saved had been of greater value. But on a valuation of the property saved at $3,600, $2,500 is too much. If the brig had been derelict, $1,800 would have been the salvage ordinarily awarded, and these salvors cannot claim to receive more than, or as much as if they had found the brig abandoned at sea.

I consider $1,500 to be as liberal a reward as can be given to these salvors, out of this amount of property; for that sum they must have a decree. I give them also the costs, because the claimants offered them no particular sum in cash, before suit brought.

Case No. 17,473.

WEYAUWEGAN v. AYLING.

[See 99 U. S. 112.]

Case No. 17,474.

In re WEYHAUSEN et al.

[1 Ben. 397.] [1]

District Court, S. D. New York. Sept., 1867.

INVOLUNTARY BANKRUPTCY — APPEARANCE BY ATTORNEY.

In proceedings in involuntary bankruptcy, the order to show cause having been served on only one of two debtors, and no notice having been published as to the other, *held*, that the appearance of the debtor not served need not be personal, but might be by attorney.

[In the matter of William Weyhausen and Philip Freytag, bankrupts.] In this case, which was a petition in involuntary bankruptcy, the order to show cause was served on only one of two debtors, and no publication of notice as to the other had been made. Both debtors, however, appeared by the same attorney, and desired to waive any other notice. Doubt was raised whether the debtor not served could appear by attorney, and whether he must not appear in person. After hearing counsel, THE COURT (BLATCHFORD, District Judge) held that, under the forty-first and forty-second sections of the act [of 1867 (14 Stat. 537)], the appearance by attorney, of the debtor not served, might be entered.

WEYMOUTH (CRANE v.). See Case No. 3,358.

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

Case No. 17,475.

The W. F. GARRISON.

[1 Lowell, 139.] [1]

District Court, D. Massachusetts. March, 1867.

SALVAGE — RULE OF COMPENSATION — TOWAGE SERVICES.

1. In salvage, when the benefit received will warrant it, the salvors will be entitled to share to a greater or less degree in that benefit. The compensation should include a gratuity or premium for the encouragement of promptness and gallantry, and is not based merely on the value of the respective vessels and the dangers to which each was exposed, or to the hardships undergone.

2. Services rendered after reaching a port of safety, in towing to a port where repairs could be made, are towage, and not salvage.

3. Where a valuable steamer went in search of a schooner reported to be disabled, and found her after five hours' search, and towed her to a place of safety in two hours more, and afterwards towed her into port, these services being done in the intervals of the steamer's usual employment, and the last service being towage worth one hundred dollars, and the value saved was $11,000, the salvage awarded was $1,700.

Some hours before daylight, in the morning of the 28th of November last, the schooner William F. Garrison, on her voyage from Boston to the southward, in ballast, had arrived some ten or twelve miles to the westward of Gay Head, in Martha's Vineyard, and in trying to reef her mainsail in a heavy blow from the northwest was taken aback and lost her foremast and part of her maintopmast. The master rigged a stay from the mainmast head to the windlass and set one of his jibs, but was unable to work into Vineyard Sound, and brought up toward noon under the lee of the island of No-Man's-Land. He set a signal of distress and went on shore for assistance. He intended to go over to Martha's Vineyard to hire a steamer, but after engaging a boat and boat's crew, he thought the attempt too hazardous with the wind and sea as high as they then were. The wind blew from the north-west very heavily during the remainder of the day and some time into the night, and the schooner lay at a single anchor, and safely enough so long as the wind should remain in that quarter. In the course of the day the signal of distress was seen by Mr. Smith, the underwriters' agent at Chilmark, and he went seventeen miles to Edgartown, and arriving at about 8 p. m. notified the agent of the steamer Monohansett of what he had seen, but did not describe the place where the schooner lay with entire accuracy. The steamer was fired up and sent to Holmes Hole, where her master lives, and he joined her and took command. The wind was still blowing heavily and there was considerable sea outside, and the weather was unusually cold for the season. The steamer ran down to the place where they understood the vessel to be,

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

and did not find her, and occupied some time in searching for her. They found her at last, and on coming up hailed to know if the schooner wanted assistance, and the answer was that she did. The steamer sent a boat with four men to assist in getting the anchor, but it was disputed whether this was by request or not. The schooner was not short-handed, and there was no danger in this service, for the wind and sea had by this time moderated considerably. The anchor was hove up, and a line from the steamer made fast to the schooner, and before the towing had begun the captain of the schooner called out to know what the charge would be. Captain Cromwell of the Monohansett answered that he could not tell, but it would not be unreasonable. It was now about one o'clock at night, and the steamer proceeded to tow the schooner to Tarpaulin Cove, which is a safe harbor with good anchorage about sixteen or seventeen miles from No-Man's-Land. In the afternoon of the same day she towed her to New Bedford, where the repairs were made. The Monohansett was a steamer valued by her owners at about seventy thousand dollars, employed chiefly as a passenger and freight carrier between New Bedford and Edgartown, touching at Holmes Hole and Wood's Hole. The trip was made once a day each way in summer, and in winter but one way on one day and back on the next. It was said that the steamer depended in part upon towage and salvage to meet her expenses in winter. The only other steamers in these waters were two tugs, one of which belonged to the libellants, and both had their headquarters at New Bedford, between thirty and forty miles from No-Man's-Land. It was said that one of these tugs appeared off No-Man's-Land soon after daylight the next morning after this service was rendered, and it was suggested that she came in search of a job in saving the schooner.

W. Crapo, for libellants.
C. Dodge, for claimants.

LOWELL, District Judge. This is a clear case for salvage. No bargain was in fact made, and Captain Cromwell was not bound to make any in the dark, after he had come out so far to render a salvage service. Whether Captain Smith could properly and prudently have refused to employ him unless he would make one is another question not important here, though I do not see how he could well refuse. The only question then is of the amount to be awarded, and this is always a difficult and delicate question, and one in which it has been said that courts can hardly hope to do more than to give satisfaction in the long run. There is and can be no market value or fixed standard for the reward of services which are in themselves unusual, and of which the reward is not expected to be based merely on the value of the services in the particular case, but is to include a gratuity or premium for the encouragement of promptness, skill, and gallantry in future. The only standard that ever was set up, that of a moiety in cases of derelict, is found unsuited to modern times, and has been abandoned.

The parties differ pretty widely in their views of this matter. The claimant has offered eight hundred dollars, and the libellants think they should have three or four times that sum. Nearly all the facts which must be considered in arriving at a judgment were disputed, but the trial has cleared up most of these disputes. It is now agreed that the value of the property saved shall be taken as eleven thousand dollars. The work in the afternoon of the next day was towage, and was worth about one hundred dollars. What the salvors did is not the subject of much doubt. They started out promptly and spent some five hours in reaching the schooner, and during a part of this time the wind was boisterous and the sea rough, so much so that there was some hesitation in proceeding; the steamer as I suppose not being well adapted to sea work; the navigation between the Vineyard and No-Man's-Land is intricate, insomuch that the master of the schooner seems to consider it the only real difficulty he was under. Excepting this, the towage from No-Man's-Land to Tarpaulin Cove was not difficult. In distance it was about sixteen or seventeen miles, and the steamer was employed in all in the strictly salvage service seven or eight hours. She did not lose her regular trips between Edgartown and New Bedford, but performed the salvage in the interval, and the subsequent towage in another interval, between two trips.

The main discussion at the last upon these subordinate points was concerning the degree of peril from which the schooner was rescued. She was safe while the wind was at the northwest, but a gale from any other quarter would drive her ashore or to sea, and in either case her situation would be very bad. With fair weather she might probably have been worked to some leeward port, and it would depend on the direction of the wind what port she could make; or her crew with the aid of the fishermen and pilots on the island, might have rigged a jurymast; or the tugs at New Bedford might have heard of her. Making allowance for all contingencies, and taking the chances of the weather at that season, I cannot but consider the schooner to have been in considerable prospective danger and in urgent need of the services of a steamer when the Monohansett arrived.

I do not think the offer of eight hundred dollars was large enough. It is said that Captain Cromwell would probably have been glad to contract to do precisely what he did, for that sum or even less. This is not admitted by the libellants; but even if it were, it is not conclusive, because he did not make any contract. It was perhaps Captain Smith's misfortune or want of enterprise in the first instance which prevented a bargain being made;

for if he had got over to Chilmark he could have gone to Edgartown, and might have bargained with somewhat more leisure; but as he did not, and as Captain Cromwell started without any certainty of finding the schooner, or of being employed if he did find her, he is entitled to whatever the service is worth as a salvage service. As I have had occasion to say before, the salvors cannot be held to receive only what the work was worth to them, any more than the owners are bound to pay all it was worth to them, which may have been immensely greater; as an argument and consideration tending to enlighten the court both can be shown, and where the benefit received will warrant it, the salvors will be entitled to share to a greater or less degree in that benefit.

Upon the whole, considering the great value of the steamer, the promptness and efficiency of the service, the benefit conferred, and all the other elements of the service, I think that I ought to award the sum of seventeen hundred dollars. It should not be paid over until it is certain that the crew of the steamer are entirely satisfied with their shares. Salvage awarded.

W. G. HEWES, The (MILLER v.). See Case No. 9,594.

WHALAN (UNITED STATES v.). See Case No. 16,669.

Case No. 17,476.

WHALEN v. SHERIDAN.

[17 Blatchf. 9; 8 Reporter, 422; 1 Wkly. Jur. 447.] [1]

Circuit Court, S. D. New York. Aug. 7, 1879.

ARMY OFFICERS — COMMANDER OF MILITARY DISTRICT—AUTHORITY IN CIVIL MATTERS—NEW TRIAL—PLEADING.

1. An officer of the army of the United States, assigned to the command of a military district created by the act of March 2d, 1867 (14 Stat. 428), had no authority, as military commander, to issue an order to the sheriff of a county, requiring him to place a person in possession of a plantation and personal property which were, at the time, in possession of another person.

2. But where he issued such an order, on the application of H., who claimed to be the true owner of the property, and was sued by W., who was dispossessed by the execution of the order, for damages for such dispossession, it was held that he could justify under such order if H. was the true owner and was entitled to the possession.

3. A motion for a new trial, because of alleged newly discovered evidence, denied, on the ground that such evidence was merely cumulative.

4. Under the system of pleading adopted in New York, judgment at the trial, in a suit at law, is to be rendered in accordance with the facts pleaded and proved, without regard to the form of the pleadings or the theory on which they were prepared.

[Cited in brief in Sumner v. Rogers, 90 Mo. 328, 2 S. W. 476.]

[On motion for a new trial.]

Scott Lord, for the motion.

Stewart L. Woodford, Dist. Atty., opposed.

WALLACE, District Judge. The jury having found a verdict for the defendant, the plaintiff now moves for a new trial, upon the ground of newly discovered evidence, and because of errors alleged to have been committed on the trial. The action was for trespass to personal property situate on the Killona plantation, in the state of Louisiana, of which the plaintiff was dispossessed, on the 8th day of August, 1867, under color of an order issued by the defendant, as military commander, directed to the sheriff of the county, requiring the sheriff to place one Mark Hoyt in peaceable possession of the plantation and personal property. The defence was a general denial of the plaintiff's cause of action, and a justification of the act of the defendant, under the authority of a law of congress passed March 2d, 1867 (14 Stat. 428), entitled, "An act to provide for the more efficient government of the rebel states." By that act those states were divided into five military districts, one of which was composed of the states of Louisiana and Texas, and the president of the United States was directed to assign an officer of the army to the command of each district, and to detail a sufficient military force to enable such officer to perform his duties and enforce his authority. The act declared it to be the duty of each officer so assigned, to protect all persons in their rights of person and property, to suppress insurrection, disorder and violence, and to punish all criminals and disturbers of the public peace, and, to this end, to allow the local civil tribunals to take jurisdiction of, and try, offenders, or, when, in his judgment, it might be necessary, to organize military tribunals for that purpose. The defendant was assigned to the command of the district composed of the states of Louisiana and Texas. He alleged, by way of justification, that Mark Hoyt was the real owner of the personal property, and was entitled to the possession of the Killona plantation, and, having been dispossessed therefrom by the plaintiff and other lawless persons, he applied to the defendant for protection, and, thereupon, the defendant, as such military commander, issued the order to the sheriff to place Hoyt in possession, and that the dispossession of the plaintiff under the order was the supposed grievance of which the plaintiff complained. The evidence on the part of the plaintiff was to the effect, that the plaintiff was in the exclusive and peaceable possession of the Killona plantation and the personal property thereon, until the 8th day of August, when he was required by the sheriff of the county to obey the military order of the defendant, and remove from the plantation, and relinquish the personal property to Mark Hoyt. On the part of the defendant, there was evidence to

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 8 Reporter, 422, and 1 Wkly. Jur. 447, contain only a partial report.]

the effect that Hoyt was the owner of the personal property, and entitled to the possession of the property and plantation, and that, for some time prior to the issuing of the order, and when the order was executed, one Slater was in possession of the plantation and personal property, and the plaintiff was merely an occupant of certain rooms in the plantation buildings. Upon any view of the facts justified by the evidence, it was clear, that, although the possession of the plantation and property was held adversely to Hoyt, such possession had been peaceably obtained and maintained, and was under color of right. Upon the evidence, the court ruled that the defendant had no authority, as military commander, to issue the order in question, and, when he assumed to administer remedial justice between citizens, not essential for the preservation of the public peace, or the prevention of illegal violence to persons or property, he exceeded his lawful powers. The court also ruled, that, while the defendant could not justify his act, as one done by virtue of his authority as military commander, nevertheless, as his order was issued upon the application of Mark Hoyt, for the purpose of assisting Hoyt to obtain possession of his property, if the jury should find that Hoyt was the owner, and entitled to the possession of the property, the defendant could justify under the authority of Hoyt. Exceptions were taken to this ruling. The principal questions of fact submitted to the jury were, whether the plaintiff was in possession of the property at the time the order was executed, and, if so, whether Hoyt was the true owner of the property.

So far as the present motion proceeds upon the ground of newly discovered evidence, it can be briefly disposed of, and must be decided adversely to the plaintiff. The plaintiff desires to obtain the benefit of newly discovered testimony, to the effect, that, prior to the time of the execution of the order, Slater had transferred all his right and interest in the property to the plaintiff, and did not claim to exercise any control over it, and was not on the plantation, and had not been for some time. This testimony is insufficient to authorize a new trial, because it is merely cumulative. The status of Slater as well as of the plaintiff, with reference to the possession of the plantation and personal property, was one of the main issues of fact to which the evidence upon the trial was directed, and the newly discovered evidence is but additional evidence upon the same point, and is of the same general character as that produced upon the trial, and, within all the authorities, is cumulative, and, as such, not sufficient as ground for a new trial.

The important and more difficult question presented by this motion is that which involves the correctness of the ruling upon the trial, that the defendant could justify his act as one authorized by Hoyt, and could depend upon Hoyt's title to the property.

As the cause of action arose in the state of Louisiana, the rights of the parties are to be ascertained according to the law of that state, but, as nothing appeared, from the evidence on the trial, to show that the law of Louisiana differs from that of New York, the case was submitted, and is now to be considered, as though it were governed by the rules of the common law.

Although the owner of personal property, who takes it by force from the possession of one who holds it without right, is liable criminally for a breach of the peace, or civilly in an action for assault and battery, he is not liable in trespass, because, in an action of trespass, when the plaintiff's case rests upon proof of possession, title in the defendant is always a perfect defence. Hyatt v. Wood, 4 Johns. 150; Ives v. Ives, 13 Johns. 235; Jackson v. Morse, 16 Johns. 197; Jackson v. Farmer, 9 Wend. 201; Taunton v. Costar, 7 Term R. 431; Harvey v. Brydges, 14 Mees. & W. 437; Meriton v. Coombes, 9 C. B. 787. If Hoyt was the owner, and entitled to the possession, of the property in question, at the time of the plaintiff's dispossession, the plaintiff could not recover against Hoyt. Could he, then, recover against the defendant? The defendant undertook to restore Hoyt to his own, at Hoyt's solicitation. He was held liable for all acts done pursuant to his order, to the same extent, and because he was to be regarded, as though he had personally accompanied Hoyt and the sheriff, and assisted in the removal of the plaintiff. It would seem strange if Hoyt, upon whose request the defendant intervened, should not be liable, and yet the defendant be held. Such a conclusion would present the anomaly of the right to recover for a wrong, against an agent or a servant, for acts in behalf of a principal, when there is no right of recovery against the principal. The argument is, that, inasmuch as the defendant assumed to act as a military commander, he cannot justify in any other character or capacity. This argument would apply with equal reason to Hoyt also, because he was instrumental in procuring the defendant to act in his capacity of military commander. The logical sequence would be, if Hoyt had retaken his own with a file of soldiers, under the flag of the United States, that he must show his right to the flag and the soldiers before he could be heard to assert his title; and this for the protection of a person who had no right to the property or to its possession. Suppose Hoyt had resorted to artifice, to obtain possession, or had induced the plaintiff to abandon the property by untrue representations, would he be precluded from showing his right, when sued, because he had obtained possession by artifice or deception? If so, an owner may take his own by the strong hand, under circumstances which render him amenable criminally, and yet be protected, while if he resorts to stratagem, involving no criminal liability, he must pay damages to one who, as against him, has

no right to detain the property. No authority or principle can be found to sustain such a conclusion.

The theory of the plaintiff is, that the defendant is estopped from asserting that he was acting as military commander; and numerous cases are cited to the effect, that one who holds himself out as acting in some special character, cannot be heard to deny that he was so acting, afterwards. The doctrine of estoppel has no application in this case, nor are the authorities cited in point, because, the plaintiff cannot be prejudiced by allowing the defendant to show that he was, in fact and in law, acting in privity with Hoyt.

An estoppel in pais arises where one party has been induced by another to rely upon the existence of a state of facts, and thereby to do or omit some act which will enure to the prejudice of the former, if the latter is permitted to prove the non-existence of the facts Under these circumstances, one who has assumed to exercise an official authority will be precluded from disputing his appointment or title to the office. How has the plaintiff been misled because the defendant assumed to act as a military commander in requiring the plaintiff to restore the property to Mark Hoyt? The plaintiff was bound to know the law, and is conclusively presumed to have known it, as well as the defendant. He knew, therefore, that the defendant did not possess the authority which he assumed, and that, as a military commander, the act of the defendant was beyond the scope of his lawful powers. What injury, in a legal sense, has the plaintiff sustained by acting upon the assumption that the defendant, as military commander, could compel the restoration of the property to Hoyt? Concede that the plaintiff would not have surrendered possession of the property had he not supposed the defendant had the right, as well as the physical power, to compel obedience to his orders, nevertheless, the plaintiff has only surrendered possession to the person who was entitled to it. He might have defended his possession by force, and, if the property had been taken from him by violence, might have had his action for assault and battery. He would have recovered, however, only compensation for his personal injuries. He knew he had no right to the possession of the property as against Hoyt; he knew that the defendant was seeking to obtain possession only for Hoyt; and, under these circumstances, he did only that which he should have done without any order or any show of coercion. The books will be searched in vain for any precedent sustaining the doctrine that an estoppel arises under such circumstances.

Under the instructions of the court, the defendant could not justify unless Hoyt was entitled to the property. If Hoyt was entitled to the property, inasmuch as the defendant intervened at Hoyt's solicitation and for his protection, he was entitled to stand upon any defence which Hoyt could maintain. The case is similar to Gault v. Jenkins, 12 Wend. 488, where the defendants dispossessed the plaintiff, under a warrant in summary proceedings which was void because of want of jurisdiction in the officer issuing it, and, being sued in trespass, it was held they could justify by proof that they acted by the direction of the owner entitled to the possession of the premises.

It is insisted, that the defendant's justification is pleaded, technically, as one by virtue of his office as military commander. As to this, it suffices to say, that the answer sets out all the necessary facts, and, if the legal conclusions are inconsistent with the facts alleged, it is the duty of the court to apply the correct legal inference to the facts. Under the system of pleading adopted in this state, judgment should be rendered at the trial in accordance with the facts pleaded and proved, without regard to the form of the pleadings, or the theory upon which they were prepared. Wright v. Hooker, 10 N. Y. 51; Marquat v. Marquat, 12 N. Y. 336. The motion for a new trial is denied.

[For hearing on a motion to file and serve a bill of exceptions nunc pro tunc, see 5 Fed. 436.]

Case No. 17,477.

WHALEN v. The SILVER SPRING.

[32 Hunt, Mer. Mag. 711.]

District Court, D. Massachusetts. March Term, 1854.

SEAMEN'S WAGES—FISHING VOYAGE—AUTHORITY OF MASTER—FRAUDULENT SHIPPING ARTICLES.

[The master of a vessel prepared by her owners for a fishing voyage, with intent to secure the bounty, has no implied authority to engage seamen for wages merely, instead of upon shares, as required by the statute of June 19, 1813 (3 Stat. 2).]

This was a proceeding in rem instituted by the libelants to recover wages as fishermen on board the Silver Spring, during the last season.

SPRAGUE, District Judge. It is quite clear, I think, that this vessel was designed for a fishing voyage in the season of 1853, and that the owners contemplated the voyage so conducted as to secure the bounty, or allowance as it is called in the statute, provided by law. Certain preliminary steps requisite for this purpose were taken at Harwich, where the vessel was, and where the owners lived. The owners provided a fisherman's paper or agreement, which was there signed by the captain and three men. And the vessel was inspected, and the certificate, which is one requisite for obtaining the bounty issued, the number of the crew being left blank, trusting to the honor of the master to ship them properly. The vessel left Harwich to come to Boston to complete her crew, the owners having provided the proper fishing paper. And the master here hired the

libelants on wages. They subsequently signed the articles which had been brought from Harwich. Had the owners at the time of the signing of the agreement by the libelants, or at any time prior to receiving the agreement, any knowledge that the libelants were hired on wages? I think not. Had the master any previous authority to hire men on wages? There is no evidence of any express authority. The inquiry is therefore whether he has any implied authority as master. I think the master has no implied authority in a fishing voyage to hire men on wages, first, because the owners cannot obtain the bounty if the men are hired at monthly wages, and, second, because the requirement of the law of June 19, 1813, is positive and unequivocal, that the master of every fishing vessel of more than twenty tons shall, before proceeding on his voyage, make an agreement in writing, for shares, with every fisherman employed therein. By this law the agreement is to be made with the master, and it is the master's duty to have the articles signed. And the presumption is, that he had no authority other than that given him by law, and in conformity to the requirements of the law.

Subsequently to the agreement actually made, the vessel did not return to Harwich, till after the end of her voyage or fare. But the master, before sailing from Boston, sent the owners the shipping articles properly signed and filled up. There is no evidence of any other communication to the owners at that time—nothing to show that the owners had any knowledge at that time that the crew were hired on monthly wages. At the end of the first voyage the vessel returned to Harwich, and certain payments were made to the libelants. Do these payments bring home to the owners the knowledge that the men were actually engaged on wages? It does not appear that the payments were made to the men by the owners. And nothing is more common, when men are engaged on shares, as in whaling voyages, for the master or owner to advance them money, deducting it from the amount due, when the final settlement is made. Here the men received certain sums of money, but this does not show that the owners knew the men were engaged on wages. One man, John Ryan, left by permission of the master at the end of this voyage. He received a certain sum of money as the amount due him. It does not appear that he was paid by the owners, nor does it follow, because he received a sum of money as a settlement of his agreement, that the owners knew he received it as monthly wages. They may have known it. But there is no evidence before the court to determine this. There is no evidence that the owners then had any knowledge that the men were hired at monthly wages, or that they did not suppose them to be on shares. There is no doubt, I think, that the master agreed that these men should have monthly wages. He was willing to pay them on the return from the second voyage, but he had no money.

It is said that the libelants were induced to sign the written agreement by fraud and deception. They are their own witnesses. And what is their story? That after the master had agreed with them for wages, he told them to sign the articles in order that the owners might get the bounty. The articles were read over to the libelants. They are both familiar with the practice in fishing voyages. One probably knew something of the requirements of the law, for he at first refused to sign the articles until assured the only object of them was to get the bounty, and at the end of the second voyage, when a dispute arose, he told the owners that they had only three shares-men, and not three-fourths American citizens on board. Now it stands thus—these persons, having agreed with the master for monthly wages, signed the articles in order to enable the master to commit a fraud in obtaining the bounty—a fraud upon the owners and upon the government—a fraud which must at least deprive the owners of the right to claim the bounty, or to retain it if paid. And yet these persons seek now, by a proceeding against the vessel, to render her liable for monthly wages according to their agreement with the master. The court of admiralty goes far to enforce a seaman's contract for wages; but never so far, I think, as to uphold him in committing a fraud. Shall the court allow the libelants to say that they are not bound by the written contract, because it was only signed to get the bounty—when they signed it with their eyes open? I am not now called upon to decide whether the libelants can enforce the written agreement, or whether this is so tainted with fraud that a court will not enforce it. But for the reasons already given the libel must be dismissed, though, as the parties were led into the transaction by the fraud of the master, without costs.

WHALING (CADY v.). See Case No. 2,285.

Case No. 17,478.

WHANN v. HALL.

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

Circuit Court, District of Columbia. June Term, 1810.

EVIDENCE—SUBSCRIBING WITNESSES.

Testimony of the subscribing witness cannot be dispensed with, although he resides in Massachusetts.

The plaintiff offered in evidence a receipt, to which there was a subscribing witness.

THE COURT refused to receive other evidence of the handwriting, although the plain-

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

tiff proved that the subscribing witness resided in Massachusetts, and had not been in the district since the last term.

But THE COURT said they would hear a motion for a new trial, if the verdict should be against the plaintiff.

Verdict for the plaintiff.

WHARFIELD (TAYLOE v.). See Case No. 13,772.

Case No. 17,479.

WHARTENBY v. DANIEL et al.

[6 Am. Law Rev. 164.]

Circuit Court, D. Delaware. June Term, 1871.[1]

CONSTRUCTION OF WILLS—DEVISES—RULE IN SHELLEY'S CASE.

[1. "Issue," prima facie and generally, means "heirs of the body," and refers to lineal descendants. To take a case out of the rule in Shelley's Case, the intent of the testator to change the primary meaning of the word, and employ it in an unusual sense, must manifestly appear in the will itself. There must be enough to overcome the legal presumption to the contrary.]

[2. A devise to a person for life, with remainder to his issue and the heirs of the issue, does not give a mere life estate to the first taker, unless there are also in the devise of the remainder words of distributive modification; and the fact that the laws of a state make a distribution when a fee descends or is given to issue or heirs is not of equal effect with an express direction in the will that there shall be a distribution.]

This was an action of ejectment. The plaintiff claimed under the will of James Tibbitt, made March 25th, 1829. The clause in the will aforesaid whence the controversy in the above suit arose was as follows: "All the rest, residue, and remainder of my estate, both real and personal, of what kind and nature soever, I give, devise, and bequeath to my son, Richard Tibbitt, during his natural life, and after his death to his issue by him lawfully begotten of his body, to such issue, their heirs and assigns forever. In case my son Richard Tibbitt shall die without lawful issue, then in that case to my wife, Elizabeth Tibbitt, my sister, Sarah Heath, and my sister, Rebecca Mull, during the natural life of each of them, and to the survivor or survivors of them, and after the death of all of them to James Whartenby, son of Thomas Whartenby, of the city of Philadelphia, to him the said James Whartenby, his heirs and assigns forever." The facts in the case were admitted. Estates-tail are recognized in Delaware, and by the statute law of the state may be barred by deed as well as by fine and common recovery. Richard Tibbitt, supposing he had an estate-tail, on May 14th, 1853, executed a deed to bar the entail.

On the part of the plaintiff it was contended that Richard Tibbitt took but a life estate in the premises, with a contingent remainder in fee to his "issue," i. e., children, which vested immediately on the coming into esse of any child, and subject to open up and let in the interest of future born children. Issue meant the children of the first taker. That an estate-tail would place the power in the hands of the first taker of defeating the fee given to his issue. The intention of confining "issue" to a definite class of individuals was strengthened by superadded words of limitation, the words of distribution being supplied by the laws of the state, and by limiting an estate over to lives then in being and to the survivor or survivors of them. That the plaintiff took a substitutionary devise over upon the death of the first taker without leaving children.

For the defendants it was argued that this was an estate-tail, and therefore barred by the deed according to the laws of the state. If not an estate-tail, still the plaintiff could not recover, not claiming as heir of James or Richard Tibbitt, nor if Richard Tibbitt had had issue could he have been heir to such issue. The plaintiff claimed title under an executory devise limited upon a contingency too remote to support it, i. e., the death of Richard Tibbitt without issue, meaning an indefinite failure of issue.

STRONG, Circuit Justice, instructed the jury that in this case it was not necessary to inquire whether what was given to James Whartenby, the plaintiff, was an executory devise limited to him after an indefinite failure of issue of Richard Tibbitt, and therefore too remote, or whether it was a substitutionary estate, or a devise directed to take effect after a definite failure of issue of a person in being when the will was made. "Issue" "prima facie and generally means 'heirs of the body,' and it has reference to all lineal descendants." The rule in Shelley's Case is "an unbending rule." To take it out of the rule, "the intent of the testator to change its primary meaning and employ it in an unusual sense must manifestly appear in the will itself. There must be enough to overcome the legal presumption to the contrary." Superadded words of limitation alone are "insufficient to overcome the other legal presumption arising from the gift to issue that he intended them to take as issue, that is, by descent through their ancestor Richard Tibbitt. It raises no more than a presumption against a presumption, in which case the legal inference arising from the use of a word of limitation must prevail." "In the present case there are no words of distributive modification." "I do not think the fact that the laws of the state make a distribution when a fee descends, or is given to issue, or heirs, is of equal effect with an express direction in the will that there shall be a distribution." "Where there are no words of distribution, there is an absence of this double expression of the testator's intent to employ the words 'heirs of the body' or 'issue' as equivalent to children, or as a mere description of persons." In no one of the cases cited "has a devise to a per-

[1] [Affirmed in 17 Wall. (84 U. S.) 639.]

son for life with remainder to his issue, and the heirs of the issue been held to give a mere life estate to the first taker, unless there were also in the devise of the remainder words of distributive modification." In addition to the limitation to the heirs generally of the issue, and the express gift to Richard Tibbitt during his natural life, the devise to his issue is not to his issue unqualifiedly, or generally. It is not to all his issue. The words are: "After his death to his issue by him lawfully begotten of his body, to such issue, their heirs and assigns forever." "The testator in these words seems to have defined what he meant by issue, not heirs of the body, but issue begotten by the tenant for life, and begotten of his own body, necessarily children." This intention was further strengthened by the substitutionary devise, in case of the death of the first taker without lawful issue, to persons then in being for life only, and by the fact that in such contingency they were to take the whole property for life, and that words of limitation were added to the devise to the issue. That the first taker took an estate for life, and the devise over to James Whartenby was not void for perpetuity. Verdict for plaintiff.

To this charge the defendants then and there excepted before the verdict, and filed their bill of exceptions.

[On appeal to the supreme court the judgment of this court was affirmed. 17 Wall. (84 U. S.) 639.]

Case No. 17,480.

WHARTON'S HEIRS.

[Cited in Kurtz v. Hollingshead, Case No. 7,953. Nowhere reported; opinion not now accessible.]

WHARTON (JAMES v.). See Case No. 7,187.

Case No. 17,481.

WHARTON v. LOWREY.

[2 Dall. 364.][1]

Circuit Court, D. Pennsylvania. 1796.

EQUITY PLEADING—AMENDMENTS—BILL TO OPEN AN ACCOUNT.

[To a bill which sought to open a settled account on the ground of fraud, an answer was filed denying the fraud and pleading the statute of limitations. Complainants then asked leave to amend by alleging that the fraud was discovered within six years. *Held*, that the amendment would be allowed, as complainants could not foresee that the statute would be pleaded.]

Bill in equity. The bill was filed in October, 1793, to open an account which had been settled and signed by the complainants in April, 1781, touching the transactions between the testator and the defendant, while commissaries in the American army, during the Revolutionary war. The bill charged the defendant (among other fraudulent practices) with making erasures in the complainant's books, and also set forth a number of specific errors and overcharges in the account. The defendant filed an answer to the bill, in which he denied all fraud, canvassed and refuted the specification of errors and overcharges, and pleaded the statute of limitations.

Rawle & Lewis, having obtained a rule to shew cause why the bill should not be amended by inserting that the frauds charged had come to the complainant's knowledge within six years before the commencement of the suit, now moved to make the rule absolute, and cited 1 Har. Ch. Prac. 106, 3 P. Wms. 143.

Mr. Dallas, for the defendant, admitted that the allowance of amendments was discretionary with the court, but contended that after a general answer to the allegations, and a denial of the frauds stated in the bill, the complainant ought not to be indulged, without some other proof to support the charge of fraud, than his bare assertion. In the cases cited in 3 P. Wms. 143, there was no answer to the bill, but merely a plea of the statute of limitations; and in the principal case the chancellor only ordered the defendant to answer, which the present defendant has already done. Twelve years have elapsed since the account was settled; and the fraud being denied on oath, and unsupported by any species of evidence, the complainant ought not to be permitted to harass the defendant, and procrastinate a decision.

BY THE COURT. Considerations respecting the merits of the cause ought not to weigh in the determination of the present question. The complainant could not foresee that the statute of limitations would be pleaded, and it is in order to bring before the court an essential fact arising from that plea, that the amendment is proposed. The rule made absolute.

[1] [Reported by A. J. Dallas, Esq.]

WHARTON (MONTGOMERY v.). See Case No. 9,737.

Case No. 17,482.

The W. H. CLARK.

[5 Biss. 295.][1]

District Court, W. D. Wisconsin. May, 1873.

COLLISION — OVERTAKING STEAMER — TOWING STEAMER—RAFT—DAMAGES—REPAIRS—POSSIBLE EARNINGS.

1. Where two steamers are going in the same direction, it is the duty of the pursuing boat to avoid the other.

2. This rule, however, does not justify the leading vessel in suddenly changing her course so as to embarrass, or throw herself across the track of, the other.

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

3. Where there is no opportunity of passing, the pursuing boat should keep such a distance as to avoid all possibility of a collision.

4. When the colliding boat has a raft in tow, the boat is liable, not the raft.

[Cited in The Chickasaw, 38 Fed. 361.]

5. The boat furnishing the motive and directing power, having the pilot in the pilot-house, and giving the signals to the crew, must be held responsible for the proper management of the raft.

6. The fact that the expenses of the boat and its officers were charged to the raft, and that the owners of the raft employed the boat, is not material. This is a proper method of keeping the accounts, and does not affect the maritime relations of the boat and raft.

7. It seems, that admiralty jurisdiction could not be sustained against a raft. Quære.

[Cited in Re Raft of Cypress Logs, Case No. 11,527; The F. & P. M. No. 2, 33 Fed. 511.]

8. Full charges for repairs should not be allowed when the boat was old and somewhat decayed.

9. The party repairing should show positively that he has only reinstated the vessel in the condition she was before the collision.

10. The full amount which she might have earned should not be allowed as compensation for time lost.

In admiralty. This was a libel filed by the Northwestern Union Packet Company, as owner of the steamboat Mollie Mohler, against the steamboat W. H. Clark, to recover for damages sustained by the steamer Mollie Mohler, by collision with the W. H. Clark, near the bridge at Winona, Minnesota, on the Mississippi river, July 21, 1872, while the Mollie Mohler was engaged in towing a raft of logs from Beef Slough, in Wisconsin, to Rock Island, Illinois. Jeremiah Turner filed a claim as owner, and answered the libel.

William Hull, for libellant, made the following points, and cited the authorities as sustaining them:

I. The master and crew of the Clark had entire control of both boat and raft, consequently the collision is as directly attributable to her as if she collided with the Mohler. The Express [Case No. 4,596]; The Hector [Id. 6,317]; Pope v. The R. B. Forbes [Id. 11,275]; Owners of The James Gray v. Owners of The John Fraser, 21 How. [62 U. S.] 184; The Rescue [Case No. 11,708]; New York & B. Transp. Co. v. Philadelphia & S. Steamboat Nav. Co., 22 How. [63 U. S.] 461; Sturgis v. Boyer, 24 How. [65 U. S.] 110; The Maria Martin, 12 Wall. [79 U. S.] 31.

II. As both boats were going in the same direction, the Mollie Mohler could keep her course, and the Clark should have avoided her. New York & L. U. S. Mail S. S. Co. v. Rumball, 21 How. [62 U. S.] 372; Chamberlain v. Ward, Id. 548; The Chesapeake [Case No. 2,643]; The Carroll, 8 Wall. [75 U. S.] 302. The pursuing boat must, in passing, select a safe course at her peril. She has only the unoccupied water-way, whether stationary or moving with less speed than the passing boat. The Rhode Island [Cases Nos. 11,743, 11,745]. The rear boat is not justified in coming within hazardous proximity to, or in crowding, the leader. If she does, she is liable for damages. The City of Paris [Case No. 2,765]. The Clark should have allowed the Mohler to continue her course and stopped in time. Ward v. Dousman [Id. 17,153]. Precautionary measures must be taken in time. Wakefield v. The Governor [Id. 17,049]; The Louisiana v. Fisher, 21 How. [62 U. S.] 5. Varying movements of the Mollie Mohler, whereby the Clark was misled, will only excuse a departure from the rule. The Hansa [Case No. 6,036]. Various classes of collision defined. Abb. Shipp. 229; Ward v. The Fashion [Id. 17,154]; 1 Pars. Shipp. & Adm. 525. This was not an "inevitable accident," and could have been prevented by ordinary care. The Baltic [Case No. 823]. It was not "mutual fault," as the Mohler contributed not in the least. The Clark was culpably negligent in trying to tow a raft she could not manage. The Helen R. Cooper [Cases Nos. 6,333, 6,334]; The George Farrell [Case No. 5,332], The Syracuse, 12 Wall. [79 U. S.] 167. The Clark's negligence being proven, the onus is on her to prove that the collision was not caused thereby, and that it would equally have happened had she performed her duty. Martinez v. The Anglo Norman [Case No. 9,174]; 1 Conk. Adm. 383. Libellant's witnesses on the Mohler deserve greater credit as to her management than those of the Clark, or others not knowing the facts. Whitney v. The Empire State [Case No. 17,586]; Pope v. The R. B. Forbes [Id. 11,275]; The Narragansett [Id. 10,019]; The Neptune [Id. 10,120]; The Rhode Island [Id. 11,745]; The Bay State [Id. 1,149]; New York & L. U. S. Mail S. S. Co. v. Rumball, 21 How. [62 U. S.] 372, 382. A quasi custom cannot vary the law. The Clement [Case No. 2,879].

Damages should be for: 1. Raising, towing, dockage, and repairing of the Mollie. 2. A per diem compensation for loss of boat's services, at the rate hired, while necessarily being repaired. 1 Conk. Adm. 385; The Narragansett and The Rhode Island [supra]; The Cayuga [Cases Nos. 2,535, 2,537]; The Favorita [Case No. 4,694]; The Santee [Id. 12,329]; Williamson v. Barrett [13 How. (54 U. S.) 101]; The Baltimore, 8 Wall. [75 U. S.] 377; Sturgis v. Clough, 1 Wall. [68 U. S.] 269; 1 Pars. Shipp. & Adm. 538. Immaterial whether the vessel was weaker or stronger. Id. 543; Amoskeag Manuf'g Co. v. The John Adams [Case No. 338]; The Granite State, 3 Wall. [70 U. S.] 310. Offering or rendering no assistance to the injured vessel is a circumstance tending to show consciousness of fault. The Atlas [Case No. 633]. Whether raft is subject to admiralty jurisdiction, see Tome v. Four Cribs of Lumber [Id. 14,083.]

J. Hamilton Davis and Hugh Cameron, also for libellant.

Thomas Wilson, for respondent.

The raft only is liable, the boat being employed solely and only as a motive power, and being exclusively under the management of the raft's master and crew. Proceedings in admiralty may be had against a raft. The Rock Island Bridge, 6 Wall. [73 U. S.] 213; A Raft of Spars [Cases Nos. 11,528, 11,529]; 16 Stat. 453, 454, § 47. If it was illegal for the Clark to tow a raft she could not handle, the same is true of the Mollie, for she could not handle herself, and the court will in such cases leave the parties where it found them. The Leopard [Case No. 8,264]; 1 Pars. Shipp. & Adm. 528, and cases cited; Sturgis v. Clough, 21 How. [62 U. S.] 45. The damages cannot be divided, as the Clark was not negligent, and if it admitted of a reasonable doubt even, the loss must be borne by the party on whom it falls. The Grace Girdler, 7 Wall. [74 U. S.] 196, 203. The respondent must be affirmatively and specifically held in fault to allow damages. The Breeze [Case No. 1,829]; 1 Pars. Shipp. & Adm. 328, 329; The Wm. Young [Case No. 17,760]; 3 Greenl. Ev. § 404. The libellant must prove herself clear of fault, and also culpable negligence or actual misfeasance against the other to recover for a collision. The Relief [Case No. 11,693]; Ward v. The Fashion [Id. 17,154]; The Columbus [Id. 3,043]; The Marpesia, 7 Am. Law Rev. 287; Martinez v. The Anglo Norman [Case No. 9,174]; The Randolph v. U. S. Id. [11,562]. If neither party is in fault the loss rests where it falls. The Eliza and Abby [Id. 4,349]; 1 Pars. Shipp. & Adm. 525. The same of an inevitable accident. Id. 525, and note. The law exacts of officers only ordinary foresight and skill. The Eliza and Abby and The Grace Girdler, supra; Shear. & R. Neg. §§ 29–31.

Guy C. Prentiss, also for respondent.

HOPKINS, District Judge. If I were to believe the testimony given on each side, in this case, I should have to find that there was no collision, for if the witnesses testify truly, it was entirely impossible that the boats could have got together at that point; but taking the collision as established and admitted, I have, after a great deal of consideration and examination of the testimony, maps, plats, diagrams and distances from the bridge, elevator and other monuments in that vicinity, arrived at a conclusion, quite satisfactory to my own mind, as to the manner in which, and through whose fault, the collision occurred. The Mohler, at about four o'clock on the morning of the 31st of July, 1872, started with her tow, a raft of logs, about 110 feet wide by 450 feet long, from a point about four miles above the Winona bridge across the Mississippi river. The steamer W. H. Clark, about the same time in the morning, started at a point about four miles above with her raft, an eight-string lumber raft, being about 136 feet wide by 450 feet long. The Mohler was commanded by C. H. Jewell, a licensed pilot, and the Clark by Mr. Turner, a licensed pilot, the claimant in this case. The Mohler, owing to an injury to her raft the evening before, did not tow ahead with her wheel, but floated with the current in order to give the hands an opportunity to repair her raft. The Clark followed after her at nearly double her rate of speed, so that when the Mohler arrived at the bar opposite the elevator, about 1,000 feet above the bridge, the Clark had arrived at the point of Rolling Stone island, a distance of only 1,800 feet from the Mohler, and following in her track. The bow of the Mohler, after going over the reef, was thought to be too far out in the stream to go through the west draw of the bridge with safety, and thereupon the Mohler, in order to straighten it with the stream, backed her wheel, by which the bow was thrown in by the current; in doing which, some detention occurred, and the Mohler did not move as rapidly as the current. The Clark followed on in the same course, gaining rapidly upon the Mohler, and when it reached the reef opposite the elevator and turned the bow of its raft to run through the west draw, the bow of its raft was not to exceed 200 feet from the stern of the Mohler, and was going much more rapidly than the Mohler. At that time the danger of the collision became imminent to the persons in charge of both boats. The Mohler, having her raft straightened up, went ahead on her wheel, but before she had made many revolutions or produced much effect upon its motion, she had to stop, as the bow of the Clark's raft was getting so close as to endanger her wheel. The Mohler and her raft then floated with the current until the collision. The captain of the Clark, when opposite the elevator, seeing, as he says, that he was rapidly gaining upon the Mohler and coming in dangerous proximity to her, gave a signal with his whistle to put out a line, changed the position of his boat so as to assist to land his raft, and also gave signal whistles to the oarsman on the bow to throw in the bow, and gave orders to snub the raft and land it as quickly as possible, so as to avoid collision with the Mohler; that the line was put out and fastened to the piling just below the elevator, as he could not land in front of the elevator on account of barges tied there. The speed of the raft was not checked until it passed by the stern of the Mohler, and struck her with a forward and flanking-in motion about five feet forward of her stern post and broke a hole in her hull about ten feet long and twenty inches wide, from the effect of which she immediately filled with water and sank, and was dragged by the current and raft through the pier below the bridge and was there left in water about up to her upper decks. The raft of the Clark was stopped by the line and the collision, and in a short

time after passed between the piers and by the Mohler on her course. The current below the reef was at the rate of two and a half miles an hour, and from Rolling Stone point to the reef from 3½ to 4 miles. The pilot on the Clark testified that she did not go ahead on her wheels at all after they left the point until the collision, except a few strokes just before the collision, to aid them in landing their raft, to avoid it.

The question to be first determined is whether either party was at fault, and if so, which. That must be solved by the application of certain well-settled rules of law relating to boats in such cases. In the first place, I regard it as settled beyond controversy that when two steamboats are going in the same direction the one ahead is entitled to keep her course, and it is the duty of the pursuing boat to avoid her. This rule, however, does not go to the extent of justifying the leading vessel in suddenly changing her course so as to embarrass, or throw herself across the track of the pursuing boat. The 17th article of the act of congress of April 29, 1864, provides (13 Stat. 61) that "every vessel overtaking another vessel shall keep out of the way of said last-mentioned vessel." But the 18th, 19th and 20th articles provide that due regard shall be had to the circumstances of each case. The Grace Girdler, 7 Wall. [74 U. S.] 196. But I do not see in this case that the Mohler was guilty of any sudden change, or maneuver calculated to embarrass or change the course pursued by the Clark. It is true she backed after passing over the reef, to straighten her raft, as her pilot says, so that she could go through between the piers of the bridge safely. Mr. Hanks, a very intelligent and experienced pilot, called as a witness on the part of the respondent, testified that the current at the reef is such, that "the bow of a raft is often thrown out a little, and as it goes over it turns again towards the Minnesota shore, and sometimes we have to back up under the reef to straighten our raft before going through." From this it appears that backing in the manner the Mohler did is not unusual at that place.

The doctrine in relation to the rights and duties of vessels going in the same direction is very fully stated in the case of Whitridge v. Dill, 23 How. [64 U. S.] 448, in which case the opinion of Judge Betts, in the case of The Governor [Case No. 5,645], is quoted approvingly, and in which he expresses the rule as follows: "But from the fact that they were running in the same direction, the one astern of the other, there is imposed upon the rear boat an obligation to precaution and care which is not chargeable to the same extent upon the other. * * * The rear boat in such case must stop her way or back off and await the opening of a sufficient passage, if the leading boat is so placed that safe room is not left to pass without coming within a hazardous proximity to her."

The general law of navigation secures to vessels under way the track they are rightfully pursuing, and makes it cause of damage for others to molest or crowd upon them in it. This rule would not allow the leading boat to unnecessarily obstruct the navigation, or to maneuver with a view to embarrass the boat following, and there is nothing in the testimony in this case to warrant the conclusion that the Mohler did anything to obstruct the navigation, and as there was no chance for passing at that point, the Clark should have kept back a proper distance to have avoided all possibility of a collision. The rule upon that subject, as laid down in the case of The Carroll, 8 Wall. [75 U. S.] 302, 306, is as follows: "The safeguards against danger, in order to be effectual, must be seasonably employed, and in this case they were not used until the danger was threatening." The same remark is applicable to this case, for here when the danger became imminent, the respondent did all he could to avoid it, but his efforts were unavailing because too late. The court in that case also say its greater fault was in suffering the vessel to get into such dangerous proximity at the moment preceding the collision, and as she has furnished no excuse for this misconduct she is chargeable with all the damages resulting from the collision. This respondent, judged by that rule, is equally liable, for his fault was in following too close to the Mohler. In a place of that description, where the passage was too narrow to allow one vessel to pass the other, her pilot should have kept her back a sufficient distance to avoid accidents or unavoidable delays in the navigation of the Mohler; and here the question arises as to what course he could have pursued to avoid it? Upon this question the testimony of experts is very conflicting and unsatisfactory. The witnesses on the part of the libellant testify that he could have landed his raft at various points below Rolling Stone, and above the elevator, and Mr. Register, an old and experienced pilot, testifies that he has often landed floating rafts between those points.

The libellant's witnesses also testify that at Rolling Stone point, or at any point until he got to the reef, he might have changed his course and gone through the east draw, that the water and passage were as good through that as through the west, except that it was a little safer and easier to steer by the land than by the piers alone; while the claimant and his witnesses testify that it would have been very hazardous, if not impossible, to have landed above the elevator, and that in order to have gone through the east draw it would have been necessary to have changed the course at the point of Rolling Stone island, and that they would deem it hazardous to run

the east draw with an eight-string raft; but I do not understand any of them to state that it would have been impossible. It would doubtless require more skill than to run by the shore, but as the center pier extended up the river for some distance above the bridge, and was planked up solid, so as to avoid all danger of catching in case the raft should strike against it, I cannot regard it is an undertaking of sufficient hazard to justify him in crowding upon the Mohler in order to avoid the risk of running through the east draw. Indeed, Mr. Davidson, an experienced pilot in running rafts both by boat and floating, and who manifested great candor and impartiality in his testimony, testified that he had run an eight-string raft through the east draw without trouble. He also stated that "it would have been difficult for the Clark to have gone through the east draw, starting at Yeoman's Mill (which is about 600 feet below Rolling Stone point); but I think it could have been done, and situated as those boats were, if I had apprehended any danger, it would have been safer to have undertaken to go through the east draw." I think this testimony shows that the passage through the east draw was not impracticable by any means, and under the circumstances I think the respondent should have essayed its passage. The testimony shows that rafts did run through it, and the claimant swears that he had run it on other occasions himself, so I cannot find, under the testimony, that the passage through the east draw was impracticable with an eight-string lumber raft, or that it was impossible to have landed it above the elevator and below the point of Rolling Stone island, or that the danger in attempting to do so was sufficiently imminent to excuse him from trying to do either to avoid the collision.

But it is contended on the part of the claimant, and with a good deal of plausibility, that he did not apprehend any danger of a collision until after he had got far below the point where he could make that passage, and if the Mohler had kept on as she ought to have done, he would not have overtaken her, but I cannot view the case in that light. He had been following the boat all the morning, and knew that he was going about as fast again as she was, that in two hours he had gained upon her nearly four miles that morning, which was enough, in my opinion, to put him on his guard, and to require him to adopt timely precautions against danger, especially as they were approaching a place where to pass would be impossible.

I think the facts were sufficient to cause apprehension on the part of the claimant. He was negligent in not comprehending the dangers of the situation. That there was danger to be apprehended, the event demonstrated, and he, as an experienced seaman, should have taken timely precautions to avoid it; and not having done so, I think the respondent is liable for all the damages occasioned by the collision. I think the Mohler was not managed in the most skillful manner. Her pilot might, perhaps, have gone faster than he did with safety, but that question under the law was left largely to his discretion. He was ahead and had the right of way, and had the right to be cautious, and I do not see any such abuse of that right as to justify me in holding that the Clark had the right to run into his boat, or in dividing the loss, which at the time of the conclusion of the argument I felt strongly inclined to do.

Having determined that the libellant is entitled to recover for the injury of the offending party, it becomes necessary to ascertain whether it is the boat or the raft that is liable. The respondent contended that it was the raft; that the boat was but the mere agent of the raft, and under the exclusive control of the officers of the raft.

The raft had no motive power of its own. It would float with the current of the stream and be borne along with it, but in and of itself it had no motive power or contrivances for utilizing any power to promote its propulsion. The steamboat was therefore employed to propel it and manage it, or, in other words, to navigate it.

A block called a "butting block" was placed on the stern of the raft, against which the steamer pushed with its bow to move it ahead. It had a line called a "backing-line" fastened to the raft and the bow of the boat to enable the steamer to back the raft. It had guy lines attached to each side of the stern of the boat, running around each rear corner of the raft to a capstan stationed in the centre of the raft to steer the raft by. The position of the boat to the raft was fixed and regulated by the use of the capstan and those guy lines. In that way the boat was made to apply its power directly or obliquely so as to propel the raft straight ahead or to the right or left, as the necessities of the case might require. It was not only therefore the motive power, but was the steering or directing power.

The boat was run and managed by Mr. Turner, a pilot licensed to run tow-boats. He alone had authority in law to run the boat. The boat was licensed and duly enrolled as a tow-boat, and as such was within the regulations prescribed by the acts of congress.

The signals to the crew for managing the raft proceeded from the pilot-house, and the pilot in charge of the boat gave them by sounding the boat's whistle. The raft had no pilot other than the pilot of the boat. He had the direction of the whole craft, boat and raft, and gave all the directions for its navigation. The boat had no master but its pilot, and the raft had neither pilot nor master distinct from the boat.

I think, therefore, the boat was liable, and that the claimant is mistaken in supposing that the boat was under the exclusive direction of the officers and crew of the raft. I think the case comes under the third rule laid down in Sturges v. Boyer, 24 How. [65 U. S.] 122, that "when the tug, under the

charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which for the time being has neither her officers nor crew on board, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels." That, I think, describes the position of the boat and tow in this case. See, also, The Maria Martin, 12 Wall. [79 U. S.] 44.

This view is strongly supported by the evidence of the respondent's expert witnesses showing what experience and knowledge is requisite for a pilot to run a raft with a steamboat. They testify that a steamboat pilot cannot run a steamboat with a raft in tow, nor can a raft pilot run a raft towed by a boat; that to run a boat towing a raft a peculiar knowledge and skill is necessary, which can only be acquired by a long experience in that service. The libellants dispute this, but all admit that it is a new method of moving rafts, and that the rafts are under the control of the pilot of the boat; that he is expected to combine the requisite skill to navigate both, and both are under his control as master, and the whole is under and subject to the control of the boat in which the motive power employed resides. The steamboat, therefore, is the active thing, and consequently is to be treated as the offender, and held liable for damages that it should have prevented by a judicious and careful management of the raft.

The counsel for the claimant contended with great earnestness and apparent confidence that, as the account of the expenses of the boat and officers of the boat were charged to the raft, this was a controlling circumstance in determining which was the principal and which the agent. But that circumstance failed to impress me at the time as possessing much significance, and further reflection has not changed my first impression. The owners of the raft had to pay the towboat for her services, and the mere form or method adopted by them in keeping that account is quite immaterial. It was well enough to charge it to the raft, as in that way they could conveniently ascertain the cost of the lumber and determine at what price they would have to sell it to clear themselves. It was a convenient mode of keeping their accounts, not at all affecting the relation of the boat to the raft in a maritime sense.

I have thus far considered the question as if the raft could be held liable in admiralty for an injury of this character, but I do not intend to pass upon this question. In the view I have taken of the relation and liability of the boat, it is not necessary. But from the examination I have given it, I do not at present see upon what principle admiralty jurisdiction could be sustained against a raft of lumber.

Chief Justice Taney in Tome v. Four Cribs of Lumber [Case No. 14,083], says: "They are not vehicles intended for the navigation of the sea. They are not recognized as instruments of commerce or navigation by any act of congress; they are piles of lumber and nothing more, fastened together and placed upon the water."

Notwithstanding the great extent of rafting lumber upon the navigable streams in this country, I cannot find a case where they have been proceeded against in admiralty, except that case and the cases Raft of Spars [Case No. 11,528] and The Josephine [Id. 7,545], which were all salvage cases.

It is true the judge in delivering the opinion in the Case of Rock Island Bridge, 6 Wall. [73 U. S.] 213, says: "A maritime lien can only exist upon movable things engaged in navigation," and in enumerating them mentions "rafts" among others, but the question involved in this case was not before the court, and that part of the opinion may not therefore be considered as authoritative.

But as I do not deem it necessary to decide this question I shall not pursue the argument further. I have only said this in deference to the very able argument of the learned counsel of the claimant upon the questions at the trial. Indeed I feel under great obligations to the learned counsel on both sides, for the able, careful and instructive arguments they submitted, both upon the facts and law, and particularly for the full references to the authorities bearing upon the questions involved.

Having arrived at the conclusion that the libellant is entitled to recover against the steamboat the damages sustained by the collision, I find it quite perplexing and difficult to determine the true amount thereof, which was submitted to me without a reference to decide.

It is apparent from the evidence that the boat was somewhat decayed, and suffered more on that account than a stanch boat would, and also required more repairs. The libellants raised and repaired the boat themselves, and in repairing changed it in some respects, and it seems to me the charges for the repairs are very large, and I cannot understand why such extensive and general repairs were necessary. A hole about twenty inches wide by ten feet long was broken in her hull and she sank immediately, and while she was lying in the stream some of her upper works were injured by passing boats. She was probably strained some in raising, but I do not feel that the evidence shows satisfactorily that all the repairs and work done upon her were made necessary by the collision. When the owner raises and repairs the boat himself, it is necessary to examine more closely the charges than when done by a third person, for reasons too obvious to require to be stated.

I have concluded therefore, under the testimony offered, that not more than one-half of libellant's charges for repairs should be allowed as properly attributable to the collision, and have therefore allowed that ac-

count at only $756. The rule is, that "a party should show positively that they had no more than reinstated the vessel in the condition she was before the collision." This the libellant omitted to do, and I have therefore to exercise my best judgment on that question.

The libellant claimed a per diem allowance for the time the boat was undergoing repairs. That seems to have been settled in Williamson v. Barrett, 13 How. [80 U. S.] 101, as a proper item of damages in case of collision. But I hardly think it proper to allow the same compensation as when in use, as the wear and tear when used is something, as well as the ordinary risk of navigation. The Rhode Island [Case No. 11,740a].

The court also allowed, for use of steamers or barges to raise the wreck, $500; for use of steam pump, $100; for fuel $100; and miscellaneous charges and expenses to the amount of $273.50, making a total of $1,929.50, for which costs he directed a decree to be entered in favor of libellant.

WHEAT (WASHINGTON v.). See Case No. 17,238.

Case No. 17,483.

WHEATLEY v. HOTCHKISS.

[1 Spr. 225;[1] 16 Law Rep. 692.]

District Court, D. Massachusetts. Feb., 1854.

SEAMEN'S WAGES — GREEN HANDS — ADMIRALTY PRACTICE—SECURITY FOR COSTS.

1. The libellant shipped as an able seaman, but was in fact competent to perform only the duties of a green hand. *Held*, that the measure of compensation for his services is not the wages of a green hand for such a voyage, but only what his services were actually worth to the owners.

2. The practice in admiralty, of exempting seamen from giving security for costs, is on account of their presumed inability.

[Cited in The Arctic, Case No. 509a.]

3. Any person may sue there without giving such security, upon proof of inability.

4. This rule does not necessarily apply to appeals. And where there is evidence that a seaman is of ability, the court will order him to give security for such costs as the appellate court may decree, unless he shall prove himself unable to do so by satisfactory affidavits.

This was a libel filed by a seaman of the ship Harvard, against the master, for wages, during her late voyage from Calcutta to Boston. The respondent admitted that the libellant shipped at Calcutta, as an able seaman, and by the articles was to have $30 per month, but alleged that the libellant was grossly incompetent to perform the duties of an able seaman, and was so ignorant of all ship's work, that he was not worth on board more than half the wages of an able seaman; and that the respondent had tendered to him the sum of $15 per month, as full compensation for his services during the voyage.

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

F. W. Sawyer, for libellant.
R. H. Dana, Jr., for respondent.

SPRAGUE, District Judge, after stating that upon the evidence he thought that the libellant was not an able seaman, remarked that there was more difficulty in deciding what amount of compensation should be accorded to him, for such services as he rendered on board of the ship. Having failed to execute his contract as set forth in the articles, he has no right to claim the $30 per month, which were the wages therein stipulated; but only such a sum as his services fairly deserved. In applying a quantum meruit to seamen's services, there is some difficulty. In case of services rendered on shore, when a laborer brings an action against his employer for their value, it is competent for him to prove the market value of similar services, as one element to show the value of his own services, in the particular case. But the master on shore has the power to discharge an incompetent servant, when he chooses, and to substitute another in his place. At sea there is no power of substitution; the master must continue an inefficient or ignorant seaman to the end of the voyage. Beside this, the ship needs but a limited number of hands, and those are distributed into able seamen, ordinary seamen, green hands and boys, from each of which classes are expected peculiar services, and of each of which the ship is supposed to have its exact complement. If the man, who ships as an able seaman, is incompetent to do his duty as such, he not only deprives the ship of what may be essential service, but his deceit wrongs the other able seamen, by compelling them to do his work, while he remains an ordinary seaman, or green hand, on a vessel already quite supplied with persons of this description. A supernumerary green hand may be worthless on board of a ship, to which, at the very time, an able seaman is essential; and the measure of such a person's value is not the wages which a green hand can command in port, but the value of that person, to that ship, under all the circumstances. Any other rule would be contrary to policy, as well as justice, and would encourage men to ship for duty which they were incompetent to discharge, in the confidence that failure would do nothing worse than throw them back, on the wages of that class of seamen to which they properly belonged.

In such cases, the burden is on the libellant to show the value of his services, in this respect. No such proof has been furnished. In this state of the evidence, the court cannot award him more than the sum tendered. Libel dismissed, without costs.

In the above case, the libellant claimed an appeal, and the respondent moved that he be required to give security for costs. It

appeared that the respondent had recently paid the libellant above $400, as damages in a suit for a tort. SPRAGUE, District Judge, said that the practice of exempting seamen from giving security for costs, was founded on their presumed inability. Any other person may sue in the admiralty, without giving security, upon proof of inability; and a seaman may be required to give security, if his ability is proved. This libellant has had one hearing, without giving security, and now, upon his claiming an appeal, there is evidence tending to show his ability to give security for costs, and he must stipulate with surety for such costs as the appellate court may decree, unless he prove himself unable to do so by satisfactory affidavits.

WHEATLEY (KEENE v.). See Case No. 7,644.

WHEATON (BURKE v.). See Case No. 2,164.

WHEATON (HARDING v.). See Case No. 6,051.

Case No. 17,484.

WHEATON v. LOVE.

[1 Cranch, C. C. 429.] [1]

Circuit Court, District of Columbia. July Term, 1807.

DEPOSITIONS—NOTICE.

Under the law of Virginia respecting the taking of depositions, notice to the attorney at law of the opposite party is not sufficient.

Notice of taking a deposition under the Virginia laws, was given to E. J. Lee, attorney at law for the defendant.

E. J. Lee acknowledged service, but stated that he could not attend.

E. J. Lee now objected to the deposition, because notice to an attorney at law is not good under the laws of Virginia. Buddicum v. Kirk, 3 Cranch [7 U. S.] 297.

Mr. Swann, for plaintiff, became nonsuit; and THE COURT reinstated the cause on payment of the costs of the term. The deposition having been taken under the former decisions of this court that such notice was good. DUCKETT, Circuit Judge, contra. [Case No. 17,485.]

Case No. 17,485.

WHEATON v. LOVE.

[1 Cranch, C. C. 451.] [1]

Circuit Court, District of Columbia. Nov. Term, 1807.

CONTINUANCES—DEPOSITIONS—CAPTIONS.

1. The court will not, on motion of the defendant, continue a cause because the costs of non pros. have not been paid.

2. The party will not be permitted to give parol evidence of a cause of caption of a deposition, different from the cause stated by the magistrate who took the deposition; and if that cause be insufficient the deposition will be rejected.

THE COURT refused to put off the trial of this cause on account of the non-payment of the former costs; the cause having been reinstated on payment of costs. [Case No. 17,484.]

E. J. Lee, for defendant, objected to the deposition of J. McCanahan, taken under the act of congress. 1. The certificate does not state it to be a civil cause, but only in a suit. 2. It does not appear by the certificate that the witness lived more than one hundred miles from the place of trial; it only states that the deposition was taken at his office in the borough of Norfolk, which is more than one hundred miles from the place of residence of the defendant. It does not appear that the plaintiff's agent or attorney does not live within one hundred miles of the place of caption.

Mr. Swann, contrà, contended that the omission of the magistrate to certify may be supplied by parol proof, and offered to prove that the witness lived more than one hundred miles from the place of trial, and that that was the cause of caption, although the magistrate had certified a different cause. The certificate of the judge is not conclusive. If the judge had delivered it into court, no certificate would have been necessary.

Mr. Jones, in reply. The party who introduces the deposition cannot give evidence to disprove what the judge certified. The certificate of the judge is made evidence by the judiciary act of 1789, § 30 (1 Stat. 73), of the reason of taking the deposition, and of the notice.

THE COURT (nem. con.) refused to receive the deposition, because the mayor of Norfolk, before whom it was taken, had not certified such a cause of caption as the law requires. The plaintiff became nonsuit; and upon his motion the cause was ordered to be reinstated on the 15th, if the whole costs should be paid before that time.

WHEATON (MILLER v.). See Case No. 9,595.

Case No. 17,486.

WHEATON et al. v. PETERS et al.

[33 U. S. (8 Pet.) 725.]

Circuit Court, E. D. Pennsylvania. 1832.[1]

COPYRIGHT — ACQUISITION — DEPOSITING COPY OF BOOK—CONSTRUCTION OF STATUTES—EXISTENCE OF COMMON-LAW RIGHTS.

[1. The requirement in the fourth section of the act of 1790 (1 Stat. 125) that the author shall deliver a copy of his book to the secretary of state, to be preserved in his office, is not merely directory, but, especially since the pas-

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

[1] [Reversed in 8 Pet. (33 U. S.) 591.]

sage of the supplementary act of 1802 (2 Stat. 171), is a condition which must be performed before the right of copyright can vest in the author.]

[2. The delivery to the secretary of state, by the reporter of the supreme court, of 80 copies of his Reports, in accordance with the reporter's act of 1817 (3 Stat. 376), is not to be taken as a substantial compliance with the requirement of the fourth section of the act of 1790, and cannot operate to cure an omission to deposit a copy under the latter provision.]

[3. The legislature has no right to impose upon the courts a construction of statutes previously passed. It is for the court to construe the law; but it is, nevertheless, the right and duty of the judge to look into all the statutes made upon the same subject, in order to discover what was the intention of their provisions. He is thus to ascertain their true meaning and construction by his own judgment, and not by any subsequent legislative declaration of their meaning.]

[4. In the United States there is no common-law right of copyright. The protection of authors rests exclusively upon the statutes expressly enacted by congress for that purpose.]

[This was a bill in equity by Wheaton & Donaldson against Peters and Grigg to enjoin the alleged infringement of a copyright in Wheaton's Reports of the decisions of the supreme court of the United States.]

HOPKINSON, District Judge. It is not necessary, at this time, to set forth all the details contained in the bill of complaint. It is sufficient, for the present purpose, to say that the complainants claim to have a copyright, under the statutes of the United States, or by the common law thereof, in and to the twelve books or volumes of the Reports of cases argued and adjudged in the supreme court of the United States, commonly known as Wheaton's Reports; and they charge that the defendants have violated their rights by printing or publishing a certain book or books, entitled Condensed Reports of Cases in the Supreme Court of the United States: in consideration whereof the complainants pray, among other things, that the defendants may be restrained from the further threatening to print and publish, and from the further printing, publishing and selling, or exposing to sale the said Condensed Reports; that they may be decreed to account and pay to the complainants what shall be found coming to them; and, generally, for further relief, &c. The defendant, R. Peters, denies that the book called Condensed Reports is any violation of the complainants' rights; he further denies that the Condensed Reports contain anything that is the exclusive property of the complainants, or which, being also in Wheaton's Reports, is susceptible of being made the subject of literary property. He further avers, that by an act of congress, passed on the 31st of May, 1790, it is enacted that no person shall be entitled to the benefit thereof, unless he shall deposit a printed copy of the title of his book in the clerk's office of the district where he shall reside; shall publish it in one or more newspapers for four weeks; and shall, within six months after the publishing thereof, deliver or cause to be delivered to the secretary of state a copy of the same to be preserved in his office. He calls for proof from the complainants that these requisites of the act have been complied with. In the bill, as well as the answers, many circumstances are set forth which it is not necessary to repeat. Connecting the pleadings with the argument of the case, it may be generally stated that the complainants claim a copyright in the twelve volumes of Wheaton's Reports, under the statutes of the United States and at common law. The defendants deny that their book is a violation of the complainants' rights, if they have any, in Wheaton's Reports. They further deny that they have any such right, because they have not performed the requisites of the acts of congress of the United States on the subject of copyrights; because there is no common law copyright in the United States; and because Wheaton's Reports is not a work entitled to the benefit of copyright, either by the statutes or by the common law.

I shall first consider the complainants' right under a statute of the United States. The deficiency in their title most relied upon is that they did not, according to the requisition of the fourth section of the act of 1790, deliver or cause to be delivered to the secretary of state a copy of their book, to be preserved in his office; other omissions as to some of the volumes are also alleged. The question is, whether this injunction or direction to an author of a work seeking to obtain a copyright for it, is an essential part of his title, so that he cannot claim the benefit of the act unless he has complied with it. This is not a new question in this court. It arose in the case of Ewer v. Coxe [Case No. 4,584], decided in 1824, on the construction of the third section of the law of 1790, which stands, in this respect, on the same footing with the fourth section of the same act now under consideration. In that case the fact was admitted by the plaintiff that a copy of the record of the title of his work had not been published as the acts of congress required, but insisted that it was not necessary to vest a copyright in the proprietor of the work. In that case, therefore, the mere question of law was presented to the court on the construction of the acts of congress.

In the case now before the court, the fact, as well as the law, has been a subject of controversy between the parties; and the complainants have endeavored to show by evidence that they have complied with the terms and directions of the section of law in question. This question of fact must be first disposed of. Have the complainants made satisfactory proof that they did, within six months of the publication of their work, deliver, or cause to be delivered, a copy thereof to the secretary of state, to be preserved in his office? No official certificate, no rec-

ord of any such delivery has been produced, nor could such record be required, as we cannot say that any such record was kept, and the act of congress does not require it. The fact of delivery is open for proof by any legal and satisfactory testimony. With a view to establish it, the complainants have produced two witnesses—Mr. H. C. Carey, examined at the bar of this court, and Daniel Brent, Esq., whose deposition was taken at the city of Washington. In substance, Mr. Carey has testified that, in 1816, the first volume of Wheaton's Reports was published by his father, who then did business alone; the witness then did his father's business as his clerk; in 1821 he became a partner with him. When he did his father's business as his clerk, he, the witness, was conversant with his business as to copyrights; says they were in the constant habit of advertising, but not of keeping a copy or record of the advertisements until within the last ten years; he says the next step towards securing a copyright was to deposit a copy in the office at Washington. "We were always accustomed to do it, but never deemed it necessary to have a certificate from Washington, because we had never seen one. We supposed a record was kept at the office of the deposit of books, and could always be furnished if necessary. The earliest certificate we have is dated 1820. I don't doubt that a copy was deposited, although we have no evidence of it." On his cross-examination, he says that he has no recollection at all of a deposit of a copy of this work in the office of the secretary of state; that nine-tenths of the books they have deposited were put in the post-office, addressed to the department of state; does not pretend to recollect that this was the course in 1816. He cannot positively say that, with regard to all publications made by them, a copy was sent to the department of state. Does not know whether there was or was not a record kept in the department; has never inquired there, nor had any occasion to make the inquiry. He adds, that it was always their intention to send a copy of all works to the department of state whose titles were recorded in the clerk's office, but he won't pretend to say that it was always done.

In regard to the books in question, there is no direct proof of the delivery of any one of them to the secretary of state; there is no circumstantial proof of it—there is no proof of such an uniform custom of the trade in general, or of Mr. Carey's business in particular, from which we can infer it with that degree of certainty which constitutes proof in a court of justice. As to the books in question, Mr. Carey has no knowledge; he pretends to none. He has no more proved, or even conjectured, the delivery of Wheaton's Reports in the manner and for the purposes prescribed by the act, nor in any manner or for any purposes, than he has proved the same thing for all the many hundred works, in mass, published by him in the same period of more than ten years. But he does show us that the most satisfactory proof was in his power, and in the power of the complainants, and could be had simply by asking for. He got a certificate of the delivery of a work for copyright as early as 1820, seven years before the conclusion of Wheaton's Reports. He farther says that until Mr. Clay came into the office, there was no order in it as to sending certificates. This was in 1825, after which we are to presume that order did exist in the office on this subject; but no certificates are shown for the volumes of Wheaton's Reports published after this period. We may advert here to the certificates produced by the defendants, some of them of a very high number, upwards of one thousand; from which we may infer that these certificates were not unknown or unusual, when the copy was actually delivered to the secretary of state. The complainants ask what evidence they are to produce of this fact. If the law makes the delivery of the volume to the secretary a requisite, a necessary part of a plaintiff's title, he must prove it by legal and satisfactory evidence, when he founds a claim on this title in a court of justice. In this case, however, nothing is required of him that is impossible, unreasonable, or difficult; nothing but what has been done by others in at least a thousand cases, and by Mr. Carey himself, in many. He has obtained and produced evidence of the same nature as to the delivery of eighty copies under another law; he might have had the same evidence of the delivery of the one copy under the copyright law. If he chose to rely on transitory and uncertain testimony, it was at his peril. He got the certificate in the one case to obtain his salary; he should have got it in the other to secure his copyright. The deposition of Mr. Brent serves the complainants no better in this part of their case. He proves the regular deposit of eighty copies under the direction of the reporter's law, but says, that there does not appear any evidence that the successive volumes of said Reports, or copies of them, were deposited in the department of state by the maker or publisher of the same, agreeably to the provisions of the laws of congress for securing copyrights to authors, &c., though the memorandum of similar deposits was kept in the patent-office, a branch of the department of state, and not at the department. The deponent believes that, for several of the first years, the memorandum and giving receipts were often neglected during the period referred to. So far as a negative may be proved, I should conclude from this testimony that no copy ever was delivered in conformity with the provisions of the act of 1790; no evidence of it appears in the department, either by record, or by finding the book there, or of any other kind, although the memorandum of similar deposits was kept in the patent-office, a branch of the department of state. I will add, on this subject, that as the law makes it the duty of the secretary of

state to preserve the copy delivered to him in his office, we are bound to presume, in the absence of contradictory evidence, that he did perform his duty, and that the mere circumstance that the book is not found there is prima facie evidence that it was never delivered there.

This view of the evidence brings us to the conclusion that the complainants have failed to prove that within six months, or indeed at any time, they did deliver to the secretary of state a copy, or copies, of the work in which they claim a copyright, according to the provisions of the fourth section of the act of 1870, and it must now be taken that they did not so deliver a copy. I will here notice an argument which has been pressed on the court with great ingenuity and force. It is that after so long an enjoyment of the right, after so long a possession undisturbed, it should be presumed that everything was done which was necessary to be done to make it perfect; and that the evidence may have been lost by the lapse and accidents of time. Any presumption of this sort is much weakened by the negative testimony of Mr. Brent; it is also weakened, if not destroyed, by another circumstance. If the deficiency existed only in the earlier volumes of the work, which were published fourteen, fifteen, and sixteen years ago, the argument might receive some favor, although the lapse of time is not very considerable; but we find the same defect in relation to the last as the first volumes of this work; the same in 1827 as in 1816, which gives rise to another presumption, that the same course was pursued as to all of them, and a copy of none delivered, according to the fourth section of the act. However the possession may have aided the complainants in their application for an interlocutory decree of injunction, until hearing, the parties now stand on their legal rights.

This view of the evidence brings us to a much more important and difficult question, that is, to the very question decided in the case of Ewer v. Coxe [Case No. 4,584], and if that decision was right, it must prevail now. The counsel on both sides have accordingly directed their most strenuous efforts, on the one side to sustain, on the other to overthrow, the authority of that decision. In that case, the plaintiff claimed a copyright in a certain book, under the acts of congress of 1790 and 1802 for securing copyrights to authors, &c. The third section of the act of 1790 enacts that no person shall be entitled to the benefit of the act unless he shall, before publication, deposit a printed copy of the title of his book in the clerk's office of the district court; the section, after giving the form of the record to be made in the office, proceeds, "and such author or proprietor shall, within two months from the date thereof, cause a copy of the said record to be published in one or more newspapers printed in the United States, for the space of four weeks." The plaintiff admitted that he had not thus published a copy of the record of the title of his book; and the question was, whether it was a matter essential to his title—whether he could have a copyright without it. The question in the present case arises on the fourth section of the same act, but the principle of decision is the same in both cases. In deciding the case of Ewer v. Coxe [supra], the learned judge thought it material to settle whether the requisitions of the third and fourth sections of the act are merely directory, or whether their performance is essential to the vesting of a title to the copyright secured by the law; he recites the several sections of the act, and reasons upon them severally. He says, "It is perfectly clear from the language of the second section, that the proprietor can acquire no title to the copyright for the term of the first fourteen years, unless he shall deposit in the clerk's office a printed copy of the title of the book; for the section declares that he shall not be entitled to the benefit of this act unless he shall make such deposit." The judge, therefore, considers this to be a condition of the grant of the right; but he thinks that this condition cannot, "upon any grammatical construction, be extended to the requisition (he cannot avoid calling it a requisition) contained in the last sentence of the section, to publish a copy of the record, within the time and for the period prescribed." From this reasoning the judge concludes that if the title of an author to a copyright depended altogether upon this act, he should be of opinion that it would be complete, provided he had deposited a printed copy of the title of the book in the clerk's office, as directed by the second section; and that the publication of a copy of the same would only be necessary to enable him to sue for the forfeitures created by the second section. The judge then passes to the act of April, 1802, which is a supplement to the former act, and declares that every author or proprietor of a book who shall thereafter seek to obtain a copyright for the same, before he shall be entitled to the benefit of the act to which this is a supplement, he shall, in addition to the requisites enjoined in the third and fourth sections of the said act, give information by causing a copy of the record, which by the said act he is required to publish, to be inserted at full length in the title page, or in the page immediately following the title. As to this additional requisite, the judge remarks that it is obvious, the proprietor can acquire no title to the copyright unless it is complied with. He then reasons that as this new requisite is an addition to those prescribed by the third and fourth sections of the act of 1790, he must perform the whole before he can be entitled to the benefit of the act. This reasoning ap-

pears to be logical enough, and, as we shall see, the objection to it is that it is not legal —it is not technical. The judge says that the act—that is the act of 1802 (which we must observe)—will admit of no other construction; and that the meaning could not have been more clear and intelligible if the act, that is, the supplement, had declared that "the proprietor, before he should be entitled to the benefit of the act of 1790, should cause a copy of the record of the title to be published; and shall deliver a copy of the book to the secretary of state, as directed by the third and fourth sections of that act; and shall also cause a copy of the said record to be inserted in the title page," &c. The judge proceeds, "That this was the intention of the legislature, is strongly illustrated by the section of this act," &c. Of what act? what intention? Certainly the intention of the act of 1802, not of the act of 1790. The whole of the judge's reasoning is on the act of 1802, and its meaning, and not the act of 1790. If this be so, the objection made as to his opinion entirely fails in point of fact. The objection is that he was not authorized to give a construction to the first act of congress by the enactment of the second; that the legislature cannot give constructions to their own laws; that if in a second act the legislature has supposed the first had a meaning, which, in truth, it had not, this opinion of the legislature could not give such meaning to the first. To sustain this objection, a single sentence in the case of Postmaster v. Early, 12 Wheat. [25 U. S.] 148, has been relied on; the chief justice there says, "It is true that the language of the section indicates an opinion that the jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law does not make law." There is nothing but what is perfectly reasonable and familiar in this principle, and we can hardly suppose it was unknown to or disregarded by Judge Washington in the case of Ewer v. Coxe. When he assented to it in the supreme court he never imagined that he had overlooked or violated it on his circuit. Did he, in Ewer v. Coxe, adjudge that the publishing of the record of the title was essential to the right, under and by the act of 1790, because congress in 1802 had indicated that such was their opinion of its meaning? Did he adopt their meaning of the provisions of that act, and surrender his own? By no means; he says not a word about the meaning or construction of the first act, nor what congress had thought or indicated about it; he leaves it with the construction he had just before given to it. His opinion proceeds on his construction of the law of 1802, and of what was enacted by that law; he thinks that this law, not the law of 1790, makes the requisites of the third and fourth sections of the act of 1790 conditional and indispensable to the copyright; he finds that these requisites, by the law of 1802, are connected to and put upon the same footing with a newly created requisite, which is clearly essential to the right, and then therefore says, the whole must be performed before the author shall be entitled to the benefit of that act. But why must the whole be performed? Is it by virtue of a construction different from his own, which he puts upon the first act, in deference to the indication of the opinion of the legislature? Not at all. He says that it seems to him that the act, that is, the supplemental act, will admit of no other construction. That the meaning would not be the more clear, if the act, still the supplemental act, had declared, &c.; that is, had re-enacted the third and fourth sections of the original act, giving them the same force, effect, and character which is given to the new and additional requisite, of which it is expressly declared that it must be performed by the proprietor "before he can be entitled to the benefit of the act of 1790." In the whole argument of the judge, he confines himself strictly to the meaning and construction of the act of 1802, looking only to its own provisions and language for that meaning. He asserts that the intention of the legislature in passing the second act was to re-enact the third and fourth sections of the first, with the additional force given to the additional requisite, which he illustrates by a reference to the second section of the supplement. His reasoning on this subject is quite satisfactory to my mind, and does not interfere with the opinion of the supreme court in the case of Postmaster General v. Early [supra]. In this endeavor to show that Judge Washington has grounded his judgment in Ewer v. Coxe entirely on his construction of the law of 1802, I would not be understood to indicate an opinion that he would not have been perfectly correct if he had taken both acts together in forming his opinion of either. They are both on the same subject; the latter is a declared supplement to the former. We may consider them, to many purposes, as one act, and look to the whole in judging of the intention of any part, and in doing this we should not fall under the interdiction of the principle that "a mistaken opinion of the legislature concerning a law, does not make the law."

This being my understanding of the opinion of Judge Washington, I might rest upon it for my judgment on this part of the case, until it is overruled by a higher authority; but it is proper, at least it is not a work of supererogation, to proceed one step farther on this subject. If Judge Washington was mistaken in his construction of the act of 1802, and I am so in following him, how would the case stand on the law of 1790? May not the judge have been too strict in his grammatical construction of the provisions of that act? When a statute creates a right,

confers a benefit, a privilege on any individual, and at the same time, although not grammatically connected by being in the same sentence or clause, enjoins upon him to do certain things in relation to the right or privilege granted, can we separate them, unless they are expressly or clearly separated by the donor? May we sustain the one and suppress the other? Shall we do this by mere use of phrases? Is it enough to say that the first is a grant and the other directory, and therefore they are independent of each other? Because it is true that such cases may occur; that a statute may be so worded, that we may clearly see that something is directed to be done, which may be well separated from other enactments or provisions in the law, shall we therefore be allowed to get up a rule of construction for every case of a direction in a statute, and make a severance between a grant and everything directed to be done in relation to it, but not grammatically joined to it, merely by saying it is directory? May the favored individual take the benefit and neglect the duty? May he claim the grant as a vested right and refuse to do that which the donor, in the same instrument, enjoins upon him to do? To distinguish between an immaterial, disjoined direction in a statute, and one which is truly not so, we should look not so much to their positions in the statute, to a strict grammatical construction, for Lord Hardwicke, in 2 Atk. 95, disclaims it; but to the whole scope and design of the legislature as manifested by all the provisions of the statute. If the several parts form one whole, create a system, are members of one plan and design, they should all be taken together, to be of equal importance, to be dependent one on the other, to co-exist as one body or being. The duty imposed on the grantee is as imperative, is as much a part of the creation, as the grant to which it relates; it is a modification, a limitation, a regulation of the grant, by and according to which only it can be claimed or enjoyed. The public, the citizens of a community, acting by their representatives, confer upon an author certain privileges or rights for his exclusive benefit; and to protect him in the enjoyment of them, they impose certain penalties or give certain remedies against any person who shall violate these rights. But some protection is also due on the other side, that innocent and ignorant invaders of the privilege may not be involved in suits and penalties, by the want of accessible means of information of the subject and extent of the grant. With this wise and just object in their view the legislature, at the same time and in the same instrument by which they confer the privilege, enjoin or direct the person who would enjoy it to do certain things on his part, and among others to deliver a copy of his work to the secretary of state, to be preserved in his office, that all may know where to go to be correctly and precisely informed of what it is he claims; what is his right, and that thus they may avoid any infringement of it. This is an essential part of the scheme for the encouragement of authors, so as not to bring others innocently into trouble or, it may be, ruin. If this be so, shall we defeat or change the whole design because the different parts of it are not grammatically connected in one clause, or sentence or section; or by calling one part of it a grant and the other directory? Could it have been intended that the author should take and enjoy the benefit, and omit to do on his part what he is clearly and expressly enjoined to do, and this because it is called directory, and does not stand in this or that part of a section? Judge Washington thinks that to deposit a printed copy of the title of a book in the clerk's office is essential to the right, because it is grammatically connected with the words, "that no person shall be entitled to the benefit of this act unless," &c. In a subsequent part of the same section it is declared that the author shall cause a copy of the record to be published; and the next section enacts that he shall deliver a copy of his book to the secretary of state. The first requisite the judge thinks essential, for the reason given; and the two last not to be so, but to have reference only to the remedy, by reason of a grammatical construction of the clauses and their disconnection by position from the condition expressed in the preceding part of the section. I would rather look at the subject-matter of all the clauses and their connection with each other as component portions of one object or design. In this point of view the publication in the newspapers, and the delivery of a copy of the book to the secretary of state are, at least, as important, and more exact and diffusive in their information to the public as the deposit of a printed copy of the title in the clerk's office. In answer to the obvious reason and justice of this view of the law it is said that these provisions or requisites are but directory. How did this term get the restricted interpretation which seems to be fastened on it? How came the enactment of a statute to be thought less obligatory, because it is directory or directs something to be done? Blackstone says, "The directory part of a statute is that whereby the subject is instructed and enjoined to observe," &c. In the case of Postmaster General v. Early, the chief justice refers not merely to the several parts of the same statute, in construing a provision in it, but to the whole course of legislation on the subject, and he says he would avoid a construction which is opposite to the whole spirit of that legislation. He does not confine himself to sections or to single acts, but takes the whole of what the legislature have done on the subject to come at the meaning. The rule I would adopt in expounding the act of 1790 is the same that is taken by the court of king's bench in the case of University of Cambridge v. Bryer [16 East, 317]. Lord Ellenborough says, "I think the sound rule of construing any statute, as indeed it is of construing any

instrument, whether it be a statute, will or deed, is to look into the body of the thing to be construed, and to collect, as far as may be done, what is the intrinsic meaning of the thing." I would observe, in relation to the case of Ewer v. Coxe, that Lord Ellenborough admits that he would be obliged, by subsequent statutes, to put a perverse, and, what he should consider, an unnatural interpretation on the statute as originally passed; but he would endeavor to maintain the integrity of the original text, unvitiated by subsequent misconstructions. Le Blanc says "that construction may be materially aided and explained by the language of other statutes." He does not agree with Lord Ellenborough that he would follow a legislative misconstruction of a statute. For myself, I would deny that a legislature has a right to impose upon a court their construction of their statutes previously passed; it is for the court to construe the law; but it is, nevertheless, the right and duty of a judge to look into all the statutes made upon the same subject, to discover what was the intention and meaning of any of their provisions, thus to ascertain the true meaning and construction by his own judgment, and not by any subsequent legislative declaration of intention or construction.

In the statute of 8 Anne, c. 19, the requisition of a registry with the Stationers' Company is what is called directory, and is contained in a different section from that which confers the right; but the lord chancellor, in 2 Atk. 95, thought it was, nevertheless, essential to the right. The object of the registry, as declared by the statute, was to give such notice and information of the right as to prevent an infringement of it through ignorance; but the connection of this direction with the forfeitures is direct and explicit, which it is not in our act of 1790. I am aware that the king's bench, in Beckford v. Hood, 7 Term R. 620, held a different opinion as to the necessity of the registry. They consider it not to be essential to the right, but as only affecting the remedy, or forfeitures given by the statute. This seems to me to place the court and the parties in that suit in a singular predicament. The right claimed was under the statute, and not at common law, and, since the passing of the statute, could not be claimed according to the common law. But the party who had the right given by the statute had lost the remedy. He is therefore sent for this back to the common law. A statute, therefore, which has confessedly modified, restrained, limited the common-law right, has, nevertheless, left his common-law remedy as it was before, entirely unimpaired, unaffected by the statute. He comes, therefore, into court with the statute in one hand and the common law in the other, having a perfect right under neither; that is, his common-law right is curtailed by the statute and his statute remedy is taken away by the common-law construction of the statute. These are technical refinements which would occur only to the learned ingenuity. The author has forfeited his claim to the remedies of the statute by virtue of which he claims the right, by virtue of which he makes out that he has been wronged, because he has not obeyed the injunctions of the statute by which both the right and the remedy are given; but still he is allowed to retain the right and enforce it in another way, notwithstanding such a disobedience of the injunctions of the statute as have forfeited its remedies. I agree that all this, be it incongruous or not, may be done by the legislature if they choose, but I do not see why judges have so labored their wits to come to such a result by forced constructions, doubtful implications and tortuous reasoning. Would it not be more consonant with reason and convenience to send the party to his common-law right if he wishes a common-law remedy, and to enforce him his statute rights only by the means provided for it by the statute; and not permit him by this curious machinery to take all that is granted to him by the statute and disregard all that is required of him by the same statute. It is agreed that his common-law right, if he had any, is cut down by the statute, but yet there is no limit to its remedies; he may recover, under all and any circumstances, whatever he may persuade a jury has been his damages by the violation he complains of, thus depriving the citizens of that part of the statute which was enacted for their benefit and protection. Can we believe that such distinctions, introduced by the ingenious learning of judges, sometimes prone to be lawmakers, sometimes desirous of favoring some strong case of conscience, ever occurred to the legislature who made these statutes? Did they suppose that parts of their enactments, when they had not said so, were to be strictly carried into effect, and other parts were to be called directory, and therefore to be obeyed or not at the option of the party enjoined to perform them? When they declared that an author shall have a certain right, they also declared that he shall do certain things which are explicitly described. Did they suppose he might take the one and reject the other; that the only consequence of his disobedience would be to deprive him of the remedy provided for him by the statute, and leave him one which perhaps he likes better? Did they not believe that when he took the grant he bound himself to do all that was enjoined upon him by the same authority and the same instrument that created the grant, unless they were clearly separated and made independent of each other by the unequivocal language of that instrument? I have been tedious on this subject, but as I have ventured in this part of the case (I mean the construction of the act of 1790) to differ with the learned careful and excellent judge whose opinion in Ewer v. Coxe has been so

frequently referred to, as well as from the judgment of a majority of the judges of the supreme court of errors in the case of Nichols v. Ruggles, 3 Day, 145, I have thought myself bound to explain my reasons as I have done. As to Judge Washington, I would observe that having made up his opinion on the act of 1802, he may not have bent the force of his mind to that of 1790, or have come to a certain conclusion how he would have considered the case if it had stood on that act alone. The case of Nichols v. Ruggles was very fully argued by the counsel; but the opinion of the court appears to have been given instanter; no argument or reasonings accompany it; and in one particular, to wit, that "the copy to be delivered to the secretary of the state appears to be designed for public purposes and to have no connection with the copyright," it seems to me that the court are clearly mistaken. This will be a subject of remark hereafter.

The complainants have contended, with great earnestness and plausibility, that if there has not been a literal compliance with the requisitions of the fourth section of the act, they have been substantially performed for all the beneficial purposes intended by their enactment. In support of this position, that part of the deposition of Mr. Brent is relied on in which he has testified that eighty copies of each of the volumes of Wheaton's Reports, beginning with February term, 1817, were delivered to the department of state; he further testifies that all of the said eighty volumes were received under the act of congress giving a salary to the reporter for preparing and furnishing the said Reports. He further says that, according to his recollection, there has always been one or more complete sets of said Reports, from the time of their publication, in the said department of state. The argument assumes that the object of the act of 1790 in directing one copy of a book to be delivered to the secretary of state is the same with that of the reporter's act of 1817, in directing eighty copies of the Reports to be delivered there, one of which is for the secretary of state, and that that object was to form a library for the government, just as the statute of Anne imposes it on authors to present copies of their works to the universities; and that if this object is accomplished, it matters not whether it is done under and according to the fourth section of the law of 1790, or to the directions of the act of 1817. This construction of these laws has many difficulties to overcome. In the first place, it would be not a little singular that two acts of congress should direct the same thing to be done for the same purpose; and as both acts are unquestionably in force, the consequence would be that it is the duty of the author or proprietor of those Reports to deliver two copies of each volume for the supposed library, one under each act, and his delinquency will not be relieved by the argument. But in truth, the differences in the provisions and objects in these acts are manifest on the first inspection. The act of 1817 has nothing to do with the copyright either of books in general or of the particular works mentioned in it; nor has the provision of the fourth section of the act of 1790 any reference to a public library. The law of 1817 was passed for a special work and a special object, "to provide for the Reports of the decisions of the supreme court." It gives to the reporter an annual compensation for his services of one thousand dollars, and one of the conditions of this grant is that he shall deliver to the secretary of state eighty copies of the decisions, to be distributed in the manner, and to the public officers, designated by the act. One of these copies is to be given "to the secretary of state," and "the residue of the said copies shall be deposited in and become part of the library of congress." When a library is intended, it is thus expressly mentioned, and the library is not for the government of the department of state, but the library of congress, an establishment or institution well known to have no connection with the department, and to be kept in the capitol, at the distance of more than a mile from the office of the department of state. The reporter is bound to deliver these eighty copies, not in consideration of his copyright, as in England, where it is so much complained of, but in consideration of the salary paid to him by the United States. It is a purchase of his books. It has no connection with his copyright; he must deliver them whether he has a copyright or no. As to the object or purposes of these deliveries of a copy to the secretary under the respective acts; the one copy out of the eighty to be given to the secretary of state is for his personal use and accommodation, as the copies are that are to be distributed to the other secretaries, to the judges and other officers named in the act. He may take and use it where he finds it most convenient, and not in his office exclusively, being bound only to transmit it to his successor, who will hold it as he had done. Again, the reporter is not bound to see that the secretary, or any other of the officers named, gets the copy designed for him. He sends the whole to the department of state, and the due and proper distribution of them must be there attended to. Very different in all respects are the provisions of the copyright law. By them it is incumbent on the author or proprietor of a book to deliver one copy to the person designated to receive it, to wit, the secretary of state. The copy so delivered is to be preserved in the office; not as a gift to him, nor for his use, nor to be at his disposal beyond the limits of his office, but for an object connected with the grant of the copyright, and with nothing else. This copy must remain in the office; the secretary has no more right to remove it than any other person. It seems to me to be intended for the same purposes as the draw-

ings and models of machines in the patent-office; that our citizens may know where to go to be correctly informed what it is that is patented, and not to be led into an infringement of the right by an ignorance of what it is. I am confirmed in this view of the case by the testimony of Mr. Brent, who says that the memorandum of the deposit of books for securing copyrights was kept in the patent-office, a branch of the department of state, and it is fair to presume that the books were kept in the same place. This negatives the suggestion that these books were for the use of the secretary, or to form a library for the public. The patent-office could hardly be selected as the place for a public library. The use or purpose I have assigned to the delivery of this book is not only reasonable, but necessary for the safety of the citizens against the penalties of the act. There are numerous publications of which no information would be derived from the titles deposited in the clerk's office and published in the newspapers, such as extracts from poets or eminent prose writers, collections or abridgements of voyages, selected letters, &c., &c. The materials are common property, and exist in great masses; and it is only by an examination of the work that any one can know in what manner, or to what extent, the copyright author has appropriated them to himself. The intention of this provision, is, at least, much more likely to be that which I have suggested, than that it should have been for the use of the secretary or his department. The injunction is laid on the proprietors of all books for which a copyright is claimed, not only for the Reports of the decisions of the supreme court, which we may believe would be a desirable acquisition for that officer. But how can we make this supposition of many other books which have been or may be deposited for copyright? Was it intended to give so dignified a destiny to a spelling book, a Greek grammar, an edition of Hoyle's games, an apothecary's manual—as in the case of Ewer v. Coxe, a cooking-book, a song-book, a jest-book? We cannot, without something more than a smile, imagine that congress directed such works to be delivered to the secretary of state, for his special use, or for the formation of a public library. The delivery of the copy under our copyright law, as I have said, is analogous to that required by the statute of Anne, to be sent to the Stationers' Company, and not to the copies to be given to the libraries of the universities. It is true that nine copies of every work are to be sent, for the universities, to the Stationers' Company, as well as that which is to be preserved there, but none are sent to the universities but such as they shall demand; and they will not, therefore, have their shelves loaded with such stuff as I have alluded to, which will, perforce, be crowded into our public library, and must be preserved there, on the construction given to this provision by the complainant. Nor is it enough to say that if a copy be, in fact, in the office of the secretary of state, it is a compliance with the law for all the purposes of the law: it must be delivered in pursuance of the act, to be preserved there as the act directs, or the court cannot know that it is there, how long it has been there, or how long it will remain there. It may have been there at the period the witness speaks of—it may not be there the next day, for there is no obligation to keep it there, unless it were brought there by and in conformity with the act of congress, which makes it the duty of the secretary to preserve it in the office. I know that courts of equity have gone very far, and very frequently, in substituting what they have deemed to be the substantial compliance with the requisitions of the statute, for the actual requisitions. This has been especially done in relation to the recording acts and the statute of frauds. As to the first, they have felt authorized to accept proof of notice in fact of an actual personal knowledge for the recorded notice called for by the law. I think I shall be supported by the profession in saying that it is regretted that these departures from the enactments of the statutes were ever indulged. It has thrown into uncertainty that which the law had made certain; it has left to float in transitory and fallible evidence what the law had provided for by permanent immutable testimony. Nor can I perceive how it is that the legislature had not the same absolute authority to prescribe the kind of notice that shall be received by the courts of any fact, as that any notice should be given of it; nor how judges can dispense with the one more than with the other. What has been decided and done in such cases must remain; but I will never add another step to it.

If the complainants have failed to sustain their case by and under the acts of congress, the question occurs, are they supported in it by the common law? The question of the existence of a common law in the United States was particularly noticed, I believe, for the first time judicially, in the case of U. S. v. Worrall [Case No. 16,766]. In that case Judge Chase, the most learned constitutional as well as common-law lawyer, said, "In my opinion, the United States, as a federal government, have no common law; if, indeed, the United States can be supposed for a moment to have a common law, it must, I presume, be that of England; and yet it is impossible to trace when or how the system was adopted or introduced. With respect to the individual states, the difficulty does not occur. When the American colonies were first settled by our ancestors, it was held, as well by the settlers as the judges and lawyers of England, that they brought hither as a birthright and inheritance so much of the common law as was applicable to their local situation and change of circumstances. But each colony judged for itself what parts of the common law were applicable to its new conditions, and in various modes, by legislative acts, by judicial decisions, or by constant

usage, adopted some and rejected others. The whole of the common law has nowhere been introduced; some states have rejected what others have adopted; and there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application." He adds, as the result of these positions, "that the common law will always apply to suits between citizen and citizen, whether they are instituted in a federal or a state court." As regards the common law of the United States, as such, he says, "The United States did not bring it with them from England; the constitution does not create it, and no act of congress has assumed it. Besides, what is the common law to which we are referred? Is it the common law entire, as it exists in England; or modified, as it exists in some of the states; and of the various modifications, what are we to select—the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?"

In general, it seems to me that these principles and arguments cannot be controverted; they have never been judicially repudiated. When in a suit in the courts of the United States the common law has been received as the rule of decision, it has been received not as a law of the United States, prevailing with authority, through all equally and alike, but as the law of some particular state, by which the particular case was governed. The court does not adopt it as the common law of England, or of the United States, but as the law of the state which has adopted it and made it its own. The question, however, discussed by Judge Chase is much broader than that we have to entertain; it has not been contended, it could not be, that the whole common law of England, as it exists there, has ever been received in the United States, or in any one of them. Parts of it only have been adopted, and the evidence of such adoption is to be sought in "legislative acts, in judicial decisions, or constant usage." Has any such evidence—has any evidence of any description—been produced to show that what is asserted to be the common-law copyright in England, has ever been adopted by any one of the United States? Was it brought hither by our ancestors? Was it applicable to their local situation and change of circumstances? Or has it ever been so considered? A question meets us here at once—was it at the period of the migration of our ancestors a known, recognized and settled right even in England? What is its history—its judicial history? It is wrapped in obscurity and uncertainty. The general question was first discussed in 1760, long after the settlement of these colonies, in the case of Tonson v. Collins [1 W. Bl. 301], and no decision was given. In 1769 the celebrated case of Millar v. Taylor [4 Burrows, 2303] was argued, in which the subject was examined at great length. The great question was, whether the right of an author in his works, after publication, was a common-law right which always existed, and did still exist, independent of, and not taken away by, the statute of Anne? Three of the judges were in favor of the plaintiff's copyright; but their judgment was shaken violently, if not to the foundation, by the opposing argument of Judge Yeates. Some years after this decision, that is, in 1774, the question came before the house of lords in the case of Donaldson v. Beckett [2 Brown, P. C. 129]. Of eleven judges, eight to three were in favor of the common-law right, seven to four held that printing and publishing did not deprive the author of the right. Five thought that the action at common law was not taken away by the statute, and six were of an opposite opinion. Judge Kent, speaking of the judgment in Millar v. Taylor, says, "The court was not unanimous; and the subsequent decision of the house of lords in Donaldson v. Beckett, in February, 1774, settled this litigated question against the opinion of the king's bench, by establishing that the common-law right of action (if any existed) could not be exercised beyond the time limited by the statute."

Can we believe that this common-law copyright was a known, understood and settled thing in these colonies, brought here by our ancestors as their birthright, when down at least to 1774 the greatest lawyers in England were disputing about its existence there; and when even those who held that it did exist, could not agree as to what it was; nor how far it was or was not modified by the statutory provisions? Did our forefathers ascertain, adopt and regulate a right, which Mansfield, Yeates and Camden could not agree about or understand alike? Judge Kent adds his doubt on the question, when he says, "if any existed." As to its reception and adoption as part of the law of the United States, we cannot but observe that this learned and searching jurist, although treating very fully on the subject of copyright, gives no suggestion of the existence of a common-law right in the United States, or in any of them, nor of any other right than that which is granted by the acts of congress, to be enjoyed on complying with the terms prescribed by them. He particularly notices the agitation of the question in England, and, as we have seen, does not seem to consider it certainly settled there. Here he was directly upon the subject; and although he thinks the laws of congress afford an adequate protection, he does not intimate that an author has any beyond them. The efforts of those judges in England who have labored to preserve to an author the common-law right, together with that given to him by the statute, seem to me not to have sufficiently considered the uncertainty and inconvenience which would grow out of such a system. If these two rights are co-existent, the question occurs, who would take for a limited period, under the statute, what he may enjoy in perpetuity by the common law, or what is there to prevent an author from using the privileges and remedies of the statute, for the term

prescribed, and then going back to his common-law right? The injustice and incongruity of such a proceeding was admitted; and how is it avoided? These judges have said, and such was the final disposition of the question, if it be finally determined, that they would confine this common law within the limits of time prescribed by the statute. And where do they find their authority for this arrangement? The statute gives no warrant for it; the common law gives none. The limits imposed by the statute have relation expressly and only to the rights derived from it, and not to any right which was vested in an author, independent of the statute. If they may fetter the common-law right with this enactment, why did they not impose upon it all the other conditions of the law; and, in short, bring the whole right under and within the statutory provisions, and take the statute as a modification or substitute of any pre-existent rights, as a legislative declaration of what should be the whole law on the subject for the future? The judges themselves made themselves legislators when they thus regulated the enjoyment of a right by their own authority. We shall keep ourselves free from such embarrassments, and from the necessity of resorting to such expedients to escape from them, by resting the protection of authors upon the statutes expressly enacted for that purpose, and in believing that our legislature has done that which is just to them, and without inconvenience and danger to the public. This is the only right, the only protection that I can recognize; and I do not find that any other has ever been recognized here. No judicial decision or dictum of any court of the United States, nor of any court of a state, before or since the adoption of our present constitution, before or since the Revolution, has been produced on this argument, which recognizes the common-law right now claimed. On the contrary, before the whole power of legislating on this subject was surrendered to the federal government, many of the states did pass laws for the protection of authors; and if, as is unquestionable, the acts of congress have superseded all the state statutes on the subject, why have they not also superseded the state common law, if it ever existed? It certainly never had a more sacred and intangible character than the statute law; and the same policy which abrogated the latter, and transferred the whole subject to federal legislation, has swept away every other law inconsistent with that policy and legislation. It was intended to put the whole subject under the regulation of congress, and of congress only. But I have found, the counsel have found, no common law such as is now set up in the colonies, in the states, or in the United States, and if I am now to recognize it, I must first make it. As I have mentioned the state statutes on this subject, I should notice an argument much pressed from the use in them of the word "securing" and not "vesting" the right. This is too slender a foundation to raise an acknowledged pre-existing right upon. The same term is used in the act of congress of 1790, but was it an acknowledgment by congress that the United States, as such, had a common law which vested the right, and that they passed their law only to secure it?

Holding the opinion that the complainants have not entitled themselves to the aid and benefit of the statutes of the United States for the protection of authors, and that they have no right at common law which this court can recognize and protect, it is not necessary for me to give any opinion on the remaining question argued at the bar, whether the Reports in question may or may not be the subject of literary property. Let the complainants go to the law side of the court, and if they shall establish their right there, they may return and claim the aid of this court to protect that right. As it now stands, or were it even more doubtful, equity cannot interpose her extraordinary powers between the parties.

I am conscious of the importance of the questions which have been discussed in this cause, to the parties and to the public; and it is a real satisfaction to me to know that my opinion may be, and I presume will be, reviewed by another tribunal. Injunction dissolved, and the bill dismissed.

[On appeal to the supreme court the decree of this court was reversed. 8 Pet. (33 U. S.) 591.]

WHEATON (SHIEFFELIN v.). See Case No. 12,783.

Case No. 17,487.

WHEATON v. UNITED STATES et al.

[8 Blatchf. 474.] [1]

Circuit Court, S. D. New York. June 19, 1871.

CIRCUIT COURTS — FORFEITURES UNDER INTERNAL REVENUE LAWS—APPEALS—REVIEW.

1. This court has jurisdiction to review a judgment or decree of distribution made by the district court among various claimants of the informer's share in a forfeiture, after condemnation and sale of the forfeited property, and the claimants are, in such sense, parties to the proceeding, that they may invoke the exercise of that jurisdiction.

2. Whether the mode of such review, in the case of property seized on land as forfeited under the internal revenue laws, is by appeal or by writ of error, quere.

In this case, after a decree by the district court, condemning property seized on land as forfeited to the United States under the internal revenue laws, that court, on a controversy between two persons as to which one of them was entitled to the share of the informer in the proceeds of the property, made a decree in favor of one of them. [Case unreported.] The other brought a writ of er-

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

ror in this court to reverse that decree, and a motion was now made to dismiss such writ.

Robert D. Benedict, for the motion.
Daniel G. Rollins, Jr., opposed.

WOODRUFF, Circuit Judge. The power and jurisdiction of this court to review a judgment or decree of distribution among various claimants of the informer's share in a forfeiture, after condemnation and sale of the forfeited property, and that the claimants are, in such sense, parties to the proceeding, that they may invoke the exercise of that jurisdiction, seems to me established by the following cases: The Josefa Segunda, 10 Wheat. [23 U. S.] 312; Westcot v. Bradford [Case No. 17,429]; McLane v. U. S., 6 Pet. [31 U. S.] 404; In re Howard, 9 Wall. [76 U. S.] 175; Ex parte Zellner, Id. 244; Blossom v. Milwaukee R. Co., 1 Wall. [68 U. S.] 655; U. S. v. Twenty-five Thousand Gallons Distilled Spirits [Case No. 16,564], Nelson, J., June, 1868, affirming same case [Id. 14,282].

Whether the mode of review, in a case like the present, is by appeal or by writ of error, was not discussed on this motion. The distinction is not material to the principal question. On this subject, see U. S. v. Haynes [Id. 15,335] and U. S. v. Nourse, 6 Pet. [31 U. S.] 470, 495. The motion to dismiss the writ of error is denied.

WHEATON (WASHINGTON v.). See Case No. 17,239.

Case No. 17,488.

In re WHEELER.

Ex parte CARTER et al.

[2 Lowell, 252.] [1]

District Court, D. Massachusetts. May, 1873.

CONTRACT MADE BY AGENT—PROOF OF RATIFICATION—BANKRUPTCY OF PURCHASER—SET-OFF.

1. A., doing business in Worcester, Mass., made a contract with B.'s agent in New York (B. living in Philadelphia) to buy a large quantity of iron, deliverable in monthly instalments, on credit. The contract was subject to B.'s ratification. A day or two afterwards A. called on B., who told him he had received the order and entered it on his books. The parties afterwards corresponded about the contract, as subsisting. *Held*, there was sufficient evidence of ratification.

2. Before the time came for delivering the first lot of iron under this contract, A. failed, and notified his creditors that he could only pay twenty-five per cent of the amount of his debts. At the meeting of creditors at which this offer was made, C. told B.'s agent that he would take the iron on A.'s behalf; but he did not offer to pay cash for it. *Held*, B. was not bound to accept this offer.

3. Afterwards B.'s agent, with authority, wrote A. that B. would not deliver the iron unless his old debt were paid. A. took no notice of this letter, and afterwards went into bankruptcy. Neither A. nor his assignees in bankruptcy ever offered to pay cash for the iron, or demanded its delivery; and there was no evidence that they were ever able or prepared to pay for it. *Held*, the letter of B.'s agent was not, under these circumstances, such a repudiation of the contract as would authorize A.'s assignees to set off the value of the contract against B.'s debt provable in bankruptcy.

[Cited in Ex parte Pollard, Case No. 11,252.]

The bankrupt was a manufacturer of iron at Worcester, Mass., and bought large quantities of pig-iron of the firm of W. T. Carter & Co., of Philadelphia. At the time of his failure he owed them a balance, represented by notes and accounts, amounting to about $13,000, which they offered for proof against the estate. The assignees claimed a set-off for damages, arising out of the alleged breach of a contract by these creditors to sell the bankrupt five hundred tons of iron. The evidence was, that, on the 25th January, 1872, John H. Thompson, of New York, an iron broker, agreed, on the part of Carter & Co., to sell to Wheeler five hundred tons of Coleraine pig-iron, deliverable in lots of one hundred tons at Hoboken, in New Jersey, to be shipped thence to Worcester, by way of Norwich, on the twenty-fifth days of February and March, the twentieth days of April and May, and the fifteenth day of June, respectively, on credit. Thompson made a memorandum of the sale, which was agreed to be sufficient to comply with the statute of frauds, if he was authorized to make it. The terms of his agency were, that he should sell iron for the plaintiffs, subject to their approval. He at once sent them notice of the sale; he testified that he did not think he had ever received any notice of its acceptance. One of the plaintiffs testified that it had never been formally accepted. Wheeler deposed that he saw Mr. Carter a day or two after the sale, and Carter said it had been received and entered on their books. Towards the middle of February, and before the thirteenth, Wheeler failed, and called a meeting of his creditors, which was held at Worcester on the fifteenth, when he made an offer of twenty-five cents on the dollar in settlement of his debts. Thompson attended this meeting on behalf of the plaintiffs, and refused this offer. While there, another creditor, friendly to Wheeler, offered to take, on Wheeler's account, the iron which was to be delivered under the contract, and to be personally responsible for the price. Thompson refused to send it to him unless he would become answerable for the old debt; and at the same interview he told Wheeler that he must pay cash if he took the five hundred tons. Letters passed between the parties which show that the plaintiffs were very much dissatisfied with the statement of Wheeler's affairs. On the 19th of February, Thompson wrote Carter & Co., among other things: "Mr. Wheeler says he will be able to take the five hundred tons of iron at the periods

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

agreed upon, and I have told him if he does so he will have to pay cash for it, as the iron is delivered at Hoboken." On the 23d of February, Thompson wrote to Wheeler, among other things, that Carter & Co. positively refused to let him have any part of the five hundred tons, unless the iron already had by him should be paid for in full. Afterwards, in March or April, Wheeler saw Carter & Co. in Philadelphia, and they offered, as he testified, to make a considerable allowance for this contract, as part of an arrangement for settling the old debt. But the negotiation failed. Wheeler petitioned for adjudication of bankruptcy April 12, 1872. There was no evidence, excepting as above given, that either he or his assignees had offered to take or pay for the iron, or that any thing further had been said or done about it. Iron rose largely in price after January 25; and it was agreed that, if the plaintiffs were liable in set-off or mutual credit, the amount of damages was $5,500.

T. L. Nelson, for assignees.

There is sufficient evidence that the contract was ratified by Carter & Co., and this is equivalent to previous authority. Browne, St. Frauds (2d Ed.) 370. The letters prove this. Id. §§ 346, 347, 357, 359; Coddington v. Goddard, 16 Gray, 436; Blackb. Sales, 115. We admit that, upon Wheeler's insolvency, the sellers might withhold the goods until they received the price. But as they declared beforehand that they would not deliver, it was not necessary for Wheeler or his assignees to tender the price. A tender need not be made, if it would be fruitless. Chit. Cont. (7th Am. Ed.) 443; Cook v. Doggett, 2 Allen, 439.

P. Emory Aldrich, for creditors.

We deny that any contract was made. But, if made, Carter & Co. could retain the iron until paid for, after the failure of Wheeler had annulled the agreement for a credit. Arnold v. Delano, 4 Cush. 33; Bloxam v. Sanders, 4 Barn. & C. 941; Bloxam v. Morley, Id. 951. In Bloxam v. Sanders, Bayley, J., says that the seller's right is something more than a lien, and that payment or tender of the price is a condition precedent to the buyer's right of possession. See Tooke v. Hollingworth, 5 Term R. 215. Carter & Co. never repudiated the contract. They were never called on to fulfil it. There is no sufficient evidence that either Wheeler or his assignees were ever in a position to fulfil their part, or ever intended or offered to do so; and it is impossible to say that Carter & Co. would not have performed their part if duly requested.

LOWELL, District Judge. It is admitted that a contract was entered into between Wheeler and Thompson, and a sufficient memorandum made of it, if the bargain was ever ratified by Thompson's principals. It appears that Thompson wrote them that Wheeler would call on them in Philadelphia; and that he did call, and they told him the order was received, and entered on their books. This is a ratification; because they would have no occasion to enter on their books a rejected offer. But, besides this, there is ample evidence that both parties considered it a binding and existing contract in February.

The real question in the case is, whether there has been a breach on the part of Carter & Co. It is agreed that, upon the failure of the buyer, they had the right to withhold the goods until the price should be paid or offered; and that if cash were offered or tendered, or if the want of tender was excused or dispensed with, and the cash was ready for them, they must go on and deliver the iron. The point of controversy is, whether an offer was made, or if not, whether it was waived. The assignees contend that, before the time for the first delivery came, the sellers rescinded the contract, and so left nothing for the buyer to do but to recover his damages. It was decided in the queen's bench in England, in 1853, that if one party to an executory contract repudiates it before the time of performance arrives, the other party may have his action immediately: Hochster v. De La Tour, 2 El. & Bl. 678. This was thought, at the time, to be a novel doctrine; but it has been followed by the other courts: Danube, etc., Co. v. Xenos, 13 C. B. (N. S.) 825; Frost v. Knight, L. R. 5 Exch. 322; s. c., in error, L. R. 7 Exch. 111. The leading case certainly commends itself to the judgment. A courier was engaged in April to serve for three months from the first of June; and in May the employer wrote him that he should not make the journey, nor need his services. The courier thereupon engaged with another traveller; but the new service was to begin at a later day than the first of June, and he sued the former employer in May for the value of the time thus lost, and it was held he might recover his damages. The case was classed with those in which the promisor has incapacitated himself from keeping his engagement; as if, having promised to marry A., he marries B. before the time has come for fulfilling his engagement with A., an action lies at once by the latter.

But it was found that these executory breaches, so to say, could not, in fairness, be made to apply in all cases. In Avery v. Bowden and Reid v. Hoskins, which were so much alike that they were argued and decided together in the court of error, the facts were, that a charterer was bound to furnish a cargo of grain at Odessa, to be shipped to England, at a time when war between Russia and Great Britain was imminent. The charterer's agent at Odessa notified the master of the vessel, immediately on his arrival at the port, and before he was bound to furnish a cargo, that he should not furnish it;

but the master insisted that he would wait during the time allowed by the contract; and, before that time had expired, war was declared, and performance of the contract became illegal. It was held that no action could be maintained by the ship-owner. 5 El. & Bl. 714, 729; 6 El. & Bl. 953. Upon a review of the decisions above referred to by Cockburn, C. J., in a recent case, he finds the law of England to be, that, when the promisor has announced his intention not to perform the contract, the promisee may treat the notice as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible; and in this case he keeps the contract alive for the benefit of both parties, and remains liable to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, but also to take advantage of any supervening circumstances which may justify him in declining to complete it; or he may treat the notice as a breach, and have his action at once. Frost v. Knight, L. R. 7 Exch. 112, 113. In Benj. Sales, p. 424, the English rule is stated thus: "A mere assertion that the party will be unable, or will refuse, to perform his contract, is not sufficient: it must be a distinct and unequivocal, absolute refusal to keep the promise, and must be treated and acted on as such by the party to whom the promise was made."

I have given the result of these cases, because they go farther than any that I have seen in this country to support the contention of the assignees; and I recognize a certain equity in their claim, which I should be not unwilling to make available, if the law would permit it. But it seems impossible to bring it under even the most advanced of the decisions.

Wheeler had broken his implied obligation to keep his credit good, and was notoriously and deeply insolvent, when the letter of the 23d of February, which is said to be, or to announce, the breach of contract by Carter & Co., was written. There is no satisfactory evidence that he or his assignees have since, at any time, been able or willing to carry out the contract which the law substituted for the original contract, that is, to pay cash on delivery, or that they ever told Carter they were ready. There was some talk about it at the meeting of the creditors at Worcester in February; but no offer was made which Carter & Co. were bound to accept, because the offer was not to pay cash. Judging from the evidence, the letter of Thompson to his principals, in which he writes that Mr. Wheeler says he shall be able to take the iron, refers to this conversation; for there does not appear to have been any other, nor any letters from Wheeler. I consider that the whole meaning of that letter, with the other evidence, is this: that Wheeler hoped to settle with his creditors, and go on in his business, and take the benefit of this valuable contract. But he never was in a position to do so. I agree that, in the letter of 23d February, Thompson, acting for the plaintiffs, and by their authority, undertook to annex a condition to the delivery of the iron, which the law did not impose nor permit; but I regard this as an offer, which, under the circumstances, Wheeler should have taken some notice of, if he intended to insist on the renewal of the contract, or to hold it to be definitely renounced by Carter. This letter could not have reached him at Worcester until the day before the first lot of iron should have been paid for at Hoboken; and there is no evidence that it affected his conduct in any way. I think it is to be considered as part of an unfinished negotiation to renew the contract, and it certainly is not an unconditional refusal to perform it. We must remember, among the other facts, that it was not at this time apparent how advantageous the contract would be for the buyer.

I feel myself constrained, therefore, to decide against the assignees, for several reasons: 1. The sellers did not make an absolute and unequivocal renunciation of the contract. 2. The buyer did not accept or act upon the notice as being such a renunciation, or inform the sellers that he took it so. 3. It is not proved that the buyer was able and willing to perform his part of the contract. 4. He never notified such readiness. If the case turned merely on the consideration whether the one party or the other was bound to take the first step to reinstate the suspended contract, the judgment ought to be the same. The contract was suspended by the misfortune of Wheeler; and it was for him to give a clear and unequivocal notice of his intention to pay cash, before the sellers would be bound to manufacture the iron, or to send it to Hoboken. It cannot be that Carter & Co. must make an investment of $16,000 on the chance of an insolvent man becoming solvent, or being able to do by the aid of others what he confessedly could not perform himself. But this is only one of several reasons why the assignees must be held not to have been put by Wheeler, and not to have put themselves, in a position to claim damages on account of this contract.

If it were proved, or could be taken for granted, that the letter prevented Wheeler from attempting to pay for the first cargo or lot of iron, which is perhaps a question of some nicety, yet it surely ought not to affect his assignees. They could not have supposed that they were expected to pay the old debt as a condition precedent to receiving the iron, and they should have made an offer, and put the other party to his election to fulfil or reject. I cannot think, therefore, that in any event the damages could be assessed for the whole value of the contract. But, upon the evidence before me, I decide that there has been no breach at all. Debt admitted to proof in full.

Case No. 17,489.

In re WHEELER et al.

[16 N. B. R. 277; 10 Chi. Leg. News, 18; 5 N. Y. Wkly. Dig. 202; 5 Cent. Law J. 368.] [1]

District Court, D. Indiana. Oct., 1877.[2]

INVOLUNTARY BANKRUPTCY—DISCHARGE.

In voluntary proceedings, creditors whose debts were contracted prior to January 1, 1869, are not to be counted in ascertaining the number and value of creditors consenting to a discharge in the absence of assets. The assent of such a creditor is a nullity.

[In the matter of Edward E. Wheeler and James D. Riggs, bankrupts.]

Application for discharge. The bankrupts' estates paid nothing to their creditors. They applied for a discharge, and procured the assent of one-third in value and one-fourth in number of the creditors whose claims had been proven. One of these was Mrs. Eliza Wheeler, whose claim was for seven thousand dollars, of which four thousand dollars had been contracted prior to 1869. The creditors opposing a discharge applied to prevent it by claiming that since, under the law, a creditor whose claim was made prior to 1869 could not oppose a discharge, it followed that the creditor could not availably consent to a discharge. Mrs. Wheeler's claim in full only made the required value of assent.

P. Hornbrook, for bankrupts.

Iglehart & Son and Denby & Kumler, for creditors.

GRESHAM, District Judge. The bankrupt act of 1867 [14 Stat. 517], as amended July 27, 1868 [15 Stat. 227], and July 14, 1870 [16 Stat. 276], furnishes the provisions which constitute section 5112 of the Revised Statutes, which reads as follows: "In all proceedings in bankruptcy commenced after the first day of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors, to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case, at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to the 1st of January, 1869." There is here no distinction made between voluntary or involuntary cases. In all proceedings in bankruptcy the discharge of the bankrupt is made to depend upon the payment of fifty per cent., or, failing that, upon the assent of a certain proportion in number and value of his creditors, who have proved their claims and to whom he is bound as principal. A restriction is placed upon the creditors; it is only those whose claims accrued after January 1, 1869, whose assent is indispensable; none whose debts were contracted prior to that date are to be taken into the account. Their assent is not necessary, and they are not to be counted for the purpose of determining whether the requisite number and value have assented. The provision does not apply to them. The amendment of 1874 [18 Stat. 178] makes important changes in this provision as to discharges. It declares that in compulsory or involuntary bankruptcy, no provision of the law as it then stands, requiring the payment of any proportion of the debts of the bankrupt or the assent of any portion of his creditors, as a condition of discharge from his debts, shall apply. But the involuntary bankrupt may, if otherwise entitled, be discharged by the court in the same manner, and with the same effect, as if he had paid the required per cent., or as if the requisite number and value of creditors had assented. It changes the terms of discharge in voluntary cases, by reducing the required payment to thirty per cent. And it declares expressly that "the provision in section 33 of said act of March 2, 1867, requiring fifty per centum of said assets, is hereby repealed." The amendment concludes with a repeal of all acts and parts, or acts inconsistent with that act, June 22, 1874 [18 Stat. 178]. The effect of this repeal, so far as the involuntary class of bankruptcy proceedings is concerned, is clear enough. Indeed, without words of repeal, the substitution of new provisions covering the whole ground of the former legislation on that subject, would operate as a repeal by implication. The effect of the express repealing language is confined to the repeal of so much of section 33 (now section 5112, Rev. St.) as requires fifty per cent. Nor will it be easy to show any inconsistency between the last clause of section 5112 by which the creditors whose debts were contracted before the 1st of January, 1869, are excluded from the provisions for payment and assent, and any of the provisions of the amendment. That clause of exclusion stands unrepealed, and is in full force to-day. It follows, therefore, that a bankrupt who finds himself unable to pay thirty per cent. on the debts proved against him, is not required to obtain the assent of those creditors who became such before January 1, 1869. The assent of those of later date is alone necessary. To apply these views to the case in hand. The bankrupts, Edward E. Wheeler and James D. Riggs, having applied for discharges, and being unable to show a sufficiency of assets, as required by the act, are attempting the alternative of getting relief by means of the assent of creditors. If they are restricted to the assent of creditors whose claims originated after 1869, the re-

[1] [Reprinted from 16 N. B. R. 277, by permission. 5 N. Y. Wkly. Dig. 202, contains only a partial report.]

[2] [Reversed in Case No. 17,491.]

quired number and value have not assented; and to escape this dilemma they present the assent of a single creditor whose claim is of earlier date. With this assent, if admitted, the scale is turned in their favor. But this cannot be allowed. The act imposes upon creditors of this class a disability. The provision for paying thirty per cent. is in express language declared not to apply to them. They are not to be counted in ascertaining the number and amount of which the majority are required to assent. If they do not constitute any part of the quorum, they have no right to vote yea or nay. The creditors of later date alone constitute the body of voters. They can assent to the discharge, or, by withholding their assent, can prevent the discharge. This is their exclusive privilege, and that privilege cannot be interfered with by the creditors of an earlier date. For these reasons the assent of such a creditor is simply a nullity, and the discharge must be refused. An order will therefore be entered that unless the bankrupts do, within twenty days, procure the assent of the required number and amount of creditors whose claims have originated since January 1, 1869, the petition for discharge do stand dismissed, with costs.

[On appeal to the circuit court the above decree was reversed. Case No. 17,491.]

Case No. 17,490.

In re WHEELER et al.

[18 N. B. R. 385; 26 Pittsb. Leg. J. 84.] [1]

District Court, S. D. New York. Sept. 20 1878.

BANKRUPTCY—ASSIGNEE'S LIABILITY FOR RENT—EXECUTION—LIENS.

1. Where the marshal kept some of the property seized by him on premises which had been leased by the bankrupt, *held*, that the landlord was entitled to nothing by virtue of the covenants of the lease unless the assignee elected to take the lease and thereby became in fact the assignee thereof; that the estate was liable to the landlord before the appointment of the assignee, not on the ground of contract, but upon equitable considerations, for a benefit conferred upon the estate, and the allowance is to be measured by the benefit thus conferred; ordinarily it is the value of the premises for storage of the goods, unless the circumstances are such as to make a greater expense proper.

2. An execution against the bankrupts was placed in the hands of the marshal previous to the commencement of the bankruptcy proceeding. *Held*, that this created a lien in the creditor's favor which is not affected by the bankruptcy, that it was immaterial whether the goods were the property of one of the partners individually or of the firm jointly, and that such lien is superior to that of the marshal for his charges in the proceedings other than those charges which relate to the goods upon which the lien attaches.

3. A judgment creditor does not acquire a lien protected under the bankrupt law by commencing proceedings supplementary to execution; until the appointment of a receiver, his right is not a lien within the meaning of the bankrupt law [of 1867 (14 Stat. 517)].

[In the matter of George M. Wheeler and W. Bailey Lang, bankrupts.]

J. F. Miller, for assignee.

T. M. Wheeler and Wm. Tracy, for landlord.

C. W. Bangs, for execution creditor.

CHOATE, District Judge. This is a motion to confirm the report of the register as to the disposition to be made of certain funds in the hands of the marshal. They are claimed by the assignee of the bankrupts as belonging to the general estate of the bankrupts, and by John Sedgwick, assignee of another bankrupt, as the proceeds of property on which he had acquired a specific lien prior to the bankruptcy, and a claim is made against them by the landlord of the premises in which some of the property was held by the marshal, this claim being for rent or the use and occupation of the premises.

1. As to the claim of the landlord, the register has allowed him for the use and occupation of the premises by the marshal eleven hundred and twenty-five dollars for four months' occupation, being at the rate of the rent stipulated for in the existing lease between the bankrupts and the landlord. This is error. The landlord is entitled to nothing by virtue of the covenants of the lease, unless the assignee elects to take the lease and thereby becomes, in fact, assignee of the lease. The estate is liable to the landlord before the appointment of an assignee, not on the ground of contract, but upon equitable considerations for a benefit conferred upon the estate, and the allowance to be made is measured by the benefit thus rendered, and ordinarily it is the value of the premises for storage of the goods, unless the circumstances are such as to make a greater expense than for storage proper, either for present or future purposes of sale, or for some other purpose. In re Lucius Hart Manuf'g Co. [Case No. 8,592]. This part of the report must therefore be set aside. The question of the benefit to the estate has not been tried nor determined.

2. It is admitted that Sedgwick, assignee, as execution creditor of Wheeler & Lang, had a lien by levy of execution, prior to the commencement of the bankruptcy proceeding, on a part of the goods which the marshal has sold under direction of the court, the net proceeds of which are three hundred and eighty-eight dollars. This claim is now conceded by all parties.

3. It is also clear that Sedgwick, assignee, is entitled to the further sum of seven hundred and ninety-three dollars and eighty-four cents, the proceeds of personal property, office furniture, etc., which were in the possession

[1] [Reprinted from 18 N. B. R. 385, by permission. 26 Pittsb. Leg. J. 84, contains only a partial report.]

of one of the bankrupts at the commencement of the bankruptcy proceedings. An execution against the bankrupts had been previously put into the hands of the marshal. This has been held to create a lien in his favor which is not affected by the bankruptcy. In re Hull [Id. 6,857]. It is not material whether the goods were the property of Wheeler or of Wheeler & Lang jointly. They were in either case bound by the execution except as against bona fide purchasers, and the proceedings for the conversion of the goods into money have been without prejudice to the rights of the execution creditor.

4. The rest of the money in the hands of the marshal is the proceeds of the collection of accounts. The execution creditor claims a lien thereon by virtue of proceedings supplementary to execution, which were commenced prior to the bankruptcy, but which never proceeded to the appointment of a receiver, because of the filing of the petition in bankruptcy and the injunction issued thereon restraining the further proceedings under the execution. This claim must be disallowed. It has been repeatedly held, as I understand in this court, that a judgment creditor does not acquire a lien protected under the bankrupt law by commencing proceedings supplementary to execution; that until the appointment of a receiver his right, though described as an inchoate lien (16 N. Y. 544), is not a lien within the meaning of the bankrupt law.

5. The judgment creditor claims that some part of the accounts collected were the proceeds of the sale of goods in possession of the bankrupts, or one of them, at the commencement of these proceedings in bankruptcy, and afterward sold by Wheeler, one of the bankrupts, in violation of the terms of the injunction of this court. If this is so, it would seem that the lien of the execution which attached to those goods would attach to their proceeds now in the hands of the marshal. But on this point the register has not reported, and the matter must be referred back for further testimony, if desired, and for a further report as to the sources from which the remaining moneys, one thousand six hundred and twenty-one dollars and thirty-six cents, were derived.

6. The claim of the judgment creditor, by virtue of his specific lien under the execution is superior to that of the marshal for his charges in the bankruptcy proceedings other than these charges which relate to the goods upon which the lien attaches. His charges for service of warrant, etc., must come out of the funds belonging to the general estate of the bankrupt, and not out of the goods on which the judgment creditor has a lien. Report referred back for further proceedings before the register.

[For hearing on an application for the discharge of George M. Wheeler, see 5 Fed. 299.]

Case No. 17,491.

In re WHEELER et al.

[11 Chi. Leg. News, 407; 19 N. B. R. 258; 8 Reporter, 674; 4 Cin. Law Bul. 655.] [1]

Circuit Court, D. Indiana. Sept., 1879.[2]

BANKRUPTCY—DISCHARGE—CONSENT OF CREDITORS.—WHEN LAW APPLIES.

The amendment of 1874 [18 Stat. 178], relating to the terms under which a bankrupt is entitled to his discharge, was intended to cover cases of voluntary as well as involuntary bankruptcy, and to bring within its terms the circumstances under which, as well in the one case as in the other, the bankrupt could or could not be discharged. Therefore, in any case where there were no assets equal to thirty per cent., if the bankrupt secured the assent of one-fourth of his creditors in number and one-third in value, he is entitled to his discharge, without regard to the time when the debts were incurred.

[Cited in Re Townsend, 2 Fed. 562.]

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

[In the matter of Edward E. Wheeler and James D. Riggs, bankrupts. An application was made for a discharge, and upon its refusal in the district court (Case No. 17,489) an appeal was taken to this court.]

Mr. Hornbrook, for petitioners.

Palmer & Iglehart, for the creditors.

DRUMMOND, Circuit Judge. The bankrupts in this case made an application to the district court to be discharged from all debts provable against them under the bankrupt act; and the discharge was refused for the reason that it was held by the district court, that under the amendment of June 22, 1874, to the bankrupt law of 1867 [14 Stat. 517], they were restricted to the assent of creditors whose claims originated after the first of January, 1869. The court held that the proviso in the 5112th section of the Revised Statutes still operated upon the amendment made in 1874, and the question in the case is, whether the act of 1874 left that proviso in full force, or whether it was repealed by the later act. If repealed then it is conceded that the bankrupts had complied with the law in force at the time of their application, and were entitled to a discharge. It is undoubtedly a question of considerable difficulty, and upon which different opinions have been entertained by judges in administering the law. It is, perhaps, unnecessary to refer to the previous legislation upon the subject. It is sufficient for our purpose to consider the section of the Revised Statutes, already referred to as modifying the law upon the subject, at the time that the amendment of 1874 was adopted. The 5112th section of the Revised Statutes was as follows: "In all proceedings in

[1] [8 Reporter, 674, and 4 Cin. Law Bul. 655, contain only partial reports.]

[2] [Reversing Case No. 17,489.]

bankruptcy, commenced after the first day of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to 50 per centum of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, 1869." It will be observed that this section applies to all proceedings in bankruptcy without distinction, and it operates by way of prohibition upon the court, declaring that no discharge shall be granted under certain circumstances; the assets must be equal to 50 per cent. of the claims of a certain character, or the assent in writing of a majority in number and value of his creditors, under the terms there named, must be filed; and then there is a declaration or proviso that this shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to the first day of January, 1869.

The 9th section of the amendment of the act of June 22, 1874, is as follows: "That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner, and with the same effect as if he had paid such percentage of his debts, or as if the required proportion of his creditors had assented thereto; and in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to 30 per cent. of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number and one-third in value, and the provision in section 33 of said act of March 2nd, 1867, requiring 50 per centum of such assets, is hereby repealed." It will be observed that this section, as to cases of voluntary bankruptcy, is like the section in the Revised Statutes, which has been referred to and operates by way of prohibition, stating that no discharge shall be granted to the debtor under certain circumstances; and, whereas, by the section of the Revised Statutes the assets were required to be equal to 50 per cent., in this amendment it is only necessary that they should be 30 per cent.; and as by the section in the Revised Statutes the assent of a majority of the number and value of creditors was required, in this amendment the assent of one-fourth in number, and one-third in value was declared to be sufficient, and as to cases of involuntary bankruptcy, the amendment declares that the payment of any proportion of the debts, or the assent of any portion of the creditors was unnecessary.

It is a circumstance which should not be overlooked in the consideration of this question, that the last clause of the 9th section of the act of 22d of July, 1874, expressly repeals a provision in section 33 of the act of March 2, 1867, requiring 50 per centum of the assets, and it seems an argument of weight, that where an amendment repealed expressly, a particular provision of a previous law, and did not repeal the proviso in the section of the Revised Statutes, to which reference has been made, that it was intended by the law-maker that the latter should remain in force. But we can look to the particular phraseology of the last clause of the section of the Revised Statutes in order to determine whether or not it was the intention of congress it should remain in force, or whether on the other hand it was its purpose then to legislate fully, both as to voluntary and involuntary bankruptcy. The statement in that clause is that "this provision shall not apply" to certain debts—the provision as it was then declared to exist. Now, was it the intention of congress, after declaring in the 9th section of the act of June 22, 1874, under what circumstances parties, in cases as well of voluntary as of involuntary bankruptcy, should be discharged, that there was to be added to that part of the section which refers to the discharge of voluntary bankrupts, the last clause of the section of the Revised Statutes which has been referred to? If so, then we should have to say there was incorporated in the amendment that language, and that congress intended to say, "This provision shall not apply to certain debts" —meaning thereby the provision contained in the amendment of 1874. It would seem, in the absence of any express declaration to that effect, that when congress had changed the law as it stood in relation to discharges in voluntary cases that if it had intended that the provision in the original law should still adhere to the law as amended, there would have been some clear declaration or intimation of that purpose. Undoubtedly it was not necessary in terms to repeal that part of the previous act or the amendment requiring 50 per cent. of the assets; because the first part of the 9th section having legislated upon the cases of involuntary bankruptcy, as to that the general repeal in the 21st section of the act of June 22, 1874, would have operated upon cases of involuntary bankruptcy—but I am not prepared to admit that the mere fact there was this express repealing clause is conclusive that

congress did not by the amendment as to voluntary cases, intend to repeal the provision in the section of the Revised Statutes referred to. On the contrary, admitting that the subject is one of difficulty, it seems to me that the fair construction of the amendment of 1874 leads to the conclusion that congress intended to cover the case of voluntary as well as involuntary bankruptcy, and to bring within the terms of the amendment the circumstances under which, as well in the one case as in the other, the bankrupt could or could not be discharged. It may be admitted that a repeal of a prior statute by a subsequent one, by implication merely, is not encouraged by the courts, and it must appear from the later statute, where the repeal is claimed to exist by implication, that it was clearly the intention of the lawmaker not to leave the prior statute in force. But when we look at the whole scope of the amendment of 1874, and apply the language of the 9th section to the case now before the court, it seems to me that it was the intention of congress to declare by that section, that in any case of bankruptcy where there were no assets equal to 30 per cent., that if the bankrupt secured the assent of one-fourth of his creditors in number, and one-third in value, as there stated, that he was entitled to a discharge irrespective of the time when the debts were incurred; and, therefore, I hold, contrary to the opinion of the district court, that the 9th section of the act of June 22, 1874, necessarily repealed the proviso to the 5112th section of the Revised Statutes, and that in this case, on the facts as conceded, the bankrupts are entitled to their discharge, and it will be so ordered and certified to the district court. Perhaps I should add that in considering this question, I have fully examined the various cases which have been cited by the counsel of the respective parties.

Case No. 17,492.

WHEELER v. BATES.

[6 Biss. 88;[1] 6 Chi. Leg. News, 413.]

Circuit Court, N. D. Illinois. May, 1874.

JURISDICTION OF FEDERAL COURTS—FORCIBLE ENTRY AND DETAINER.

1. Since the Illinois statute of February 16, 1874, the U. S. circuit courts in that state have in proper cases jurisdiction of actions of forcible entry and detainer.

2. Such action is a "suit of a civil nature" within the meaning of the act of congress of 1789 [1 Stat. 73].

This was an action of forcible entry and detainer to recover possession of certain lands in McHenry and Winnebago counties in this state. All the proper jurisdictional facts were alleged and admitted, save the right of the court to take jurisdiction of this form of action, on which ground defendant demurred to the jurisdiction.

Geo. F. Harding, for plaintiff.

Consider H. Willett, for defendant.

DRUMMOND, Circuit Judge. I do not in this case propose to decide upon the sufficiency of the complaint, but only the question of jurisdiction. It is a right claimed under a recent statute in this state, and a question of some practical importance and it is known that under the prior statutes of forcible entry and detainer the proceedings were instituted before a justice of the peace, and the case could go from the justice of the peace to the courts of record, and so on to the supreme court of the state. On the 16th of February last the legislature passed a statute upon the subject of forcible entry and detainer, and gave jurisdiction to the courts of record of the state, on complaint in writing of the person entitled to the possession of lands and tenements being filed with any court of record or justice of the peace in the county where such premises were situated, setting out that the plaintiff was entitled to the possession of said premises, and that the defendant unlawfully withheld the same. The first section of the act declares that no person should make an entry in any lands except where it was allowed by law, and that he should not enter by force, but in a peaceable manner; and the second declares that the party entitled to the possession of the land may be restored, in a manner thereinafter provided; and it states, under six heads, the circumstances in which restoration can be made.

The only question as to the jurisdiction of the court is whether the action authorized by this new statute is a civil suit within the meaning of the judiciary act of 1789. That act declares that circuit courts of the United States shall have jurisdiction where the matter in dispute, exclusive of costs, shall exceed the sum of five hundred dollars (provided the citizenship of the parties is such as to warrant it), and another section of the same act declares that where a suit is brought in a state court, and the amount in dispute shall exceed the sum of $500, and the defendant against whom the suit is brought is a citizen of another state, he shall be entitled to remove the cause from the state court to the circuit court of the United States. It means suits of a civil nature, at law or in equity, so that the only question is whether this is a suit of a civil nature. If it is, notwithstanding it could not have been brought previously in the courts of the states, but was first authorized by this statute, if the citizenship of the parties was such as to warrant it, it could be brought in the circuit court of the United States, or, if brought in a state court, it could be transferred to the circuit court of the United

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

States. It is impossible for the legislature of a state, by adopting new forms of proceeding and investing the state courts with exclusive jurisdiction of causes of action, to deprive the federal courts of the jurisdiction given by the acts of congress, as this would place the jurisdiction of the federal courts within the control of the states. If, under the laws of the states, the citizens of the several states have a right to maintain a civil action, then the courts of the United States, in a proper case, also have jurisdiction.

This, then, is an action to recover the possession of land or buildings; it is a civil remedy; it can be maintained in the state courts; the plaintiff in this suit is a citizen of another state; the defendant is a citizen of this state; the amount in controversy is over 500 dollars. It is, then, within the jurisdiction of the federal courts, notwithstanding it is a new remedy which never existed before. See U. S. v. Block [Case No. 14,610], and the authorities there cited.

And for the recent act of congress defining and enlarging the jurisdiction of the federal courts, see [Act March 3, 1875; 18 Stat. 470].

Case No. 17,493.

WHEELER v. CLIPPER MOWER, ETC., CO.

[10 Blatchf. 181; 6 Fish. Pat. Cas. 1; 2 O. G. 442; Merw. Pat. Inv. 242.] [1]

Circuit Court, S. D. New York. Sept. 24, 1872.

PATENTS — INVENTION — REDUCTION TO PRACTICAL USE — REISSUES — COMBINATIONS — IMPROVEMENTS — INFRINGEMENT — EQUIVALENTS — HARVESTERS.

1. In order to sustain a patent for an invention, it is not necessary that the inventor should reduce the invention to practical use before he obtains the patent.

2. All that is necessary is, that the invention should be perfected, and the proper specification, drawings and model be furnished.

3. A patent does not become void, if the patentee does not, after the patent is granted, put the invention into practical use.

4. A device which cannot be reduced to practical operation and use without the aid of further invention, is not patentable; but it is not necessary to the patentability of a device, that it should have, in itself, apart from any connection with, or application to, other known devices or instrumentalities, capacity to produce practically useful results.

5. Where a patent claims a combination of several devices, it may be reissued to claim the devices separately, if new and useful, even though the aggregate combination claimed in the original patent was not, by itself, useful, or was even impracticable, provided the reissue points out how the devices separately claimed may be reduced to practical use.

[Cited in Calkins v. Bertrand, Case No. 2,317; Broadnax v. Central Stock-Yard & Transit Co., 4 Fed. 216. Approved in Odell v. Stout, 22 Fed. 163. Cited in Holmes Burglar-Alarm Tel. Co. v. Domestic Telegraph & Telephone Co., 42 Fed. 224.]

6. The right of a patentee to protection is not to be tested by the question, whether, in a state of the art subsequent to the granting of his patent, his invention, without improvement, would be deemed of value.

7. The reissued letters patent, Nos. 875, 877 and 879, granted to Cyrenus Wheeler, Jr., January 3d, 1860 (the original patent having been granted to him December 5th, 1854), and the reissued letters patent No. 2,610, granted to said Wheeler, May 14th, 1867, as a reissue of reissue No. 876, granted January 3d, 1860, of the same original patent, and the reissued letters patent, No. 2,632, granted to said Wheeler, May 28th, 1867 (the original patent having been granted to him February 6th, 1855), all for "improvements in grain and grass harvesters," are valid.

[Cited in Aultman v. Holley, Case No. 656; Wheeler v. McCormick, Id. 17,499.]

8. Said original patent of 1854 is not open to the objection, that the machine described in it was not susceptible of reduction to practical use.

9. A machine cannot be pronounced useless or impracticable because it is susceptible of improvement which will obviate or prevent embarrassments to its most perfect operation.

[Cited in Gibbs v. Hoefner, 19 Fed. 324.]

10. The question of the infringement of the said patents, considered.

11. A patent for a device cannot be avoided by dividing the device into two parts, which, when combined, produce the same result, in substantially the same way.

[Cited in Strobridge v. Lindsay, 6 Fed. 512; Westinghouse v. New York Air-Brake Co., 59 Fed. 597.]

12. A device is not less an equivalent of another, because, superadded to all the functions of such other, it may perform a further office, or, because, besides all the functions of such other, it performs some one of the offices more effectively, or better, so long as it performs them in substantially the same way, and uses substantially the same means.

13. A claim for devices described, which are alleged to produce a specified result, is not rendered invalid by proof that, under special circumstances, and on exceptional occasions, such result is not produced. The claim will be construed as describing the general rule of the operation of the device.

[2] [Two suits. Final hearing on pleadings and proofs. Suits brought upon reissues of two letters patent granted Cyrenus Wheeler, Jr., for "improvements in grain and grass harvesters." The first dated December 5, 1854, was reissued January 3, 1860, in five divisions, numbered respectively 875, 876, 877, 878, 879. Of these reissues, No. 876 was again reissued May 14, 1867, as No. 2,610. The second patent dated February 6, 1855, was reissued June 5, 1860, as No. 971, and again, May 28, 1867, as No. 2,632. The bill in the first suit alleged infringement of reissues Nos. 875, 2,610, and 2,632. The bill in the second suit alleged infringement of reissues Nos. 877 and 879.

[The defendants, in their answer, denied infringement; that the reissues were for the same inventions as the original patents; that

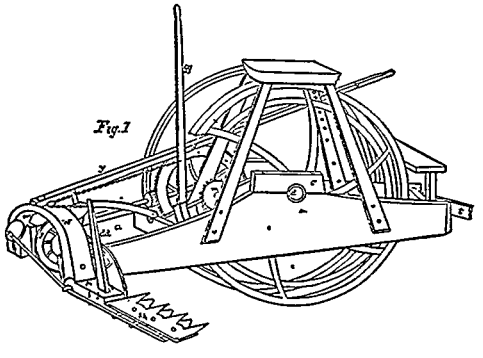
[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 10 Blatchf. 181, and the statement is from 6 Fish. Pat. Cas. 1. Merw. Pat. Inv. 242, contains only a partial report.]

[2] [From 6 Fish. Pat. Cas. 1.]

the machine described in the original patent of 1854 was ever used, or was ever capable of successful use, and that Wheeler was the first and original inventor of the devices claimed; but alleged that the same were, prior to the date of Wheeler's invention, known to other persons, and described in various patents and rejected applications, and, among a large number of others, in the patent of Obed Hussey, December 31, 1833; the patent of William F. Ketchum, February 10, 1852, and the rejected application of Edwin P. Cavett, filed in 1852.

[The engraving, No. 1, is a sketch, representing the material parts of the drawing accompanying the original Wheeler patent of December 5, 1854, and will be readily understood when examined in connection with the specifications annexed.

[Specification of Wheeler patent of December 5, 1854: "Be it known, that I, Cyrenus Wheeler, Jr., of Poplar Ridge, in the town of Venice, county of Cayuga, and state of New York, have invented and made certain new and useful improvements on a machine for harvesting grain and grass, and I do hereby declare that the following is a full and exact description of the construction and operation of the same, reference being had to the accompanying drawings making part of this



specification, in which—Fig. 1 is a perspective view of the machine. Fig. 2, of the arched bar and half of joint. Fig. 3, of socket, standard, quadrant, and corresponding half of joint. Figs. 4 and 5, longitudinal sections of cutter-bar or arm, with knife or cutter and spring. Fig. 6, cutter-spring. Fig. 7, perspective view of table or apron for holding the grain. a are the side pieces of the frame attached to the shaft, b, of the driving-wheel by boxes, c, in which the shaft revolves. The side-pieces, a, extend forward of the driving-wheel, d, sufficient distance to attach a tongue by a roller, e, which admits of the tongue moving freely up or down, thereby enabling the machine to adjust itself freely to the inequalities of the ground. The side-pieces, a, extend back from the driving-wheel sufficient distance to admit of a cross-piece, f, and to give sufficient space for the caster-wheel, g, to move freely on its spindle, h, between the cross-piece and the connecting-rod i. d is the driving-wheel of the machine, which is firmly attached to the shaft b. j is a rim attached to the inside of the arms, k, of the driving-wheel, d, and having cogs, l, on its internal surface, which gear into a pinion, m, which pinion is attached to a shaft, n, on which is also fastened a face-wheel, o, which face-wheel gears into the pinion, p, which pinion is firmly attached to the shaft, q, at one end, and at the other is attached to a wheel, r, in which is inserted a wrist, which serves as a crank. The shafts, n and g, are supported by boxes attached to the frame-work, in which they freely revolve; t is a wheel of the same size as the driving-wheel, and is attached to the shaft, b; which projects sufficiently far through the side-piece, a, to admit of the wheel's revolving freely outside of the frame-work. The wheel revolves freely on the shaft, as its axle, without interfering with the motion of the driving-wheel, while it serves to keep the machine in an upright position; u is the driver's seat, elevated above the driving-wheel, and supported by its legs, v; w is an arched bar passing over and on the outside of the, hinder part of the side-pieces of the frame, a, to which it is attached by bolts, x, passing through both, and admitting of the top of the arch, w, being turned backward or forward as on hinges or pivots by the lever, y, which is firmly bolted to the top of the arch, w, and extends forward on the inside of the driving-wheel to the inside forward leg, v, to which it is secured by a guide and pins. z is a socket with the half of a rule-joint, a, a, attached to its corresponding half at the end of the arched bar, w, by a bolt passing through both; b, b, is a quadrant attached firmly to the inner side of the socket, z, and passes by and close to a similar one, c, c, attached to the end side of the arched bar, w, thereby strengthening and supporting the joint, a, a; d, d, is a standard, firmly attached at its base or lower end to the socket, z, and at its upper end is perforated with a hole, to which is attached a chain or rope, e, e, which passes around the pulley, f, f, on the top of the arched bar, w, and is carried forward to the lever, g, g, which lever is attached at its lower end by a bolt to the middle piece, s, s, of the frame, admitting of the upper end of the lever being moved backward or forward; h, h, cutter-bar, composed of an upper and lower portion, with sufficient space left between for the admission of the knives or cutters, i, i, and a spring, o, o, between the knife or cutter and the bed-piece or lower half of the cutter-bar, h, h. j, j, points of the stationary or upper portion of the cutters; k, k, bolts passing through both parts of the cutter-bar, h, h, and through the knives or cutters, i, i, and through the spring, o, o, the knives or cutters, i, i, moving on the bolts, k, k, as on a pivot. The shanks of the cutters, i, i, extend back of the bar, h, h, far enough to ad-

mit of attaching the driving-rod, l, l, to them by bolts or pins; i is a connecting-rod composed of two parts, with a screw admitting of its being lengthened or shortened at pleasure. One end of the rod is attached to the driving-rod, l, l, by a joint, and the other to the crank or wrist, s; g is a caster-wheel; h is a spindle and straps or legs which support the wheel, the spindle passing through the arm, r, r, which arm is bolted at the other end firmly to the cross-piece, f.

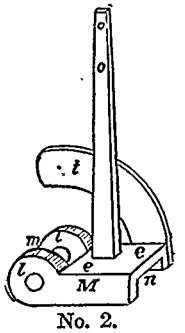
["Figs. 2 and 3 are detached views of the arm and socket when united at m, m, by a bolt. A strong joint is made similar to a rule-joint, which admits of the outer end of the cutter-bar, h, h, rising or falling with the inequalities of ground when in use. The arch, w, is united to the hind part of the side-pieces, a, by bolts at x, which admits of the top of the arch being rolled on the bolts backward or forward. Figs. 4 and 5 are longitudinal sections of the cutter-bar—Fig. 4 being a representatiion of the upper surface of the under half or portion of the bar, and fig. 5, the under part of the upper portion or half of the bar. The points or stationary cutters, j, j, are made concave on their under side, for the purpose of giving a better fit to the cutting edges of the movable cutters or knives, i, i, which knives have a concave surface on their upper part, from their point to a short distance back of the bolts on which they turn. n, n, show the upper portion of the guards or braces, which guards are fastened to the under side of the under portion or half of the cutter-bar, and are curved upward and meet the points of the upper or stationary cutters, to which they are united by rivets or screws, sufficient space being left between the two for the free play of the movable cutters. o, o, represent a curved spring of steel, with a hole through the middle for the admission of the bolt on which the movable cutter turns. At one end of the spring, o, o, is a slot, p, p, which serves, by means of a pin in the lower part of the cutter-bar, to keep the spring o, o, in position. The spring, o, o, by its form and position under the movable cutter, i, i, serves to press the upper or cutting-edge firmly against the under surface of the upper portion of the cutter-bar, h, h, and its stationary points or cutters, j, j. The Figs. 4 and 5, when united at each end by bolts or rivets, sufficient space being left between the two for inserting the knife or cutter and spring, forms the cutter-bar, which is firmly bolted to the socket, z, by bolts passing through the hole, q, q, and corresponding holes, g, g, in the socket, z. The cutters, i, i, are beveled from the upper edges downward and inward, making a sharp shear-edge on both sides. The upper or stationary cutters or points, j, j, are beveled upward and inward, so as to present a sharp corner for the movable cutter to operate against. Fig. 7 is a representation of the table or apron for receiving the grain when cut, and bolts or fastens to the under side of the cutter-bar, h, h. The cutter-bar h, h, is composed of two bars of iron of similar width and thickness, bolted or riveted together, with their flat surfaces parallel to each other, a space being left between them by inserting blocks or pieces of metal, and the stationary cutter may be welded to the upper bar, or fastened to it by rivets or bolts. The wheel, t, being constructed partly of wood and partly of iron, or wholly of iron, and so fitted to the shaft as to play freely on it, as its axle, without interfering with the motion of the driving-wheel, the face-wheel, o, and the pinions, m, and p, should be of such size, as, combined with the driving-wheel, d, will give from twenty-five to thirty revolutions of the crank or wrist, s, to one of the driving-wheel. The crank-shaft, g, should be of sufficient length to bring the crank or wrist, s, in direct line with driving-rod, l, l. The arched bar, w, should be composed of iron. The ends of the arched bar, w, on its inside, should be made straight, and parallel to each other. The spring is bent in a curved or arched form, o, o, so the ends of the spring may rest on the lower part of the cutter-bar, h, h, and the center of the spring press against the under portion of the knife or cutter, i, i. I also fasten to the top of the arch, w, a lever, y, of iron or wood, which extends forward and passes through a guide attached to the inside forward leg, v, and is confined, at any required height, by pins passing through the guide and leg. The caster-wheel, g, is composed of iron, from ten to sixteen inches in diameter, with a rim from two to three inches wide, which is placed in a strong stand or legs of, with a spindle, h, attached, which spindle passes through an arm or socket, r, r. The arm or socket, r, r, is composed of iron of a curved form, and of sufficient length to admit the caster-wheel, g, playing freely on its spindle under it, without interfering with the cross-piece, f, to which the arm is firmly bolted. The apron or grain-table is composed of a light framework, covered with boards, which may be made to correspond in length to the cutting portion of the cutter-bar, h, h, and may be fastened to the cutter-bar, when desired, by bolts—the width of the table being made sufficient to catch the falling grain, which may be raked from it by a man riding on the machine. In operating the machine the off-horse travels near the standing grass. The movable cutters, i, i, by their position under the stationary points or cutters, j, j, and by being firmly pressed against the corners or edges of them by the springs, o, o, as they move to and from their bolts in the arc of a circle, cut freely and easily all grass or herbage coming between the points and cutters—the machine cutting equally well the coarsest or finest and softest grass, not being liable to clog or buff in thick fine herbage, and cutting equally well at the fastest or slowest walk of the team, the arched bar and socket being supported and kept from pressing too hard upon the ground by the caster-wheel, g. The caster-wheel also, by its support, admits of the machine being

turned short round, avoiding the necessity of backing the team when coming out, and setting it at the corners of the standing grass. The cutter-bar, h, h, in the movement of the machine forward, rises and falls beyond the joint, a, a, adjusting itself to the inequalities of the ground. By the lever, y, attached to the arch, w, the driver can raise or depress the points of the cutters, i, i, and j, j, the arch, w, turning on its bolt, x, as on a hinge, for the purpose of cutting off higher or lower, or for the purpose of passing any obstruction met with, without leaving his seat; and in like manner can, by the aid of the perpendicular lever, g, g, and its connections, the chain, e, e, the pulley, f, f, and the standard, d, d, raise the outer end of the cutter-bar h, h, to any required height, and sustain it there, for the purpose of passing obstructions, or for the convenience of moving from one field or place of operation to another. Having thus fully described my improved machine, I would state that I do not claim the driving-wheel, face-wheel, or pinions, the boxes or shafts of the same. Neither do I claim the connecting-rod of two parts, or the driving-bar, nor claim the double-edged movable pivoted cutters, or shears as pivoted in the center, and placed on the top of the stationary or fixed ones, or the cutter-bar as heretofore constructed by others. Neither do I claim the seat for the driver, or the table for receiving the grain. I do not claim the caster-wheel, as such alone, but, what I do claim as my invention, and desire to secure by letters patent, is: The hanging the cutter-bar, h, h, provided for the purpose, with a socket, z, to one extremity of the arched bar, w, by means of joints, a, a, and segments, b, b, c, c, said arch bar, being in its turn pivoted in x, to the main frame, a, a, all for the purpose of giving the cutter-bar, h, h, by means of levers y, d, d, and g, g, a motion independent of the frame, and both rotating longitudinally parallel to the ground, and oscillating radially from the joints, a, a, in order to adapt the same to the inequalities of the ground, or to stop its action at pleasure, as described.

"Cyrenus Wheeler, Jr."

[The first division of the reissue No. 875 related principally to the "hinged shoe, M," and its combinations. It contained the following general description: "In the construction of a grain and grass harvester known as a 'combined reaper and mower,' there are many essential features that must be adaptable to both reaping and mowing, the condition of each operation varying with the material to be cut, and the nature of the ground over which the machine is to be operated. In cutting grain, the cutters are raised a considerable distance above the ground, but in this position they must be under the easy control of the driver or operator; whilst in cutting grass, it is important that the cutter should run as close to the ground as possible, having due regard to their security from striking into or against any intervening obstacles. To make a mowing machine practical, the cutter-bar should follow the undulations of the ground over which it passes, without being influenced by the inequalities of the ground over which the wheel or wheels of the main frame may be passing, and to make it thus follow the undulations of the ground, it should depend upon receiving all its vertical movements from the surface of the ground over which it is, for the time being, passing, whilst its forward movement only is controlled by the main frame. To construct such a convertible machine as will adapt itself to both the cutting of grain and grass, and be susceptible of the necessary adjustments for each separate purpose, constitutes the general characteristics of this invention. And the manner in which the machine is constructed, will be hereafter fully set forth, first premising that there are certain principles or functions in the organization of the machine which form the subject-matter of separate applications for letters patent, whilst this application looks to the construction of the details or devices by which these more general principles are carried out, and the manner in which I have combined and arranged them in one machine, to effect the several purposes hereinafter mentioned."

[It contained also the following description of the "hinged shoe, M." which will be readily understood when read in connection with the engraving No. 2, a fac-simile of Fig. 3 of the reissue: "To the rear portion of the main frame is connected an arm, K, which carries a caster-wheel, L, by means of which said rear portion of the frame is mainly supported, and may be raised, and held up if desired; the piece, H, and the shoe or socket, M, connected to it, are also supported and kept from pressing too hard upon the ground by the caster-wheel, L, which may, by washers placed on the spindle, be made to support these parts at any given height. The shoe, M, is hinged to the piece, H, by a pivot-bolt, k, which stands at right angles to the pivots, i, of the brace, bar, or piece, H, so that the shoe, M, and consequently the finger-bar that is connected to it, as will be hereafter explained, may have the motions incident to both the hinged or pivoted points, i and k. The shoe, M, as more distinctly seen at Fig. 3, has lugs, l, l, and space m, between them, into which the end of the hinged piece, H, passes, and by means of the pivot-bolt, k, passing through their holes, the hinge is formed; it has also a socket or recess, n, made in it, for receiving the end of the finger-bar, N (Fig. 7), said finger-bar being firmly bolted to said shoe by bolts passing through their respective holes, o, o, o, o, therein. To the shoe, M, is connected a post



No. 2.

or arm, O, to the upper end of which is fastened a rope or chain, p, which passes around a friction-pulley, g, on the piece, H, and thence to a lever, P, to which it is adjusted and fastened."

[The claims of this reissue were as follows: "I claim under this patent, first, in combination with the hinged-bar, H, and the finger-bar, the intermediate shoe, M, hinged to said bar, H, substantially in the manner and for the purpose set forth. I also claim, in combination with the hinged-bar, H, a lever that, when released, allows said bar to freely swing around its pivoted points, and when fastened, holds said bar firmly in its adjusted position, as described. I also claim the shoe, M, as a hinge and support both, to the cutter-bar, substantially as described. I also claim the socket or recess, n, in the shoe, M, for the reception of the finger-bar substantially as described. I also claim, in combination with a finger-bar hinged at one of its ends to an intermediate piece, also hinged to the main frame, an elevating and supporting caster-wheel for carrying that end of the machine when adjusted for reaping or mowing, substantially as described. I also claim the combination of a brace or support, t, on the shoe, and a similar brace or support, u, on the bar, H, for resisting the strain on the finger-bar, when reaping, substantially as described, or for transporting it from place to place. I also claim the flexible connection for elevating the outer end of the finger-bar, substantially as described."

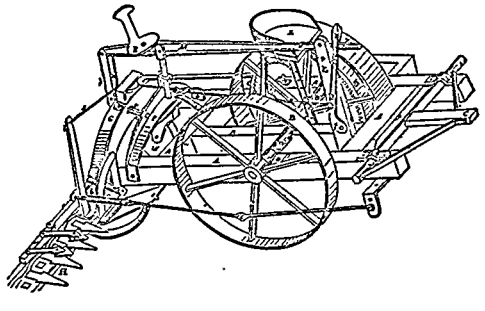
[Reissue No. 2,610 was for the finger-bar.

[It contained the following general description: "To adapt a harvesting machine to the mowing of grass, it is necessary that the finger and cutter-bar should travel close to the ground, and not only this, but that they should receive all their vertical movements from the ground over which they pass, and not be influenced by the projections or depressions over which the driving wheel or wheels are passing. But as the finger and cutter-bar must receive their advancing movement from the main frame, its organization, and connection of the cutter therewith must be such as to allow the finger-beam to have a free vertical movement both above and below the plane over which the driving-wheel is passing. The object of this invention is to cause the finger-beam to conform to the undulations of the ground independently of the movement of the driving-wheels, and this is accomplished by employing a frame which vibrates about the axis of the driving-wheels, and attaching the finger-bar to one corner thereof, and attaching the draught to the frame by means of a loose or hinged connection. The gearing which drives the cutter is so arranged about the axis of the drive-wheels as a driving-center that, as the corner of the frame to which the finger-bar is attached, rises and falls, the driving of the cutter is not disturbed. The finger-bar is attached to this vibrating frame at one corner by a hinge. The propulsion of the finger-bar forward is effected solely by this hinge. Thus, while the vibrating frame permits the finger-bar attached to its corner to follow the ground, the hinge propels the finger-bar, and permits its outer end to rise on said hinge, and thus a floating finger-beam is produced. The gearing consists of a beveled wheel on a shaft extending from the inner side of a rim attached to the driving-wheel to the beveled wheel on one end of the crank-shaft, by which the cutter is vibrated, and thus the cutter vibrates without disturbing the relative position of these driving parts."

[The claim was as follows: "I claim, in combination with a harvester-frame that is free to vibrate about a gear-center, a laterally projecting finger-bar, so hinged to one end or corner of said frame, as to permit the finger-bar at each end to follow the undulations of the ground over which it is drawn."

[The claims of reissues 877 and 879 will be found in the opinion of the court. The second patent, granted February 6, 1855, was applied for in September, 1854, while the first was still pending. Engraving No. 3 is a sketch of the patent office model, filed with this second application.

[The disclaimer and claims of this patent were as follows: "Having thus fully set forth my improvements in the foregoing description, I will proceed to state my claim. In the first place, I do not claim the framework, a (Fig. 1), the driving-wheel, b, its cogged rim, c, shaft, d, pinion, f, face-wheel, g, shaft, h, pinion, i, shaft, j, crank-wheel, k, driver's seat, z, raker's seat, y, connecting-rod, g. Neither do I, in this, intend to disclaim the screw, i, i, nuts, o, o, arched bar, l, and its pivotal attachment, a, b, the joint, m, quadrants, n, socket, o, standard, p, caster-wheel, r, spindle, s, rod and chain, t, pulley, u, lever, v, bail, h, h, having previously invented them or their equivalents, which are fully set forth and described in a caveat and drawings filed by me in the patent office, on or about November 28, 1853, and still further described in a specification, model, and drawings filed in the same office on or about March 16, 1854. But what I do



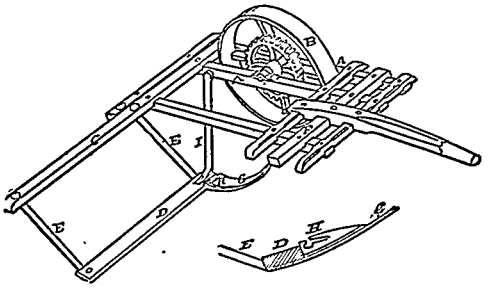
No. 3.

claim, and desire to secure by letters patent, is: I claim the combination of the double-edged cutters, r, r (Fig. 1), with the cutter-bar, x, x, the braces, z, z, the vibrating cutters, l, l, their shanks, m, m, projections, u, u, the circular ribs, t, t, the bolts, p, p, the spring, a (Fig. 3), the holes, g, g (Fig. 1), the ribs d (Fig. 3), the cavities, y, y (Fig. 1), or their equivalents, as substantially set forth, the whole forming the cutting apparatus of the machine. 2. I claim the revolving or track rake, consisting of its frame, 1 (Fig. 1), its wheel, 3, shaft, 4, pinions, 7 and 10, shaft, 6, wheel, 5, teeth, 8, apron, 2, joint, 9, and cap, 11, or their equivalents, arranged and combined substantially as set forth."

[This patent was twice reissued; the sectime as No. 2,636. This reissue contained the following general description: "My invention relates to that class of machines known as 'combined machines'; that is to say, harvesting machines capable of cutting grass or grain either, and that can be changed from one to the other purpose conveniently. When cutting grass, the machine should follow as closely as possible the undulations of the ground; but when cutting grain, it should carry its cutting apparatus above the surface of the ground. To make a machine equally adaptable to both these purposes, requires that it should have two properties that would seem inconsistent with each other in one machine, viz: the property of adapting itself to the surface of the ground over which it is passing while cutting grass, in which case the several parts of the machine must have motions independent of each other; and, secondly, the property of being elevated above the ground and held comparatively rigid in such elevated position when cutting grain; but in both conditions to be under the control of the driver or conductor, who, from his seat, can elevate or depress such portions of the machine as may require it for passing obstructions, or for cutting at a greater or less height above the surface of the ground. In changing such a machine, to convert it from a grain-cutting to a grass-cutting machine, or vice versa, some of its parts must also be changed; and my invention relates to some of these parts, also, as will be hereafter set forth, as they perform certain functions important in their particular relations and conditions. Such are the general purposes and objects of my invention. Their specialties will be more fully set forth hereafter, as well as the several mechanical devices which I have contrived for turning the machine short around at the end of the swath, for strengthening the finger-bar when cutting grain, and making it lighter for cutting grass, and for a track-clearer. My invention consists in so combining a finger-bar with the main frame of a harvesting-machine, and with levers, or their equivalent raising or lowering devices, extending to within reaching distance of the driver or conductor in his seat, as that said driver or conductor from his seat may raise up either end of the finger or cutter-bar, independently of the other end, or both ends at once, at pleasure; and my invention further consists in the use of a platform, which, when the table or platform is used, is attached to the finger-bar, and removing the platform when the machine is converted into a mower; and my invention further consists in combining with the platform or table a caster-wheel, so hung that when the machine is being turned around, said caster-wheel will elevate the platform, and also the outer end of the finger-bar, and thus prevent them from striking against any projection, or being wrenched, strained, or broken; and, in connection with the platform caster-wheel, the caster-wheel in the rear end of the main frame, when they bear the relative position substantially as they do to the finger-beam and main wheel, as represented; and my invention further consists in a track-clearer, that is caused to revolve by gearing, and so located that in backing the machine, or turning it around, there will be no danger of breaking or otherwise injuring said track-clearer."

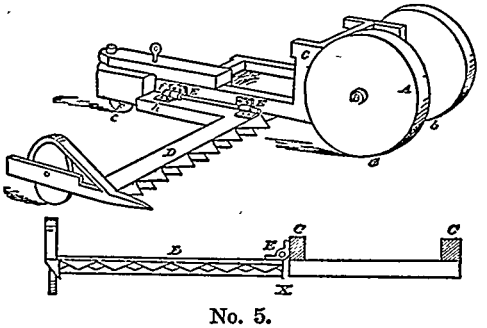
[The claims were as follows: "1. The combination of a vibrating frame, a finger-bar attached to one corner or end thereof by a hinge, and a platform in rear of said finger-bar, so as to leave an unobstructed space for the delivery of the grain onto the ground. 2. The combination of a vibrating frame, with the cutting apparatus hinged thereto, a driver's seat, and an arrangement of one or more levers, whereby the driver, in his seat, can raise and sustain the cutting apparatus when desired. 3. The combination of a finger-bar, hinged to a vibrating frame, and a removable platform connected with the said frame by means of the finger-bar only. 4. The combination of a hinged finger-beam and a side-delivery platform, so arranged that the grain may be delivered from the platform onto the ground out of the way of the horses on their next round. 5. The combination of a hinged finger-beam, a lever and a yielding or linked connection, extending from the lever to the vibrating part of the machine to which the finger-beam is attached, whereby the inner end of the finger-beam is raised to pass obstacles in mowing, and raised and sustained in reaping. 6. The combination of a hinged finger-beam, a lever, a yielding or linked connection extending from the lever to the vibrating part of the machine to which the finger-beam is attached, and the seat for the driver, whereby the driver can raise the inner end of the finger-beam to pass obstacles in mowing, and raise and sustain the same in reaping. 7. The combination of a hinged finger-beam with an auxiliary draught-rod or bar attached to the inner end of the hinged finger-bar. 8. The platform-bar, Q, as a means of securing the platform to the finger-beam, and for strengthening said finger-beam when it has the platform to carry, substantially as described. 9. The inclined caster-wheel, S, arranged as represented, and in combination

with the platform, whereby the latter is elevated when the machine is being turned short around to the right, substantially as described. 10. In combination with a finger-beam and platform, placed in rear of the main supporting-wheel, the two casters, N, S, arranged as described, for allowing the machine to turn short around to the right, for the purposes specified. 11. A revolving track-clearer, when operated from a ground-wheel through gearing, substantially as described."



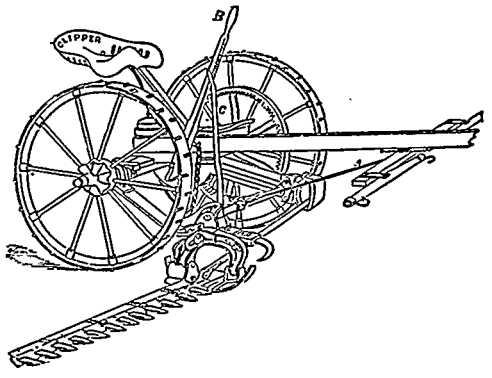
No. 4.

[Engraving No. 4 is a fac-simile of the drawing of the W. F. Ketchum patent of February 10, 1852. This, and the patent granted E. B. Forbush, July 20, 1852, referred to by defendants as anticipating the first, third, and fourth claims of reissue No. 875, showed two forms of the socketed shoe. They were prior in date to Wheeler's "shoe M," but were attached rigidly to the machine, while Wheeler's was hinged Both showed a socket for

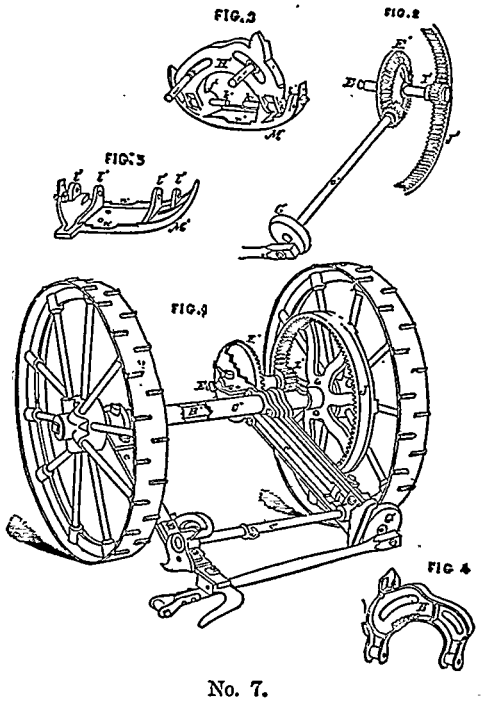


No. 5.

the finger-bar. Engraving No. 5 is a sketch of the model of the Hussey machine, patented in 1833, and introduced by defendants as an anticipation of the claim of reissue 2,610, as showing a hinged finger-bar. The rejected application of Cavett, filed in April, 1852, and introduced by defendants as an anticipation of reissue 2,610, showed a rocking frame, and a cutter-bar hinged to a corner thereof. It was, however, claimed by complainant that the rocking frame did not vibrate about a gear-center, and that the device was never used. It was also argued that it was at best a rejected application, and that, under the law, a rejected application can not be received to defeat the validity of a subsequent patent.



No. 6.



No. 7.

[Engravings Nos. 6 and 7 represent the Clipper machine, as made and sold by the defendants. Its construction will be readily understood from the engravings, when examined in connection with the opinion of the court.] [2]

George Harding, for complainant.

S. D. Law, David Wright, and B. F. Thurston, for defendant.

WOODRUFF, Circuit Judge. These suits are prosecuted for the alleged infringement of patents granted to the complainant, and seek an injunction and an account of the income derived by the defendant from such infringement. The patents in question are for improvements in grass and grain harvesters. The first original patent was granted December 5th, 1854, on an application filed March

[2] [From 6 Fish. Pat. Cas. 1.]

16th, 1854, and is numbered 12,044. This patent was surrendered in November, 1859, and reissues were granted for several separate and distinct parts of the improvements claimed to be embraced in the original patent, and such reissues were dated January 3d, 1860, and numbered 875, 876, 877, 878, and 879. Of these reissues, one, No. 876, was again reissued May 14th, 1867, and numbered 2,610. The second original patent was applied for September 20th, 1854, and was granted on the 6th of February, 1855, and numbered 12,367. This patent was also surrendered, and, on the 28th of May, 1867, was reissued, numbered 2,632. These suits are brought upon the said two original patents, as reissued under the numbers 875, 877, 879, 2,610, and 2,632. The bill in the first suit alleges infringement of reissues 875, 2,610 and 2,632; and the bill in the second suit alleges infringement of reissues 877 and 879. The answers in each suit are substantially the same, the proofs taken in each, so far as pertinent or applicable to each, are the same, and the suits were brought to a hearing and argued together.

The defendant insists upon the invalidity of the complainant's reissued patents, upon want of novelty in the distinguishing features of the complainant's alleged invention and upon a denial that the defendant has infringed the patents in any particular in respect to which the complainant's patents can be sustained, if sustained at all. My examination of the patents and of the proofs has led me to a different conclusion upon all of these grounds of defence. I shall not probably find time to write in detail my analysis of the patents, discuss the particular proofs, and give the reasoning which brings me to the result. I should be pleased to do all this, and it would be of some convenience to counsel on the review which, I assume, cases of so much importance will hereafter receive. But, other cases require my attention, and I shall do little more than indicate my opinion on the points chiefly argued by the counsel.

(1) The first ground upon which the complainant's reissued patents are assailed is, that the original patent of December 5th, 1854, was void, for two reasons: 1st. That the invention therein mentioned was never reduced to practical use; and, 2d. That the machine, as described and shown in the original record, was not susceptible of being reduced to practical operation.

On the argument, it was insisted, that a patent is void, if the patentee did not reduce the invention to practical use before the patent was obtained. This proposition is wholly unsound. No such condition is required by the act of congress; and, if it were true that a patent would be void on that ground, no patent could properly be granted, unless proof was furnished that the invention claimed had gone into practical use, which is not and cannot, under the statute, be made a condition of granting the patent. It is enough, that the inventor has perfected his invention, and is able to furnish to the patent office such specifications and model as the law requires. Having done this, the patent, in so far as prerequisites to its validity, either by way of experiment or use, are material, is valid.[3]

But, the terms of the brief before me are, that the "patent of December 5th, 1854, was void, because it was never reduced to practical use." This includes, perhaps, the idea, that the patent became and is now void, and was void when it was surrendered and reissued in several divisions, as above stated, because the invention described therein has never, since the patent was granted, been put into practical use. This is an argument, not that the patent was originally void, but that, through the neglect of the inventor, it has become invalid. It involves the idea of abandonment of the invention. The statute requires that an alien shall put, and continue, on sale to the public the invention or discovery for which he receives a patent, but it contains no such provision in relation to the patentee, when a citizen of the United States. If an invention is not so far perfected as to be adapted to use, that is to say, where the invention is of a machine, or part of a machine, and is not so far completed, that, when constructed, it will produce the desired effect, then, indeed, no patentable invention has been made. But, if the invention be such, that, when the thing invented shall be constructed according to the model and specifications filed, it will operate successfully as a practical and useful thing, the inventor has satisfied the law, and his patent is valid. He is not bound, by law, to construct it, in order to preserve his patent.

(2) This leads to the second of the defendant's reasons for insisting that the patent of December 5th, 1854, is void, namely, that the machine, as described and shown in the original record of the patent, was not susceptible of being reduced to practical operation. If, by this, is simply meant, that a machine, or a device, that cannot be reduced to practical operation and use without the aid of further invention, is not patentable, there is no occasion here for calling it in question. On the other hand, if it be meant, that no device is patentable which has not in itself, apart from any connection with, or application to, other known devices or instrumentalities, capacity to produce practically useful results, then the proposition is not true.

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[3] Counsel, in arguing that an invention must be reduced to practical use before a patent is granted, or the patent is void, must, I think, have meant to claim no more than that it must be reduced to some private or experimental use, practical in kind, but distinct from a public use. If not, then the unsoundness of the proposition is quite obvious, since, under the former law, the public use of the invention defeated the subsequent patent, and could be set up as a defence, by an alleged infringer; and the same is true under the present law, if the machine patented have been in public use for more than two years. Note by Woodruff, Circuit Judge.

Patents for simple devices, and patents for parts of machines, are almost numberless, of which it may be truly said, that it is only by connection with other devices or instrumentalities, to which they are intended to be applied, that they can be made to produce any result whatever. True, the patentee is bound to disclose a mode in which they may be rendered practically useful, and it may be one of many modes, and it may necessarily involve the use of many other known devices which are required in order to the useful result. Patents may be granted for combinations, in which some of the parts are old and some are new, and whatever in the several parts is new may be separately secured to the inventor; and yet it may be true, that only in the combination described, or in some similar combination, is the new part thus secured to the inventor of any practical use whatever.

(3) This brings into view the defendant's claim, that the several reissues of the original patent of 1854 are void, because they are not for the same invention as that described in the original patent record. The original patent embraced, as an aggregate combination, several parts of the entire machine described in the specification, and claimed such aggregate as the invention of the complainant. These parts were all shown in the specification, drawings and models. I know of no rule which forbids the inventor, who has omitted to claim separate new devices, or severable and distinct combinations, in the original patent, making a surrender, and taking reissues for the distinct combinations or separate devices. From the fact of surrender and reissue, it is to be inferred, that the original patent did not secure to the patentee all that he claims in the reissue; but, that alone does not render the reissue void. If the devices covered by the reissues were, in fact, new and useful, and if they are shown in the original specification, drawings, or model, then the patentee is entitled to secure the exclusive use of each separately, by a reissue embracing each.

Again. The claim that the original patent of 1854 was void because the invention therein described was not susceptible of being reduced to practical operation, gains its importance to this controversy from the inference sought to be drawn therefrom, namely, that the several reissues are, therefore, void. These suits are not founded on the original patent, but on the reissues; and the claim is, that, if the original patent was void, because the machine therein described was not capable of reduction to practical use, therefore, the reissues are themselves void. If the premise were here conceded, I do not think that the inference necessarily follows. For example—suppose an inventor of several distinct new devices, or of several new combinations, each capable of being usefully employed in and towards a machine or various machines, and that their separate construction and mode of operation is fully apprehended, and the distinct office or function of each is appreciated—such inventor may, undoubtedly, have a patent for each. Suppose, now, he erroneously conceives that he has arranged a combination of all of them, or a combination of all of them with other known devices, so as to produce a new and useful machine, and for such a machine he applied for and obtains a patent, describing and illustrating all the several new devices, or separate combinations of devices, their construction, and operation, but claiming only the aggregate machine. Such aggregate machine may be utterly useless; the patentee is wholly mistaken in regard to the practical operation of the whole; it will not produce the result for which it was intended, nor, in its aggregate form, any other useful result. Does the inventor, in such case, lose the benefit of his skill and ingenuity in producing devices, or combinations of devices, which are of practical value, because he first sought his patent in the form of a useless or impracticable combination? I apprehend not. He may surrender his original patent, and have it reissued in parts, which shall claim the respective new and useful devices or combinations of devices, pointing out, of course, in his specification, some mode or manner in which they may be reduced to practical use and value. He might have done this in his original patent, and claimed each separate new device as his invention. Not having done so, he may do so in his application for reissues and his specifications therein; and the fact, if it be true, that his original patent was defective, because he claimed therein the aggregate combination, and that a useless or impracticable one, no more impairs the validity of the reissues, than any other defect or invalidity which makes a surrender and reissue necessary to protect the device or devices which are useful, and which were in fact invented.

These observations upon some of the legal grounds upon which the complainant's patents are assailed, are made in order to exclude the idea that they are assented to, and not because I find, as a fact proved in the cause, that the machine described in the patent of December 5th, 1854, was not a practical and, within the meaning of the law of patents, a useful machine. I find the contrary. Doubtless, when viewed in the light of subsequent improvements, it was imperfect, but it was a very large advance upon machines for mowing theretofore attempted. It is one of the embarrassments to which early inventors are constantly subjected, that other persons, availing themselves of the substance of the invention, make improvements thereon, which measurably hide the merit of the original; and, if the right of a patentee to protection were to be tested by the question, whether, in the present state of the arts, his invention (without improvement) would be deemed of any value, or be saleable

for use, very many authors of most important inventions would be turned out of court.

(4) The principal ground upon which it is claimed, and attempted to be proved, that the machine, as described and claimed in the original patent of December, 1854, was not susceptible of reduction to practical use, is, that the socketted piece receiving and holding the finger-bar, (or cutter-bar,) at the inner end, though called a shoe, m, in the re-issued patents, was not a shoe in fact—it had no toe; and it is, therefore, said, that, if it encountered an obstruction in its path, it would not slide over it, but must stop the machine, or the cutter-bar be wrenched from its connection with the frame; and, further, as the rear of the supporting-frame was described as resting on a caster-wheel, midway the sides of the frame, in the line of the cutter-bar, it is certain, that, whenever the caster-wheel passed into a depression in the ground, existing only in its own line of travel, this socket-piece, misnamed a shoe, would come to the ground, and, for want of the curved toe, would plough into the ground, and stop the machine, or wrench the bar, as in the other case.

Now, in the first place, the socket-piece holding and supporting the inner end of the cutter-bar, is, in fact, shown to have its under surface curved or rounded up at its front. It is so shown in the model furnished, before the patent was granted, on the requirement of the patent office, and made on an enlarged scale for the express purpose of exhibiting this particular part of the machine. It may be true, that if, in its path, it met an obstruction higher than the curve of the under surface, its progress would be hindered, but the same is true of the finger-guards (which may properly be likened to small shoes), all along the length of the cutter-bar. If they meet an obstruction higher than their points, some means must be employed to raise them, or they will stop the machine, or plough into the ground. In reference to the path of travel, either of the shoe or socket-piece, or of the finger-bar, at any point therein, such an obstruction might happen; but, such a liability does not render the machine impracticable. No machine has been hitherto constructed which may not encounter such an obstacle, at some point in the path of the cutter-bar. The subsequent addition of the curved toe (which ordinary mechanical judgment would suggest, without the aid of invention), as it appears in the patent of 1855, and as the complainant's machines appear to have been, in fact, constructed, was, doubtless, an improvement, (though not a further invention,) but the machine would mow upon level prairies, or other smooth ground, and upon ground containing only slight elevations and depressions, without the toe. A machine cannot be pronounced useless or impracticable, because it is susceptible of improvement which will obviate or prevent embarrassments to its most perfect operation. If it could, then it would be the duty of the courts to pronounce the patent for any machine void, so soon as ordinary mechanical judgment, or even ingenuity, had suggested an improvement which made it perform its desired office more rapidly or more perfectly.

So, in regard to the suggestion that the caster-wheel at the rear end of the supporting-frame (which ordinarily bore this socket-piece or shoe very slightly above the surface) might pass into a depression in its own path, and bring the socket-piece to the ground, and so the finger-bar would be influenced by irregularities in the ground, not in the path of the cutters. If this be so, it only points to another particular in which subsequent experience has taught that improvement is possible. The objection is itself greatly exaggerated. In any machine which has been produced on the trial, wherein the finger-bar conforms most perfectly to the undulations of the ground, if either end passes into a depression, there is a liability to bring the bar and cutters, at some intermediate point, to the ground. The most that can be truly claimed, adverse to the complainant's original machine, in that respect, is, that the path within which such a depression is liable to affect the undulations of the cutter-bar is a little wider than if, instead of the caster-wheel between the ends of the frame, a wheel was placed at the inner end of the cutter-bar, or the shoe or socket-piece was furnished with the curved toe before mentioned.

What I before said on the subject of making an improvement, is apt to this point; and I am clearly of opinion, that it would be a great perversion of the law, as it would be a most unwarranted assumption of fact, to hold, that these criticisms of the complainant's patent were a defence, or that the complainant's patent was void, because it described an impracticable or useless machine for mowing.

In thus overruling the objections above stated, made by the defendant to the patent of 1854, I recognize and concur with the defendant in the claim, that that patent derives no aid or support from the patent of February, 1855. Each patent must stand or fall by itself. It is, however, pertinent to say, that, in no just view of the duty of the patentee to reduce the patent of 1854 to practical use, could the incorporation of the improvements of 1855, in the machine, when constructed, impair the validity and effect of such patent, if it was, as, in fact, I find it to have been, without such an improvement, a patentable machine.

And, once more, that the function of a shoe was indicated in the model of the socket-piece, m, by its curved under and forward surface, has already been stated; and, that such a function was in the mind of the patentee, even if, in its original structure, it was imperfect, is shown in the almost contemporaneous prolongation of the curve, by the addition of the toe. In considering that fact, it must be borne in mind, that a shoe, to assist in slid-

ing an object over the ground, was no new invention. It was a common, and may, I think, be declared an obvious, aid to that operation. From the large drogue, or stone-boat, having a similar function, through the shoe applied to coach or wagon wheels, to slide the vehicle (there retarding motion), down to its smaller and other varieties, including application to attempted mowing-machines, it was a common device. Ordinary mechanical judgment would suggest its use; and, had the complainant, in his patent, claimed anything as invention, in the function of a shoe, assigned to the socket-piece, m, as a distinct subject, such claim would have been invalid. He did assign to the socket-piece that function, and it exhibited that capacity, in some degree, in the model. It was, therefore, no departure nor enlargement of the patent of 1854, to exhibit the same well-known function by reference to the like well-known curved under surface. more perfectly developed in the subsequent reissues.

(5) In regard to the novelty of the complainant's invention, it is quite impossible for me to write at length an analysis of the various attempts at the construction of a useful mowing-machine, prior to his invention, in any similar form, or by similar devices. Counsel have, with great ability, done this, in their elaborate and valuable arguments, which have been preserved and printed; and I should be compelled, to a large extent, to re-write what they have skillfully done, as an aid to the court. My conclusion is, that none of the previous machines or inventions impair the validity of the complainant's patents, in any of the claims of which I deem the defendant to be an infringer.

(6) On the subject of infringement, it is claimed, that the absence of the caster-wheel at the end of the vibrating frame to which the finger-bar is hinged, not only distinguishes the Clipper machine constructed by the defendant, but assigns it to a distinct class of machines, substantially and radically different, in their organization and operation; and this, upon the suggestion, that, in the complainant's machine, as patented in 1854, the caster-wheel carried the end of the vibrating frame, and that carried the inner end of the cutter-bar, the latter being raised or lowered by the frame, and the frame being raised or lowered by the caster-wheel, according to the undulations in its path, while, in the Clipper machine, the inner end of the cutter-bar rests on a shoe, following the undulations of the ground, raising and lowering the vibrating frame, according to those undulations in the path of the shoe. Within certain limits, this is true. When the path of the caster-wheel was such that the shoe or socket-piece, holding the finger-bar, did not touch the ground, the end of the vibrating frame was sustained by the caster-wheel, and rose and fell with it; but, when inclination of the ground was such that the socket-piece bore upon the ground, and performed (whether more or less perfectly) the function of a shoe, then the shoe sustained the end of the frame, and the latter rose and fell with the undulations over which the shoe passed, as it confessedly does, in the Clipper machine. Thus, the complainant's machine had both features. The one caused by the presence of the caster-wheel may have been a disadvantage, but its omission, while the other substantial features of the complainant's invention were appropriated, cannot be said to constitute the Clipper machine a new machine in organization, and in its principle and mode of operation, though it were conceded that the omission of the caster-wheel, at the centre between the ends of the vibrating frame, is an improvement.

(7) Without attempting, by further writing, to discuss the many other considerations and particulars urged in behalf of the defendant, none of which have, I think, been overlooked by me, although not here noticed, I pass to a very brief consideration of the claims infringed by the defendant's Clipper machine.

The first claim of the reissued patent No. 875 is, "In combination with the hinged bar, H, and the finger-bar, the intermediate shoe, m, hinged to said bar, H, substantially in the manner and for the purpose set forth." The only ground upon which it seems to me possible to question the infringement of this claim by the Clipper mowing machine, is by maintaining that the Clipper does not contain the hinged bar, H, and, therefore, does not use the shoe, m, in the combination described.

It is, certainly, true, that the circular or curved plate used by the defendant in the Clipper, to cause the finger-bar to oscillate, is, in appearance and form, very unlike the hinged arched bar, H, which is used for the same purpose in the complainant's machine; and it is, also, true, that the hinged arched bar performs, in the latter machine, an office of which the Clipper's curved plate is incapable, namely, the office of bracing or strengthening the vibrating frame to which, on each side, it is attached. It is the single instrument for oscillating the cutter-bar, and, at the same time, giving strength to the frame. In the Clipper mower, the same two results are effected in a different form. The curved plate is the means of oscillating the cutter-bar, but it lies lengthwise, instead of crosswise, the frame; and an additional cross bar, from one side to the other of the frame, gives it firmness and strength. The two perform precisely the same functions, and all the functions of the complainant's hinged bar.

A patent for a device cannot be avoided by dividing it into two parts, which, when combined, produce the same result, in substantially the same way. That the defendant's cross-bar does strengthen the vibrating frame, by a firm connection between its two sides, and in substantially the same way as the curved bar, H, strengthens the frame in the complainant's mower, seems to me quite clear. If, then, the curved plate in the Clipper performs the same office in the oscillation of the cutter-bar, and in substantially the same way, then the defendant uses the

mere equivalent of the complainant's hinged bar. That hinged bar turns on a bolt, acting as a pivot, or centre of motion. The defendant's curved, oscillating plate turns on a centre of motion, about which it is made to turn, not by a bolt through that centre, but by being hung to bolts arranged in a curve around such centre, and moving in curved slots in the oscillating plate. The testimony shows, and it seems to me obvious, that this device for oscillating or rotating the curved plate, is the plainest mechanical equivalent for a rotation on a bolt at the centre; and that they are commonly and readily substituted the one for the other, whenever any incidental or collateral purpose makes one preferable to the other. For all the purposes for which the complainant's curved-bar was used, in either the support or the oscillation of the finger-bar, this device of the defendant is an equivalent.

True, a collateral purpose made the defendant prefer a motion on bolts and slots curved so that the plate would rotate thereon, instead of on the bolt in the centre. That purpose was this. It was desired, and the use of the curved plate, set lengthwise of the frame, made it necessary, to pass the rod or pitman, which moves the knives, through this curved plate, and that cut away the centre. But, this only made the choice of an equivalent mode of effecting the rotation a necessity. The defendant could not (if the precise arrangement of the Clipper in other respects was adhered to) rotate the oscillating plate on a bolt in the centre, and, therefore, used curved slots, made around the centre, and bolts, on which the curved slots should move. I concur fully with the witness Mr. Renwick, in his testimony on this point.

It is urged, that the oscillation in the two machines causes the two finger-bars to turn on different lines, as centres of oscillation. No doubt, there is a slight difference in that respect. But, it would be trifling with the subject, and making the rights of a patentee in general valueless, to hold that this deviation protected an infringer. The substantial purpose, and the substantial result is, to raise and lower the points of the cutters, according to the desire of the operator, when passing over ascending or descending ground. This is done in both, and by substantially the same means. That the centre of motion in that raising and lowering of those points is not identical, is not of the least importance. In one, that centre is an inch or two higher than in the other, and that is all. I cannot regard this, on the question of infringement, as of the slightest significance. I greatly doubt whether this feature in the Clipper is even an improvement. If it be, it is, nevertheless, in the just sense of the law of patents, an appropriation of the complainant's invention, in the combination described in the claim under discussion.

The third claim is, "The shoe, m, as a hinge and a support both, to the cutter-bar, substantially as described." This is the part above called the socket-piece or shoe. In its socket it receives and firmly holds the inner end of the cutter-bar, and, by its hinge, it attaches it to the oscillating bar at the end of the vibrating frame. That such a device was never used prior to the complainant's invention, I find, from the evidence. That the Clipper mower uses this device, is entirely clear. In both machines, it receives the finger-bar in a socket, and holds and supports it. In both, it is hinged to the oscillating piece; and, by its hinge, the outer end of the finger-bar is permitted to rise and fall, to adapt itself to the undulations of the ground. The only difference, worthy of notice is, that its forward edge or side is, in the Clipper, elongated and curved upward, in the more perfect form of a shoe. On that difference I have already observed, at some length, and will not here repeat my observations. I may add, however, that it partakes rather of the character of difference in degree than difference in function, although, in the complainant's machine, this function of the device is imperfectly performed, and, in some situations, might not be effective. Besides, this court, on a former occasion,—Sarven v. Hall [Case No. 12,369],—held, that a device is not less an equivalent of another, merely because, superadded to all the functions of such other, it may perform a further office. Still less does it fail to be the equivalent of another, because, besides all the functions of such other, it performs some one of the offices more effectively or better, so long as it performs them in substantially the same way, and uses substantially the same means.

The fourth claim of this reissue is for "the socket or recess, n, in the shoe, m, for the reception of the finger-bar, substantially as described." If this be interpreted as claiming, simply and broadly, a socket, in whatever is designed to receive and hold the finger-bar at its inner end—a mere socket or recess of the form and capacity of that described—then it was not new; it was old, not only in itself, but in its application to this purpose. Whoever provides a proper device to which to attach the inner end of the finger-bar, without, in other respects, infringing the complainant's patent, may make therein such a socket as the complainant has made, and may insert the finger-bar therein. If the claim be interpreted to mean the socket in the shoe, m, as a combination in substance as the complainant made it, so that it embraces, at the same time, the features of that shoe, then what has been said on the subject of the third claim also embraces this.

The claim in reissue No. 2,610 is as follows: "I claim, in combination with a harvester frame, that is free to vibrate about a gear centre, a laterally projecting finger-bar, so hinged to one end and corner of said frame, as to permit the finger-bar, at each end, to follow the undulations of the ground over

which it is drawn"; and the claim number two of reissue No. 2,632, of the patent of February 6th, 1855, is for "The combination of a vibrating frame with a cutting apparatus hinged thereto, a driver's seat, an arrangement of one or more levers, whereby the driver in his seat can raise and sustain the cutting apparatus, when desired." One of the defendant's objections applies alike to both of these claims—First, that they are invalid because too broad. If they must be read as claiming any and each possible mode, and every possible instrumentality, by which the result can be attained, there is force in the objection. But, they are both definite combinations, wherein none of the parts are claimed separately, or treated as new. Thus, the first is a combination of a harvester frame, free to vibrate about a gear centre (of which it may be assumed, for the purpose of testing this claim, that many were well known), with a laterally projecting finger-bar, hinged to one end and corner of said frame, so as to permit the finger-bar, at each end, to follow the undulations of the ground over which it is drawn (which, also, for the purposes of the test, may be deemed already well known). This combination was new, and it is this combination which the patentee claims. If he had claimed any and every finger-bar which might be so hinged as to permit it to follow the undulations of the ground, the objection of too great generality might be pertinent. Read in connection with the specification itself, I do not think the claim is objectionable; and this same combination is not found in any prior invention.

The other claim is still more clearly for a specific combination, to which like observations are applicable.

Second, it is insisted, that the claim in the reissue 2,610, above named, is proved to be invalid, by evidence that the combination there professedly described, as exhibited in the specification, drawings and model of the original patent, will not produce the result stated, that is to say, the finger-bar, as the machine is shown in the record of the patent and the model, will not, at each end, follow the undulations of the ground over which it is drawn. The claim is, therefore, said to be liable to two objections: 1st. That the reissue seeks to extend the patent beyond the invention shown by the record of the original; and, 2d. That the claim is only for a conceived result, which cannot be accomplished by the instrumentalities referred to in the specification, drawings and model.

Whatever may be true of the legal propositions involved in these objections, I apprehend, that, when the claim is justly and reasonably interpreted, it is not liable to the criticism which they assume to be well founded. The fact is, that, as a general rule, each end of the finger-bar is permitted, as the claim states, to follow the undulations of the ground over which it is drawn. On exceptional occasions, the caster-wheel may pass over an elevation which is of so limited an extent that it does not reach the inner end of the finger-bar, in which case it will not be exact to say that such inner end follows precisely the undulation of the ground over which it passes. But, the same strictness applied to any finger-bar would lead to the same necessary concession, that, in some part thereof, in special and exceptional instances, it does not follow the undulation of the ground over which it passes. When one end passes over an elevation, it is raised, in the centre, from the ground. When the centre passes over an elevation, one end or the other is raised from the ground over which it passes. The claim here should be taken to express nothing more than the general rule of the operation of the machine in this respect. Undulations in a field are not like possible casual obstructions (as by a stone, or a stump, or the like); the caster-wheel is not remote from the inner end of the finger-bar, and, in passing whatever can be properly called undulations, the arrangement does permit that end to follow them. The argument of the defendant, and, to some extent, the testimony, confound such obstructions as are above mentioned, and possible holes in the path of the caster-wheel, with an undulating surface, in respect to which the claim in question states the truth, and gives the general operation of the combination included in the claim. That there may be special, possible or occasional exceptions, ought not to, and does not, destroy the truth of the claim as stated, nor impair its validity. It must, I think, be conceded, that the defendant's criticism of this claim has something of foundation in an exact literal interpretation of its language. At first, it seemed to me sufficient to raise a doubt whether the claim should be sustained; but, consideration of the subject matter, and of the general practical operation of the machine over undulating surfaces, leads me to the conclusion above stated, and that, to construe the claim so strictly and narrowly as the defendant requires, would be giving force to letter instead of substance, would be unreasonable, would be adopting a needlessly rigid construction, warranted only by a disposition hostile to patentees, and not inclined to reasonable fairness. As to the arrangement of levers, mentioned in the claim in reissue No. 2,632, above stated, it must suffice to say, that the proofs, as well as my examination of the machine put in evidence, tend strongly to the conclusion, that, although the defendant's machine contains a decided improvement, by which, with a single hand, what is, in substance, two levers, may be operated, yet their mode of operation and their mechanical construction, widely as they differ in form, are substantially the same, and that their combination, in the Clipper machine, so as to be operated at a single end or handle, is to be regarded as an improvement only. Viewed separately from this combination, one, by means of an upright attached to the

shoe, m, connected to the lever by a linked connection (in substance, in relation to the operation contemplated, a chain), raises the outer end of the cutter-bar; the other, connected with the ground as a fulcrum, by the intermediate parts of the structure, raises the end of the frame, and, with it, the inner end of the finger-bar, when desired. Though there is room for some doubt, my conclusion is in conformity with some of the evidence, that the one system of levers is the mechanical equivalent of the other.

The claims in the patents alleged in the second suit to be infringed by the defendant, are the first claim in reissue No. 877, and the single claim in reissue No. 879. The first is as follows: "So hinging a finger-bar, by one of its ends only, to the main frame, as that it may oscillate or turn around its longitudinal axis, for the purpose of raising or lowering the points of the fingers, to adapt the machine to the condition of the ground, or of the crop to be cut, substantially as described." Nothing in the evidence warrants the suggestion that this was not a new invention; and it is not possible to deny that the Clipper machine has the capacity to oscillate the finger-bar, so as to raise or depress the points of the fingers, for the purpose mentioned. If, then, in the Clipper machine, this capacity to oscillate is effected in substantially the same way, and by substantially the same means, as are described and shown in the complainant's patent, the defendant infringes this claim. What has already been said in relation to the first claim in reissue No. 875, is, perhaps, sufficient to dispose of this question. The hinged bar, H, there mentioned, is the means or instrument by which the finger-bar is connected with the main frame, so that the oscillation becomes practicable; and this present claim is infringed by the use of a substantially like instrument, operating in substantially the same manner, or, to use the language of this claim, "substantially as described."

But, the defendant insists that the finger-bar, in the Clipper machine, does not turn on or around precisely the same axis as in the complainant's machine. This, according to the testimony, is true. In the latter, the centre of oscillation is a little higher than it is in the Clipper mower, the oscillation is more nearly a swinging motion than a turning on its own centre; while, in the Clipper mower, the oscillation partakes more nearly of the latter character. But, can it be said, that, in relation to such a subject as this, that difference is substantial? With reference to the object in view—the raising and lowering of the fingers, which is the sole useful purpose contemplated—the effect is identical. The means, according to my opinion, expressed in discussing the other reissue (No. 875), are substantially the same, and they operate probably not in the same geometrical curve, but, in substance, in the same manner. To hold otherwise, would be to give to immaterial variations capacity practically to destroy the value of any patent whatever.

Reissue 879 exhibits the single claim, "In combination with a cutter-bar, the shoe, m, and its hinge, and a supporting piece, and its hinged connection to the main frame, the arranging of the pivots of said hinges at right angles to each other, and in or near the line of the finger-bar, as described." It is quite unnecessary to enlarge upon this claim. That the pivots referred to are arranged, in both machines, as therein described, is unquestionable. If, therefore, the defendant's Clipper machine employs, in substance, the shoe, m, and its hinge and the supporting piece, H, and its hinged connection to the main frame, the conclusion that this claim is infringed is inevitable. I have already expressed the opinion, that the Clipper machine does, in substance, employ both, or what is a mere mechanical equivalent; and it follows, that, the described arrangement of the pivots of the hinges being the same, the defendant infringes the reissued patent in question. Without going into the discussion of further details, I am of opinion, that the complainant is entitled to a decree in conformity with the foregoing opinion.

[For other cases involving this patent, see Wheeler v. McCormick, Cases Nos. 17,498 and 17,499.]

WHEELER (COLLINS v.). See Case No. 3,018.

WHEELER (COMSTOCK v.). See Case No. 3,071.

Case No. 17,494.

WHEELER et al. v. The EASTERN STATE.

[2 Curt. 141.] [1]

Circuit Court, D. Massachusetts. Oct., 1854.

COLLISION—STEAMERS MEETING—USAGE.

1. The rule which requires two steamers approaching each other, to port their helms, and so pass on the starboard hand, must be acted on when there is any probable chance of collision by keeping their courses; it is not enough for the party, who departs from the rule, to show that they would have gone clear, if each had kept its course; he must also show, the other party ought to have perceived there was no probable chance of collision by so doing.

[Cited in Haney v. The Louisiana, Case No. 6,020; New York & B. Transp. Co. v. Philadelphia & S. Steam Nav. Co., 22 How. (63 U. S.) 473; The Sunny Side, Case No. 13,620.]

2. Semble, a local usage cannot vary the rule.

[Cited in The Clement, Case No. 2,879.]

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

[This was a libel in admiralty by James P. Wheeler and others, owners of the Admiral, against the steamer Eastern State, to recover damages for a collision. From a decree of the district court (case unreported), libellants appeal.]

Hutchins & Wheeler, for appellants.

C. P. Curtis, Jr., contra.

CURTIS, Circuit Justice. This is a cause of collision brought here by an appeal by the

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

libellants from a decree of the district court. The case made by the libel is, that, about six o'clock, in the evening of the 6th day of October, 1852, the steamer Admiral, bound from Eastport in the state of Maine, to Boston, was coming up the harbor of the latter place, and having arrived about opposite the upper end of a shoal called the "Lower Middle," was crossing towards the westerly side of the channel which is between that shoal and Castle island, when the captain and pilots of the Admiral first saw the steamer Eastern State, about half a mile above, coming out from among some sailing vessels, on the easterly side of the channel, bound out, headed for the Lower Middle, and, at the moment, three points on the starboard bow of the Admiral, so that if both vessels kept their course they would go clear. That the Admiral kept her course; the Eastern State changed hers to the westward, as soon as she was clear of the sailing vessels, and the result was, that she struck the Admiral forward of her wheel-house, and inflicted severe injury. The fault attributed to the Eastern State is, that when she got clear of the sailing vessels, she put her helm to port, instead of keeping her course and passing the Admiral on the starboard hand. The answer alleges, that the Eastern State, in coming down the channel, passed a sloop under sail, and, in order to do so, went on the easterly side of the channel, and as soon as the steamer was clear of the sloop, her helm was put to port, and her course changed for the starboard, or westerly side of the channel; and after this change of course the master of the Eastern State, who was on the look-out, forward, on the topgallant-forecastle, first saw the Admiral, about abreast of the lower buoy on the Lower Middle, and heading westerly; he supposed the Admiral would keep the east side of the channel; but instead of doing so the Admiral crossed the channel to the westward. The fault attributed to the Admiral is, that on arriving at the upper end of the Lower Middle shoal, instead of bearing to the northward and keeping on the eastern side of the channel, she kept her course, crossed the channel, got on the wrong side of it, and thus caused the collision. Before adverting to the controverted facts in this case, there are several things of much importance to be noticed. The first is, the rule of navigation applicable to the case of two steamers approaching each other. That rule is, that if two steamers are approaching each other, in such a manner that there is any probable chance of collision if they keep their courses, each is bound, seasonably to put the helm to port, so as to pass each other on the larboard hand. Some attempt has been made to show that at the time in question, this rule was not in force in navigating Boston Harbor. The rule having been declared by the highest authority, both in this country, and in England, in reference to vessels going free (4 Notes Cas. 42; 1 W. Rob. Adm. 478; 2 W. Rob. Adm. 1, 277; 7 Notes Cas. 137; [St. John v. Paine] 10 How. [51 U. S.] 557; Lowry v. The Portland [Case No. 8,583]), and being equally applicable to steamers, I should more than doubt whether any local custom could be allowed to vary it. But I do not find in the case, evidence to prove such anomalous practice in this harbor. There are some rather loose and vague statements, made by two witnesses, who have been accustomed to navigate Boston Harbor in steamboats; but they amount to no more than this,—that though they are aware of the rule they disregard it. As to this, I have only to say, and wish it to be distinctly understood, that they and all others who disregard it, under circumstances to which it is applicable, do so at their own peril.

There is another consideration having an important bearing on the case. The place where this collision occurred, is the channel through which nearly all the shipping bound to and from the harbor of Boston passes. At and near that place this channel is of its least breadth. The shoal called the "Lower Middle," lying nearly east of Castle island, and ranging east and west, a steamer coming from sea and heading westward while abreast of the shoal, must change her course to the northward, when the shoal is passed, to head up to the city. If her course is changed while passing the end of the shoal, she keeps on the easterly, or right hand side of the channel; if she holds her westerly course after passing the end of the shoal, she crosses the channel, towards Castle island, and then changes her course to the northward, and is on the left and wrong side of the channel. Under some circumstances, and in some places, it might not be a matter of much importance, which was done. Not so in this case. The channel is narrow. It is greatly frequented. The dusk of the evening had come. And it is the concurrent testimony of all the disinterested witnesses who have skill, and have spoken to this point, that the invariable practice is, for steamers, coming up the harbor, when they arrive at that point, to bear to the northward round the westerly end of the Lower Middle, and thus keep on the easterly and right hand side of the channel. In crossing the channel therefore, the Admiral was in fault, and considering the hour and the place, the fault was a grave one.

The libellants insist that the Eastern State was also in fault; and that even if the Admiral did wrong in crossing the channel, the Eastern State might have avoided the collision by keeping on the east side, and passing the Admiral on the starboard hand; and under the circumstances was bound to do so. It is not enough for the libellants to show, that the steamers would have cleared each other if each had kept its course. They must go further, and show that there was no probable chance of a collision, if each kept her

course; and that this was, or ought to have been, apparent to the Eastern State. The rule does not permit, much less require, either to speculate upon chances of escape, or to depart from its requirement, which is to go to the right in all cases which admit of any question. It is not a rule to go to the right, if it seems best at the time to do so; but a rule to go to the right in all cases, where it is not clearly apparent there will be no collision, by keeping their respective courses. A moment's consideration will show, that the rule would lose nearly all its value, if those in charge of one steamer, were obliged, not only to determine whether they judged it best to go to the right, but also to speculate upon the probability that those in charge of the other steamer would decide in the same way. The purpose of the rule is to prevent collisions; not to have a law to settle collision cases when they occur. And, to prevent them, it is indispensable that both should act on one rule, and thus coöperate. This cannot be attained, if the course, when questionable, is left to the judgment and presence of mind of those in charge. Their judgment and presence of mind will not be the same, and in practice they will not coöperate, and thus collisions will occur. Now, upon the proofs, I do not think it is made out that the Eastern State ought to have perceived, there was no probable chance of a collision if she departed from the rule and kept her course. It is testified by those on board the Admiral, that when they were about abreast of the upper end of the Lower Middle, they first saw the Eastern State, and she was then about half a mile off and three points on the starboard bow. Take this to be true, and suppose also that the Eastern State was then coming out from among the vessels, and was then in the act of changing her course; facts which are controverted by the claimants, who assert that when her course was changed, the Admiral was abreast of the lower part of the shoal; but take the facts to be as asserted by those on board the Admiral; was it apparent to the Eastern State, that there was no probable chance of a collision if she kept her course? Suppose she had done so, and the Admiral had borne to the northward in passing the end of the shoal, and so kept on the eastern side of the channel, a collision would have been almost certain. In that case, in my judgment, the Eastern State would have been in the wrong. Because, in considering whether there was a probable chance of collision by keeping her course, those in charge of her were bound to know that the channel was crooked there, that it inclined to the northward rapidly, after passing the shoal, that the usual course of steamers coming in was, to haul to the northward in passing beyond the shoal, and thus keep on the easterly side, and therefore the Admiral might be expected to do so, and if this were done, there would be not only a probable chance, but almost a certainty of a collision. And, if upon these grounds, the Eastern State would have done wrong, to depart from the rule, it necessarily follows that she did right to adhere to it, and the disaster is attributable, not to the observance of the rule by the Eastern State, but to a departure by the Admiral from the usual and proper course at that point, crossing the channel, instead of keeping on its eastern side.

It was argued that the course of the Eastern State was changed, after it was apparent the Admiral was crossing the channel; and when it ought to have been perceived, that if she kept her course they would clear each other, but if she attempted to go to the right, they must come together. Of this I am not satisfied. I think the evidence quite strongly preponderates the other way. I have read the whole of the evidence and considered the arguments of the counsel, and my opinion is, that the helm of the Eastern State was put to port as soon as possible after passing the vessel under sail, and while those in charge of her believed, and had a right to believe, the Admiral would take the usual course, and keep up the channel, and not cross it. Let the decree of the district court be affirmed with costs.

Case No. 17,495.

WHEELER et al. v. FACTORS' & TRADERS' INS. CO. et al.

[3 Woods, 43.] [1]

Circuit Court, D. Louisiana. April, 1877.[2]

FIRE INSURANCE—CREDITORS INSURING DEBTOR'S BUILDING.

Certain creditors of G., at his instance and cost, took out in their own name and for their own benefit, insurance on his gin house, etc., to secure their debt in case of loss of the gin house by fire. The property insured was burned. *Held*, that a creditor of G. who held a mortgage on the same property, and who, by its terms, was entitled to have the same insured for his benefit at the cost of G., had no claim on the insurance money, even though the parties who took out the insurance had no insurable interest in the property insured.

The case of complainants [Ezra Wheeler and others], as stated in the bill, was substantially as follows: The complainants were the holders, by assignment from Foster & Gwynn, of three notes made by the defendant John H. Green, payable to his own order and indorsed by him, one for $10,000, dated May 23, 1870, one for $3,723.61, dated May 23, 1871, and one for $3,009.55, dated March 7, 1872. Each of the notes was secured by a separate mortgage, executed by Green upon the Bell plantation, in Carroll parish, Louisiana. The mortgages, to secure the two notes last mentioned, each contained a clause whereby Green agreed that he would cause to be insured against fire the buildings and improvements on said plan-

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

[2] [Reversed in 101 U. S. 439.]

tation, until the payment of said two notes respectively, and transfer the policies to the mortgagees, and in default of such insurance the mortgagees might insure said property for their own security and charge the premium to him. Green, when asked by George Foster, acting for plaintiffs, respecting said insurance, told Foster that he had insured said premises for the benefit of complainants, and afterwards, in January, 1873, Gwynn, of the firm of Foster & Gwynn, called at the office of the defendants Johnson & Goodrich to learn whether the policy for the protection of the mortgagees had expired, and if so, to cause a new policy to be taken out, and Gwynn was informed that the property was insured by Johnson & Goodrich, for the protection, as he supposed, of complainants. Johnson & Goodrich, as the agents and commission merchants of Green, did, in January, 1873, by an indorsement under an open fire policy in the Factors' and Traders' Insurance Company, obtain an insurance against fire of said premises for $5,500 until March 28, 1873, but payable to the merchants of said Green, namely, the said Johnson & Goodrich. On or about March 26, the gin house insured by said policy was destroyed by fire, whereby the insurance company became liable for the loss. The bill further charged that Johnson & Goodrich had no insurable interest in the said premises. The claim of complainants was that they were entitled to the insurance money, and the prayer of the bill was that the insurance company might be restrained from paying over the money to Johnson & Goodrich or to Green.

E. T. Merrick, for complainants.
Thomas Hunton, for defendants.

WOODS, Circuit Judge. The case, as made by the bill, is not supported by the evidence. The answers and testimony show that Johnson & Goodrich, at and before the time the insurance was taken out by them, were the commission merchants of Green, and were his creditors in the sum of $4,629.06; that they desired to have insurance on the gin house and gin stands on the Bell plantation, to secure their debt in case of loss by fire, and so informed Green; that Green assented to their proposition to take out said insurance at his cost, and wrote to Johnson & Goodrich to remind them to take out such insurance. Johnson & Goodrich accordingly indorsed the insurance upon an open policy which they had in the Factors' and Traders' Insurance Co. for the sum of $5,500, payable to themselves in case of loss, and charged the premium to Green. Neither Johnson nor Goodrich knew of the clauses in the mortgages given to secure the notes held by complainants, providing for insurance of said premises; they did not, nor did either of them nor any one in their office, with their knowledge, inform Gwynn that the property was insured for the benefit of the mortgagees or insured for the benefit of any one else; nor did John H. Green ever inform Foster & Gwynn, or either of them, that he had caused the premises to be insured for the benefit of complainants, through Johnson & Goodrich or any one else. In short, the whole case made by the bill is overturned by the answer and evidence, except the averments that complainants are the holders of three notes of said John H. Green, secured each by a separate mortgage, and that the last two mortgages each provided for insurance of the premises, as above set forth. No insurance was ever taken out by Green for the benefit of complainants. Johnson & Goodrich acted in their own behalf for their own benefit, and took a policy payable to themselves, for the security of their own debt, without any knowledge that Green had ever agreed to insure for the benefit of complainants. By what rule of law or equity the complainants can claim the proceeds of the insurance I do not know. It is said that Johnson & Goodrich had no insurable interest in the premises. If that is so, the result is that the policy is void. It does not follow that some one else who had an insurable interest, but for whom no insurance had been taken out, is to be substituted in the policy for Johnson & Goodrich. The insurance company made no contract of insurance with the complainants, and they cannot insist on the fruits of a contract to which they were in no manner parties, and which was not made for their benefit. Bill dismissed.

[On appeal to the supreme court, the above decree was reversed. 101 U. S. 439.]

WHEELER (HARRIS v.). See Case No. 6,129.

Case No. 17,496.

WHEELER v. HELMBOLD et al.

[5 Blatchf. 503.] [1]

Circuit Court, S. D. New York. Nov. 11, 1867.

CONSTRUCTION OF CONTRACTS — TENDER OF PERFORMANCE—EQUITY JURISDICTION.

1. In an agreement between H. and W., it was provided: (1) That W. should have the option of taking 1,875 shares of stock, in a certain company, and certain presses, on the following terms and conditions, namely, the payment of $3,000 in 30 days, $1,000 in 60 days, $1,000 in 90 days, $7,000 in 9 months and $3,000 in 12 months; (2) that, on the payment of $3,000, a cotton compress was to be delivered to W., and, on the payment of $150, in addition, a plantation press was to be delivered to him; (3) that, on payment of any sum of $1,000, or upwards, a pro rata amount of the whole of the stock proposed to be delivered to W. by the contract, and a pro rata amount of 2,500 other shares of stock in the same company, owned by W., but held by H. as collateral security, should be delivered to W., as rapidly as such payments were made. *Held*, that W. had the option, under the agreement, to pay, at any time within the times and amounts limited, the sum of $1,000, and receive the proportion of stock thereto belonging, and that, on the tender of any such $1,000, the pro rata pro-

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

portion of shares belonging to it became, in equity, the property of W. *Held*, also, that the refusal by H. to accept a tender when made, did not confer on W. a right to any more shares than the pro rata proportion represented by the sum tendered, and that, as to all sums not tendered within the times limited by the agreement, W. forfeited his option in regard to the pro rata portion of shares represented by such sums.

2. A claim by W. against H., for damages for delaying to assign a patent, under an agreement to assign it, and for discouraging parties from buying the patented machines, *held*, not to be a subject for affirmative relief in equity, in this suit, or for equitable set-off, in this suit, against any sum due by W. to H.

In equity. This was a motion for a provisional injunction, founded on a bill, and opposed by the defendants, on an affidavit made by the defendant Helmbold. On the 14th of September, 1866, the plaintiff, being the owner of three patents for improvements in cotton presses, assigned them to the defendant Helmbold, and, at the same time, entered into a written agreement with him, the material provisions of which were as follows: (1) Helmbold was to pay down to Wheeler $7,500, and advance such further sums as should be necessary to carry on the business of making machines under the patents; (2) the two parties were to share equally all profits from the business and the patents, except that the whole net profits were to belong exclusively to Helmbold, till they should amount to $15,000 and, after that, 50 per cent. of all further profits was to be appropriated to reimburse Helmbold for any advances of his, until he should be wholly repaid, and the remaining 50 per cent. was to be divided equally between the parties, and, after such advances were repaid, all profits were to be divided equally between the parties. On the 3d of October, 1866, Wheeler and Helmbold and one Baldwin formed a corporation, under the laws of New York, called "The Champion Press Company," for the business of making and selling machines under the patents. The stock of the company was 5,000 shares, of $100 each. The whole of it was to be issued to Helmbold, in the first instance, in payment for the patents, which he was to assign to the company. He was then to transfer to Wheeler one-half of the stock, but was to retain the certificates for such one-half, until his advances should be repaid, according to the terms of the agreement of September 14th, 1866. Helmbold made advances to the amount of $7,500, in addition to the $7,500 which he had so paid to Wheeler. Helmbold and Wheeler then, on the 31st of January, 1867, entered into another written agreement, which, after referring to the agreement of September 14th, 1866, recited that Wheeler proposed to take the option of reimbursing to Helmbold all the advances made by him in the business, say $15,000, and allowing him to retain, in addition, an interest of one-eighth of the stock of the company, and then provided as follows: (1) Wheeler was to have the option of taking three-eighths of the stock of the company, or $187,500 of stock (which would be 1,875 shares), and also certain presses, on the following terms and conditions, namely, the payment of $3,000 in 30 days from date, $1,000 in 60 days, $1,000 in 90 days, $7,000 in 9 months, and $3,000 in 12 months; (2) on payment of $3,000, the cotton compress was to be delivered to Wheeler, and, on the payment of $150, in addition, the plantation press was to be delivered to him; (3) then followed a provision in regard to which the controversy on this motion arose, and which was verbatim as follows: "It is also understood, that, upon payment of every sum of $1,000 or upwards, a pro rata amount of the whole of the stock proposed to be delivered to said Wheeler, by their contract, and a pro rata amount of the interest of said Wheeler (held by the said Helmbold, as collateral for the return of his advances), shall be delivered to the said Wheeler, as rapidly as the said advances are reimbursed;" (4) the patents were to be assigned to the company, and its organization completed by the election of officers, and the issuing of the stock, which was to be held by Helmbold, as collateral for the return of his advances. On the 15th of March, 1867, the organization of the company was completed, and, on the day following, Helmbold assigned the patents to the company, and the whole of its stock was issued to him. Wheeler paid, or satisfactorily secured, to Helmbold, the payments which, by the agreement of January 31st, 1867, were to be made in thirty days, sixty days, ninety days and twelve months, being in all $8,000 out of the $15,000, leaving unpaid only the $7,000 which was to be paid in nine months. In pursuance of these payments, Helmbold transferred to Wheeler eight-fifteenths of the 1,875 shares, namely, 1,000 shares, and 1,426 shares out of the 2,500 shares in the hands of Helmbold as collateral. On the 22d of March, 1867, Helmbold transferred to the defendant Curtis, as trustee for him, all the stock then standing in his name. On the 25th of October, 1867, Wheeler tendered to the defendants $1,000, and demanded the transfer to him of one-fifteenth part of 4,375 shares being 291 shares. These 291 shares, added to the 2,426 shares, before transferred to Wheeler, would give him 2,717 shares, being a majority of the stock; and the inability of the defendants to vote on these 291 shares would leave under their control only 2,283 shares, and under the control of the plaintiff 2,426 shares. The defendants refused to receive the $1,000, or to transfer to Wheeler any more stock. The annual election for trustees of the company was soon to take place, and the controversy was really one as to which of the two parties should have the control of the company. On the 1st of December, 1867, Helmbold served a

notice on Wheeler, of his intention to sell, at public auction, on the 6th of the same month, 1,949 shares of the stock of the company, being the balance of stock in his hands as collateral, and the balance of the 1,875 shares. The bill prayed a decree for the transfer to Wheeler by Curtis of 125 shares of stock, and by Helmbold of 166 shares. It also prayed an injunction, restraining the defendants from disposing of so much of the stock standing in the name of Curtis, and held by him in trust for Helmbold, as to leave standing in his name less than 875 shares, or of any of the stock deposited in the hands of Helmbold, and, also, restraining Curtis from voting upon any of the 875 shares.

Clarence A. Seward and John L. Ward, for plaintiff.

Elbert E. Anderson, for defendants.

BLATCHFORD, District Judge. The whole controversy turns upon the construction of the clause in the agreement of January 31st, 1867, which relates to the payment of sums of one thousand dollars and upwards. The plaintiff contends that he has a right, under the agreement, to make, at any time within the times limited by the agreement, a payment of $1,000 or upwards, and receive the proper proportion of stock applicable to such payment, and that he can exercise his option, within the times limited by the agreement, to such an amount, in sums of at least $1,000, within the sums specified therein, as he chooses, without being bound to pay the entire sums specified; as, for instance, that, having paid the first $5,000, he can, within nine months from the date of the agreement, pay $1,000 more, without being bound to pay $6,000, in addition to such $1,000. The defendants contend, that the option given is to pay as follows: $3,000 in 30 days, $1,000 in 60 days, $1,000 in 90 days, $7,000 in 9 months, and $3,000 in 12 months; that these terms are not varied by the subsequent provision of the agreement; and that the plaintiff has no right to pay the $1,000, without paying the other $6,000, which go to make up the $7,000 payable in 9 months.

It will be seen, that the option given to Wheeler by the agreement, is an option to take the 1,875 shares and the presses, by paying $15,000 in the amounts and within the times specified. If the agreement had stopped there, there would have been no right in Wheeler to receive any part of the 1,875 shares or the presses, until and unless he paid the whole $15,000, and paid it by paying it in the instalments and within the times limited. The parties accordingly go on to provide, that, on the payment of $3,000 of the $15,000, the cotton compress shall be given up, and that, on the payment of $150 more of the $15,000, the plantation press shall be given up. But still there was no provision for any pro rata transfer to Wheeler of the 1,875 shares, or of the 2,500 shares standing in Wheeler's name, but held by Helmbold as collateral. The agreement, therefore, goes on to provide, that, "upon payment of every sum of one thousand (1,000) dollars, or upwards, a pro rata amount of the whole of the stock proposed to be delivered to said Wheeler by this contract, and a pro rata amount of the interest of the said Wheeler (held by the said Helmbold as collateral for the return of his advances) shall be delivered to the said Wheeler as rapidly as the said advances are reimbursed." The defendants contend, that the words, "any sum of one thousand dollars or upwards," mean, any of the sums before specified, being two of $1,000 each, two of $3,000 each, and one of $7,000, whether such sums are $1,000 or more; and that the provision means that, upon payment of any of the sums above specified, whether $1,000 or more, pro rata amounts of the two parcels of stock shall be delivered to Wheeler as rapidly as such payments shall be made. The plaintiff, on the other hand, contends, that the provision gives him an option to pay, at any time within the times and amounts limited, the sum of $1,000, and receive the proportion of stock thereto belonging. On the construction contended for by the defendants, the tender of the $1,000 within the nine months amounted to nothing, because $6,000 more were not tendered within the same time. On the plaintiff's construction, the tender of the $1,000 within the nine months was sufficient to entitle him to the 291 shares.

Although the question is not free from difficulty, I incline, on the whole, to the interpretation put upon the provision by the plaintiff. On this view, the 125 shares out of the 1,875 shares, and the 166 shares out of the 2,500 shares, which 291 shares are the pro rata proportion belonging to the $1,000 tendered, are, in equity, the property of the plaintiff, and the defendants ought to be enjoined from intermeddling with those 291 shares.

But the plaintiff contends, that the defendants, by refusing the tender of $1,000, and refusing to transfer the 291 shares, have perfected the right of the plaintiff to the rest of the 1,875 shares and of the 2,500 shares, without the payment by the plaintiff of any more of the $7,000 which was to be paid in nine months. I cannot concur in this view. The whole agreement is one giving an option to the plaintiff to have the 1,875 shares, and the 2,500 shares, delivered to him, by making the payments specified within the times prescribed. Before he made the tender of $1,000 he had paid and arranged the payments that were to be made within the thirty days, the sixty days, the ninety days, and the twelve months, but he had paid nothing toward the $7,000 additional that was to be paid within nine months; and, even though he had, as is held, the right to pay within the nine months only $1,000 of that $7,000, unless he chose to pay more of it, yet he had a right to forfeit his option as to the $6,000, if he chose to forfeit it. This he has done. He has allowed

the nine months to expire without paying more than $1,000 of the $7,000. He could have tendered the whole of the $7,000 and become entitled to the entire residue of the 1,875 shares, and of the 2,500 shares. But he has elected not to do so. The refusal by the defendants to receive the $1,000 and to transfer the 291 shares, can confer upon the plaintiff no greater rights, as respects the remaining 1,658 shares, than the agreement gives him. By the agreement he must pay $6,000 to secure a right to the 1,658 shares. By tendering the $1,000, he acquired a right in the 291 shares only, and none in any part of the 1,658 shares.

The defendants, therefore, have a right to regard the agreement of January 31st, 1867, as at an end, so far as any option on the part of the plaintiff in respect to the 1,658 shares is concerned. It has expired, in regard to those shares, by its own limitation. The defendants have, therefore, a right to deal with 750 shares, and no more, out of the 1,875 shares, as their own, without reference to any rights of the plaintiff therein; and the defendant Helmbold has a right to hold and treat 908 shares, and no more, of the stock standing in Wheeler's name, as being pledged as collateral to the indebtedness of Wheeler to him, and to exercise, in regard to it, the usual rights of a holder of collateral security.

In regard to the 750 shares, no ground for the equitable interference of this court is alleged in the bill, except what grows out of the agreement of January 31st, 1867, and that has been already disposed of.

In regard to the 908 shares, the bill sets up certain acts of the defendant Helmbold in delaying to assign the patents to the company and to complete the organization of the company, and in discouraging parties from buying the patented machines, which acts, it alleges, have caused damage to the plaintiff, and it prays that the amount of this damage may be assessed and set off against the $6,000 which still remains unpaid of the $15,000, and that the amount of stock represented by the amount of such damage be transferred to the plaintiff in like manner as if he had paid to Helmbold in money an amount equal to such damage, and that the surplus of such damage beyond the $6,000 be paid by Helmbold to the plaintiff. On all these facts, the bill prays a permanent injunction restraining the defendants from transferring to any other person than the plaintiff, without his consent, any of the stock of the plaintiff so deposited in the hands of Helmbold. In regard to this alleged damage to the plaintiff, it is sufficient to say, that, if the facts are as stated by the plaintiff, he has a plain, adequate and complete remedy at law therefor, by a direct action against Helmbold, if he has any cause of action growing out of the alleged acts of Helmbold. The damage set up is not a subject for affirmative relief in equity, in this suit, nor is it a subject for equitable set-off, in this suit, against any amount which the plaintiff owes to Helmbold. Helmbold's right of action against the plaintiff does not grow out of the agreement of January 31st, 1867, but out of an indebtedness of the plaintiff to Helmbold, otherwise created. Helmbold cannot sue the plaintiff, on that agreement, for any of the sums specified therein, for, the effect of the agreement is merely to give the plaintiff an option, and to bind the defendant to transfer stock on the exercise of such option. But Helmbold cannot compel the plaintiff to exercise the option or sue him on the agreement for not exercising the option. Therefore, so far as the damage referred to can be set off, in any suit, against what the plaintiff owes Helmbold, it must be so set off in a suit brought by Helmbold against the plaintiff. The damage does not grow out of the agreement of January 31st, 1867, which is the sole proper subject of any equitable jurisdiction in this suit.

I think, therefore, that the plaintiff is entitled to a provisional injunction restraining the defendants from selling, assigning, transferring, disposing of, pledging, or encumbering, in any way, to, or in favor of, or for the benefit of, any other person than the plaintiff, so much of the stock now standing in the name of the defendant Curtis, on the books of the company, and held by him in trust for the defendant Helmbold, as to leave standing in his name, on the books, in trust, as a stockholder, less than one hundred and twenty-five shares, or, at its par value, twelve thousand five hundred dollars' worth of the stock, or any more than nine hundred and eight shares of the stock of the plaintiff deposited, and still remaining, in the hands of the defendant Helmbold as collateral security. In regard to these 908 shares, no ground for equitable relief is shown by the bill, and it does not appear that Helmbold is about to exercise in regard to them any other rights than those which, as a holder of them as collateral security for a debt due to him, he is entitled to exercise. The injunction will also restrain the defendants from voting, either in person or by proxy, at any meeting or meetings of the stockholders of the company, upon all or any of the two hundred and ninety-one shares. An injunction will accordingly issue to the extent above prescribed, and, in all other respects, the injunction asked for is refused.

Case No. 17,497.

WHEELER v. The KATE.

[Cited in The Louis Olsen, 52 Fed. 656. Oral opinion; not now accessible.]

Case No. 17,498.

WHEELER v. McCORMICK.

[8 Blatchf. 267; 4 Fish. Pat. Cas. 433.][1]

Circuit Court, S. D. New York. March 9, 1871.

PLEAS IN EQUITY—REFERENCE TO ANNEXED PAPER—INFRINGEMENT OF PATENTS—JURISDICTION OF CIRCUIT COURT, S. D. NEW YORK.

1. Where the allegations of a plea to a bill in equity are qualified by a reference to a paper annexed to the plea, the plea must be read as if the paper were introduced, in its very terms, into the body of the plea.

2. A bill in equity was filed by W., in a circuit court in Illinois, against C. and L., alleging the infringement by them, within the jurisdiction of that court, of a patent granted to W., and praying for an account and an injunction. Subsequently, W. filed a bill in this court, against the said C., alleging the infringement by him, within the jurisdiction of this court, since the filing of the previous bill in Illinois, of the same patent, and praying for an account and an injunction. To such bill in this court C. interposed a plea, setting up, in abatement, the pendency of such previous suit. *Held*, that the plea was bad.

[Cited in Pennsylvania Salt-Manuf'g Co. v. Myers, Case No. 10,955. Distinguished in Turrell v. Spaeth, Id. 14,268. Cited in Gold & S. Tel. Co. v. Pearce, 19 Fed. 419.]

3. The case of Woodworth v. Stone [Case No. 18,021] commented on.

4. It is irregular to file, without special leave of the court, two pleas to a bill in equity.

5. The 6th section of the act of April 3d, 1818 (3 Stat. 415), declaring that the original jurisdiction of the circuit court of the Southern district of New York shall be confined to causes arising within the said district, and shall not be construed to extend to causes of action arising within the Northern district of New York, does not exclude from the jurisdiction of the circuit court for the Southern district of New York causes of action arising out of the state of New York.

6. Rules for the construction of the particular provisions of a statute, stated.

[Cited in Institute for Education of Mute & Blind v. Henderson (Colo. Sup.) 31 Pac. 716.]

[This was a bill in equity, filed to restrain the defendant from infringing letters patent for an "improvement in grass and grain harvesters," granted to complainant December 5, 1854, reissued January 3, 1860, in seven divisions, and extended for seven years from December 5, 1868.] [2] The bill of complaint herein described the defendant as a citizen of New York, and alleged that the plaintiff was the inventor of certain improvements in grass and grain harvesters, and that the exclusive right to make, use and sell the same was secured to him by certain letters patent, and by reissues and extensions thereof duly granted to him. It then averred, that a bill had theretofore been filed on behalf of the plaintiff, against the defendant, in the circuit court of the United States for the Northern district of Illinois, complaining of sundry infringements by the defendant, committed prior to the filing of the said bill; that, since the filing of the said bill, the defendant had committed and was then committing divers other acts of infringement of the said letters patent, besides those theretofore complained of in the said bill, by constructing and using the said patented improvements, or machines in some parts thereof substantially the same in construction and operation as in the said letters patent mentioned; and that the defendant, without the license of the plaintiff, and against his will and in violation of his rights, had made, used and sold, and intended to continue still to make, use and sell, the said improvements, within the Southern district of New York, in violation of the said letters patent. The bill thereupon prayed discovery whether the alleged letters patent, and the re-issues and extensions thereof, were issued and granted as alleged, and that the defendant account for and pay over the income "thus unlawfully derived from the violation of the rights of the plaintiff, as above, and be restrained from any further violation of the said rights, by injunction," and that the machine or machines in the possession or use of the defendant be destroyed or delivered up to the plaintiff for that purpose, and that the plaintiff might have such other relief, &c. The defendant interposed two separate pleas to the bill. The first plea alleged, that, on or about the 8th of May, 1869, the plaintiff exhibited his bill of complaint in the circuit court of the United States for the Northern district of Illinois, in equity, against this defendant, as a citizen of Illinois, and against Leander J. McCormick, of Chicago, setting forth the same matters and equities, and for the same purpose, and to the same tenor and effect, and in the same right, and praying for the same relief, against the defendant and against the said Leander, and for an account of the income derived from the alleged infringement of the same letters patent, as the said plaintiff now alleged, set forth and prayed for against the defendant, as would fully appear by reference to a true copy of said former bill of complaint, annexed to the plea, and filed therewith and made part thereof. The plea then alleged appearance by the defendant, answer, replication, the taking of testimony, and the present pendency of the said suit in the said circuit court, undetermined, &c., and insisted upon the same in abatement, and prayed judgment whether the defendant should be required to make further answer, &c. The copy of the bill of complaint, which was annexed to and made part of the plea, set forth the same patents, re-issues and extensions, and in the same words, as the bill of complaint herein. It then averred, that the defendants therein (Cyrus H. McCormick and Leander J. McCormick), well knowing, &c., were then constructing and selling the said patented improvements, or machines in some parts thereof substantially the same in construction and operation as in the said letters patent mentioned; and that the said de-

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

[2] [From 4 Fish. Pat. Cas. 433.]

fendants, without the license of the plaintiff, against his will, and in violation of his rights, had made and sold, and intended to continue still to make and sell, the said improvements, within the Northern district of Illinois. The bill thereupon prayed discovery, whether the alleged letters patent, re-issues and extensions were issued and granted, as alleged, and whether the defendants, or either of them, had, and when, &c., made, sold or used any, and how many, machines, constructed wholly, or in part, upon the principles and in the manner described in said letters patent, and how they were made, &c.; and that the defendants might account for and pay over the income "thus unlawfully derived from the violation of the rights of the plaintiff, as above, and be restrained from any further violation of the said rights, by injunction, and that the machine or machines in possession or use of the defendants be destroyed or delivered up to the plaintiff for that purpose," and that the plaintiff might have such other relief, &c. The second plea alleged, that the said supposed cause of action, if any, arose or accrued to the plaintiff out of the jurisdiction of this court, that is to say, at Chicago, in the state and Northern district of Illinois, and not within the jurisdiction of this court, nor within the Southern district of New York; that the defendant was a citizen of the state of Illinois, and of Chicago, in the Northern district of said state; that he was there engaged in the manufacture of harvesting machines, with Leander J. McCormick, his partner; that he had not, since the 2d of January, 1860, made, or caused, authorized or procured to be made, any harvesting machines whatever, at any place within the United States other than the said city of Chicago; and that no harvesting machine made by him, or made at his aforesaid manufactory, or made by his authority or procurement, had, at any time since the 2d of January, 1860, been sold or used by him, or by his authority or procurement, within the Southern district of New York. Referring, next, to the 6th section of the act of congress of the United States, of April 3d, 1818 (3 Stat. 415), entitled, "An act respecting the courts of the United States within the state of New York," the plea alleged the competency of the jurisdiction of the circuit court for the Northern district of Illinois, and denied the jurisdiction of this court, to determine the matters in question in this cause. Upon these pleas the case was set down for argument.

Clarence A. Seward and George Harding, for plaintiff.

George T. Curtis and Henry Baldwin, for defendant.

WOODRUFF, Circuit Judge. (1) By setting down the pleas herein for argument, the complainant admits the facts therein alleged; and the sufficiency of the pleas, as a defence, is the question to be considered. Upon the first of the defendant's pleas, two questions, therefore, arise: 1st. Does the plea itself show that the present bill, filed in this court, is for the same cause of action as the former bill, filed in the circuit court for the Northern district of Illinois? and, 2d. If the cause of action be the same, does the pendency of the said former suit abate the present suit?

1st. Although the terms of the plea, in the first instance, import that the bill filed in Illinois sets forth the same matters, is filed for the same purpose, to the same tenor and effect, and in the same right, and prays the same relief, as the complainant alleges, sets forth and prays for herein against the defendant, those terms are distinctly qualified by the pleader, by his reference to the said bill, a copy of which is annexed to the plea and made part thereof. Had he seen fit to make the allegations in the form specifically and distinctly made, without thus incorporating the bill itself in his plea, and the complainant had then set the plea down for argument, the court would have been required to treat these allegations of fact as admitted, and the question first stated would not arise. It would have stood before the court admitted that the cause of action in each suit is identical. But, the plea having qualified these allegations by reference to such bill, that is to say, by adding, "as will fully appear by reference to a true copy of said former bill of complaint, hereto annexed, * * * which is filed herewith and made part of this plea," it is made necessary to examine that bill, and the enquiry whether the plea shows that the former suit is for the same cause of action is opened.

The plea must be read precisely as it would be if the bill had been introduced, in its very terms, into the body of the plea, thus—that the complainant exhibited his bill of complaint in the circuit court, &c., in the words and figures following, that is to say—and thereupon inserting a copy of such bill, alleging appearance, answer, taking of proofs, and the continued pendency of the suit, and insisting thereon in abatement, &c. Read in this manner, the plea amounts to this—whereas the complainant has filed a bill in this court, alleging sundry infringements of his patents since the filing of the complainant's bill in Illinois, and that the defendant has made, used and sold, and intends to still continue to make, use and sell, the said improvements, within the Southern district of New York, and asks an account of the income thus derived from the violation of the complainant's rights so alleged, and an injunction restraining the defendant from any further violation, such bill ought not to be entertained, but should be held abated, and the defendant be not required to answer, because the complainant, before filing such bill, had filed in Illinois such former bill, alleging that the defendant and another were then constructing and selling the said patented improvements, and, without the license of the complainant, had made and sold, and intended to continue still to make and sell, the same, within the Northern district of Illinois, and asking an account of the income

thus unlawfully derived from the violation of the complainant's rights thus alleged, and an injunction restraining the defendant from any further violation. If the two bills, justly interpreted according to their legal import and effect, are not for the same cause of action, then this plea does not show that a former action for the same cause was pending when this bill was filed, for, all that the plea imports is, that just such a suit was pending, and for just such cause, as is set forth in the Illinois bill.

The differences between the causes of action set out in the two bills are claimed to be, that the bill in Illinois alleges infringements of the complainant's patents before, or at the time of, the filing of that bill, as the ground for invoking the jurisdiction of the circuit court for the Northern district of that state, while the bill here alleges infringements of the complainant's patents since the filing of such former bill, which allegation the plea does not deny; and that the former bill alleges that the defendants have made and sold, and intend to continue to make and sell, the patented improvements within the Northern district of Illinois, while the bill here alleges that the defendant has made, used and sold, and intends to continue still to make, use and sell, the patented improvements within the Southern district of New York, which allegation the plea does not deny. Are these causes of action identical, in the sense, that the pendency of an action for the one operates as an abatement of the other? I think not. The facts which alone warrant any prosecution of the defendant are not identical, although they are alike in their nature, and are equally infringements of the complainant's rights. The complainant is entitled to maintain this suit for infringements committed since his former bill was filed, although he may be unable to prove, or though it be not true, that, when the former bill was filed, the defendant had infringed, or then contemplated or intended to infringe, his rights in any manner or degree whatever. It is true, that a bill to restrain the infringement of the rights of a patentee has some of the features of a bill quia timet, and that the relief by injunction is preventive, and is intended to restrain the defendant from doing in the future the wrong he is shown to have committed, and to be in the actual commission of when the bill is filed. But no case is cited to the effect, that, if the complainant fails to show the commission of any act at or before the filing of the bill of complaint, which either infringed or endangered his rights, he may nevertheless maintain his suit and have a decree restraining the defendant in the future. The extent to which the claim in this respect can be carried, is the proposition stated by Mr. Justice Story, in Woodworth v. Stone [Case No. 18,021]: "The case is not like that of an action at law for the breach of a patent, to support which it is indispensable to establish a breach before the suit was brought. But, in a suit in equity, the doctrine is far otherwise. A bill will lie for an injunction, if the patent right is admitted or has been established, upon well grounded proof of an apprehended intention of the defendant to violate the patent right. A bill quia timet is an ordinary remedial process in equity." In that case, the complainant had surrendered his original patent after the filing of his bill, and had obtained a re-issue. Thereupon, he filed a supplemental bill, and the motion was to continue the injunction upon the supplemental bill. The proofs were deemed sufficiently to show acts of the defendants, in the use of the complainant's invention before the re-issue, to call for a continuance of the injunction. It may well be deemed an extreme case which holds, that, because a defendant has done that which appears now to be no infringement of any legal right existing when the bill is filed, it may be inferred, nevertheless, without other proof, that he will, in the future, violate the rights secured to the complainant by his re-issued patent. But, even that case is far short of holding, that a complainant who shows no existing cause of action when his bill is filed, can have a decree, upon proof that a cause of action has arisen thereafter; and, if the language of that case seemed to warrant any such idea, I should be reluctant to follow it.

The bill filed in Illinois may be dismissed. The complainant may wholly fail to establish any infringement, or any ground for filing his bill, and yet this action might be maintained. It rests upon new facts, upon the existence of which the right to maintain the Illinois bill does not depend, and the existence of which constitutes the very cause of action in this bill. If the allegations in this bill are true, the complainant is entitled to a decree against the defendant. These allegations may be true, and yet the complainant be not entitled to a decree in the suit in Illinois; and the complainant may, therefore, be entitled to a decree here, although he wholly fails in the former suit.

2nd. Again, the bill here proceeds upon allegations of sales, and intention to continue to sell, in this district; and this is not denied in the plea. The bill in Illinois does not proceed upon such an allegation, and, so far as the bill there purports to be founded upon any apprehension of a violation of the patent rights, its allegations relate solely to sales in the Northern district of Illinois. The facts now alleged did not exist, and are not the ground upon which the complainant did or could rely. Until better advised, I am not prepared to hold, that, where a bill is filed in one district, and the defendant goes to another and begins an infringement there, where he is beyond the jurisdiction of the court, and no power exists to bring him there, to punish him, the complainant may not pursue him, and, by bill in the proper court, restrain him from violating the patented rights, in such other jurisdiction. Where, in equity, the remedy

which the court before whom the former suit is pending can afford, is not complete or effectual, that, of itself, is a ground for discrimination, and the new facts which operate to the prejudice of the complainant forbid that such suit should be deemed a ground of abatement.

No doubt, so far as the complainant seeks an account of profits in the Illinois suit, he may have it in that suit down to the time of accounting, provided, always, he does establish there the right to recover upon the allegations in his bill. But this is only a matter of practice, intended to avoid the necessity of a new suit, to recover money the right to which is established in the suit itself, and, in that respect, this is like other actions for an accounting, in which the time of the accounting is the time for fixing the amount or balance. But, the right to the account, upon the facts alleged in the bill, must be established; else, no account is ordered. This feature of the case, therefore does not change the view above presented.

My conclusion is, therefore, that the plea does not show such identity of the causes of action, that the pendency of the suit in the Northern district of Illinois is a defence, by way of abatement of the present suit.

(2) As to the second plea, I observe, first, that it is not objected by counsel that two pleas are filed without special leave given for that purpose. That this is irregular, and that both are liable to be overruled, as improperly interposed, is, no doubt, familiar. But, the conclusions I have reached render it unnecessary to place any stress upon this, since I regard the plea to the jurisdiction of the court as without sufficient foundation.

The section of the act of April 3d, 1818, relied upon (3 Stat. 415, § 6), is in these words: "And be it further enacted, that the original jurisdiction of the circuit court of the Southern district of New York shall be confined to causes arising within the said district, and shall not be construed to extend to causes of action arising within the Northern district of New York." The construction of a particular provision of a statute should always be given with reference to the object of the statute, the connection in which such provision stands, the evident intention of the legislature, and the change which the whole statute shows it to be the purpose to effect, or, in other words, the evil it was intended to remedy. By considerations suggested by such reference to the whole statute, general words are often restricted in their application, and they have been deemed to be so limited in this instance.

The act relates to the courts of the United States in the state of New York. There were two districts—the Northern district and the Southern district. It was the purpose to enlarge the territorial limits of the Northern district and to reduce the limits of the Southern district, and so effect a more equal division of the business, and to secure, also, the more certain and convenient dispatch of business. It provided, that the district judge of the Southern district should, in case of the sickness or other disability of the judge of the Northern district, hold the district court therein. It made a new appointment of terms for the Northern district, and revived suits and proceedings therein, and continued them, in the same manner as if terms had theretofore been regularly held. It assigned five counties to the Northern district theretofore forming part of the Southern district. It confirmed proceedings theretofore had in either district, in suits instituted in the former district court for the district of New York. This is especially significant, since, by reference to the act of April 9th, 1814 (3 Stat. 120), creating the Northern district, it will be seen, that that act did not prescribe any distribution of the business pending in the then district of New York, embracing the entire state. It provided for the continuance of suits pending in the former district of New York, in the Northern district or in the Southern district, making the jurisdiction of either depend on the question, in which district the cause of action arose or the seizure was made, and authorized the one or the other, according to that test of jurisdiction, to proceed to final judgment or decree. Finally, in relation to suits thereafter to be brought, by the section above cited, the jurisdiction of the circuit court for the Southern district was confined to causes arising within that district, and was declared not to extend to causes of action arising in the Northern district. For more than sixty years, this last section has been construed to relate solely to the distribution of cases between the Northern and Southern districts of New York, and as not affecting the jurisdiction of this court otherwise than in that relation. It has thus been practically, during that period, held, that causes of action arising in the Northern district of New York are alone excluded from the jurisdiction of this court. This accords with the design and purpose of the act, and follows out to their legitimate and proper result the other provisions of the act, and produces conformity in all. I am not now at liberty, nor am I disposed, in the face of a construction that seems to me in all respects reasonable, and has, by the practice of sixty years, become authority in this court, not questioned or impeached in any of the hundreds of causes that have gone hence to the supreme court of the United States, where the cause of action arose out of the state of New York, to question the jurisdiction in such cases. This is the only question presented by the second plea, assuming that it is, in other respects, regular and proper. It must, therefore, be held insufficient.

[For another case involving this patent, see note to Wheeler v. Clipper Mower & Reaper Co., Case No. 17,493.]

Case No. 17,499.

WHEELER v. McCORMICK.

[11 Blatchf. 334; 6 Fish. Pat. Cas. 551; 4 O. G. 692.] [1]

Circuit Court, S. D. New York. Oct. 27, 1873.

REISSUE OF PATENTS — COMBINATIONS AND CONSTITUENT DEVICES—HARVESTERS.

1. The reissued letters patent Nos. 875, 877, 878 and 879, granted to Cyrenus Wheeler, Jr., January 3d, 1860, and the reissued letters patent No. 2,610, granted to said Wheeler May 14th, 1867 (the original patent on which such five reissues were founded having been granted to said Wheeler December 5th, 1854), and the reissued letters patent No. 2,632, granted to said Wheeler, May 28th, 1867 (the original patent having been granted to said Wheeler February 6th, 1855), such six reissues having been extended and being each for an "improvement in grain and grass harvesters," are valid.

2. Where a patentee has, in his original patent, patented an aggregate of several devices, he may, in obtaining a separate reissued patent for each one of such several devices, give the same identical description, in the specification of each reissue, of each and all of the devices included in the original patent.

3. If, in such case, the claim of each reissue is for a distinct and severable part of the invention described and shown in the original patent, the reissues are not open to the objection that they are several patents for the same invention.

4. Reissued letters patent No. 880, granted to said Wheeler, January 3d, 1860, founded on the said original patent of December 5th, 1854, were not extended; but, as such reissue claimed only a distinct and separate device, not included in the other reissues of the same date, the fact that such device became public property, gives no right to use the devices claimed in the reissues which were extended, although the specifications are alike in their descriptive parts, it appearing that the use of the latter devices does not necessarily involve the use of the device claimed in reissue No. 880.

[Cited in brief in Thompson v. Barry, Case No. 13,942. Cited in Boomer v. United Power-Press Co., Id. 1,638.]

[2] [Final hearing on pleadings and proofs.

[Suit brought on reissued letters patent Nos. 875, 877, 878, 879, 2,610, and 2,632, granted Cyrenus Wheeler, Jr., for "improvement in grain and grass harvesters." The facts in relation to these patents, their history, the specifications of the original and of the reissues, with the claims of the reissues, the drawings of the original and the reissues, as well as of several machines alleged by defendant to antedate the patents, are given in full in the statement of the case of Wheeler v. Clipper Mower & Reaper Co. [Case No. 17,493], to which we refer. The question of great importance, not involved in the prior case, "When several reissues are taken for a common original, the reissues having specifications substantially alike, but distinct and separate claims, what effect does the expiration of one of the group have upon the others that are extended?" is fully discussed in the present opinion.] [2]

George Harding, for plaintiff.

Charles F. Blake and Henry Baldwin, Jr., for defendant.

WOODRUFF, Circuit Judge. On the 5th of December, 1854, the complainant, Cyrenus Wheeler, Jr., received from the United States a patent for an "improvement in grass and grain harvesters," for which he had made application March 16th, 1854. On the 7th of November, 1859, he surrendered this patent, for the purpose of obtaining reissues thereof in divisions, and, on the 3d of January, 1860, the patent was reissued in seven divisions, numbered 875, 876, 877, 878, 879, 880, and 881. Of these the reissue numbered 876 was surrendered on the 6th of April, 1867, and, on the 14th of May thereafter, was again reissued, numbered 2,610. On the 6th of February, 1855, another patent was granted to the complainant, for an "improvement in grain and grass harvesters," which was afterwards surrendered and reissued June 5th, 1860, and again surrendered, and, on the 28th of May, 1867, again reissued, numbered 2,632. For the alleged infringements of the reissued patents numbered 875, 877, 878, 879, 2,610, and 2,632, this suit is brought, the same having been extended.

The answer sets up probably as many grounds of defence as the ingenuity of counsel could suggest. It denies that the complainant invented the devices originally patented, and denies that a machine constructed in accordance with his patents is a practicable machine, or has any useful or patentable quality. It denies the validity of the several reissues, on various grounds, avers that other parties were at the time interested in the patents, and that the complainant surrendered them, and obtained reissues, without their authority, consent or concurrence, and alleges that the reissues were obtained without any legal or justifiable grounds therefor; that they embrace devices not shown in the original patent, specifications, drawings, or models, and which were not of the complainant's invention; that some of the reissues are for the same devices patented in others; and that one of the reissues has expired, without extension, which included all the distinctive peculiarities shown in the original patent. It objects, that other persons are jointly interested with the complainant in the patents, and that the suit is defective for want of the presence of such persons as parties. It denies the validity of the extension of the patents beyond the term for which they were originally granted. It avers the commencement of a suit in Illinois by the complainant against the defendant and another, for infringing the same patents, on the 8th of May, 1869, which is still pending. It denies infringement by the defendant at any time

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 11 Blatchf. 334, and the statement is from 6 Fish. Pat. Cas. 551.]

[2] [From 6 Fish. Pat. Cas. 551.]

[2] [From 6 Fish. Pat. Cas. 551.]

since January 2d, 1860, or that he has made or sold within the Southern District of New York any infringing machines. The defendant has, moreover, interposed a supplemental answer, setting up, as a partial defence, that, since this suit was commenced, to wit, on the 3d of July, the complainant, Wheeler, sold, assigned, transferred and set over to Cornelius Aultman all the right, title, and interest he, the said Wheeler, then had in the several letters patent and patent interests in the bill of complaint mentioned, and therein set forth as the property of the said Wheeler. This assignment and transfer the defendant relies upon as a partial defence, that is to say, as a bar to any decree for an accounting to or with the complainant for any profits arising from infringements committed after the date of the said assignment, and as a bar to the granting of any injunction herein upon the prayer of this complainant. Possibly, in the defendant's answer, some other grounds of defence were suggested, but not all of the supposed defences were insisted upon on the hearing.

1. The objection founded upon want of necessary parties rests upon two agreements, one of which goes, as is claimed, to the right of the complainant to maintain this suit without joining other parties. That agreement was entered into by the complainant, Wheeler, and others, of the first part, and Cornelius Aultman and others, of the second part, on the 27th of December, 1860, to continue in force for ten years. It is the same agreement that was urged as a defence, as against Aultman, in the suit of Aultman v. Holley [Case No. 656]. [3] [It is called in that suit and in this the "consolidation contract." In deciding the case of Aultman v. Holley [supra] at this present term, I have considered the same objection which is now urged here, and held that that agreement did not disable Aultman to maintain a suit in his own name, upon his patents included within the scope of that agreement. The same reasons apply to the present complainant, and my opinion in that case on this point must be taken as my opinion in this, and may, if either party so desires, be inserted in this place, mutatis mutandis, as part of this opinion. The other agreement was entered into by and between Wheeler, the complainant, and Henry Morgan, Allen, Mosher, and others, on the 25th of October, 1859. It recites that he had theretofore entered into certain agreements with the others, relating to his patents for harvesters, and in it he agrees to obtain a reissue of his patents, and that upon obtaining such reissue he will execute to such several other parties assignments to convey to them undivided shares or interests in all said patents now held by him, and all reissues and renewals and extensions of the same: to the said Morgan, one-fourth; to other of the persons named, one-fifth; to others, eighteen one-hundredths; and to another, seventeen one-hundredths; so that the said several parties shall become joint owners thereof (certain specified states excepted); that the income derived from the excepted states shall be divided in like proportions. Among other numerous detailed provisions showing the considerations moving between the parties, is one that Wheeler and Morgan, when the reissues have been obtained and the deeds of assignment are executed, are authorized to make sales of territorial rights, give licenses, to prosecute for infringements, compromise and settle claims for infringements, &c., they to render accounts, &c., to the others, and pay to the several others their proportionate share. By a supplement another firm was admitted to share, with one of the firms who were included in the agreement, certain of the advantages secured thereby.

[The defendant, in his allegation of defect of parties, names a part only of the persons with whom his agreement was made, and on recurring to the consolidation contract it appears that he has only named those who were parties to that contract also. This makes it quite apparent that the objection in the answer refers only to the consolidation contract, and has no reference to the agreement of October, 1859; nevertheless, I cannot say that an objection in the answer that Morgan and Mosher and some others specified are necessary parties does not warrant the production of this agreement of October, 1859, and any claim in respect to the specified persons which that agreement will sustain. It cannot be denied that that agreement made them equitable joint owners of the patents now in question with the complainant Wheeler. When the reissues were obtained it was the plain duty of Wheeler to make and deliver to the others such assignments as the agreement provided for, and such as would have invested them with the legal title jointly with himself; until then Wheeler might have sued at law upon his legal title for the joint benefit. In equity, their title was (in the absence of any proof of a release, reassignment, or of a rescission of the agreement) as clear as his was at law. To this extent equity would regard that as done which ought to be done, and in equity their equitable title and immediate right to share the proceeds of a recovery made them necessary parties to a suit to recover for and to restrain infringements, if that objection is raised. True, the complainant testifies that this agreement, "as far as the transfer of interest in the patents, as called for in that writing, was never acted upon." This is not sufficient to avoid the effect of the agreement; it does not show that any change was made in the relations of the parties to the reissued patents. Their equitable titles in the shares, severally stipulated to each, became vested upon the procurement of the reissues, subject only to an accounting with certain of the parties mentioned. To vest the legal title it was

[3] [From 4 O. G. 692.]

necessary that the agreement should be "acted upon," but the parties, without action, could suffer Wheeler to retain the legal title and rest on their equitable rights. Proof that the agreement, in so far as it called for a transfer of the legal title, was not acted upon, does not show that it was in any manner defeated, or that it was rescinded, or that anything occurred to interfere with or interrupt its full force and effect in equity; while, on the other hand, the express admission by the complainant, in his testimony, that other writings were executed, not followed by showing what those writings were, leaves the defendant at liberty to insist upon the full force of his objection, and to presume that, had the complainant produced those writings, the equitable title of those absent parties would not be less clear. It is, however, proved that on the 8th and 9th of July, 1868, releases were executed to the complainant by Morgan, Mosher, and certain other persons, who, by express stipulation herein, are admitted to have then been the owners of all the interest of the parties to the said agreement in question, excepting, of course, Wheeler himself. By these so-called releases the parties sell and relinquish to the complainant, his heirs and assigns, any and all the right, title, and interest, which the parties thereto can or may have, or claim either in law or in equity, in or to said patents, and any reissue or extension of the same by reason of any agreement, contract, or understanding previously had with them or those whom they represent; to be had and held by the said Wheeler and his legal representatives to the full end of the term for which said letters patent are or may be granted. This operated to vest in Wheeler the equitable as well as the legal title. In respect to subsequent infringements, his right to sue in equity as well as at law was unembarrassed. This, however, leaves to the defendant a partial defence to this suit, which was commenced on or about the 30th of June, 1870. As to infringements and profits from infringements accrued prior to those last-named releases, the objection remains, and on that ground the defendant now insists that if the defendant be decreed herein to account, such accounting shall not go back to an earlier date than July 8, 1868. The complainant urges that this release of the equitable interest in the letters patent carries with it their interest in then existing claims for infringement. I think not; no such intention is expressed; the words used have no such import nor implication. These releases, in that respect, are not unlike the instrument which, pending this suit, the complainant has executed to Cornelius Aultman, and which the defendant has set up in his supplemental answer. The only difference is that the former transfer the equitable title, and the latter both the legal and equitable title. If the latter were construed to embrace all claims to antecedent profits arising from infringements, it might be claimed to defeat the suit altogether. I must, therefore, hold the objection, for want of parties, valid to this extent—viz., that the complainant, if entitled to a decree, notwithstanding other alleged defences, cannot require the defendant to account in this suit for profits arising and accruing from infringements prior to July 8, 1868.] [3]

2. Upon the merits, I shall not attempt to go into all the details of the arguments most minutely and very ably addressed to this case by the respective counsel. In one form or another, they have, nearly all of them, on a like question, been under consideration in other cases heard and decided in this court between other parties. See Wheeler v. Clipper Co. [Case No. 17,493]; Aultman v. Holley [Id. 656]. The patentable nature of the invention described in and secured by the original patents granted to Wheeler, December 5th, 1854, and February 6th, 1855, and the practicability of the devices patented, and their utility, I deem unquestionable. The contrary, though set up in the defendant's answer, is not insisted upon by his counsel. That the reissues here in question are not invalid on the ground that they include devices not shown, described or indicated in the original patents, their specifications, drawings, or model, has also been heretofore held, and I find no reason to change my opinion on that point. Though alleged in the answer, no ground is shown for holding the extension of the patents invalid or void. The pendency of a suit in Illinois against the defendant and Leander J. McCormick, set up in the answer, is no bar to this suit, whatever operation, if any, a recovery here may have upon a final recovery there.

3. The invalidity of the reissues in question is most strenuously urged by the counsel for the defendant, on the ground, that they are several patents for the same alleged invention, and not several patents for distinct and severable parts of the invention described and shown in the original patent. This is most elaborately and ably argued. I do not understand that the counsel for the complainant contests the legal principles urged in support of this branch of the defence. The contest is, rather, whether there is any foundation of fact upon which it rests; whether, according to a just construction of the several reissues, they are not, in fact, for severable parts of the aggregate invention included in the original patent. I think the arguments of the defendant's counsel have not sufficiently kept in view this idea—Where a patentee, having patented an aggregate of several devices, is permitted to surrender his patent and receive new letters patent for the several devices included in it, it does not follow that his new specifications may not be identical in their description of each and all of the devices included in the original aggregate patent. It is the patentee's selecting out of these devices some or one, being separable and capable of use as a

[3] [From 4 O. G. 692.]

distinct device or devices, and making that or those the subject of his specific claim, that determines what is covered by each reissue. The description of an entire machine may be convenient, and sometimes necessary, in order to show the adaptation of the separated device to a useful purpose, and illustrate, not its construction alone, but its application, in one practicable mode, to the purpose for which it was designed. Such a description may be given, but that does not make the patent cover all that is included in the description.

In this case, then, it was competent for the patentee to amend his original specification, so as fully and minutely to describe all that was shown in the original, or in its drawings or model, and receive patents for each separate device shown therein, or each separate and severable combination of devices, capable of distinct use, and, while such specification might be annexed, in totidem verbis, to each reissued patent, define and claim, in each, such separable and distinct part of his original aggregate invention, the specification in each case showing, as it should, the construction of each separate patented device or combination of devices, so as to give the required information to the public, and illustrating the application of each device or combination to actual use, in the construction of an aggregate machine. This does not make one reissue include all that is described in the specification. All that is inclued in a specification is not necessarily included in the patent. What is claimed in and secured by the patent is secured not only when used in the mode illustrated, by the description of other devices with which it may be used, in the specification, but it is secured against its use in connection with other devices of an entirely distinct character.

For example, in reissue numbered 2,610, the patentee claims, in combination with a harvester frame that is free to vibrate about a gear centre, a laterally projecting finger-bar, so hinged to one end or corner of said frame, as to permit the finger-bar at each end to follow the undulations of the ground over which it is drawn. This claim, read in connection with the specification, refers to and is confined to a special class of harvesting and mowing machines, viz., those in which the rise and fall of the finger-bar is effected by a vibration of the frame of the machine around the gear centre, and the hinging of the finger-bar to one end or corner of that frame, so that it may rise and fall with it. It is the use of a laterally projecting finger-bar in connection with such a frame, and hinged thereto, and, also, hinged so as to permit the rise and fall of either end, which is the subject of this patent. In comparison with this, take either of the claims, say the first, in reissue numbered 875—"in combination with the hinged-bar H and the finger-bar, the intermediate shoe M, hinged to said bar H, substantialy in the manner and for the purpose set forth." Here is a limited claim to the shoe, confined to its connection with the oscillating bar H and the finger-bar, in the manner pointed out in the specification. It is clear, that the claim in number 2,610 might be infringed without the employment of this specific combination, and it is equally clear, that the claim last above recited would not be infringed by the use of the shoe M in any other manner or combination than with the oscillating bar H, mentioned therein. It is true, that the devices specified in each claim may be so used as to infringe both, but one may be used, and may infringe one of the claims, and not infringe the other. As already suggested, the fact that the specification in each patent describes the whole, is not material. That is illustrated where there is but one patent, and, of course, but one specification; and yet the patentee, by his several claims, separates the devices, and, as may lawfully be done, claims the whole as an aggregate, and each separately.

A like comparison, instituted in reference to the other several claims in these reissues, leads to the same conclusion. In some, the several and separate character of the devices is more plainly apparent than in others, but I think they are none of them liable to the objection that the complainant has taken more than one patent for the same device or combination. In a certain sense, it may be said that a patent for a combination of several new devices includes them all, but this does not forbid the patentee from claiming the combination, and also claiming the several devices which enter into it, if he be the inventor of each, and they are useful by themselves or in other combinations. It is not to my mind very clear that the complainant might not have secured all to which he was entitled, by reissuing his original patents, and claiming separately therein each device or combination of devices which he has claimed under several reissues. But the law permits him to divide his patent, and I find no sufficient ground for pronouncing the reissues invalid.

4. A ground of defence depending substantially upon the point last considered, arises out of the fact alleged in the answer, that reissue number 880, which was founded upon the original patent of December 5th, 1854, has not been extended. The term of the original patent, and, of course, the term of this reissue, expired December 5th, 1868; whereupon, it is claimed, that, inasmuch as the invention patented by that reissue became, on the expiration of the term, public property, and the defendant, therefore, became entitled to use it—First, that the defendant is not liable for any infringement since that time, by the use of anything included in that patent; and, second, that that reissue does, in fact, embrace within it the devices included in the other reissues, and so the defendant is

not liable at all, or, if at all, he is not liable unless it be for infringements prior to that date. In the first place, the defendant is not sued for violating any rights secured to the complainant by the reissued patent number 880. In the next place, the whole proposition fails, if reissue number 880 embraces only a distinct and separate device, not included in the other reissues, so as to be free from the objection already considered. I will not inquire whether that reissue was invalid, either as not embracing a patentable invention, or because the device which was the special subject of that patent was not new, or not the invention of the patentee. Nor will it be necessary to inquire whether the complainant is at liberty to allege the invalidity of that patent on any ground, in order to avoid the conclusion sought to be drawn from the expiration of its term. I am of opinion that nothing fell into the public domain, on the expiration of that patent, except the special device claimed in it, and that that patent did not include the devices embraced in the other reissues upon which this suit is brought.

Bearing in mind that a patent includes no more than the patentee claims therein, it will be seen, that, although, as in other reissues, the specification gives a full description of the device and of other devices which illustrate its application to use, the claim thereupon is, "the use of two hinges, substantially as described, whereby the finger-beam may be folded to the main frame, in the manner substantially as set forth." Waiving, as before, the question of the validity of this patent, it is manifest, that the devices claimed in the other reissues do not necessarily permit such folding of the finger-beam to the frame. They, or some of them, provide for the rise and fall of the finger-beam at either or both ends, and for its oscillation, so as to elevate or depress the points of the fingers, but neither of them describe a construction or use adapted to this folding of the finger-bar sidewise against the frame. That is only described and provided for in the specification of this reissue No. 880, and it is doubtful, at least, whether the machine, as described and shown in the original patent, had any such capacity. Be that as it may, the special feature, not included in the other reissues, and in no wise essential to the operation of the devices which are therein patented, is pointed out in the specification of reissue No. 880, and it is the special location of the hinge by which the shoe or socket piece is hinged to the oscillating bar. The device consists in so extending the place of that hinge sidewise towards the inner or grain side of the machine, as that it may clear the frame, when turned or folded. All the other functions of the oscillating bar mentioned in the other reissues might be effective, and the finger-bar might rise and fall at either or both ends, in actual use for mowing, and, so far as desired, in reaping, without this capacity of folding to the side of the main frame. This special location sidewise of the frame, admitting of such folding, is the specific device covered or sought to be covered by this reissue, and, whether such mere location involved any patentable quality or not, it does not, in itself, so include the other devices, that the termination of the exclusive right to employ the specific location involves, also, the right to use the other devices. Such location, if patentable, might be suggested by a third person, not the inventor of the other devices. If he had the right to use such other devices he might employ them in his new location. If not, his patent would be of no value, it being merely an added improvement to what was patented to another. In short, the devices included in the other reissues do not necessarily include this capacity to fold the finger-bar against the side of the frame, and the special right to extend the location of the hinge inward, so as to clear the frame, and so permit or enable the finger-bar to be thus folded, may, as an improvement, be vested in another inventor, who, nevertheless, cannot use it on a machine constructed within the other patented devices, without infringing the patents therefor. Such a location of the hinges, whereby the hinged finger-bar may be folded to the side of the frame, may be applied to machines not involving the use of the other patented devices, and the right to use such a location may have become free to the public, and yet without involving the right to use such other devices. For general illustration, suppose separate patents for several devices, all of which are useful in constructing an aggregate machine. The expiration of one of the patents makes the specific device therein patented public property. But, while that will warrant the use of that device in any other connection, it will not warrant a use thereof in connection with the other patented devices, unless any use thereof necessarily involved the use of such devices; nor even then, except upon the ground that there is one patentee of both or all, who, in giving the use of one to the public, necessarily gives all that is essentially necessary to make that use available. Not only so, a device may be patentable and may become public property, either by expiration of a patent or by abandonment to the public, which is useful and valuable, which, nevertheless, cannot be used except in connection or combination with other patented devices. In such cases, it cannot be used save by permission of the patentee of such other devices, whether he be the former patentee of such first named device or a third person. This exhibits the condition of the device patented in the reissue No. 880, even if it were conceded that it could not be used otherwise than in connection or combination with devices included in the other reissues, while, if it is susceptible of use in connection with other modes of hinging the cutter-bar, which would not include the devices claimed in such reissues, the result more conclusively follows, that the expiration of

that patent forms no justification for infringing the other reissued and extended patents.

5. The question of the novelty of the invention claimed by the complainant, and whether he was the first inventor, was very elaborately discussed in this court by the counsel defending the case of Wheeler v. Clipper Co. [Case No. 17,493], upon the same proofs which are presented in this, bearing on those questions. The influence of the same prior patents, applications for patents, inventions, attempted inventions, experiments, and failures, upon the inventions of others, was discussed in that case, and also in the case of Aultman v. Holley [Id. 656], and to some extent also, in Kirby v. Dodge & Stevenson Co. [Id. 7,838]. Those questions have again been most elaborately reviewed on some alleged new aspects of the questions considered, and I have endeavored to give to the views of counsel not only a patient, but a careful attention, and I am constrained to the same conclusion, in this case, as is stated in the former cases, and what is stated on the subject, without a discussion of each patent, invention, and experiment in detail, in Wheeler v. Clipper Co., and Aultman v. Holley [supra], must be taken as my opinion in this case.

6. As to infringement by the defendant, the resistance of the charge depends very largely upon an impeachment of the complainant's title as inventor of the several devices employed by the defendant. So far as the denial of any infringement of the complainant's exclusive rights depends upon that impeachment, what has already above been said sufficiently overrules it. In relation to the specific claims infringed, much that was said in the Clipper Case, is applicable to the defendant's machine. The infringement seems to me very clear. It includes, and, in substance, uses the devices embraced in the third and fourth claims of reissue number 875, and, probably, at least one other, but only the infringement of the third and fourth was urged by the counsel for the complainant; also, what is embraced in the claims in reissue number 877, the claims in reissues numbers 878, 879, and 2,610, and the first, fourth, fifth, sixth, and eighth claims in reissue number 2,632. The testimony of the expert, Mr. Renwick, is full and explicit, that the defendant's machine contains all these devices or combinations. My conclusion upon all the proofs is in conformity with his testimony to that effect. The witness also testifies, that the defendant's machine contains also substantially the same combination described in reissue number 2,632, and referred to in the third claim thereof; but, as the counsel for the complainant, in his printed argument submitted, expressly states that the claims in this patent, alleged to be infringed, are the first, fourth, fifth, sixth, and eighth, I confine the decision to those claims.

Without further detailed discussion of the numerous points and arguments most ably presented by the counsel in this case, I must content myself with saying, that, after a laborious examination of the case, I am of opinion that the complainant is entitled to a decree in conformity with the foregoing opinion, declaring the infringement and directing an account of profits, but, for reasons above stated, that account must begin with the 8th of July, 1868, and, inasmuch as the complainant has, since the filing of the bill in this case, and on the 3d of July, 1872, assigned and transferred all his right, title, and interest in these patents to Cornelius Aultman, as alleged in the defendant's supplemental answer, the account must terminate with the last-named date, after which the complainant has no interest in the profits of the defendant's infringement, and no interest to be protected by injunction. The usual reference will be made to take such account, and the amount reported must be decreed to the complainant, with costs.

[For another case involving this patent, see note to Wheeler v. Clipper Mower & Reaper Co., Case No. 17,493.]

WHEELER (MERCHANTS' & MANUFACTURERS' NAT. BANK v.). See Case No. 9,439.

WHEELER (NUTTER v.). See Case No. 10,384.

Case No. 17,500.

WHEELER et al. v. SIMPSON et al.

HOE et al. v. SAME.

[1 Ban. & A. 420;[1] 6 O. G. 435.]

Circuit Court, N. D. New York. Sept., 1874.

INFRINGEMENT OF PATENTS—VALIDITY OF CLAIMS—LAWS.

1. A patent for a saw, claiming, in combination, clearing teeth hollowed out in front, so as to plane out the wood between the scores cut by the fleam teeth, is not infringed by a saw in which the wood is rasped out by clearing teeth, which are straight and perpendicular in front.

2. A claim for an effect or function, in the abstract, cannot be sustained; the means by which the effect is produced, or the function performed, must be specified.

3. A saw having its fleam teeth of the usual triangular form, with intervals between them, operates by means of a construction so unlike that of a saw having its fleam teeth arranged in pairs, with only a perpendicular slit between them, that it is no infringement of a patent for the latter, although the effect may be the same.

[These were suits in equity, brought respectively by Elisha P. Wheeler and others and by Richard M. Hoe and others against Ambrose H. Simpson and others for alleged infringement of a patent.]

C. A. Durgin and Mr. Everett, for complainants.

C. B. Collier, for defendants.

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

HUNT, Circuit Justice. The plaintiffs in the Wheeler suit, are the assignees of the patent for "improvement in saws," known as reissue No. 4,096, dated August 9, 1870, the original of which was dated June 21, 1853, No. 9,807, and of which Joseph H. Tuttle was the original inventor.

No question is here made, of the regularity of the plaintiffs' title, or of the sufficiency of the reissued patent. The defendants plant themselves solely upon the ground, that they are not infringers of the patent described.

What is claimed as the invention of Joseph H. Tuttle, under the reissue No. 4,096, is:

"(1) The saw herein described, having a series of alternate sets of fleam and curved planing teeth, located upon the same plate or blade, the sets of fleam teeth for scoring the sides of the kerf, and sets of curved planing teeth for removing the wood between the scores, when constructed and arranged to operate in the manner shown and described.

"(2) A saw, as above described, having a series of alternate sets, or pairs, of scoring and curved planing teeth, the sets or pairs of scoring set to opposite sides of the blades to score the wood on the opposite sides of the kerf, the sets, or pairs, of curved planing teeth set back to back, and projecting less than the scoring teeth, and, when thus constructed and arranged, act as gauges to control the depth that the scoring teeth may cut, substantially in the manner described and shown."

Fleam teeth, set in opposite directions, are not claimed as an invention. These are used in all cross-cut saws.

Hooked or curved teeth are not claimed as a part of the invention. Such teeth were previously well known in saws, and were used in Clark's patent of 1849, referred to in the Tuttle specification. The use of scoring teeth and of planing teeth upon the same blade, is not claimed as an invention. This use was previously well known, and was a part of Rone's rejected application, in the plaintiffs' specification also referred to.

The position and use of these different teeth, in the "manner described in the specification," is the plaintiffs' invention. What is the manner referred to?

(1) The fleam teeth project beyond the cutting teeth and cut two straight scores, one on each side of the kerf. (2) The hooked teeth are set back to back, and, at such distance, that while the cut is made by one tooth, the back of the other regulates the depth of the cut, the teeth not cutting serving as guides to those that are cutting. By this means, cutting is done, in both directions, from end to end. (3) The hooked teeth are cut away under the front edge in the form of an irregular curve, so as to produce a uniform planing or cutting, instead of a rasping edge.

The combination of these teeth, in the manner thus described, is the invention patented.

Mr. Crawford, an expert, and the only one examined, says, that Mr. Tuttle's advance, in this invention, was this: "In the construction and arrangement of the teeth, by which the wood scored by the scoring teeth on the opposite sides of the kerf was removed from the pathway of the saw, and also in constructing the clearing teeth, that they should act as gauges to determine the depth at which the scoring teeth should act in the wood."

This definition differs from the patent in these respects: (a) The patent does not claim an advance in that the scoring teeth remove the wood from the pathway of the saw. (b) It omits the claim of the patent, that the wood is removed by a planing, instead of a rasping operation. (c) It omits the effect of the combined action of scoring teeth, and curved clearing teeth, set as described in the patent. The difference is illustrated by the evidence of complainants' expert in a former case, read on the hearing of this case: "(7) Do you not consider that it is of the essence of the invention of Joseph H. Tuttle, as described in reissued patent 4,096, that the clearing teeth should have this planing, in contradistinction of the scraping action? Answer. That, I believe to be one of the essential features of the invention of Joseph H. Tuttle, as recited in the said reissue of letters patent. (9) You do not find in Larimun's patent, or in defendants' patent (Ex. p.), any teeth having the planing action, or that could be called planing teeth, do you? Answer. I do not; as the teeth denominated clearing teeth would come under what I denominate as clearing teeth having a scraping instead of a planing action."

On the cross examination of the expert Crawford, the following occurs: "(4) Cross question. What is the difference in the mode of clearing in the original letters patent here and in Exhibit E, defendants' patent, if any? Answer. All the difference I can define is, that in Exhibits A and B, the wood in the kerf is planed out, while that in Exhibit E is scraped out."

The difference in the drawing, annexed to and forming a part of the several patents, shows that the machines are designed to produce the effect, in one, of planing out the kerf, and in the other, of rasping it out. (Plaintiff's Patent, Record, p. 18.)

This drawing

Fig. 1.

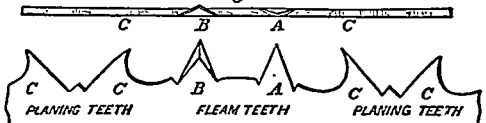
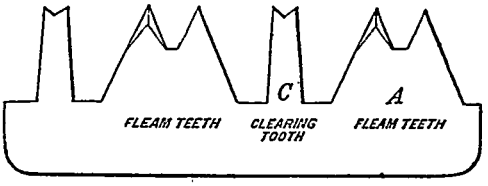


Fig. 2.

shows the irregular curve upon the face of the clearing teeth, intended to cut or plane out the kerf, and which has that effect.

Defendants' saw, Exhibit "E," Record, p. 32.



The drawing, forming a part of the specification of the defendants' patent, shows no teeth having a curved or cutting edge, but they are straight in their form and rasping in their operation. The one set of teeth cuts or planes out the wood, the other rasps or scrapes it out. In its want of plaintiffs' combination, and in the non-use of a planing operation, defendants' machine is essentially different from the plaintiffs' patent, and the proof of infringement fails. There is, I conceive, a coincidence in this, that the clearing teeth in each machine operate as a gauge or guide, to determine the depth of the cut of the scoring teeth. But, I think, an action for an infringement cannot be maintained upon this ground.

It is too well settled, to need the citation of authorities, that a claim for an effect or a function, in the abstract, is not patentable. The mode and machinery by which the effect is produced must be set forth. The party cannot, for example, sustain a patent for determining the depth of the cut of cutting teeth, in the abstract, or by any and all means that may be suggested. He must, as in the present case has been done, specify how he determines the depth of the cut. Thus, the patent says, that the teeth are cut away under the front or cutting edge, in the form of an irregular curve standing at an angle of forty five degrees, placed back to back, and curved in opposite directions at a suitable distance from each other, and "when thus constructed and arranged to act as gauges to control the depth that the scoring teeth may cut."

The teeth in the defendants' saw, by which a like effect is produced, are not "thus constructed and arranged." The construction and arrangement differ in these essential particulars: The teeth in the plaintiffs' patent are cut in the form of an irregular curve; those in the defendants' patent are straight. The plaintiffs' teeth are cut away under their cutting edges; the defendants' are not. The plaintiffs' are necessarily required to be at a considerable distance from each other, or the effect fails. No such necessity exists, as to the location of the teeth, in defendants' patent. In my judgment, there is no infringement proved.

In the Hoe case, the plaintiffs' patent, No. 37,835, is for "the employment of alternate clearing teeth dd, the ends of which are concave or notched so as to form sharp or pointed corners, in combination with the triangular pairs of cutting teeth aa, arranged on a single blade, substantially as and for the purposes herein set forth."

The claim of the patent is for the use of certain described cutting teeth, in combination with the clearing teeth, as described.

The cutting teeth are in this form

as described in the plaintiffs' patent.

The cutting teeth of the defendants' saws are in this form,

and are different, in all their essential particulars, from those described in the plaintiffs' patent. While the same result may be produced, to wit, that the fleam teeth cut down the sides, and the clearing teeth cut out the wood, the result is not produced by teeth of the same form or character.

The expert Crawford says: "The operations and functions of the teeth in the two exhibits are the same." He also says that, "the combinations and arrangements of the teeth are the same, all the difference being, that in plaintiffs' patent the scoring teeth, at their cutting points, are nearer together than in Exhibit E."

I understand the plaintiffs' patent to be limited to the use of notched clearing teeth, in combination with the particular triangular pairs of cutting teeth, which he describes. Thus, in his prior patent of January 6, 1863, he says: "I do not claim, broadly, the use of alternate pairs of cutting teeth with intermediate plane teeth, as I am aware that such, with the points situated at a considerable distance apart, have been used before; but, what I claim as my invention is the use of alternate triangular pairs of cutting teeth aa, separated individually by the narrow slit b, and with their points resting closely together, in combination," etc.

The patent sued on, purports only to be an improvement upon the one of January 6, 1863, and, in my judgment, it is limited to a combination of cutting teeth, with the particular form of fleam teeth described in the patent of March 3, 1863. Although the operation and function of the teeth in the defendants' patent may be the same, they are produced by means of instruments quite different in their construction. I cannot agree with the statement, that the construction

and arrangement of the teeth, in the two patents, are the same. In the January patent, the cutting teeth are thus described: "I make each pair of the cutting teeth aa, combined in the usual triangular pointed form of a single ordinary tooth, but a little larger, to give sufficient strength, and with a narrow central slit or opening b, between them, extending from point to base, as represented. The points of the teeth are thus situated closely together, nearly opposite each other laterally." The same form is preserved and set forth in the patent sued on. The cutting teeth, used in the defendants' saw, possess none of these peculiarities. They are the ordinary cutting teeth, which have been in use for ages. There is no infringement proved. In each case, the bills must be dismissed with costs.

WHEELER (SOCIETY FOR THE PROPAGATION OF THE GOSPEL v.). See Case No. 13,156.

Case No. 17,501.

WHEELER v. SUMNER.

[4 Mason, 183.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1826.

ASSIGNMENT OF VESSEL AT SEA—TAKING POSSESSION—PRIOR ATTACHMENT.

1. Where A made an assignment of a vessel at sea in trust to B, to indemnify B for indorsements, and also to pay the demands of certain other creditors named in the conveyance, *held*, that the taking possession of the said vessel by B, in a reasonable time and manner after her return, would be a sufficient delivery and possession to support the assignment, although other creditors of A should attach the vessel before such possession was obtained.

2. It was not necessary, to the validity of the assignment, that the preferred creditors should be technically parties to it, nor that their assent should in any manner be given to it at the time of its execution, provided they assented before any attachment of the property.

3. The assignment being for the benefit of the preferred creditors unconditionally and without any stipulation for a release or otherwise, the law would, in such case, presume the assent of the creditors.

Trespass for taking and attaching the brig Fair American. Plea, as to force and arms, not guilty: 2. As to residue of trespass, that the defendant [Charles P. Sumner], as sheriff of the county of Suffolk, attached the vessel as the property of Jonathan Bartlett. Replication, traversing that the vessel was the property of Jonathan Bartlett at the time of the attachment. Issue on the traverse.

At the trial it appeared in evidence, that Jonathan Bartlett was, on the 7th of April, 1826, the owner of the brig Fair American, and being indebted to certain persons, on that day made an assignment to the plaintiff [Samuel Wheeler] of the brig, and certain other property, in trust, to indemnify the plaintiff, as his indorser, and to pay the other creditors named in the conveyance. The conveyance was by a deed poll. Afterwards, on the same day, Jonathan Bartlett executed a bill of sale of the brig to the plaintiff in the form required by the registry act, for the consideration of 2000 dollars, the plaintiff being an indorser for Bartlett on a note for that amount. On the 10th of April the enumerated creditors signed a paper assenting to the trust, and requiring the trustee to execute it. At this time the brig was at sea. The attachment was made by the sheriff on the 15th of April, at the suit of a creditor of Bartlett; the brig having at that time arrived from her voyage at Boston. The plaintiff, as soon as practicable, demanded possession of the brig of the sheriff, which was refused, and she was afterwards sold by the sheriff to satisfy the judgment in the suit on which she was attached. After the attachment a more formal assignment was prepared and executed by the debtor, the plaintiff, and the other creditors. The principal question in the cause was, whether the conveyance of the 7th of April was fraudulent as to creditors or not.

Mr. Parker, for defendant, took various exceptions to it.

Webster & Bliss, for plaintiff.

STORY, Circuit Justice, after summing up the facts, proceeded as follows. The principal question in this case is, whether the assignment is bona fide, or fraudulent as to creditors. If bona fide and for a valuable consideration, then, though it may fail as to all the other preferred creditors, yet it is good to protect the plaintiff to the extent of his liability for his indorsement of the note of 200 dollars. And if so, then the property in the brig Fair American passed by the assignment and bill of sale, and the plaintiff is entitled to recover. For this is not like the case of a foreign attachment. Here the plaintiff is entitled to recover the property itself, which he holds by a regular and good transfer; and the defendant must be deemed a trespasser to that extent.

Many of the objections taken by the defendant's counsel have been already disposed of by the court. There are some, however, which require a more direct opinion. First, it is said, that the assignment is void, because the preferred creditors were not parties to it, neither did they assent to it at the time of its execution. It is contended, that either defect is fatal. I am of a different opinion. It was not necessary, to the validity of the assignment, that the creditors should be technically parties to it; nor that their assent should in any manner be given to it at the time of its execution. It is sufficient, if they assented to it before the present attachment, and that is conclusively proved. But this objection, if sustained,

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

would only go to the ultimate interest of the other preferred creditors in the property assigned; for as to the plaintiff, if it was bona fide, he is entitled to hold it, for he assented, and is a party to the deed. Secondly, it is objected, that here there was no delivery of the possession at the time of the conveyance. But that was unnecessary, because no delivery of possession can be of a ship at sea, and a sale of her, under such circumstances, is good without it. It is sufficient, if the vendee takes possession, and asserts his title in a reasonable time and manner after her return. It is of no consequence whether, upon her return, the creditors of the vendor attach her before the vendee obtains possession or not. His title is not affected by anything but fraud or gross laches on his part.

I will only add, that in this case, as the assignment was for the benefit of the preferred creditors unconditionally, and without any stipulation for a release or otherwise, the law would, in such a case, presume the assent of the creditors; for the assignment could not but be for their benefit, being made by an insolvent debtor. Here, however, there has been an express assent before the attachment.

Verdict for the plaintiff.

WHEELER & WILSON MANUF'G CO. (CORLISS v.). See Case No. 3,233.

Case No. 17,502.

WHEELING v. BALTIMORE et al.

[1 Hughes, 90.] [1]

Circuit Court, D. Maryland. Dec., 1862.

MANDAMUS BY FEDERAL COURTS—CORPORATIONS—RIGHTS OF STOCKHOLDERS — EQUITY JURISDICTION—CITIZENSHIP OF CORPORATIONS—CHARTER POWERS.

1. The power of the United States circuit courts to issue the writ of mandamus is confined to those causes in which it may be necessary to the exercise of their jurisdiction, and therefore such court may entertain a bill in chancery, in cases where mandamus would be an ample remedy in a state court, if it is not a necessary remedy in the United States court.

2. Where an incorporated company would be the proper complainant in a chancery suit, but refuses or elects not to bring the suit when required by a stockholder to do so, and the controversy is between different classes of its stockholders, a court will entertain a bill, brought by a stockholder, to settle such controversy.

3. If a company be incorporated by two states, a citizen of one of the states may sue it in a United States court in the other state in which it is incorporated.

[Cited in Uphoff v. Chicago, St. L. & N. O. R. Co., 5 Fed. 548.]

4. Corporations have no other power than such as are expressly granted by their charter, or as are necessary to carry into effect the powers expressly granted.

5. Under the charter of the Baltimore and Ohio Railroad, granted in 1826, and the subsequent acts of the legislature supplemental thereto, no express authority was given the city of Baltimore to appoint directors to represent an increase of stock derived from a stock dividend, and therefore an appointment by the city of four new directors to represent stock so derived, was held to be illegal.

In equity.

This bill is filed by the city of Wheeling, as a stockholder in the Baltimore and Ohio Railroad Company, on behalf of itself and all others of the private stockholders who, being entitled, shall come in and contribute to the cost of this proceeding.

After alluding to the original act of incorporation of said Baltimore and Ohio Railroad Company, the bill states that by the second section of said original charter, the said city of Baltimore was authorized to subscribe for 5000 shares of stock in said corporation, and that by a resolution of the mayor and city council of Baltimore, approved on the 20th of March, 1827, the mayor was authorized, in pursuance of said act, to subscribe in the name of the said mayor and city council for the said 5000 shares, and did so subscribe. That afterwards, by an act of the general assembly of Maryland, passed at December session, 1835 (chapter 127), the said mayor and city council were authorized to subscribe for 30,000 shares of stock in said company, in addition to the subscription previously made by it, and above mentioned; and that by a resolution of the mayor and city council aforesaid, approved 17th of March, 1836, the mayor was authorized, in pursuance of said last-mentioned act, to subscribe for the said additional 30,000 shares, and did so subscribe. That the said 35,000 shares, so authorized to be subscribed for by the acts aforesaid, are all the shares in said company which the said mayor and city council of Baltimore have subscribed for to the capital stock of said company, and that the said mayor and city council hold no other shares in the capital stock of said company as subscribed for to it, except the 35,000 shares aforesaid. That on the 17th day of December, 1856, the said Baltimore and Ohio Railroad declared an extra dividend of 30 per cent. on the capital stock of the company, payable on or after the 12th January, 1857, to all stockholders holding stock on the 22d day of December, 1856, in certificates of indebtedness, bearing an interest from the 1st day of June, 1857, of six per cent. per annum, payable half-yearly on the 1st day of December and June, in each year, until the 1st day of June, 1862, inclusive, after which last-mentioned date, by the terms of the resolution declaring said dividend, the said certificates of indebtedness should be converted into the stock of the said company at par. That the whole number of shares of stock in the said company, on the 22d day of December, 1856, was 101,102, of which number on that day 59,246 shares were held by the private stockholders in said company. And that on the said last-mentioned

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

day, the said mayor and city council of Baltimore held and owned no other stock in said company except the 35,000 shares which had been subscribed for by them as aforesaid. That the certificate for the portion of the extra dividend above mentioned, belonging to the said mayor and city council of Baltimore, for and in respect of its said 35,000 shares, was duly delivered to them, and the interest thereon paid up to the 1st of June, 1862, inclusive, since which time, viz., on the 26th day of June, 1862, the said certificate has been converted, pursuant to its terms and the tenor of the dividend resolution, into stock of the said company, amounting to one million and fifty thousand dollars, and that said stock was not subscribed for by the said mayor and city council, or acquired by it in any other way than as heretofore detailed, viz., as the fruit and dividend of its 35,000 subscribed shares aforesaid. And it prays for an injunction against the mayor and city council of Baltimore to restrain them from appointing any persons as directors of the Baltimore and Ohio Railroad Company for or in behalf or in virtue of the stock in said company, acquired by them as and for a dividend under the extra dividend resolution passed by said company on the 17th December, 1856, and that existing appointments of any persons as such directors may be annulled and declared void, and that John A. Thompson, Henry S. Hunt, Aaron Fenton, and John Dennison may be enjoined from taking their seats as directors at the board of the Baltimore and Ohio Railroad Company, or acting in any way as such directors by virtue of their appointment made by the mayor and city council of Baltimore, on the 2d and 3d days of October, 1862, and that the said Baltimore and Ohio Railroad Company may be enjoined from permitting or suffering the said persons from taking seats at its board or acting in any way as directors under any appointments made or that may be made by the mayor and city council of Baltimore, in virtue of the stock so acquired by them as a dividend under the extra dividend resolution aforesaid. An answer has been filed by the mayor and city council of Baltimore, and also by Messrs. Thompson, Fenton, Dennison, and Hunt, the directors appointed by the said city in October last. These gentlemen adopt the answer of the corporation, which is at great length, and present several defences to the relief sought by the complainant. The Baltimore and Ohio Railroad Company have not answered the bill. The corporation claims the right to appoint these four additional directors by virtue of the 7th section of the act of Maryland of 1826, c. 123 (the original act of incorporation of the Baltimore and Ohio Railroad Company), and upon the construction of this act the merits of this controversy depend.

GILES, District Judge. Independent of the merits of this controversy, several objections have been taken by the learned counsel for the defendants to the right of the complainant to the relief sought by this bill. And I shall discuss them in the order in which they were noticed by the counsel for complainant—and first, that the proper remedy in this case is a mandamus which can give full and adequate relief if complainant is entitled to any; and that equity will never interfere by injunction where there is full and adequate relief in a court of law. I grant that if this were a case in one of the courts of our state, the objection would be unanswerable. The courts of the state, having full power to grant a mandamus where such a remedy is appropriate and adequate to give the relief sought, would not and ought not to interfere by the exercise of its equity jurisdiction, which supposes that the party has no adequate relief at law.

But how stands the matter in a court of the United States? By the 14th section of the judiciary act of 1789 [1 Stat. 81] c. 20, it is enacted "that all the beforementioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and *all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions*, and agreeable to the principles and usages of law." It is under that part of the section I have italicized that the courts of the United States derive their authority to issue a mandamus. It is only in cases where it is necessary to the exercise of their respective jurisdictions. One of the learned counsel for the defendants contended that it was within the true meaning of this section, when the mandamus was issued in a case over which the courts of the United States had jurisdiction, from the character of the parties to it, or otherwise—although the mandamus might have been the original process in the case. But this is no longer an open question in this court. The supreme court has decided in [Riggs v. Lindsay] 7 Cranch [11 U. S.] 504, that the power in the circuit courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. And they held that the circuit court did not possess the power to issue the writ in that case, which was a motion to issue a mandamus to a register of a land office in Ohio. I understand this decision as construing the 14th section of the act of 1789 to give the power to issue the writ of mandamus only in aid of a judgment of the circuit court. And this is made clear by reference to the cases of McClury v. Silliman, 6 Wheat. [19 U. S.] 598; Kendall v. U. S., 12 Pet. [37 U. S.] 617; Wayman v. Southard, 10 Wheat. [23 U. S.] 22; and Board of Com'rs of Knox Co. v. Aspinwall, 24 How. [65 U. S.] 384. In McClury v. Silliman, Justice Johnson, delivering the opinion of the supreme court, says: "It is now contended that as the parties to this controversy are competent to sue under the eleventh section, being citizens of

different states, this is a case within the provisions of the fourteenth section, and the circuit court was vested with the power to issue this writ, under the description of 'a writ not specially provided for by statute,' but 'necessary for the exercise of its jurisdiction.'" This is the ground taken, as I understand, by the counsel in this case. Justice Johnson says: "The fourteenth section of the act under consideration could only have been intended to vest the power now contended for in cases where the jurisdiction already exists, and where it is to be courted or acquired by means of the writ proposed to be sued out." And the supreme court in sustaining the writ of mandamus issued by the circuit court for the District of Columbia, in the case of Kendall v. U. S. [107 U. S.] 437, did it upon the ground that that court was vested with broader power and jurisdiction in this respect than are vested in the circuit courts of the United States in the several states. I am of opinion, therefore, that this objection is not valid.

The second objection urged by the defendant's counsel is, that the bill should have been filed in the corporate name of the "Baltimore and Ohio Railroad Company," and that this is not one of those cases in which a private stockholder has the right to institute proceedings in his own name.

Now the bill alleges "that the said company in its corporate capacity has made no defense, nor taken any steps in denial of the pretensions aforesaid of the said city of Baltimore, although respectfully requested to do so by your orator, which through its counsel adressed to the president and directors of said company the two notes, copies of which are herewith filed, to neither of which has any answer been made; and that your orator has reason to apprehend, and does apprehend and charge, that the said company does not intend to initiate any proceedings in the premises, but means to leave the private stockholders to defend themselves." The failure of the company to reply to the two notes of the complainant's counsel, and to file an answer to this bill, shows clearly that this charge of the bill is true. And inasmuch as the facts of the case show that there are three classes of stockholders in the Baltimore and Ohio Railroad Company whose interests in reference to this controversy are in conflict, there is wisdom in the course pursued by the president and directors of the company. They could not with propriety take sides with either class of stockholders. For this reason, if for none other, the private stockholders should be permitted to file a bill in their own name, to have this controversy between themselves and the other stockholders of the company finally decided, and to obtain such relief in the premises to which they may show themselves entitled.

But I consider this case within the spirit of the decisions made in the two cases referred to in the argument, viz., Campbell v. Poultney, in 6 Gill & J. 102; and Dodge v. Woolsey, 18 How. [59 U. S.] 344. Whenever the course pursued by the corporate body would amount to a breach of trust, or be a violation of the chartered rights of the stockholders, and there exists no adequate remedy at law, a court of equity will interfere, and its powers may be put in motion by a single shareholder, though it is usual for him to act for himself and all the other stockholders similarly situated who will come in and contribute to the expense of the suit. Much stronger, however, is the claim of this complainant to be permitted to institute these proceedings in its own name, as I have shown that the corporation which represents all its shareholders could not with propriety institute this proceeding.

The third objection is to the jurisdiction of the court. It is contended by the defendant's counsel, that inasmuch as the charter of the Baltimore and Ohio Railroad was confirmed by the legislature of Virginia, said company became a corporation of that state; the complainant, which is also a corporation of Virginia, cannot institute any proceedings against the said railroad company in this court. But this, too, is no longer an open question, the very point having been decided by the supreme court in the case of Marshall v. Baltimore & O. R. Co., 16 How. [59 U. S.] 314. Marshall was a citizen of Virginia, and as such sued the Baltimore and Ohio Railroad Company in this court, and the supreme court held that the suit was properly instituted.

Having thus disposed of the objections to the character and form of this bill, and to the nature of the relief sought by it, I now come to the merits of this controversy. The corporation of Baltimore claim that they have the right, as the owner of the stock which has accrued to them by virtue of the extra dividend resolution, to appoint four additional directors in said company. And the counsel for the city claim this by virtue of the 7th section of the original charter of the Baltimore and Ohio Railroad Company. So much of that section as relates to this subject is in the following words: "And be it enacted, that to continue the succession of the president and directors of said company, twelve directors shall be chosen annually, on the second Monday of October in every year, in the city of Baltimore, by the stockholders of said company, and that the state of Maryland and the city of Baltimore may each appoint one additional director of said company for every twenty-five hundred shares of stock of said company by them respectively owned at the time of such election, but shall not be permitted to vote upon their stock in the election of the directors by the stockholders in general meeting." And that part of the 2d section of said act to which I shall have occasion to refer, is in the following words: "That the capital stock

of the Baltimore and Ohio Railroad Company shall be three millions of dollars, in shares of one hundred dollars each, of which ten thousand shares shall be reserved for subscription by the state of Maryland, and five thousand by the city of Baltimore, for the space of twelve months after the passage of this act by the legislature of Maryland, and the remaining fifteen thousand shares may be subscribed for by any other corporation or by individuals."

The 11th section of the act is as follows: "That if any of the fifteen thousand shares of the capital stock of the said company, not reserved to the city of Baltimore or the state of Maryland, shall remain unsubscribed until the organization of the said company, or if the shares of the capital stock hereinbefore reserved for the said state or city, or any part of them, shall not be subscribed by the said state or city respectively during the time for which such stock is reserved for them, in either case the president and directors of the said company, or a majority of them, shall have power to open books, and receive subscriptions to any of the capital stock of said company which may thus remain unsubscribed for, or to sell and dispose of such unsubscribed stock for the benefit of the company, for any sum not under its par value," etc.

Under this act the city subscribed for the five thousand shares reserved for her within the time specified, and appointed two directors, and has appointed them annually ever since, as she has never parted with the said stock. The only other subscription the city has ever made to the Baltimore and Ohio railroad, was a subscription made in 1836, of thirty thousand shares, by virtue of the authority given to the city by the act of assembly of 1835, c. 127. The 1st section authorized the city to subscribe to the capital stock of the Baltimore and Ohio Railroad Company any amount not exceeding three millions of dollars over and above the sums heretofore subscribed by them. And the 4th section of said act authorized the city to appoint an additional director for every five thousand shares of the stock of the said company for which the city might subscribe in pursuance of that act, and which shall be owned by the city at the time of the annual election, with this proviso at the end of said section: "Provided that nothing herein contained shall be taken to impair the right which the city has to have two directors of the said company for the five thousand shares already held by it, whether it should make the subscription hereby authorized or not, nor in any event to have more than twelve directors of said company." Now it is contended that the authority of the city to appoint a director for every two thousand five hundred shares of stock owned by said city, at any election, is not to be limited to the five thousand shares which the city was authorized to subscribe for by the second section of said original act, but was an authority to appoint an additional director for any two thousand five hundred shares which the said city might subscribe for or purchase at any future time. Now this construction would be plausible if the city possessed the authority, in 1826, to subscribe for this or any other railroad stock, independent of any special grant of power or authority from the legislature. The counsel for the city contend that it had such power by virtue of the general authority contained in the first section of its charter (act of 1796, c. 68), "to purchase and hold real, personal, and mixed property, and to dispose of the same for the benefit of the city." Now it is admitted that if you cannot find this power for the city in its charter, it does not exist. For corporations (and in this aspect there is no difference between municipal and other corporations) have no other powers than such as are expressly granted, or such as are necessary to carry into effect the powers expressly granted. As authorities upon this point, if any are wanted to sustain so clear a proposition, I refer to the following cases: Perin v. Chesapeake & D. Canal Co., 9 How. [50 U. S.] 184; Mayor, etc., of Baltimore v. Hughes, 1 Gill & J. 481; Cohen v. Virginia, 6 Wheat. [19 U. S.] 264; New London v. Brainard, 22 Conn. 555; Beatty v. Knowler, 4 Pet. [29 U. S.] 152; City of Lafayette v. Cox, 5 Ind. 38; Hodges v. City of Buffalo, 2 Denio, 112; Kane v. Mayor, etc., of Baltimore, 15 Md. 247. The case in 5 Indiana was very similar to this case. The city of Lafayette had undertaken to issue bonds to aid in the construction of a railroad, relying upon the authority given to it in its charter to create a debt to a limited amount, but the court decided that the authority to create a debt was limited to a debt to carry out the objects specified in the charter.

I hold it to be very clear, therefore, that the authority to the city in the 1st section of its charter to purchase real, personal, and mixed property, is limited to the purchase of such as may be necessary for the purposes of the corporation, such as houses for its public offices to be held in, and furniture to fit them up, or to such as may be necessary to enable the city to execute the powers conferred upon the said corporation by the 8th section of said act of 1796. And I am sustained in this view by the acts of the city and the legislature of this state from 1826 to the present time. The city has never subscribed to any work of internal improvement without seeking a special authority from the legislature of the state for that purpose. This is a legislative interpretation of the city charter for a period of sixty-six years. To some of these laws I will now refer.

The act of 1831, c. 214, § 2, gave to the city the authority to aid in the construction of any useful public work authorized by any law of the state to the extent of $1,000,000. Act 1835, c. 395, gave authority to the city to subscribe for such part of the capital stock of the Maryland Canal Company, and the Balti-

more and Ohio Railroad Company, as shall not be subscribed by individuals. Act 1853, c. 269, gave authority to the city to aid in the construction of the Pittsburg and Connellsville Railroad. Act 1854, c. 260, § 4, authorized the city to subscribe to the Susquehanna Railroad Company, and the acts of 1826 and 1835, to which I have referred in a former part of this opinion. The city having then no power, in 1826, to subscribe for shares in the Baltimore and Ohio Railroad Company but what that act in its 2d section gave, must not the authority given to the city in the 7th section to appoint one director for each two thousand five hundred shares by it owned, be limited to appoint directors for that five thousand shares, and for none other? They could subscribe for no further shares without a new grant of power from the legislature; and we see that when the legislature made a new grant of power in 1835, they fixed a new basis of representation in the board of directors, and authorized the city to appoint an additional director for each five thousand shares of stock by the city subscribed under the act. Now the proviso of the 4th section of that act has been much relied upon to warrant a different construction of the act of 1826. I remark, in the first place, that the act of 1835 is a special act to give authority to the city, and is not a supplement to the charter of the railroad; and although by the railroad receiving the city's subscription, they were bound to admit the six directors for whose appointment that act provided, yet that act no further bound the railroad company, or altered in any other manner the chartered rights of the railroad. Besides, the office of a proviso is almost universally to limit, and not to enlarge power. The power now claimed for the city must be found, if it exists at all, in the 7th section of the act of 1826. It will be observed that it was optional with the city whether it would subscribe for any amount of stock under that act, and the legislature contemplated a contingency of that kind when, in the 11th section, it provided for a sale, etc., of such part of the stock reserved for the city as it might decline to subscribe for within the time specified. It was the same contingency, or a sale of her stock after subscription by the city, that the legislature evidently had in view when they used the word "owned" in the 7th section. I am therefore of opinion that the city has no legal authority to appoint these four additional directors, and if the act of 1835 had not contained the authority to appoint the six directors as provided in the 4th section, no such right would have existed in the city. This extra dividend stock has been issued by the president and directors of the Baltimore and Ohio Railroad Company to fund the certificates of indebtedness which had been given to the stockholders of said company for net profits borrowed from them from time to time, and was the exercise of a power clearly granted by the 13th section of the charter. It is, then, so many new shares added to the capital stock of the company, with only such privileges as belonged to the original capital stock, and not having the special privilege or restriction in reference to that part belonging to the state and city which the legislature thought proper to grant and impose in the 7th section of the original charter. I will therefore grant the injunction for which the complainant has prayed in his bill.

WHEELRIGHT (BOWIE v.). See Case No. 1,733.

Case No. 17,503.

WHELAN v. WASHINGTON.

[3 Cranch, C. C. 292.] [1]

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

TAXATION OF SLAVES.

1. The tax upon the slaves of non-resident owners, under the by-law of April 5, 1823, does not accrue until the hiring is complete.

2. If the tax be paid and received before the prosecution commenced, the owner is not liable to the penalty.

Appeal from the judgment of a justice of the peace against [Sarah Whelan], a non-resident slaveholder for a penalty of $20 for not paying the tax of two dollars on a female slave, hired out by the defendant, in the city of Washington, before the hiring, under the second section of the by-law of April 5, 1823. The tax was paid before the prosecution was commenced.

THE COURT (nem. con.) was of opinion that as the tax was imposed upon slaves hired, it did not accrue until the hiring was complete; and that if paid and received before the prosecution, the defendant was not liable to the penalty. Judgment reversed with costs.

Case No. 17,504.

WHELPLEY v. ERIE RY. CO.

[6 Blatchf. 271.] [2]

Circuit Court, S. D. New York. Dec. 16, 1868.

CORPORATIONS—ILLEGAL ISSUE OF STOCK—APPOINTMENT OF RECEIVER—INJUNCTION.

1. A bill was filed against a corporation, by the holder of alleged shares of its capital stock, claiming that they had been illegally issued, the same having been issued by the conversion into stock of bonds issued by the corporation, and praying that their legality might be inquired into, and that, if they should be held to be illegal, the plaintiff might be repaid the amount paid by him for such alleged shares, and that the corporation might be enjoined, pending the suit, from disposing of so much of its property as would indemnify the plaintiff, and that a receiver of that amount might be appointed. It appearing that the moneys re-

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

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

ceived by the corporation, on the issue of the bonds, had not been kept separate from its general funds, and could not be traced and identified: *Held*, that the injunction could not be granted, or the receiver appointed.

2. An order for an injunction or a receiver, will not be made in an improper case, even on the consent of both parties to the suit, more especially where the rights of third parties may be concerned.

[Cited in The Holladay Case, 29 Fed. 236.]

The bill in this case was filed against the Erie Railway Company, by [Henry B. Whelpley,] a stockholder, charging that he was the owner of one thousand shares of its stock, and that they were a part of two hundred thousand shares overissued by said company, in violation of its charter, and contrary to law. It prayed that such issue of stock might be inquired into, and its legality, or illegality, be established; that, if it should be held that the said issue was illegal and void, the company might be decreed to pay to the plaintiff the amount paid by him for such spurious stock; that the company, pending the suit, might be enjoined from disposing of its property, or so much of it as would indemnify him; and that a receiver might be appointed, and the company be decreed to convey to him a sufficient amount of moneys, or securities, to enable him to pay to the plaintiff the advance made by him for said stock, with interest. The bill was filed on behalf of the plaintiff, and of all other persons holding the alleged overissued stock. The district judge, at chambers, no opposition being made, and notice of the application being waived by the company, granted the injunction, and appointed a receiver. August Belmont and Ernest B. Lucke now came into court with a petition, setting forth that they were the holders of a portion of such overissued stock, and asked to be made parties to the suit, as provided for in the bill, and as interested in the question to be determined by the court, and charged that the person appointed receiver was an unfit person, disqualified for the proper discharge of the duties of that office.

Charles O'Conor, for Belmont and Lucke.

Edwin W. Stoughton, David Dudley Field, and John K. Porter, for defendants.

NELSON, Circuit Justice. The question involved in this alleged overissue of stock depends upon the construction of several provisions of the laws of the state of New York concerning the powers and duties of railroad corporations. Different and conflicting constructions of such provisions are insisted upon by the respective parties, and the questions involved therein, must necessarily come up for consideration and disposal, on the final hearing of the case, on pleadings and proofs; but, in the view I have taken of the case, it will not be necessary, or, perhaps proper, to express an opinion in respect to them, on this preliminary motion.

I am satisfied, on an examination of the bill, and of the papers in opposition, that a case has not been made out that will authorize the court to uphold the order for the injunction, or for the appointment of a receiver, even assuming the stock in question to be a part of an illegal issue or an over issue. If the moneys received on the issue of the bonds which were converted into stock had been kept apart and separate from the general funds of the company, and could be traced and identified, an equity might well arise in behalf of the defrauded stockholders, against the particular fund, and attach to the same. In equity and conscience, the money paid on the issue of the bond, and thus traced and identified, would be the money of the person who paid it; and the holder of stock, into which the bond had been converted, and who would represent the bond on which the money was paid, would stand in the same equitable relation to the fund as the person who paid the money. But the bill, in this case, does not place the right of the plaintiff to follow the moneys advanced on the alleged fraudulent issues of stock, on the ground that such moneys were kept separate and apart from the general funds of the company. On the contrary, it sets up the right to have set apart from these general funds a sufficient amount to reimburse the plaintiff for these advances, thereby, impliedly, at least, admitting that they have been commingled with the general mass. Besides, the opposing papers show that this is the fact. Judge Story thus states the principle applicable to such a case (2 Story, Eq. Jur. § 1265): "Where there is any fraud touching property, they" (courts of equity) "will interfere, and administer a wholesome justice, and sometimes even stern justice, in favor of innocent persons who are sufferers by it, without any fault on their own side. This is often done by converting the offending party into a trustee, and making the property itself subservient to the proper purposes of recompense, by way of equitable trust or lien. Thus, a fraudulent purchaser will be held a mere trustee for the honest, but deluded and cheated, vendor." And, as stated by Lord Ellenborough, in Taylor v. Plumer, 3 Maule & S. 562, 575, "it makes no difference, in reason or law, into what other form, different from the original, the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods," &c., "for, the product of, or substitute for, the original thing, still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description." See, also, Thompson v. Perkins [Case No. 13,972], and 2 Story, Eq. Jur. § 1259. In the latter condition of things, the aggrieved party can come

in only as a general creditor, and is entitled to no preference, or priority, over that class of creditors. This is the condition of the plaintiff in this bill.

It is claimed, by the counsel for Belmont and Lucke, that the receiver should be removed as unfit and disqualified, on the facts set forth and admitted in the case, and some other person be appointed in his place; and that the company is estopped from contesting the matter, because it assented to the appointment of the receiver. I do not assent to this view. The company waived the notice which is required by the rules and practice of this court, before an injunction can be issued; but the order for the injunction; and for the appointment of a receiver, depended upon the judgment of the judge who granted them. Indeed, I am not prepared to admit that an order for an injunction, or a receiver, can be made in an improper case, even with the consent of both parties, more especially where the rights of third persons may be concerned.

My conclusion, on the whole, is, that Belmont and Lucke be permitted to join as parties to the suit, that the injunction be dissolved, and that the order appointing a receiver be vacated and set aside.

WHERRITT (SHAWHAN v.). See Case No. 12,728.

WHERRY (McFERRAN v.). See Case No. 8,792.

Case No. 17,505.

WHETCROFT v. BURFORD.

[2 Cranch, C. C. 96.] [1]

Circuit Court, District of Columbia. Dec. Term, 1813.

ASSUMPSIT—SET-OFF—ACCOUNT.

An account for work and labor cannot, at the trial, be given in evidence upon non assumpsit, as a set-off, unless the account has been filed and notice given.

Assumpsit, against the defendant, as indorser of the note of Ambrose White, indorsed by Burford to Minifie, and by Minifie to Whetcroft as his agent and trustee.

Mr. Law, for defendant, offered to prove work and labor done by White for Minifie on account of this note.

Mr. Key, for plaintiff, objected, because notice of such set-off had not been given before the jury was sworn.

THE COURT (nem. con.), upon consideration of the Maryland act of 1785, c. 46, § 7, which requires the account to be filed, or pleaded, refused to receive the evidence.

[See Case No. 17,507.]

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

Case No. 17,506.

WHETCROFT v. DUNLOP.

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

Circuit Court, District of Columbia. April Term, 1801.

VACATING JUDGMENT—SPECIAL DEMURRER.

A special demurrer will not be admitted to set aside an office judgment.

[This was an action by Whetcroft's administrator against John Dunlop.]

THE COURT refused to admit a special demurrer to the declaration to be filed on setting aside the office judgment. The cause of demurrer assigned was the want of profert of the letters of administration.

Case No. 17,507.

WHETCROFT et al. v. WHITE.

[2 Cranch, C. C. 96.] [1]

Circuit Court, District of Columbia. Dec. Term, 1813.

PROMISSORY NOTES—INDORSEMENT—ATTACHMENT.

If the indorser of a promissory note accept an order from the indorsee for the amount of the note, in favor of a third person, a subsequent attachment of the money in the hands of the indorser, by a creditor of the indorsee, will not avail him.

Assumpsit against the maker of a promissory note indorsed by Burford to Minifie, who indorsed it to Whetcroft in trust for the benefit of Minifie. Minifie, being indebted to Long, gave him an order on Burford to let Long have such goods as he should want. Burford accepted the order. Vickers and others, creditors of Minifie, served an attachment on Burford, and on White, and on Whetcroft. Burford afterwards let Long have goods on account of the order.

Mr. Key, for plaintiff, contended that the attachment having been served on Burford before he delivered the goods to Long, (although after his acceptance of the order,) bound Burford, and that his delivery of them afterwards was in his own wrong.

Mr. Law, contra.

THE COURT (FITZHUGH, Circuit Judge, absent,) said the order and acceptance were to be presumed to be equal to the amount of the debt due from Burford to Minifie, and were an assignment thereof to Long; and that the assignment of the note to Whetcroft, being for the benefit of Minifie, the payment by Burford to Long was a good set-off.

[See Case No. 17,505.]

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

Case No. 17,508.

In re WHETMORE.

[Deady, 585; 2 Am. Law T. 105; 1 Am. Law T. Rep. Bankr. 136.] [1]

District Court, D. Oregon. June 18, 1869.

BANKRUPTCY—EXEMPTIONS—ERRONEOUS CLAIM—DISCHARGE—OBJECTION BY OMITTED CREDITOR.

1. The "business of a contractor" is not a "trade, occupation or profession" within the meaning of the act (Code Or. 211) exempting certain tools and implements from execution.

2. Where the affidavit to a schedule states in the prescribed form, that it contains a statement of all the bankrupt's estate, its truth is not affected by an erroneous claim in such schedule that a certain article therein mentioned is exempt from execution.

3. If the bankrupt makes an erroneous claim to property mentioned in the schedule, as being exempt from the operation of the bankrupt act, it is the duty of the assignee to correct or disregard it.

4. Where a bankrupt, in pursuance of an arrangement with a certain creditor, omits his debt from his schedule, such creditor will not be permitted to object to the bankrupt's discharge on that ground.

[In the matter of W. C. Whetmore, a bankrupt.]

Robert Bybee, for petitioner.
M. W. Fechheimer, for creditor.

DEADY, District Judge. On October 27, 1868, the petitioner was adjudged a bankrupt on his own petition. No debts having been proved against his estate, on March 26, 1869, the petitioner filed his petition for final discharge from his debts. To this petition John A. Blanchard, a creditor, appeared and filed specification of grounds of opposition to the discharge. On May 22, 1869, the matter was tried by the court, without the intervention of a jury.

The grounds of opposition to the discharge, are: (1) That the bankrupt swore falsely in his affidavit annexed to his schedule, in this, that he willfully failed to insert therein a certain judgment debt due said Blanchard. (2) That said bankrupt swore falsely in the affidavit aforesaid, in this, that he claimed a horse and spring-wagon, as exempt, on account of being necessary to carry on his business. (3) That said bankrupt swore falsely in the affidavit aforesaid, in this, that he willfully failed to insert in his schedule a debt due to S. F. Shattuck.

The latter ground of opposition seems to have been made under a misapprehension of the facts, and was abandoned on the argument.

The second ground of opposition is insufficient. The bankrupt is a house carpenter, and it may be admitted that a horse and wagon are no part of the tools or implements necessary to enable a carpenter to carry on his trade. If he is also engaged in the business of a contractor, he may find it necessary to own or employ a team or teams. But the business of a contractor is not a "trade, occupation or profession" within the meaning of the local law of this district, which exempts certain tools, implements, etc., from execution. Code Or. 211. If the law were construed otherwise, a merchant or shopkeeper might successfully claim his stock-in-trade, of whatever value, to be exempt from the operations of the act, because the same would be necessary to enable him to carry on his business. But the affidavit to schedule B does not state that this property was exempt from the operation of the act because necessary to carry on his business. It is in the prescribed form and merely declares "the said schedule to be a statement of all his estate, both real and personal," etc. In this respect the truth of the affidavit is not questioned. True, the schedule itself contains a statement that this horse and wagon are exempt, but it seems to me that this is no part of the affidavit. And if it were, I do not think it would be sufficient to prevent the petitioner's discharge. If the schedule contains "an accurate inventory" of the bankrupt's property, that is sufficient. Whether a particular article should be stated in the schedule as exempt from the operation of the act or not, must often be a mere matter of opinion. An error in this respect, however gross, if the facts are truly stated, it seems to me is not a bar to a discharge. If the bankrupt makes an erroneous or unfounded claim in this respect, it is the duty of the assignee to correct it, and if he fails to do his duty in the premises, the creditors may appeal to the court for relief.

As to the first ground of opposition, the testimony establishes the following facts:

Before the commencement of the proceedings in bankruptcy, the opposing creditor, Blanchard, had a judgment against the bankrupt for $16.50. Whetmore, being desirous of going through bankruptcy, consulted an attorney, who advised him to settle or arrange Blanchard's claim, and go through for the rest of his liabilities, which he called "Cariboo debts." The result was that the attorney for the bankrupt and Blanchard, with the bankrupt's assent, agreed that the attorney would pay the debt of $16.50, and that the same might be omitted from the schedules in the contemplated proceedings in bankruptcy. Whether this transaction amounted to a novation by which the debt due from the bankrupt was extinguished, or is a mere promise by the attorney to pay the debt of another, may be a question. But in any view of the matter, the circumstances are sufficient to preclude this creditor from opposing the discharge upon this ground. He agreed and consented to the omission of the debt from the schedule. Upon this understanding the bankrupt filed his petition in bankruptcy, omitting this debt from his schedule. The creditor having induced the bankrupt to make this

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission. 2 Am. Law T. 105, and 1 Am. Law T. Rep. Bankr. 136, contain only partial reports.]

omission ought not now to be heard to object to his discharge, on account of it. Of course, I do not intend to be understood as endorsing the morality or propriety of this transaction. On the contrary, it is quite evident that there was an intention to prefer Blanchard contrary to law and by the suppression of fact. But as to this, the parties are equally in the wrong, and the law leaves them as it finds them. The discharge is granted.

Case No. 17,509.

WHETMORE et al. v. MURDOCK.

[3 Woodb. & M. 380.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1847.

INSOLVENCY—FRAUDULENT TRANSFERS—ACCOMMODATION ACCEPTANCES—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.

1. Where one has accepted drafts to accommodate another, payable at a future day, he may take notes payable at that day as security. And if, in the mean time, the debtor is likely to fail, he may exchange these notes for others on demand and sue them before the drafts are paid, and attach property as security. The exchange may be agreed on and the new notes taken and put in suit at once, if the old ones are agreed to be returned, and are in fact soon returned.

2. But the parties, under such circumstances, being relations, and the debtor going into insolvency the next day after the new notes are executed and the attachment made, are, with other circumstances, some evidence of collusion and want of good consideration.

3. A verdict given against the validity of the new notes will not, in such case, be set aside as against the weight of evidence.

4. Nor will it be set aside on the ground of newly discovered evidence, if at the trial it was not proved directly that the old notes had been returned, though circumstances were shown from which it might be inferred, but since the trial the insolvent has disclosed that the notes were in fact seasonably returned to him.

5. His admissions or statements as to such a prior transaction, made since his property was transferred to assignees, and in a suit which they defend are not competent evidence, and much less are they sufficient to justify a new trial, when the plaintiffs decline to swear that these facts are newly discovered by them.

6. Such assignees may defend on the ground of fraud or want of consideration, and in cases where the insolvent could not, as they represent the other creditors in this, rather than the debtor.

7. Nor will a new trial be granted for the concealment at the trial of the actual return of the old notes, unless that fact was known to the assignees, and concealed by them and not by the insolvent, as the assignees are the virtual defendants, and the debtor here was in feeling friendly to the plaintiffs, rather than the defendants.

8. Due diligence required, in such a case, that the plaintiffs should have inquired of the debtor and obtained and used the old notes at the former trial.

This was an action of assumpsit on two promissory notes, made by the defendant [Warren Murdock] to the plaintiffs [David W. Whetmore and others], one dated July 3d, 1846, for $1236.88, and the other July 8th, the same year, for $1682.15. The plaintiffs were citizens of New York, and the defendant of Wareham, Massachusetts. The general issue was pleaded, and a special notice filed, requiring proof of the execution of the notes and their consideration and setting up payment of them. It appeared in evidence that property had been attached the 26th of August on the writ which issued August 25th, 1846, and that the defendant went into insolvency under the laws of Massachusetts the day of the attachment, and a warrant issued to a messenger and was published the 28th August, 1846. The assignees were admitted to defend the action, and sought to avoid a recovery here on the ground of fraud and collusion between the original parties, as well as for the special reasons set up in the notice under the plea. The signature of the defendant was proved at the trial, and the following facts as to the consideration. The defendant and one of the plaintiffs were brothers, and the latter were in the habit of raising money by the sale of notes for the defendant in New York. On the 3d of July, 1846, the defendant drew a draft on the plaintiffs for $1260, payable in ninety days, which they accepted for his accommodation, and received a note from him of the same date and amount, as security for their acceptance, and paid the draft at maturity. On the 8th of July, 1846, the defendant drew another draft on them for $1700, payable and secured and accepted in like manner. It further appeared that one of the plaintiffs was absent from New York in August, 1846, and on the 28th, 29th or 30th, returned with the two notes now in suit, being of the same date with the former notes, of like amount, deducting interest for the sixty days, and payable on demand. It was next shown that an entry of these notes was made in their books on a blank space under the month of July, stating that they had been received, and that the other prior notes were returned to the defendant. The bookkeeper testified that he believed the others were enclosed in a letter and put in the post office directed to the defendant, but was not entirely certain of this. He had never seen them since in possession of the plaintiffs, nor had they ever, to his knowledge, been discounted for them by others. The entry was dated July 31st, though it was actually made August 31st, and he testified that it was his custom to leave some blank space at the end of each month, in order to make entries under the proper month of such matters as had been forgotten, or were not then completed, but belonged to the business of that month. Both of the acceptances were paid by the plaintiffs when they became due. The judge instructed the jury that if they believed the original parties had agreed that new notes on demand should be given for

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

the first ones, which were payable in sixty days, and the latter be returned, there was a good consideration at their execution for the new notes, if the transaction was bona fide, and if the old ones were in truth afterwards returned on the parties reaching home, and if the drafts accepted for the old notes were duly paid at maturity by the plaintiffs. The case went to the jury on this instruction, the counsel for the assignees insisting that on the evidence there was no valid consideration shown by a seasonable return of the old notes, or any agreement proved to be made in respect to them, and that the whole execution of the new notes was collusive and with a view to defraud the other creditors by having property attached under process from the courts of the United States, and thus withdrawn from distribution among the other creditors, under the insolvent system of this state. The trial was had here before Sprague, J., at an adjournment of the October term, 1846. [Case unreported.] The jury returned a verdict for the defendant, and the plaintiffs moved to set it aside for the following reasons: (1) That it was against the weight of evidence. (2) That new evidence had been discovered. Subsequently, in December, 1846, a third cause was assigned: That the original notes had been seasonably returned to the defendant Murdock, but the fact concealed at the trial by the assignees.

R. Fletcher, for plaintiffs.
T. Coffin, for assignees.

WOODBURY, Circuit Justice. There is no cause assigned here for a new trial on account of any misdirection by the court. Because this charge was in point of law quite as favorable to the plaintiffs, if not more so, than can in some respects be vindicated after mature consideration. But the verdict being against the weight of evidence is the first ground suggested for a new trial. This objection relates to the evidence as to the consideration of the second notes, it being either the first notes then agreed to be returned, and soon actually returned, or it being a collusion or fraud to injure other creditors, and hence without any good consideration. On the plaintiff's side, the proof as to the consideration came from a single witness, the clerk. He was not present at the agreement, and testified only to facts, from which it was inferred—such as the new notes being brought back, the old ones believed to be returned, no claim since made on them, and they never being discounted, to his knowledge. On the other side, several circumstances attending his testimony were urged as throwing discredit on him. Beside this, the absence of any witness who was present at the agreement, so as to prove it directly, as well as the facts that the parties were nearly related, and one about to fail, and the supposed change of notes made just before going into insolvency, and altered so as to be put in suit the same day, when otherwise they could not have been, and other large mutual claims then existing, and a suit on them brought at the same time, were all urged against the fairness and validity of the case, on the whole matter connected with it. Moreover, the antedating of the last notes, and the insertion of the transaction on the books under the month of July, when it really occurred in August, were urged as further evidence of unfairness. It would be difficult to say here that there were not important facts to be weighed by the jury operating on both sides, and that the credibility of the only witness was not really in question, and to be weighed also by them. When this is the state of a case, a new trial is seldom proper, because the verdict may by the judge be supposed to be against the weight of evidence. See cases in Fearing v. De Wolf [Case No. 4,711], and Macy v. De Wolf [Id. 8,933]. Under such circumstances the jury, and not the court, are to hold the balances. Much less are we able to say that on the whole case, as appearing at the trial, the jury made a clear mistake, or indulged in a clear abuse of their power, one of which is usually necessary to justify setting aside a verdict when recovered, because it is against the weight of evidence. See, also, Aiken v. Bemis (at this term) [Id. 109].

The second ground assigned for a new trial, is newly discovered evidence. This consists of matter since disclosed by the insolvent in a bill of discovery brought against him by the plaintiffs. He admits there that the agreement to return the old notes was as set up at the trial, and that they were returned soon after, and, as appears by an express post mark on the envelope at New York, that was done on the 31st day of August, 1846. There is no doubt in our minds that this matter so disclosed is important, but the difficulties concerning it are, was it competent evidence, situated as this case is? ought it not to have been discovered before the other trial, and was it not mere cumulative testimony? It must be recollected, that though the insolvent is a party on the record, this action is defended by his assignees. Now if the insolvent was still to be considered as the party, so as to make his subsequent confessions or statements evidence, it would violate the sound principle that a party in interest is not to be affected by the confessions of a nominal party after the latter ceases to be interested, and this is known to the other side. Cow. & H. Notes to Phil. Ev. pt. 1, note 172; 1 Johns. Ch. 51; 2 Johns. Cas. 121, 258; 1 Johns. 531; [McNutt v. Bland] 2 How. [43 U. S.] 14; 4 Johns. 403; 3 Johns. 425; [Bridges v. Armour] 5 How. [46 U. S.] 91; 12 Johns. 343. So it is well settled that the statement of a bankrupt after his bankruptcy, and after the property has vested in a messenger or assignees, and he in respect to that has become dead, or civiliter mortuus are inadmissible. After that he cannot be a witness, or his confessions be competent to affect the previous title. See Carr v. Gale (Me.; May Term, 1847) [Case No. 2,435] and cases in Notes to Phil. Ev.

p. 164; see cases in Bridges v. Armour, 5 How. [46 U. S.] 94; 5 Durn. & E. [Term R.] 513; 1 Esp. 330; 1 Starkie, 60; 7 Cow. 174; 1 Greenl. Ev. 498. This seems particularly reasonable in a case like the present, where the insolvent is related to the other party, and is charged with collusion with them to defraud his other creditors, and hence is hostile to the course now pursued by his own assignees. It would be very extraordinary, either in law or equity, if an insolvent thus situated could be allowed by subsequent statements or admissions to impair or affect the right of others. And though some of the English cases seem to admit such confessions, yet the facts were in some different and the current of American cases is entirely the other way. See those in notes to 2 Phil. Ev. 164; Lewis v. Long, 3 Munf. 136; [Welch v. Mandeville] 1 Wheat. [14 U. S.] 233; [Mandeville v. Welch] 5 Wheat. [18 U. S.] 227; Corser v. Craig [Case No. 3,255]; Bholen v. Cleveland [Id. 1,381]; Green v. Darling [Id. 5,765]; [Wheeler v. Hughes] 1 Dall. [1 U. S.] 23; [Van Horn v. Harrison] Id. 139; [Inglis v. Inglis] 2 Dall. [2 U. S.] 49; [Field v. Biddle] Id. 172; 1 Mass. 117; 5 Mass. 210; 8 Mass. 465; 9 Mass. 337; 10 Mass. 316; 13 Mass. 304; 9 Pick. 202; 2 Greenl. 143; 3 Greenl. 346; 2 N. H. 39; Simonton v. Boucher [Case No. 12,877]. Thus a partner, after dissolution of the partnership, can make no admissions to bind others. 9 Cow. 420; 11 Pick. 331. It is laid down also, that a disclosure obtained by a bill of discovery, must be obtained before a verdict or hearing, in order to be of any avail. 3 Johns. Ch. 351; 1 Vern. 176. But I am inclined to think that if the disclosure was otherwise competent, this objection ought to be overcome by setting aside the first verdict, and then the disclosure would be in season before a second trial.

There is another objection, that this evidence might have been discovered before the other trial by the use of due diligence. Because it was known to a relation, a party concerned in this very business, a person supposed to be friendly and assisting the plaintiffs in their recovery, and the one of all others, who, being presumed to know all about the matter, as one party to it, should have been inquired of as to the fact. What fortifies this view, is the want of any affidavit that this knowledge of the return of the notes is new. It must be in fact new, and if new, there still should have been due diligence to discover it sooner, and if not exercised, a party failing to do it must abide by his neglect and his loss. See cases before cited; 15 Johns. 293; 7 Mass. 205. This evidence seems, also, to be strictly cumulative, though that is often a very difficult point to settle judicially. It is to the same particular facts, the agreement to exchange the notes and the early fulfillment of it, and not to subordinate or different points. It is the same kind of evidence by parol, and if not cumulative, it surely would be difficult to say what is. See Fearing & Macy's Cases, before cited; see Aiken v. Bemis [supra]; Alsop v. Commercial Ins. Co. [Case No. 262]; Ames v. Howard [Id. 326].

The other point made for a new trial since the disclosure, that the defendant knew the notes were returned and concealed them at the trial, might apply, and ought to, probably, if the defence was conducted by Murdock. Courts will not allow a verdict obtained by trick or deceit to stand. Grah. New Trials, 56; 1 Burrows, 352. But it must be again called to mind that the defence was conducted by the assignees of Murdock, and not himself. That it is not proved that they or their counsel knew at the trial of the return of the notes or concealed them. The plaintiffs have not even filed any affidavit to their belief in that fact, and hence the whole ground of this objection fails. The knowledge of this fact seems to have been with one friendly to the plaintiffs, and likely to have disclosed it to them, rather than being with the assignees. Nor can it be argued that the latter must stand like the insolvent in such defences, and be allowed to do nothing, which he would not be. On the contrary, if they did stand like him, little use would result from their being admitted to defend in any supposed collusion or fraud by him. So far from standing alike in that class of cases, they can avoid for fraud or collusion what he could not, because having been a party to it. But they in avoiding it do not represent him merely, but the creditors. See cases in Leland v. The Medora [Case No. 8,237], and in Carr v. Gale [supra].

Upon this whole case, then, we are not prepared to say that the jury have apparently decided wrong and from any prejudice or bias, as is argued against non-resident suitors. This is not one of those cases where the plaintiffs obtain an advantage simply by suing in the courts of the United States. Because if the contract was made in New York, or was to be performed there, having originally belonged to residents there, as the facts concede, it ought not on sound principle to be affected by the insolvent law, though prosecuted in the courts of Massachusetts, much less in this court. The plaintiffs thus situated, should have an advantage always and everywhere, as to the court. Savoye v. Marsh, 10 Metc. [Mass.] 594; Cook v. Moffat, 5 How. [46 U. S.] 308. Their contract was not made to be governed by the laws of Massachusetts, but of New York, where the promisees resided, and where it was to be fulfilled. Fiske v. Foster, 10 Metc. [Mass.] 597. It is only where a demand has been transferred to a foreign resident, when not belonging to him originally, that jealousies should be indulged of a design to evade the equality of the state insolvent system, and a close scrutiny made into the truth of the transaction, and where juries might be expected to lean against plaintiffs. Bradley v. Currier [Case No. 1,777]. If they did this in the present case merely because the creditor was a non-resident, and had always been, and hence was not contracting with a view to

Massachusetts laws, by a contract elsewhere made, and to be performed elsewhere, it was short-sighted, if not illiberal. And I should be inclined to think, on all the circumstances and the course of argument said to have been pursued at the trial, that the jury rather felt strong doubts whether the only witness testified fully and fairly all he knew, and whether in truth there was not a collusion or fraud in giving new notes on demand, instead of others not due, and doing it in Massachusetts on the eve of a failure by the promisor, when the other notes were not present, and with a view to enable a suit to be at once brought and property secured by attachment before others interfered, and before any payment had in fact been made by the plaintiffs on the drafts which they had accepted. And when, beside all this, the plaintiffs had claims of the insolvent in their possession to a large amount, which they afterwards collected. See the next case; see Alsop v. Commercial Ins. Co. [supra]. Now, though securities running to a future time may be exchanged for those on demand (Cushing v. Gore, 15 Mass. 69), yet it opens a wide door to doubt and suspicion if exchanged under all the circumstances here indicated; and by most bankrupt laws, if done to aid in an attachment on the eve of a failure, it would be a preference of one creditor over another in contemplation of bankruptcy not to be upheld (Ashby v. Steere [Case No. 576]). Even the insolvent law itself (St. 1838, c. 163, § 10), makes a preference of one creditor culpable so as to prevent or avoid a discharge. We do not feel entirely satisfied, therefore, that the jury erred here in their conclusion; and, for the reasons already stated, we think the motion for a new trial cannot be granted.

Case No. 17,510.

WHETMORE et al. v. MURDOCK.

[3 Woodb. & M. 390.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1847.

APPLICATION OF PAYMENTS—HOW DETERMINED—PRINCIPAL AND SURETY.

1. In an action on a long running account between the parties, of notes, acceptances, &c., if the debtor transfer a note or draft to the plaintiffs, which is due at a future day, and give no direction on what claim the money when collected shall be applied, the creditor may apply it before action, and if he do not, the court may at the trial.

2. The true application of it by them is to such of the claims as seem most proper under all the circumstances: as to one not bearing interest, if others do; one not secured, if others are; one owned in his own right, if others are not; and finally if none of these exist, to the oldest demand.

3. But if one of the claims is not due when the draft is received, or is supposed to be otherwise secured before the money is collected on this draft, or if the creditor, when it is collected, credits it generally and informs the assignees beforehand that when received it will reduce their general balance so much, the money should be applied to the oldest demand or be considered as applied generally to the whole account by the creditor when he received it.

4. If notes are given, as in the other cases between these parties, to secure acceptances, and are found against by a jury for want of consideration or fraud, the money, when actually paid on the acceptance before the suit, may be recovered as not merged by those notes. But the sum received by the creditor on the draft cannot be applied first to such demand, when the debtor did not so direct, nor the creditor so enter it, but both resorted to what they considered other security for the payment of what might be so advanced on those acceptances.

5. Money not paid for a principal before action brought, cannot be recovered by the surety, as money paid, unless on a special promise to pay it previously; and if that promise is found to be fraudulent, the money actually paid after the suit may be recovered, but only in a separate subsequent action.

This was another action of assumpsit between [David W. Whetmore and others and Warren Murdock] for the balance of a long and large account annexed, instituted at the same time and served on the 25th of August, 1846. [For the report of the former case, see Case No. 17,509.] It appeared to embrace all the transactions between them, such as notes, drafts, &c., for one or two years. Among the credits was a note or draft on some third person transferred to the plaintiffs by the defendant in June, 1846, and paid in October, 1846, amounting then to $2150. The plaintiffs received it as security for their claims generally, and no specific direction had been given by the defendant on what particular demands to apply it. The judge at the trial directed that, under the circumstances of the case, the jury ought to make it go first in discharge of the oldest demand existing between the parties in the account annexed. The jury did this, and after a verdict for the plaintiffs, founded on this direction, the plaintiffs moved for a new trial on the ground that this direction was incorrect in point of law. The motion was argued at the same time by the same counsel as in the last cause.

R. Fletcher, for plaintiffs.

T. Coffin, for assignees.

WOODBURY, Circuit Justice. There is no doubt that if there be a payment of money by a debtor, without any special application of it to one of several debts, the creditor before the suit, or the court, if not done by him before, may at the trial apply it in such way as seems most equitable and proper, under all the circumstances of the case. "Recipitur in modum recipientis." 23 Pick. 473; 2 N. H. 193; 5 Metc. (Mass.) 268; 3 Metc. (Mass.) 536; Pitm. Sur. 158; Boody v. U. S. [Case No. 1,636]. Some cases hold that the creditor, in such an event may, when receiving the money, apply it to any legal claim then due. 2 Strange, 1194; 1 Taunt. 564; 2 N. H. 196; 11 Metc. (Mass.) 184. I am not prepared to

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

say that this power may not exist in the creditor, though it would look more just to confine his application to the claim seeming to be indicated by the reason and justice of the case, when these are strong for one of the debts due, rather than for another. That is, it should be applied to the claim implied, if there be any implication. But if no such reason is found to exist here, it would seem probable that the creditor here had, in fact, before the action, applied the money received on the draft to the account generally. It is so entered on the exhibit annexed to the writ, and beside this, he wrote to these assignees, that when collected, it would reduce the general balance due to them so much. In that exhibit the acceptances when made were charged in the account to the defendant, as they are in the action. Supposing, then, that they were rightfully charged in that manner, and were recoverable in this action, if due and paid before the trial, though not due when the action was brought, then under this aspect, the result would be much the same as under the ruling of the judge, though it would be reached in a different form, and would rest on a different fact and principle. But supposing that this view be questionable, or that the creditor should not in equity apply the money generally to the account, when a demand like this in the present case exists, which it is supposed has strong claims to be first extinguished by it, the inquiry becomes necessary, whether any such claim existed here stronger than in favor of the oldest debt, to which the judge ordered the payment to be applied first.

What is the demand which it is contended here should possess a preference? It is for the money advanced by the plaintiffs to meet their acceptance, secured by notes of the defendant, but which notes the jury have found in the other case to be void. In the first place, such a demand is not of the strongest character, the security taken for it having been pronounced invalid by a jury. But still, as the defence there went rather to the security itself, than the original debt, and as a note in Massachusetts is not considered to merge the original consideration (Leland v. The Medora [Case No. 8,237], and Brown v. Noyes [Id. 2,023]), I think the money advanced on the acceptances constitutes still a legal claim to be paid in some way by the defendant, and which may be enforced against him at law. It was included in the account annexed here by the plaintiffs, and should, therefore, have been allowed by the jury in the verdict, if it could be, when not actually paid till after the action was instituted. But more of this, after ascertaining whether the ruling as to the credit of the money received was legal. We have seen already, that this demand, instead of standing with strong features now in its favor, has been at least in bad company, and the security for it avoided. In the next place, does the debtor appear to have indicated in any way a wish to have it extinguished specially by the money collected by the plaintiffs, although he may not expressly have ordered it to be so applied? For if he did, "Solvitur in modum solventis." Mills v. Fowkes, 5 Bing. N. C. 455. There was no evidence whatever of such a desire on the part of the debtor, but, on the contrary, the draft had been transferred to the plaintiffs, probably in June, 1836, near the time of its date, some weeks before those acceptances existed, and still longer before the substituted notes for them were given in the latter part of August. Nor was the money received on this draft before or at the time the acceptances fell due in September; but more than a month after, October 30th, 1846. Not only did the debtor give no indication that he wished this money thus applied, but the creditors gave none before the suit. The creditors, when receiving it, did not apply it specially to the payment of what had been advanced on the acceptances, or to the notes executed therefor, but proceeded to trial afterwards to recover those very notes in November, 1846, and continued to hold to secure their payment since the last of August, the special attachment made on the writ in that action, rather than the draft and money. This attachment furnished a good reason why the creditor did not, when the draft was received, or when the money was afterwards collected on it, mean to apply either in discharge of the consideration of these notes. And this course of procuring other security for those notes and by an attachment by cooperation of the debtor in recovering them on demand, is decisive evidence that both the debtor and creditor did not mean to apply this draft, or the proceeds of it, specially to discharge what should be paid by the plaintiffs on the acceptances, which they were then trying to secure in another way. Both at that time gave strong indications of a desire to obtain different security for them and eventual payment from other sources. But though in this view neither the debtor nor creditor made a special application of the money collected to this particular demand, nor either of them did anything showing a desire for such an application, but rather the reverse, it is contended that certain circumstances exist in connection with a debt itself, which sometimes show it to be equitable to apply a payment to one debt, rather than another. Upham v. Lefavour, 11 Metc. (Mass.) 184. Thus assuredly it might be equitable for the court or the creditors, if one demand was on interest and another not, to make the application of the money received to the latter, in the first instance. Poth. Obl. note, 530; 9 Cow. 773; Gass v. Stinson [Case No. 5,262]; 1 Story, Eq. Jur. § 459. But all here in law drew interest alike. So, if one demand was secured, and another not, it might be equitable to make the application first to the latter. [Field v. Holland] 6 Cranch [10 U. S.] 8, 10; Cremer v. Higginson [Case No. 3,383]; 2 Maule & S. 318; 5 Taunt. 596. This last rule would exclude the present demand,

as at the trial, as well as at the time of the receipt of the money on the draft, it was supposed to be secured by a special attachment of property. So it might be just to apply it to the debt in the creditor's own right, if one be in autre droit. 12 Mass. 321. Or to a debt similar in character with the payment, in amount or otherwise. 11 Mass. 300; 5 Taunt. 596. In the present instance at the trial, I do not see that any of these circumstances existed which rendered it probable that the parties meant there should be any specific application of this sum, collected by the plaintiffs in October, to this, rather than the other claims. Nor do I perceive any strong equitable consideration to require the application then to be made to this particular demand. In this situation, the rule, long existing and well established, is that adopted at the trial, to make the application first to the oldest demands. Boody v. U. S. [Case No. 1,636]; Hilton v. Burley, 2 N. H. 193; 2 Maule & S. 18; 5 Taunt. 597; 2 Barn. & Ald. 39; 1 Mer. 572. Nor is this course arbitrary and inequitable, but rests on a like foundation with the other rules, where the debtor says nothing. It must be presumed, if there be no other equity to settle the question, to intend to pay first what has been longest due, and about which there has been most forbearance on the one side, and neglect on the other, and which is the nearest being lost or barred by the statute of limitations.

The only remaining question is, whether the payments made on account of the acceptances, if not included in the verdict, ought to have been, and a new trial be proper, so as to have them included. If not included, I think that, as before intimated, the plaintiffs are entitled to recover them in some suit, but whether in this or not, is questionable. The money had not been actually paid when this suit was instituted, but it had been agreed to be paid at the time of the acceptances. The notes were taken to secure the acceptances. At first they were payable at a future day, like the acceptances, but were afterwards changed to be payable on demand, and the change was legal, so far as respects the mere alteration of time. Does this imply an alteration of the time at which the defendant was to become liable to the plaintiffs for the acceptances, so as to make them a debt or obligation in presenti, as between the plaintiffs and defendant, the former being bound to pay them, and thus agreed to do it, at all events, and hence the defendant might undertake to secure and pay them forthwith? If it did, in that view, the verdict should have embraced their amounts unless the fraud extended to them, as well as the note, the defendant having thus undertaken, before this action was brought, to secure and pay for the acceptances forthwith. But if the acceptances were regarded only as liabilities not due when this suit was brought, and nothing had been done by the parties to make them, as between the parties a debt incurred by the plaintiffs for the defendant, which the latter was to secure and pay in presenti, then some doubt would exist if an action could lie by the plaintiffs, till they were paid. There would be an obligation on the defendant to indemnify them when the suit was brought, though actual payment was not made before the suit, but only before the trial. This would constitute a strong equity to recover for them in that action, but it might not be strictly legal. Perhaps to be thus legal, it must be apparent that the parties changed the time of paying the acceptances, as well as of the note. The presumption for the purpose of this motion may be considered in favor of such a change. But if so, was not this change void? The presumption may be, if the new agreement as to time was void in regard to the note or security, it was as to the acceptance, and at best left them as they stood before. If the plaintiffs insist otherwise, or that the amount can be allowed here, even if the new agreement was void, and the actual payment of the acceptances not made till after this suit was brought, these questions must be argued further. And if it be deemed material to have the fraud specifically settled by a jury, in respect to any change of time in paying the acceptances, or if the counsel for the assignees wish to put it to another jury, that the change in the time of payment was fraudulent towards other creditors, and if so, insist that without such change, these acceptances cannot be received as between these parties, but by a suit brought after they fell due as originally given, and after their actual payment, it is doubtful whether we ought not to examine further the last position, and if for the defendant, to allow another jury to pass on this point of fraud as to the acceptances not before made in his suit. But the natural inference being that any fraud in the new agreement was void as to the acceptances no less than the note, and it being apparent, on now looking to the minutes on which the amount of the verdict was computed, that these acceptances were not included, contrary to the impression heretofore made, we must hear the counsel further, whether they can be allowed in this action on a new trial, or the plaintiffs must bring a new suit for them instituted since they were actually paid. The point becomes important, as property is attached in this action, which may prove sufficient to pay their whole amount, whereas if not recoverable here, but only in another action, the payment of them will not be in full, but only pro rata with other creditors out of other funds.

The general rule doubtless is, that nothing can be recovered which was not due at the time the writ was served. Kerr v. Dick, 2 Chit. 11. Before the term closed at an adjourned session in April, 1848, the plaintiff moved to have the verdict set aside, or re-

formed so as to include the amount paid on the acceptances. The motion was argued by the same counsel, but no new cases were cited in its support. The court overruled it for these reasons. There was no evidence at the trial that the acceptances, independent of the second note, were agreed to be payable on demand. The jury, therefore, passed an opinion on the notes and found them to be fraudulent and void. This is the most favorable view for the plaintiffs, because if the agreement extended to the acceptances, as well as the notes, it must as to the former be considered void, as well as to the latter.

The acceptances would then stand as originally, and as thus they were not due when this action was instituted, they cannot be included in the verdict, either by amendment or a new trial. But at the same time they should not be barred by the present verdict and judgment on it, as the jury have not passed any opinion on the acceptances. We will, therefore, give a special judgment on the verdict, expressly excluding the acceptances as not decided on, or let the plaintiffs withdraw them from the declaration without prejudice, in order that they may be proved before the commissioner of insolvency, or be sued in new action, if not obliged to be so proved.

WHIDDEN (UNITED STATES v.). See Case No. 16,670.

Case No. 17,511.

The WHIP & MICHIGAN.

[Cited in McKee v. The Pearl, Case No. 8,849. Nowhere reported; opinion not now accessible at the clerk's office.]

Case No. 17,512.

In re WHIPPLE.

[6 Biss. 516;[1] 13 N. B. R. 373; 8 Chi. Leg. News, 134.]

District Court, N. D. Illinois. Jan., 1876.

BANKRUPTCY SUPERSEDES CREDITORS' BILL — RECEIVER APPOINTED BY STATE COURT.

Proceedings in bankruptcy supersede a creditors' bill in a state court. A receiver appointed by the state court can be compelled to deliver the property over to the assignee in bankruptcy, subject to all the rights which the creditors whom he specifically represents have obtained, and to all the priorities which they have obtained by their diligence.

[Cited in Re Nolan, Case No. 10,289.]

This was a rule to show cause why certain judgment creditors of the bankrupt [R. M. Whipple] should not be enjoined from proceeding under creditors' bills against the bankrupt in the state courts, and from enforcing an assignment by the debtor to the receiver appointed in such creditors' suits. On the 8th day of August, 1874, Louis Stix and others filed in the circuit court of Cook county an ordinary creditors' bill to enforce a judgment against Whipple previously recovered in that court. On the fourth day of November, 1875, a receiver of the debtor's effects was appointed in that suit, and the debtor was ordered to make an assignment of his effects to such receiver. On the 10th day of July, 1875, the Chatham National Bank and others filed a similar creditors' bill in the superior court of Cook county, upon judgments previously recovered therein against Whipple, and upon the 5th day of November, 1875, a receiver was appointed, and the debtor was ordered to assign his effects to such receiver. On the 24th day of November, 1875, and before the debtor had executed an assignment to the receiver in either creditors' suit, an involuntary petition in bankruptcy was filed against him in this court, on which he was adjudicated a bankrupt on the 6th day of December, and delivered his property to the marshal under the warrant in bankruptcy. The judgment creditors in each of the suits in the state courts above named, having taken proceedings therein against Whipple to enforce an assignment to the receiver appointed in each case, a rule was granted against them in this court to show cause why they should not be enjoined from further proceeding in the state courts.

E. & A. Van Buren and Tenneys, Flower & Abercrombie, for judgment creditors.

Edwin Bean and R. W. Smith, for petitioning creditors in bankruptcy.

J. L. High, for bankrupt.

BLODGETT, District Judge. This question came before me in the case of the National Insurance Company, which was also a case where a creditors' bill had been filed in the state court, on which a receiver was appointed and took possession of the assets of the company, and proceedings in bankruptcy were then instituted against the company. I had occasion to investigate the question very thoroughly in that case, and after a very careful examination in the light of the authorities, both in this country and in England, I came to the conclusion that the proceedings in bankruptcy superseded the creditors' bill; and that the receiver in the chancery suit would be obliged and could be compelled to deliver the property over to the asssignee in bankruptcy, subject, of course, to all the rights which the creditors whom he specifically represented had obtained, and to all the priority which they had obtained by their diligence. I announced my conclusion in that case and the parties acquiesced in it.

This class of cases, of course, brings up the difficult question of collision between the jurisdiction of the several courts, and I see no way to harmonize it except to assume that when proceedings in bankruptcy are properly instituted and take effect, they must of necessity supersede the proceedings on creditors' bills, subject to all the rights which the parties may have acquired by the steps taken. Now, if one creditor obtained a judgment in

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

1873, that judgment is ipso facto a lien upon the real estate of the debtor, and if anything is realized out of his real estate this lien would have to be respected. Then if he had acquired possession of any assets through his receiver, undoubtedly to the extent that assets had come into the receiver's hands, the authorities require the bankruptcy court to respect the lien thereby obtained.

How far we are to go in enforcing what counsel characterize as an equitable lien, simply by their having instituted proceedings in chancery and obtained the appointment of a receiver, is a question upon which I would prefer to reserve an opinion until we come to distribute the estate. That is a question that has never been fairly up. It is presented by Mr. Tenney in this case, he claiming that by their diligence in filing the creditors' bill, they have acquired a sort of blanket lien on the whole property. It seems to me utterly impossible to carry on the two administrations together; the estate should be administered in one court, and I think the bankrupt court the proper one. The assignee in bankruptcy necessarily, and by operation of law, takes possession of the assets, subject to the existing claims or liens of the creditors in the state courts. And I think that the better authority and the more reasonable doctrine is that the proceedings in bankruptcy supersede all other proceedings for the administration of the assets of the debtor, subject only to priorities which are obtained by any creditors by the use of diligence, which are to be respected and which should be paid in the order of priority, according to whatever rights have been obtained. Now, in this case, the receiver in the state court has obtained no property. The bankrupt reports to this court that he has turned over all his assets of every nature to the marshal of this court, under the warrant of seizure in bankruptcy. Under these circumstances, the bankruptcy court must go on and administer the estate, leaving these judgment creditors to assert their claims and priorities, if any, in this court. The question is not a new one, but has been frequently up, and until it is overruled by the supreme court, I shall insist upon this construction of the law.

Let the rule to show cause be made absolute, and the judgment creditors be enjoined from proceeding in the creditors' suits in the state courts, reserving all questions as to the priorities which they have there acquired, to be determined by this court hereafter.

Case No. 17,513.

In re WHIPPLE.

[2 Lowell, 404;[1] 11 N. B. R. 524.]

District Court, D. Massachusetts. March, 1875.

BANKRUPTCY — APPROVAL OF COMPOSITION — DUTY OF COURT.

1. In deciding whether a composition should be approved or rejected, it should be compared with what the creditors would receive through an assignee, not with what the debtor might possibly be able to pay them.

[Approved in Re Weber Furniture Co., Case No. 17,330.]

[Cited in Guild v. Butler, 122 Mass. 500.]

2. The act of congress puts upon the judge the responsibility of approving or rejecting a composition.

[Approved in Re Weber Furniture Co., Case No. 17,330.]

3. It cannot be assumed that any composition accepted by the required proportions of creditors is preferable to bankruptcy.

The bankrupt offered a composition of thirty-three and one-third per cent, which was accepted by more than the necessary proportion of creditors in number and value, but was opposed by a minority. The evidence tended to show that the assets consisted principally of two pieces of land, with the buildings, &c., one of which was the planing-mill, machinery, and fixtures, where the business of the debtor was carried on. In his list he valued this property at $12,000, subject to a mortgage for $2,000, and the other, which was a lot of land with four tenement houses, at $7,000. After deducting from the aggregate of debts those that were either secured or privileged, and from the assets all liens and privileges, there remained, according to the debtor's statement, assets of the value of $15,000 to pay debts of somewhat less than $33,000. The creditors insisted that the assets applicable to the unsecured debts were worth at least $19,000.

W. S. Gardner and G. W. Morse, for objecting creditors.

T. Weston, Jr., and N. Tebbetts, for bankrupt.

LOWELL, District Judge. Our system of ending bankruptcy by a composition has been borrowed from England, and theirs was borrowed from Scotland. In the latter country, the court was at one time required to pass upon the reasonableness of the offer of composition; but in England the action of the creditors is final, in the absence of fraud. I have looked at the decisions in the courts of both countries. They are well worth referring to, but are not numerous enough to have brought the subject up in all its possible aspects, or to enable us to reconcile some seeming contradictions in the dicta. In Scotland the disposition was strong to uphold, as reasonable, a composition that was fairly adopted; and in England, on the other hand, to set aside as fraudulent one that was decidedly unreasonable. See Smith v. Robertson, 8 Ct. Sess. Cas. 1055, affirmed in the lords, 2 Dow. & C. 312; Kilpatrick v. Wighton, 5 Ct. Sess. Cas. 895; Ex parte Williams, L. R. 10 Eq. 57; Ex parte Cowen, 2 Ch. App. 563; Hart v. Smith, L. R. 4 Q. B. 61; Ex parte Linsley, 9 Ch. App. 290.

It will not be possible to lay down many

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

general rules. But one that I have heretofore announced I adhere to, that the judge must make his comparison, not with what the debtor might possibly have done, but rather with what assignees in bankruptcy could do. The elements of this comparison must vary with the amount of debts, the amount and character of the assets, the nature of the business that is to be wound up, and many other circumstances. How far congress intended to protect creditors against each other, and how far the court is to inquire into motives, are questions of no little difficulty. Some creditors may vote for the resolution without much inquiry, from a general and not altogether unfounded idea, that bankruptcy is to be avoided at all risks; some out of kindness to the debtor; some from a conviction that the offer is for their own interest, as distinguished from the general interest. What is the court to do? How far to go in upholding or in setting aside?

I am of opinion, upon the whole, that congress has put upon me the difficult and delicate responsibility of rejecting a composition, even if opposed by a small minority of creditors, when it is made to appear that a settlement in bankruptcy would be more for their advantage. It may be said that these summary settlements are made for the very purpose of enabling the debtor to resume his business; and that as the composition must be paid from the assets of the debtor, some allowance must be made from the apparent value of the assets to enable him to convert them. These considerations have force; but, as I said in another case, there is always a margn in favor of a debtor who settles his own affairs, for he can realize more than any assignee could do; and by making my comparison of the offer with the probable dividend in bankruptcy, I do, in fact, leave something in his hands for both the purposes referred to. In the case I have mentioned, I intimated an opinion that a difference of five per cent upon the amount of the debts in that case, which was small, would not be sufficient to induce me to reject the resolution.

It cannot be admitted by the courts, and is not the fact in this district, nor, I suppose, in any, that a compromise, however inadequate to the debtor's means, is better than bankruptcy. In this case, from the very simple character of the business to be wound up, the whole could be settled in two months, and at an expense, as the register informs me, of not more than $500, including the charges of auctioneer and assignee.

The evidence of the experts, given upon the basis of a forced sale of the property for cash, satisfies me that the net assets applicable to the payment of the unsecured debts are at least $18,000, of which the debtor offers to divide something under $11,000, and retain something over $7,000. This is a more convenient and intelligible mode of stating the matter than by proportions; for if the whole amount of debts was small, a loss of a large per centage might be but a small sum of money, which would be absorbed in expenses.

Taking the precise facts of this case, I think an offer which leaves so large an amount in the debtor's hands ought not to be imposed even upon a small minority of the creditors. Motion to record the resolution denied.

The debtor was afterwards permitted to make a better offer, which was accepted. It is not the practice to allow a second offer to be made, without good reasons; and such were given in this case.

Case No. 17,514.

WHIPPLE v. BALDWIN MANUF'G CO.

[4 Fish. Pat. Cas. 29.] [1]

Circuit Court, D. Massachusetts. May, 1858.

PATENTS—CONSTRUCTION OF CLAIMS—ANTICIPATION—EXPERT EVIDENCE—INFRINGEMENT—PATENTED IMPROVEMENTS.

1. The concluding part of the specification, where the applicant sums up and states what he claims as new, is that, and that only, which is to be looked at in the first instance.

2. If there is a question upon the construction of the claim, the court will look at the other parts of the instrument in order to understand the claim and to give a construction to it.

[Cited in Dennis v. Cross, Case No. 3,792.]

3. It is of no consequence whether a prior invention is patented or not. If it was described before, then a subsequent patentee was not the first inventor, and can not maintain his patent.

4. The opinion of an expert is evidence; but it is not conclusive. It is simply given as the judgment and opinion of one who may have knowledge upon the subject, or has had the opportunity, at least, to acquire knowledge upon the subject. It is presented to the jury to be weighed and considered.

5. If the reasons given by an expert seem to the jury to be satisfactory, they may adopt them. If, on the other hand, they are not satisfactory, the jury will follow their own judgment, and are not obliged to follow the judgment of witnesses.

6. The inventor of an improvement can not use the original invention in connection with the improvement, although it may make it work better and more advantageously.

[Cited in Norton v. Jensen, 1 C. C. A. 452, 49 Fed. 863.]

7. The inventor of an improvement has a right to his own improvement. The original inventor can not use the improvement because it is engrafted upon his invention.

8. The jury may consider whether the defendant's machine is like a machine made prior to that of the patentee. If so, it will follow either that the defendant does not infringe, or that the patentee is not the first inventor.

This was an action on the case [by Milton D. Whipple against the Baldwin Manufacturing Company], tried before Judge Sprague and a jury, to recover damages for the infringement of letters patent [No. 1,839] for "improvement in machine for cleaning wool

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

from burrs and other foreign substances and also for ginning cotton," granted to plaintiff, October 28, 1840, reissued July 31, 1849 [No. 140], and extended for seven years, from October 28, 1854. The invention consisted in certain improvements in burring cylinders. The only claim of the patent, in controversy, was the second, which reads as follows: "Forming and arranging the teeth of cylinders for burring wool in such a manner that their outer convex sides shall be substantially concentric with the axis of the cylinder, for the purpose of seizing and holding the fibres, and presenting a surface against which the guard can act in removing burrs and other foreign matter therefrom."

Alfred B. Ely, for plaintiff.
Benjamin Dean, for defendant.

SPRAGUE, District Judge (charging jury). In this action the plaintiff seeks to recover damages for an alleged infringement of a patent right. The patent produced by the plaintiff is for that of which he claims to have been the first and original inventor, in the year 1840. At that time, it seems to be settled that a patent was granted to him, which was surrendered and reissued in 1849, and the reissue of the patent is that which has been presented and read to you—or, rather, the claim was read to you, the full specification not having been read. It was renewed according to law, in 1854, for seven years from the termination of the first fourteen years. It is now in force, if it be a valid patent.

No question is made, gentlemen, as to the reissue in 1849, or the extension in 1854. It has not been contended or suggested that the reissue is not, substantially, for what was originally described in the patent in 1840. And, therefore, gentlemen, you may take it, for this investigation, that the question is on the validity of the patent issued in 1840. Two grounds, gentlemen, are presented as defense against this claim. The first is what may be denominated the question of priority; that is, the defendant says that Mr. Whipple was not the first inventor of that which he claims in his patent. The second ground is what has been denominated the question of infringement; that is, the defendant says that whether the patent was valid or not, he has not used Mr. Whipple's invention. These are two distinct questions, gentlemen, for your determination, and both of them must be decided in favor of the plaintiff, before he can be entitled to your verdict. As to the question of priority, that is, whether Mr. Whipple is the original and first inventor of what is set forth and claimed by him in his patent, it is sufficient, in the first instance, that he has the patent which is granted to him by the government, under the law of the United States. To produce that instrument to you, as he has in this instance, is prima facie proof that he is the first and original inventor. He having produced that, the burden of proof is then upon the defendant, to allege and to show that, although he has had a patent from the government, yet there is some mistake or fraud in some part, because he was not really the first inventor; for if those who undertake to give an exclusive right to a patentee, by issuing the instrument called a patent, should thereby undertake to give a monopoly to any person for a thing known before, and used before, they have no power, by law, to do so; and if this shall appear in an investigation in a court of justice, the claim will be set aside. The question, then, gentlemen, taking the construction of the patent law which I have referred to, is, whether, on the whole evidence, it appears to you that Mr. Whipple was or was not the first inventor of that which he claims in his patent. And it is here material, gentlemen, that we should distinctly understand what it is that he claims as his invention. There is a long description, part of which has been read, and this, as part of the proof, has been put into your hands, with the specification or description of the machine. But, after all, gentlemen, the concluding part, where he sums up and states what he claims as new, is that, and that only, which you are to look at, in the first instance, to see and understand all his claim. If there is a question upon the construction of that claim, then you will look at the other parts of the instrument, and will be enabled to understand the claim, and to give a construction to it.

I believe there are two distinct claims set forth; but the first has not been read to you; there is no question made about it; it is not considered material to this inquiry, or as affecting the patent in any respect, and need not trouble you in the course of this investigation. The matter for consideration is that which has been presented as the claim which has been infringed, and upon which this issue determines. The claim is for the form and arrangement of the teeth of the cylinder for burring wool. It is that he claims the form and arrangement of the teeth of the cylinder used for the purpose of burring wool, in such a manner that the outer surface of the teeth shall be substantially concentric with the axis of the cylinder. This is for the purpose of taking the wool and separating it from the burr. That is the claim; that is all that he claims to have invented.

That is the question of his claim, gentlemen; and the second question is, whether that existed before. The only machine in which it is alleged to have existed before is the common card-machine, or that card-machine as it may have been modified by Mr. M. H. Simpson. No other pre-existing machine is presented to you in the evidence, as having anticipated the invention thus claimed by Mr. Whipple. The whole inquiry, then, is narrowed to this—whether the machine used by Mr. Simpson, or described by him in any patent that he may have obtained, is sub-

stantially the same as that set forth in this claim. I say, gentlemen, the question is whether any machine used by him, or described in his patent, was the same as that here claimed. Much has been said about Mr. Simpson's patent. To this inquiry it is no otherwise important whether Mr. Simpson had a patent or not, than as it goes to show whether the same invention existed before as this which Mr. Whipple claims. Of course, whether it was patented or not is of no consequence. If it was described before, then Mr. Whipple was not the first inventor; and if he was not the first inventor, then he can not maintain his patent. And upon this question, gentlemen, you will take, in the first place, the model that has been presented to you and examine it. For this, gentlemen, use your own knowledge, skill, and judgment in the subject, and compare it with that which has been presented as Mr. Simpson's. You have no model of that, except that some parts of what is supposed to have been used by him, or what is stated to have been used by him, are presented, namely, the surface of the burring cylinder, the strip of leather (upon which there were cards), which has been presented to you as that which Mr. Simpson used, with such modifications as he has testified to. I believe he testified that his teeth were larger and coarser than those of the specimens produced. The principles were common although he made some statement of sometimes using them larger. Now you will observe, gentlemen, the specification and claim of Mr. Whipple here is on the form and manner of arranging the teeth, the forming and arranging the teeth on the cylinder in such a manner that the outer edge of the tooth shall be substantially concentric with the axis, that is, that the teeth from the periphery or circumference of the cylinder, in fact, the tooth itself, the outer edge of the tooth, being the circumference of the cylinder. Is this what Mr. Simpson invented? If he did not thus anticipate Mr. Whipple's invention, if he did not do that—if Mr. Whipple's is substantially different in its mechanical arrangement and mode of operation, substantially and materially different in these respects, then it is not the same as Mr. Simpson's. That is a question of fact for you to determine. You will determine it from what is admitted here, gentlemen, and presented as models, stated to be such, as a representation to the eye, for your own examination, in the exercise of your own judgment. You will also take into view the whole evidence in the cause—the statement by Mr. Simpson, who was a witness upon the stand, his opinion, and the reasons for that opinion. And then you will take into view the testimony of all the other experts, seven or eight in number—Mr. Whipple and seven other persons having been called as experts, to give you their opinion as the result of more or less observation and experience. Those opinions, gentlemen, are evidence to you; but they are not conclusive. They are simply given as judgment and opinion of those who may have knowledge upon the subject, or have had the opportunity, at least, to acquire knowledge upon the subject. But still they are presented to your consideration, for you to weigh, and consider, and give them such effect as you may think proper. You will look at the reasons which they assign. If those reasons seem to you satisfactory, you will adopt them. If, on the other hand, they are not satisfactory, if you have clear judgment that the reasons are unfounded, you will follow your own judgment, and are not obliged to follow the judgment of witnesses. The whole is evidence for your consideration. As I do not propose, gentlemen, to go into any detail of the evidence, I do not know that it is necessary that I should go further in relation to the first question, that is, the question of priority.

The second question presented is the question of infringement. If you are satisfied, from the proof upon the stand, that the defendant in this case has used an invention for which the plaintiff has not a valid patent—in other words, gentlemen, if Mr. Whipple was not the first inventor, and his patent is not valid, of course you need not trouble yourselves whether anybody has infringed it, because everybody will have a right to use it. If the patent is a valid one, and Mr. Whipple is entitled to the exclusive right to use, vend, or sell to others to use or vend, then the question is whether the defendant has violated that right by using the invention. And here the evidence lies in a narrow compass; it is not extensive or complicated. The model, also, presents to you the instrument or machine used by the defendant, which is called the Parkhurst machine. You will examine the two, and see whether this Parkhurst machine embodies and uses the invention of Mr. Whipple. If it does, it infringes. And here it is proper that I should inform you, gentlemen, that it is no matter, in that view, whether he does or does not use something else. If he has made an independent improvement upon Mr. Whipple's machine, if he engrafts that improvement upon Mr. Whipple's invention, he can not use Mr. Whipple's invention because he has got an improvement upon it, although it may make it work better and more advantageously. If Mr. Parkhurst should make an improvement, he has a right to his own improvement. Mr. Whipple can not use Mr. Parkhurst's improvement upon his invention, because it is engrafted upon it; and Mr. Parkhurst can not make or sell Mr. Whipple's invention, because he has invented something that will make it better. Each may claim his own share. The question is: Does this, whatever else it may contain, or whether it contains any thing else, embrace or use the invention of Mr. Whipple? If it does, it is an infringement. Now it is contended that employing these plates with teeth cut into them is substantially using the invention of

Mr. Whipple in this, that these discs or plates are substantially the same as if you had cut a series of sections or plates from off Mr. Whipple's cylinder, and then had put something between them, such as pieces of pasteboard, which should separate them successively, and that this, although it would make the cylinder so much longer, would still contain what was original in Mr. Whipple's invention—separating them by putting between them successively this pasteboard or other substance, but leaving them to operate substantially in the same manner. That is a familiar doctrine; and in determining whether this is an infringement, you will again require to see what is the invention upon which Mr. Whipple relies. And you will see that all he claims is a form and arrangement of teeth on the cylinder for the burring of wool, in such a manner that the outer edge of the tooth shall be substantially concentric with the axis of the cylinder. Now, is that done in the Parkhurst machine, as used by the defendant? Are the teeth formed and arranged in such a manner that the outer surface of the teeth is substantially concentric with the axis of the cylinder? If that is done in the Parkhurst machine, then it is an infringement upon Mr. Whipple's, although he may have mixed up something else with it. If he has taken that, as I have observed before, then he has taken that which belongs to Mr. Whipple, and which he has the right to have exclusively in his own use. If he had separated the teeth, as you see they are separated here, and if this separation of them in that manner is an improvement, so that the wool is better burred, with less injury to the fibre, or with more or less perfect separation from the impurities, still, gentlemen, as I have before observed, with this improvement, he may have his right to his patent for the improvement, he may hold that improvement so that nobody else can use it, but he can not, in order to use his improvement, take that which is the property, and the exclusive property, of the plaintiff; and that, gentlemen, again, is a question of evidence, to be determined from your examination of the models, from the witnesses who have been produced, the opinions they have given as experts, and the reasons which they have given, in the pointing out to you the substantial differences, or the identity of the machines, questions which mean the same.

These are the questions, gentlemen, which are presented upon the evidence in this case, and which offer themselves to your understanding, to your intelligence, and upon which you are to exercise your judgment. I do not know, gentlemen, that there is any thing further. If there is any question of law raised, I will present it to the jury.

Mr. Dean. I would suggest, may it please your honor, this proposition: Suppose the machine used by the defendant is substantially the machine invented by Mr. Simpson, prior to the plaintiff's patent, even though it is claimed that in some particulars it resembles the plaintiff's patent, yet if it is substantially the same thing that was invented and used prior to the plaintiff's patent, the plaintiff can not then recover.

SPRAGUE, District Judge. Gentlemen, I believe that the conclusion to which the counsel have called my attention will necessarily follow from what I have already stated to you. If the defendant's machine is substantially the same as Mr. Simpson's, then, of course, the plaintiff can not recover, because either one of two results must follow in that case. The defendant will have the right to use that which was known before 1840, that is, if the defendant used something substantially like Mr. Simpson's, as known before 1840, then he will have the right to use it; and it then comes to this, either it is not an infringement of the plaintiff's, or the plaintiff is not the first inventor. We come to that result. And you may take that into view, in determining whether it is the same as Mr. Simpson's. But in considering this, you must recollect that the question is whether it is what Mr. Simpson used prior to 1840; not what Mr. Simpson says he made in 1842, for that was subsequent to the patent, and after Mr. Simpson himself had seen the patent. And, therefore, any thing that Mr. Simpson made after Mr. Whipple's patent, of course can not aid at all the right of the defendant or the right of Mr. Simpson. The question relates solely to what was invented prior to 1840. If Mr. Simpson's was the same as Parkhurst's, substantially the same—I mean Mr. Simpson's prior to 1840—then the plaintiff can not recover. But still, the points recur that I have already presented to you, in the question whether Mr. Whipple's was the first and original invention or not, and the other question, whether, if so, the defendants have used that invention.

[For other cases involving this patent, see Ely v. Monson & B. Manuf'g Co., Case No. 4,431: Whipple v. Middlesex Co., Id. 17,520.]

Case No. 17,515.

WHIPPLE v. CUMBERLAND COTTON MANUF'G CO.

[3 Story, 84.] [1]

Circuit Court, D. Maine. May Term, 1844.

TAXATION OF COSTS—TRAVEL OF PARTY AND WITNESSES—WITNESS FEES—EXPENSE OF SURVEY.

1. Where the plaintiff taxed his travel from Lowell, where he lived, to Portland, the place of the trial, at the several times when he actually attended; it was *held*, that such tax was proper, as his personal attendance was important.

2. Where the testimony of a witness residing in another state or country, is important and necessary, his fees for actual travel and attendance from his place of residence are properly taxable in the case.

[Cited in Hathaway v. Roach, Case No. 6,213; Edwards v. Bond, Id. 4,294. Distin-

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

guished in Woodruff v. Barney, Id. 17,986. Cited in Anderson v. Moe, Id. 359; Spaulding v. Tucker, Id. 13,221; U. S. v. Sanborn, 28 Fed. 301; The Vernon, 36 Fed. 115; Burrow v. Kansas City, Ft. S. & M. R. Co., 54 Fed. 282; Pinson v. Atchison, T. & S. F. R. Co., Id. 465; Hunter v. Russell, 59 Fed. 966.]

3. A witness is entitled to his fees taxed during the whole time of his actual attendance during the trial of the case, although the examination on both sides be closed; or although the illness of counsel suspend the trial of the case.

[Cited in Dennis v. Eddy, Case No. 3,793.]

[Cited in Alexander v. Harrison, 2 Ind. App. 53, 28 N. E. 121; Rowe v. Shaw, 56 Me. 307.]

4. Where a survey was ordered by the court; it was *held*, that the expenses thereof were to be borne equally by both parties, since it was for their mutual benefit.

After the trial of this cause [Case No. 17,516], several questions arose as to the taxation of costs on the part of the plaintiff, which were submitted to the court for a final decision.

(1) The plaintiff [Oliver M. Whipple] was taxed his actual travel from Lowell, in Massachusetts, to Portland, on those terms when he attended and was present at court. The defendants contended, that a party living without the district or state, can only tax travel from the line of the state to the place where the court is held, on the usual travelled route from his place of residence.

(2) A witness, whose place of residence and business was at Saco, was summoned while temporarily absent on business at Boston, and actually travelled from Boston to Portland to attend the court. The plaintiff claimed to tax travel for a witness from Boston. The defendants objected to any travel beyond Saco, the place of his residence, and they object to any travel beyond the line of the state.

(3) The plaintiff claimed to tax the attendance of his witnesses after the examination of the witnesses was closed, and while the case was under argument. The defendants objected to taxing for witnesses after the examination was brought to a close.

(4) The case came on for a hearing, and after three days spent in the examination of witnesses, it was postponed from Thursday to the Monday following, on account of the sickness of counsel. The plaintiff claims to tax for the attendance of his witnesses during the postponement. The defendants objected to the taxation of the witnesses who resided in an adjoining town, not more than five or six miles from the place of the sitting of the court.

(5) The plaintiff claimed to tax the whole expense of the survey which was ordered by the court. The defendants objected to this taxation.

THE COURT held:

1. On the first point, that the plaintiff was entitled to charge his actual travel from Lowell, the place of his residence, to Portland, the place of the trial, at the several terms at which he actually attended the court, it appearing to the court, that his personal attendance and presence was important and proper, even if not indispensable in the case, under all the circumstances.

2. That the witness, stated in the second point, was entitled to have his fees for travel and attendance taxed in the case, as it was clear, that his attendance was proper and important, and that he actually did travel from Boston for the purpose. The courts in England have allowed travel and attendance fees, and even expenses of witnesses, who have been summoned from a foreign country, where it appeared to the court, that their testimony was important and necessary to the justice of the cause. 2 Tidd, Prac. 814 (9th Ed.) 1828. The same rule has been applied in other parts of the present circuit, where necessary witnesses have attended from other states.

3. On the third point, that the witnesses were to have their fees taxed during the time of their actual attendance after their examination was closed, it not appearing to have been unnecessary or improper; because, although the examination on both sides was closed, yet, under the circumstances of the case, it might be necessary for the court to direct the witnesses to be recalled to explain a part of their testimony, which might be obscurely given or misinterpreted.

4. Upon the fourth point, the attendance of the witnesses during the illness of counsel was properly to be taxed, since it was required by the state of the case, and it was uncertain when the cause would be resumed. If the witnesses had left the court without leave, they would have been liable for all damages, as well as to be attached, if their presence was required in the intermediate trial before their return.

5. On the last point, the expenses of the survey were to be borne equally by both parties, since it was made for their mutual benefit, and was necessary to the true understanding of the cause on both sides.

Case No. 17,516.

WHIPPLE v. CUMBERLAND MANUF'G CO.

[2 Story, 661.] [1]

Circuit Court, D. Maine. Oct. Term, 1843.

DAMAGES—FLOWAGE OF LANDS—EXCESSIVE VERDICT.

1. Where A. brought an action against B. for flowing back the water of the river Presumpscot, to the injury of his rights, as riparian proprietor, and to the obstruction of his mills; it was *held*, that if the plaintiff could prove, that the natural flow of the stream was changed by any person, not having a legal right to change it, he could recover nominal damages, although no actual injury had been thereby occasioned to him.

[Cited in Roundtree v. Brantley, 34 Ala. 544.]

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

2. Wherever a wrong is done to a right, the law imports damage; and if no substantial injury be proved to be thereby occasioned, nominal damages will be given in support of the right.

[Cited in Pfeiffer v. Grossman, 15 Ill. 54.]

3. In such cases, if the plaintiff establish his right of action, the jury may, if they choose, give him such damages as will fully indemnify him beyond what the taxed costs would reach, and may take into consideration counsel fees, and other necessary expenses, fairly incurred by him in the case.

[Cited in brief in Hastings v. Livermore, 15 Gray, 12. Cited in Cleveland, C. & C. R. Co. v. Bartram, 11 Ohio St. 466.]

4. A verdict will not be set aside, in a case of tort, for excessive damages, unless it clearly appear, that the jury committed some gross and palpable error, or acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated.

[Cited in Clarke v. American Dock & Imp. Co., 35 Fed. 479; Ross v. Texas & P. Ry. Co., 44 Fed. 48; Barry v. Edmunds, 116 U. S. 565, 6 Sup. Ct. 509.]

[Cited in Woodbury v. District, 5 Mackey, 129. Cited in brief in Shaw v. Boston & W. R. Corp., 8 Gray, 81. Cited in New Orleans, etc., R. Co. v. Hurst, 36 Miss. 666; Burdict v. Missouri Pac. Ry. Co. (Mo.) 27 S. W. 461, 464; Willard v. Holmes (Com. Pl.) 21 N. Y. Supp. 1004.]

Action on the case for flowing back the water of the river Presumpscot, in the town of Gorham, Maine, to the injury of the rights of the plaintiff [Oliver M. Whipple], as a riparian proprietor, and also to the injury and obstruction of the plaintiff's mills, situated at or near Gambo Falls, on the same river. The declaration contained various counts, alleging the gravamen in various ways, in some of which the injury was asserted to be by flowing back the water, so as to obstruct the plaintiff's mills in their due operation, and in others, an injury also to the lands of the plaintiff, as a riparian proprietor, on the same river. The cause was tried at the adjournment of the May term, 1842, upon the general issue; and a verdict was found for the plaintiff for $1,400. [Case unreported.] At the trial it was admitted, on the part of the defendants, that the plaintiff was the owner of the mills, and mill privilege, and lands on the river Presumpscot, described in his declaration, to which the injury was alleged to be done. It was also admitted, on the part of the plaintiff, that the defendants were the owners of the "Knight Dam," so called, and the mill privilege erected thereon, which was situate lower down on the same stream than the plaintiff's mills and lands; and that the defendants, as such owners, were entitled to flow back the water of the river as far and as high as it had been flowed back by the Knight dam, which had been erected about 1786 or 1787, they having succeeded to all the rights of the proprietors of the Knight dam, and the privileges thereof. The main controversy at the trial turned upon this, whether the water was flowed back further than it was by the old Knight dam, which was affirmed by the plaintiff, and denied by the defendants; and also whether it flowed back so as to obstruct the plaintiff's mills and mill privilege, which was affirmed by the plaintiff, and denied by the defendants. A great deal of evidence was introduced to these points on both sides, and was submitted to the jury.

STORY, Circuit Justice, in summing up to the jury, after stating the various facts offered in evidence by the parties, said: The real question between the parties is, whether the water is now flowed back by the defendants upon the plaintiff's lands and mills, or upon either of them, higher and further than the Knight dam had formerly flowed it back. One means of ascertaining this is to ascertain whether the new dam, now erected on the Knight dam, is higher than the old dam; for if it is, that will, of itself, afford a strong inference, that the water is flowed back higher and further; for water will obey the ordinary operations of the law of nature. Streams do not flow backwards in the ordinary course of things, unless there be some obstruction below to interfere with their usual passage. Another means doubtless is to ascertain, whether, in point of fact, the water does now ordinarily flow backwards higher and further than formerly. Thus, for example, if it now ordinarily does drown or cover lands, or rocks, or banks in the stream, which were not formerly so drowned or covered in the ordinary course of the river; or if the mills of the plaintiff are now subjected to stoppage and obstruction from back water in the ordinary state of the river, which did not formerly take place, that also would furnish grounds, from which the jury might infer, that the present dam was higher than the old Knight dam. But flowage back, occasioned by extraordinary freshets, or by other distinct causes, in no wise connected with any supposed increased height of the Knight dam, ought not to be allowed to have any influence upon the minds of the jury against the defendants in the present cause.

In respect to the right of the plaintiff to maintain the present suit, it is not indispensable for him to show, that the water is flowed back by the defendants, so as actually to obstruct and stop the operation of his mills. There is evidence for the jury to consider on this point; and if they are of opinion, that such a stoppage and obstruction did exist, by the act of the defendants, they ought to give damages therefor to the plaintiff. On the other hand, if the defendants flowed back the water by increasing the height of the Knight dam beyond that of the old Knight dam, so as to drown or cover a portion of the plaintiff's land, that also would be a ground for giving him damages therefor. Indeed, the principle of law goes much further; for every riparian proprietor is entitled to have the stream flow in its natural channel, as it has been accustomed to flow, without any obstruction by any mill or riparian proprietor below

on the same stream, unless the latter has acquired such a right by long user, or by purchase, or in some other mode, which the law recognizes as conferring a title on him. See Tyler v. Wilkinson [Case No. 14,312]; Mason v. Hill, 5 Barn. & Adol. 1; Williams v. Morland, 2 Barn. & C. 910; Wright v. Howard, 1 Sim. & S. 190; Blanchard v. Baker, 8 Greenl. 253, 266; 3 Kent, Comm. lect. 52, p. 439. And if any mill or riparian proprietor below on the same stream does, without any such title, undertake to obstruct or change the natural stream, then, although the riparian proprietor above cannot establish in proof, that he has suffered any substantial damage thereby, still he is entitled to recover nominal damages, as it is an invasion of his rights, and would, if acquiesced in, make the tort thus done to him ripen by long user into a right against the party. In short, wherever a wrong is done to a right, the law imports, that there is some damage to the right, and, in the absence of any other proof of substantial damage, nominal damages will be given in support of the right. This is a well-known and well-settled doctrine in the law, and has been fully recognized in this court. Webb v. Portland Manuf'g Co. [Case No. 17,322]; Butman v. Hussey, 3 Fairf. [12 Me.] 407.

In respect to damages, in cases of this sort, where the plaintiff comes to vindicate his right against an injury by wrong-doers, if he establishes his right of action, the jury have a right, if they choose, to give him such damages as will fully indemnify him, beyond what the costs taxed in the cause will reach. In considering what is the proper amount or measure of damages, they are at liberty to take into consideration the necessary expenses of fees to counsel, and other necessary expenses, to which the plaintiff has been put in the progress of the cause, and by the nature of the defence, beyond what he will be indemnified for by the taxable costs. It might otherwise happen, that a plaintiff might be grievously injured, or suffer great pecuniary losses, by his endeavors to vindicate his right against mere wrong-doers. The jury are not, indeed, bound, under such circumstances, positively to include such necessary expenses in the damages. What the court mean to say is, that they are at liberty, if they choose, to include such reasonable compensation in the damages, for such necessary expenses, as they may think were properly and fairly incurred in the vindication of the right of the plaintiff. And with these remarks he left the case to the jury, who found a verdict for the plaintiff, as has been already stated, for $1400.

Rand & Preble, for defendants, afterwards filed a motion for a new trial, which was as follows: "And now, after verdict, and before judgment, the defendants move the court, that the verdict of the jury returned in this case, may be set aside, and a new trial granted; because the court instructed the jury, that the question to be considered and decided by them was, whether the dam, erected by the defendants and now standing upon their premises, is or is not higher than the Knight dam: whereas, the jury should have been instructed, that the question to be considered and decided by them was, whether the dam, erected by the defendants, and now standing upon their premises, does or does not cause the water to flow back upon the plaintiff's mills and mill-wheels, more than the Knight dam did. And also, because the court instructed the jury, that in estimating the damages to which the plaintiff would be entitled (if any), they should allow the plaintiff, in addition to the actual damages sustained by the flowage of his mill-wheels and mills, such further sum as would be sufficient to indemnify him for all expenses incurred by said plaintiff in the prosecution of this suit, including all counsel fees: whereas, the jury should have been instructed, that the plaintiff (if entitled to recover at all), could recover only the damages actually sustained by him in consequence of the flowage of water upon his mill-wheels, there being no evidence or pretence that such flowing was done vexatiously, or maliciously, but only under a belief that they were in the lawful exercise of their own right. And also, because the damages given by the verdict of the jury in this case, are unreasonable and excessive, no actual damage having been proved to have been sustained by the plaintiff, or any evidence introduced tending to prove any actual damage so sustained; and there being no evidence or pretence that such flowing was done vexatiously or maliciously, but only under a belief that they were in the lawful exercise of their own rights."

The motion coming on for argument at this term, Fessenden & Deblois, for plaintiff, resisted the motion. They insisted, that the charge of the court upon the first and second points was not correctly stated. As to the first point, they said: The court did not say the only question to be settled and decided by the jury was, "whether the dam erected by the defendants is or is not higher than the Knight dam," but it called the attention of the jury to the fact, that the defendants claimed to flow back the water of the river, as far as the Knight dam had formerly flowed it back; and that this fact had been admitted by the plaintiffs, and that, as one means of ascertaining, whether the defendants had flowed back further than they had a right, by virtue of the use of it for twenty years, that they would be called on to consider and decide, whether the dam erected by the defendants is or is not higher than the Knight dam.

There is a diminution, if we may so style it, of the charge of the judge. He did charge the jury, that they must find that the defendants did cause the water to flow back upon the plaintiff's mills, and mill wheels, and land, more than they had any right to do, and more than the Knight dam did. One mode of ascertaining, whether the

property of the plaintiff had been trespassed upon by the defendants, was to find, whether the new dam was higher than the Knight dam, as, if it were so, the inference was almost a necessary one, that the new dam flowed back more water than the Knight dam. And to this point the defendants introduced much of their testimony, if not the most of it; and it was on this point, that both parties struggled to carry the jury. It was, therefore, not only proper, but absolutely necessary for the court to instruct the jury, that they must consider and decide, whether the dam was higher than the Knight dam. This it did do, but it did more, and instructed the jury in respect to the whole law of the case. He instructed them, that riparian proprietors had the rights to the flow of the stream passing by and over their lands, as it naturally flowed, and that any one, who obstructed such flow, in any manner, for any length of time, infringed upon the rights of such riparian proprietor, and subjected himself to the action of such proprietor. And, he further charged the jury, that the rights of the riparian proprietor could be taken away from him only by a user of the water, inconsistent with such rights, for a period of twenty years, in which case the acquiescence of such riparian proprietor in such infringement of his rights abridged them to the extent of such infringement of such rights, and no further. He also instructed the jury, that it was an infringement of such rights to flow back on the land of the riparian proprietor, even where the proprietor had not appropriated the water to the use of machinery, and that the flow of the stream was not, in any case, to be disturbed; and he gave to the jury the reason of the law, that twenty years' user of the water gave title to such use, and, therefore, the first infringement must be resisted, or the wrong might be suffered to ripen into a right. And this, he said, was the universal law of the stream, governing all the riparian proprietors on the stream. And it was only in connection with these doctrines, that he called the jury to consider, whether the Knight dam was as high as the new one, or rather, whether the new dam was any higher than the Knight dam. And the jury could not have mistaken this direction.

With these general directions, therefore, it was for the jury to decide, whether the new dam was higher than the Knight dam, and the direction was correct. He is sustained by the following authorities: 2 Chit. Pl. 600; Mason v. Hill, 5 Barn. & Adol. 1; Williams v. Morland, 2 Barn. & C. 910; Frankum v. Earl of Falmouth, 6 Car. & P. 529; Wright v. Howard, 1 Sim. & S. 190; Hazard v. Robinson [Case No. 6,281]; Tyler v. Wilkinson [Id. 14,312]; Webb v. Portland Manuf'g Co. [Id. 17,322]; Blanchard v. Baker, 8 Greenl. 253, 266; 3 Kent, Comm. (3d Ed.) lect. 52, p. 439.

This being the state of the law, we say, that the judge did right to charge the jury to examine, whether the new dam was higher than the Knight dam, as one of the modes of ascertaining, whether the defendants flowed back the river more, than by user for twenty years or grant, they had acquired a right to flow back on the land of the plaintiff, as far as they were proved to have flowed it.

As to the second point, they said: The judge did not charge the jury in the words, or to the import, conveyed in the second cause for a new trial. His charge was in substance and effect this: "That the jury had a right, in considering the damage the plaintiff had sustained, to allow such a sum as will remunerate the plaintiff for the expenses incurred by him in protecting and vindicating his rights, and in pursuing his remedy; that the plaintiff had a right to a perfect indemnity for the wrongs and injury he had sustained, and that the expenses, to which he had been put, were legitimate subjects for the consideration of a jury." But he did not charge the jury, that they might allow the fee of counsel, eo nomine. They added, that they were prepared to vindicate the doctrine stated in the second point, even if such had been the charge to the jury.

But THE COURT said, that the charge had been wholly misconceived, which had been given to the jury, upon the first and second points; and, therefore, upon these points, the case was not arguable. The charge was, in fact, that, which has been already stated.

Rand & Preble then said, that they should confine their argument to the third and last point, that the damages were excessive and unreasonable.

Fessenden & Deblois argued, that the damages allowed were but a reasonable indemnity for the plaintiff, considering the nature of the suit, the protracted character of the controversy, and the necessary expenses incurred to vindicate it. They cited and relied on Boston Manuf'g Co. v. Fisk [Case No. 1,681]; Bracegirdle v. Orford, 2 Maule & S. 77; Carter v. American Ins. Co., 3 Pet. [28 U. S.] 307; Conrad v. Nichols, 4 Pet. [29 U. S.] 309; Bell v. Cunningham, 3 Pet. [28 U. S.] 84; Thurston v. Martin [Case No. 14,018]; Coffin v. Coffin, 4 Mass. 41; Leeman v. Allen, 2 Wils. 160; Huckle v. Money, 2 Wils. 205; Sampson v. Smith, 15 Mass. 367; Boies v. McAllister, 3 Fairf. [12 Me.] 308.

STORY, Circuit Justice. We are of opinion, that the motion for the new trial ought to be overruled. The two first points have been already disposed of. The third point is, as to the damages being excessive. We take the general rule, now established, to be, that a verdict will not be set aside in a case of tort for excessive damages, unless

the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law, by which the damages are to be regulated. The authorities, cited at the bar, are entirely satisfactory and conclusive on this subject. Indeed, in no case will the court ask itself, whether, if it had been substituted in the stead of the jury, it would have given precisely the same damages; but the court will simply consider, whether the verdict is fair and reasonable, and in the exercise of sound discretion, under all circumstances of the case; and it will be deemed so, unless the verdict is so excessive or outrageous, with reference to those circumstances, as to demonstrate, that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice, to mislead them. There is no pretence of any thing of this sort in the present case; and looking at the nature of the controversy, the number of years, which it has been pending, the unavoidable expenses attending the surveys and employment of agents, as well as the necessary expenses of the employment of counsel beyond what the taxable costs can possibly remunerate, we cannot say, that there is any excess in the damages awarded. They may not be precisely, what we ourselves should have given, sitting on the jury; but we see no reason to say, that they can, in any sense, be treated as excessive, or unreasonable. See 2 Tidd, Prac. 909 (9th Ed.) 1828; Pleydell v. Earl of Dorchester, 7 Term R. 529; Gough v. Farr, 1 Younge & J. 477; Wood v. Hurd, 2 Bing. N. C. 166.

Motion overruled, and judgment according to verdict.

[For a hearing on certain questions which arose as to the taxation of costs on the part of the plaintiff, see Case No. 17,515.]

Case No. 17,517.

WHIPPLE v. HUTCHINSON.

[4 Blatchf. 190.] [1]

Circuit Court, N. D. New York. Aug. 21, 1858.

CONTEMPT—VIOLATION OF INJUNCTION—REQUISITES OF INJUNCTION—INFRINGEMENT OF PATENTS—COSTS.

1. Where, on a motion for an attachment for the violation of an injunction, the question as to whether the writ was, or was not, served on the defendant, is left in doubt, the motion will be denied.

2. The writ of injunction ought, as a general rule, to contain a concise description of the particular acts or things in respect to which the party is enjoined, and ought not merely to refer to the bill of complaint for the description of the thing enjoined. Otherwise, it cannot be the foundation for an attachment against any person, except, perhaps, a defendant who has been served with the bill.

[Cited in Re Cary, 10 Fed. 626; St. Louis Mining & Milling Co. v. Montana Min. Co., 58 Fed. 132.]

3. On a motion for an attachment for the violation of an injunction to restrain the infringement of letters patent, affidavits to show that the patentee was not the first and original inventor of the thing patented, are immaterial and irrelevant.

[Cited in Bate Refrigerating Co. v. Gillett, 30 Fed. 685.]

4. Such affidavits are immaterial and irrelevant, also, where the defendant is constructing the patented article by agreement, under the patent.

5. Where the injunction has been violated, and the defendant is protected from the consequences only by a defect in the service of the writ, no costs will be allowed to him, on a denial of a motion for an attachment for such violation.

[6. Cited in U. S. v. Anon., 21 Fed. 767, with numerous other cases, to the point that there is no rule in a court of equity that the answer of the respondent to interrogatories should be taken as true, and he be discharged, if he denies the contempt.]

This was a motion [by Squire Whipple] for an attachment for the violation of an injunction. The injunction restrained the defendant [John Hutchinson] from constructing iron bridges according to letters patent which secured the exclusive right to the plaintiff. It was alleged, that the injunction had been served on the 23d of March, 1858. The violation complained of related to a bridge over the Erie Canal, at the city of Syracuse, and two other bridges at the village of Pittsford.

NELSON, Circuit Justice. The affidavits on behalf of the plaintiff fully establish the breach of the injunction, and, had they not been met and answered, I should have felt bound to grant the attachment. But, on looking into the opposing affidavits, I find satisfactory explanations of the alleged breaches.

The first answer goes to the several breaches, as charged. The second to the breach in respect to the bridges at Pittsford. The first turns upon the service of the writ of injunction. The affidavit of the defendant denies, in express and positive terms, this service, and avers that the only paper served was a copy of the order of the court granting an injunction. There is, undoubtedly, some misapprehension, either on the part of the person making the service, or of the defendant; but, in a proceeding of this kind, so penal in its character and consequences, the service of the writ claimed to have been disregarded should not be left in doubt. It was also urged, on behalf of the defendant, that, if the injunction had been duly served, this motion for an attachment must have failed, on account of a defect in the description of the thing enjoined, as set forth in the writ. I think the objection would have been fatal, as it respected every other person con-

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

cerned in the violation, except the defendant himself. The writ refers to the bill of complaint, for the description of the thing enjoined, and, as that had been already served on the defendant, he, perhaps, would have been chargeable with notice of it; but, as to all other persons, this reason would not apply. The writ, as a general rule, ought to contain a concise description of the particular acts, or things, in respect to which the party is enjoined, so that there may be no misapprehension on the subject.

The second answer to the motion is in respect to the two bridges at Pittsford. As concerns these, the affidavits on the part of the defendant show that the patent fee has been paid, according to the agreement between the parties. Both the defendant and Filkins prove this fact, and that the plaintiff agreed to give a receipt for the payment.

Affidavits are produced, tending to show that the plaintiff was not the first and original inventor of the thing patented, with a view to affect this motion. But these affidavits are immaterial and irrelevant. That question was settled, so far as the injunction is concerned, when the writ was granted; and, besides, the defendant is constructing bridges by agreement, under the patent.

The same may be said as to the action of the canal board. That took place, adopting a previous proposition of the plaintiff, as late as the 17th of April, 1858. This was after the infringement charged in the bill, and after the allowance of the injunction.

My conclusion, upon the whole, is, that the motion for the attachment must be denied. But, as I am of opinion that the completion of the bridge at Syracuse was a violation of the injunction, and that the defendant is protected from the consequences only by the defect in the service of the writ, I shall allow no costs to him.

The motion is denied, without costs.

Case No. 17,518.

WHIPPLE v. LEVETT et al.

[2 Mason, 89.] [1]

Circuit Court, D. Rhode Island. June Term, 1820.

CONTRACTS—NOTE PAYABLE IN GOODS—"FACTORY PRICES" CONSTRUED.

In a note given for the payment of a sum of money in specific articles, at "factory prices," the terms, "factory prices," are to be construed, the prices at which such goods are sold at factories, unless there be proof of a different technical sense universally established by the custom of trade.

Assumpsit [by John Whipple against Thaddeus & Joshua Levett] on a special note dated the 23d of November, 1819, for the payment of a sum of money in certain goods, "at factory prices," signed by Joshua Levett.

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

At the trial two points were made by Mr. Searle for defendants. 1st. That there never was any joint promise by the defendants. 2d. That "factory prices" did not mean such prices as goods are sold for at the factories; but had a technical meaning, known to the trade, and referred to prices which had been annexed to like goods at the original establishment of the manufacturing establishments in Rhode-Island, and which were known by the name of "Old Ticket Prices." He admitted that these old ticket prices were in most cases fifty per cent. above the prices for which the goods could be obtained at the factories. Parol proof was admitted to show whether the words "factory prices," had acquired any uniform technical meaning in the sense contended for, but the evidence was extremely contradictory, and it appeared that goods had not for many years been bought or sold with reference to old ticket prices, and to some of the articles enumerated in the note, no old ticket prices had ever been affixed.

Mr. Whipple, for himself, argued e contra on both points.

STORY, Circuit Justice. The construction of the terms of this note, is matter of law; and I am of opinion, that the terms "factory prices," in this note must be understood according to their common meaning, that is, the prices at which goods may be bought at the factories, in contradistinction to prices of goods bought in the market after they have passed into the hands of third persons or shopkeepers. If it had appeared in evidence that the terms had acquired a uniform technical sense, universally known and understood in the community, and brought home to the knowledge of the parties to this note, it might have been proper to construe the terms with reference to such universal usage. But no such usage is proved; and it would be strange indeed, if persons now contracting, should have reference to prices established twenty years ago, and not now referred to in practice in cases of real purchases and sales, to fix the terms of their bargains. In the present case, there is a still stronger reason for construing this note according to the plain sense of the terms, because some of the enumerated articles are proved never to have had any "old ticket prices" annexed to them. The terms "factory prices," must, therefore, have been used in the common sense, the only sense in which they could apply to all of them, and the parties manifestly intended to apply them to all.

The jury found a verdict for the defendants on the other point.

Case No. 17,519.

WHIPPLE v. MIDDLESEX CO.

[See Case No. 17,520.]

Case No. 17,520.

WHIPPLE v. MIDDLESEX CO.

[4 Fish. Pat. Cas. 41; Merw. Pat. Inv. 211.] [1]

Circuit Court, D. Massachusetts. Oct., 1859.

PATENTS—CONSTRUCTION OF CLAIMS—PATENTABLE COMBINATION—INFRINGEMENT—WOOL CLEANING MACHINES.

1. If by the examination of a specification, and by applying it to the then existing state of the art, it can be ascertained what the invention was, then the claim, which is designed to be a condensed summary of the invention, is to be construed so as to be co-extensive with the invention, if that can be done without doing violence to its language.

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

2. Forming and arranging the teeth, within the meaning of Whipple's claim, includes not merely their points or projections, but also the plain surface in the rear, and against which the guard is to act in removing the burrs.

3. If the same form of teeth, and the same surface or arrangement, were combined by applicant for the first time, though both were acknowledged to be old, and, by combining them, he made a cylinder materially different from any which had previously existed, the combination would be patentable.

4. Upon the question of infringement, if the result be the same in kind, it is not necessary that it should be the same in degree.

5. A patent calling for smooth or plain surfaces is infringed by surfaces having slight inequalities, but which are sufficiently smooth for all practical purposes, and are substantially the same as the patented surfaces in their mode of operation and kind of result.

This was an action on the case [by Milton D. Whipple against the Middlesex Company], brought to recover damages for the infringement of letters patent for "improvement in machines for cleaning wool from burrs and other foreign substances, and also for ginning cotton," granted to plaintiff, more particularly referred to in the report of the case of Whipple v. Baldwin Manuf'g Co. [Case No. 17,514].

After the case was at issue, the parties agreed upon the following order of reference:

"And now the parties appear and agree to refer this action to the determination of the Honorable Peleg Sprague. His report to be made as soon as may be; judgment thereon to be final, and execution to issue accordingly; and if either party neglects to appear on due notice, then the referee is to proceed ex parte."

The referee, having fully heard the case, delivered the following opinion.

A. B. Ely, J. Giles, and B. R. Curtis, for plaintiff.

J. G. King, G. T. Curtis, C. L. Woodbury, B. F. Butler, and Geo. Gifford, for defendants.

SPRAGUE, District Judge, Referee. This suit is founded wholly upon the second claim. This claim is "forming and arranging the teeth of cylinders for burring wool." It is not a claim for a machine, but for a cylinder, or rather for the forming and arranging the teeth of a cylinder.

The claim, then, states two limitations upon the generality of the previous language, viz: that the forming and arranging of the teeth is to be "in such a manner that their outer convex sides shall be substantially concentric with the axis of the cylinder, for the purpose of seizing and holding the fibres, and presenting a surface against which the guard can act in removing burrs and other foreign matter therefrom."

The outer convex side of the teeth are to be concentric, etc. What is meant by the outer side of the teeth? Again, these teeth are to present a surface against which the guard can act in removing burrs, etc. What kind of surface? and what action of the guard against the surface?

These questions, and others that may arise upon the meaning of the claim, can be solved only by reference to the specification in which the invention is fully set forth and explained.

If, by examination of the specification, and applying it to the then existing state of the art, we can learn what the invention was, then the claim, which was designed to be a condensed summary of the invention, is to be construed so as to be co-extensive with the invention, if that can be done without doing violence to its language.

What, then, was the invention? So far as is necessary for the present inquiry, it may be stated to be, to form and arrange the teeth with points which would seize and hold the fibre; with a smooth surface in rear of the points, firm and non-elastic to support or float the burrs, so that the guard could remove them, and these teeth to be in such succession around the cylinder that their points should be protected by the heels or smooth surface, in rear of the preceding teeth, so as to prevent burrs from being taken hold of by the points of the teeth, and also so as to prevent too many fibres of the wool being seized.

This smooth surface, or, as it is called in one place, this "plain surface," is made by what in the claim is called the outer convex side of the teeth. Forming and arranging the teeth, within the meaning of the claim, includes not merely their points or projections, but also the plain surface in rear, and against which, as stated in the claim, the guard is to act in removing the burrs.

In the specifications, the smooth surface is sometimes spoken of as distinguished from the teeth. Thus it is said: "Upon this roller I affix a combination of teeth and smooth surface." But then it is declared, "these teeth may be made in various ways, but I prefer the plan of combs reaching lengthwise of the roller." And it is added, "but the main object is to have both teeth and surface in combination, the teeth to seize and hold the fibres, and the smooth surface to aid the guard," etc.

It is clear that the claim regards the smooth surface as a part of the teeth, or an essential ingredient in the arrangement of the teeth,

[1] [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 211, contains only a partial report.]

and, by the specification, it is emphatically made an essential part of the invention. Thus it is said, "The main object is to have both teeth and surface in combination." And again, "The teeth, when thus protected, by the preceding plain surface;" and again, "These protected teeth form an essential feature in my machine."

The defense is placed on two grounds: First, that the patent is void for want of novelty, and second, that the defendants have not infringed it. And it is insisted that the plaintiff must fail upon one or the other of these grounds. That if such a construction be given as to sustain the invention as new, then there is no infringement; or if so construed as to show an infringement, then there was no novelty.

On the point of novelty, it is first insisted that the plaintiff's patent is defeated by Whitney's cotton-gin. That in the drawings annexed to his patent specimens of teeth are shown, having concentric backs, constituting a plain surface, and that these teeth are cut from a metallic ring, so that their points are successively protected by the preceding heel or smooth surface of the other.

In giving a construction to the plaintiff's patent, we are to ascertain what he intended. Now it is certain that he intended not to embrace Whitney's invention. For he says expressly, "these teeth differ from . . . . the teeth of the saw-gin in being combined with a convex, smooth surface, to facilitate the removal of burrs and seeds."

It is said that the saw-gin in use did not contain teeth having convex backs, or any smooth surface in rear of the points, and that this formation of the teeth was never put in practice, nor was even theoretically beneficial for ginning cotton. However that may be, I think that the convex backs of those teeth in Whitney's specification and model are not the smooth surface of the plaintiff's patent, which he emphatically declares is to be in combination with his teeth, for the purpose not merely of protecting the points, but of supporting or floating the burrs, and presenting a surface against which the guard is to act in removing them. Now, the Whitney teeth, instead of being so arranged as to prevent seeds of cotton from falling between them, that is, presenting a surface which will support or float foreign matter, are designedly so arranged as to create no such surface, but to permit the seeds and foreign matter to fall between the rows of the teeth; and it is in this respect the plaintiff's patent says that its teeth are distinguishable from those of the saw-gin, in the language already quoted.

The plaintiff's teeth differ from Whitney's in their arrangement.

But is this a material difference? Does it involve such invention or discovery as to be patentable? There is a mechanical or physical change, by bringing the metallic rings, from which the teeth are cut, so near together that burrs or cotton seeds will not fall into channels between them. This change of arrangement creates a surface which supports or floats the burrs, so that the guard may remove them, which could not be done if they fell into channels between the rings.

This result is important. Indeed, it is the attainment of the whole object of the machine, viz: the removing the burrs, by bearing them on this surface to meet this guard. This mechanical change, and its effects, are, I think, so considerable as to be patentable.

The next invention relied upon, as prior to the plaintiff's, is the Shly patent. No machine or model, pursuant to this patent, has been produced, and no witness ever saw one that he knew to be such. We have only the patent.

The only difference from the Whitney invention, which has been relied upon or pointed out by the defendants, is, that in Shly's, "the saws are to have eight or ten teeth, cut in the space of an inch, on the circumference of the saws. Then three inches on the circumference of the saw is to be left uncut, and so continue until the saw is cut around."

But this change from Whitney's is not material in the present case. It does not make Shly's any more like the plaintiff's. The blank space does not protect the tooth that follows it, and the saws or circles of teeth are not brought any nearer together than in Whitney's. Indeed, it is said in the specification, that they are to be one inch apart. Their arrangement, in this respect, is the same as Whitney's, and subject to the same remarks as to presenting the plaintiff's surface.

We have, in the next place, the Simpson cylinder. This consisted wholly of card teeth. This, also, the patentee expressly excludes from the description of his invention. He says, "These teeth differ from the teeth of a common card, by having greater strength combined with sharpness."

The specification teaches how this greater strength combined with sharpness is obtained. It is by the different mode of formation. The card teeth were made of round wire stuck in leather. The teeth of the patent were cut in plates of metal, fastened upon the cylinder in such manner that they may be said to be cut from the surface of the cylinder, and in such a manner as to be both firm and sharp. This mode of formation is materially different from that of the card teeth, and produces also some difference of result. To what extent they differ, in practical operation, there is some conflict of evidence, but I do not think it necessary to determine the degree of that difference, because I am satisfied that the difference in the mechanical or physical formation, combined with the difference of result, are so considerable as to sustain a patent.

It is contended that Whitney gave the same form of teeth, and Simpson the same surface or arrangement. It is sufficient to say that, if this were true, of which I am not satisfied, still such formation and such arrangement were never before brought together, and by

combining them Whipple made a cylinder materially different from any which previously existed.

We come now to the question of infringement. The inquiry here is not whether there have been such changes, mechanical and functional, as to be patentable, but whether, notwithstanding such changes, any thing is used which was invented by the plaintiff, and embraced in his patent. Do the defendants use any thing that belongs to the plaintiff?

We certainly find in their cylinder all that is set forth in the second claim, viz: Forming and arranging the teeth of a cylinder for burring wool, "in such a manner that their outer convex sides shall be substantially concentric with the axis of the cylinder, for the purpose of seizing and holding the fibres, and presenting a surface against which the guard can act in removing burrs and other foreign matter therefrom."

Is the formation and arrangement of the teeth, and their outer convex sides, and the surface presented, such as are required by the plaintiff's specification? The defendant's cylinder differs from the plaintiff's both in structure and function. Are these differences only modifications of, or improvements upon, the plaintiff's, or do they displace and supersede it? In the plaintiff's, the only cylinder described has the surface continuous from end to end. In the defendants', it is not continuous, being formed by plates or rings of metal, going round the cylinder, and placed near to each other, but with some space between them. The specification does not require the surface to be continuous. It states it only as one form, and that which the patentee preferred. The language is, "These teeth may be made in various ways, but I prefer the plan of combs reaching lengthwise of the rollers." If, therefore, the surface of the cylinder were covered with combs, and then, by some fine instrument, channels were cut around the cylinder, between the teeth, so that they would then be in plates or rings of metal, they would still present the plaintiff's surface, provided the other descriptions and requirements of the specification remain.

The next mechanical change in the defendants' is, that the teeth are not in straight lines lengthwise with the cylinder. This change is produced by a slight alteration in the relative positions of the rings, that is, suppose them to be so placed that their teeth are in straight lines lengthwise with the cylinder, then moving each alternate ring slightly around it will destroy the straight lines, but leave each ring and its teeth precisely as before. To this the same remarks apply which have just been made, as to the change by channels in the surface.

The next mechanical change is in the edges of the rings, and is effected by passing a triangular file around the cylinder, between the rings, to sharpen the teeth. This produces a ridge on the upper side of the tooth, or the surface in rear of the tooth, the top of the ridge being in the middle of the tooth, with slopes on each side toward the channels, between the rings. The top of this ridge is not brought to a sharp edge, and varies in the different cylinders used by the defendants, being sharper or narrower in some of them than it is in others. Here, too, we may observe that we find no express prohibition of such a change, nor does it seem to be in itself incompatible with any of the requirements of the specification. By these mechanical changes a new function is introduced. Some of the fibres of the wool fall into the channels between the rings, instead of being supported on the surface. This produces two effects, (1st) those fibres are protected from the action of the guard, and (2d) they are separated or loosened, more or less, from their burrs, because the rings are placed so near together that the burrs, and other foreign matter, can not pass between them, but are supported upon the surface. But the fibres of the wool do not all go into those channels. Some remain upon the surface, and upon them and their burrs the action of the guard is the same as if the channels did not exist.

The question is, do all these changes displace the plaintiff's patented invention, or are they modifications of, or improvements upon it? The question is asked if these changes do not make the defendants' cylinder so different as to be no infringement, what changes would have that effect? What is the criterion?

The answer is to be found in the case cited, Winans v. Denmead, 15 How. [56 U. S.] 344. It is there said that, to constitute an infringement, the thing used must be so near to that set forth in the patent, "as substantially to embody the patentee's mode of operation, and thereby attain the same kind of result as was reached by his invention. It is not necessary that the defendant's cars should employ the plaintiff's invention to as good advantage as he employed it, or that the result should be precisely the same in degree."

It seems to me that the defendants' cylinder comes up to this standard, that it does substantially embody the plaintiff's mode of operation, and thereby attain the same kind of result as was reached by his invention. We have seen that it corresponded with the language of the second claim, and I think, it meets all the requirements of the specification.

We find in the defendants' cylinder that each tooth is protected by a preceding plain surface, and has strength combined with sharpness, and is combined with substantially such a surface as is described in the specification, viz: a surface to aid the guard in detaching the burrs, or other impurities, from wool, a surface which supports the burrs, below which they can not sink, and against which the guard acts in removing them, and which protects the succeeding teeth.

If it be said that it does not support all the fibres of the wool, and present them to the guard, to the same extent as would a continous surface, the answer is that it is sufficient; if the result be the same in kind, it is not necessary that it should be precisely the same in degree. The defendants' cylinder might embody the plaintiff's invention, if it acted upon a part of the wool and burrs, although it should be so constructed as to permit another portion, not only of the wool, but of the burrs also, to escape its action. If it be said that the surfaces are not smooth or plain, it would be answered that they are so for all practical purposes, and to meet all the requirements of the specification. It is true that it speaks of them as smooth or plain. And in the case cited, the patent called for a circle, but the court held it was not confined to a perfect circle, but that it might be departed from as above quoted. So in this case, the form of the surface may be varied within the same limits, and, as we have seen, the variation does not exceed them. It can not be admitted that the defendants can escape infringing by making slight inequalities in the surface, either lengthwise or around the cylinder, while, in its mode of operation and kind of result, it will remain substantially the same.

But it has been earnestly contended that the defendants' cylinder has more similarity to Whitney's or Simpson's than it has to the plaintiff's. But the defendants' agrees with the plaintiff's, and differs from them in precisely those particulars which are pointed out in the plaintiff's specification, and which I have already mentioned in discussing the question of priority.

The defendants' has a convex, smooth surface, to facilitate the removal of burrs and seeds, which Whitney's had not. But, it has been emphatically asked, if you take Whitney's metallic plates, or rings with teeth, like some of those described in his drawing, and place them around a cylinder, when will they become the plaintiff's invention? I answer, when you have placed them so close together that, by this new arrangement, you have obtained that surface which the plaintiff's specification demands, and which is nowhere found in Whitney's, but is there carefully avoided by designedly leaving channels into which the seeds of cotton, and other foreign matter, may fall.

The defendants' cylinder differs from Simpson's and agrees with the plaintiff's in the formation of the teeth. The defendants' teeth are cut from plates or rings of metal, which are placed around the cylinder, close to each other, and the teeth may be considered as cut from the periphery of the cylinder, and, like the plaintiff's, have strength combined with sharpness, so as readily to seize the fibres, and, at the same time, present a firm, non-elastic surface to the action of the guard—qualities which Simpson's card teeth did not possess. The case of Silsbee v. Foote, 14 How. [55 U. S.] 225, meets an objection as to the sufficiency of the specification and claim.

I am of opinion that the plaintiff's patent is valid, and has been infringed by the defendants.

Judgment for plaintiff for two thousand dollars, costs of reference eight hundred and fifty dollars, and costs of court to be taxed.

WHIPPLE (NORTH AMERICAN INS. CO. v.). See Case No. 10,315.

Case No. 17,521.

WHIPPLE v. RENTON.

[Mc.A. Pat. Cas. 332.]

Circuit Court, District of Columbia. 1854.

PATENT-OFFICE APPEALS—JURISDICTION OF JUDGE — APPEAL BY PATENTEE.

[The court has no jurisdiction of an appeal by a patentee from a decision by the commissioner in interference proceedings awarding priority to the applicant, and granting him a patent. Pomeroy v. Connison, Case No. 11,259, followed.]

[This was an appeal by George A. Whipple from a decision of the commissioner of patents, in an interference proceeding awarding priority to James Renton in respect to an invention of an improvement in furnaces for making iron direct from the ore.]

J. J. Greenough, for appellant.

MORSELL, Circuit Judge. On the 23d of December, 1853, James Renton filed an application in the patent office for letters-patent for an improvement in furnaces for making iron direct from the ore, which was declared to interfere with a patent granted to the said George A. Whipple on the 10th of May, 1853; and for the trial of the issue so formed the parties were allowed to take their testimony, which being done, and the said matter fully heard, the commissioner on the 6th of June, 1854, awarded priority of invention to the said James Renton; from which said decision the said George A. Whipple hath appealed and filed his reasons of appeal. The commissioner has laid before me the grounds of his decision in writing, with the original papers and the evidence in the cause; and a time and place having been appointed for the hearing of said appeal, the party appellant by his counsel filed his argument in writing in reply to a motion to dismiss the appeal for the want of jurisdiction made by the counsel for the appellee; and the said case was thereupon submitted. This, as before said, is an appeal by a patentee from a decision of the commissioner, not refusing or rejecting, but granting, the application for letters-patent. I have carefully examined and considered the argument made in support of the jurisdiction. The point being the same which was decided by Judge Cranch in the year 1842 in the case

of Pomeroy v. Connison [Case No. 11,259], on very full consideration, and followed by me since, I feel that I ought to consider the point as settled, and am therefore of opinion that I have no jurisdiction in this case, and order and direct the said appeal to be dismissed; and the same is hereby so certified by me to the commissioner, and I shall herewith return the papers to the patent office.

WHIPPLE (STANLEY v.). See Case No. 13,286.

Case No. 17,522.

In re WHIPPLE FILE CO.

[1 Lowell, 477;[1] 12 Int. Rev. Rec. 98.]

District Court, D. Massachusetts. Sept., 1870.

BANKRUPTCY OF MANUFACTURER—INTERNAL REVENUE TAX—LIABILITY OF ASSIGNEE.

The assignees of a bankrupt manufacturer selling his goods in the course of their trust in the condition in which they found them, are not bound to pay the tax imposed by the act of March 31, 1868, on sales by manufacturers.

In bankruptcy. The assessor of internal revenue of the Third collection district of Massachusetts and the assignees of the Whipple File Company, a bankrupt corporation, submitted to the court, by an agreed statement in accordance with section 6 of the bankrupt act, the question whether the assignees were liable to be assessed under the act of 31st March, 1868 (15 Stat. 59), as manufacturers, for the excess over five thousand dollars, of the amount of the sales of goods of the company which they had disposed of in the execution of their trust by order of this court in bankruptcy.

J. C. Ropes, Asst. Dist. Atty., for assessor.
T. K. Lothrop, for assignees.

LOWELL, District Judge. The Whipple File Company was a manufacturer within the act, but not so the assignees of the corporation in bankruptcy. [At the time of its bankruptcy it had on hand a stock of files and other goods which their assignees have since sold at private sale, under the decree and order of this court, and the question presented by the agreed facts, is whether a tax can be levied on the amount of their sales under the law referred to. I am of the opinion the United States cannot levy such a tax. The assignees are not manufacturers, and are not the agents of the manufacturers.][2] If they had done anything in the way of finishing the goods, as I authorized the assignees of McKay & Aldus to do, it may be that they would be liable not only to this assessment but to pay the special tax imposed on manufacturers. [But as the case stands, they are persons lawfully possessed of these goods, but not makers of them.][2] But as they did nothing but sell the goods, they are no more manufacturers than any of those persons who bought goods of them. Nor can it be said that they are agents of the manufacturer. [No doubt they have full power over the property, but not as agents.][2] They are trustees appointed by the creditors under the authority of the court, and not by the bankrupt, and their sales are not the bankrupt's sales. These goods have reached the market, undoubtedly, without being taxed, but this is by the misfortune of the owners who ceased to be able to sell and pay the tax upon them.

If it be contended that the assignment was a sale, for which the bankrupt manufacturer should be assessed, the answer is that it was rather a statute execution and probably not within the scope of the act. [The goods pass as they would if the manufacturer were dead, but they are not sold by him in the one case more than in the other. With this point however, we are not directly concerned, because if the Whipple File Co. can be lawfully assessed, on the footing of a sale to their assignees, the tax is not a debt at the time of their bankruptcy.][2] At all events the assignment took place after bankruptcy, and cannot be the foundation for a debt either privileged or common against the assets. [The question submitted by the agreed facts must be answered in the negative.][2] Judgment for the assignees.

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

[2] [From 12 Int. Rev. Rec. 98.]

WHISEN (SWIFT v.). See Case No. 13,700.

WHISKEY (UNITED STATES v.). See Case No. 16,671.

WHISTLER, The (KEENE v.). See Case No. 7,645.

Case No. 17,523.

WHISTON v. SMITH et al.

[2 Lowell, 101.][1]

District Court, D. Massachusetts. Jan., 1872.

CONTRACTS—EQUITABLE REMEDIES—BANKRUPTCY—ADVANCES FOR FEES—LIEN—MORTGAGE.

1. In equity, the court may give effect, upon equitable terms, to the valid part of a contract which is fraudulent in part.

[Cited in Hutchinson v. Murchie, 74 Me. 190.]

2. This doctrine applied to a mortgage which was, in part, a preference.

3. A person who advances his own money for the fees in bankruptcy has a first lien on the assets for its repayment. A mortgage to secure the advance gives no additional security, and is useless.

Bill in equity by [F. G. Whiston], the assignee of one Gray, to set aside two mortgages on the whole stock of goods of the bankrupt as preferences. One of the mortgages was given to A. E. Smith to secure an

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

[2] [From 12 Int. Rev. Rec. 98.]

old debt of $1,200 and a new advance of $300. Smith already held a mortgage on the same stock for the old debt, but it was given within four months of the bankruptcy, and was not of importance, except as it might bear upon intent. The security to Payne, the other defendant, was given to indemnify him for advancing the fees in bankruptcy, and was so expressed.

J. O. Teele, for plaintiff.
J. D. Thomson, for defendants.

LOWELL, District Judge. Mr. Smith was a partner with the bankrupt, and left in the business $1,000, because it would destroy the business to withdraw it. All the evidence shows that Gray was insolvent, and that Smith must have known it. Indeed, a creditor who takes security upon the whole stock of a trader for an antecedent debt has never yet succeeded, in any case within my knowledge, in explaining the transaction, excepting by evidence of the actual solvency of the trader at the time; such a mortgage is taken at the risk of bankruptcy occurring within four months A nice question is, whether the mortgage ought to stand as valid for the $300. In Denny v. Dana, 2 Cush. 160, a mortgage bad in part, because given by way of preference, was held to be wholly void. And it has been held that where an old mortgage was cancelled, and a new one taken, which was partly on newly acquired property, and was void for preference, the mortgagee could hold under neither. Paine v. Waite, 11 Gray, 190. These were cases at law. The rule in equity is very different. In that jurisdiction one may always hold by his best title, and a cancelled security which was valid will not be merged in a new one which is void. There are many decisions that, in the absence of a fraud in fact, participated in by the holder, a security may stand good for part and be rejected for the remainder. See, per Swayne, J., Clements v. Moore, 6 Wall. [73 U. S.] 299, 312, and the cases there cited; and Herschfeldt v. George, 6 Mich. 456; Bullett v. Worthington, 3 Md. Ch. 99, affirmed 6 Md. 172; Boyd v. Dunlap, 1 Johns. Ch. 478; Bean v. Smith [Case No. 1,174].

This is a case for the application of that practice; for the evidence is that the new mortgage was taken as a matter of convenience, and the transaction, though a preference as to the old debt, under the decisions, was not fraudulent in the usual sense of that term. The mortgage may, therefore, stand as security for the advance of $300.

The mortgage to Payne was unnecessary, because a person who in fact advances his own money for the fees in bankruptcy has a first lien on the assets for its repayment. Payne's mortgage is of no use to him, and whether it should be affirmed or annulled, he has a right to receive back his lawful advances.

Decree that the mortgage to the defendant Smith is a valid security for the $300 advanced October, 1871, and interest, and invalid as to all other sums purporting to be secured by it; that Payne has a right to be reimbursed out of the assets any sums he may have advanced, for proper fees in bankruptcy; that the assignee have power to sell the mortgaged property, free of the incumbrance of the mortgages, and that he pay into court for the use of the defendants the sums so due to them respectively, and keep the remainder as assets in the bankruptcy. If there should be any dispute as to the amounts, they can be settled before the final draft of the decree.

Case No. 17,524.

The WHITAKER.

[1 Spr. 229;[1] 18 Law Rep. 496.]

District Court, D. Massachusetts. March, 1854.

SALVAGE CONTRACT—LIEN—LABORERS EMPLOYED BY CONTRACTOR.

1. A person who contracts with the owner, to supply or repair a foreign vessel, for a round sum, is not, merely by virtue of his contract, the agent of the owner.

[Cited in The Wandrahm, 14 C. C. A. 414, 67 Fed. 360.]

2. Laborers employed by such contractor have not a lien upon the vessel, for the price or value of their labor.

[3. Cited in The Williams, Case No. 17,710, to the point that there is no lien for salvage services performed under a contract for a fixed sum, to be paid at all events, whether resulting successfully or not.]

This was a suit in rem, against the brig Whitaker, to recover $2330, for services rendered in getting said brig off a beach in Scituate, upon which she had been driven in a storm.

It appeared in evidence, that the master of the brig had entered into a contract with one Samuel H. Holbrook, to get his vessel off, for the sum of $900, which was to be in full for every expense attending that service. Holbrook, in pursuance of his contract, procured an anchor and chain to be sent to the vessel, to be used in getting her off; employed men to labor upon her at daily wages, and with their aid, attempted to launch her directly into the sea. Having failed in this attempt, he hired Otis, the libellant, to launch her, and directed him to employ such assistance as was necessary. Otis, with the aid of persons employed by him, launched the vessel, across the beach, into the North river, in a direction opposite to that in which Holbrook had attempted to launch her.

All the persons who labored with Holbrook in his attempt to launch the vessel, and Otis, who, in his schedule, in addition

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

to a claim for his own services, charged the wages of the persons whom he had employed, as money paid, were joined in this libel.

The libellants had knowledge of the contract with Holbrook. The Whitaker belonged in the state of Maine, and the claimants, her owners, all resided there.

Seth Webb, Jr., for libellants.
John C. Dodge, for claimants.

SPRAGUE, District Judge. Holbrook had a lien, which he might enforce, either in a cause of contract or of salvage. But in the execution of his contract with the master, he had no authority to hire laborers, or procure materials, upon the credit either of the vessel or owners; and the men employed by him have no lien upon the vessel, which they can enforce in this libel. They knew that Holbrook was a contractor, and not an agent of the owners. The libellants did not bestow their labor and materials on the vessel, under a contract with the owners or master, or with any person who, by the acts or conduct of the owners, had apparent authority to bind the vessel by a lien.

The aggregate amount of the claims of these libellants greatly exceeds the $900, for which Holbrook had contracted to get the vessel off; and if they have a lien therefor, it would subject the owners to the payment of a larger sum than that stipulated in the contract with Holbrook, under which alone these persons labored. This libel to enforce a lien, as material men, in which Holbrook has not joined, must be dismissed. Whether the libellants might join with Holbrook, in a libel for salvage, I have no occasion now to consider.

Libel dismissed.

[NOTE. Subsequently another suit was brought against the same brig by the same libellants, only the seamen who served under Otis sued in their own names. See Case No. 17,525.]

[The opinion of SPRAGUE, District Judge, as given in 18 Law Rep. 496, is as follows:

[SPRAGUE, District Judge, dismissed the libel, with costs for the claimants, and in pronouncing the decree said, in substance, that it was apparent the libellants had rendered meritorious services in getting the vessel off; and if their claim had been made for a salvage compensation, he would intimate no opinion what the result would have been. The claim set up, however, was for labor and materials furnished for a foreign vessel. In such a case, there was no lien upon the vessel, unless the labor and materials were furnished at the request of the owners, or their agent the master, or some other person having authority to act for the owners. That, as a general rule, no one could subject property to a lien but the owner or his agent. That Holbrook, in virtue of his contract merely, was not the agent of the owners of the Whitaker, for this purpose; and there was no evidence that he had any other authority, and it was therefore immaterial whether he had or had not told his employees that they were to look to the vessel. That Holbrook had a lien upon the vessel for the $900, for which he had contracted to get her off, and to allow the libellants to sustain their claim, would be to subject the owners of the vessel to pay twice for the same service.]

Case No. 17,525.

The WHITAKER.

[1 Spr. 282; [1] 18 Law Rep. 497.]

District Court, D. Massachusetts. Feb., 1855.

SALVAGE SERVICES—CONTRACT FOR COMPENSATION—LABORERS HIRED BY CONTRACTOR.

1. It is essential to a claim for salvage, that the services should contribute to ultimate safety.

[Cited in The Choteau, 9 Fed. 212.]

2. A contract to labor for the relief of a vessel in peril, at an agreed compensation, to be paid at all events, displaces a claim for salvage.

[Cited in The Camanche v. Coast Wrecking Co. of New York, 8 Wall. (75 U. S.) 478. Disapproved in The Louisa Jane, Case No. 8,532.]

3. An agreement for a specified sum is binding upon the salvor, and his compensation, although still salvage, is limited to the amount agreed.

[Cited in The Silver Spray, Case No. 12,857.]

4. Persons assisting such salvor may maintain a claim for a salvage compensation, if their right to payment depends upon success.

[Cited in The Silver Spray, Case No. 12,857; The Marquette, Id. 9,101; The Louisa Jane, Id. 8,532.]

5. But the court will take care that the owner of the property shall, in such case, be protected against the contractor, and shall not be forced to pay, in the whole, more than the amount agreed.

This was a suit in rem, against the brig Whitaker, to recover a salvage compensation for services rendered to said brig. It was brought after the decree of the court dismissing the libel in the case of The Whitaker. The services for which compensation was sought, were the same as set forth in the former suit [Case No. 17,524], and the libellants were the same, except that the men who labored under Otis, now sued in their own names. The respondents relied mainly upon their contract, as before, and set forth, in their answer, that they were, and always had been, ready to pay the sum of $900 to Holbrook, or to any person authorized by him to receive it.

Seth Webb, Jr., for libellants.
John C. Dodge, for claimants.

SPRAGUE, District Judge, held that the vessel was in a condition to be the subject of salvage service. The men who labored under Holbrook, in attempting to launch the vessel, were not salvors, inasmuch as the services by them rendered had no tendency to relieve her from peril, and did not at all contribute to her ultimate safety; that the men who succeeded in relieving her were entitled to salvage compensation, unless the nature of the contract, under which they labored upon her, displaced their claim; that an agreement to relieve a vessel in peril, for an agreed compensation, is binding upon the salv-

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

ors, and their compensation, although still salvage, is limited to the amount agreed; that persons assisting the contractor may sustain a claim for salvage, but the court will take care that the party receiving the salvage service shall, in such case, be protected against the contractor, so that he shall not be required to pay, in all, more than the amount named in the contract; and that when the contract is to labor upon the vessel, for a compensation to be paid at all events, whether the vessel be relieved from her peril or not, such a contract displaces a claim for salvage. That, in this case, it being shown that the men who labored under Otis were hired for a per-diem compensation, no decree could be made in their favor, nor could any decree be made in favor of any of the libellants, unless Holbrook became a party to the suit, or the respondents were in some way relieved from his claim upon the contract.

Subsequently, the counsel for the libellants moved for leave to amend, by making Holbrook a party, stating that he was authorized to act for Holbrook. Leave being granted, a decree was rendered in favor of Holbrook and Otis, for the $900, without costs, and the libel dismissed, as to all the rest of the libellants.

Case No. 17,526.

WHITAKER et al. v. BRAMSON.

[2 Paine, 209.] [1]

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

FINALITY OF JUDGMENTS — PLEADING RECORDS — DESCRIPTION — VARIANCE — PLEA OF NUL TIEL RECORD—RES JUDICATA—JUDGMENTS OF OTHER STATES—PENNSYLVANIA PRACTICE — AFFIDAVIT OF DEFENSE.

1. It is not a conclusive criterion, whether a definitive judgment has been rendered, that the entry employs or omits the usual form of "ideo consideratum est." Judgments are final and subject to review by writ of error, as well when entered without, as with that clause.

2. In pleading a record, it is not indispensable that the precise words of the record shall be observed. Surplusage, or immaterial omissions in matters of substance, in pleading records, are attended with no other consequences than in other cases. But as to matters of description it is otherwise, and there the record produced must conform strictly to the plea.

3. As the plea of nul tiel record puts in question the identity of the record, if circumstances descriptive of the record be untruly stated, though it was not necessary that they should be stated at all, it will be fatal.

4. The party by pleading a record with a prout patet, proffers that issue, and it is incumbent on him to maintain it literally; and this as well where the averment has reference to particulars which need not be specifically stated upon the record, as to those which must be so stated.

5. A record described as determining the rights of the party by the consideration and judgment of the court, and the conviction of the defendant, is not identical with one directing the same results, but in a different way.

6. All the particulars set forth in pleading, descriptive of a record or instrument on which the party relies, must be established by proof, or the variance will be fatal.

7. Although a party under the plea of former recovery be precluded from giving the record in evidence, on account of variance, yet he may avail himself of it under the general issue. But whether such proof can be received without notice of the special matter,—quære.

8. A judgment to operate as a bar, must be final. Suitors are not concluded by the pendency of an action in any other court for the same matter, or by any course of proceeding thereon short of final judgment.

[Cited in Webb v. Buckelew, 82 N. Y. 561.]

9. Under the constitution and act of congress, judgments obtained in the different states, have the like effect in every other state as in that where they are rendered. Although, therefore, they, in fact, are, proceedings of foreign and independent tribunals, they bear the character of judgments of courts of concurrent powers with those where they are offered in evidence.

10. The court cannot infer from principles of general law, what course of proceedings must necessarily have been adopted to obtain a complete judgment in a neighboring state. It will be presumed that the record conforms to the law or usage of that state, so far as it purports to go; but there may be averments and proof against its supposed operation.

11. A judgment imports that the indeterminate claims of a party are reduced to a certainty of the highest order, and one which can never more be questioned by the debtor. It is, therefore; a loose and faulty practice in actions for money, to leave it to the discretion of the party in whose favor judgment is rendered, to determine for himself how much he will take under it.

12. At common law, it is indispensable to a full judgment, that what it gives or decrees should be distinctly expressed.

13. Under the rule of the district court of Philadelphia, authorizing the plaintiff in actions on contract to sign judgment against the defendant, when he omits to file an affidavit of defence, if the amount be undetermined the judgment is only interlocutory, and to be made final when the appropriate proceedings shall be had for ascertaining the sum to be recovered.

14. And where, under the above rule, judgment by confession is entered, it will not be deemed final, unless there are concurring circumstances which denote the intention of the parties that it shall be final and complete as between them.

At law.

PER CURIAM. Assumpsit on two promissory notes. One note dated October 14th, 1824, for $281 25, payable six months after date; the other, dated December 17th, 1824, for $424 50, payable in six months. The declaration also contains the common money counts, and counts in indebitatus assumpsit. To this declaration the defendant pleaded: 1, the general issue; 2, the exemption of his body from imprisonment because of certain insolvent discharges; and 3, to the counts up-

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

[2] [Date not given. 2 Paine includes cases decided between 1827 and 1840.]

on the promissory notes, a former recovery for the same cause of action.[3]

The latter plea is the one immediately drawn in judgment; it is, after the formal commencement, as follows: "Because, he says, that after the making of the respective promissory notes by this defendant in the said two first counts of the said declaration mentioned, to wit, on the 28th day of November, 1825, the said plaintiffs impleaded this defendant by the name of John Bramson, before the judges of the district court for the city and county of Philadelphia, in the commonwealth of Pennsylvania, in a plea of trespass on the case for the same identical promissory notes in the first and second counts of the said declaration of the said plaintiffs mentioned; and such proceedings were thereupon had in the said district court before the judges aforesaid, to wit, on the 2d day of June, 1826; that the said plaintiffs, by the consideration and judgment of the same court, recovered against this defendant, by the name of John Bramson, in the plea aforesaid, their damages for

[3] A former suit for the same cause of action, in which the defendant obtained a verdict, is a bar to a second suit, although such verdict was rendered on the erroneous ground that the plaintiff's cause of action had not then accrued, when in fact the plaintiff had at the time a good and perfect cause of action. Morgan v. Plumb, 9 Wend. 287. A party setting up a former recovery in bar of a second suit, must show that the matter of the second suit was directly in issue in the former suit, and that the verdict and judgment in that case were directly upon the points sought to be litigated in the second suit, and of necessity involved their consideration and determination by the jury. McKnight v. Dunlop, 4 Barb. 36. A former recovery in an action by vendor against vendee, for the price of part of property delivered under a contract, is a bar in a suit by vendee against vendor for damages for nonfulfillment of such contract. Id. A former recovery, in which the same matter was tried upon the merits, may be given in evidence without being specially pleaded, wherever the party had no opportunity so to plead; and such recovery, though received in evidence under general pleadings, is as conclusive as in cases where the matter is specially pleaded. Beebe v. Elliott, Id. 457. A former verdict and judgment may be specially pleaded in trover. Miller v. Manice, 6 Hill, 116. A former recovery against defendant is an absolute defence to a second suit for the same debt or claim, whether pleaded or not. Niles v. Totman, 3 Barb. 594. Where a plea was interposed, setting forth a former recovery for the same cause of action in the state of Vermont, and a satisfaction of the judgment there by appraisement of lands upon execution issued upon such judgment; it was held, that such satisfaction being by a course of proceeding unknown at common law, the defendant was bound, if the proceeding was authorized by the statute law of the state of Vermont, to set forth the statute, so that the court might see that the proceedings had been conformable thereto; and, that a general averment that the proceedings were according to the laws of the state of Vermont, and fully authorized thereby, was not sufficient. Holmes v. Broughton, 10 Wend. 75. The court of errors cannot take judicial cognizance of any of the laws of the other states of the Union at variance with the common law. Id. It seems, however, that upon a common law question, the legal presumption is, that the common law of a sister state is similar to that of our own. Id. Where a party may avail himself of a former verdict or decree by way of estoppel, he must plead the same in bar of a suit, or in answer to a plea, or he will be deemed to have waived the estoppel, and to have consented that the jury shall re-investigate the facts, and find according to the truth of the case. A former verdict is not conclusive evidence; it is so only when pleaded. This rule, however, does not apply to actions of ejectment or assumpsit, nor to cases where the plaintiff's title is by estoppel, or where the party has had no opportunity to plead the matter specially as a bar. Wood v. Jackson, 8 Wend. 1. The fact that a judgment has been reversed, and the verdict upon which it is founded set aside, is a complete answer to a verdict urged by way of estoppel. A purchaser under a judgment may claim every benefit which the judgment creditor could have claimed had he been the purchaser, and, notwithstanding the reversal of the judgment, is entitled to the land purchased while the judgment was in existence, but not the benefit of a collateral fact settled by a verdict set aside as illegally rendered. Id. The former recovery for the amount of moneys paid at the commencement of the first suit, is no bar to a second action for other moneys subsequently paid on the same account; the former recovery being as for so much money paid at the request of the defendant, implied from his legal liabilities to indemnify the plaintiff. Wright v. Butler, 6 Wend. 284. A record of a recovery in a former action between the same parties, in which the jury decided that there was sufficient evidence of demand and notice of non-payment, is sufficient in a subsequent action to establish the fact of demand and notice. Id. Where a party has no opportunity to plead a former verdict as an estoppel, the record thereof may be given in evidence, and is conclusive and binding on the party, the court, and the jury. Id. Wood v. Jackson, 8 Wend. 1. Where an erroneous judgment is recovered, and the amount thereof collected, and such judgment is subsequently reversed for defect of form merely, and restitution and costs of reversal awarded to the defendant in the original judgment, such defendant cannot plead the payment made by him on the erroneous judgment in bar to a second suit for the original cause of action. Close v. Stuart, 4 Wend. 95. Where, in consequence of the want of ordinary care and skill in laying the foundations of a house about to be erected, damage was sustained by the owner of an adjoining house, and the parties thereupon entered into an agreement, by which it was stipulated that the work should proceed, that a partition wall should be built for the benefit of both parties, and that the damages and compensation should be passed upon by the arbitrators; which submission was revoked previous to an award made; and, in an action for breach of covenant brought by the person who built the house to recover a compensation for a portion of the wall, in which action the defendant set off his damages, it was held, that such damages were a legitimate subject of consideration in such action of covenant under the agreement between the parties, and having been submitted to and passed upon by a jury, a suit could not subsequently be sustained for a recovery of the same damages. Skelding v. Whitney, 3 Wend. 154. It seems that where a defence has been insisted on in a former action, submitted to and passed upon by a jury, and not objected to by the plaintiff in such action, although such defence be not the subject of set-off in such action, a party will be precluded from subsequently maintaining an action for the subject-matter thus set off by way of defence. Id. The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court. Burt v. Sternburgh, 4 Cow. 559. Thus, where B. brought trespass quare

the non-payment of the said two identical promissory notes in the said two first counts of the said declaration mentioned, and whereof this defendant, by the name of John Bramson, was convicted, as by the record and proceedings thereof still remaining, &c." To this plea the plaintiff replied nul tiel record, upon which issue was taken.

On the trial of the cause, the defendant produced a record of a judgment in the district court for the city and county of Philadelphia, which he offered in evidence in support of his plea. The record was duly authenticated pursuant to the act of congress of May 26th, 1790. The counsel for the plaintiffs objected to the competency of this proof to sustain the issue, because the record upon its face showed that no final judgment had been rendered in that court upon this matter; and its admissibility was objected to on account of variances between the record produced and the plea of the defendant.

First, as to variances. These are supposed to consist in this: 1st, that it is aver-

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clausum fregit, in May, 1816, laying the trespass with a continuendo between 1st November, 1814, and the 24th November, 1815, and recovered; and then brought trespass against the same defendant for a subsequent injury to the premises in question in a former suit; held, that the record in a former suit, followed by parol evidence that the premises in question were the same in both, was conclusive evidence of the plaintiff's title in the second action; that it operated against the defendant by way of estoppel, whether it was pleaded, or given in evidence in the second suit. Id. But held, also, that the defendant might, in the second suit, have shown title in himself by alienation, or adverse possession, acquired since the time in the former suit. Id. A plea that the defendant was not served with process, and had not notice of the pending or prosecution of the suit, is equivalent to a denial of appearance in person or by attorney, and a bar to the action. Holbrook v. Murray, 5 Wend. 161. In an action on such a judgment against several, who sever in their defence, if the plea of one be adjudged good, and the judgment as to him be pronounced void, it is void as to all the defendants. Id. A former recovery for a previous payment is no bar to a second action for a subsequent payment, although the evidence in both actions is in part the same. Butler v. Wright, 2 Wend. 369. The judgment of a court of concurrent jurisdiction, directly upon a point, is conclusive between the same parties, upon the same matter coming directly in question in another suit. Gardner v. Buckbee, 3 Cow. 120. And this, whether it be pleaded, or given in evidence under the general issue. Id. It is conclusive, whether it appear upon the face of the record in the former suit, that the same matter was tried and passed upon, or not. Id. If it was, in fact, so tried, without this fact appearing of record, the proper course is to give the record in evidence, and then prove, by parol, that the matter did arise, and was tried upon the pleadings in the record. Id. Where B. sued G. upon a promissory note in the marine court, and G. pleaded the general issue, with notice that the note was given upon the fraudulent sale of a vessel by B. to G., which was the question upon the trial, and the verdict was for the defendant; and afterward B. sued G. in the common pleas, upon another note given upon the same purchase; held, that upon the trial of the second cause, the record and proceedings in the first were conclusive evidence of the fraud, and were a conclusive bar to the second action; that the proper course was to give the record of the marine court in evidence; and then show by parol evidence, (e. g. by the justice who tried the first cause,) that the same question had been tried before him. Gardner v. Buckbee, 3 Cow. 120. In an action of assumpsit against the maker of a promissory note, (not negotiable,) it is a good plea in bar, that a judgment was recovered in the supreme court of the state of Vermont, (where the note was made and the parties resided,) at the suit of the creditors of the plaintiff on a foreign attachment against the plaintiff, as an absconding debtor, to recover the amount of the same note of and against the credits and effects in the hands of the defendant, (the maker of the note,) as the trustee and debtor of the plaintiff. Prescott v. Hull, 17 Johns. 284. A judgment for the defendant in trespass de bonis asportatis, is a bar to an action of assumpsit to recover the price of the same goods. Rice v. King, 7 Johns. 20. Where an action has been brought, and judgment given, but part of the plaintiff's demand omitted by mistake, if he afterward bring another action to recover the demand so omitted, the former action is a good bar. Platner v. Best, 11 Johns. 530. A plea of a former recovery and satisfaction, necessarily contains matter of fact and record, and may conclude to the country. Thomas v. Rumsey, 6 Johns. 26. The pendency of a suit in another state or in a foreign court, by the same plaintiff against the same defendant, for the same cause of action, is no stay or bar to a new suit brought here. Bowne v. Joy, 9 Johns. 221. The exception, rei judicatæ, applies only to final or definitive sentences abroad, upon the merits of the case. Id. And the same rule applies to the pendency of a cause in an inferior court in the same state. Id. So, another action pending between the same parties, for the same cause, in the circuit court of the United States, of another district, is not pleadable in bar, nor in abatement. Walsh v. Durkin, 12 Johns. 99. Aliter, as to a foreign attachment in another state, by a third person; for there the attachment is a lien, and if the defendant is not allowed to plead in abatement, he may be compelled to pay the money twice. Id. Where, by virtue of a foreign attachment prosecuted according to the laws of another state, a debt due from the defendant to the plaintiff is attached by a creditor of the plaintiff, to whom the defendant is compelled to pay the debt, in an action brought against him in this state for the same debt, he may plead the recovery by the attaching creditor in bar. Embree v. Hanna, 5 Johns. 101. So, the pendency of the proceedings under the attachment may be pleaded in abatement. Id. See Prescott v. Hull, 17 Johns. 284. The same cause of action is where the same evidence will support both actions. Rice v. King, 7 Johns. 20; Johnson v. Smith, 8 Johns. 383. Where matters have been once submitted to a jury, their verdict is a bar to another action, and the plaintiff will not be permitted to show that they separated his demand, passing upon part of it, and giving no verdict upon other parts. Brockaway v. Kinney, 2 Johns. 210. A recovery in a former action apparently for the same cause, is only prima facie evidence that the subsequent demand has been tried, but is not conclusive. Snider v. Croy, Id. 227. If the plaintiff, in a former action, joined two trespasses in the same count, and the court, on motion of the defendant, compelled him to elect for which trespass he would proceed, and that he should not go for both, and the jury found damages accordingly, it will not be a bar to a subsequent action, brought for the trespass which he was obliged to abandon. Id. A recovery against one joint trespasser is not alone a bar to an action against another; there must at least have been an execution thereon. Livingston v. Bishop, 1 Johns. 290.

red in the plea that the plaintiffs recovered in that court their damages for the non-payment of the two notes, whilst the record shows that judgment was rendered for want of an affidavit. That part of the record supposed to contain the judgment of the court upon those demands, is in this form: "And now, to wit, on the second day of June, 1826, the plaintiffs, by their said attorneys, come and sign judgment against the said defendant, in the words following to wit: 'June 2, 1826, I sign judgment in this case for want of an affidavit of defence. John C. Lowber.' And, therefore, the court direct judgment to be entered, accordingly, in favor of the said plaintiffs." 2d, that the plea avers that the plaintiffs, by the consideration and judgment of the said court, recovered their damages, &c., whereof the said defendant was convicted; but that it nowhere appears by the record that the matter was determined by the consideration and judgment of the court, or that the defendant was convicted of anything claimed by the plaintiffs' suit.

It is urged for the defendant, that the law does not exact a literal correspondence of the record with the plea, and that it is enough to plead a record according to its effect, without regarding the precise phraseology in which it may be framed. It certainly cannot be regarded as a conclusive criterion whether a definitive judgment has been rendered, that the entry employs or omits the accustomed form of "ideo consideratum est." Judgments are final, and subject to review by writ of error, as well when entered without that clause as with. Yates v. People, 6 Johns. 338. Neither generally in pleading a judgment, need the precise words of the record be observed. Surplusages or immaterial omissions in matters of substance, in pleading records, are attended with no other consequences than in other cases. Archb. Civ. Pl. 362, 376. But as to matters of description it is otherwise, and there the record produced must conform strictly to the plea. It has been considered that if any circumstances descriptive of the record be untruly stated, though they were not necessary to be stated at all, it will be fatal on nul tiel record. Lawes, Pl. 670. This is because the issue puts in question the identity of the record set up as evidence of a former recovery.[4]

The party, by pleading a record with a prout patet, proffers that issue, and it is incumbent on him to maintain it literally (Purcell v. Macnamara, 9 East, 160); this, as well where the averment has reference to particulars which need not be specifically stated upon the record, as to those which must be so. Upon these principles, if the phraseology in which the judgment is narrated in the plea is to be taken as descriptive of the record evidencing such judgment, no departure from it in the proofs can be allowed. A record described as determining the rights of the party, by the consideration and judgment of the court, and the conviction of the defendant, would not be identical with one directing the same results, but in a different way. Philipson v. Mangles, 11 East, 516. The like rule prevails in relation to other instruments. A declaration upon a note, as containing the words "for value received," cannot be supported by proving a note without these words (10 Johns. 418); yet they add no efficacy to the instrument. 9 Johns. 217; Bayley, Bills, 24, 25. These doctrines are discussed and applied in the elementary books. 3 Starkie, Ev. 1531–1533, 1593, 1596, 1598, 1600, 1604. The current of the cases, and the principles on which they rest, clearly tend to show that all the particulars set forth in pleading, descriptive of the record or instru-

[4] The only plea of the general issue applicable to a declaration upon a judgment of a neighboring state is nul tiel record. Shumway v. Stillman, 4 Cow. 292. A plea of nul tiel record to a judgment in an inferior court is not triable by the record, but by a jury; and may be joined with a plea of payment. Witherwax v. Averill, 6 Cow. 589. Nul tiel record may be pleaded to an action on a judgment given in another state. Andrews v. Montgomery, 19 Johns. 162. Contra, Post v. Neafie, note, 2 Johns. Cas. 257; Rush v. Cobbett, Id. 256; Hitchcock v. Aicken, 1 Caines, 460; and see 3 Caines, 22. Under the plea of nul tiel record, the defendant cannot give notice of special matter to be offered in evidence at the trial. Raymond v. Smith, 13 Johns. 329; Haverly v. Barkeydt, 1 Wend. 70. Nul tiel record cannot be joined with any other plea. Carnes v. Duncan, Colem. & C. Cas. 41.

In most of the United States, where a domestic record is put in issue by the plea of nul tiel record, the question arising upon it, though a question of fact, is one to be tried by the court, and not by the jury. State v. Isham, 3 Hawks, 185; Barker v. M'Clure, 2 Blackf. 14; Adams v. Betz, 1 Watts, 425; Hill v. State, 2 Yerg. 248. But, in New York, it is provided by statute, that all issues of fact joined in any court proceeding according to the course of the common law, shall be tried by jury, except in those cases where a reference shall be ordered. 2 Rev. St. p. 409, § 4. Under this provision, it seems, an issue of nul tiel record must be tried by jury. Trotter v. Mills, 6 Wend. 512. And, before the above statute, the supreme court held, that a replication of nul tiel record to a plea of a judgment recovered for the same cause of action in the circuit court of the United States, must conclude to the country, and, consequently, that the issue must be tried by a jury. Their reasoning is thus: "The circuit court of the United States, in relation to this court, is neither a superior nor an inferior court, but is to be regarded as a court of another government. Their records, therefore, as to this purpose, are foreign records, and the verity of them must be tried by a jury. The original record of that court cannot be brought here to be inspected by this court; nor can the tenor of it be brought in by certiorari or mittimus out of chancery." Baldwin v. Hale, 17 Johns. 272.

In England, it has been held, that a plea of nul tiel record pleaded to an action of debt on an Irish judgment, must conclude to the country; for though since the union, such judgment is a record, yet it is only proveable by an examined copy, on oath, the verity of which is to be tried by a jury. Collins v. Mathew, 5 East, 473.

ment on which the party relies, must be established by his proof, or the variance will be fatal. In my opinion, this case falls within those principles. The record of the former judgment is the only evidence the defendant can offer in support of his plea; and as his plea makes various allegations prout patet, or as contained upon the record, it is manifest that it assumes to describe the precise contents, so as to identify the record on which the defendant relies. The record produced not comporting with this description, the variance is fatal. The defendant, however, insists that if his record cannot be given in evidence under the plea, on account of the variance, yet that he may avail himself of it under the general issue.

Such, no doubt, is the rule of evidence (1 Chit. Pl. 572; 2 Saund. Pl. & Ev. 134; 1 Saund. 92; 3 Wend. 272); but it is intimated to be questionable whether the proof would be received without a notice of the special matter (3 Cow. 120; 4 Cow. 558). I do not purpose to discuss this point, as my judgment will be placed upon the other leading point in this case, to wit, whether this record proves a final judgment; although I am free to say that the inclination of my opinion is, that the defendant may give such evidence under the general issue, without notice, for the reason that the proof shows that, when the suit was instituted, the plaintiff had no such cause of action. The former contract was extinguished or merged by the judgment into which it had passed, and no other remedy remained to the creditor but upon such judgment. Green v. Sarmiento [Case No. 5,760]; Fairchild v. Camac [Id. 4,610]; Field v. Gibbs [Id. 4,766].

The main question in the case is, whether the record produced proves that a definitive judgment has been rendered by a competent court, upon the subject-matter of this suit. It is clear that the judgment must be final to operate as a bar. But courts do not consider their suitors concluded by the pendency of an action in any other court for the same matter, or by any course of proceedings thereon short of final judgment. 9 Johns. 221; Tidd, Prac. 977. In the language of a majority of the court of errors, in the case of Yates v. People (6 Johns. 401, 457, 458), a judgment is final when the court puts an end to the action, by declaring that the party has, or has not, entitled himself to the remedy he sues for; or, as Judge Spencer expresses it, the judgment is complete when the language of the record imports an ultimate and final decision of the case, whether the language employed be consonant to technical formulas or not. The distinction between interlocutory and final judgments is, that the first are only intermediate and do not finally determine the suit, whilst the latter at once put an end to the action. 3 Bl. Comm. 395, 399; 2 Saund. 30. Under the constitution and act of congress, judgments obtained in the different states have the like effect in every other state as in that where they are rendered. Although, therefore, they in fact are proceedings of foreign and independent tribunals, they bear the character of judgments of courts of concurrent powers with those where they are offered in evidence.[5] This consideration, if it does not vary the application of the common law rule in relation to foreign judgments, at least opens more distinctly the inquiry into the character and effect of the judgment in its home forum. The English courts regard no for-

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[5] In New York, the Revised Statutes provide, that the records and judicial proceedings of any court in a foreign country, shall be admitted in evidence in the courts of this state, upon being authenticated as follows:

1. By the attestation of the clerk of such court, with the seal of such court annexed, or of the officer in whose custody such records are legally kept, with the seal of his office annexed:

2. By a certificate of the chief justice or presiding magistrate of such court, that the person attesting such record is the clerk of the court, or that he is the officer in whose custody such record is required by law to be kept; and in either case, that the signature of such person is genuine: and,

3. By a certificate of the secretary of state, or other officer of the government, under whose authority such court is held, having the custody of the great or principal seal of such government, purporting that such court is duly constituted, specifying generally the nature of its jurisdiction, and verifying the signature of the clerk or other officer having the custody of such record, and also verifying the signature of the chief justice or presiding magistrate. 2 Rev. St. p. 396, § 26.

Copies of such records and proceedings in the courts of a foreign country, may also be admitted in evidence upon due proof—

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of such original:

2. That such original was in the custody of the clerk or other officer, legally having charge of the same: and,

3. That such copy is duly attested by a seal, which shall be proved to be the seal of the court in which such record or proceeding shall be. Id. § 27.

It is declared, however, that these provisions shall not prevent the proof of any record or judicial proceeding of the courts of any foreign country, according to the rules of the common law, in any other manner than that pointed out above; nor shall they be construed as declaring the effect of any record or judicial proceeding, authenticated as prescribed by the statute. Id. § 28.

The different modes of authenticating foreign judgments, independent of any legislative provision on this subject, have been laid down by Marshall, C. J., as follows: 1. By an exemplification under the great seal. 2. By a copy, proved to be a true copy. 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These he pronounces the usual, if not the only modes of authenticating foreign judgments. Church v. Hubbart, 2 Cranch [6 U. S.] 187, 238. See, also, Mahurin v. Bickford, 6 N. H. 567, 570; Vandervoort v. Smith, 2 Caines, 155, et seq.

If these modes of authentication be all beyond the reach of the party, other testimony, inferior in its character, will, it seems, be received. Church v. Hubbart, supra. per Marshall, C. J. See Hadfield v. Jameson, 2 Munf. 53; Young v. Gregorie, 3 Call, 446. Also, per Washington, J. in Wood v. Pleasants [Case No. 17,961.]

eign judgment as conclusive between the parties, unless it is of a form to render it so, if obtained in one of their own courts. This is the result of the decision in Plummer v. Woodburne, 4 Barn. & C. 625. In that case the record set forth that the jury found for the defendant, and that judgment was rendered by the court upon and agreeably to the said verdict, and it was held to be no bar when pleaded as a former recovery. Yet it might well happen in the diversified practice of courts in the different states, in many respects notoriously conducted without much observance of common law rules, that a judgment in that form would be deemed final and complete. We are to investigate and settle the faith and credit and effect this judgment would have in Pennsylvania, and whether or not a greater or less credit would have been given it if obtained in one of our courts. We are to regulate the influence of this record by the former and not by the latter consideration. Hampton v. McConnell, 3 Wheat. [16 U. S.] 234. This court cannot infer, from principles of general law, what course of proceedings must necessarily have been adopted to obtain a complete judgment in a neighboring state. It will be presumed that this record conforms to the law or usage of that state, so far as it purports to go.

If it was competent to the plaintiffs to show such inference to be inaccurate, it might be competent for them, under this issue, to give the evidence to the court, as there may be averments and proof against the supposed operation of a record. [Biddle v. Wilkins] 1 Pet. [26 U. S.] 692. A plaintiff in Pennsylvania is allowed to issue judgment against the defendant in action upon contract, when the defendant omits to file an affidavit of defence. This practice, it is believed, is peculiar to that state. The competency of the district court to establish such a course of practice has been ably contested, and, though ultimately upheld, it was by the opinion of a divided court. Vanatta v. Anderson, 3 Bin. 417.

The question now arising is, whether the judgment authorized by this rule is final in the first instance. It would certainly add to the singularity of this mode of procedure, if the plaintiff, by his simple fiat directing this species of judgment, could conclude the defendant in a matter of unascertained damages, and become entitled to recover whatever he claims to be due, without having that claim sanctioned by a jury or the court. This is certainly not so ordinarily by the practice of that very court, in cases of indebitatus assumpsit. The case of Coates v. M'Camm, 2 Browne (Pa.) 175, was of that character; but in order to fix with certainty the demand of the plaintiff, the defendant called for a bill of particulars, which was, accordingly, furnished at his instance. No affidavit of defence being filed in time, judgment was signed for that cause, and an execution issued, without any previous inquisition to ascertain the damages. A rule was obtained for the plaintiff to show cause why the judgment and execution should not be set aside. After discussing various points in relation to the pleadings and former condition of the cause, the court say: "The plea in abatement being too late, the court are of opinion that it was regular to sign judgment for want of an affidavit of defence. But as no inquisition has been held to ascertain the damages, the execution must be set aside; and if the defendant has merits, he can avail himself of the defence before the inquest." 2 Browne, 173.

There would seem to be no greater necessity for an ulterior proceeding in that case to ascertain the damages, after the defendant had been apprised in answer to his own call, by a bill of particulars, what the specific demand was, than in an action on promissory notes. The declaration on promissory notes is always upon the face of them, without regarding the endorsements upon the notes themselves; and if there is to be no act of court ascertaining the sum actually due, it is manifest that the promissor, or his representatives might thus be subject to pay the full amount, where the notes themselves bore evidence of their being nearly satisfied.

This court would look for very satisfactory evidence that a practice so loose and liable to abuse, was sanctioned in the enlightened tribunals of a neighboring state, before we could recognize and affirm it. It, therefore, appears to me, there is a substantive defect in this record, if to be considered one of final judgment, in not determining with certainty the sum for which judgment is directed. The very nature of a judgment imports that the indeterminate claims of a party are reduced to a certainty of the highest order, and one which can nevermore be questioned by the debtor. It is, as is said by the Pennsylvania court (2 Serg. & R. 142), a most loose and faulty practice, in suits claiming money, to pass judgment against one party and in favor of another, and then leave it to the discretion of him in whose favor the judgment stands, to determine for himself how much he will take under it.

Judgments for the penalty on bonds for the payment of money, are not analogous. There the judgment is for a specific sum. Strictly at law, the penalty would be the sum the plaintiff was entitled to collect; but courts of law exercise an equitable jurisdiction over the judgment and restrain the creditor from receiving more than the money actually due, with interest and costs: but the body and estate of the debtor are subjected, by the terms of the judgment, to pay a specified sum. Here no amount is designated by the judgment, limiting the recovery of the plaintiff; and on the argument, the counsel for the de-

fendant seemed in doubt whether the judgment must be taken to be for the $700 damages claimed by the declaration, or for the sum of the two notes, with interest.

The rule of the district court of Philadelphia, above stated, provides explicitly in one case that the judgment shall be for a precise sum; and if the defence be to part only, the "defendant shall specify the sum which is not in dispute, and judgment shall be entered for so much as is or shall be acknowledged to be due to the plaintiff." It is difficult to perceive a reason for designating the sum recovered in one case, which would not equally exact it in the other; and the only interpretation I can give the rule is, that in the latter case the sum being fixed by the confession of the party, a final judgment is at once rendered for the amount; but in the other, the amount being undetermined, the judgment is only interlocutory, and to be made final when the appropriate proceedings shall be had for ascertaining the sum to be recovered.

This would conform the judgments under that rule to those obtained at common law (14 Vin. Abr. 612; 6 Dane, Abr. 90; Lawes, Pl. 669), it being indispensable to a full judgment that what it gives or denies should be distinctly expressed.

There is no satisfactory evidence before me that the courts in Pennsylvania hold anything to be a complete judgment short of the requisites at common law. The case of Lewis v. Smith, 2 Serg. & R. 142, goes further than any other case towards supporting the judgment set up in the present instance. There an action of indebitatus assumpsit was brought on a debt of $30,000, claiming $60,000 damages. The defendant gave a plea of confession; upon which a general judgment was entered for the plaintiff, neither the plea nor the judgment designating the amount to be recovered. The validity of the execution, and subsequent proceedings upon this judgment, were subsequently brought in question before the supreme court, it being contended that this could not be considered anything more than an interlocutory judgment. So the court clearly intimate it should be considered upon general principles; but they found themselves controlled by a long-established course of practice which had obtained in that state, to enter judgments by confession in that way, and to deal with them as complete judgments, at least for the purpose of issuing execution and recovering the money thereon against the judgment debtor. The court reprehends the practice, in strong terms, as loose and improper; but they think it had so far acquired the sanction of usage, as that it could not be abrogated without a formal rule duly promulgated. But it will be perceived, that the two judges who sat in the decision of the case, mark, with the most cautious distinction, this as a case upon confession, and that the parties intended it should be final. Tilghman, C. J., says: "I take it, that where judgments are confessed, if the plaintiff's demand is in the nature of a debt, which may be ascertained by calculation, whether it arise on a note or other writing, or on an account, it is sufficient to enter judgment generally. The judgment is supposed to be for the amount of damages laid in the declaration, and the execution issues accordingly." Again: "That this was intended by the parties as a final, and not interlocutory, judgment, I am well satisfied." The chief justice refers to two particulars in the proceedings establishing the understanding of the parties: First, that a stay of execution had been given on the judgment; second, that on its revival by scire facias as a judgment for $60,000, the defendant had also confessed judgment to the sci. fa. Yates, J., concurred with the chief justice in considering the judgment as final, in contradistinction to interlocutory, which does not bind lands. He says: "It was not a judgment by default, but by confession; it contained a stay of execution for sixty days, and the subsequent judgment agreed to by the defendant showed the intention of the parties, that they considered it final. I see nothing incorrect herein." It is manifest that the court meant their decision should extend no further than to judgment by confession; and it is even doubtful whether the mere fact of confessing judgment would be enough to sustain one entered as that had been, without other circumstances concurring to denote the intention of the parties that it should be final and complete as between them. The case is no authority beyond that point; it does not assume to touch the mass of judgments entered for want of affidavits of defence, but would rather seem, by broad implication, to consider all such as imperfect judgments; they being certainly no higher than judgments by default. The case of Coates v. M'Camm is not affected by this decision, and that case is entitled to great regard on this point, as it occurred in the court which adopted the rule under consideration, and must be considered an exposition of the true meaning of the rule, or a limitation of its action.

The case of Lewis v. Smith, 2 Serg. & R. 142, also clearly recognizes the doctrine of the common law, as governing in this respect the proceedings of the Pennsylvania courts, other than in the excepted case. That case looks for all the constituents to a perfect judgment, that would be required in this state or at Westminster Hall. At all events, it does not establish the point, that a general judgment for the default of the defendant is complete and final; nor that any judgment not for a specified amount could be good on a contract for the payment of money, other than when entered upon the confession of the party.

Another criterion which may justly be applied to the judgment is, to inquire whether an action of debt would lie upon it, or any other action, which would enable the plaintiff to enforce it in this state? It would be difficult to frame a declaration upon it which would be sustained by the record. There is

an inexplicable ambiguity upon the face of the record, if it evidences a final judgment, whether the amount of the promissory notes with interest, or the specific sum of seven hundred dollars, is awarded by the court; and though it might equally well support either assumption, yet it would not be sufficient to establish one or the other. Upon this view of the case, I feel compelled to consider this judgment as no more than interlocutory; and therefore whether admissible in evidence under the general issue or well pleaded, it would be no bar to the plaintiffs' recovery in this action. And without pursuing the argument into the further illustrations it might admit, I shall rule in relation to the two prominent points in the case, that the record does not comport with the plea, nor is it proof of a final judgment and former recovery which bars this action.

Judgment for plaintiff.

Case No. 17,527.

WHITAKER v. The FRED LORENTS.

[2 West. Law Month. 520.]

District Court, D. Wisconsin. Jan., 1859.

ADMIRALTY JURISDICTION—FEDERAL COURTS—PASSENGER ON RIVER STEAMBOAT—PERSONAL INJURIES.

A passenger on board a steamboat on the Mississippi river, from a port in a state to another port in the same state can not claim the jurisdiction of the district court of the United States in that state, of a libel in rem for injuries sustained while on board as such passenger, through negligence of the officers in care of the boat; the boat being at the time on a trip between points or places in different states.

[Cited in U. S. v. The Seneca, Case No. 16,251; The Daniel Ball, Id. 3,564.]

[This was a libel by Franklin Whitaker against The Fred Lorents to recover damages for injury sustained.]

MILLER, District Judge. The libel alleges that the steamboat Fred Lorents was used in navigating the waters of the Mississippi river; and made regular trips on said river, between the ports of Galena, in the state of Illinois, and the port of St. Paul, in the state of Minnesota, touching at the ports within the state of Wisconsin. The libellant was at Fountain City, in the state of Wisconsin, where the steamboat was lying, she then being on her down trip from St. Paul to Galena; and he took passage from Fountain City to Prairie du Chien, and paid the charges for such passage. That in consequence of the imperfect and unsafe construction of the steamboat, and of the negligence and improper conduct of the officers, and want of sufficient lights, the libellant was pressed by the crowd into an open hatchway, while the steamboat was preparing to land her passengers at Prairie du Chien, whereby he received the injuries described—to recover damages for which this suit is brought.

The libellant was a passenger on board the steamboat, from one port or place, to another port or place, within this state.

The constitution of the United States, in defining the powers of the federal courts, extends them "to all cases of admiralty and maritime jurisdiction." It defines how much of the judicial power shall be exercised by the supreme court only; and it was left to congress to establish other courts, and to fix the boundary and extent of their jurisdiction. The district courts could not assume jurisdiction without the aid of an act of congress. The act of 1789, organizing the courts, gives the district courts of the United States "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, including all seizures, &c., on waters which are navigable from the sea, by vessels of ten or more tons burden, as well as upon the high seas." The Mississippi river is one of those rivers. The steamboat being a vessel of ten or more tons burden, I consider the matter of the libel to be within the admiralty cognizance of this court. But the question is, whether the libellant is entitled to claim the jurisdiction, and to subject this steamboat to admiralty process. By the constitution of the United States, "congress shall have power to regulate commerce with foreign nations, and among the several states."

In the case of Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1, it is decided, that the power to regulate commerce, extends to every species of commercial intercourse, between the United States and foreign nations, and among the several states; and that this power did not extend to the purely internal commerce of a state. It is remarked by Marshall, C. J., in the opinion of the court: "It is not intended to say that those words (in the constitution) comprehend that commerce, which is completely internal, and which is carried on between man and man in a state, or between ports of the same state, and which does not extend to, or affect other states." "The genius and character of the whole government seem to be, that its action is to be applied to the external commerce of the nation, which affects the states generally; but not to that which is completely within a particular state, and with which it is not necessary to interfere for the purpose of executing some of the powers of the government. The completely internal commerce of a state may be considered as reserved for the state itself." In the case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, which was a libel on a contract of affreightment, the court remarks: "The exclusive jurisdiction of the court in admiralty cases, was conferred on the national government, as closely connected with the grant of the commercial power. It is a maritime court, instituted for the purpose of administering the laws of the seas. There seems to be ground, therefore, for restraining its jurisdiction within the limits of the grant of the commercial power, which would confine it, in cases of contract, to those con-

cerning the navigation and trade of the country upon the high seas, with foreign countries, and among the several states." "Contracts growing out of the purely internal commerce of a state, are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the federal courts." The limitation of jurisdiction, as expressed in those cases, would require that the contract of passage should be from a port or place in one state to a port or place in another state, to entitle a party to the admiralty jurisdiction of this court.

The act of congress, passed in 1845 [5 Stat. 726], extending the admiralty jurisdiction to the district courts, in states bordering on the Lakes, provides: "That the district courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories," &c. In the case of Brooks v. The Peytona [Case No. 1,959], I refused cognizance of a libel for mariners' wages accruing on board, while the steamboat was employed on Lake Winnebago, exclusively within this state. And the supreme court of the United States recently, in the case of Allen v. The Fashion, 21 How. [62 U. S.] 244, which was taken up by appeal from this court, affirmed this principle. In that case, it appeared that leather was shipped from Manitowoc to be delivered at Milwaukee, which was jettisoned. The court decided, that as the contract of affreightment was confined to ports within the state, it was not the subject of admiralty cognizance, although the boat was on a voyage to Chicago, a port in the state of Illinois. So, in the case under consideration, the contract and also the cause of complaint were exclusively within this state, and the steamboat was on her voyage or trip to Galena, a port in the state of Illinois.

Although the act of 1845 is not the act under which this libel is filed, yet the decisions of this court in the foregoing cases, and the act itself, are upon the general principles of the admiralty jurisdiction of the federal courts, as extended by the constitution, and conferred by the act of 1789 [1 Stat. 73].

The libel must be dismissed for the want of jurisdiction.

Case No. 17,527a.

WHITAKER v. FREEMAN.

[1 Dev. (N. C.) 271, 280.]

Circuit Court, D. North Carolina. May Term, 1827.

LIBEL—SEVERAL PLEAS—GENERAL ISSUE AND JUSTIFICATION—DECLARATION.

1. Of several pleas each is separate and independent as if contained in different records. Therefore, where in an action for a libel the defendant pleaded not guilty and a justification, it was *held* that the admission of the libel contained in the latter plea could not be used either to estop the defendant to insist on his denial or as evidence to prove the publication on the issue joined on the former plea.

[Cited in Glenn v. Sumner, 132 U. S. 156, 157, 10 Sup. Ct. 41.]

2. A declaration for a libel must undertake to set out the very words. To give the substance and effect is not sufficient, and if on the trial the libel produced does not correspond with that set out, the plaintiff must fail, since no reason can be assigned why the plaintiff should not be required to prove what he is required to allege.

This was an action on the case [by Jonathan Whitaker against Frederick Freeman for an alleged libel].

The declaration besides the usual introductory averments of good character, &c., alleged a special inducement that the plaintiff was a Congregational clergyman and minister of the gospel, and that the defendant designed to defame him in that character, &c. The declaration then charged the publication of a libel in the form of a letter directed to one H. P., from which particular sentences were selected, and stated in various forms in twenty-five different counts, all exactly alike in the inducements, &c., and setting forth the libellous sentences extracted, not according to the tenor, but charging that the letter contained, amongst other things, "the false, scandalous, malicious and defamatory matter following."

The libellous matter was charged in the different counts as follows: 1st count. "He lived within 30 miles of my father. The reports of his frequently whipping his wife are well known there." 2. "He was in the habit of whipping his wife." 3. "It was said that he whipped his wife." 4. "It was notorious there that he was in the habit of whipping his wife." 5. "I have it from good authority that he has been guilty of giving his wife repeated whippings." 6. "He has been guilty of stealing wood." 7. "He has been charged with stealing wood." 8. "I have it from good authority that he has been guilty of stealing wood." 9. "I have it from good authority that he has been charged with stealing wood." 10. "If he has credentials with him they are forgeries." 11. "If he has credentials with him they are probably forgeries." 12. "If he has credentials with him they are probably forgeries or were given him to get rid of him." 13. "If he has credentials they are forged." 14. "If he has credentials they are probably forged." 15. "If he has credentials they are probably forged or given him to get rid of him." 16. "He is an impostor, and should not be countenanced." 17. "He is an impostor, and should not be countenanced as a teacher of youth or preacher of religion." 18. "He is an impostor, and should not be countenanced or employed as a teacher of youth or preacher of religion." 19. "He should not be countenanced as a teacher of youth or

preacher of religion." 20. "He should not be employed as a teacher of youth or preacher of religion." 21. "He is an impostor, and should not be employed as a teacher of youth or preacher of religion." 22. "He is an impostor, and should not be countenanced or employed as a teacher of youth or moral instructor." 23. "My object in giving you information is that he may not be employed as a teacher of religion or instructor of youth." 24. "I give you information that he may not impose himself on other communities." 25. "You are at liberty to use this letter as you think proper, to prevent the people from being imposed on by him."

The declaration also contained a distinct set of counts, alleging the several libellous charges in this form: "They (innuendo, the plaintiff and one Daniel K. Whitaker) lived, etc.," in all other respects exactly like the first set. To this declaration, the defendant pleaded, 1st, not guilty, and 2nd, the truth of the matters contained in the libellous charges, as a justification.

On the trial, the letter being produced under a subpœna duces tecum, the material facts of it appeared to be in the following words: "No sooner did I cast my eye upon that part of a former letter of yours, informing me of your being visited (infested I should say) by two anti-Trinitarian preachers—a father and his son—than it was impressed upon my mind, Whitaker and his son are the men! The character of these men I know full well. They are from New Bedford, Massachusetts, which is within 30 miles of my father's house, and which place I have often visited, and visited this last fall. I have never heard any good of them. I have heard from the best authority, much evil. Not that they were capable of doing much hurt by preaching. They were considered by all as unfit to preach—as too immoral even to preach socinianism. The older man has been settled over the anti-Trinitarian church in New Bedford a number of years, and had also a school in that place until last spring or summer. Reports of his stealing wood, &c., whipping his wife unmercifully, and such like deeds had become so frequent, and his immoralities and infidelity so notorious, that his people (his church and congregation) were ashamed of him, and were anxious to get rid of him. At length (his congregation having dwindled away to almost his own family) and the parish wishing to have another minister, agreed to give him $1,200 if he would release them from their obligation to support him, and clear out. He found this for his interest and left N. B. These two men, no doubt finding their character gone in Massachusetts, have come to these ends of the earth, hoping to impose upon the good people. The young man has probably taken up preaching since he left his native state. They may have recommendations from those who were willing to have them leave those regions, and cared not for what impositions they might practice elsewhere. Their testimonials, if they have any, may be forged. It is a pity they should be permitted to impose upon the people anywhere, either as preachers or schoolmasters. I consider them as dangerous men in either occupation. You are at liberty to show the above, as far as you may think proper."

It was insisted on the part of the defendant that the letter produced did not support any one of the counts, and that the plaintiff was not entitled to a verdict; while on the part of the plaintiff it was contended that there was no material variance between the declaration and the letter, and that, if there was, the defendant, by his plea of justification, which admitted the publication of the libel as charged in the declaration, was estopped to deny the publication; or, if he was not technically estopped, yet the admission in that plea was evidence from which the jury upon the plea of not guilty must find against the defendant.

These points were fully argued by Mr. Gaston, for plaintiff, and Mr. Badger, for defendant. The Chief Justice expressed a wish that the trial should proceed, reserving these questions for his further consideration; upon which a verdict was taken for the plaintiff, with an agreement that, if the court should be against the plaintiff on the matters reserved, the verdict should be set aside, and a nonsuit entered.

MARSHALL, Chief Justice. This is an action on the case founded in a libel published by the defendant. He has pleaded not guilty, and also justified the words as being true. At the trial, the plaintiff gave in evidence a letter written by the defendant to his correspondent in Raleigh, for the purpose of being shewn to others, which contains substantially the charges stated in the declaration, but in different language. The plaintiff insisted at the trial—1st, that the plea of justification admitted the publication of the libel charged in the declaration and dispensed with the necessity of proving it; 2dly, that the letter given in evidence supported the declaration. The jury found a verdict for the plaintiff, subject to the opinion of the court on the two points reserved.

1. On the first point the plaintiff produced cases to show that the plea of justification contains a formal admission of the words charged in the declaration, and would not be good without such admission. It must confess and avoid the charge. He then insisted that this being a confession on record was stronger than a confession made orally in the country, and estopped the party from denying it. In support of this last proposition he relied on the generally admitted dignity of record evidence, and cited Goddard's Case, 2 Coke, 4, 6. In Goddard's Case the court, after saying that the jurors, who are sworn to say the truth, shall not be estopped, for an estoppel is to conclude one to say the truth,

added: "But if the estoppel or admittance be within the same record in which issue is joined upon which the jurors shall give their verdict, then they cannot find anything against that which the parties have affirmed and admitted of record, although the truth be contrary, for a court ought to give judgment upon a thing confessed by the parties, and the jurors are not to be charged with any such thing, but only with things in which the parties differ." In Goddard's Case, as was very properly remarked by the counsel for the defendant, there was a single plea, and the admission and agreement of parties, to which the observation of the court applies, are made in the particular and single issue which the jury was sworn to try. The language of the court is applicable to such a case only. The jury, though not generally "estopped to say the truth, is estopped if the admittance be within the same record in which issue is joined upon which the jurors shall give their verdict." When this case was decided a record contained a single issue, and the word "record" might be used generally in the same sense with the word "issue." The relative "which," in the last instance, refers to "issue," upon which issue the jurors shall give their verdict. This is proved clearly by the reason the court assigns why a jury is estopped from finding the truth contrary to such admission. It is that "a court ought to give judgment upon a thing confessed by the parties, and the jurors are not to be charged with any such thing." Now, the jurors are charged with every issue of the cause, and must pass on every issue. The court cannot give judgment until a verdict is found on each. Indeed, I do not understand the plaintiff to contend that the admission in one plea estops the jury from finding the truth in an issue made upon different plea; but that the admissions in one plea may be given in evidence in support of a different issue in the same cause. Goddard's Case, then, turns on a principle entirely distinct from this, and inapplicable to it. In Kirk v. Nowill, 1 Term R. 118, Buller, J., said that several pleas in the same cause were "as unconnected as if they were in separate records." In England, under the statute of 4 and 5 Anne, c. 16, the defendant is allowed to plead several pleas with leave of the court. In commenting upon this statute, Bacon says, in his Abridgment (vol. 5, p. 448): "It hath been frequently insisted upon that a defendant could not, within this act, plead contradictory and inconsistent pleas, as non assumpsit and the statute of limitations, etc." But the court has allowed such pleas, "observing that, if the benefit of the statute was to be confined to such pleas as are consistent, it would hardly be possible to plead a special plea and a general issue, the one always denying the charge, the other generally confessing and avoiding it, and the statute itself makes no distinction herein". In conformity with this rule the English books on the subject of pleading in all their forms of special pleas state the general issue as being first pleaded. This would be entirely useless if the admissions contained in almost every special plea in bar could be used to disprove the facts alleged in the general issue. The English books do not, I believe, furnish a decision, or even a dictum, to countenance the idea that the matter of one plea can be brought in evidence against another. Their entire independence of each other has been often held. In Grills v. Mannell, Willes, 378, the attempt was to aid one plea, to which a demurrer had been filed, by an averment in a subsequent plea. Lord Chief Justice Willes, in delivering the opinion of the court, said: Though he has denied it in his second plea (that the opposite party was seised in fee), that will make no alteration, it being a known rule, and never controverted, that one plea cannot be taken in to help or destroy another, but every plea must stand or fall by itself. This opinion undoubtedly applies to the sufficiency of a plea in point of law. It asserts that one plea cannot be affected in point of law by a fact averred in a different plea, not that such facts may not be used as evidence, but it shows that the distinct pleas in the same cause are entirely independent of each other, and have no technical connexion. The same principle is laid down in the case of Kirk v. Nowill, 1 Term R. 118. That was an action of trespass, in which the general issue and three special pleas in bar were pleaded. The jury found three issues for the plaintiff and the last for the defendant. The plaintiff obtained a rule to show cause why judgment should not be entered up in his favor, because the last plea on which the verdict was found for the defendant was no bar to the action. The defect in the fourth plea was cured by an averment in the second and third; but the court made the rule absolute; and Buller said: "There never was such an idea before, as the counsel against the rule have suggested, that one plea might be supported by what was contained in another. Each plea must stand or fall by itself."

It is admitted that these cases apply only to the entire independence of different pleas in point of law; but they certainly show that the facts alleged in one plea have no more influence on an issue made upon a distinct plea in the same cause than if the same matter had been pleaded in a different cause. Ever since the statute of Anne it has been usual in England, where the defendant meant to justify, to plead also the general issue. This is so apparently useless if the plea of justification amounts to a confession which can be transferred to the general issue, that a court would not give leave to plead both pleas where the right depended on the court, and the defendant would not ask it where useless pleas are attended with heavy expenses. The principle in pleading that a special plea must confess and avoid the fact charged in the declaration was introduced at a time when the rigid practice of courts requir-

ed that every cause should be placed on a single point, and when it was deemed error to plead specially matter which amounted to the general issue; it was not allowed to deny the fact and to justify it. The defendant might select his point of defence; but, when selected, he was confined to it. That a single point might be presented to the jury, he was under the necessity of confessing everything but that point. The attention of the jury was not directed to multifarious objects, but confined to one on which alone the cause depended. This rigid rule was undoubtedly productive in many instances of great injustice. The legislature in England thought proper to change it, and to admit of various defences in the same action. But the forms of pleas remained. The permission to put in more than one with leave of the court did not vary the established forms. The admissions which are contained in one plea respect only the issue made up on that plea. The purpose for which the rigor of the ancient rule was relaxed by law would be defeated if the matter of one plea were to destroy another. There is no more reason that a plea of justification should prove the libel on issue of not guilty than that it should support a new action for a libel founded on the plea itself. It contains an averment that the words were true, and, if uttered by the defendant, not in his defence by way of plea, but as a substantive and voluntary allegation, would be the foundation of a new action. But such a plea has never been so considered. Whether the reason is that the allegation is in the form prescribed by law, which the defendant must use in order to avail himself of a defence allowed by law, or that the plea is put in by counsel, and the words are used by him, and are not the words of the defendant, the reason operates as strongly against their being used as testimony in support of the general issue as against their being used in support of a new action founded on the plea. Certain it is, that in England this use has never been made of them.

In the United States, generally, the rigor of the ancient rule that the defence shall be confined to a single point has been relaxed still further than in England. In most of the states —and North Carolina is understood to be among them—the defendant has a legal right, without asking the court, to plead as many several matters as may be necessary or as he may think necessary for his defence. It would be entirely inconsistent with the spirit and object of these acts, to permit forms of pleading devised at a time when judicial proceedings were regulated on a principle which they were intended to change to render one of the defences which they authorise, an absolute nullity. In England this has never been attempted. The courts there will not exercise the power they possess to restrain the defendant from pleading inconsistent pleas, because such restraints would defeat the policy of the act of parliament. The policy of the acts passed on the same subject in the United States is still more apparent. It is true that in one state the principle maintained by the plaintiff in this cause has been sustained. The very respectable court of Massachusetts has decided that in an action for slander the admissions contained in a plea of justification do of themselves disprove the plea of not guilty. I am far from disregarding any opinion of that court. But I believe it stands alone, and that no similar decision has been made in any state of the Union. It constitutes no inconsiderable deduction from the authority of the decision in Massachusetts that there is reason for the opinion that it was disapproved generally by the bar. The legislature of that state has enacted that henceforth the plea of justification shall not in an action of slander be taken as proof that the words were spoken if not guilty be also pleaded. This act of the legislature shows I think that the general sense of the profession, even in that state, was opposed to the decision of the court.

I think a fair construction of the act which authorises the defendant to plead several pleas, that he may use each plea in his defence, and that the admissions unavoidably contained in one cannot be used against him in another. It was therefore incumbent on the plaintiff in this case to prove the libel charged in the declaration.

2. Has he done so? The letter offered in evidence contains substantially a charge that the defendant is guilty of facts essentially the same as are stated in the declaration, but the charge is made in words which vary materially from those alleged in the declaration, and they also state the fact as varying in form. Does this evidence support this issue on the part of the plaintiff? Reg. v. Drake, 3 Salk. 224, was an information for a libel, which stated the words according to their tenor. The word "nor" was inserted instead of "not." This variance, though it did not alter the sense, was held fatal. The court said that cujus quidem tenor imports a true copy. Holt said a libel may be described either by the sense or by the words, and therefore an information charging that the defendant made a writing containing such words is good, and in such case a nice exactness is not required, because it is only a description of the sense and substance of the libel. In Rex v. Beere, 12 Mod. 218, it was again held that "according to the tenor and effect following" imported a literal copy. The word "effect" alone, it was said, would have been too uncertain, but that word did not vitiate, and "tenor" was certain. The language of the court in Reg. v. Drake would seem to justify the inference that it is sufficient to state the sense and substance of the words in the information or declaration. If the charge be "that the defendant made a writing containing such words," that is good; "and in such case a nice exactness is not required because it is only a description of the sense and substance of the

libel." "A nice exactness" in what? I presume, in the proof of the words laid in the declaration. It does not purport to charge the whole libellous matter in the very words used in the libel, but to charge its sense and substance. The exact extent of this decision is not quite apparent. Whether the very words laid in the declaration must be proved, or the material words will be sufficient, or whether equivalent terms will satisfy the law, remains unexplained. It would be difficult to sustain the proposition that the word "tenor" was indispensable in order to bind the plaintiff to an exact recital of the words of the libel. That such words as these: The defendant made and published of and concerning the plaintiff "a paper writing in the words following, to-wit, he (the plaintiff meaning, &c.)" —would not import a recital of the very words as much as if the word "tenor" had been inserted. And if the sense and substance is all the charge imports, it is difficult to assign a reason why it would not be sufficient to charge the sense and substance in the declaration. Yet in Rex v. Beere, the court said that to state in the declaration that the defendant published a false, scandalous, and malicious libel, "according to the effect following," would be too uncertain. In Reg. v. Drake, the court took a distinction between slander written and spoken, which seems founded in reason: "Words are transient, and vanish in the air as soon as spoken, and can be no tenor of them; but when a thing is written, though every omission of a letter may not make a variance, yet, if such omission make a word of another signification, it is fatal."

We are left to conjecture whether this observation applies to every declaration for written slander in which words are specified or to such only as charge the libel according to tenor. Nelson v. Woolston Dixie, Cas. t. Hardw. 305, was an action for words spoken. The words which were spoken to the plaintiff's servant were laid in the declaration thus: "Where is the thief, your master; that confederate thief with Barker, who hath robbed me. I will hang him, by God; damn me if I do not." The variance was that the words proved were, "I will hang them both," instead of "I will hang him;" and this was held fatal. Lord Hardwicke said: "The words laid are not proved. An action for words may either lay the particular words spoken, as in this case, or may set out the substance of the words; and if the substance only be set out, as that the defendant charged the plaintiff with such or such a crime, &c., then it is sufficient to prove the substance of the words, and that was Stayley's Case, and there are precedents of that sort in Rastal's Entries, and the substance is laid in Latin; but where the very words are laid those words must be proved as laid, though the rules are not now so strict as formerly; for, if there should be a variation in the order of the words as proved to be spoken from what is laid in the declaration, so it be agreeable in substance, it is sufficient." It is not stated in the report of this case that the declaration charged the slanderous words to be spoken according to tenor, but that it purported to state the words themselves; and in such case it was held necessary to prove them as laid. It is observable, too, that the variance does not consist in the slanderous words themselves, but in additional words, which are perhaps explanatory of the meaning of the words importing the slander. Nor is there any distinction as to the meaning of the slanderous words themselves, between threatening to hang both the thieves and threatening to hang the plaintiff only. That this variance was held fatal shows how nearly it was then supposed the proof must come to a declaration purporting to recite the slanderous words. The opinion expressed by Lord Hardwicke, that the declaration may set out the substance of the words, as that the defendant charged the plaintiff with such or such a crime, is contradicted in other cases, and seems now to be overruled in England; though in Richardson's Practice a declaration in that form is inserted, and has been supported, I am told, in the court of appeals of Virginia. It has also been supported in Pennsylvania. Kennedy v. Lowry, 1 Bin. 393. In England it is certainly held bad. In 3 Maule & S. 110, the plaintiff charged the defendant in one count with speaking "false, scandalous, and malicious words, to the effect following, &c." This was held bad after verdict. The court observed that in Dr. Sacheverell's Case [Harg. St. Tr. 828], the judges said: "By the law of England and the constant practice in all prosecutions by indictment or information for crimes or misdemeanors by writing or speaking, the particular words supposed to be criminal ought to be expressly specified in the indictment or information." The court added: "There seems no reason for any difference in this respect between civil and criminal cases. The action arises ex delicto." A reason assigned for this rule is that, were it otherwise, "it would be almost impossible to plead a recovery in one action in bar of another." In Wood v. Brown, 6 Taunt. 169, the declaration charged the defendant with publishing a libel "purporting, &c." On demurrer this was held bad, because by such a mode of declaring the plaintiff would withdraw from the defendant the power of demurring to the words of the libel. In Zenobio v. Axtell, 6 Term R. 162, where the libel was published in a foreign language, it was held ill to set forth its substance in a translation. The declaration ought to state the libel in the original language. In Wood v. Brown, 1 Marsh. C. P. 522, the declaration charged the defendant with publishing "a certain false, scandalous, malicious, and defamatory libel, purporting thereby that the plaintiff's beer was of a bad quality, &c." The court seemed to think that what was said by Lord Holt in Reg. v. Drake, furnished a strong argument in favor of the opinion that it was sufficient to set forth the sense and substance of the libel. "Here, how-

ever, the plaintiff had neither stated the words nor the substance. He had merely stated the conclusions which he himself had drawn from the supposed libel, and which might be very different from those which the court would draw from it." The chief justice said: "We will consider of this case. I certainly have always thought it was necessary to state the libel." After taking time to consider, Lord Chief Justice Gibbs said: "We have looked into the case and into the cases on the subject, and though in some of the cases there are expressions which have carried this doctrine farther than was at first intended, we think it impossible that this declaration can be supported. It charges the defendant with publishing a libel purporting as is therein stated. In all actions for libels it is the province of the court to say whether the expressions complained of amount to a libel or not; and if this mode of declaring could be supported, the court would lose that jurisdiction, and it would be given to the jury." It has been held very clearly (2 East, 426) that in a plea justifying slander because the defendant heard it from another it is not sufficient to allege that the person referred to spoke words to the effect of those on which the action is brought; the words themselves must be set forth in the plea.

If the words themselves must be set forth, as seems to be the prevailing opinion, it is difficult to assign a sufficient reason, especially in actions for written slander, why the words should not be proved. The distinction between charging a libel according to tenor and charging it in words purporting to be the very words of the libel seems entirely arbitrary, and one for which no satisfactory reason can be assigned. Its effect would naturally be to discard the word "tenor" from every declaration as being at the same time useless and dangerous. But it is not easy to reconcile the rule which requires the words themselves to be stated with that which dispenses with their being proved. It would seem to consist with reason and with general legal principle that in all cases where the declaration professes to charge the very words the plaintiff should be held to prove those words, at least if they are in writing. The cases on this subject, however, are very unsatisfactory. Mr. Justice Buller, in his Nisi Prius (page 5), says: "It was formerly holden that the plaintiff must prove the words precisely as laid; but that strictness is now laid aside, and it is sufficient for the plaintiff to prove the substance of them." Mr. Buller does not inform us whether this rule is confined to words spoken or extends also to libels. His examples are of oral slander. There is too wide a range for those who are to determine in what cases the evidence proves the substance of the charge. The books do not, and perhaps cannot, furnish complete satisfaction on this point. It is clear that words spoken in the second person will not sustain a declaration charging the same words, if alleged in the declaration to be spoken of the plaintiff in the third person; and it is also clear that the slightest variation between the evidence and the charge, if it may indicate a different thing, is fatal. The case of Walters v. Mace, 2 Barn. & Ald. 756, is a strong example of this. The declaration charged that the defendant said of the plaintiff, "This is my umbrella, and he stole it from my back door." The evidence was that the defendant said, "It is my umbrella," &c. The variance was held fatal, because the words charged in the declaration applied to a particular umbrella, which was present, and the words proved applied to an umbrella which was absent. And yet the words "it is my umbrella," &c., may be spoken of a particular umbrella then present. There are many cases to the same effect; but they all turn upon the principle that the difference in language, though very slight, may denote a different offence. In such cases there is a plain and sufficient reason for holding the variance fatal.

In Rex v. May, 1 Doug. 193, it was held in an indictment for perjury, the words "in manner and form following, that is to say, &c.," do not bind the party to recite the instrument verbatim. This was an indictment against May for perjury in an indictment against the present prosecutor for an assault. It referred to the former indictment, and added, "which indictment was presented in manner and form following, that is to say," and then proceeded to set forth the indictment in hæc verba, but omitted a word contained in the original indictment. It was admitted not to have been necessary to recite the former indictment; but it was contended that the prosecutor had undertaken to recite it, and that, having done so, was bound to set it forth verbatim. A verdict was given for the plaintiff, and a rule was moved to shew cause why the verdict should not be set aside. The objection had been made at the trial before Buller, J., but was overruled by the judge, who said "that the word 'tenor' had so strict and technical a meaning as to make it necessary to recite verbatim; but that by the expression in this case nothing more than a substantial recital was requisite, and that the variance here was only in matter of form." The rule was granted, but was afterwards given up, and judgment was pronounced against the defendant. This, it is true, was not an action for a libel; and it was not necessary for the action to set forth the paper in which the misrecital by the omission of a word took place. But it is a very strong case to prove what I have said appears to me to be very unreasonable, that the plaintiff is not held to a strict recital, unless the word "tenor" is used. Still it is difficult to reduce the materiality of the variance to certain rules. Compagnon v. Martin, 2 W. Bl. 790, was an action for words in which it was held that, though all the actionable words laid in the declaration were not proved, the plaintiff might have a verdict for such as were proved. That, however, was an action

for words spoken, not written, and an action was sustainable for the words proved. Had the words which were not proved been left out of the declaration, no doubt would have existed in the case; and it was thought material that the judge directed the jury to disregard those words in estimating damages. Tabart v. Tipper, 1 Camp. 350, was an action for a libel. The words charged in the declaration were, "My sarcastic friend, by leaving out, &c." The libel produced in evidence was, "My sarcastic friend Moros, by leaving out, &c." The sole variance was that the word "Moros," which existed in the libel, was omitted in the declaration. And yet the reporter does not state that the declaration charged the words according to tenor. If an exact recital was unnecessary in an action for a libel, where the declaration purports to state the libel in terms, I feel some difficulty in accounting for this case. The omission of the word "Moros" does not seem to me to be a substantial variance. In 7 Taunt. 204, the declaration charged the defendant with saying "Hancock's wife is a great thief, and ought to have been transported some years ago." The words proved were, "Hancock's wife is a damned bad one, and ought to have been transported seven years ago." The variance was held fatal. In Barnes v. Holloway, 8 Term R. 150, words laid affirmatively were proved to have been spoken interrogatively, and this variance was held fatal. Yet it is clear that an interrogation may imply an affirmation, and may be so understood by the hearers. The court said, "Whatever the party may mean, the words must be proved as they are laid." There is "a manifest distinction between the same idea conveyed by words spoken affirmatively and interrogatively."

The person who looks into this subject will be surprised at finding how very unsatisfactory the cases are. I will now compare the libel adduced in evidence with that charged in the declaration.

The Chief Justice then proceeded to dissect the letter, and to compare with critical exactness the several sentences it contained with the counts in the declaration intended to set them forth, and observed that, though the imputations cast upon the character of the plaintiff were of equal atrocity with those charged in the declaration, and in some instances approached so nearly as to be substantially the same, yet were they in no instance exactly the same; and the verbal variations were such as at least to make the charges susceptible of a slightly different meaning from the proof. He concluded by declaring that upon the principles he had stated such variance, though slight, was fatal, and that consequently the verdict must be set aside, and a nonsuit entered.

NOTE. It is proper to state that the declaration was drawn without the inspection of the letter declared on, which was never seen by the plaintiff's counsel until produced on the trial, and the only information possessed of its contents was derived from the recollection of witnesses who had heard it read. It should also be added that after the nonsuit was entered the chief justice, on motion of the plaintiff's counsel, directed that on payment of the costs the nonsuit should be set aside, and the plaintiff allowed to file a new declaration.

Case No. 17,528.

WHITAKER v. POPE.

[2 Woods, 463.] [1]

Circuit Court, N. D. Georgia. March, 1876.

INTEREST—REPEAL OF USURY LAW—ACTION TO RECOVER USURY—PARTIES—SET-OFF.

1. Interest from the commencement of the suit is recoverable as a matter of law in an action upon a money demand, even though interest is not claimed in the petition.

2. A claim for money taken as usury, while a law forbidding usury was in force, is not destroyed by the repeal of the law.

3. Indebitatus assumpsit would be a proper form of action at common law, to recover money paid as usury. Under the Code of Georgia, the action for open account would seem to be applicable.

4. A bill of particulars appended to a petition to recover money paid as usury, which sets forth the usurious payments as general indebtedness for cash paid by the plaintiff to the defendant, is sufficient.

5. Where an action was brought in the name of A. for the use of B., and it appeared on the trial that before suit brought, A. had assigned the claim to B., who therefore held the legal title, an amendment under the Code of Georgia was allowed after verdict by striking out the name of A. from the petition.

6. When a debtor had notice that his creditor A. had assigned the debt due him to B., and afterwards procured a counterclaim against the original creditor A., *held*, that he could not use such claim as a set-off in a suit brought in the name of A. for the use of B., to recover the debt assigned to B.

Action at law [by Jared I. Whitaker, for the use of E. D. Dodge, against John D. Pope]. Heard upon motion in arrest of judgment and motion for new trial.

A. T. Akerman, for the motion.

L. E. Bleckley, contra.

BRADLEY, Circuit Justice. The defendant moves in arrest of judgment because the verdict is for interest as well as principal, when no interest is demanded in the petition. But the interest given by the verdict is only interest from the commencement of the action. This need not be demanded, but follows as a matter of law.

The defendant then moves for new trial on several grounds: (1) That in 1873 the legislature repealed all laws on the subject of usury, and, therefore, usury taken prior to that time can not be recovered back. This is not so. When the usury was taken, it was taken against law, and the usury paid therefor was money had and received by the de-

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

fendant for the use of the plaintiff. This demand was not canceled by the repealing law. After the law was passed, there was no such thing as usury, but prior to it there was, and the law did not and could not annihilate that state of things, or the rights that grew out of it. (2) That the action for an open account is not applicable to the recovery of money paid by way of usury. An examination of the Code, however, induces the conclusion that it is a proper form of action. Indebitatus assumpsit for money had and received would have been a proper form of action under the common law system of pleading, and where that action would formerly lie, the action for open account would seem to be generally applicable under the Code. Besides, the objection could be covered by proper amendment if it were material. (3) That the bill of particulars was insufficient. This objection is not well taken. The bill sets forth the usurious payments as general indebtedness for cash paid by the plaintiff to the defendant. This is the meaning of the form of account given, and this expresses the legal effect of money paid on account of usury. It is cash paid for which the receiver is indebted to the payer. (4) That the action was brought in the name of Whitaker for the use of Dodge, when it ought to have been brought in the name of Dodge himself, to whom, as it appeared by the evidence, Whitaker had assigned the claim as collateral security for a debt. We think that the assignment produced did have the effect of passing the legal title of the account to Dodge. The operative words of the agreement are "turn over," instead of "assign," which, in our view, means the same thing. To turn over a note or an account as collateral security means the same in law as to assign it for that purpose. But the petition discloses the fact of Dodge's interest. It states that Whitaker sues for the use of Dodge. The defendant could not have been misled by this form of action, and he was not injured by it. He was allowed to make every defense which he could have made if the action had been in the name of Dodge. We think, therefore, that the petition may be amended by striking out the name of Whitaker, and making Dodge plaintiff in form as he is in substance. Parties may always amend if there is enough in the pleadings to amend by. Code, § 3479. In this case we think there is enough to amend by. The Code goes on to specify some particular cases: thus, coplaintiffs or defendants who are omitted may be added; coparties improperly inserted may be stricken out; a person's name may be added as suing for the use of the original party; and representative character may be added or stricken out. Code, §§ 3483, 3487. We think that the present case is within the reason of the law relating to such amendments. (5) That the defendant was not allowed a set off claimed by him. We think that this set off was justly disallowed. It was a claim against Whitaker, procured by the defendant after he had been served with the petition—which showed the fact that Whitaker was suing for the use of Dodge. The defendant, therefore, had notice before procuring this claim, that Dodge had an interest in the claim sued on. He procured the counterclaim before the petition was filed, it is true; but that does not matter. He had notice of Dodge's interest; and it was too late for him to buy up claims against Whitaker.

We see no reason for granting a new trial for any of the causes above specified.

The other grounds relied on are exceptions to the charge and rulings of the court. It is sufficient to say, that after giving them due examination, we do not see any sufficient cause for setting aside the verdict. The rulings were substantially correct, and the defendant has suffered no legal injury thereby.

Motion denied.

WHITAKER (UNITED STATES v.). See Case No. 16,672.

Case No. 17,529.

Ex parte WHITCOMB.

In re COLWELL.

[2 Lowell, 523;[1] 15 N. B. R. 92.]

District Court, D. Massachusetts. Nov. 27, 1876.

BANKRUPTCY — ASSIGNEE'S FEES — DISCRETION OF COURT—RULES PRESCRIBED BY SUPREME COURT.

1. By section 5099 of the Revised Statutes, the allowance of a reasonable compensation to an assignee for his services is within the discretion of the court of bankruptcy, and cannot be wholly regulated beforehand by the supreme court. This discretion is given to the court only, and not to the registers.

[Cited in Re Cook, 17 Fed. 329.]

2. Assignees, intending to charge for services, beyond the fees mentioned in rule 30, must notify creditors of their intention in the notices of the meeting at which their account is to be presented.

In bankruptcy.

M. Storey, for objecting creditor.

R. M. Morse, Jr., for assignee.

LOWELL, District Judge. Two charges in the assignee's account are objected to: one, of $275, for his own services in superintending the manufacture of the unwrought stock of shoes in the bankrupt's factory, under an order of court authorizing the business to be carried on in accordance with the act of 22d June, 1874; the other, of $300, for money paid his counsel for advice in the settlement of the estate.

The evidence upon the first item is that the

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

assignee is a manufacturer, acquainted with the business which was to be carried on, and that he took the superintendence of it, and gave his time and attention to it, and succeeded in realizing for the creditors considerably more than would probably have been obtained in any other way. He has charged five dollars a day for fifty-five days. On the other hand, it is said that the bankrupt was employed as a foreman at the factory, and was competent to do all that the assignee did, and that the latter was, in fact, a supernumerary. Upon the whole, I think the assignee may fairly charge for fifty days' work, if any such charge is admissible by law. Rule 30 of the supreme court enacts that no allowance shall be made to an assignee other than the commissions on the money received and paid out, and only once on that, excepting as is by said rule specified. The fees therein mentioned do not include any services for superintending or carrying on the business of the bankrupt, which the statute permits to be done in certain cases, with the assent of a majority in value of the creditors. It appears to be a casus omissus; and I cannot suppose that the court intended that only the commissions for collecting and disbursing should be paid, when the duties are so very different and so much more onerous than those which are usually performed by assignees. The rule, however, is positive, that no other allowance shall be made; and I do not see how I can change the rule. I must, therefore, decide the question, which I alluded to in a late case, but did not then find myself obliged to pass upon, whether the supreme court has power to say that no other allowance shall be made than is provided by rule 30.

Rev. St. § 4990, gives the supreme court authority to regulate the fees and charges in all proceedings in bankruptcy; this and all the other powers given by that section are qualified by the opening words of the grant, "subject to the provisions of this title." One of the provisions is, in section 5099, that the assignee shall be allowed, and may retain out of the money in his hands, all necessary disbursements, "and a reasonable compensation for his services, in the discretion of the court."

I am of opinion that this discretion, given to the court of bankruptcy, cannot be regulated beforehand by the supreme court. Fully impressed with the importance of keeping the charges of assignees within reasonable limits, and ready to exert my authority at all times to repress any tendency to waste or overcharge, I do not feel at liberty to refuse to an assignee a reasonable compensation for his services, if the particular fees enumerated by the supreme court should, in any case, fail to afford him such compensation. The table of fees, as I have said, is made up without any reference to the unusual mode in which this estate was lawfully settled. It gives him something for whatever the supreme court understand to be the usual work which devolves upon him; and I do not mean to say that for these things the supreme court may not prescribe the fees; nor that an assignee's account, charging for what he may call extra or additional services, should ever be allowed as matter of form, or merely because there is no objection made, nor that there will be many cases in which any thing of the sort ought to be allowed. Taking this case alone, and in its peculiar circumstances, I decide that the assignee is to have, for superintending the manufacture, $250.

I may add here, to save misconstruction, and to put the practice of this district upon a proper footing, that assignees who intend to charge for services beyond the fees mentioned in rule 30 must warn the creditors of the fact in the notices for the meeting at which the account is to be considered; that the registers should examine carefully the grounds and reasons for all such charges, whether objected to or not, and, if they consider that any allowances of that sort ought to be made, should report the same to the court, with their reasons. I am of opinion, as at present advised, that the court only, and not the register, is invested with the discretion given by section 5099.[2]

I come now to the charge of $300 paid to counsel. We have been told, and wisely, by a justice of the supreme court, in delivering an opinion for himself and his brethren, that assignees are too ready to rush into litigation, and to contest every thing upon which ingenious counsel can raise a doubt; and that their endeavor should be to settle and compound controversies, and to save time and expense, as far as possible. The assignee appears to have acted on the rule thus laid down, and to have escaped litigation; and the objection taken to this item is, that he might have done all this without going to counsel, or to so good counsel. I have not found that the highest charges in these cases have been made by the most competent attorneys; and I see in this case good reason for employing counsel, though it turned out, happily, that no lawsuit was expedient, and that certain investigations, which appeared to be necessary, developed nothing which required action on the part of the assignee. There was, however, reason to investigate, and the creditors would not have been satisfied without it. Twenty-five dollars are to be deducted from the assignee's charges. The remainder of the account is allowed.

WHITCOMB (HILL v.). See Case No. 6,502.

[2] See a rule of the supreme court amending rule 30, and passed since this decision was made: 93 U. S., at the beginning.

Case No. 17,530.

WHITCOMB et al. v. PHOENIX MUT. LIFE INS. CO.

[11 Chi. Leg. News, 408; 8 Reporter, 642; 8 Ins. Law J. 624.] [1]

Circuit Court, D. Massachusetts. July 3, 1879.

LIFE INSURANCE — GENERAL AGENTS — POWERS — LOCUS OF CONTRACT.

1. The policy issued by a life company of another state to a citizen of Massachusetts, provided that it should be void unless the premium was paid when due at the office of the company, or to an agent upon the production of a receipt signed by the president or secretary; also that it should take effect when countersigned by the agent in Massachusetts, who was also required to countersign receipts. *Held*, that though the agent was a general agent in the sense of the Massachusetts statutes requiring the appointment of a general agent to accept process, and who should give bonds, this has nothing to do with his power to bind the company, but only his power to represent the company in securing the enforcement of the contract.

2. The countersigning by the agent was chiefly intended as proof that premiums had been paid to him. As he was not authorized to refuse to countersign, the act was purely ministerial. The fact that the policy was forwarded to the agent and delivered by him, but not countersigned, was not material. The policy took effect from its delivery, and there can be no just distinction between the two acts; both are intended to effect substantially the purpose of getting the policy into the proper hands and securing the premium.

3. The contract was not a Massachusetts contract within the provisions of the non-forfeiture law of that state, and the prohibition to make such a contract as this one, cannot affect the contract as a legislative command.

[Cited in Smith v. Mutual Life Ins. Co., 5 Fed. 584.]

[Questioned in Holmes v. Charter Oak Life Ins. Co., 131 Mass. 66.]

This case was submitted upon agreed facts. The defendant company is chartered by the laws of Connecticut, having its office and principal place of business at Hartford, where all applications are sent and accepted or rejected. It had a general agent in Worcester, Massachusetts, duly established in accordance with the laws of Massachusetts, through which it transacted business in said commonwealth. In May, 1874, application was duly made by Benjamin F. Whitcomb to the defendant company through said general agency for a policy of insurance upon his life. The application was sent by said general agent to the company at Hartford, and was accepted by the company at said Hartford, in form as set forth in the policy, and under said date, the company issued said policy. It was signed by the president and secretary at Hartford and sent to its general agency at Worcester, by whom it was countersigned and delivered on payment to him of the premium then due. The policy is dated at Hartford, May 18, 1874, and countersigned by D. W. Bartlett, general agent, on the same day. It assures the life of B. F. Whitcomb for the benefit of his wife and children, the present plaintiffs, in the sum of $5,000, in consideration of a payment of $104.10 made on that day, and of the annual payment of a like amount on or before the 18th of May in each year. It contains a promise by the company that if after three annual premiums have been paid, the policy shall be surrendered while in force, a new policy will be issued for the whole amount of even dollars received by the company, (subject to any indebtedness on account of premiums,) without further charge, except interest on all indebtedness of the policy. The next paragraph but one has the condition that if the said premiums shall not be paid at the office of the company, or to an agent on his producing a receipt signed by the president or secretary, on or before the date above mentioned, the company shall not be liable to pay the sum insured, or any part thereof, and the policy shall cease and determine. The policy was to take effect when countersigned by D. W. Bartlett, agent at Worcester. The premium due 18th May, 1875, was paid to the agent at Worcester upon a receipt signed by the secretary and countersigned by the agent. On the 20th of April, 1876, notice was sent by Bartlett, the agent, to B. F. Whitcomb, that the next payment upon the policy would fall due before noon on the 18th day of May, 1876, and stating the amount, which was arrived at by charging the premium and interest on a premium note and deducting a dividend. Payment of this dividend was never made, and B. F. Whitcomb died November 25, 1876.

The only defense arising under the agreement of the parties was the failure to pay the annual premium, and whether this involved a forfeiture was agreed to depend upon whether the rights of the parties were governed by the "nonforfeiture law" of Massachusetts. By the General Statutes of Massachusetts (chapter 58, § 68), every foreign insurance company doing business in the state must appoint a citizen thereof, resident therein, a general agent, upon whom all lawful processes against the company may be served, with like effect as if the company existed in the state. By that and later statutes, the agent was required to give certain bonds, make certain deposits, certain annual returns, etc., etc. The statute of 1861 (chapter 186) provides that no policy of insurance on life, thereafter insured by any company chartered by the laws of the commonwealth, shall be forfeited or become void by the non-payment of premium thereon, any farther than regards the right of the insured to have it continued in force beyond a certain period, to be determined by ascertaining the net value of the policy according to the mode there pointed out; and after deducting any indebtedness to the company, four-fifths of what remains shall be considered a net single premium of temporary insurance ac-

[1] [8 Reporter, 642, contains only a partial report.]

cording to the age of the party at the time of the lapse. If the death occurs within the term of temporary insurance covered by the value of the policy, and no other condition of the insurance has been violated, the company shall be bound to pay the amount insured as if there had been no lapse, anything in the policy to the contrary notwithstanding, provided notice and proof shall be submitted to the company within ninety days after the decease. The statute of 1872 (chapter 325, § 7) declares that "all corporations, associations, partnerships or individuals, doing business in this state under any charter, compact, agreement or statute of this or any other state, involving an insurance, guaranty, contract or pledge for the payment of annuities or endowments, or for the payment of moneys to families, or representatives of policy or certificate holders, or members, shall be considered and deemed to be life insurance companies within the meaning of the laws relating to life insurance within this state, and shall not make any such insurance, guaranty, contract or pledge therein, or to or with any citizen or resident of this state, which shall not distinctly state therein certain things, including the period of continuance, the amount of premiums, etc., nor excepting in accordance with the conditions and restrictions of the statutes now or hereafter regulating the business of life insurance; provided nothing in this section shall be held to conflict with the provisions of chapter 186 of the act of 1861."

I. T. Haague, for plaintiffs.
Henry D. Hyde, for respondent.

LOWELL, District Judge. The brief for the plaintiff is prepared with great ability and learning, and I have examined it with care; but many of the points taken in it are concluded by the exhaustive and binding judgment of Mr. Justice Clifford, given in this court, October 7, 1878, in Desmazes v. Mutual Benefit Life Ins. Co. [Case No. 3,821], which will save me from elaborating those points. In so far as this case differs from that in its facts, some observations will be necessary. It is plain that Bartlett, the agent of the company, called in the agreed statement a general agent, is such, in the sense of the statutes of Massachusetts, as the context of the agreed facts show, which name has nothing to do with his power to bind the company by contract, but only his extensive power and obligation to represent the company in securing the enforcement of the contract when the time comes to enforce it. His only functions appear to have been to forward applications, and if they were accepted, to countersign and deliver the policy, and receive the first premium, and if the company chose to send him receipts for the subsequently accruing annual premiums he was to countersign and deliver them when he received the payment of the premiums. From the fact that he countersigned receipts as well as policies, it is evident, I think, that the signature was chiefly intended to facilitate the proof of the fact that the premium had been paid, and paid to him, and thereby to lessen the risk of misapprehension in any accounting between the assured and the company; and more especially between the agent and the company. It does not appear that he had any power to alter the contract in the slightest particular, nor to refuse to countersign or deliver either policy or receipts, if the several premiums were tendered him in due time; and I can conceive of no purpose in the countersigning, over and above the delivery, except for the preservation of written evidence, as I have pointed out.

The question argued is, whether this was a Massachusetts contract. No doubt the loss, if there should be one, was to be settled according to the laws of Connecticut, though the action might arise in Massachusetts by virtue of the statute above referred to. The dividend which the insured received in part payment of his first annual premium was made, I suppose, in conformity to the law of Connecticut, and the assured was a member of the company, with all the benefits of those laws. The premium was payable at Hartford, unless the company chose to appoint an agent to receive it in Massachusetts, and if they made such an appointment they could revoke it at pleasure, though after the appointment had been made known to the assured, they could not claim a forfeiture for his failure to pay at Hartford, if he was ready to pay to the agent here, unless they had reasonably notified him of the change. Insurance Co. v. Davis, 95 U. S. 425; Insurance Co. v. Eggleston, 96 U. S. 572. Mr. Justice Clifford decided that such a contract was to be governed by the law of Connecticut, in that case of New Jersey. The only differences of fact are, that in the agreed facts of that case, the agent was not called a general agent, but it is plain that he was such under the law of Massachusetts. The other, and at first sight more striking, difference is, that the policy was sent by mail to the agent, and was by him delivered, but not countersigned. Upon reflection I do not esteem this difference to be material. The contract in that case took effect by delivery in Massachusetts, and in this by being countersigned and delivered in the same state; the mere fact of the countersigning for the purposes and under the circumstances already referred to, has no more effect upon the contract itself than the delivery alone. Two cases have been cited in which it was held that this fact stamped a local character upon the contract, and I should feel much hesitation in differing from those very able judges who made those decisions, were I not aided and instructed by the Case of Desmazes. But those decisions were placed upon reasoning which would apply

equally to delivery by an agent within the state, and that point has been concluded by the decision of this court. That there can be no just distinction drawn between a delivery and countersigning and delivery, I cannot for a moment doubt; one is as much a mere ministerial act as the other, and both are intended to effect substantially the purpose of getting the policy into the proper hands and securing the due and prior payment of the first premium, to which is simply superadded, by the signature of the agent, written evidence of his act and of his responsibility.

The statute of 1872 is perhaps broad enough to cover this case or any other in which a citizen or resident of Massachusetts contracts with any other citizen or corporation of this state, whether the contract is made here or elsewhere, and any contract in which an agent here of a foreign insurer, takes any part whatever; but if the contract was a Connecticut contract, I understand Mr. Justice Clifford to say, and I decide, that the law of Massachusetts of 1872 does not enter into and make a part of it, as matter of contract, and that the prohibiting words of the law forbidding the parties to make such a contract as they have made in this case, cannot have effect upon the contract as a legislative command or forced construction. Whether the legislature of Massachusetts might not revoke the permission for foreign companies to have agents here unless they conformed to the statute, is quite a different question.

After opportunity has been given to the plaintiffs to accept the rulings of law, judgment is to be entered for the defendants.

WHITCROFT (CARROLL v.). See Case No. 2,458.

WHITE, Ex parte. See In re PIERCE.

Case No. 17,531.

In re WHITE et al.

[2 Ben. 85;[1] 1 N. B. R. 218 (Quarto, 1).]

District Court, S. D. New York. Jan., 1868.

BANKRUPTCY—SALE OF ASSETS BY ASSIGNEE.

No order of court is necessary to authorize the assignee to sell unencumbered assets of the bankrupt.

In this case the assignee in bankruptcy applied to the court for an order directing him to sell certain unencumbered assets of the bankrupts which had come into his hands.

BLATCHFORD, District Judge. No order is necessary. By section 15 of the bankruptcy act the assignee is required to sell all unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors. General order No. 21 regulates the sale.

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

Case No. 17,532.

In re WHITE.

[2 N. B. R. 590 (Quarto, 179); 16 Pittsb. Leg. J. 110; 2 Am. Law T. 105; 1 Am. Law T. Rep. Bankr. 136; 1 Chi. Leg. News, 326.][1]

District Court, D. Massachusetts. 1868.

BANKRUPTCY—DISCHARGE.

A bankrupt who is a tradesman is not entitled to a discharge under the bankrupt act if he has not kept an invoice or stock book.

[Cited in Re Archenbrown, Case No. 505; Re Frey, 9 Fed. 379.]

In bankruptcy.

J. G. Abbott and B. Dean, for creditors.

J. D. Ball, for bankrupt.

LOWELL, District Judge. The bankrupt was a tradesman, and the evidence tends to show that he did not keep such books of account as would enable his assignee to ascertain the state of his affairs, in this, that he kept no invoice book or stock book, so that it was impossible to tell what property he was possessed of in his trade. As I intimated at the hearing, the law which refuses a discharge to an honest trader because his books are not proper, has always seemed to be a harsh one and likely to cause some injustice. But I cannot refuse to carry out the law as I find it. A discharge from debts is not a right, but a privilege, and congress can annex, to its grant of the privilege, such conditions as in its discretion seem to be appropriate; while, therefore, I should not be disposed to extend the statute by construction beyond its fair meaning, and perhaps should not hold that a trader had not kept proper books if he had merely made some careless omissions or mistakes without fraud in books themselves proper, yet I cannot say that the omission of any entire book, or set of entries, necessary to the understanding of his business can be overlooked. Perhaps, if the bankrupt kept all the original invoices themselves, from which such a book could be made up, it might be enough. There is no evidence in this case whether this was done or not. Discharge refused.

[1] [Reprinted from 2 N. B. R. 590 (Quarto, 119), by permission. 1 Chi. Leg. News, 326, gives only a partial report.]

Case No. 17,533.

In re WHITE et al.

[18 N. B. R. 107.][2]

District Court, S. D. New York. June 6, 1878.

BANKRUPTCY—DISCHARGE—REFERENCES—PRACTICE—OBJECTIONS TO DISCHARGE.

1. The bankrupts were members of a firm engaged in the lumber business, with their

[2] [Reprinted by permission.]

principal place of business at A., in this state. They were also members of other firms engaged in the same business in Canada, but in each of such firms there was another partner, at least nominally. The creditors of the Canadian firms having threatened legal proceedings to sequestrate the property of those firms in Canada, transfers of said property were made by way of mortgage to such creditors, in consideration of advances to carry on the business and to secure payment of the debts of the Canadian firms. This course was recommended by some of the principal creditors of the firm in this state, at an informal meeting of the creditors, as the best thing to be done under the circumstances. It appeared that the transfers were made in good faith. *Held* that, under the circumstances, the transfers were not preferences, within the meaning of the act, so as to deprive the bankrupts of their discharge.

2. The adjudication in this case was made in November, 1873. A petition for discharge had been filed in August, 1875. The present petition for discharge was filed in November, 1876. It was objected that the court had no jurisdiction to grant the discharge, on the ground that a prior petition for discharge was still pending and undetermined. *Held*, that the objection was frivolous, that no discharge could have been granted on the prior petition, because not seasonably made, and that the proceedings under it were abandoned when this petition was filed.

3. Whenever an objection to a discharge rests on facts, there must be a specification, in order that the bankrupt may produce evidence, and that there may be a trial of the fact.

[In the matter of Douglas L. White, Samuel W. Barnard, and Alanson S. Page, bankrupts.]

Gleason & Carter, for bankrupt.

J. H. Work, E. R. Robinson, and Burrill, Davidson & Burrill, for trustees and opposing creditors.

CHOATE, District Judge. This is an application for a discharge on the part of Alanson S. Page, one of the bankrupts. The creditor's petition was filed July 24, 1873, against White, Barnard and Page, composing the firm of White & Co., and they were adjudicated bankrupts November 5, 1873. Page's petition for discharge was filed November 14, 1876. The trustees and several creditors filed specifications on which testimony has been taken.

1. The first four specifications are for alleged preferences made by the transfer of property situated in Canada, consisting of very valuable rights to cut timber, lumber mills and logs, and other personal property used in and about the business of the two firms of A. S. Page & Co. and Page, Mixer & Co., which property is alleged by the objecting creditors to have been the property of White & Co., the said firms of A. S. Page & Co. and Page, Mixer & Co. being, it is alleged, merely the firm of White & Co., under these names. The transfers in question are dated June 26, and July 8, 1873, and were made by way of mortgage to Canadian creditors in consideration of advances to carry on the business and in trust to secure payment of the debts of the firms of A. S. Page & Co. and Page, Mixer & Co., respectively. The property appears by the evidence in both cases to have been worth more than the advances and the debts secured thereby provided the business should be continued, but insufficient for the payment of those debts if the property had been closed out under forced or judicial sale, upon the winding up of the business. The business of White & Co. was that of lumber dealers, and their principal place of business was at Albany. They were also known as the International Lumber Co. The lumber was obtained largely from Canada, and the two firms of A. S. Page & Co. and Page, Mixer and Co. were established the one at Belleville, Ontario, the other at Collingswood, Canada. The three bankrupts, White, Barnard and Page, were members of both these firms, but in each of the firms there was another partner, at least nominally; in the one William Jones, who acted as the managing partner of the firm of A. S. Page & Co., and in the other Harvey M. Mixer, whose name appears in and who was the resident manager of the firm of Page, Mixer & Co. White & Co. also had branches or closely connected auxiliary firms in Chicago and other places, and they became embarrassed on or before May, 1873, some of their paper then going to protest, and their liabilities on their own account and for accommodation of other parties were very large. At the time the transfers in question were made, the creditors of the firms of A. S. Page & Co. and Page, Mixer & Co. were threatening legal proceedings to have the property in question, which was ostensibly the property of those firms in Canada, sequestrated under the laws of that country relating to insolvent debtors, or seized for the payment of their debts, and if this had been done the evidence shows that the depreciation in the value of the property would have been very great from the immediate cessation of the business which would necessarily have followed. The objecting creditors insist that even if the firms of A. S. Page & Co. and Page, Mixer & Co. were distinct firms from White & Co., the property in question was in fact the property of White & Co., and not the property of those firms, and they also insist that inasmuch as Jones and Mixer were paid fixed salaries and did not share in the capital or the profits, they were not partners in those firms respectively, and consequently that those firms were not distinct from White & Co. and that all this property should have gone to all the creditors of White & Co. equally.

I have not found it necessary to determine whether Jones and Mixer as between themselves and White, Barnard and Page were to be considered partners or not, because there is no doubt of the fact that they were held out to the world as partners by White, Barnard and Page, and the firm of White & Co. And the firms of A. S. Page & Co. and Page, Mixer & Co., as separate firms with different partners, were allowed to trade and acquire and hold property, borrow money and incur

debts on the faith of Jones and Mixer being partners, and generally as to their separate creditors were treated as distinct firms with Jones and Mixer as members respectively, and the property in question was suffered to be in their possession and managed by them as their stock in trade and firm property. Therefore, without regard to the question very learnedly discussed at the bar, whether the courts of Canada would give any extra territorial effect to an assignment under the bankrupt law of the United States, so that a title under such an assignment to personal property situated in Canada would be superior to liens afterwards acquired or attempted to be imposed under the laws of Canada, I am satisfied that the circumstances under which those transfers were made were such that they were not preferences within the meaning of the act so as to deprive the bankrupt of his discharge. They were recommended by some of the principal creditors of White & Co., at an informal meeting of their creditors, as the best thing to be done under the circumstances, in view of the claims and threatened action of the Canadian creditors, in the expectation that by the advances secured for carrying on the business in Canada a large surplus would remain for White & Co. or their creditors. In fact the bankrupts simply yielded to what seemed to be a claim on the part of the creditors of A. S. Page & Co. and Page, Mixer & Co. which could not, as they believed, be resisted, and the attempt to resist which would probably have resulted in the entire loss of the property to the creditors of White & Co. On the evidence I think that the transfers were made in good faith, with the purpose and intention of doing what the bankrupts believed at the time to be for the advantage of all concerned, and in the belief that they would thereby avoid bankruptcy, and also in the belief that the transfers might lawfully be made without injury to the legal rights of the creditors of White & Co. In fact the transfers resulted in the creditors of White & Co. realizing about two hundred and fifty thousand dollars out of the surplus remaining after payment of the debts of A. S. Page & Co. and Page, Mixer & Co.

2. The objection that the court has no jurisdiction to grant the discharge, on the ground that a prior petition for discharge had been filed August 4, 1875, which is still pending and undetermined, is not valid. No discharge could have been granted under that petition because not seasonably made. The present petition is filed in accordance with the amendatory act of July 26, 1876. The proceedings under the first petition were abandoned when this petition was filed. An order might have been entered at any time dismissing the former petition. It can now be entered, if desired, nunc pro tunc. The case has been fully tried and heard on the merits under this petition, and the objection is frivolous.

3. The point taken on the argument that Page was a member of other firms, as a partner in which he is indebted, and that said other firms are not in bankruptcy, and that therefore he cannot be discharged because he cannot be discharged from all his debts, is not available to the opposing creditors. The point involves proof of the fact that there are outstanding and unpaid debts of such other firms. Wherever the objection to a discharge rests on facts, there must be a specification, in order that the bankrupt may produce evidence and that there may be a trial of the fact. The case of In re Plumb [Case No. 11,231] is relied on. The record there shows that the point was raised under a specification duly made and tried. It is said that the schedules filed in this case show such debts of other firms. But the fact may be that those debts were all paid or discharged before the petition for discharge was filed, or before the testimony was taken. The objection resting on a matter of fact, and not being taken by specification, the bankrupt was not called on to take any notice of what may have incidentally appeared, which if the specifications had covered this objection, might have been evidence against him.

4. The only other objection urged is the withdrawal of certain moneys from the agents of White & Co. for the benefit of Page or his firm of Page & Benson. It is enough to say the evidence does not sustain the specifications.

Discharge granted.

WHITE, The. See Case No. 7,005.

Case No. 17,534.

WHITE et al. v. ADAMS.

[5 Ben. 355.] [1]

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

SEAMEN'S WAGES—ABANDONMENT OF SHIP.

1. Where a ship, loaded with railroad iron, and leaking, in heavy weather, was abandoned, and the seamen afterwards filed a libel to recover wages for the whole voyage, on the ground that she was fraudulently abandoned, *held*, that, though there were some extraordinary features in the case, the court was satisfied that the master acted according to his best judgment in abandoning the ship, and the court would not adopt a different judgment now.

2. The seamen, therefore, could not recover wages for the voyage, but were entitled to recover wages till the abandonment.

[This was a libel for seamen's wages by Charles White and others against Samuel P. Adams.]

Wilcox & Hobbs, for libellants.

Man & Parsons, for respondent.

BENEDICT, District Judge. The bark Nellie Chapin, on the 7th day of October, 1869, while on a voyage from Bristol to Lisbon, was abandoned at sea. The crew, together

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

with a boat, some sails, provisions, and other articles, were taken off by a passing vessel. Four of the seamen now bring this action to recover of the owners of the bark wages for the whole voyage, upon the ground that the master fraudulently abandoned the vessel, and thereby unlawfully prevented them from performing their contract.

The evidence certainly presents some extraordinary features; but whatever else might be held to be the proper conclusion to be drawn respecting the conduct of the master in abandoning his vessel, the charge of fraud cannot be held to be sustained. The evidence leaves no doubt in my mind that the vessel was abandoned in good faith, solely because the master came to the conclusion that if they failed to take refuge in the vessel which spoke them, and by which they were carried into Barcelona, he would assume an unwarranted risk of the loss of their lives. It is true that the evidence affords some foundation for the argument that the fears of the master were exaggerated, and that if a bolder course of action had been adopted, it would have resulted in saving the vessel, with all on board; and it would seem that the crew was not unwilling to run the risk of continuing with the vessel. But the ship was loaded with railroad iron, she was leaking, the sea was heavy, and the weather not encouraging, and in view of the circumstances, and under the responsibility upon him, the master adopted the course which, I cannot doubt, upon the evidence, was the one which commended itself to his judgment. It is not for a judge sitting in his room ashore to decide that the honest conclusion of a master, arrived at under such circumstances, was unjustifiable, because, after the fact, and in the cold light of a judicial examination, the facts may appear to lead to a different conclusion as to what would have been the best course for the master to pursue. I therefore hold that the libel cannot be maintained for the whole amount of wages for the voyage. The libellants are, however, entitled to recover wages up to the time of leaving the ship, and a decree will accordingly be entered in their favor for any balance that may appear to be due them up to that time.

WHITE (ADAMS v.). See Case No. 68.

Case No. 17,535.

WHITE et al. v. ALLEN.

[2 Fish. Pat. Cas. 440; 2 Cliff. 224; Merw. Pat. Inv. 705.] [1]

Circuit Court, D. Massachusetts. Nov., 1863.

PATENTS—PRESUMPTION OF ORIGINALITY—FOREIGN PATENTS—PRIORITY OF INVENTION—REDUCTION TO PRACTICE — ABANDONMENT — TRANSLATING FOREIGN PATENT—FIRE ARMS.

1. The presumption of originality arising from the grant of a patent only extends back to the time when the application was filed in the patent office.

[Cited in Seymour v. Osborne, 11 Wall. (78 U. S.) 538.]

2. Where a foreign patent, granted before the application of the American patentee, is relied upon to destroy the novelty of the American patent, the patentee may prove that his invention was made prior to the granting of the foreign patent.

3. While the suggested improvement rests merely in the mind of the originator of the idea, the invention is not completed within the meaning of the patent law, nor are crude and imperfect experiments sufficient to confer a right to a patent.

[Cited in La Baw v. Hawkins, Case No. 7,960; Reeves v. Keystone Bridge Co., Id. 11,660; Gottfried v. Philip Best Brewing Co., Id. 5,633.]

4. Mere discovery of an improvement does not constitute it the subject-matter of a patent, although the ideas which it involves may be new, but the new set of ideas, in order to become patentable, must be embodied into working machinery and adapted to practical use.

5. While he is the first inventor who has first perfected and adapted the invention to use, yet this general rule is subject to the qualification that he who invents first shall have the prior right, if, as is prescribed in section 15 of the act of 1836, he is using reasonable diligence in adapting and perfecting the same within the meaning of that provision.

[Cited in Judson v. Bradford, Case No. 7,564; National Filtering Co. v. Arctic Oil Co., Id. 10,042; Electrical Signal Co. v. Hall Signal Co., 6 Fed. 606; Christie v. Seybold, 55 Fed. 76.]

6. Where an invention is voluntarily broken up and laid aside, without any controlling impediment in the way of an application for a patent, and another, in the mean time, invents the same thing, without any knowledge of that which is so suspended, and reduces the same to practice, applies for and takes out his patent, and introduces the patented invention into public use, he must be regarded as the original and first inventor of the improvement.

[Cited in Consolidated Fruit Jar Co. v. Wright, Case No. 3,135; Seymour v. Osborne, 11 Wall. (78 U. S.) 538.]

7. Where the patentee invented an improvement as early as the year 1849, and continued to experiment and perfect his invention until 1852, but did not apply for or obtain his patent until 1855, but it appeared that, during the whole time from 1849 to 1855, he was in the employ of one who held a prior and controlling patent, which prevented the use of his improvement, and it appeared that he delayed his application, and was advised to delay it on this account, only—*held*, that these facts did not prove abandonment, and that the patent granted in 1855 was valid, notwithstanding a patent granted in Belgium June 16, 1853, to other parties.

8. In determining the proper reading of a disputed translation of a foreign patent, the following considerations are applicable: (1) Which translation is most literal; (2) the question should be examined in view of the other parts of the instrument not involved in any doubt; (3) recurrence should be made to the nature of the invention to see if it is consistent with either or both readings; and (4) if it be found that one of the translations is repugnant to other parts of the instrument, and the other is consistent with the other parts, it will be safe to adopt the latter.

9. The phrase, "se chargeants par la culasse" does not mean "breech loading," but "loading at the breech."

[1] [Reported by Samuel S. Fisher, Esq., and by William Henry Clifford, Esq., and here reprinted by permission. Merw. Pat. Inv. 705, contains only a partial report.]

10. Letters patent granted to Rollin White for an improvement in repeating fire arms, dated April 3, 1855, examined and sustained.

This was a bill in equity filed to restrain the defendant [Ethan Allen] from infringing letters patent [No. 12,648] for an "improvement in repeating fire arms," granted to Rollin White, April 3, 1855, the exclusive right to manufacture which improvement was assigned to Horace Smith and Daniel Wesson, November 17, 1856. The invention consisted in extending the chambers of the rotating cylinder of a revolving fire arm right through the rear of said cylinder, for the purpose of loading the chambers at the breach from behind, either by hand or self-acting charges; and also in certain devices intended to adapt the main improvement to practical and successful use.

The claims of the patent were as follows: "I claim: 1st. Extending the chambers a a of the rotating cylinder A right through the rear of the said cylinder, for the purpose of enabling the said chambers to be charged at the rear, either by hand or a self-acting charger, substantially as described. 2d. The application of a guard to cover the front of all the chambers of the cylinder which are not in line with the barrel, or any number thereof which may have been loaded, combined with the provision of a proper space for the lateral escape of the exploded powder, substantially as described, whether the said space be between the cylinder and guard, or in rear of the cylinder, and whether the said guard be constructed with a recess to receive the balls, or be of such form as merely to stop the balls. 3d. Combining a charging piston C with the hammer, by means of gearing, substantially as described, or by the equivalent thereof, in such a manner that, by raising the hammer to cock the lock, the piston is moved toward the chambered cylinder to force a cartridge from the magazine into one of the chambers thereof, and by the falling of the hammer, the piston is withdrawn to allow a new cartridge to be supplied readily to be driven into the next chamber of the cylinder, as the hammer is again raised to cock the piece, as fully set forth 4th. Furnishing the hammer with an attachment m, by which in the act of falling, it may close the mouth of the magazine, substantially as described, before exploding the priming, and thus protect the charges within the magazine from ignition."

[2] [The respondents produced and put in evidence letters-patent granted to Hertog and Devos, in Belgium, on the 17th of June, 1853, as anticipating the complainants' patent by about two years. It appeared from the testimony that, under this foreign patent, pistols constructed in conformity with the first claim of the complainants were publicly sold in the years 1853 and 1854. A French patent of one Lefaucheux was also introduced by the respondents as exhibiting a series of revolving barrels, each with an opening at the rear end for convenience in loading, and having a guard-plate or breech-plate to prevent the passage of the flame towards the rear, at the discharge. It was contended by the respondents that complainants' pistol was simply the application of the Lefaucheux method to the arm known as the Colt pistol, where the breech is composed of a cylinder of chambers, arranged upon a common centre, so located that as the cylinder revolves, the several chambers are brought in succession, in line with the barrel, to be fired. The pistol manufactured by the respondents consisted of a many-chambered cylinder bored entirely through, the calibres being cylindrical instead of conical, and using a cartridge with a flange at the but, and all of the chambers arranged in a circle, and charged at the rear. The respondents contended, that upon the evidence of the first-named complainant, he had not shown by his account of his experiments that he had, prior to June 16, 1853,—the date of the Hertog and Devos patent,—made an invention, in the sense of the patent law, of the thing claimed by him, in the first claim; and if so, that he subsequently abandoned his invention. Sufficient attention to this part of the testimony is found in the opinion of the court. The respondents admitted that they had manufactured and sold revolving cylinder pistols, having the chamber bored right through to the rear, so as to be loaded at the rear.

[E. W. Stoughton, C. M. Keller, and E. F. Hodges, for complainants. When a patentee sues for infringement of his invention, and old machines or public descriptions are set up as prior thereto, he has a right to go back, not merely to the time when he reduced his invention to a practical working form, but to the time when he developed it as an intellectual conception, and reduced it to such condition that an artisan could make it from his description. Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448. An infringer, in order to defend himself, if he sets up a prior machine, must show that he reduced it to a practical working form; but a patentee, in order to show the date of his invention, is not compelled to make that proof, but may show when the invention was so far completed that the work of the artisan only was requisite to reduce it to practice. The question of abandonment is always one of intent, to be gathered from the evidence, unless evinced by permitting an invention to be used by the public so long that the court will presume the party intended to abandon it. There is no evidence of abandonment in this case. The respondents cannot say that complainants' invention, which they have used, is a useless one. If it is said that respondents employ the complainants' invention with improvements which make it useful, then this proves that the original invention was useful. Gray v. James [Case No. 5,718].

[2] [From 2 Cliff. 224.]

[B. R. Curtis and Causten Browne, for respondents. No invention, in the sense of the patent law, was made by the complainant in 1849. This is a case where an American inventor is endeavoring to make a title against the public, who had come into possession of the thing patented, under a foreign patent, brought into use in this country before the American patent was taken out. In such case it is not enough for the inventor to show that at a prior date he had done something in his own mind, or written it upon paper; he must show that he embodied the invention in practical form. Johnson v. Root [Case No. 7,409]; Cahoon v. Ring [Id. 2,292]. The opening of the bores at the rear was not new when used by the complainant. The complainants' invention, if there was any, consisted in the application of this system to the many chambered pistol. The application of an existing device or mode of operation, to an analogous subject, no new means of application being devised, is not the subject of letters-patent, and if new means are devised, then the patent is limited to those means. Brunton v. Hawkes, 4 Barn. & Ald. 541; Bean v. Smallwood [Case No. 1,173]; Horton v. Mahon, 6 Law T. (N. S.) 289; Ormson v. Clarke, 7 Law T. (N. S.) 361; Brook v. Aston, 8 El. & Bl. 478.] [2]

CLIFFORD, Circuit Justice. This is a bill in equity brought by the complainants to recover damages for an alleged infringement of certain letters patent belonging to them, and praying for an account and for an injunction. Letters patent were duly granted to the said Rollin White April 3, 1855, for certain new and useful improvements in repeating fire arms, and the complainants allege that prior to the granting of those letters patent, he was the original and first inventor of the improvements therein described, and that the other two complainants, on November 17, 1856, by virtue of a certain contract or assignment of that date, became, and are, the owners of the sole and exclusive right to make, use, and vend the improvement embodied in the first claim of the patent. They also allege that the respondents had full knowledge of the existence of the patent, and of their exclusive rights under it, and that they, the respondents, at Worcester, in this district, on January 1, 1858, and since that time, have unlawfully made and sold twenty-five thousand pistols and revolving fire arms, substantially embracing their patented improvement. Respondents admit that the letters patent set forth in the bill of complaint were granted to Rollin White, but they deny that he was the original and first inventor of the improvements therein described. On the contrary, they allege that anterior to the supposed discovery thereof by the patentee, the same invention, or substantial and material parts thereof, claimed therein as new, had been described in certain public works, and had been patented to various persons in foreign countries, and that the same had previously been invented by, known to, and used by divers persons, at the several places in the United States, as alleged and fully set forth in the answer, and they also allege that the improvements attempted to be patented to the supposed inventor, had been in public use and on sale for more than two years before his application for a patent therefor, and with his consent and allowance, and they deny that the patentee did, at any time prior to the date of his patent, invent and reduce to practice any such improvements as those described and claimed in his specification. Application for the patent was filed February 20, 1855, and the letters patent were duly granted to the patentee at the time alleged in the bill of complaint. Patentee states in the specification, that his invention relates to fire arms having the rotating, many-chambered cylinder, and he therein divides the supposed improvements into four parts, but reference will here be made more especially to the first part, as that is the only one which necessarily comes into revision in this case. Adopting the general description of the specification, it consists in extending the chambers through the rear of the cylinder, for the purpose of loading them at the breech from behind, either by hand or by a self-acting charger, from a magazine placed in the rear of the cylinder. Description is also given of the several elements of which the improvement under consideration is composed.

Omitting the references to the drawings, the description is in substance and effect as follows: First. The rotating, chambered cylinder having the chambers bored right through it and made slightly conical, with the smallest part in front, in order that a cartridge may be inserted easily at the back and that the ball may fit tight, so that when it arrives in its place it shall remain and not go through till the charge explodes. Secondly. The pin upon which the breech rotates, by means of a tooth attached to the trigger. Thirdly. The stock, which is constructed with a recess or groove in the side of it, to afford sufficient room in rear of the cylinder, opposite one of the chambers, for the insertion of a charge by hand, at the rear opening of the chamber. Fourthly. The fixed breech piece arranged opposite the barrel, behind the cylinder, to serve as a breach to the chamber, which happens to be in line with the barrel. Based upon that description, the claim involved in this suit is, extending the chamber of the rotating cylinder right through the rear of the said cylinder, for the purpose of enabling the said chamber to be charged at the rear, either by hand or by a self-acting charger, substantially as described.

Recurring to the answer, it will be seen that the respondents admit that they have manufactured and sold revolving cylinder pistols, having the chambers of the cylinder

[2] [From 2 Cliff. 224.]

bored right through to the rear, so as to be loaded at the rear, and the same admission was made at the argument, without any qualification whatever. Considering the state of the pleadings, and in view of the admission of the respondents, it is quite evident that the principal question presented for decision is, whether Rollin White is or is not the original and first inventor of the improvement embodied in the first claim of his patent?

Power to grant letters patent is conferred by law upon the commissioner of patents, and when that power is lawfully exercised, and a patent has been duly granted, it is prima facie evidence that the patentee is the original and first inventor of that which is therein described and secured to him as his invention. Availing themselves of that rule of law, the complainants introduce the patent granted to Rollin White, and contend—and well contend—that its effect is to cast the burden of proof upon the respondents to prove the defense set up in the answer. Conceding the rule of law to be as stated, the respondents introduced two foreign patents on which they chiefly rely to establish their defense. Both of those patents will be examined, but it will be more convenient to reverse the order adopted at the bar, because the complainants admit that the one granted in Belgium to Hertog & Devos, June 16, 1853, is for the same invention as that embodied in the first claim of the patent on which the suit is founded. Granting that proposition, it is obvious that the suit can not be maintained, unless it appears that the invention claimed by the complainants was made by the patentee at some period prior to the date of that patent. Complainant's patent was granted, it will be remembered, April 3, 1855, long after the date of the foreign patent, and the presumption of originality, arising from the granting of the same, only extends back to the time when the application was filed in the patent office, which was on February 20 in the same year. Unless, therefore, the complainants show that the invention embodied in the patent claimed by them was made and reduced to practice prior to June 16, 1853, they can not prevail in the suit, and the burden of proof is shifted upon them to establish those facts. They do not controvert any of these propositions, but refer to the deposition of the patentee, and insist that his testimony, as there exhibited, establishes the priority of his invention over that described in the foreign patent under consideration. According to his testimony, he learned the gun-making business of his brother, J. D. White, at Williamstown, in the state of Vermont, and he states that the first fire arm he ever saw, so constructed as to be loaded at the breach, was a flint-lock pistol, owned by his father, when he was about ten years of age. His description of the pistol is, that the barrel unscrewed from the breech pin and received the charge at the rear end, and, of course, when the cartridge was placed in position, had to be rescrewed to the breech pin before the pistol could be fired. Assuming his statements to be true, he himself first contrived a plan for a repeating pistol in 1837, but he admits that he never constructed a fire arm or model on that plan until he made the illustrative model produced before the commissioner at the time he gave his deposition in this case. When he made that plan, he contemplated, as he represents, extending the bore of the chambers through the breach, for the purpose of loading in the rear of the chamber, and he also states, to the effect, that the charges were to be held in the respective chambers by a leather packing. Inquiry was also made of the witness, what, if anything, was to resist the discharge at the rear end when the pistol was fired, and his answer was, that the chamber in line with the barrel would rest against the pinion that revolved it, and that the pinion, on the plan suggested, would form the breech to the chamber as the discharge should take place; and he also stated, in answer to a further inquiry, that the plan contemplated communicating the fire for the discharge by means of nipples, to be inserted into the chamber in front of the packing, to be employed to hold the charge in place. Useful as the fire arm suggested might have been, if the plan had been carried into effect, and the invention had been completed, still it is obvious that the mere conception of the improvement by the witness, however perfect the idea may have been, and although he actually described the plan to one person, can not benefit the complainant in this case, because his own testimony shows that he never completed the invention, and reduced it to practice, in the form of an operative fire arm. Original and first inventors are entitled to the benefits of their inventions, if they reduce them to practice, and seasonably comply with the requirements of the patent law, in procuring letters patent for the protection of their exclusive rights. While the suggested improvement, however, rests merely in the mind of the originator of the idea, the invention is not completed within the meaning of the patent law, nor are crude and imperfect experiments sufficient to confer a right to a patent; but in order to constitute an invention, in the sense in which that word is employed in the patent act, the party alleged to have produced it must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form. Gayler v. Wilder, 10 How. [51 U. S.] 498; Parkhurst v. Kinsman [Case No. 10,757]; Curt. Pat. § 43. Mere discovery of an improvement does not constitute it the subject-matter of a patent, although the ideas which it involves may be new; but the new set of ideas, in order to become patentable, must be embodied into working machinery and adapted to practical use. Sickels v. Borden [Case No. 12,832].

Whoever first perfects a machine and makes it capable of useful operation, says Judge Story, is entitled to a patent, and he accordingly held, in Reed v. Cutter [Case No. 11,645], that an imperfect and incomplete invention, resting in mere theory, or in intellectual notion, or in uncertain experiments, and not actually reduced to practice, and embodied in some distinct machinery, apparatus, manufacture, or composition of matter, was not patentable, under the patent laws of the United States. Pursuant to that rule, the same learned judge also held, that he is the first inventor, in the sense of the patent act, and entitled to a patent for his invention, who has first perfected and adapted the same to use, and that, until the invention is so perfected and adapted to use, it is not patentable under the patent laws. Washburn v. Gould [Id. 17,214]; Woodcock v. Parker [Id. 17,971]. Taken as a general rule, no doubt is entertained of the correctness of the proposition as stated, but it must be regarded as subject to the qualification, that he who invents first, shall have the prior right, if, as is prescribed in section 15 of the patent act, he is using reasonable diligence, in adapting and perfecting the same within the meaning of that provision. Reed v. Cutter [supra]; Marshall v. Mee [Case No. 9,129], per Dunlap, J.; Bartholomew v. Sawyer [Case No. 1,070]. Careful attention, however, must be paid to other portions of the testimony of this witness. Pistols, with a cluster of barrels revolving on an axis, so that each barrel may in turn be brought into proper line to be fired, were first seen by him, as he states, in 1839, at the shop of his brother in the state of Vermont, where he learned his trade, and he also states that, upon seeing it, he suggested to his brother, the expediency of cutting off the barrel in front of the breech, for the purpose of loading it in the rear end of the barrel. His statement is, that he made the suggestion in 1839, but there is no evidence that any such experiment was made at the time, or that any attempt was then made to carry the suggestion into effect. Witness subsequently gave some attention to the subject of inventions, and in 1841 a patent was granted to him for an improvement in looms for weaving bolting cloths. Eight years after the date of this patent, he went to work for Samuel Colt, in the manufacture of repeating fire arms. On that occasion, he worked there from February to April, and then left, but he returned again about the first of August, in the same year, and continued there engaged in that work, from the time he so returned, until December, 1854, when the owner of the establishment ceased to manufacture by contract. When he first went there, he had a contract for turning barrels under his brothers, and when he returned again, he took another contract under them for rifling and polishing the barrels, but from April, 1852, to the time he finally left, he worked under a contract with the owner to manufacture certain parts of the locks. Certain experiments in constructing a pistol having a rotating cylinder with the chambers bored entirely through, and in the use of it after it was constructed, were made by the witness during the period he was at work in that establishment; and in view of their importance in this investigation, they will be separately considered.

(1) Before he left the first time, and while he was at work turning barrels, he procured two refuse Colt's cylinders, borrowed a cutting-off tool of an acquaintance, placed them in a lathe that he used for turning the barrels, and cut off the front of one and the rear of the other, so that the two parts when put together, that is, the front of one and the rear of the other, would make a cylinder of about the usual length. Easily as the alteration was made, still it is evident that the result effected by it was of very great importance, as it constituted the front part a cylinder of chambers, bored entirely through, so as to admit the charges to be inserted at the rear end, and it, at the same time, constituted the rear part cut off from the other cylinder, a breech to close up the chambers after the cartridges were placed in position. Flanged cartridges were not used by him in that experiment, but he drilled out the rear end of the chamber, making it a little larger than it was at the front, for the purpose of holding the ball in position. Drilling out the rear end of the chamber, leaving the front of the same diameter as it was before, had the effect to form a flange in the same, against which the ball would rest when inserted at the end so enlarged, and was designed, undoubtedly, to answer the same purpose as the flanged cartridge, or the conical bore of the cylinder which has since been introduced. Circumstantial account is then given of what he subsequently did with the parts so selected, and of the way in which he attached them to the lock frame of a pistol which he borrowed for the purpose of the experiment, and of the manner in which he loaded and fired the arm so constructed and arranged. When he had completed the parts as described, he carried them to his boarding-house, procured a Colt revolving pistol of a fellow boarder, took off the barrel and the cylinder, charged one chamber of the cylinder he had prepared, with powder and ball, putting the ball foremost, and inserting the charge into the chamber until the ball came in contact with the flange or shoulder made by the drilling, and then arranged the cylinder and breech together, as already described, and fastened on the barrel, which completed the arrangement. Desiring to fire it secretly, for reasons which will presently appear, he then went across the street to a neighboring shop, and there made inquiry of the foreman, who was a workman of his acquaintance, whether or not there was a good place in the shop where he could fire his newly-constructed pistol. Responsive to that inquiry, he was shown into the basement of

the building, and there he arranged the parts of the pistol in proper position, and fired the charge through an open space in the floor, into the water below. Whether the owner of the shop knew that he was there or not, the witness is not able to state, but the workman who showed him the place knew it, and the witness thinks he was near when the pistol was fired. Regarded as a whole, the experiment, as the witness states, was not satisfactory, because there was so much escape of the flame, that if the other chambers had been charged in the same way, the charges would have ignited.

(2) Witness made another experiment about the same time, but with a much better result. He employed, on the second occasion, the same cylinder and breech as on the first, and he loaded it in the same way, except that he did not quite fill the chamber with powder, leaving sufficient space, so that he could put in a packing prepared for the purpose, which consisted of a piece of leather, fitted to the bore of the chamber, and inserted behind the powder, and made with a central conical hole, larger on the inside than the outside, and which, it was supposed, would be so expanded by the discharge as to prevent the escape of the flame at the rear. Having perfected the leather packing, and put the pistol in order for use, he went to the same shop as before, and fired it again in the basement of the building, and he states, without qualification, that the packing stopped the escape of the flame, and that he was satisfied with the experiment. Both of these experiments were made while the witness was engaged in turning pistol barrels in the establishment of Samuel Colt, and before he left there the first time.

(3) Subsequently to that time, and after he came back in the month of August, in the same year, he made a third experiment. Whether he took the same breech, or another with a ratchet on it, so that it could be turned by the machinery of the lock, is immaterial in this investigation, as in all other particulars they were substantially the same, so far at least as respects the questions involved in this controversy. Attention to what he did on the occasion, will show that the experiment was one of very great importance. First, he loaded all the chambers with powder and balls, nearly filling the chambers with loose powder, and putting in the leather packing, as described in the preceding experiment, and he states that each chamber had its nipple, and that all were capped. Secondly, having loaded all the chambers of the cylinder and adjusted the breech to the same, he again borrowed a Colt's pistol, either of the same person or of his brother, took off the barrel and cylinder, as he had done before, and attached the loaded cylinder, together with the breech, to the lock frame, as before explained, and put the same in order for use. Thirdly, he then proceeded to the same shop, and there, in the basement of the building, fired and discharged all the chambers, one after another, and he states that the pistol operated well and to his satisfaction, and that it was seen by one of the workmen in the shop, and by one of his brothers.

(4) His fourth experiment was indubitably made with a Colt's cylinder, having the ratchet arrangement on it, and its importance consists, not only in the improvements made, both in the cylinder and the breech, but also in the fact that the witness successfully repeated all that he had accomplished in the preceding experiment. Employing the language of the witness, his statement is, that "he drilled the breech the size of the chamber" through to the recess cut for the shoulder of the nipple, and then he borrowed an arbor, put the cylinder into it, and turned off the rear part of the same below the center, so that he could insert a cartridge in the rear. Particular attention should also be given to the several improvements made in the breech and its attachments or connections, and in the general arrangement of the arm. Adopting the same course as on the former occasion, he procured another refuse cylinder that had the central hole in it, cut off the rear end of it as he had done before, drilled the hole larger, so that it would slide on to the rear part of the cylinder he had just prepared for the experiment, and in that manner formed the breech, and having arranged the breech, he drilled a hole and inserted a nipple, and then attached the cylinder to the lock frame, marking it by the frame so that he could make it correspond with the recess in the lock frame for the purpose of capping the nipple, and he states, in respect to this experiment, that he so constructed the pistol that he could load it in the rear without removing the cylinder from the lock frame. Constructed and arranged as described, he loaded the pistol, using packing to stop the escape of the flame, and went to the same shop and fired it; and he states that it operated satisfactorily, as it could hardly fail to do, as it was obviously precisely such an arm as that described in the patent on which the suit was founded. Doubt can not be entertained that the pistol, as described, was a complete arm; that the cylinder of chambers could be turned in front of a stationary breech by the mechanism of the lock, and that the several chambers of the cylinder could be brought in succession to the line of the barrel to be fired; and it is equally clear that it was so constructed and arranged that the charges could be inserted in the rear of the chamber without removing the cylinder. Precise dates are not given in respect to and of these experiments, but the proof is, as already exhibited, that they commenced as early as March or April, 1849, and that the one last mentioned was made during the latter part of that year, or the fore part of the year 1850.

(5) During the next year he made a fifth experiment, with a view to use Sharp's cartridges, with a cylinder like the one he had contrived, and, to make the trial, he took the same pistol used in the preceding experiment,

or one like it; but a portion of the recoil shield was cut away, so as to let the cartridge project out of the rear, leaving a shoulder on the recoil shield near the nipple, and the arrangement was such, that a knife projected over, and coming in contact with the cartridge, would cut it off at the rear end, so that when it came in line of the barrel, it would be ignited. Loading one chamber only, he could fire it with safety under the arrangement, but when the series of chambers were loaded, he found that upon firing it three or four went off at the same time, and the result was that the experiment was not satisfactory. All of these experiments, it will be remembered, were made by the witness while he was in the employment of Samuel Colt, and during the period when his employer was in the full enjoyment of his patent for his revolving pistol. Contracts held by him or his brothers gave him a profitable business, and he could not afford to relinquish it; and if he could and had done so, it would have availed him little or nothing, as his invention was only an improvement upon that of his employer. Fear of losing employment, and perhaps the dread of prospective litigation, deterred him from any attempt to secure a patent, and so he continued assiduously to fulfill his contracts, and occasionally to prosecute his experiments.

(6) Failing to adapt the arm he had invented to the use of the particular cartridge mentioned, his next effort was to see if he could not construct a joint between the breech plate and the rear end of the cylinder, sufficiently close by the contact of the metal surfaces to prevent the escape of the flame when the pistol was fired, without the necessity of using the leather packing, or any other equivalent means to confine the powder within the chambers; and with a view to determine that matter, he, in the year 1852, made a sixth experiment, which is the last to be particularly noticed in this investigation. Commencing as before, he procured two cylinders of the same kind, cut off the front of one, to be used as such, and the rear of the other, to be used as a breech, brazed a plate over the nipples of the latter, so as to make the surface smooth, and fitted the part used as a cylinder, and the breech, together as closely as he could, and have the arm the proper length to revolve in the lock frame. What he was endeavoring to accomplish was, to make the joint so tight that upon firing the pistol, the flame would not escape from one chamber to the others, and having perfected the arrangement as well as he could, he loaded the pistol, placed it in the lock frame and fired it, but the result was, that he found he could not prevent the escape of the flame in that way. Abandoning that idea as hopeless, he mentioned the failure to his brother, and told him what the result had been, and his brother inquired of him if he was sure he could accomplish the desired result by the use of the leather packing, and he, the witness, told his brother that he was, and to satisfy him that he could do so, he loaded the pistol, using the leather packing, and fired it, and carried the breech to the shop and exhibited it to his brother for his satisfaction. No appearance of any escape of flame or smoke could be seen, as the witness states, except what appeared in the hole of the leather packing, where the fire from the cap communicated with the charge. Witness exhibited the breech used by him on that occasion, before the commissioner, when he gave his deposition, and its identity is fully established by the testimony, and it is also fully proved that the same cylinder was preserved and used by him in constructing his model for the patent office. Much testimony was introduced by the complainants, to confirm the testimony of the patentee in relation to those several experiments, but it will be sufficient to say, without reproducing the testimony, that I am of the opinion that his statements are correct, and that no one of them, which is of any importance in this investigation, has been successfully contradicted. Taking the statements as true, they show that the patentee made the invention described in the first claim of the patent, and reduced it to practice as an operative fire arm, within the meaning of the patent law, as early as the fall of 1849, or the fore part of the year 1850, when his fourth experiment was completed.

Suppose it to be so, still it is insisted by the respondents that the supposed inventor afterward deserted and abandoned his invention, and, consequently, that he cannot be regarded in this controversy as the original and first inventor of the improvement. But if that proposition cannot be sustained, then they contend that the proofs show that he took the pistol he constructed apart, and laid the materials aside for years, as something incomplete and requiring more thought and experiment, before he attempted to restore the invention, and without any definite intention of resuming the undertaking, and they insist that the rule of law upon that state of the case is, that if another in the mean time invents the same thing, without any knowledge of that which is so suspended, and reduces the same to practice, applies for and takes out his patent, and introduces the patented invention into public use, he is entitled to the benefits of his skill and diligence, and must, in judgment of law, be regarded as the original and first inventor of the improvement, although it may appear that the final experiment of the other party was so far completed that the machine, or other invention, was, in fact, the proper subject of a patent, and that the materials were laid aside to preserve the parts, to be used or not in the future, as circumstances should arise. or as he should thereafter determine, yet without any positive unconditional intention of relinquishing

what he had accomplished, or of abandoning the invention. Nothing need be remarked in respect to the first of these propositions, except to say, that the evidence in the case is not sufficient to support it, and it is accordingly overruled. Unlike the first, the second deserves to be more carefully considered. Cases undoubtedly occur, such as are supposed in the proposition, where an individual employed in inventing, or in making experiments in that behalf, feeling dissatisfied with the result of his efforts, becomes discouraged in prosecuting the investigation, and finally loses all confidence in the prospect of his ultimate success, and under the influence of such discouragements, or from a desire to engage in more profitable business, or to pursue a more pressing or favorite undertaking, decides to break up what he has accomplished, and lays the parts aside, not positively intending to abandon the subject, yet wholly uncertain whether he will ever resume it or make any further use of the parts so laid aside. Such cases are doubtless of frequent occurrence, and while they do not show an unconditional abandonment of the undertaking, they do show an indefinite suspension of the same, and an entire uncertainty during such suspension, whether the interested party will ever furnish the invention to the public. Where an invention is thus voluntarily broken up and laid aside, without any controlling impediment in the way of an application for a patent, and under all the other conditions specified in the preceding proposition, and another, in the mean time, invents the same thing, without any knowledge of that which is so suspended, and reduces the same to practice, applies for and takes out his patent, and introduces the patented invention into public use, I am of the opinion that he must be regarded as the original and first inventor of the improvement. Federal courts have everywhere held that an inventor, who has first actually perfected his invention, will not, if he has exercised good faith, be deemed to have surreptitiously or unjustly obtained a patent, for that which was in fact first invented by another, unless the latter was at the time using due diligence in adapting and perfecting what he had accomplished; and it was expressly held in Ransom v. Mayor of New York [Case No. 11,573], per Hall, J., that if a person does not use due diligence, in perfecting his invention after he has conceived the idea, and another conceives the same idea and perfects it, and secures his patent and applies it to use, the latter will be considered as the original and first inventor, and that a patent granted to the former will be void. See Reed v. Cutter [supra].

But the question to be decided in this controversy is, whether the proofs exhibited in the record bring this case within the operation of that rule of law? Some of the parts used in the several experiments to which reference has been made were preserved, as, for example, the revolving breech constructed with the nipples in it, as used in the sixth experiment, and it is an exhibit in the case, and the cylinder used in the same experiment, and several others of the identical parts used in those experiments were also preserved, and put into one or the other of his patent office models. Most or all of the other parts were put into a box, and were kept for a time in the attic of the house where he lived, and he states that when he moved from there, in shipping his goods, he lost the box, together with the materials, and it is upon the loss of these materials, and the delay that ensued in applying for a patent, that the respondents chiefly rely to support the theory of fact involved in the proposition. On the other hand, it undeniably appears that the invention held by the complainants is only an improvement upon the patented invention of Samuel Colt, who, for a long series of years, was an extensive and successful manufacturer of revolving pistols. Full proof also is exhibited that the patentee of the invention, under whom the complainants hold, was in the employment of that same manufacturer from the time he made his first experiment until he commenced to make his preparations with a view to apply for his patent; and that throughout that entire period, the well-known patent of his employer was in full operation. Direct inquiry was made of the patentee in this case, why it was that his application for a patent was so long delayed, and his answer was, that it was because his employer had a patent for the mode of revolving the pistol embraced in his improvement, and which he desired to use, and also because his employer had discharged certain men who had been experimenting on revolving pistols. Two or more of his brothers were employed in the same establishment, and on one or more occasions, when the witness exhibited his pistol to his brothers, he proposed to show the same to his and their employer, but they objected and remonstrated against the suggestion, upon the ground that if it were done, they would all lose their places. Meeting with these discouragements, he delayed his application for a patent, but there is no ground whatever to conclude that he ever, for a moment, intended to postpone his application for a patent any longer than it became necessary that he should do so in order to overcome those difficulties, and, consequently, the theory of fact involved in the proposition, can not be sustained.

Mention has not been made of the patent of John H. Johnson of April 17, 1854, because it is subsequent in date to the other foreign patent, and of course must fall within the same category.

Examination must also be made of the Lefaucheux patent of May 2, 1845, and also of a subsequent patent granted to the same per-

son, as set forth in the certificate of addition, of the seventh of February of the following year. Both of these patents, it will be observed, are prior to the date of the invention, embodied in the patent on which the suit is founded, but reference will only be made to the one first granted, as the means of explaining the invention described in the second, as it is not pretended that the first is of a character to supersede the invention held by the complainants. Parties agree, substantially, as to what the state of the art was at the time when the foreign patent under consideration was granted. Prior to that invention, there were two classes of fire arms which were well known and in extensive use. First, there was the pistol, sometimes called the pepper-box pistol, which was largely manufactured in foreign countries, and by Ethan Allen in the United States. When first introduced, it consisted, as usually constructed, of an aggregation of five or six barrels, which were formed by boring the several calibers in a solid block of metal, and the whole series were arranged in a circle about a central hole, fitted to a spindle projecting from a shield plate, and, of course, they could only be loaded at the muzzle, as the bore of the barrels did not quite extend to the other end of the block, which was unperforated, and left solid to serve as the breech of the fire arm. Improvements were made in that pistol, and patents were granted for those improvements, but they all had too much weight for a portable arm, and were more or less difficult of accurate aim, on account of the excess of weight at the muzzle, as compared with the ordinary pistol, and the consequent tendency to lower the muzzle in pulling the trigger. Following these improvements came the invention of Samuel Colt, which all admit was an improvement of great value. Instead of a cluster of rotating barrels, he provided a single barrel, which was connected with the handle of a stock, as in the ordinary pistol, and, in addition to the barrel, there was a cylinder of chambers, whose front end was joined to the barrel, and which were arranged upon a common center, and so located that, as the cylinder was turned, the several chambers were in succession brought in line with the barrel to be fired. Certain defects, however, always existed in that arm, and, among the number, was the want of efficient means to control or overcome the tendency of the recoil of the arm, when fired, to cause the remaining cartridges to protrude from the front of the cylinder; and whenever that happened, it would prevent the cylinder from revolving, so as to bring the next charge into the proper position. No remedy for that difficulty was shown in the patent, except that of ramming the cartridges in tight, and experience showed that the remedy was not always adequate to accomplish the purpose for which it was suggested. Such was the state of the art, as shown in this case, when Lefaucheux obtained his first patent "for arrangements of breech-loading pistols." According to his description of his invention, he forged the barrel of the pistol with a socket, having a cylindrical hole parallel to the bore of the barrel. By that socket, the barrel was united to the body of the pistol, by means of a fixed stem or arbor, which had a screw cut on its end, and which passed through the whole length of the socket, and bore on its end the thread of a screw to receive a nut, by which the barrel was held more or less tight, and the patentee states that it is only necessary to turn this nut slightly to the right or left, in order to fasten the barrel in its place or separate it from its connections, as circumstances may require; and he also describes the device on one side of the lock plate, which is designed to stop the barrel at the proper point, when turned on the arbor to be loaded, in order that it may be brought back, after it is charged, to its original position, to be ready to be fired. Loading was accomplished, as described, by swinging the barrel laterally so as to expose the rear end; and when the arm is charged, it is then brought back to its original position, so that the rear end may be closed by the breech plate. Important improvements were made in that invention, as appears by the description given of the same, in the specification of the certificate of addition, to which reference has already been made. Remarks should be made in the outset, in recurring to the last named invention, that the patentee, at the commencement of the specification, refers to the prior patent as the foundation of his improvement, and, throughout the description, proceeds upon the ground, that what is embodied in the certificate of addition, is a modification or improvement upon the invention described in the original patent.

In the introductory part of the description, he characterizes his former invention as a "system for pistols with one barrel," and his statement is, that the new modification or improvement relates to "pistols with several barrels," and there is no mention whatever made of pistols composed of a cylinder of chambers, united with a single barrel, and arranged upon a common center, and so located that, as the cylinder is turned, the several chambers are, in succession, brought in line with the barrel to be fired. Such a pistol is nowhere mentioned, described, suggested, or indicated in any part of the patent, unless it be assumed that the chambers of such a cylinder are the barrels of the pistol, and consequently that a pistol composed of a cylinder, although united to one barrel only, as described, is nevertheless, in the sense of the patent law, a pistol of as many barrels as there are chambers in the cylinder. All will agree, I think, that the patentee, when he framed the specification of his original patent, took no such view of the subject. On the contrary, it is clear, that when he stated that the invention was applicable to pistols with one barrel, he referred to the form of the barrel, as exhibited in the ordinary pistol, except

that it was open at the rear as well as the front end, and there is no solid ground for a different conclusion in respect to the invention embodied in the certificate of addition. Much attention, says the patentee, has been given to different plans of muskets, and especially of pistols, having several barrels that can revolve about a central axis as fast as they are successively discharged. Fire arms of the description mentioned, afford, as he states, the advantage of making it easy to fire as many times as the arm has barrels, without any interruption, but in his view, they also presented disadvantages which it becomes important to notice. He states, that in order to make use of them it was necessary to "unscrew each of the barrels, one after another, then load them, prime them, and screw them on again, each one in its respective place." His new mode of construction was invented to overcome those inconveniences, and he states that it is applicable to all the plans devised for this kind of arms with movable barrels, whether the cartridge does or does not carry the priming on it. Having made these several explanations, he then proceeds to describe the invention, and among other things says: "My invention consists simply in uniting all the barrels against" a single plate or disk, having a central axis, and in confining all these barrels by a single screw, which, while it holds them upon the axis, allows them to turn around it in succession as fast as the discharges take place." Stopping there it would not only be impossible to sustain the view of the respondents, but it would be impossible to entertain any doubt as to the true construction of the patent. But the description does not stop there, and what creates the difficulty is, that there is no translation in the record which is known to be authentic. Respondents presented one, but the complainants insist that it is erroneous, and one or more of their expert witnesses have so testified. Taking the passage in question as translated, the patentee is made to say, that the new arrangement is applicable, with the same ease, to all the mechanisms belonging to pistols with several barrels, as well as in general to the different breech-loading fire arms. Breech-loading is the phrase in dispute, and the original words are, "se chargeants par la culasse." Complainants' experts, one or more of them, testify that the phrase in our language should be, "loading at the breech," instead of "breech loading," as rendered in the translation. Embarrassment certainly arises in determining the question, but there are some considerations affecting the question which are plain and undeniable: First. The translation presented by the complainants is more literal than that assumed by the respondents, as is obvious, even to one but slightly acquainted with the language. Secondly. The question should be examined in view of the other parts of the instrument which are not involved in any doubt. Thirdly. Recurrence should be made to the nature of the invention, in order to ascertain whether it is really applicable to the fire arms involved in this controversy. Fourthly. If it be found that one of the translations is repugnant to other parts of the instrument, and the other is consistent with the other parts, it will be safe, under the circumstances, to adopt the latter, as expressing the real intention of the patentee. Guided by these rules, reference is again made to the description of the invention, which consists, as stated in the specification, simply in uniting all the barrels against a single plate or disk, having a central axis, and in confining all these barrels by a single screw, which, while it held them upon the axis, allowed them to turn as before explained. Looking at that description of the invention, it is obvious that the phrase "se chargeants par la culasse," if it be construed to include such fire arms as that of Samuel Colt, is inconsistent with other parts of the instrument, and incompatible with the nature of the invention, because it can not be so applied without borrowing the improvement held by the complainants, which is nowhere described in the certificate of addition. In view of the whole evidence bearing upon the question, I am of the opinion that Rollin White is the original and first inventor of the improvement described in the patent, on which this suit is founded, so far as respects the first claim of the patent, which is the only one involved in the controversy.

Several other defenses were presented at the argument, but it will be sufficient to say that none of them can be sustained, and they are accordingly overruled. Nothing need be added upon the subject of infringement, as it is virtually admitted in the pleadings and fully proved. The complainants are entitled to an account, and when the amount is ascertained, a perpetual injunction will be granted.

[For another case involving this patent, see Case No. 17,537.]

Case No. 17,536.

WHITE v. ARLETH et al.

[1 Bond, 319.] [1]

Circuit Court, S. D. Ohio. Feb., 1860.

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—EXCESSIVE DAMAGES—BREACH OF CONTRACT—PENALTIES—LIQUIDATED DAMAGES.

1. The court will not grant a new trial on the ground of newly-discovered evidence, unless satisfied that if a new trial was had a different result would follow.

2. The rule of damages for the non-fulfillment of a contract for the delivery of property, is the difference between the price at which it was agreed it should be delivered and its actual market value at the time and place of delivery specified in the contract.

3. The court will not set aside a verdict on the ground of excessive damages unless the damages are palpably excessive, or, if the ac-

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

tion is on a contract, they exceed the legal liability of the defendant under the contract.

4. Where it is stipulated in a contract that certain acts are to be done or omitted, and the contract is of such a nature that the actual damages of non-fulfillment are susceptible of computation in money, and a sum is named in the contract as a penalty or forfeiture for a violation, it is to be viewed as a penalty and not as liquidated damages, and in such case the actual damages sustained will constitute the rule of recovery.

5. Where the word "penal" or "penalty" is used in a contract, it must be construed as being so intended by the parties, but where a sum named is called "liquidated damages," it will be held as a penalty if it seems from the contract that it was so intended by the parties, and the justice of the case requires such a construction.

[This was an action by James White against Frederick Arleth and Andrew Shroth. Heard on motion for a new trial.]

J. Brown, for plaintiff.

R. M. Corwine and Joseph Egly, for defendants.

LEAVITT, District Judge. In this case a jury having rendered a verdict in favor of the plaintiff for damages, the defendants have filed a motion for a new trial, upon the grounds following: (1) The verdict was against the evidence. (2) Newly-discovered evidence. (3) Excessive damages. (4) Misdirection of jury by the court. The declaration is in covenant on an agreement under seal, averring that Arleth, as principal contractor, with Shroth as his surety, agreed to furnish plaintiff for six months from November 10, 1858, the still-slop of three hundred bushels of grain daily, at six and one-half cents per bushel. It is averred that Shroth bound himself as surety in the penal sum of one thousand dollars, that Arleth would run his distillery and furnish said quantity of slops for the six months and at the price stated.

Plaintiff avers his readiness and willingness to receive and pay for said slops, and avers as the breach of the contract that Arleth has failed to deliver the slops according to the agreement, and claims as damages the difference between the contract price of the slops and their market value at the time they should have been delivered. The pleas originally filed were: (1) A general plea of performance; and (2) that plaintiff had released and discharged the defendants from their obligation under the contract. The plea of performance was withdrawn before trial, and the case was put to the jury on the plea of release and discharge from the contract. The plaintiff proved by a witness, Leslie, that the hogs were at the distillery on the 10th of November, and that he was from that time ready to receive the slops; that no slops were delivered for several days after the 10th of November, and that up to the 26th of January following, there was only a partial delivery of the quantity required by the contract, and that on that day Arleth shut up his distillery and no more were delivered. The witness also stated that he was always ready as the agent of plaintiff to pay for the slops according to the contract, and did pay in full all that was delivered up to the 18th of January. It was also proved that the price of slops from November to January ranged from ten to twenty cents, and that the average price from January to May was about fifteen cents a bushel. Having offered this evidence, the plaintiff rested, and the defendant introduced a witness, Frederick Arleth, Jr., the son of defendant Arleth, who stated, in substance, that he was present at a conversation between his father and the plaintiff, on the 13th of November, in which Arleth said to plaintiff he would not deliver any more slops under the contract, and that plaintiff must take his hogs away, as he had broken the contract in not having the hogs there on the 10th of November. This witness says that after some further conversation between Arleth and White, Arleth agreed to furnish slops at the contract price, but not for any certain time, nor in any certain quantity. The witness does not say that the plaintiff, White, assented to the proposed modification of the contract. The defendant also introduced several witnesses tending to prove that the plaintiff's hogs were not at the distillery on the 10th of November, and that, therefore, he was was not ready to receive the slops according to his contract. The case was committed to the jury upon this evidence, and the jury were instructed by the court, that if they believed the original contract had been changed or modified by the parties, and that both parties had recognized and acted under such modified contract, the plaintiff was not entitled to recover under the original contract, on which he had declared in this action, and that in that case their verdict must be for the defendants. The credit and weight to be given to the evidence as to the change of the contract, was left to the jury on the evidence. And the jury were instructed, that if there was no change in, or rescission of the original contract, the defendants were liable for a breach of that contract, and that the rule of damages was the difference between the price at which defendants agreed to deliver the slops, and their actual market value at the time they should have been delivered. The jury came to the conclusion, on the evidence, that the original contract was in force, and computed damages accordingly for the plaintiff. It was the province of the jury to pass on the evidence as to a change of the contract; and, having done so, according to their views of the weight of the evidence, the court does not feel warranted in disturbing the verdict as being against evidence.

The newly-discovered evidence of the defendants is to the effect, that Leslie, the witness for the plaintiff, was not at the distillery with the hogs on the 10th of November. The affidavits are by no means conclusive on this point. But a new trial can not be granted on this ground; because the effect of the evidence is only to impeach or contradict a wit-

ness who testified on the trial. If produced, the evidence would be only cumulative. If a new trial were granted on this ground, and this evidence introduced, it would not be material and relevant. The only effect would be to show that plaintiff was not ready to receive the slops on the 10th of November; but if this were so, it would be no ground for a forfeiture of the contract, and defendant would have his remedy by action, for a breach of the contract. A court will not grant a new trial on the ground of newly-discovered evidence, unless satisfied, if a new trial was had, a different result would follow.

A claim of excessive damages is urged as a ground for a new trial. It is impossible for the court to know on what data the jury estimated damages; but, as the question of damages is always within the discretion of the jury, a court will not set aside a verdict on that ground, unless the damages are palpably excessive; or, if the action is on a contract, they exceed the legal liability of the defendant under the contract. Upon the first ground stated there is no reason for disturbing this verdict; for if the contract does not limit the damages to be recovered for a breach, to a specific sum, upon the legal rule given to the jury, the amount of damages was easily computed by the jury, and the amount returned by the jury does not exceed the rule, and is not, therefore, excessive. But it is insisted by the defendant's counsel, that this contract limits the amount of recovery for a breach to $1,000, and that the jury could not exceed this sum. This point was not pressed by counsel, on the trial, and no special instruction being asked for, the court did not embrace it in its charge. If this point is sustainable in law, the verdict must be set aside. The court will now briefly consider the two questions involved, which are: (1) Have the parties fixed by their contract the amount of damages to be recovered for a breach? (2) If there is no such limitation as to Arleth, the principal in the contract, is there a right of recovery as against Shroth, the surety of Arleth, who is sued jointly with him?

It will not be necessary to inquire whether, under the pleadings in this case, the defendants are in a position to urge this point. Strictly and technically, as there is no plea but that of release and discharge of the defendants from their contract, there is an admission of record that the contract is as set forth in the declaration, and that damages are recoverable as claimed. But waiving this point, is the plaintiff limited by this contract to $1,000 damages, either as against the principal or the surety? Without reciting the contract at length, it will be sufficient to state its substance. Taken as a whole, it is a contract by which the defendant, Arleth, a distiller, agrees to supply the plaintiff for one year from November 10, 1858, daily, Sundays excepted, the slops for feeding hogs which will be produced by an average of three hundred bushels of grain per day, with the right reserved by Arleth to put an end to the contract at the expiration of six months. And the plaintiff binds himself to pay for the slops at the rate of six and one-half cents the bushel, through the whole year, if Arleth shall elect to continue the contract after the end of six months, and to pay for the slops every two weeks. Arleth agrees to furnish tubs for the slops, and fill the slops into the tubs, and pens for six hundred hogs. And the parties agree, that if during the year the distillery should be burnt, or otherwise injured, Arleth is to be relieved from the contract for the time necessary to repair or rebuild. Then comes the sixth clause in the contract, which is in these words: "The said Arleth binds himself to the said White, his representatives or assigns, in the penal sum of $1,000, that he will run on, and furnish slop for the period of six months, commencing on November 10, 1858, and he gives Andrew Shroth as his surety for the performance of this condition. And the said Andrew Shroth hereby agrees to be the surety of said Arleth, by signing his name to this instrument. It is then provided, that if Arleth should decide to furnish the slop for the whole year, Shroth will continue his surety in the same manner as for the first six months. By the last clause in the contract, White agrees that if he should refuse to take and pay for the slops at any time, according to the agreement, he will pay to Arleth "the sum of one thousand dollars as liquidated damages, for the payment of which, he, and Andrew Shroth as his surety, hereby bind themselves." This contract is somewhat peculiar in this—that the same person is surety for both the contracting parties; and in this, also, that in that part of the contract in which Shroth binds himself that Arleth shall supply the slop, as provided for in the contract, the sum of $1,000 is designated as a penalty, or "penal sum," and in that part of the contract in which White is bound to pay $1,000 for a failure, and in which Shroth undertakes as his surety, it is called "liquidated damages." The first question arising is, whether the defendant, Arleth, is liable in an action for a breach of this contract for more than the $1,000 penalty named in the contract? There can be no question that the $1,000 is to be viewed, not as liquidated damages, but as a penalty. The language of the contract, as well as its character, justify this construction. The defendants expressly designate it as "the penal sum of $1,000." As before noticed, the plaintiff agrees that as to him, if he fails in the performance of his part of the contract, the $1,000 shall be deemed "liquidated damages." The words may, therefore, be well presumed to have been understood by the parties. The authorities are numerous, that in a contract in which certain acts are to be done, or omitted, and the

contract is of such nature that the actual damages are susceptible of computation in money, and a sum is named as a penalty or forfeiture for a violation, it is to be viewed as a penalty and not as liquidated damages, and in such case the actual damages sustained will constitute the rule of recovery. Tayloe v. Sandiford, 5 Pet. Cond. R. 210, 7 Wheat. [20 U. S.] 13. In Sedg. Dam. the point is very fully discussed and many authorities referred to, English and American. The rule seems invariable, that where the word "penal" or "penalty," is used, it must be construed as being so intended by the parties. But the converse of this rule does not hold. There are many cases in the reports to the effect, that though the sum named is called liquidated damages, it will be held as a penalty if it seems from the contract that it was so intended by the parties, and the justice of the case requires such a construction.

In this contract, it is fair to infer it, as the intention of the parties, that the sum named as the penalty in case of a failure by the defendants, was inserted, not as the measure of compensation in case of an abandonment of the contract, but as designed to secure a faithful observance of its stipulations by White. By the contract, the defendant, Arleth, was bound daily to deliver the slops certainly for six months, or, at his option, for a year; and White was obligated to receive the slop, and pay for them every two weeks. It is not to be presumed that the parties intended the $1,000 as a full indemnity under any circumstances of failure that might happen. It follows that the jury were not limited, in the computation of damages, to the penalty named in the contract. Considered as a penalty, it was optional with the plaintiff to sue for that or claim the actual damages which he could prove from the non-fulfillment of the contract by the other party. The rule seems to be, without exception, that where the action of covenant lies, the parties may sue either for actual damages or for the penalty.

It is conceded that a surety can not be held liable beyond the obligation he assumes. Defendant's counsel contend that he only assumed a liability for $1,000, and can not be held responsible beyond that. The undertaking by defendants, Arleth and Shroth, must be viewed as joint. Arleth agrees that he will run the distillery for six months and supply the slop daily; and Shroth, as surety, covenants that Arleth will do it. It is a joint undertaking, and they may be jointly sued. The measure of the surety's liability is the same as that of Arleth, and he is liable to the same extent. If Arleth is liable for actual damages beyond the penalty named, his surety is liable to the same extent. Upon the whole, the court can see no ground for disturbing this verdict. Upon the law, as stated, the jury had a right to compute the actual damages sustained by the plaintiff. The amount was susceptible of easy computation. The contract proved the quantity of slop which Arleth agreed to deliver, and the price which he was to be paid. There was clear proof of the quantity delivered during the six months, which made it clear what the deficiency was. There was clear proof of the market value of the slop for the period during which there was a failure. The average market price of the slops, for the eighty-eight days during which Arleth failed to deliver the slops, was fifteen cents a bushel; and the difference between that and six and one-half cents, the contract price, was the rule of computation which the jury pursued, etc. It is doubtless true, that owing to the great advance in the price of grain after the date of the contract, its performance involved great loss on the part of Arleth. But this was his misfortune, for which the court can not give a remedy. Motion overruled.

WHITE (BARKER v.). See Case No. 996.

Case No. 17,537.

WHITE et al. v. BOKER et al.

[3 Fish. Pat. Cas. 66.] [1]

Circuit Court, S. D. New York. Oct., 1862.

PATENTS—REPEATING FIRE ARMS.

1. The substance of the invention of Rollin White is in extending the chamber through the cylinder of the revolving pistol, so that it may be loaded by inserting the charge in the rear instead of the front as heretofore.

2. The conical form of the front of the chamber is incidental and embraced, in contemplation of law, all the equivalents, of which a cylindrical chamber and a flanged cartridge is one.

This was a bill in equity [by Rollin White, Horace Smith, and Daniel B. Wesson against Herman Boker, Henry Boker, Jr., and Herman Funke] filed to restrain the defendants from infringing letters patent [No. 12,649] for "improvement in repeating fire arms," granted to Rollin White, April 3, 1855, and more particularly referred to in the case of White v. Allen [Case No. 17,535].

E. W. Stoughton and C. M. Keller, for complainants.

George Gifford, for defendants.

NELSON, Circuit Justice. The bill in this case is filed to restrain the defendants from infringing the patent of Rollin White, issued April 3, 1855, for an improvement in repeating fire arms. After describing the improvement, and the mode of constructing it, the patentee states his claim, the one in dispute, "extending the chambers, a, a, of the rotating cylinder, A, right through the rear of the said cylinder, for the purpose of enabling the said chamber

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

to be charged at the rear, either by hand or by a self-acting charger, substantially as described." The description of the cylinder is as follows: "A is a rotating chambered cylinder, having the chambers, a, a, bored right through it, and made slightly conical, with the smallest part in front, in order that a cartridge may be inserted easily in the back, but that the ball may fit tight when it arrives in its place, and not go through till the charge explodes."

The defendants' pistol differs from the plaintiffs' in this, that the chambers are bored cylindrical instead of conical, and a flange is used upon the cartridge, which answers the purpose of the conical chamber. It is argued that this rotating chamber is described and claimed as a whole by White, the patentee, and as the one used by the defendants differs in respect to the form of the chamber, there is no infringement. This, we think, is a mistake. The substance of the invention is in extending the chamber through the cylinder, so that it may be loaded by inserting the charge in the rear instead of the front, as heretofore. The conical form is incidental, with a view of checking the advance of the charge beyond a given point, and embraced, in contemplation of law, all the equivalents, of which the contrivance of the defendants is one; or, at most, the contrivance is but an improvement upon the invention of White, and can not be used upon it without his assent.

There is a good deal of evidence in the case, going to the question of novelty in the improvement of the patentee. We have examined the whole of it, and are satisfied that the weight of it is decidedly with the complainants.

Decree for complainants.

WHITE (BOLTON v.). See Case No. 1,616.

Case No. 17,538.

WHITE v. BROWN.

[1 Wall. Jr. 217.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 23, 1848.

DOMICILE—LOSS BY RESIDENCE ABROAD.

1. Domicil of origin is not lost, for purposes of succession, by very long residence abroad, and mere doubt, even very strong doubt, of a real intention to return.

[Cited in Allen v. Allen, Case No. 211.]

[Cited in brief in Fry's Election Case, 71 Pa. St. 304; Hood's Estate, 21 Pa. St. 111; People v. Cady, 143 N. Y. 102, 37 N. E. 673. Cited in State v. Aldrich, 14 R. I. 173.]

2. The doctrine strongly applied by the verdict of a jury in the case here reported.

This was a feigned issue directed by the court to settle the domicil, at different times, of Mathias Aspden, an eccentrick, hypochondriack and solitary bachelor, who, born in Philadelphia prior to the American Revolution, died in the city of London, in 1824, leaving a will, executed in Philadelphia in 1791, by which he gave to his "heir at law," a personal estate which, at the time of this issue, amounted to about half a million of dollars. Judge Baldwin sitting in equity in 1833, had inclined to the opinion that Mr. Aspden was domiciled in England: but the matter coming before this court again, it was thought better to direct an issue to be tried at law. The evidence was very voluminous. It consisted of a printed 8vo. volume of nearly one thousand pages small pica; principally composed of letters, memorials, "and accounts of himself," which last Mr. Aspden was in the habit of writing in great numbers. In the course of twenty years since the suit had been originally brought, they had been diligently gathered from every part of the world where this eccentrick gentleman, in the course of half a century, had ever been. Mr. Aspden's history, so far as it bears upon the question of domicil, was essentially as follows:

His father was a native of Lancashire, England, who came to this country in 1718, and established himself in the city of Philadelphia. He left eleven brothers and sisters behind him in Lancashire. He had one daughter before he came, who married here, and whose descendants were numerous. His first wife being dead, he married a widow woman in the state of New Jersey, who had already six children, the descendants of whom were all numerous. Mr. Aspden, the more immediate subject of this report, was the only issue of this second marriage, and was born in 1748, in Philadelphia, in the then British province of North America. In 1760, being about twelve years old, his father went to England for surgical advice, and took his son with him. While there they visited their friends in Lancashire, and the boy was placed for some time at school. How long they remained in England did not appear exactly, but in 1764 Mr. Aspden, the father, made his will at Philadelphia, appointing his son one of his executors, and died there the following year. By this event young Aspden succeeded to an estate which, in the account of those days, was reckoned large; and in the same year we find him established as a housekeeper in his paternal residence at Philadelphia. In 1766 he went again to England, returned to Philadelphia after about a year's absence, and in 1768 or 1769 established himself in trade with one of his half brothers, named James Hartley; a partnership which was attended with very profitable results to both gentlemen, and which continued till the breaking out of the American Revolution, in 1775–6. His political principles, in connexion with this event, were with the British cause. He is spoken of as having been "a friend to his king and country," and was also a constant commercial correspondent of tories. But he never took up

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

arms against the colonies, and to protect himself from insult mustered with the "insurgents." One of his ships having been arrested in England,—under an order in council, and the English prohibitory act which forfeited all vessels found in American ports after a certain period, if owned in America,—he resolved in 1775 to go to England in one of his own vessels to recover it, but did not go. He sent over, however, all his vessels, and afterwards sold them in England. In March, 1776, being at this time engaged in business yielding him over £2000 sterling a year, he again resolved to sail for England, and having actually sold much of his real estate not immediately in the city, and left a general power of attorney to manage, dispose of and settle all his affairs;—having also made a draft of a will and also a will;—in all three papers describing himself as "of Philadelphia, Merchant"—and in the first as about to "depart the province;" in the second as about to "depart to England;" and in the third as "intending to cross the seas on a voyage to Great Britain"—he went to New York to depart accordingly. He here obtained permission from the British governor to go in an English packet then there, on condition that all his letters and papers should be enclosed to the British secretary of state, Lord George Germaine; a condition to which Aspden assented. Just as he was ready to sail, however, the governor annexed a further condition, st. an oath, that when he got to England, he would give information to the government there of any treasons, rebellions and conspiracies, which he knew of in America. A compliance with this requisition appears to have been repugnant to him; and after every effort to relieve himself from it had proved unavailing, he refused to accede to it, and returned to Philadelphia. Availing himself of a passage by another way, he left Philadelphia about the middle of September—some days before Pennsylvania came into existence as a state, and before it was possible for him to owe to it as a state any allegiance (Respublica v. Chapman, 1 Dall. [1 U. S.] 53), and reached England, through Spain, in December, 1776. In regard to his intention of changing his domicil at this time, Bishop William White, who was connected by marriage with Mr. Aspden, testified as follows: "He was in the habit of familiar intercourse with my family a short time before he went away. I was in habits of free communication with him, and he with me. . . . . He never communicated to me at that time, any intention of changing his domicil, and I do not believe it was his intention to change his domicil at that time. On arriving in England, he proceeded to London, where, according to one of his "memoirs," written probably in 1785, he was almost immediately sent for by Lord Geo. Germaine, with whom he had a conversation of more than two hours, "in the course of which," he tells us that "he answered candidly and without reserve every question that was asked him, and gave Lord George every information he knew of the state of things in America, as much as if he had been sworn to it a thousand times over." From this time till June, 1785—a term of eight and a half years—he remained in England, with the exception of an excursion of two months to the continent. While there he received from his correspondents in England, their wishes that he may "amuse himself at Spa," "may amuse himself very well in Holland:" And on his return to England from Holland, their congratulations that he had received news of his friends in Philadelphia, where they hope that he "will be so happy as to meet them once again." On one occasion he speaks of himself "as an idle man until he could return to America:" on another, invests £4000 in British funds: on a third, expresses the pleasure it would give him to embrace his relatives in America, but how to dispose of his property in England so as to admit of his return, finds a matter of considerable difficulty: on a fourth, he describes himself "without an object," "awkward, as one may suppose, from the circumstances, and full as much so from not knowing in what place to fix:" on a fifth, will wait for peace, that he may go back again and reside, if possible, in his old habitation: on a sixth, he begs his correspondent to write fully on the subject of return; and adds that "the manner in which he has wasted the prime of his youth in England has been grievous, though not to be helped, as he was circumstanced: Therefore he does not reproach himself, nor does he expect, if he return to America, that he can lead a very pleasant life. "Comfort," he believes, "is not for him in his day."

But up to this date he appears to have been a man of unswerving unity of purpose, compared with himself in all after times. An event took place about this time which, by making it doubtful whether he could make more money by being an Englishman or an American, kept him prolonging and renewing one continuous chain of contradictions with himself and with everybody, which would almost lead us to conclude that the only object of his long life had been to make a "leading case" upon domicil, and to leave his vast estate dependant upon the shape of a puzzle that it should require a quarter of a century to arrange. In 1780 a proclamation was issued against him by the state of Pennsylvania, requiring him to appear by the first of April, 1781, to answer a charge of treason. He did not appear. The time was extended by the state for nine months further; the preamble of the act of extension reciting that it was represented that Mr. Aspden had been called to Europe about his own private affairs, had not received notice of the former act, and would certainly render himself up if indulged with further time. Not appearing at the end of the extension, he was soon after proclaimed a traitor, and all his real estate which he had not sold, confiscated. In consequence of this, he presented, in 1783, a memorial under an

act of parliament to the British government, claiming compensation as a suffering loyalist. In his petition he says of himself: "If he had not been attached to the British government and opposed to the Revolution, it is not reasonable to suppose he would either have left America and all the nearest friends and connexions he had, at the early period he did, or, if this had been his determination, that he would have come to England, when there were other countries to which he might have gone, and been certain of meeting with a friendly disposition both on the part of the people and government, particularly France, where he could have placed any property he might have in Europe or might receive from America, to as much advantage and safety as in England." Speaking of his property he says, that "some was early invested in the funds, and some lay in private hands, at four and five per cent. but the whole became invested in the funds sometime before the peace, a period far from flattering, from a doubt in the minds of many, that a continuance of the war would give them an irrecoverable stroke, and which there is too much reason to suppose would have been the case had it not been for the success of Lord Rodney." But then tells us in reply to a question from the commissioners, whether he intended to return to America, he said, "that he did once, to reside there if he could. That England was a country where he had few friends or near relations, and to give them up as well as his native country was to make a great sacrifice." The commissioners allowed him nothing. He then came, July, 1785, to Pennsylvania, with a view of procuring from the government here a restitution of his property which had been confiscated. Originally an excessively timid man, his mind had by this time become morbid to a harmless insanity on the subject of his personal safety in America. Although he had every reasonable assurance that he was in no danger whatever, he was so concerned on that matter, that after a stay of but ten days in Philadelphia—consulting most of the time with lawyers about his safety—he went to New York, whence in twenty-three days from the time he had arrived, and without having done any thing at all on the subject about which he came, he set sail forthwith for England, where he soon after arrived. Writing of this journey, he says in one place, "I am just returned from my voyage, an undertaking I was betrayed into by the terms of the treaty;" and in another, "My friends in Philadelphia in their letters to me meant well; but did not enlarge so much as they ought to have done, which led me to consider myself as absolutely protected for a year by the treaty; and under this conviction, I thought it in some degree a duty incumbent on me to go to America, to use my endeavours to get my property restored to me. A few weeks before I sailed I wrote to the commissioners that I was going on this errand, and should take the earliest opportunity of letting them know the result, which I might have guessed and so been saved this perilous and anxious jaunt. . . Most certainly I found no friends amongst any of them, which could not but heighten the very uncomfortable life I had led in England for seven or eight years. And at last to find myself ensnared to death from being in the face of a publick treaty, was giving the full completion to a man's sufferings. How my lot may be cast now, I know not—or which way I shall turn myself; but happy should I be if I could form some little attachment and home, where I could be a useful member of the community, and at the same time enjoy life with some little degree of satisfaction in the remnant I have left." In another letter of a near date, the same uncertainty appears. Speaking of his fortunate escape from the perils to which he had been exposed at Philadelphia, he says, "Nevertheless I could not help at times casting my eyes back, and feel it a painful circumstance to be thus forced from my native country, friends of my early acquaintance, and a channel of business with which I was well acquainted, and which, if left at liberty to settle in the country, I would soon have got into again, and to as much advantage I believe as ever. To return again, to this country, where I could not help telling the commissioners, in consequence of some questions they asked me, I had few or no friends; a country where the remnant of property I have, will not go much more than half as far, as the same amount would in America; and where I know of no line of business in which I can engage, with either profit to myself or use to the community. Does this accord with the words of the motto, 'Ubi panis, ibi patria?' "

That he was not much more happy after arriving in England, than he was in leaving America, is apparent from a list of grievances which he records in the year 1785, that he had constantly suffered in the British Isles. "My residence," he says, "since my first coming here, (a period of near nine years) except an excursion of six weeks I took one summer to Flanders and Holland, has been constantly in England; where I am sorry to say I have experienced, from first to last, treatment of the most pointed neglect and studied unkindness; and had I been capable of departing from my duty and joining in rebellion, the cause I have had has been great. Invitations have been given to an American lodging in the same house with me, to corporate dinners, and none to me; whom I believe they know to be a man of as fair prospects and as much credit in America as ever was in the city. In London, where I have principally lived—and the greater part regularly for five years at one house in Norfolk street—not a person of my mercantile acquaintance from the city—the only acquaintance I had, or as an American was able to get—ever called upon me to say, are you sick? Are you well? Are you in comfort or affliction? Will you take a

walk this morning in the park; or have you been to a play or any publick place? or will you go? Not a single call in this way from any one, except from one who had reaped considerable profit by me, and a distressed loyalist, now and then for assistance, which was never denied. This situation, joined to my views and prospects in life being cut up, and no likelihood, from the turns things have taken left of returning, (which was my wish and intention) to any good purpose, is more than I can support." But then he finds it impossible to return, being tormented by the recollection that "in America they tell me there is no such person as myself, but that I am dead in law to all intents and purposes." About the same time he writes again: "The insecurity I found myself under in Pennsylvania, led me to make a very short stay there, and to take an opportunity of early returning again to this country, in which I have now been arrived about three weeks; and where I think its probable I shall now remain, as my property in that country, it is likely will never be restored. Immediately on his return to England, he presented another petition to the commissioners, but failed to get any thing, because he had not sufficiently made out his loyalty. Previously, in 1786, on the representation of a number of Americans that he had left Pennsylvania before it became a state, and that from the circumstances of his property in England, he could not have left that country during the war without hazarding the loss of his fortune, he had received a pardon of his treason: but his property was not restored to him. He now found himself in the position of a man who had sacrificed a large estate in the cause of revolution, and could get no recompence from either side. His counsel, Mr. Sylvester Douglass, writes to him that the decision of the British commissioners "arose from its appearing to them,—probably by too much candour on your part,—that your property in America might be recovered:" and Mr. Galloway, an able lawyer of Pennsylvania, who had left Philadelphia and joined the British side, writes as follows: "You told them, as you inform me, that you were determined to return to the new states and live there. Now I know the commissioners have carefully made the enquiry whether the claimant intended to desert his allegiance to the British government, and to become a subject of the states. I therefore think, as you have changed your mind and resolved to continue in this country a subject of the crown, you should communicate your resolution to the commissioners, if not already done." In 1787, after these letters of Mr. Douglass and Mr. Galloway, he presented another petition to the commissioners in which he states that in going to America, he had little or no expectation of having his property restored to him, but was willing to make the experiment and take the burden from Great Britain if he could: it not being his intention if he got compensation there, to ask it of England, and that he had not supposed that in making compensation, parliament intended to restrict persons from going to their former places of residence, as assistance was promised to such as might be able to go back, and there endeavour to recover their rights and properties under the treaty. He concludes by stating that "it is his serious wish and inclination to settle and fix in Great Britain." In 1788, he accordingly received a compensation of what was called the third class; a rate of reward inferior to those loyalists who stayed in America and suffered confiscation, after running every risque there and actively opposing the Revolution. He was extremely indignant at the small allowance thus made him, and in 1789—six years after the peace—presented a fourth petition to the house of commons representing his loyalty, sufferings, long residence in England, investment and centralization of his property there. He took it in person to the house and presented it to the speaker himself: but no notice was given to it.

In March, 1790, he made preparations for going to the United States, and before leaving London, executed a will which he left there and in which he appoints five executors, all Americans, his relatives, and describes himself as formerly of the city of Philadelphia, in the province, now state of Pennsylvania, merchant, now residing in lodgings, No. 10, Great Russell street, London. By this will he left the largest portion of his property to his American relatives, but made also liberal testimonials of his affection for those in England, and added to it the following memorandum: "It is my desire in case I should die in England, that my body be buried at Padiham Church, in Lancashire, and a plain, handsome monument erected to my memory, with a suitable inscription thereon; that being the church where my grandfather and grandmother are buried at, and where all my fathers, brothers and sisters were christened." Before embarking he receives from one of his correspondents, "all good wishes for a fine passage and a happy meeting with his friends in his native land." He reached America September 23d, 1791. What was his precise object in coming here—if it is possible to say of such a man that he had a precise object in any of his actions—did not appear from the evidence. The confiscation of his property and the injustice of the act, early laid hold of his mind; and to his dying hour clung to it with the closest tenacity; occupying it more and more as the possibility of recovering his property here became less and less. He had also left some debts, which as an alien enemy he could not recover, and about the recovery of which it appears that he now occupied himself. Writing now to one of his English relatives, whom he addresses as an acquaintance of his early youth, and one who had always shewn him attention, he says, in speaking of America, "I had the satisfaction to find my relations and friends in general well; the country is in a rising and prosperous way, and Philadelphia

much improved by the addition of many handsome new buildings. Yet I am rather doubtful my return now is too late timed to stay;—from changes and alterations that circumstances make in parties. On looking over the directory, I found I scarce knew above three or four persons in a hundred. In some families I found girls I left in the cradle, grown up and married: Again in others, children I left just breached, and lads from ten to fifteen are grown up and settled;—among the latter some of the most rising merchants. In short, from the Revolution and an absence of fifteen years, my native land appears what I expected, almost an unknown country to me. Being a lodger, and from the upstarts, I feel a sensitive difference between my present and former conditions here." He speaks in another letter of the fact, that his friends in England expected he would return in the December packet, which would have allowed a stay of but three or four months here, and says to his bankers there, that he don't think he will want any more money while he stays, noticing at the same time the fact, that the balance to his credit with them must be about £1200 sterling, which he did intend to invest, but now believes that he shall not. In the same letter he says: "I have lately discovered from an adjudged case (Respublica v. Chapman, 1 Dall. [1 U. S.] 53), in 1781, that I could not lawfully be the object of an attainder, having left America and made my election before the government here was formed: where there was no law, there was no transgression. This had I known ten years ago, would have been of the first importance. From changes and combinations, I am doubtful its now too late." While on this visit, speaking to an American acquaintance of his domicil or citizenship, "he said he was a citizen of Philadelphia, and as long as his father and mother's bones were in the country he should so consider himself; and desired that if he died in England or any part of Europe, he might be brought home and buried where his uncles and aunts were." He lodged during this visit with his half brother, and former partner in trade, Mr. Hartley. Making ready now to return to England, he deposited his Family Bible, in which he made some new entries—plate, about 250 oz. —a trunk of letters of no great value, and some clothes, apparently a court dress, in one of the banks. He then, 9th December, 1791, made another will, by which after a few legacies to his American relatives and none to his English, he gave all his estate to his "heir at law," and appoints three American executors, one of them being the president for the time of the bank where he had made his deposite. This will was executed in the form usual in Pennsylvania, to pass all kinds of estates, but it would have passed nothing in England, but personalty.

Arriving at Falmouth August, 1792, after an absence in America of about ten months, he went into Lancashire, and spent two or three weeks among his relatives in that vicinity. At Preston, he says, I met "with Wilson, who I remember when a little boy there. He is now about 70, and has been some years retired, and lives in the house I used to lodge at, which belonged to his uncle. I told him I had often been sorry my father had not left me there, and put me apprentice to a trade, or some good attorney, or cotton tradesman. It might have saved me many a painful and anxious hour. I also saw there my old master, Shepherd, who is still a very hearty man, of 75 at least, and continues teaching school in the old place he did the 18th January, 1762. All my intimate schoolmates I found dead or dispersed. I saw there our country folks, Mr. and Mrs. Beach, and their pretty daughter—who talk of being in London this winter. From thence I went to Blackbourn, where I met my cousin Mary Aspden, that was now the widow Dyson, and a grandmother, and many other relations who are, most of them, in much improved circumstances and in a prospering way. Mary Dyson's daughter is married to her cousin Mathias. They keep the 'Mathias' in the family; one they tell me in every family." In June, 1793, he proposes to return to Philadelphia, if he can, in August, if not, in the spring; and in the same month directs that the plate, which previous to his leaving Philadelphia he deposited in the bank, should continue there until his further order. In March, 1795, he writes as follows to an American friend: "I flatter myself it will be convenient for me to return to my native land in the course of the summer. Whatever views I might have had ten or twelve years ago, in returning, of reinstating myself again in my former business, no views of that kind will influence me at this time, although very laudable: nor shall I be led by ambition. Offices I shall be glad to see well filled, but never wish to fill one myself, unless the duty comes in turn; I then should be ready to serve from the interest I have in the public welfare. The principal inducement now, is a desire to live again among old friends in my native country, and if not a citizen of the United States to acquire the right of one." In 1796 he writes, "you may expect me, but I cannot tell you when. Circumstanced without rights in England, I can neither well leave it, nor enjoy with satisfaction the property I possess in it." In 1798 he applies to the English secretary of state for a passport, but is told that one "is not necessary for an American to leave this kingdom." Insisting however on having it, he gets one, in which he is described as "native and citizen of America." Giving an "account of himself" in the same year, "supposing he may come under the description of an alien in the alien bill," he says, "when in town, since my last return to England, I have resided in the lodgings I was lately in; considering London as my home, from my property being on loan to government, and from having business on that account there." In the same year he applies for and gets a li-

cense to reside in England, under the "Act respecting aliens resident in England," but at once makes upon it the following endorsement: "An Englishman, born within the now limits of the United States, apprehends that he is improperly called an alien, in this license, and also in a passport to embark for America last July, from his not being a subject of the United States. Otherwise he would have applied to the American minister for a license and passport." In the same year, he sets sail for America, embarking for Charleston, S. C. Finding the ship leaky, and seeing an account in the papers of a likelihood of war between the United States and France, and "being doubtful," as he says, "whether if he should be captured he would be exchanged by either side, from not being a real British subject or real American citizen," he got ashore in Ireland and returned to England; "where, not being at liberty to write to the American minister, from not being an American citizen, (the record in Respublica v. Chapman being against him) he applied to the secretary of state for a license to live in England." In the following year he sends a petition to the lord chancellor about his concerns, and describes himself as "formerly of the city of Philadelphia," merchant; now residing in England, a public creditor of more than twenty years, limited in his residence, under the alien bill, to London, and the neighbourhood thereof; but soon afterwards calls himself "The Right Honorable Mathias Aspden of Philadelphia," a title which he is led to give by way of "explanation," since "he has heretofore been described in the books of the bank as Mathias Aspden, Esq., of different streets, London; and in those of the East India Company, as Mathias Aspden, Esq., of Richmond, Surrey: and now proposes to return again to Philadelphia, his former place of residence, and wishes to show clearly that he is the same person." He resided in London till 1802, occasionally proposing to return to America, but never coming. In July, 1802, during the peace of Amiens, he went to the continent with the intention, as he said, of embarking at some of the ports there, for some part of the United States, but he did not embark. In his passports at Naples and Rome, he is styled "Americano." In February, 1803, he returned to Paris, and thence, in March, to London. In May or June, 1803, he writes that if his health, which is but indifferent, is not worse, he intends to embark for America in the course of a few weeks; but gives certain directions to his correspondents, in case he should not do so; which, it appeared, was finally the case. In February of the next year he still talks of embarking, and assigns as the cause of his delay, "the very extraordinary and hazardous times." In the spring of 1804 he went to Paris: in the summer returned to London, intending, he says, to sail for America, as he now found himself in better health than he had been, and had his affairs arranged. "Could it have been foreseen," he here adds, "that when I came to England in 1792 I should have remained so long, I should have made a tender of my services to the president in the diplomatick way; flattering myself that I should neither been incompetent to the task, nor unworthy the trust." He did not sail, however, at this time, but, on the contrary, remained in England for eleven years, at which period he set sail, and reached Philadelphia in September, 1815. He had $12,000 on deposit there which had been there since March, 1811, besides a small deposit left in 1791 in another bank. He stayed in that city some weeks, frequently visited the most reputable of his relations; not lodging with them, however; told an old negro servant of one of them that he had been in this country and out of it, that it was the best country he had ever been in, and that he wished to lay his bones here; a wish that he repeated to another witness; presented a petition to the legislature of Pennsylvania, in which he says that the confiscation of his property has caused a loss of £5000 to his heir at law in England; set off for the South, was taken ill, and remained there most of the time that he was in the United States; came again to Philadelphia, took his plate out of the bank, left there, of his large deposit, $361, of his small one $43, and set sail for England, having been twenty-two months, in all, in the United States. In the year after his return to England, he speaks of his having been "abroad in America." In 1806, '9 and '16, he had applied to the British government to be exempted from paying a tax on his dividends there, urging that he was a foreigner, and says in one application that he was "accidentally in England." The commissioners reply that the tax is not deducted in favour of foreigners residing constantly within the British dominions. In 1819 feeling, as he says, uncertain, from the weak state of his health, how soon he could venture on a voyage to America, he determined to visit the baths in the south of France, but it does not appear that he ever did so. In April, 1824, he speaks of his intention to visit America in June of that year. Death, however, put an end to his projects and his history. He died August the 9th, 1824, at lodgings, at London, at the age of 76, and was buried in that city; having made no will since that of 1791, when he left the United States.

His earlier correspondence was principally with his relations in America. After his second voyage to England, in 1792, he became so eccentrick, and troublesome, about his concerns, and finally so hypocondriack and absurd, that most of it seems to have dropped; his correspondents would not reply. And after his visit of 1817 to Philadelphia, he says that he could not find any body there with whom he could safely leave a power of attorney. He had few visitors of any sort in England, and always lived at lodgings while there, as he also did after 1776, when in America. His correspondence was principally with his

bankers, in England and America, through whom he did most of his business. He was constantly investing and re-investing money both in the United States and in England, rarely or never committing any absurdity in that particular. At the time of his death he had in the American funds about $85,000, in the English $200,000, and about $50,000 in those of France. Among the papers found after his death in his trunk, was the usual printed list of the members, issued by the East India Company, with marks designating those persons capable of election to the directorship; a privilege not allowed to American citizens. Mr. Aspden's name was among these.

The issues directed by the court were as follows: (1) Where was the domicil of origin of the testator? (2) Where was his domicil at the time of his making his will, December 6th, 1791? (3) Where was it at the time of his death, August 9th, 1824? (4) Where was it during the intermediate time, st. between December 6th, 1791, and August 9th, 1824?

Mr. Williams, Mr. Randall and Mr. W. B. Reed, in favour of the English domicil.

Mr. Aspden's own declarations on the subject of his domicil are so full of contradictions as to be of inferior weight in determining it. They appear to have been directed, during much of his life, solely by his interests, and to have been made in opposite ways at the same time. Towards the close of his life his mind became so greatly disordered—he was so entirely irresolute—scheming so idly every thing, and never executing any thing—that his declarations of intention, even if sincere, possess but little of the value to which such declarations are usually entitled; a value that is given to them only because they are usually followed by conduct conforming to them. The history of Mr. Aspden's life, his acts and his conduct are of much more importance. He was born a British subject, and he lived for at least 72 years of the 76 of his life, under British allegiance and government. He received much of his early education in England. His father was not one of our early colonists, but came here in mature life, the first and last of his family who ever came at all. The ties of Mr. Aspden were close with England prior to the Revolution. While he still owed allegiance to George III., and before the state of Pennsylvania acquired any right to his allegiance at all, he leaves the state. He sells all his estate here that he can sell, and leaves a power to sell the rest. He transports his property to England, lives there, aids and abets its cause in an open and effective way. He is attainted of treason by this state: he is disgraced by it: all his property is confiscated by it. He is protected, honoured and rewarded by the country in which he lives. With an exception of a visit of three weeks to this country, he now lives for fifteen years in England. During these fifteen years his former country has been changing in every respect. A revolution —the work of seven years—had taken place, to begin with. From a British colony it has become an American sovereignty. From a royal government, it has become a republick. Feeble in every respect when he left it, it is now formidable among nations. Its affairs had been in the hands of his friends: These are banished to England, and the government is usurped by enemies who have attainted his person, and confiscated his estates. His paternal abode is desolated, and has passed to strangers' hands. In looking into the directory, he could not recognize more than four names in any hundred: and his native land appears "almost an unknown country." He goes back to England. Unlike America, it is unchanged in every thing. He visits his relatives with satisfaction. The scenes of his youth greet him with familiar sights: and he "finds his old schoolmaster, Shepherd, still teaching school in the same place he did in 1762;" thirty years before! He lives in England for three and twenty years. At the end of that long time he visits the United States, and asks a restoration of his property, by the confiscation of which his "heir in England had suffered loss." He fails to get it. He goes back to England. There, forever after, he lives. That country is the centre of his affairs. Upon its faith—running into distant years—he places the bulk of all his wealth. There he dies: there he is buried and rests. Who, on such a case, will say that Mathias Aspden wished to die, or did die a citizen of the state of Pennsylvania, domiciled in Philadelphia?

The evidence presents some indicia common to both sides of the question; and some usual ones are wanting to either side. Aspden kept papers and made wills in both countries,—the American will being operative only because it was the latest. He called himself sometimes an Englishman, sometimes an American. He received his education partly here, partly in England. He owned no real estate, and had no mansion-house, nor immediate family.

Let us look then at the remaining indicia: I. Those in favour of the English domicil. II. Those in favour of the American. In support of the former,

1. Length of time: Mr. Aspden passed 28 years of his life, the early part of it chiefly, in America. The residue—48 years—he passed in England. Granting that his original purpose in going there was to save one of his ships, it can't be pretended that this remained his object—his sole object—forever afterwards. The doctrine of special purpose don't apply at all, even if it could apply to a case where two-thirds of a long life were given to following out such an object. A special object which occupies a whole life, becomes a general object. There is nothing like special purpose; that purpose whose type is found in the merchant engaged in a limited and special

venture, the student residing to prosecute studies, the suitor prosecuting a law suit, or the officer acting in a special service. Mr. Aspden was in England, and there was the end of it. He was there, either with an intention of indefinite residence, or he was there without strength of will enough to form any intention. There was nothing to prevent his coming to America at any time. He had no business whatsoever in England, nor ties of any kind which need have kept him there. His money was in the funds: it needed no supervision: it gave no concern. Though fear of punishment—a groundless and absurd fear—prevented his remaining here in 1785, even such fear had vanished in 1791, and is never again mentioned by him. The case then is one of a man who having no special object in staying in a country, stays there notwithstanding; of a man, perhaps, who has no real intentions at all; or—at a large concession—of a man who wishes to keep the domicil doubtful. In such a case, time is an element almost conclusive. Of the effect of it in this connexion, we have an opinion from Lord Stowell, a judge of exquisite conceptions of justice, of learning the most accurate and extensive, and one who had an acquaintance with this class of questions more intimate than any man who ever sat upon the seat of judgment. With other judges, these questions have received occasional consideration. With him they were the study of his whole life, and he was aided in them by the labours of other men who made them the whole study of theirs. He gave utterance to nothing crude, nor to anything not practical. His language is text, his decisions law. "Of the few principles," he says,—The Harmony, 2 C. Rob. Adm. (Am. Ed. 1801) 322,—"that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive: it is not unfrequently said, that if a person comes only for a special purpose, that he shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that may, probably, or does actually detain the person for a great length of time, I cannot but think that a general residence might grow on the special purpose. A special purpose may lead a man to a country where it shall detain him the whole of his life. . . . I cannot but think that against such a long residence, the plea of an original special purpose could not be averred: it must be inferred in such a case, that other purposes forced themselves upon him, and mixed themselves into his original design, and impressed upon him the character of the country where he resided. . . . I repeat that time is the great agent in the matter: it is to be taken in a compound ratio of the time and the occupation, with a great preponderance of the article of time: Be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicil." This doctrine is approved by Mr. Phillimore (On Domicil, 145), and is said by him to be "universally true of all kinds of domicil." The translucent wisdom of Lord Stowell is, on this point, but in harmony with "the majestick sense of Thurlow." "A person's being at a place," said the chancellor, in Bruce v. Bruce, 2 Bos. & P. 229, note, "is prima facie evidence that he is domiciled at that place. A British man settles as a merchant abroad: he enjoys the privileges of the place: he may mean to return when he has made his fortune, but if he dies in the interval, will it be pretended that he had his domicil at home? In this case Major Bruce left Scotland in his early years: he went to India, returned to England and remained there for two years, without so much as visiting Scotland: and then went again to India, and lived there sixteen years and died. He meant to return to his native country, it is said; and let it be granted. He meant then to change his domicil, but died before actually changing it." In Butler v. Hopper [Case No. 2,241], the plaintiff came from South Carolina, where, as well as in Georgia, he had a valuable plantation which he cultivated, and on which he had a furnished house and servants. He visited them every year. From 1794 to 1806, he resided in Philadelphia, with his family and several children, and during the whole time, nearly, was representing South Carolina, either in congress or in the state legislature. Yet on a question of jurisdiction, the court held that his residence in Philadelphia fixed his domicil in that state. In Elbers v. United Ins. Co., 16 Johns. 128, the supreme court of New York say: "The fact of a person residing in a country for a considerable period, leads to the conclusion that he has adopted it as his residence. If the real fact be otherwise, he alone can shew it." "It is not necessary," said Chief Justice Heston of Maine (Greene v. Inhabitants of Windham, 13 Me. 225, 228), in speaking of the requisites to constitute domicil, that a man should go to a place "with a fixed resolution to spend his days there. . . . Men may and do acquire a domicil wherever they establish themselves for the time being, with an intention to remain until inducements may arise to remove." Chief Justice Parker, of Massachusetts, in commenting upon Vatel's definition of domicil, "the habitation fixed in any place with an intention of always staying there," says (Putnam v. Johnson, 10 Mass. 88), that a better definition—one better suited at any rate to the circumstances of this country is, "the habitation in any place without any present intention of removing therefrom."

2. The effect of allegiance: This is an element peculiar to this case. Mr. Aspden, when he left Pennsylvania in September, 1776, was a British subject, and owed allegiance to the king of Great Britain. Before Pennsyl-

vania came into existence as a state at all Mr. Aspden was out of it. He had a right to make his election, and he shewed by his acts that he preferred to follow his original allegiance. In fact the state twice renounced him as a subject, and he twice renounced the state as a sovereign. From the 28th September, 1776, he was an alien enemy. As evidence of intent to assume a British domicil—the ground which we principally assume in adducing it—this is a fact of potential influence. The transition from one domicil to the other, was most easy. There was nothing immissible between the characters of a British colonist and an English subject. There was much that was so between those of a royal colonist and a republican independent. Mr. Aspden then was but following a natural current. Except that he was not upon the same soil, England, after the revolution, was more like his former home than America itself. It therefore bears no resemblance to the case—which will be relied on by the other side of the Marquis de Bonneval—of a Frenchman acquiring a domicil in England, a case—not to speak it profanely—somewhat resembling that which Sir W. Scott thought difficult to presume, of a British Christian acquiring a Mahomedan domicil. But independently of intention, we beg to ask where there is a case of any native born subject leaving a revolting province, whose revolt terminates in independence, and living in the parent country ever afterwards, who has yet been considered as retaining his former domicil? How can a man have a domicil in any country with which he is in active, open, lawful war? He had not a dollar of property in America, nor, if he had not made his election, a single right there, except the right of being hanged or the right of being shot.

3. The centre of Aspden's affairs, the seat of his fortune, was London. His business, so far as he had any business, was investing money. His principal investments were in British funds. He had some in America, as he had some in France; but London was the place where he invested the bulk of his estate; and whence he superintended it all. A portion of his property was in Spanish bonds; a security not known nor marketable on American change.

4. Though he did speak of coming to America, and did come to it on three different occasions, there is nothing, either in his declarations of intentions or in his acts, after his return to England in 1792—certain not after his return there in 1817—to shew that he meant to reside permanently in the United States: After his return to England in 1817, he speaks of his having been "abroad," in America. When he left Philadelphia in 1817, he took away with him the plate—the last remnant of his chattels personal in America—which he had left there for 26 years before; leaving nothing but a will and some old papers of but little value. He left a small deposit in bank, just as he had left a very large one in England, which he now goes back to manage: and he never returns to America again.

5. His political rights, so far as he chose to exercise any, were English: He is enrolled, with his knowledge, it would appear, among the persons capable of being managers of the East India Company, a privilege which is not granted to American citizens.

6. Description in legal documents: In many papers he is described as "formerly of Philadelphia now of London." His being described in passports as an American, is accounted for by the fact that it was on the continent, just after the peace of Amiens, when the title of an American was a guaranty of civility and safety, and that of an Englishman a warrant for detestation and rudeness. It is of the least possible significance. An Italian consul would call him any thing which he called himself, and was willing to pay for.

7. Place of death: "A man," says a leading case on domicil (Guier v. O'Daniel, 1 Bin. 349, note), "is prima facie domiciled at the place where he is resident at the time of his death: and it is incumbent on those who deny it, to repel the presumption of law." Mr. Aspden died in London, not while passing through there, but after a residence there for 48 years.

II. The only criteria in favour of the English domicil are,

1. The place of birth. We admit that the British province of Pennsylvania was his domicil of origin, but that province no longer existed. Its soil was there, but it was deprived of all that had once made it lovely. Its institutions: its people: its conditions: its prospects were all changed. Mr. Aspden knew nobody here; nobody here knew him: What knowledge had he when he died, of the place of his birth? what of its passing concerns? How often did he ever greet its people here or any where, or walk its streets, or look upon its mansions? With London, its resorts, its ways, its walks, its men and manners, its events of every hour, he was as intimate as any native of London could be whose habits were as sequestered as his own. It was his home unless he was a vagabond. It was his home above all other places, however less it may have been his home, than it might have been, or than it necessarily is to most of its inhabitants. The place of birth is powerful, but it is not omnipotent. It can't control time, allegiance, property and a long, consistent course of action. That would put an end to all questions of domicil by resolving them all into questions of birth. "A person's origin," said Lord Thurlow (Bruce v. Bruce, 2 Bos. & P. 231, note), "is to be reckoned as but as one circumstance in evidence which may add to other circumstances, but it is an enormous proposition that a person is to be held domiciled where he drew

his first breath, without adding something more unequivocal." Lord Loughborough (Bempde v. Johnston, 3 Ves. 202), laid "the least stress" upon the place of birth taken alone, though in conjunction with the place of education and connection, it had great weight.

2. His expressions of intention to return to America: Mr. Aspden's declarations of intention—to say nothing of the fact that there are about as many one way as the other, and that they were dependent upon contingencies, (as of health) which never occurred—are shewn by his history through a long series of years, to have had scarcely any connexion or correspondence with his conduct. If they existed at all, they were without the evidence of any overt act: they were residing secretly and undistinguishably in the breast of the party, and liable to be revoked every hour. Lapse of time, country of allegiance, place of residence, seat of fortune, place of death and burial, therefore, all act with their natural and uncircumscribed force. In Stanley v. Bernes, 3 Hagg. Ecc. 372, it was proved that Mr. Stanley, who resided for a long time in the Portuguese dominions, frequently described himself as a British subject, and often expressed it as his most ardent wish to lay his bones in his native soil: speaking with abhorrence of being buried where he then was. He often spoke also with affection of the English religion, and with disgust of the Roman Catholick: and it was proved that in expectation of an invasion by the French, he had transferred his property, by way of safety, from his own name to his son's, who was born in Portugal. On his death, moreover, he was buried in the English burying ground, and his will was taken possession of by the British consul in the way usual with the wills of English subjects alone. But the high court of delegates considered that all his declarations of intentions were outweighed by his residence of fifty years in Portugal. This was a case of succession.

It was part of the case of Bruce v. Bruce [supra], that in many letters Major Bruce "had expressed an anxious desire to return and spend the remainder of his life in his native country; particularly he wrote to that purpose a few months before his death, and he was in the course of remitting home his money when he died." But the house of lords held, that as he had been domiciled in India, and as he was not actually on his way to Scotland, and had not any fixed and settled intention to return there at any particular time, India must be considered as the place of his domicil. In the Case of De Bonneval, 1 Curt. Ecc. 868, the marquis had spoken of England as his home, and frequently expressed his preference for a residence there. "I do not, however, consider" said Sir Herbert Jenner, in giving his opinion on the case, "that the declaration made by the deceased at different times, that he preferred a residence in this country, can be a ground upon which the court is to rest its judgment: the domicil cannot depend upon loose declarations of this sort, where there are documents which shew that the party looked to France as his home." If documents, as Sir Herbert Jenner says, be stronger than declarations, certainly facts (which we have in this case instead of documents), are stronger than either. In the case of The Venus, 8 Cranch [12 U. S.] 281 (where a citizen of the United States established his residence in England, between which and the United States war suddenly broke out, and his property was captured by an American ship, before he could have acquired any knowledge of the war), the majority of the supreme court refused to hear evidence at all, of the party's mere declarations of intentions to return. "Mere declarations of such an intention," said Judge Washington (8 Cranch [12 U. S.] 281), in delivering the opinion, "ought never to be relied upon when contradicted, or at least rendered doubtful by a continuance of that residence which impressed the character. They may have been made to deceive, or, if sincerely made, they may never be executed. . . . But when he accompanies those declarations by acts, &c." This, it may be admitted, was a rule of policy, but it was a rule of policy founded upon the fact that intention is a thing easy to be counterfeited; easy to be assumed whether it exist or no; and that in doubtful cases it must be proved by acts and not by declarations.

Mr. Tilghman, Mr. J. M. Read, and Mr. H. D. Gilpin on the other side:

The most important question here is, "What is the legal meaning of domicil?" Among French jurists Vatel defines it (Droit des Gens, l. 1, c. 19, § 218), "a fixed residence in a place, with an intention of always staying there, made known by a declaration, express or tacit." "He who stops," he adds, "even for a long time in a place for the management of his affairs, has only a simple habitation there, but has no domicil." Dargentré, "a civilian of high authority," defines it (quoted in Phillim. Dom. 11) negatively in saying, that "they who have no intention of fixing their abode in a place, but are absent somewhere for convenience, necessity or business, cannot, by any lapse of time, create a domicil, cum neque animus sine facto, neque factum sine animo ad id sufficiat." Boullenois says (Id. 13): "A man cannot be said to belong to a place unless he be then in the spirit and meaning of abiding there." Among German jurists, Wolff calls it (Jus Gentium, c. 1, § 137) a fixed habitation in a certain place with the intention of remaining there. Forcellini (quoted in Phillim. Dom. 14, note), among the Italians, says: "Domicil is the home, the seat of domestick life, the residence

which is certain and permanent." "A domicil then," says C. J. Marshall (dissenting opinion in The Venus, 8 Cranch [12 U. S.] 290), "in the sense in which this term is used by Vatel (and the same remarks applicable to the definitions of other jurists), requires not only actual residence in a foreign country, but an intention of always staying there. Actual residence without this intention amounts to no more than simple habitation. . . . The intention which gives domicil is an unconditional intention to stay always." Domicil means then, we say, a man's permanent residence known to be such by his declarations and acts, which he has no intention of leaving, and which he regards as his established home.

The definition of domicil generally being settled, we say that domicil of origin—by which is meant the place of birth and immediate connexions, the place in which, according to the Roman law, a man is born or ought to be born—that this domicil subsists during minority and until the person has legally the will to change it by arriving of age. It is a domicil fixed by law, what the law calls a necessary domicil, and, quite independently of the parties' will, attends him through his minority. The supreme court of Pennsylvania (School Directors v. James, 2 Watts & S. 571) states this matter with legal precision, as well as with force and beauty of sentiment: "No infant who has a parent, sui juris, can in the nature of things have a separate domicil. This springs from the status of marriage which gives rise to the institution of families; the foundation of all domestick happiness and virtue which is to be found in the world. The nurture and education of the offspring make it indispensable that they be brought up in the bosom and as a part of their parents' family, without which the father could not perform the duties he owes them, or receive from them the service that belongs to him. In every community therefore they are an integrant part of the domestick economy, and the family continues for a time to have a local habitation, and a name after its surviving parents' death. The parents' domicil therefore is consequently and unavoidably the domicil of the child."

This domicil of origin remains through life unless a new one is acquired by the positive act of the party, in abandoning it, and taking, animo et facto, another as his domicil. A leading case on this subject is a recent one, that of De Bonneval v. De Bonneval, 1 Curt. Ecc. 856. The Marquis De Bonneval was born in France in 1765, of French parents, lived there till the revolution in 1792, came to England, stayed there till 1814 or 1815, received an allowance as a French emigrant, returned to France with the Bourbons in 1814, returned to England on Napoleon's return in 1815, but after his defeat went immediately back. After that time until his death, in 1836, he was occasionally living in one country and the other: he had a house in England on a lease of 44 years, bought in 1820: he died there, having made a will in each country, the last one being in France. He was held to be domiciled in France. The court said: "Having first ascertained the domicil of origin, that domicil prevails till the party shall have acquired another with the intention of abandoning the original domicil. The acquisition of a domicil does not simply depend on the residence of a party; the fact of residence must be accompanied by an intention of permanently residing in the new domicil and of abandoning the former; in other words, the change of domicil must be manifested, animo et facto, by the fact of residence and intention to abandon. Again, the presumption of law being that the domicil of origin subsists until a change of domicil is proved, the onus of proving the change is on the party alleging it, and this onus is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicil; for the change must be demonstrated by fact and intention. "I do not consider," said Sir Herbert Jenner, "that the declarations made by the deceased at different times, that he preferred a residence in this country (England) can be a ground upon which the court is to rest its judgment; the domicil cannot depend upon loose declarations of this sort, where there are documents which shew that the party looked to France as his home. Unless the evidence was nicely balanced, the court would pay no regard to such declarations, shewing a preference for a residence in this country; and not a decided intention to abandon his native land and take up his sole residence here." Sir Herbert, in delivering the opinion of the court, alluded too to the circumstances that this residence in England, in the first instance, was because the marquis was compelled to leave France by the revolution; he did not come with the intention of taking up his permanent abode in England and abandoning his domicil of origin, that is, to disunite himself from his native country. A continued residence in England was not sufficient to produce a change of domicil of origin. In the Case of Sautereau (quoted in Phillim. Dom. 58), he had his domicil of origin in Burgundy, he left there in his minority, never returned, but died in another province of France. Yet his domicil at the time of his death was held by the French lawyers to be Burgundy, because he was first sent from there in the capacity of a steward or servant, and under one person and another, continued to act in the same capacity till his death. As there was no intention of permanent change, his domicil of origin remained. In the case of Craigie v. Lewin, 3 Curt. Ecc. 435, the court said that "where the question of domicil at the time of

his death, was in equilibrio, the place of birth and origin might have turned the scale." In Somerville v. Somerville, 5 Ves. 750, the master of the rolls said: "The original domicil, or, as it is called, the forum originis or the domicil of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and taking another as his sole domicil."

What then constitutes such a change? Nothing but the absolute abandonment of the former domicil, and the taking of a new one animo et facto. Thus, where one whose domicil of origin was Hanover, went to Hamburg and lived there ten years, carrying on mercantile transactions, and then went to Paris where he died a bachelor, leaving his property at Hamburg; Hanover was held by Grotius and other Dutch lawyers (quoted in Phillim. Dom. 103) to be his domicil at the time of his death, because he made no declaration of intending to change his domicil of origin. In Munro v. Munro, 7 Clark & F. 842, Sir Hugh Munro was born in Scotland, and resided there till he came of age in 1784: for the next four or five years he visited France but always returned to Scotland, though not to his family mansion. In 1794 he went to London, took a house there, formed an illicit connexion with a woman whom he afterwards married. A daughter was born, while they were thus living in London, but before the marriage. In 1802 they returned to Scotland. The question was as to his domicil at the time of his child's birth. Had he changed his domicil of origin, which was Scotland, so as to establish a new domicil in England while he lived there? Seven out of thirteen of the Scottish judges thought he had: and that England was his domicil. But the English house of lords reversed the decision on the express ground that to constitute a change of his domicil of origin, he must not only have acquired another residence, but coupled it with the intention of making it his sole residence, and abandoning his domicil of origin.

Nor does the circumstance of a person's death at a place different from his domicil of origin, of itself, afford more than a slight presumption, and one to be explained, that it had become his place of residence. In the case of Johnstone v. Beattie, 10 Clark & F. 138, though the party (a Scotch lady,) went to England on account of her health, stated she expected to die there, and gave directions that her body should be buried there, still as it did not appear that she had abandoned her residence in Scotland, this fact was not held to establish a new domicil in England. In our own case of Guier v. O'Daniel, 1 Bin. 349, note, Guier, who was a seafaring man, died abroad, but his domicil was held to be at Wilmington, which was his domicil of origin, and which it was held that he had never relinquished.

It is true that in questions of commercial domicil, time is not only an important element, but generally a conclusive one. Intention is often of no moment at all: the party's acts settle every thing. That at least is the English law. The case of The Harmony, from which Sir W. Scott's opinion is quoted on the other side, was a case of commercial domicil, not of domicil for succession. And even in cases of commercial domicil, the English courts have gone further than the continental jurists, and further, it is probable than we have. Chief Justice Marshall, in speaking of the decisions of Sir William Scott says, (dissenting opinion in The Venus, 8 Cranch [12 U. S.] 299): "It is impossible to consider them attentively, without perceiving that his mind leans strongly in favour of captors. . . . In a great maritime country, depending on its navy for its glory and its safety, the national bias is perhaps so entirely in this direction, that the judge, without being conscious of the fact, must feel its influence. However this may be, it is a fact of which I am fully convinced: and on this account it appears to me to be the more proper to investigate rigidly the principles on which his decisions have been made." Mascardus ("himself no mean authority," says Mr. Phillimore,) tells us (quoted in Phillim. Dom. 148) that he was taught by the chief of all interpreters of the law, by Bartolus, that where a person retained the intention of returning to his former domicil, a thousand years would not suffice to establish a new one. Locré speaks (Id. 148) of a case decided by the parliament of Paris, where a person who had been absent for fourteen years, retained his domicil by a correspondence intimating his intention to do so. According to the Sardinian Code (Id. 160), it appears that "no domicil in a foreign country, however long and permanently established, will, of itself avail to prove that the person establishing it had abandoned the intention of returning to his native country, and so incurred the forfeiture of his civil rights." In short, the true doctrine of change of domicil for purposes of succession, is laid down by the judge of the prerogative court in a recent case (Collier v. Rivaz, 2 Curt. Ecc. 855): "Length of time will not, alone, do it: intention alone will not do it; but the two taken together, do constitute a change of domicil."

In a country so greatly and extensively commercial as the United States, the courts which administer the law of nations, will be careful not to establish principles in conflict with the national policy. Chief Justice Marshall, who looked at these matters with the comprehensive eye of statesmanship, not less than with the close observation of the logician, says (dissenting opinion in The Venus, 8 Cranch [12 U. S.] 293): "Nothing can be more obvious than that the affairs of a commercial company will be transacted to most advantage by being conducted as it respects both purchase and sale, under the eye of a person, interested in the result. The nation who

takes an interest in the prosperity of its commerce, can feel no inclination to restrain its citizens from residence abroad for the purposes of commerce, nor will it hastily construe such residence into a change of national character to the injury of the individual. It is not the policy of such a nation, nor can it be its wish, to restrain its citizens from pursuing abroad a business which tends to enrich itself." A maxim of the law is, that native domicil easily reverts. The foreign domicil being adventitious, de facto, and somewhat unnatural, prevails only while it is actual and complete. 1 Am. Lead. Cas. 561.

To apply these principles to the case of Mr. Aspden: Mr. Aspden's domicil of origin was Philadelphia. His father was a settled inhabitant there and died there. Aspden was born there, and lived there—a housekeeper and house owner—until the Revolution. There is no evidence that when he left Philadelphia in 1776, he designed to abandon his American domicil and to acquire a new one in England. If he did not leave Philadelphia on a special purpose, he left it at least as a person who was unsafe in it during a civil war. At the worst, he was in a condition similar to that of the "exile" or "prisoner," who, says Denisart (quoted in Phillim. Dom. 88, note), "are never presumed to have lost their design of returning, no matter how long a time may have passed since they were originally placed under the restraint." He came back again in 1785, the earliest date possible after the peace, and did not stay, only because he was in bodily terrour, not because he wished to abandon the country. Other persons thought that his fears were chimerical: whether they were so or not it is difficult now to decide; he himself thought them well grounded, and there is no doubt that they were real. His absence till 1791, was therefore in a measure a constrained or enforced absence. There is no case that decides if a man through terrour—even though a vain terrour—leaves his country, that he also loses his domicil for purposes of succession. Mr. Aspden was not absent six years after his second departure in 1785, before he returned again: and made in 1791 a will, executed, not according to English forms, but according to the forms of Pennsylvania. He appoints three executors, all of them American; and makes such a provision as to one of them, that the will could never be without an American executor, nor his estate ever require any sort of administration. He thus guards effectually against any Englishman's taking possession of his effects, in case of his death in England. He leaves that will here: lived with it as his last will, and died with it as his last will. He is not abroad in England two years, before he expresses his intention to return again to America, and directs his plate not to be removed from the place where he left it; and in six years afterwards, 1798,—having constantly made mention of his intention to come here—he does actually set sail for America, and would have arrived, had not the ship proved dangerous to such an extent, that he deemed it necessary for his life to get ashore in Ireland. He remains in England only four years more, before he leaves it, in 1802, for the continent. He declares that his purpose in going to the continent was to set sail for the United States. Whatever his purpose really was, it is certain that the continuity of his English residence was destroyed; and he styles himself and is styled in Italy, "an American." He stays nearly a year on the continent. In 1804 he goes to Paris; again breaking the thread which the other side treats as continuous and unbroken from its origin. A few years after this, in 1808, the relations between the United States and England became unsettled and uncomfortable: War is actually declared in 1812, and lasts till 1815, during all this time he is much safer in England than in crossing the ocean; being, as he says, in danger if he came here, of being captured both by French and American cruisers. Peace is made, February, 1815, and in September of that same year, almost as soon as it was possible for him to cross the ocean safely, he is again in Philadelphia. He remains in the United States two whole years: and when he leaves the country he still leaves his will behind him here. Soon after returning to England, he expresses his design of coming back to the United States, and no doubt would have come a sixth time had not his death intervened.

Now is there any thing in all this to control that rooted principle of law, that domicil of origin remains until the party has actually abandoned it? abandoned it, animo et facto and acquired a new one. Mr. Aspden did not remain continuously in England. He was roving about—a wanderer free—in various countries—in different hemispheres, and upon the ocean that divides them. Even had he, by lapse of time, lost his original domicil in 1815, the only time at which it can be really supposed that he lost it, that domicil was resumed by his residence of two years in America in 1815–16–17. It is unimportant that he did not reside continuously at Philadelphia during these two years. He resided no where continuously. He was a bachelor, with no liens, no affections and with neither capacity or disposition, it is probable, to fix himself anywhere. Had he died in America on this visit, would any question of domicil ever have arisen? Mr. Aspden was an irresolute and most procrastinating man: his intentions of coming to America were perfectly real, but he wanted energy to execute them promptly. In each one of his last four departures from England, he had been declaring for years his intention of coming, before he actually came: he delayed the execution of his intentions, but he executed them in the end. So for some time before his death he was getting ready to return. He was irresolute—not about the fact of his return, but about the exact time. He delayed, deferred and procrastinated, just as he had done in the four cases before. But

no question, had he lived, he would ultimately have arrived a fourth time—just as he had done three times before.

GRIER, Circuit Justice. Domicil is a word which we have adopted from the Roman or civil law, but which it has been considered so difficult to define with precision and accuracy, that an eminent writer (Bynkershoek) on the subject was unwilling to hazard a definition, and therein has been commended by a learned English judge (Lord Alvanley, 5 Ves. 750) for his wisdom.

The Roman codes described domicil as follows: "In whatever place an individual has set up his household gods and made the chief seat of his affairs and interest; from which, without some special avocation he has no intention of departing; from which when he has departed he is considered to be from home; and to which, when he has returned, he is considered to have returned home. In this place there is no doubt whatever he has his domicil." Quoted in Phillim. Dom. 11.

It would tend rather to confuse than to elucidate the subject, to notice the many other attempts at definition of this word, and to attempt to point out their several merits or defects. It may be correctly said, however, that no one word is more nearly synonymous with the word "domicil," than our word "home." The definition given by the late Judge Rush of this city (Guier v. O'Daniel, 1 Bin. 349, note), which has received the approbation of an English writer (Phillimore) on this subject, combines, it is probable, accuracy with brevity beyond any other. He defines it "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain for an unlimited time."

Two things, says Judge Story (Confl. Laws, § 44), must concur to constitute domicil. First: Residence. Secondly: The intention of making it the home of the party. There must be the fact and the intent, and in many cases actual residence is not indispensable to retain a domicil after it is acquired, but it is retained animo solo, by the mere intention not to change it, or adopt another. If therefore a person leave his home for temporary purposes, but with an intention to return to it, this change of place is not, in law, a change of domicil.

There are few subjects presented to courts for their decision which are surrounded with so many practical difficulties as questions of domicil. The residence is often of an equivocal nature; the intention extremely obscure, and has to be gathered from acts and declarations oftentimes conflicting and contradictory. It is probable, however, that there is not a case to be found in all the books which presents more difficulties arising from this cause than the one before us. The testimony fills an 8vo. volume of nearly 900 pages. You have the whole history of the life of Mathias Aspden, all that he did, much that he said, and much more that he has written. Indeed it would seem, that being a man of much leisure he had spent a great part of his life in writing documents which bear—some indirectly, and many directly—upon the very question which you are called on to decide. And with an obliquity of genius rarely exceeded, he has enveloped it in so much contradiction and confusion and obscurity that it will require your utmost attention and the vigorous exercise of all your powers to solve the question.

On the first point submitted to you there is no doubt. The domicil of origin of Mr. Aspden was Philadelphia, in the then British province of North America.

The next question will be: Did the testator ever change this domicil, and acquire another;—a domicil of choice as distinguished from his domicil of origin? And this is the great question in the case.

In the consideration of it the following rules must be observed:

1. That although a man may have two domicils for some purposes, he can have one only for the purpose of succession.

2. That the original domicil, or forum originis, as it is called, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and taking another as his sole domicil. A man cannot be considered as a vagabond, or a person without any domicil; for the domicil of origin is not abandoned until a new one has been intentionally and actually acquired.

3. That in order to acquire a domicil of choice, the fact of residence must be coupled with the intention to abide an indefinite time, or make the place his home. But the shortest residence with such an intention is sufficient. A residence in one place for a great number of years is a violent and continuing proof of the animus manendi; yet if it clearly otherwise appear that such residence was without such intention, it would be of itself insufficient to constitute such domicil.[2]

4. That the burden of proof lies on him who asserts a change of domicil.

5. That the domicil of origin easily reverts, and that it requires fewer circumstances to constitute domicil in a native subject or citizen than to impress the national character on one who is originally of another character. The acquired domicil, however, must be finally abandoned before the domicil of origin can revert.

6. A fugitive from his country on account of civil war still retains his domicil, unless he shows an intention of a total abandonment of his country by the acquisition of a new domicil of choice. Nor will the confiscation

[2] This remark, the court observed, might not be correct to this extent, in cases of commercial domicil in time of war, or of matrimonial, forensick or political domicil in time of peace; but was to be received as correct in its application to cases of testamentary domicil.

of his property by the new government, in the case of a revolution effected after civil conflict—nor the attainder of his person—of themselves, put an end to his domicil of origin. If he elect to adhere to the old sovereign or government, looking forward with hopes of its re-establishment, his domicil of origin is not necessarily abandoned by such election. Allegiance to the existing government, or the exercise of political rights, constitute no part of the definition of domicil. These facts may nevertheless be of great importance in judging of the intention. Consequently, adherence to the king of Great Britain in our Revolutionary War, although it might have caused the forfeiture of the life or property of an American citizen, was not, of itself, an abandonment of his domicil. The estates of those persons who fled from England with the Stuarts and died in France, were administered by the French courts according to the law of England as their domicil.

Keeping in view these principles, you will inquire whether Mr. Aspden ever acquired a new domicil of choice. It is admitted that he left Philadelphia, his domicil of origin, in 1776 and went to England, where—with the exception of two or three years spent in the United States and in journeys on the continent of Europe for health or amusement—he lived until his death in 1824. The actual habitancy being thus clear, the question then depends on intention. Did he go to England with the intention of making it his home? If not, did he at any time while there, change his intention so that the animus manendi concurred with the act of habitancy, so as to constitute a change of domicil? The leading fact that he spent the greater part of his life in England and died there, raises a violent presumption that his intention corresponded with his acts. But as I have before said, in questions of succession even forty-eight years spent in a foreign country may possibly be accounted for, and the inference drawn from length of time rebutted.

(THE COURT then gave a detailed history of the evidence, essentially as the reporter has presented it in his statement of the case.)

Without expressing any opinion on Mr. Aspden's intention, I may say that the testimony is full of contradictions: and would afford clear ground for a verdict either way, if the testimony on the opposite side be left out of view. As it is, the question is susceptible of much doubt.

Previous to the testator's return to England in 1785, there is no sufficient evidence, I think, of an intention to make England his home. Between 1785 and 1791, when he returned a second time to Philadelphia, there are declarations both ways. How far, on the one side, they may be accounted for as made by the suggestion of Mr. Douglass and Mr. Galloway, his counsel in England, to gain a certain end there; or how far, on the other, they may have been prompted by a hope of obtaining a return of his property here, you will judge for yourselves. After he obtained his pardon here and compensation in England, his heart appears to have been set on getting his attainder reversed and his property here restored; and the hope, it appears, never forsook him. Did it tend to keep the animus revertendi always alike in his breast? Does his reporting himself as an "alien" in England, and his styling himself "The Right Honorable Mathias Aspden of Philadelphia," shew that he considered himself an American? Or were such designations resorted to, only for the purpose of evading a tax on his dividends in England?

In fine, without wishing to express any opinion on the merits of the question, I may remark, that the biography of the testator, exhibits him as a man who led an unhappy and discontented life. Love of money his ruling passion, without ties of family or friendship, he fled to England to save his personal property from confiscation, and thereby lost his real property here. Notwithstanding his political principles made him prefer his English allegiance in the War of the Revolution, and though he was extremely vexed by the treatment which he had received from our legislature, he still retained a strong attachment for his native land. When in England he was absent from the associations and companions of his youth, and ever planning his return. When he returns he finds every thing changed. The friends of his youth have been removed by death: New men have grown up and are at the head of affairs. Every thing has been moving forward, while he alone has stood still. He fails to meet the respect and attention to which he fancies that his wealth entitles him. He becomes sour and discontented, and returns to England to inflict on chancellors and parliaments the endless memorials which he had lately found ineffectual on legislatures and congresses. Time, instead of assuaging the sense of his grievances, seems only to add to their weight and number: his hopes of remuneration from republican honour or royal generosity, become at last a monomania: he spends his time in writing memoirs and memorials contradictory and unintelligible, to annoy his contemporaries and puzzle posterity, and indites a will in a few lines, whose meaning, after twenty years of litigation yet remains to be settled. A wandering hypochondriack in search of health, he spends his time in vibrating between two continents, is occupied throughout his life in accumulating wealth for unknown heirs, and finally dies without a friend to soothe his pillow or follow him to the grave! Whether he died an Englishman or an American, it is for you, gentlemen, to decide.

The jury having been out for twenty-four hours, found a verdict in favour of the American domicil at each of the dates mentioned in the issues.

A few days afterwards a motion was made by the plaintiff for a new trial, which was refused by the court, who expressed their satisfaction with the finding of the jury.

Case No. 17,539.

WHITE v. BURNS.

[5 Cranch, C. C. 123.] [1]

Circuit Court, District of Columbia. March Term, 1837.

PROMISSORY NOTES—DISCHARGE OF INDORSER—COMPETENCY OF WITNESS.

1. If new notes are taken by the holder of a note, and time given without consent of the indorser upon the old note, he is discharged.

2. The maker of a note is a competent witness, not to prove its original invalidity, but the improper use afterwards made of it, and that time was given him without the consent of the indorser.

[See Bank of Columbia v. French, Case No. 867.]

Assumpsit [by W. G. W. White] against [Benjamin Burns] the indorser of J. B. Gorman's note for one hundred dollars.

Mr. Bradley, for defendant, offered to examine J. B. Gorman, the maker of the note, to prove that it was made to be discounted at the Bank of Washington to take up a note for one hundred and five dollars, with the defendant's indorsement, then about becoming due at the Bank of the United States; but that it was discounted by the plaintiff without the consent of the defendant, and that time was given to the maker, also without the defendant's consent.

Mr. Hoban, for plaintiff, relied on the case of Bank of U. S. v. Dunn, 6 Pet. [31 U. S.] 54, that the party to the note cannot be a witness to invalidate it.

THE COURT (nem. con.) permitted Mr. Gorman, the maker, to be sworn and examined as to those facts.

Mr. Bradley then prayed the court to instruct the jury that if they should be of opinion, from the evidence, that after the note upon which this action is brought became due the maker thereof, without the knowledge or assent of the defendant, made an agreement with the plaintiff to forbear any suit upon the said note, and in consideration thereof paid to the plaintiff five dollars, and gave his two promissory notes to the plaintiff, one for $45, at thirty days, and one for $50 at sixty days, and also paid him the further sum of $3.50, and that the plaintiff did, in fact, thereupon forbear any suit until after both the said notes had become due, the plaintiff did thereby discharge the defendant from liability upon the said note.

Mr. Bradley cited Theo. Prin. & Sur. 164, 184; Hubbly v. Brown, 16 Johns. 70; 2 Wheeler, 212; Woodhull v. Holmes, 10 Johns. 231; Skilding v. Warren, 15 Johns. 270.

Mr. Hoban contended that the agreement to forbear was upon an usurious consideration, and, therefore, not binding upon the plaintiff; and, therefore, did not discharge the defendant; and prayed the court to instruct the jury that if they should believe, from the evidence, that more than lawful interest was given for the forbearance of the two notes of fifty and forty-five dollars, such forbearance did not discharge the defendant, and he is liable upon the note of one hundred dollars.

But THE COURT (nem. con.) refused to give the instruction asked by Mr. Hoban, and gave that asked by Mr. Bradley.

Verdict for the defendant.

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

Case No. 17,540.

WHITE v. CLARKE et al.

[5 Cranch, C. C. 102.] [1]

Circuit Court, District of Columbia. June 10, 1837.[2]

EQUITY JURISDICTION—SURRENDER OF NEGOTIABLE PAPER—PAYMENT IN GOODS—INSOLVENCY—COMPROMISE CONTRACTS.

1. Courts of equity have jurisdiction to decree the surrender of negotiable notes, unconscientiously withheld by the defendant.

2. If goods be sold at an abatement of five per cent. from the invoice price, upon the vendee's assurance that the notes given by him therefor should be punctually paid, and he suffers one of them to be protested, and the vendor afterwards receives goods for his claim, at seventy per cent., the seventy per cent. is to be calculated upon the amount due upon the notes, and not upon the full invoice price.

3. The rule that if a debtor, in compounding with his creditors, secretly promises to give to one more than to the others, in order to induce him to sign the instrument of composition, it is void, only applies to cases where the creditors are supposed mutually to agree with each other, as well as with the debtor. But when each creditor is separately compounded with, this principle of mutuality and equality does not apply.

4. Each creditor has a right to make his own bargain with his debtor, and one bargain cannot be void because it is better than another.

5. A fraud in another transaction between the complainant and others, not parties to the cause, cannot invalidate the transaction between the parties to the suit before the court.

The bill in equity in this case states that on the 2d of July, 1832, the complainant passed to the defendants his twenty-six promissory notes of that date, each for $274.67, payable to them at different times, from sixteen to forty-four months, amounting to $7,141.42, three of which notes had been passed away by the defendants to Clagett & Washington; that on the 30th of December, 1833, he entered into an agreement with the defendants, to anticipate the payment of those notes, and to deliver to them, and they agreed to receive of the complainant, goods in his store, "in full payment of the said sum of money, at the rate of seventy cents in the dollar on the price the said goods and merchandise were marked to have cost; and the said Clarke and Briscoe did further agree to deliver to your

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

[2] [Affirmed in 12 Pet. (37 U. S.) 178.]

orator, to be cancelled, on the delivery of the said goods and merchandise, all the said promissory notes then in their possession, and speedily to pay and take up such of the said notes as had then been negotiated and were in the hands of other persons, and to deliver them to your orator in like manner to be cancelled." That the complainant fulfilled the agreement on his part, in every particular, and delivered the goods to the full amount, except a fraction of $1.41, in payment of the said sum of $7,141.42 at the rate of seventy cents in the dollar on the prime and marked cost of the said goods and merchandise, which they accepted, on the terms of the said agreement, in satisfaction and payment of the said sum of money, without objection known to the complainant, who has tendered to deliver, and is ready to deliver to them goods and merchandise to the value of $1.41. That the complainant has demanded the notes which the defendants refuse to deliver up to be cancelled, &c. It then prays the court to order the defendants to bring the notes into court; and to pay the notes held by Clagett & Washington; and for general relief.

The answer of the defendants states that the consideration of the notes was the sale of a large invoice of goods by them to the complainant from which they agreed to deduct five per cent. in consideration of his solemn promise that the notes should be punctually paid. They deny that they made the agreement respecting the compromise of their claim, and the cancelling of their notes, in the terms and upon the conditions set forth in the bill. But they aver that about the time mentioned in the bill, in consequence of hearing that the complainant had failed in business and was compromising with his creditors, a conversation and arrangement did take place between the defendant Clarke and the complainant, in which the said defendant asked him upon what terms he would settle the whole claim of the defendants; not merely on what terms he would settle the amount of the said notes. The complainant offered sixty cents in the dollar payable in goods; but upon the said defendants' saying that they understood that he had compromised with other creditors at seventy, he agreed to pay the defendants in goods the whole amount of their claim at the rate of seventy cents in the dollar; and pay the difference, namely, thirty cents when he was able; and it was not till after the said arrangement had been so agreed upon that any thing was said between them about the defendants' getting up and cancelling the complainant's notes; but it was afterwards arranged between them that upon the settlement of the defendants' whole claim by paying the same in goods at the rate of seventy cents in the dollar, the defendants should get in and cancel the said notes; not upon the settlement, in that mode, of the amount of the notes merely; such was not the understanding of the defendants; but the amount understood by Clarke, at the time, was the amount of the original invoice from which five per cent. had been deducted when the notes were given upon the assurance of the complainant that the notes should be punctually paid; and as the complainant had failed totally to comply with that assurance the defendants considered that in equity and strict justice they were entitled to the amount of the invoice without such deduction. That the complainant had not complied substantially or otherwise with the terms of the said compromise, in the sense in which it was properly understood and agreed as aforesaid, so as to entitle him to call in the said notes in consideration of goods delivered by him in consequence of such compromise. That according to such compromise, in the terms in which it was made and understood on the part of the defendants, the notes were to be got in and cancelled upon the entire settlement of the defendants' said claim, and not otherwise; especially not upon the liquidation, at the rate aforesaid, of the mere amount of the notes. That the said terms have not been complied with on the part of the complainant, and he has refused to comply with the same, having delivered goods only to the amount stated in his bill, refusing to deliver goods to the amount of the goods originally delivered to him by the defendants without said deduction.

The defendants complain that a great part of the goods were remnants, and that it was a hard compromise on their part if it had been complied with. But they allege that it was not binding on them because obtained by fraud practised by the complainant upon the defendants and other creditors of the complainant, in order to alarm them into a compromise. That the whole matter of his pretended failure was a deliberate, artful, and fraudulent scheme of the complainant, to alarm and force his creditors into compromises, while, in fact, he was possessed of ample means to pay off all his debts and have a surplus on hand; that with such ample means in his hands, and with a fraudulent design to conceal and appropriate the same to his own illicit and fraudulent gains, he proclaimed his own failure and insolvency, and went about, under the alarm thus communicated to his creditors, and with false representations of his desperate circumstances, to catch up the most advantageous compromises he could with them, one by one; his offers of compromise varying from forty to eighty-seven and a half cents in the dollar, actually effecting compromises with some at the lowest rate, and with others at the highest. That preparatory to this scheme of fraudulent failure, and shortly before it was proclaimed, he had made unusually large purchases on credit, and shortly after gave out his failure in business and insolvency, and set on foot his plan of fraudulent compromises. That it was under the greatest pressure of this alarm, and while it was fraudulently used by the complainant to practise upon the fears of his creditors, that the defendants were fraudu-

lently and deceitfully drawn by him into such agreement for the compromise, as they have stated and admitted; and they believe that his scheme of a pretended and fraudulent failure had been meditated and prepared by the complainant before he made his purchase of the defendants and gave his notes; and that a few days after that transaction, namely, about the 9th of July, 1832, he caused to be entered in the land records of this county a fraudulent deed, settling valuable property on his family, which had been executed in the month of January preceding, and in the mean time kept secret.

To this answer the complainant filed a general replication; and a commission to take depositions was issued, under which sundry depositions were taken, and by consent, all the papers, except the bill and answer, filed in the case of Hall v. White (at December term, 1833), were permitted to be read in evidence in this cause.

At the hearing, W. L. Brent and Mr. Marbury, for the complainant, contended that according to the compromise as proved, the 70 per cent. was to be computed upon the amount of the notes then outstanding, and not upon the invoice price of the goods, and that there was no fraud on the part of the plaintiff in effecting the compromise; and that the notes ought to be delivered up, as the terms of the compromise had been faithfully complied with by the complainant, whether the defendants did or did not expressly promise to give them up. They were negotiable, and the complainant ought not to be kept in fear of being harrassed by them, as he might be if they should be negotiated. That a court of equity has a clear jurisdiction to decree a surrender of them to be cancelled. Hamilton v. Cummings, 1 Johns. Ch. 517. That no objection can arise from the fact that he made better terms with some of his creditors than with others, as each was acting for himself alone.

Mr. Hoban and Mr. Jones, contra, contended that the answer of the defendants, stating the terms of the compromise, being responsive to the statement of the compromise in the bill, is evidence for the defendants, unless contradicted by two witnesses, or by one corroborated by circumstances. That as the abatement of five per cent. from the invoice price was made upon the assurance of the complainant that the notes should be punctually paid; when he failed to pay punctually the defendants were remitted to their original right, and were entitled to the whole invoice price, and were not bound to give up the notes unless that whole price should be paid by the complainant. Sewell v. Musson, 1 Vern. 210; Leigh v. Barry, 3 Atk. 583; MacKenzie v. MacKenzie, 16 Ves. 372; Bennet's Case, 2 Atk. 527. That this court has no jurisdiction to decree a specific execution of a verbal contract relating to personal estate, upon the ground of contract only. Greenwood v. Lidbetter, 12 Price, 183. That the compromise was obtained under fraudulent and false pretences. Pollen v. Huband, 1 P. Wms. 751; Hov. Frauds, 13, 14; Huguenin v. Baseley, 14 Ves. 289; Roche v. O'Brien, 1 Ball. & B. 340; Child v. Danbridge, 2 Vern. 71; Cecil v. Plaistow, 1 Anstr. 202; Mawson v. Stock, 6 Ves. 300; Jackman v. Michell, 13 Ves. 581; Sadler v. Jackson, 15 Ves. 52, 55; Leicester v. Rose, 4 East, 372; Constantein v. Blache, 1 Cox, Ch. 287; Chapple v. Ashley, 1 Dowl. & R. 27; Cockshot v. Bennett, 2 Term R. 763; Fawcett v. Gee, 3 Anstr. 910; Smith v. Cuff, 6 Maule & S. 160; Spooner v. Whiston, 8 Moore, 580; Jackson v. Lomas, 4 Term R. 166; Coleman v. Waller, 3 Younge & J. 212; 1 Story, Eq. Jur. 199, 236, 356, 366.

CRANCH, Chief Judge, after stating the substance of the bill, answer, and evidence, delivered the opinion of the court.

It is contended by the counsel for the defendants that the bill contains no ground for jurisdiction in equity; that courts of equity will not enforce the specific execution of parol agreements respecting personal property; that all the cases in which those courts have decreed the specific performance of agreements respecting chattels, were cases upon written contracts. But in the present case the equity of the complainant does not depend entirely upon the contract, but upon the refusal of the defendants to deliver up negotiable notes which, under the circumstances of the case, they would unconscientiously withhold even if they had not expressly agreed to surrender them. 2 Story, Eq. Jur. p. 22, § 715, and Id., p. 24, § 717. The danger that the defendants might pass them away before maturity, by which the complainant would be deprived of his legal defence, seems to me to be a sufficient ground for the interference of a court of equity. But the jurisdiction of a court of equity to compel the surrender of instruments, especially of negotiable instruments, unconscientiously withheld, seems to be put beyond doubt by Chancellor Kent in Hamilton v. Cummins; and by Mr. Justice Story in his Commentaries on Equity Jurisprudence (volume 2, p. 11, § 700, and Id., p. 15, § 705).

Admitting the jurisdiction, three principal questions arise: 1st. What was the contract of the 30th of December, 1833? 2d. Was it obtained by fraud or imposition practised by the complainant upon the defendants? 3d. If it was a valid contract, has it been complied with on the part of the complainant?

1. What was the contract? The defendants, in their answer admit that, on the 30th of December, 1833, there was an agreement with the complainant for a compromise of their just claim upon him, by which he agreed to pay, and they agreed to receive the whole amount of their claim, at the rate of seventy cents in the dollar, payable in goods in his store; that in consequence of such compromise he delivered to them, and they received, goods to the amount stated in

his bill, (that is, to the amount of the notes, at seventy cents in the dollar, with the exception of a fraction of $1.41, which the complainant avers he was always ready to deliver, &c.) Admitting then (that which the complainant is not bound to admit) namely, that the compromise was upon the terms stated in the answer, the question is, what was the amount of the defendants' just claim against the complainant on the 30th of December, 1833? The forty-four notes were given for the exact amount of the purchase-money of the goods sold by the defendants to the complainant on the 2d of July, 1832. The complainant never owed them a larger sum for those goods. The amount of the notes was the debt, and the whole debt, compounded. The complainant had paid, punctually, the first fifteen notes, each note being for $274.67 amounting, in all, to $4,120.25. Three more of the notes had been paid by Mr. Van Ness, amounting to $824.01. The sixteenth note, due November 5th, 1833, had been renewed, by mutual consent, for sixty days. The seventeenth note, due December 5th, 1833, was not paid, and was then lying under protest from the 6th to the 30th of December. But the failure of the complainant to pay that note, at maturity, did not give the defendants any new right, or restore them to any previous right, as in cases of compounding debts, where, if the composition is not punctually paid, the creditor is remitted to his original rights. The remaining notes had time to run, from one to twenty-seven months. The just claim of the defendants, therefore, on the 30th of December, 1833, was not even to the amount due upon the face of the notes; but to that amount, (minus the discount for the time they had to run,) and the interest and cost of protest upon that which became payable on the 5th of December, 1833.

The defendants, in their answer, admit payment of the full amount of the notes, in goods, upon the terms, and at the rates, of the compromise; they have, therefore, received payment, in the stipulated mode, of at least the full amount of their just claim. This is my view, of this part of the case, founded upon the defendants' answer alone; and it is strongly corroborated by the testimony of the witnesses, and by the acts of the defendants themselves.

Mr. Brannan testifies that Mr. Clarke, the defendant, originated the proposition for the compromise; and asked Mr. White, the complainant, how much he would give him for his claim; and that seventy cents in the dollar was agreed upon, to be paid in goods at the marked cost price. It appears from his deposition, and those of James L. White and Cornelius G. Wildman, that before the goods were delivered, the complainant asked Mr. Clarke, who was then in the complainant's shop, for the amount of his claim; to which Mr. Clarke replied, "send in your young man to my store and he will get it." That Mr. Wildman was, accordingly, immediately sent by Mr. White to the defendant's store for that purpose, and the defendant, Mr. Briscoe, gave him the paper marked "A.," annexed to the complainant's Exhibit No. 1, which is a statement of forty-four notes, from one to forty-four months; for $274.67 each $12,085.48

Fifteen duly paid,.....	4,120.05
	$7,965.43
Three paid by Van Ness,.....	$24.01
	$7,141.42

That Mr. Clarke, the defendant, continued to take goods until his claim was satisfied. And it appears by the deposition of James T. Clark, that an inventory of the goods taken was made at the time and delivered by Mr. Brannan, the complainant's clerk, to the defendants, immediately after the delivery of the goods, to show the amount, and that they might examine it. The inventory is produced and verified by the witness. It amounts to $4,997.58. The amount of the notes, without allowing any discount for the time they had to run, was $7,141.42, which at seventy cents in the dollar is $4,998.99, being $1.41 more than the goods taken.

There is no evidence that the defendants asked to take any thing more, or even suggested that they had any further claim. The transaction itself shows that the complainant understood the amount of the unpaid notes to be the whole amount of the defendants' claim, and that the defendants acquiesced in that understanding. At all events, the admissions of the defendants, in their answer, show that the notes have been satisfied, and therefore they ought, not only according to equity and conscience, but by the express agreement of the defendants, to be given up; unless the agreement for the compromise was obtained by fraud practised by the complainant upon the defendants.

2. Was it thus obtained? The nature of the fraud, alleged in the defendants' answer, is that the complainant, by false representations of his inability to pay all his debts, had induced some of his creditors to compound their claims; that the defendants, hearing reports of such compromises, became alarmed, and under that alarm, willing to secure what they could, agreed to the composition, when, in fact, the complainant was able to pay all his debts. That the complainant took an unconscientious advantage of that alarm, knowing himself to be solvent, and that the defendants believed him to be insolvent. To maintain this defence the defendants must prove, first, the representations; second, that they were false and that the complainant knew that they were false when he made them; third, that such false representations induced some creditor or creditors of the complainant to compound their claims; fourth, that the defendants had

heard of such false representations and composition, and were thereby, or by other false representations of the complainant in relation to his affairs, and his inability to pay all his debts, made to themselves or others, with intent to injure some one, induced to make the compromise; and that the complainant knew, at that time, that the defendants were so induced, and acted under a state of alarm produced by such false representations and information. There is no evidence that the complainant made any representation or pretence of insolvency before the protest of some of his notes in November, 1833; and his letters to A. Hart & Co., of the 30th of October; to Tiffany & Co., of the 14th and 16th of November, and to Hall & Co., of the 21st of November, produced in evidence by the defendants, show an earnest desire on the part of the complainant to prevent those protests, and to maintain his credit. There can hardly be a stronger proof of his sincerity, and of the good faith in which he made his purchases, that fall, than the fact that between the 1st of September and the 6th of December, when his shop was closed by an injunction obtained by his Baltimore creditors, he paid debts, in cash, to the amount of $12,000, as appears by the affidavit and deposition of Mr. Wildman, who exhibits an account of the particular items to which the money was applied.

I have said that there was no evidence that the complainant made any representation or pretence of insolvency before the protest of some of his notes in November; perhaps I ought to have excepted the testimony of Mr. Henry B. Clarke, who says that in the fall of 1833, about three weeks before Mr. White went to New York the first time and made his large purchases, in a conversation between Mr. White and Mr. Briscoe, who was regretting the failure of Mr. Henry Carter, he heard Mr. White remark to Mr. Briscoe, that he had better be sorry for himself, for he, Mr. White knew that "he himself was not able to pay his own debts." What Mr. Briscoe said in reply, the witness does not recollect. Mr. White appeared to be quite serious. The witness afterward, he thinks on the same evening, or shortly after that, heard Mr. Briscoe say that he was fearful of losing the debt due by Mr. White to Clarke and Briscoe. It seems to be very improbable that Mr. White should have said this seriously, with intent to alarm Mr. Briscoe into a compromise, when he was about to go to New York to purchase his fall supply of goods. Mr. Briscoe took no steps, in consequence of it, to get security for the debt. It can scarcely be believed that it caused the compromise of the 30th of December, 1833. Up to the time when the complainant's storehouse was shut up by the injunction on the 6th of December, there had been nothing in the complainant's conduct or conversation to excite alarm, except the protest of one or two of his notes, and an application to some of his creditors for an extension of time. This is testified by Mr. James L. White, and corroborated by Mr. Brannan and Mr. Wildman. There is no evidence of any assertion or pretence of insolvency by Mr. White until after his Baltimore creditors or some of them as agents of the others, came here and in a manner compelled him to give them a statement of his affairs, which, when made, showed that he was unable to pay all his debts. His Baltimore creditors then charged him with fraudulently obtaining their goods, under pretence of being solvent when he knew himself to be insolvent; and, upon the idea that the sales to him were void by reason of the fraud, and the right of property not changed, although so mingled with other goods that they could not be replevied at law, they filed a bill in chancery and obtained an injunction to prevent the then defendant but now complainant from selling or removing the goods until the further order of the court. This injunction remained until the 26th of December, 1833, when it was dissolved on affidavits.

There is no evidence of any thing said or done by the complainant in order to excite alarm among his creditors. I deem it unnecessary in this case to inquire whether the complainant in making his purchases in the fall of 1833, intended to defraud those vendors. The purchase made by the complainant of the defendants' goods, was in July, 1832, and in no manner connected with the purchases made by the complainant in 1833. The alleged ground of fraud in the one case is exactly the reverse of that alleged in the other. The purchases in 1833 were said to be fraudulent because the complainant represented himself to be solvent when he knew himself to be insolvent. The charge in the present case is, that he represented himself to be insolvent when he knew himself to be solvent. They have, in fact, no relation to each other. The authorities cited to show, that if a debtor, in compounding with his creditors, secretly promises to give to one, more than to the others, in order to induce him to sign the instrument of composition, it is void, are only applicable to cases where the creditors are supposed mutually to agree with each other, as well as with the debtor. But where each creditor is separately compounded with, this principle of mutuality and equality does not apply. Each creditor has a right to make his own bargain with his debtor; and one bargain cannot be void because it is better than another. The purchase of a lot in the name of his children and building a house upon it, if he was solvent at the time, would not be even a technical fraud upon his creditors; but if he was not solvent, it would be only a technical fraud, which would be set aside in favor of creditors only, or subsequent purchasers. A copy of the deed is not produced in evidence, but it is said that it re-

cites that the purchase-money belonged to his children, and there is no evidence to contradict the recital. If the deed is offered in evidence it must be taken altogether, and the burden of proof is on the defendants to contradict any part of it. It was made in January, 1832, nearly two years before the compromise; and even if it was fraudulent, it is no way connected with the compromise. It was registered in July, 1832, and any one interested might at any time have had access to the record.

It is very natural to suppose that the heavy charges of fraud made against the complainant by his Baltimore creditors in the beginning of December, 1833, and the severe proceedings they instituted against him; the sequestration of his whole stock in trade, and the total suspension of his business by the injunction, were sufficient, of themselves, to cause the alarm, under which the defendants, as soon as the injunction was dissolved, (which was on the 26th of December,) sought a compromise by a payment in the goods which had thus, as to them, been put in jeopardy. There is no evidence to show that that alarm had been voluntarily created by the complainant, and the defendants seem to have been content with their share in the scramble which followed the removal of the injunction. Every one was, no doubt, anxious to save all he could from the wreck; and the subsequent settlement with other creditors, at fifty cents in the dollar, only shows that the defendants, in getting seventy, fared better than some of their neighbors. The notes, excepting that which fell due 2d-5th of December, were not payable, having time to run, from one to twenty-seven months, without interest; the immediate payment, therefore, especially in the precarious state of the complainant's affairs, was a good and valuable consideration for the discount which was agreed upon. Looking upon this compromise, therefore, in every point of view, it seems to me to have been a fair and valid contract, which ought to be executed by both parties in good faith.

3. The third question, then, is, has it been complied with on the part of the complainant? The defendants admit, in their answer, that it has been complied with on his part to the extent of the notes. Being of opinion that the amount due upon the notes constituted the whole just claim of the defendants; and there being no evidence that at the time of the agreement for the compromise, and at the time of the execution of that compromise by the delivery of the goods, they intimated any further claim, I must say that, in my opinion, the complainant has fairly and fully complied with the terms of the contract, and that the defendants ought to deliver up all the notes to be cancelled.

MORSELL, Circuit Judge, concurred. THRUSTON, Circuit Judge, dissented.

The decree was entered up on the 10th of June, 1837, and was, in substance, that the injunction should be perpetual to prevent the defendants from negotiating the notes; that the defendants should bring them into court to be cancelled, and that they should pay the complainant $1,083.55, being the amount paid by the complainant on judgments obtained against him upon three of the notes which the defendants had passed away, with interest thereon from the date of the decree.

From this decree the defendants appealed to the supreme court of the United States, where it was affirmed in February, 1838. 12 Pet. [37 U. S.] 178.

Case No. 17,541.

WHITE v. CLARKE et al.

[5 Cranch, C. C. 401.] [1]

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

APPEAL—DECREE—EFFECT OF MANDATE—ATTACHMENT.

1. When a decree for the surrender of certain promissory notes, and the payment of a certain sum of money is affirmed by the supreme court of the United States, with costs and damages at the rate of six per cent. per annum, and the cause is remanded to the circuit court by mandate commanding that court "that such execution and proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding;" and the court thereupon orders the defendants, without further delay to bring the notes into court to be cancelled, and the sum of money mentioned in the decree with interest thereon, and the costs of this suit and the costs in the supreme court, to be paid to the complainant, the defendants cannot supersede this order to comply with the decree which had been appealed from, nor stay execution upon that decree by confessing a judgment out of court, under the Maryland act of 1791, c. 67, § 1; more than two months having elapsed since the original decree was rendered.

2. The court will not issue an attachment upon a decree for payment of money, but will leave the complainant to his remedy by fieri facias, or ca. sa.

The decree of this court in this cause [Case No. 17,540] having been affirmed by the supreme court of the United States, at January term, 1838, with costs, and damages at the rate of six per cent. per annum [12 Pet. (37 U. S.) 178], and a mandate having been filed on the 6th of April, 1838, commanding this court "that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding," the court, on the 11th of April, 1838, upon the motion of the complainant's counsel, after reciting the decree which had been the subject of the appeal, and which had been affirmed, and by which the defendants, Clarke and Briscoe, were required without delay to

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

bring into this court to be cancelled, certain promissory notes signed by the complainant, and particularly described in the bill, and to pay to the complainant the sum of $1,083.55, with interest from the date of the decree, and the costs of this suit, passed an order "that the said defendants, Clarke and Briscoe, without further delay bring the notes aforesaid into this court to be cancelled, and the said sum of money with interest thereon, and the costs of this suit, and the sum of $142.88, the complainant's costs in this suit in the said supreme court, to be paid to the said complainant." This order was served upon the defendants on the 19th of April, and on the 19th of June, 1838, the complainant obtained a rule upon the defendants to show cause on Thursday the 21st of June, why an attachment should not be issued against them for having failed to comply with the order of the court of the 11th of April.

Upon the return of the rule, the defendants, showed, for cause, the following paper which they had filed on the 21st of April, as a supersedeas to the decree: "District of Columbia, Washington county, to wit: You, Joseph S. Clarke and Richard G. Briscoe, Walter Clarke and James T. Clarke, do confess judgment to William G. W. White, for the sum of one thousand and eighty-three dollars and fifty-five cents, with interest from the tenth day of June in the year of our Lord one thousand eight hundred and thirty-seven till paid, and costs of this suit; to wit, one hundred and forty-seven dollars and fifty-eight cents, and one hundred and forty-two dollars and eighty cents, the costs in the supreme court, and the additional cost thereon, which sums were recovered by the said William G. W. White against the said Joseph S. Clarke and Richard G. Briscoe, on the eleventh day of April, in the year of our Lord one thousand eight hundred and thirty-eight, by a decree of the circuit court of the District of Columbia, sitting as a court of equity for Washington county aforesaid; the said sums of money to be levied of your bodies, goods, and chattels, lands and tenements for the use of the said William G. W. White in case the said Joseph S. Clarke and Richard G. Briscoe shall not pay and satisfy to the said William G. W. White the said sums of money so as aforesaid recovered against them with the additional cost thereon, on the twenty-first day of October next. Taken and acknowledged before us, the subscribers, two of the justices of the peace of the United States of America, in and for the county of Washington and district aforesaid, this twenty-first day of April, eighteen hundred and thirty-eight. W. Thompson, J. P. Clement T. Coote, J. P."

The notes were brought in by the defendants, to be cancelled.

Mr. Hoban, for defendants, contended that the order of the 11th of April, 1838, was a new decree, which the defendants had a right to supersede, under the Maryland act of 1791, c. 67, § 1.

Mr. Marbury and Mr. Key, for complainant, contra. The decree which was affirmed was passed on the 10th of June, 1837, and it is that decree which the supreme court has commanded this court to execute. This court cannot now reverse or alter it, except to add the costs according to the mandate. The right to supersede is limited to two months after the decree; which two months had long since elapsed. The appeal was a supersedeas; but it was removed by the decree of affirmance; the complainant cannot have a second supersedeas.

THE COURT (THRUSTON, Circuit Judge, contra,) was of opinion that the defendants could not now supersede the decree.

Mr. Marbury then moved for an attachment; but the court refused, and told him he might have a fieri facias, or ca. sa.

[See Case No. 17,542.]

Case No. 17,542.

WHITE v. CLARKE et al.

[5 Cranch, C. C. 530.] [1]

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

APPEAL — AFFIRMANCE — EFFECT OF MANDATE — SUPERSEDING JUDGMENT.

When a decree of this court is affirmed by the supreme court of the United States, and a mandate is sent to this court, commanding that such execution and proceedings be had in said cause as according to right, justice, and the laws of the United States, ought to be had, the appeal notwithstanding; and this court makes an order that the defendants without further delay, perform the decree thus affirmed with costs, this order is not such a judgment or decree as may be superseded under the Maryland act of 1791, c. 67.

On the 10th of June, 1837, this court decreed that the injunction, in this case granted, restraining the defendants from transferring certain promissory notes which the plaintiff had given them, should be perpetual; that the defendants should, without delay, bring the said notes into court to be cancelled, and should pay the plaintiff $1,083.55, (being the amount paid by him on three judgments obtained against him by Clagget and Washington, on three notes which the defendants had passed to them before maturity,) and interest thereon from the said 10th of June, 1837, and that they pay the costs of the suit. [Case No. 17,540.] From this decree, the defendants appealed to the supreme court of the United States, who, on the 22d of February, 1838, affirmed the same with costs, and damages, at the rate of 6 per cent. per annum, and sent a mandate to this court, commanding that "such execution and proceedings be had in said cause, as according to right and justice, and the laws of the

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

United States, ought to be had, the said appeal notwithstanding." [12 Pet. (37 U. S.) 178.] Whereupon this court, on the 11th of April, 1838, after reciting the decree of this court of the 10th of June, 1837, the appeal, the affirmance, and the mandate, ordered that the defendants, without further delay, bring the notes into court to be cancelled, and the said sum of money with interest thereon, and costs of this suit, and $142.88, the complainants' costs in this suit in the supreme court, to be paid to the complainant; and that herein the said defendants fail not. The defendants brought the notes into court, but instead of bringing the money into court, produced a certificate from two justices of the peace, that on this 21st day of April, 1838, the defendants, with Walter Clarke and James T. Clarke, confessed judgment to the plaintiff "for the sum of $1,083.55, with interest from the 10th of June, 1837, until paid, and costs of this suit, namely, $147.58, and $142.80, the costs in the supreme court, and the additional costs thereon, which sums were recovered by the said W. G. W. White against the said Joseph S. Clarke and Richard G. Briscoe, on the 11th of April, in the year of our Lord, 1838, by a decree of the circuit court of the District of Columbia, sitting as a court of equity, for Washington county aforesaid." [Case No. 17,541.]

In this state of the case, Mr. Marbury and Mr. Key, for the complainant, moved for an attachment against the defendants for not bringing the money into court, according to the order of the 11th of April, 1828; and contended that the judgment thus confessed before the two justices, is not a supersedeas. That the order of the 11th of April is not a final decree upon which an execution could issue; it is a mere command to the defendants to perform the final decree of the 10th of June, 1837; and it is now too late to supersede that decree, because more than two months have expired since that decree was passed; and it was superseded by the appeal-bond until the affirmance of the cause in the supreme court, and cannot now be superseded by a confession of judgment.

Mr. Hoban, contra, contended that the order of the 11th of April is a renewal of the decree of the 10th of June, 1837, and may now be superseded.

Mr. Key, for complainant, in reply, contended that the act of assembly of Maryland of November, 1791, c. 67, does not apply to such a decree as this, which is a mere order to the defendant to obey a previous decree. That the act contemplated only ordinary decrees simply for the payment of money, and not a complicated decree to do particular acts, and also to pay money; the whole decree must be superseded, or no part of it.

THE COURT (THRUSTON, Circuit Judge, contra,) was of opinion that the confession of judgment was not a supersedeas; but refused to grant an attachment, saying that the complainant might have a fieri facias.

Case No. 17,543.

WHITE v. COLORADO CENT. R. CO.

[5 Dill. 428;[1] 3 McCrary, 559; 17 Am. Law Reg. (N. S.) 783.]

Circuit Court, D. Colorado. July, 1879.

LIABILITY OF WAREHOUSEMEN—NEGLIGENCE—EXPLOSIVE SUBSTANCES.

1. A railroad company which keeps a warehouse for storing goods carried over its line until they shall be called for by the consignee, in respect to goods so carried and stored in its warehouse is regarded as a bailee for hire, and is required to exercise the care and diligence of ordinary warehousemen in keeping such goods.

2. Putting a large quantity of powder (one hundred and sixty kegs) in the same warehouse with plaintiff's goods was negligent conduct, for which defendant is liable in damages to the extent of the loss resulting to plaintiff from the presence of such powder in the warehouse.

3. A fire occurring in defendant's warehouse, where plaintiff's goods were stored, there being a large quantity of powder in the same house, if the firemen who resorted to the place for the purpose of extinguishing the fire were, by the presence of powder in the house, hindered and prevented from saving plaintiff's goods, the powder may be regarded as the proximate cause of the loss.

[Cited in brief in Adams v. Missouri Pac. R. Co., 100 Mo. 560, 12 S. W. 637, and 13 S. W. 509. Cited in Green Ridge R. Co. v. Brinkman, 64 Md. 62, 20 Atl. 1024.]

4. In such case the question of negligence is not for the jury, and the jury may be instructed that the storing of powder in the same house with plaintiff's goods, such house being located in a city where there was danger from fire, is negligent conduct on the part of the defendant.

This cause was tried before HALLETT, District Judge, and a jury. A verdict for the defendant was returned. The following opinion was delivered on the plaintiff's motion for a new trial.

Charles & Dillon, for plaintiff.

Teller & De France, for defendant.

HALLETT, District Judge. On the 1st of January last, plaintiff's intestate shipped a lot of dry goods and clothing from Georgetown to Denver over defendant's line. The goods were received at Denver and placed in defendant's warehouse on the morning of the 3d of the same month. Two days later they were destroyed by fire which originated in the building without fault of defendant. This action, in which plaintiff seeks to recover the value of the goods so destroyed, is founded upon an alleged liability of defendant to plaintiff as a common carrier and as a warehouseman.

As to the first count in the declaration, in which plaintiff sought to charge defendant as a common carrier, the jury have found against the plaintiff, and thus all questions arising on that count have been eliminated from the case. On the second count, in which defendant is charged with negligence as a warehouseman, the jury found for

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

plaintiff in the sum of $4,704.75, and the motion now to be considered is directed against that verdict.

It seems from the evidence that defendant's warehouse was a long wooden structure—one hundred feet or more in length—and that the company's offices for transacting its freight business were kept in one end of it. These offices were divided off from the main building by partitions, and the remainder of the building was used for storing goods. At about the center of the building, on each side, and communicating with the part which was used for storage, were large doors, through which the goods were passed when received into or taken out of the building. The plaintiff's goods, when received, were put in that end of the building which did not contain the office, and, of course, at some distance from the doors last mentioned.

By the same train which brought plaintiff's goods, a quantity of gunpowder, amounting to about one hundred and sixty kegs, was also received; and this powder was put by defendant in the same room with plaintiff's goods, but upon the other side of the doors before mentioned, and towards the offices, which were in that end of the building. So that, with reference to the doors which opened through the warehouse, it may be correct to say that the offices and the powder were in one end of the building, while the plaintiff's goods were in the other end of the same building. But the powder was, in fact, pretty near the door on that side where it lay, and between the offices and the plaintiff's goods.

The fire which destroyed the building and the goods, when first discovered, was in the roof immediately above the offices, and, of course, at some distance from the plaintiff's goods. Thus it appears that the fire was in one end of the building and the plaintiff's goods in the other, while the powder was between the fire and the goods, on the same side of the large doors before mentioned as the fire. This was the situation when members of the fire department arrived in considerable force on the ground with their apparatus, for the purpose of extinguishing the fire. The weather was cold, and some delay occurred before water was obtained, but three or four streams were soon brought to bear, so that, under ordinary circumstances, the flames might have been suppressed before half the building was destroyed. One witness testifies that there was an opportunity to cut off the fire at the large doors before mentioned, by carrying the water in at that place and playing on the fire from the inside.

But nothing of this kind was attempted, and, indeed, the firemen would not go within seventy or eighty feet of the building on the outside, because they feared injury from the powder. Some testimony was given at the trial to show that this fear was unfounded, but if the experts who testified on that point had been present at the fire to explain the properties of gunpowder to the terrified firemen, it is doubtful whether the explanation would have been entirely satisfactory. The theory advanced is that metallic cans, in which the powder was put, are so expanded and cracked by the heat of a burning building that the powder escapes, and in that condition, if ignited, it produces only a flash in the pan, which is not at all dangerous to those who are outside of the building. If, however, one who is inside the building swallows the fire, as one of the witnesses said, it is deadly; so that even on this theory it was not safe to go into the building at the large doors before mentioned, for the purpose of suppressing the fire. So, too, a prudent person might well be excused from assuming that all of the cans would be cracked and laid open by the heat so as to render them harmless. Altogether, it may be said that this evidence does not prove, nor tend to prove, that the powder was not dangerous to life in the situation where it was found, but merely that the workmen might have approached the building more closely without danger to themselves. Whether they could have worked more effectively at a distance from the building of twenty-five or thirty feet than at a distance of eighty feet, does not appear, but may be a matter of reasonable inference. It does, however, appear that the gunpowder prevented the firemen from going in at the large doors before mentioned, with hose, and there operating against the fire. All the witnesses agree that this movement would, under the circumstances, have been full of danger, and it seems probable that it was not made for that reason. One witness testifies that he suggested it to the firemen, and was answered that it was dangerous to go there on account of the powder. Looking to the form of the building, the fact that it was built of wood, and the situation of plaintiff's goods with reference to the fire, it also seems probable that the goods would have been saved if the powder had not been stored in the building. Upon the evidence showing or tending to show that the loss of the goods was due to the presence of the powder in the warehouse, the court charged the jury as follows:

"As to the second cause of action, the liability of defendant, if any exists, depends upon the effect of storing powder in the warehouse, if any was stored there. You are advised that storing a considerable quantity of powder in the same house with plaintiff's goods was negligent conduct, and if the loss was occasioned by the presence of powder in the house, the defendant is liable. In order to fix such liability, however, it must appear to you from the evidence that the loss was certainly occasioned or produced by that cause. If those who were engaged in suppressing the fire would have

been able to save plaintiff's goods, and would have done so, if no powder had been kept in the building, the defendant may be held. But if this is a doubtful matter, and it is uncertain whether the presence of powder in the house occasioned the loss, the defendant is not liable. Upon that point you remember what the witness said about it, you determine as well as you can whether this loss certainly proceeded from that cause —from the presence of the powder. If it is doubtful in your mind, upon the evidence here, whether the loss was occasioned by that, that is to say, if, withdrawing the powder from the house, you think it still doubtful whether the goods would have been saved, the defendant cannot be held liable upon that. The only act of negligence, as it seems to me from the evidence here, was the putting of the powder there, and you must be able to ascribe that loss to that cause, and certainly to that, if you are to hold the defendant upon that. That is the position in which the matter stands."

That this principle is applicable to ordinary warehousemen, would appear to be beyond question. To store or deposit gunpowder in large quantities in any place in a city where it will endanger life and property, is a public nuisance. Cheatham v. Shearon, 1 Swan, 213; Myers v. Malcolm, 6 Hill, 292; [Hay v. Cohoes Co., 2 N. Y. 159].[2]

The case in 6 Hill shows that the party storing the powder will be liable for any damage that may result from it. And the same view is expressed in some of the textbooks. 1 Add. Torts, 308; Wood, Nuis. § 142.

Warehouses are usually, if not always, located in cities, where the danger from fire is great, and, of course, keepers of such houses must provide against the danger with reasonable care. It is often difficult to determine whether such care has been used, but no embarrassment is felt respecting the point now under consideration. With reference to warehousemen in general, we have only to ask whether a prudent man would store a large quantity of gunpowder in a building with other goods, in a populous city —whether that is the usual and ordinary course of business—to decide the question of negligence.

But it is said that a railway company which keeps warehouses for the convenience of the public, and as a necessary appendage to the business of a carrier, is not to be put upon the footing of ordinary warehousemen; that the company is not a warehouseman by choice, but through the negligence of its patrons, who will not take away their goods as soon as they are received at the company's depot; that as the company may lawfully carry all things, so may it lawfully store whatever it carries, and he who entrusts goods to its charge takes upon himself the risk of such storage. These suggestions are not without weight, but it is believed that they ought not to prevail against the general rule which exacts from a bailee for hire reasonable diligence in the care of property entrusted to him. That a railway company, keeping the property of its patrons in its own warehouse for a reasonable time, until it shall be called for, is to be regarded as a bailee for hire, and not as a naked depository, is now fully settled. Norway Plains Co. v. Boston & M. R., 1 Gray, 273; Whart. Neg. § 478.

As such, no reason is seen for relieving it from the duties and responsibilities which attach to that character of bailment. It must be borne in mind that the company was not bound to carry the powder on its railway, and still less was it required to store so dangerous an article in its warehouse. Boston & A. R. Co. v. Shanly, 107 Mass. 575; Whart. Neg. § 856.

If the company was willing to incur the risk of carrying powder, it must be assumed that it was also willing to take upon itself the liabilities incident to such risk. So, also, it may be said the matter of storing the powder was disconnected from and entirely independent of the carrying. Although the company had carried the powder, it was not bound to put it in its warehouse. The consignee might have been required to take away the powder in the very hour of its arrival at Denver, or it might have been sent to some warehouse prepared and kept for storing such articles. Putting it in the warehouse of the company was a voluntary act, carrying danger to the property of others, and therefore wrongful in itself. That it was not an exercise of the reasonable care in preserving the plaintiff's property which the law enjoined, seems to be too plain for argument.

Another objection to the charge is that the powder, if at all instrumental in the destruction of plaintiff's goods, was not the proximate cause of that result. To support this objection, insurance cases are cited in which it has been held that loss occasioned by explosion of powder may be connected with the fire which ignited the powder as the proximate cause.

Hence, it is claimed that, in all such cases, the fire, and not the powder, is the proximate cause of loss. But there may be, and usually there is, more than one agency or means of producing loss. Take, for instance, the car loaded with oil which escaped from the company's servant and ran down a steep grade and came in collision with a locomotive, which set fire to the oil, and thence it was communicated to the plaintiff's house. The fire and oil united in the destruction of plaintiff's house, and the cause of all the mischief was a defective brake on the car. If there was negligence in respect to any one of these things, the person chargeable with such negligence was responsible for the loss. Oil Creek & A. Ry. Co. v. Keighron, 74 Pa. St. 316.

So, also, where dry grass was negligently

[2] [From 3, McCrary, 559.]

allowed to remain in heaps near defendant's railway, and fire was communicated to such heaps by a passing engine, and thence carried by the wind a distance of two hundred yards to plaintiff's cottage, which was destroyed, the defendant was held liable. Smith v. London & S. W. Ry. Co., L. R. 6 C. P. 14; Id. L. R. 5 C. P. 98. The fire was, of course, a cause of mischief, but the wind and dry grass were also efficient in communicating the fire to the building, and the negligence was in respect to the grass only. If defendant had set the grass on fire negligently, or (if that had been possible) had caused the wind to blow, it would have been liable for the loss in the same manner.

On the same principle, it was held in Massachusetts that one who negligently cut the hose with which water was supplied for suppressing a fire, was liable for the damage occasioned by his wrongful act. Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 278.

There, as in the case at bar, it was contended that the proximate cause of loss was the fire, rather than the act of the defendant. But the court was of a different opinion; saying that when a man cuts off the hose "through which firemen are throwing a stream on a burning building, and thereupon the building is consumed for the want of water to extinguish it," his act is to be regarded as the direct and efficient cause of the injury.

In all these cases it may be said that the fire is a proximate cause of loss, but it does not follow that it is the only cause standing in that relation to the result. And so, while it is true that plaintiff's goods were in fact destroyed by fire, it is also true that the gunpowder in the warehouse, by keeping the workmen from the fire, may have contributed to the loss in such way as will make it a proximate cause. "Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause." Shear. & R. Neg. § 10.

Without further discussion of what appears to be plain, we have no doubt the powder was near enough to the loss to make the defendant liable for its negligence in putting it in the warehouse, if, as the jury have found, it directly contributed to the result; and this objection must be overruled.

The defendant further relies on the form of the instruction, claiming that the question of negligence was improperly withdrawn from the jury.

It is not denied, and it cannot be successfully claimed, that where the facts are established, negligence may be an inference of the law to be decided by the courts. Shear. & R. Neg. § 11; Tarwater v. Hannibal & St. J. R. Co., 42 Mo. 193; Pittsburg & C. R. Co. v. McClurg, 56 Pa. St. 294. In some cases, as where the conclusion to be drawn is not direct and certain, the rule is otherwise ([Railroad Co. v. Stout] 17 Wall. [84 U. S.] 663); but here the facts lead in but one direction.

It was admitted at the trial that defendant's warehouse was in the city of Denver, and whether powder was stored there—although it was not denied—was submitted to the jury on the evidence. It is difficult to discover any other fact that entered into the question of negligence, unless it be the dangerous properties of powder, and perhaps that is the point in controversy.

In the argument of this motion at the bar, counsel were understood as saying that the testimony of witnesses at the trial had raised a doubt as to the effect of powder exploding in a burning building, and if the question to be decided should be as to the effect of such explosion on the building itself and the contents thereof, their position would not be untenable. The testimony tended to prove that neither the building nor the goods therein were much injured by the explosions. But this is not the point to which the evidence was directed. As before explained, the question was whether the firemen were reasonably deterred by the presence of the powder in the building from effective work in extinguishing the fire. And so far was the evidence from showing or tending to show that the firemen were not so deterred, that it tended rather to establish the inference of danger to life from the presence of that article, as least as to all those who should attempt to enter the building. So that the evidence referred to did not in any way affect the question of negligence, and if it bore on the other point, as to whether the firemen were in fact hindered from operating against the fire, that matter was submitted to the decision of the jury on the evidence.

Aside from this, I cannot believe that it is in any case necessary or proper to ask a jury to find whether gunpowder is a dangerous compound. The fact is of universal notoriety, familiar to all men, and needs neither finding nor proof to establish it. What would be thought of the demand for such proof in a prosecution for assault with attempt to kill and murder? Would it be said that the government must show that the gun was loaded with powder and ball, and that powder is an explosive substance capable of expelling the ball from the gun with great force, and so on.

Generally, as to the negligence imputed to defendant, it may be said that the act was not to be affected by the circumstances attending it, and therefore it was not to be decided by the jury. If under any circumstances the storing of powder with other goods in a warehouse in a city would be a reasonable exercise of judgment and discretion, the rule would be otherwise; because, if the circumstances may give color to the act, and make that fair and unquestionable which otherwise must appear to be culpable, the jury would have to determine whether by the circumstances the act was relieved of the character ascribed to it. But such, it is believed, cannot be the rule as to any such misconduct. There was nothing in the evidence upon which the jury could say that the act of putting powder in the ware-

house was not negligence, and therefore there was nothing to be determined by them on that point, except the matter of putting it there, which was left to them to decide on the evidence.

Whether the presence of the powder in the warehouse was the direct and efficient cause of the loss, was not, as it could not be, conclusively shown; but the evidence on that point is regarded as sufficient to sustain the verdict. That was peculiarly a question for the jury. Milwaukee Ry. Co. v. Kellogg, 94 U. S. 474. We do not feel at liberty to disturb the verdict on that ground; and we have not been able to discover any error in any part of the record. The motion is denied.

Motion denied.

[The cause was carried to the supreme court on writ of error. The writ was dismissed for want of jurisdiction. 101 U. S. 98.]

Case No. 17,544.

WHITE v. COMMONWEALTH NAT. BANK.

[4 Brewst. 234.]

Circuit Court, E. D. Pennsylvania. Oct. 1, 1866.

BAILMENT—LOSS OF PROPERTY—LIABILITY OF BAILEE—PARTIES—CREDIBILITY.

[1. Though a bailor does not own property bailed, yet, there being no privity of contract between the owner and bailee, and the bailor having, as between himself and the bailee, represented the interests of the owner, the bailor may sue the bailee for loss of the property.]

[2. The interest of a party in the result should be considered on the question of his credibility.]

[3. One depositing in a bank without notice of its by-law that special deposits for safe-keeping shall be at the risk of the depositor is not bound thereby.]

[4. Where a bank receives a box for safe-keeping, without any special compensation therefor, but merely because the depositor keeps an account with it, it is liable for gross negligence only, which includes the omission of any care indispensable to that proper security of the thing deposited which may be reasonably required according to the usages of men of business; the depositor, however, being entitled to such security, neither less nor more, as the course of business between him and the bank shows to have been mutually intended and expected between them.]

[5. A bank which received a special deposit of a box for safe-keeping has the burden of showing that the loss thereof is not due to its fault.]

[6. A bank which received a special deposit of a box for safe-keeping, though responsible therefor if it is delivered to a wrong person, or is lost or mislaid by the carelessness of an officer or employé thereof, in the course of business, is not responsible, proper care having been observed in the selection of officers and employés, if it is lost through any act of theirs not within the scope of their employment.]

[Action by J. Atlee White against the Commonwealth National Bank of Philadelphia for loss of a special deposit.]

Samuel C. Perkins and Samuel H. Perkins, for plaintiff.

John Clayton and F. Carroll Brewster, for defendants.

CADWALADER, District Judge (charging jury). It appears from the evidence on both sides that the plaintiff was at one time the possessor of two closed boxes, and that both were deposited with the defendants. Of one of the boxes he resumed and has retained possession. Of the other he resumed possession in the beginning of September, 1855. He alleges that through his agent or messenger, Thomas F. Byrnes, this box was returned to the possession of the defendants, and that, when it was afterwards called for, it was missing, and that it has never been recovered. The defendants allege that it was returned to the plaintiff, and never came back to their possession. It is agreed that the contents of this box were unknown to them except when it was occasionally opened as the witnesses have explained. The only part of its alleged contents which are now estimated in assessing the damages claimed are the securities for $6,520 of public debt of the United States.

(The 7th point on which the defendants' counsel has requested instructions from the court applies to other subjects, and will therefore not require consideration.)

On their 6th point I am requested to instruct you that the plaintiff cannot recover for any property belonging to Mrs. Eldridge. In what relation precisely—whether as a trustee or otherwise—he stood towards this lady and other members of her deceased husband's family does not appear. The plaintiff states that the greater part of the securities for the public debt was an investment or reinvestment made by him for her of the proceeds of an insurance upon the husband's life. Between her and the defendants there was no privity of contract. They were strangers to the plaintiff's relations with her, whatever these relations may have been. I think that if, as between himself and the defendants, he represented her interests, the present action may, so far as this objection is concerned, be maintainable upon some of the counts of the declaration. I therefore cannot answer affirmatively the question involved in the defendants' 6th proposition. The controversy will therefore be considered simply as between the plaintiff and the defendants.

The first inquiry will involve points of mere fact. This inquiry is whether the box in question was in truth sent back by the plaintiff, and never was returned to him, and whether it contained the securities in question. Here the defendants' counsel in their first and second propositions requested me to instruct you that although the plaintiff has been allowed to testify in this case, yet his credibility is entirely for your consideration, and that in weighing his credibility you should

consider his direct interest in the result, the statements made in court and before the commissioner when his deposition was taken, and all the other evidence. These propositions are, of course, correct. Such considerations must be proper wherever parties are, under the recent act of congress, admitted as witnesses. In this case the principal, if not the only, testimony as to the contents of the box has been from the plaintiff himself. This testimony should be considered with caution; but, if it is believed by the jury, they will give to it the effect to which they may think it entitled. As to the return of the box to the bank, independently of the questions of its contents, the evidence of the plaintiff would, if it had stood alone, seem to be altogether contradicted by the testimony of Mr. Depuy, the teller, and Mr. Zeilin, a clerk, in the defendants' bank. But here the plaintiff's testimony seems to be strongly confirmed by that of Mr. Byrnes, who is apparently the most reliable of all the witnesses who have been examined. I have no doubt that Mr. Depuy and Mr. Zeilin testify each what he sincerely believes to have occurred. But I cannot doubt that the memory of each of them is, in some respects, defective, and that each of them has testified with rather undue confidence in the accuracy of his own recollection. The same remark applies, I think, with equal, and perhaps greater, force to parts of the testimony of Mr. White, the plaintiff. All three of them seem to have been thus unduly confident on points upon which it is quite impossible to reconcile the whole testimony of any one of them with any probable theory of its complete truth. I do not think that any such remark is justly applicable to the testimony of Mr. Byrnes. He seemed to understand the precise distinction between what he actually recollected and what he may have, independently of his own recollection, believed. The latter he did not intrude. The former he stated with distinctness. But all these remarks are upon questions of mere fact, which it is for you, and not me, to decide. Unless you believe that the contents of the box were as the plaintiff states them to have been, and believe that it was not returned to him, your verdict will be for the defendants. But if, in these respects, you believe what he states, it by no means follows that your verdict is to be in his favor. On the contrary, if you fully believe all that he states, the proper decision of the case will depend upon subsequent inquiries of great importance and general interest. In prosecuting these inquiries it will be assumed that the box was never returned to the plaintiff, and that it contained the securities in question.

The propositions which are stated by the plaintiff in his first point and by the defendants in their last point may be considered together. Here the counsel of the plaintiff requests me to instruct you that if he was a depositor in the bank of the defendants, and on account of his keeping a deposit there they received the box for safe-keeping, there was a sufficient consideration to prevent the contract from being a mere gratuitous bailment. Upon this point I answer that in the case here assumed there was a sufficient consideration to make the deposit an obligatory contract of bailment. Thus far the contract was not gratuitous; that is to say, was not founded upon insufficient consideration. How far it was, in another sense, gratuitous, or without valuable compensation,—that is to say, how far it was a bailment for the exclusive benefit of the depositors,—is not of any practical importance except upon the question of the extent of the obligation which the bank incurred. This question concerns the degree of care which the defendants were bound to use. The question is thus not that of obligatoriness of the contract, but that of the proper measure of the obligation incurred. This question is more easily answered when stated in another form. In this form the proposition will be, what is the degree or measure of the negligence or want of care for which the depositary is liable? This will be considered hereafter. In the meantime the last point of the defendants will be considered. Here I am requested to instruct you simply that the verdict should be for them. I cannot so instruct you as matter of mere law, because the question is ultimately to be answered not by me, but by you. It may hereafter appear that I think your verdict should be for the defendants. If so, this will be only the impression upon my mind of the facts in evidence. But upon the effect of the evidence you, and not I, must decide. The request of the defendants' counsel on this point is founded, perhaps, upon their by-law which distinguishes deposits of cash from special deposits. To receive on deposit the cash of a customer may perhaps be considered an essential part of the business of the incorporated banks of the United States. But the receipt of a special deposit, like the deposit here in question, though not an unusual part of their business, may be excluded from it; and when it is not excluded may be considered as occasional and incidental only, or as wholly collateral to it. The legislature of Pennsylvania, in recently incorporating a company with authority to receive such deposits, has enacted that nothing in the charter should authorize the company to engage in the business of banking. So, conversely, our banks, as they are ordinarily constituted, may refuse altogether to receive such deposits. When received, the business transacted in respect of them is very different from that other business which is included in what may be called ordinary banking operations. This by-law provides accordingly that the bank shall receive and keep its cash deposits subject to the order of the depositors, payable at sight, and may receive

special deposits at the risk of the depositor. Whether this by-law was admissible in evidence at all, might have been a very doubtful question. On the one hand, the existence of such a regulation might perhaps be supposed to have had some effect in determining the course of business of persons employed in the bank. On the other hand, there is no proof that the plaintiff had any knowledge of the existence of the by-law. Without a knowledge of it, the effect of this contract of deposit made by him could not be influenced by it. In the actual course of the business of this bank, one of the clerks, and perhaps more than one, appears to have referred all applications to make special deposits to the cashier. But others of them have testified that such deposits were made from time to time by customers of the bank, and were taken backward and forward by the customers, who were waited on by either of the tellers, or by the clerks not otherwise engaged. The evidence tends to prove that an average number of twenty or more boxes or packages were thus daily in the vault of the bank, and that the course of business in respect of them was generally the same as that pursued as to the plaintiff's boxes. If this was the case, the character and effect of the contract between him and the bank, as to the box in question, were not determined or influenced by the by-law which was unknown to him. If he had known of it, the question of its effect upon the contract might have been one of some nicety. The words "at the risk of the depositor" serve to distinguish special deposits from those ordinary ones of cash which are not, in any respect or degree, at the risk of depositors. The by-law would not reasonably be interpretable so as to absolve the bank from all care. It could not be understood as excusing fraud, or such willful neglect as would be almost equally bad. How far the definition of culpable negligence might be extended under such a by-law is here unimportant, because the plaintiff was ignorant of its existence. The responsibility of this bank for the special deposit in question is, in this case, the same as if no such by-law existed.

We now approach the question, what is the degree or the measure of the negligence or want of care for which such a depositary is liable? On this question the defendants' counsel, in their 3d and 4th points have stated, perhaps rather too abstractly, certain propositions on which I am requested to instruct you in matter of law. Their 4th point, "that even a bailee for hire or reward will not be liable if the goods are stolen, if he showed that he used due care in the keeping of them," is, of course, in the abstract, perfectly true. The 3d point is "that a mere depositary, without any special undertaking, and without reward, is not answerable for the loss of goods deposited, but in case of gross negligence, which is equivalent to fraud in its effect upon contracts." Before answering this question I will mention the 5th point of the defendants. This involves a similar proposition to the third. The 5th, is, however, stated, not abstractly, but with a particular application to the case. This proposition is "that the defendant is not responsible unless for gross negligence, to wit, the omission of that care which the most inattentive and thoughtless never fail to take of their own concerns." These three propositions, the 3d, 4th, and 5th, are in language which, though copied from that of judicial decisions, cannot be adopted without some qualifications. At all events, the language must be somewhat qualified in its application to this case. There was no ascertainable valuable compensation to the bank for this receipt or custody of this deposit. If the defendants had received or contracted for any such compensation, they would have been responsible for any want of ordinary care; that is to say, for any want of such care as persons of diligence and prudence would take of their own interest in a like case. The present was not such a case. The obligation of the defendants was, therefore, less than can be measured by the same standard of care. We must, therefore, seek a less elevated standard in defining the degree of care which is required of such a special depositary. In order to find the proper standard, we endeavor to make a corresponding change in defining the degree of negligence for which the depositary is responsible. But here, from the infirmity of language, difficulties are encountered. There is no difficulty in saying that the depositary is liable for gross negligence. We may also say that he is liable only for gross negligence. But here we must qualify this phrase by ascertaining the definition of "gross." What negligence is gross? The language of judges, like that quoted in the propositions of the defendants' counsel, has been criticized by other judges. One English judge, afterwards lord chancellor, said that he could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet. This was perhaps going too far from the other side. I will instruct you that the defendants, as special depositaries, were liable for gross negligence only. But I qualify the instruction by adding that the measure of responsibility must not be so lax as to authorize the omission of any care which is indispensable to that proper security of the thing deposited, which may be reasonably required according to the usages of men of business. I will add a qualification which may enlarge or diminish the measure of responsibility. This qualification is, I think, of especial importance in this case. The qualification is that the depositor is, in all cases, entitled to such security, neither less nor greater, than the

course of business between him and the depositary shows to have been mutually intended and expected between them. The application of this remark will be made hereafter.

There are two of the plaintiff's points which, in my opinion, involve the principal questions of the case, namely, the third point and the second point. I will consider them inversely to the order in which they have been put. The third point is as follows: "That, the receipt by the defendants of the box having been shown, the burden of proof of showing what became of the box is on the defendants." I think this is so; but there arises then the vital question, how are they to relieve themselves from this burden of proof; and what will be the effect if they have so relieved themselves? There is no difficulty in this case in determining whether the defendants have relieved themselves from the burden of proof. They have proved that their cash and assets have not been in excess of what they ought to have been; nor has there been any deficiency; that their officers and clerks were all men of integrity; they have given a complete list of all—president, cashier, all the clerks, messenger, and watchman; they have proved that no depredations occurred, and that no one of these persons was concerned in the abstraction of the box, or knows of the box or of its abstraction, so far as negatives can be proved; and that plaintiff had unusual means of knowing how his box was dealt with. If this be so, it is for you to say whether the burden of proof cast upon a depositary can ever be met if it has not been met in this case; and whether, if you say it has not been met in this case, you do not turn the depositary into an insurer. Such care was taken of the box in this case as was consistent with the use the depositor wished to make of it; he wished to take it backwards and forwards. Agreeing, as I do, that the burden of proof in this case is cast upon the depositary, I leave it to you to say whether there can be conceived a case where the depositary has more conclusively relieved himself of the burden of proof if a negative can ever be proved. If any one of the employés of the bank had been dead, it might have embarrassed us: but all are alive and called as witnesses. I don't put it as a matter of law, but as a question of reason in a business point of view; if you never allow a depositary to relieve himself of responsibility but by the production and redelivery of the deposit, you make him an insurer.

The only point which seems to me to remain in order that this whole subject may be exhausted is to the inquiry whether there may not be an uncertainty that the box has been lost or mislaid. If, then, the defendants have relieved themselves of the burden of proof, I will come to the plaintiff's second point, namely: "That, if the plaintiff's box was delivered to a wrong person, or was lost or mislaid by a default or mistake, or by the carelessness or misconduct, of any of the officers or clerks of the bank, the bank is responsible for the box and its contents." I instruct the jury as requested by the plaintiff on this point, with this qualification: that if the mistake, accident, carelessness, or misconduct was not in the course of business of the officers or clerks, and proper care had been observed in selecting honest and faithful clerks and officers, and the defendants have relieved themselves in all other respects of the burden of proof cast on them, as is stated under the defendants' third head, the defendants are not responsible. It is expressly decided in the case of Foster v. Essex Bank, 17 Mass. 479, where there was an embezzlement by the cashier of the bank of a portion of a special deposit of gold coin. And Judge Story, in his Commentary on Bailments, remarking upon this case, states that the court decided that the responsibility of the bank was the same as if the theft had been committed by a stranger; for there was no want of diligence on its part in selecting proper officers, and the act of embezzlement was not within the scope of the duty of the cashier as agent of the corporation. So far as the conjecture—for it is nothing more—is concerned, that the box might have been lost or mislaid, you see that, unless it was a mistake or misconduct of the officers in the course of their business as officers of the bank, or unless there was some fault traceable to the corporation, this point must be answered in the negative. You are sworn to decide according to the evidence; and if you believe that the defendants have relieved themselves of every burden of proof which could be reasonably required of them, and there remains no evidence to show fault on their part, or mistake or carelessness or misconduct of any of their officers or clerks, your verdict must be for the defendants. For myself I can not see—though it is entirely for you—anything in the evidence in this case which will justify a verdict for the plaintiff.

The plaintiff thereupon suffered a nonsuit.

Case No. 17,545.

WHITE v. CONNECTICUT MUT. LIFE INS. CO.

[4 Dill. 177; 10 Chi. Leg. News, 83; 5 Reporter, 39; 7 Ins. Law J. 101; 5 Cent. Law J. 486.] [1]

Circuit Court, W. D. Missouri. Nov., 1877.

LIFE INSURANCE—MISSOURI ACT AS TO MISREPRESENTATIONS IN POLICIES, CONSTRUED.

1. The act of the legislature of the state of Missouri of March 23, 1874, in respect of policies of life insurance, extends to all policies de-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 5 Reporter, 39, contains only a partial report.].

livered in this state after the act went into effect.

[Cited in Wall v. Equitable Life Assur. Co., 32 Fed. 275.]

[Cited in Bammessel v. Brewers' Fire Ins. Co., 43 Wis. 466; Havens v. Germania Fire Ins. Co., 123 Mo. 403, 27 S. W. 721; Insurance Co. v. Leslie, 47 Ohio St. 418, 24 N. E. 1072; Reilly v. Franklin Ins. Co., 43 Wis. 456.]

2. Where the provisions of that act are in conflict with the provisions of the policy, the act controls the policy.

3. Whether the applicant for insurance may waive the benefit of the act, quære; but no such waiver arises by implication.

4. The act extends to warranties as well as to representations.

5. The purpose and policy of the act expounded.

Action by the plaintiff, as administratrix of the estate of her late husband, John H. White, on a policy of insurance, dated October 2d, 1874, upon the life of the said White for the sum of $10,000. The assured was a citizen of Missouri, and the policy was issued and delivered to him in this state. When it was so delivered the act of March 23d, 1874, was in force. This act is as follows:

"Section 1. No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable; and whether it so contributed in any case, shall be a question for the jury.

"Sec. 2. In suits brought upon life policies heretofore or hereafter issued, no defence based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall, at or before the trial, deposit in court, for the benefit of the plaintiffs, the premiums hereafter received on such policies, with six per cent. interest per annum from the date of receipt.

"Sec. 3. This act shall take effect and be in force from and after its passage."

The defendant company answers, setting forth that the policy contained a provision or condition, as follows: "That the answers, statements, representations, and declarations contained in or indorsed upon the application for this insurance—which application is hereby referred to and made a part of this contract—are warranted by the assured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, then this policy shall be absolutely void." The answer further alleges that, in the application for the policy, the assured falsely answered that he had never had asthma; also falsely answered that he had never been addicted to the use of alcoholic beverages; also falsely answered that he had not been attended by a physician for a long time; also falsely answered that he had no usual medical attendant. These several answers of the assured, contained in the application, are alleged to be false; but the counts in the answer of the defendant demurred to, do not contain an allegation that the matters misrepresented contributed to the death of the assured, or that the said misrepresentations were fraudulently made, with a view to deceive or mislead the company.

The plaintiff demurs.

Clarke, Waters & Winslow, for plaintiff.

Lee & Adams and Botsford & Williams, for defendant.

[Before DILLON, Circuit Judge, and KREKEL, District Judge.]

DILLON, Circuit Judge. The statute of March 23d, 1874, is silent as to what shall be the effect if the policy contains conditions in conflict with it. And the policy in suit contains no express reference to the statute, and no express waiver by the assured of its provisions. If the statute applies, the counts of the answer to which the demurrer relates are not sufficient, because there is no averment that the matters misrepresented were material. If the statute does not apply to this contract and control the rights of the plaintiff, the answer is sufficient without such an averment. We have, therefore, two leading questions presented:

1. Whether the statute controls the provisions of the policy, or whether the provisions of the policy inconsistent with those of the statute control the latter. If the statute controls the policy where the two are in conflict, then—

2. Whether the statute, by its true construction, embraces within its remedial provisions warranties as well as representations, as these are known to the law of insurance.

In Chance v. Union Mut. Life Ins. Co. [Case No. 2,588], the circuit court of the Eastern district of Missouri (Dillon and Treat, Judges), at the September term, 1876, ruled the following points under the enactment here in question:

"(1) A contract of life insurance made by a foreign company doing business in Missouri, and countersigned and delivered in this state by the local agents of the company to, and insuring, a citizen, inhabitant, or other person in the state, falls within the Missouri act of March 23, 1874, if delivered after that act went into effect. As to such policies, the act is to be treated as incorporated therein.

"(2) The act extends to all misrepresentations made in obtaining or securing the policy. Whether the act extends to warranties, this case does not require the court to decide.

"(3) A defence based upon section 1 of that act must, in addition to alleging the misrepresentation, allege also that the matter misrepresented actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed is made by the act a question for the jury; hence it is necessary for the defendant to make the averment that the matter misrep-

resented contributed to the contingency or event insured against.

"(4) It is not necessary to the sufficiency of an answer based upon section 1 of the act, that it be alleged that the premiums required to be deposited by section 2 have been actually deposited in court for the plaintiff. This may be done at any time 'at or before the trial.' If not done, the court can deal with the omission in a summary manner."

Subsequently, in Lovell v. Alliance Life Ins. Co. [Case No. 8,552], decided at the same term, Judge Treat held that the statute extended to warranties the same as to representations.

No opinions were written in those cases, and the counsel for the company in the case at bar present the questions anew in this court, whether the statute or the contract fixes the rights of the parties where the two are inconsistent, and whether the statute extends to warranties. These questions we proceed briefly to examine, in the order stated.

1. As bearing upon both of these inquiries, it is essential to ascertain the mischief which this remedial statute was designed to cure, in order that the statute may be construed, so far as its terms will permit, to suppress the mischief and advance the remedy.

Within the last twenty-five years life insurance has attained such a vast growth as to have important public relations. It has become a usual and favorite means for making provisions for the wife and children and creditors of the assured. Life insurance companies are in the nature of savings banks, in which are invested much of the surplus earnings of the people. Universally, the companies, in taking the policies, make it a practice to put a large number of questions to the applicant, touching a great variety of matters, some of which are material, but many of which bear remotely, if at all, upon the real risk assumed. In the policy here in suit, eighty-six questions are answered.

This practice, within proper limits, is not objectionable. But when the answers are obtained, the companies almost universally insert a condition in the policy to the effect that the application is made a part of the policy, and each of the answers a warranty on the part of the assured. The effect of this is that if any one answer, however immaterial to the risk, is not literally true, there can be no recovery, although the assured was honestly mistaken, and had paid his premiums for years, and the mistaken answer in no way related to the cause of the death of the assured. This was bad enough; but in more recent years many of the companies have proceeded further, and in effect have inserted provisions in their policies putting all statements or representations made in effecting an insurance on the footing of warranties, and the courts have felt constrained to uphold the contract as framed. Take, as conspicuous examples, the leading cases of Anderson v. Fitzgerald, 4 H. L. Cas. 484, and Jeffries v. Life Ins. Co., 22 Wall. [89 U. S.] 47.

The policies in these cases contained a provision that if the statements in the application were not true, the policies should be void; and the policies were held void for the false statement of a fact, although it was not material to the risk, and although it was not in terms declared to be a warranty.

The legislature of Missouri conceived, and we think wisely, that the promises held forth to the assured in the policies in general use were but too often a delusion and a snare, and as the courts were powerless to correct the evil, it ought to be corrected by statute. It is stated by counsel that the act of March 23, 1874, was occasioned by the decision of the circuit court in Jeffries' Case, above mentioned; and this is not improbable.

In the light of these considerations, the purpose and meaning of the statute are not to be mistaken. True, the statute is not framed with the utmost care, nor with nice precision in the use of language. If more caution had been taken, it would have contained a clause that all subsequent policies should be subject to its provisions, and also words in terms extending its operation to warranties. And if it had been dictated by a just regard for the rights of the companies, it would have excepted wilful and fraudulent representations from its operation, although it is probable that the courts may hold that such is its true construction.

We are of opinion that policies issued and delivered in Missouri after that act took effect fall within its protective operation; and as to such policies the act is to be treated as if incorporated therein, certainly, unless there is an express provision in the policy to the contrary, if it be competent, indeed, to insert such a provision. Our attention has been called to a late decision of the court of appeals of Kentucky, in which a conclusion is reached that seems to be in conflict with the view above expressed. Farmers', etc., Ins. Co. v. Curry, 10 Chi. Leg. News, 43 [13 Bush, 312]. It is seldom that we feel constrained to differ with the deliberate judgment of that learned and able court, but in this instance we are not convinced by its reasoning. Its conclusion thwarts what appears to us the manifest purpose of the enactment. An exactly opposite conclusion was reached by the supreme court of New Hampshire, under precisely the same kind of an enactment. Chamberlain v. New Hampshire Fire Ins. Co., 55 N. H. 249, 264; Gen. St. N. H. p. 325, c. 157; Emery v. Piscataqua F. & M. Ins. Co., 52 Me. 322.

It is by no means clear that a principle of public policy is not involved in such an enactment as that of the Missouri legislature here in question. If such a statute is founded upon public policy, even an express waiver of its benefits would be inoperative—

as much so as if a borrower should expressly waive the statute against usury, although the statute is intended for his benefit. But, conceding that the statute is not so founded on public policy as that its benefits may not be renounced, still the general rule is that laws in existence are necessarily referred to in all contracts made under such laws, and that no contract can change the law. Such is the general rule. The exception is that where no principle of public policy is concerned, a party is at liberty to waive a statutable provision intended for his benefit. But the intention to waive such benefit ought to be clear. Now, to hold that a party, by merely accepting a policy in the form in use before the statute was adopted (which produced the very mischief aimed at by the legislature), waives the intended protection of the statute, is to defeat the precise end that the legislature had in view. It is to perpetuate the mischief and to nullify the remedy.

2. The second question, viz.: whether the statute of Missouri extends to warranties as well as representations, has given us more difficulty. It will be noticed that the statute does not use the word "representations," but "misrepresentations," and it extends to all such made in "obtaining or securing" the policy.

In view of the quite general provisions of policies to the effect that all declarations and statements, if untrue, shall avoid the policy, whether material or not (see Anderson v. Fitzgerald, supra; Conover v. Massachusetts Ins. Co. [Case No. 3,121], and cases cited; Jeffries v. Life Ins. Co., supra), and whether in terms declared warranties or not, we are of opinion that the evil which the legislature intended to remedy would not be met, if we should restrict the operation of the statute to representations, strictly so called, as distingushed from warranties.

As between warranties and representations, where these were kept distinct, the mischief which was felt grew out of the principles applicable to the former rather than the latter. Indeed, it is the doctrine of warranties, or rather the practice of the companies in requiring such a large number and variety of questions to be answered, and then inserting a condition in the policy that all such answers are warranties, that wrought the most injustice. And we cannot readily suppose that the legislature, in laying the remedial ax to this matter, intended to strike at the comparatively harmless doctrine of representations proper, and to leave the tap-root of the mischief arising out of warranties untouched. They aimed at all statements which they called "misrepresentations made to obtain or secure a policy," and declared what should be the effect of these statements, whether the condition in the policy referring to them called them warranties or representations, or without calling them by either name, compendiously provided that they should, if not true, avoid the policy, whether material or not.

The demurrer to the first four counts in the answer is sustained; and leave given to amend. Judgment accordingly.

NOTE. On the trial the circuit judge, with the concurrence of Judge Krekel, made the following observations to the jury as to the purpose, scope, and meaning of the act of March 23d, 1874:

"The statute was intended to provide a remedy for what was frequently productive of injustice, arising out of the practice of the companies to put to the applicant for insurance a great variety and number of questions, some of which were material, and some of which very remotely bore upon the proposed risk, and then, by a sweeping provision or condition in the policy, declaring that if any one answer was untrue, it should avoid the policy, and the courts had held that such provisions were valid, and that in such case the policy was void, whether the answer which proved to be untrue was material to the risk or not, and whether such answer was intentionally untrue or was the result of an innocent mistake.

"But it still remains true, notwithstanding the statute, that the contract of insurance is eminently one which presupposes and requires good faith, honest representations, and fair conduct on the part of both parties, of the persons who obtain the insurance and the company which grants the insurance. For a comparatively small premium, the company agrees to pay on the contingency of death a large sum of money. This feature of the business of insurance tempts to perpetration of frauds on the companies. It is to the interest of all that fraud should never succeed. It cannot, we think, be supposed that the legislature of Missouri, in the passage of the act of March 23, 1874, intended to give any sanction or protection to fraudulent practises against the companies; but their intention was to extend protection, to the extent therein provided, against the usual conditions in insurance policies, and to extend this protection in favor of persons who had in good faith, and without any fraud on their part or intentional misrepresentation with a view to deceive, effected insurance, by providing that in such cases immaterial representations, or those which proved to be immaterial, should not avoid the policy. It is our opinion, therefore, that the remedial provisions of the statute of March 23, 1874, do not extend to cases where the 'representations made in obtaining or securing the policy' were knowingly false, and made with a view to mislead or deceive the company. As to such representations, the statute does not change the law, and, therefore, if the said John H. White untruly answered in the application that he had never been addicted to the use of alcoholic beverages or opium, and untruly answered that he had not been attended by a physician for a long time, and these answers, or either of them, were known to him to be untrue at the time they were made, and were made to deceive and mislead the company, then the policy is avoided and there can be no recovery thereon, although the matter so untruthfully answered did not contribute to his death. But if these answers in the application were made in good faith—if, when made, the said White supposed they were true, and did not intend to deceive, then, under the statute, the mere fact that they were not true does not defeat the policy; it must be further shown that the matter misrepresented contributed to produce or hasten death."

Case No. 17,546.

WHITE v. CROSS.

[2 Cranch, C. C. 17.] [3]

Circuit Court, District of Columbia. Dec. Term, 1810.

DISTRESS FOR RENT—REPLEVIN—ASSIGNMENT BY LESSOR—EVIDENCE.

1. Upon the issue of "no rent arrear," the plaintiff in replevin will not be permitted to show that the defendant "had nothing in the tenements."

2. An assignment by the lessor, during the term, without attornment, does not prevent the lessor from distraining.

3. In replevin for goods distrained for rent, the defendant cannot give evidence of the value of the use and occupation.

Replevin. Avowry for rent. Plea, no rent arrear, and issue.

THE COURT (THRUSTON, Circuit Judge, absent,) refused to permit the tenant to give in evidence, a deed in fee from Cross to Prout, made within the term, without attornment, to show that Cross had no right to distrain; the only issue being "no rent arrear," which admits the demise, and precludes the tenant from showing that the defendant had nothing in the tenements. The court also refused to permit the defendant, Cross, to give evidence of the value of the use and occupation of the house; as he could only distrain upon a special agreement for a sum certain.

Case No. 17,546a.

WHITE v. The CYNTHIA.

[10 Reporter, 232.] [1]

Circuit Court, E. D. New York. July 12, 1880.[2]

ADMIRALTY PLEADING — EXCEPTIONS TO LIBEL — LIENS UNDER STATE LAWS — CONSTRUCTION OF STATUTE.

1. Objections to defects of form in a libel in admiralty should be raised by special exception under rule 24. If the exceptions in an answer are not insisted upon at the opening of the trial they will be considered as waived.

2. The court will follow the ruling of the district court of another state as to the construction of a state statute.

3. Liens given by state law can be enforced in admiralty.

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

Libel in admiralty for supplies furnished in Virginia. The libellants had a decree in the district court [2 Fed. 112], and the claimants appealed.

Birdseye, Cloyd & Bayliss, for libellants.

Beebe, Wilcox & Hobbs, for claimant.

BLATCHFORD, Circuit Judge. The matters of exception to the libel set forth in the answer alleged mere defects of form, and should, under rule 24, have been raised by special exception. Even if tenable, the court would allow the libel to be amended, and without terms. But the exceptive matters must be regarded as having been waived by the claimant, as he allowed the case to be tried on its merits, without insisting in the court below on the exceptive matters at the opening of the trial, as he should have done if he intended to rely on them, in which case the libellant could have amended the libel. The libel must be regarded as containing all proper allegations as to the issues passed upon at the trial. I agree with the district judge, that the materials sued for do not come within the rule that has been applied to cases of the building of a vessel. It is proper to follow the ruling of the district court in Virginia as to the construction of the statute of that state, in force when the supplies were furnished. Under that construction there was a lien on the vessel by the state law for the supplies. That lien can be enforced in admiralty. Decree affirmed.

WHITE (DYSON v.). See Case No. 4,231.

Case No. 17,547.

WHITE v. FENNER.

[1 Mason, 520.] [1]

Circuit Court, D. Rhode Island. Nov., 1818.

JURISDICTION OF CIRCUIT COURT—DIVERSE CITIZENSHIP.

The circuit court has no jurisdiction of suits between citizens of different states, except where one of the parties is a citizen of the state, where the suit is brought.

Assumpsit. The plaintiff was described in the writ as a citizen of Virginia, and the defendant as a citizen of New York. The defendant at the time of the service of the writ upon him was in Rhode Island, and was there arrested.

Mr. Searle, for defendant, moved the court to dismiss the suit for want of jurisdiction, the defect being apparent on the face of the writ. And he cited, as decisive of the point, the eleventh section of the judicial act of 1789, c. 20 [1 Stat. 78].

Tristram Burgess, for plaintiff, e contra.

BY THE COURT. This court has no jurisdiction, which is not given by some statute. The 11th section of the judicial act of 1789, c. 20, declares, that the circuit court shall have original cognizance, among other cases, of suits "between a citizen of the state, where the suit is brought, and a citizen of another state." No clause of this or any subsequent act has enlarged this jurisdiction, so as to embrace the present case. The constitution declares, that it is mandatory to the

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

[1] [Reprinted by permission.]

[2] [Affirming 2 Fed. 112.]

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

legislature, that the judicial power of the United States shall extend to controversies "between citizens of different states"; and it is somewhat singular, that the jurisdiction actually conferred on the courts of the United States should have stopped so far short of the constitutional extent. That serious mischiefs have already arisen, and must continually arise from the present very limited jurisdiction of these courts, is most manifest to all those, who are conversant with the administration of justice. But we cannot help them. The language of the act is so clear, that there is nothing on which to hang a doubt. Neither of the parties in this suit is a citizen of the state, where the suit is brought. The suit must, therefore, be dismissed. Suit dismissed.

WHITE (GOODYEAR DENTAL VULCANITE CO. v.). See Cases Nos. 5,601 and 5,602.

WHITE (GORHAM CO. v.). See Case No. 5,627.

WHITE (HATCH v.). See Case No. 6,209.

Case No. 17,548.

WHITE v. HOW et al.

[3 McLean, 111.] [1]

Circuit Court, D. Michigan. Oct. Term, 1842.

BANKS—CONSTITUTIONALITY OF LAW—INDIVIDUAL LIABILITY OF DIRECTORS — EXCESSIVE LOANS—INSOLVENCY.

1. The act entitled "An act to organize and regulate banking associations," approved March 15, 1837, is constitutional.

2. Under the above act, the directors are liable in their individual capacities in the first instance, if the debts of the institution exceed three times the amount of stock paid.

[Cited in Pickaway Co. Bank v. Prather, 12 Ohio St. 512.]

3. The directors are liable for all excess of debts above three times the amount of capital stock paid, and also for all deficits occasioned by the insolvency of the bank.

4. If a director protests against certain loans, at the time they were made, he is not liable, as director, in his individual capacity for such loans.

5. Where the plaintiff seeks to make the directors liable for excess of loans, &c. the declaration must aver the amount of such excess.

6. The amendatory bank law, which took effect the 30th December, 1837, somewhat modifies the prior law.

7. In the first law, the legislature reserved the power to dissolve or modify the charters under it, at their discretion.

8. But acts under the first law cannot be so changed by the second as to increase their responsibility.

9. This question, however, is not involved in the case.

10. The act of insolvency fixes the responsibility of the directors under the new law.

11. The insolvency of the bank occurred long after the amendatory law took effect.

McLEAN, Circuit Justice. This suit is brought against the directors of the Saline Bank, established at Saline, in this state. In his declaration the plaintiff states, that on the 28th August, 1837, at Saline, books were opened to receive subscriptions of stock for a bank, to be called the Bank of Saline, with a capital stock, &c. under the act entitled "An act to organize and regulate banking associations," approved March 15, 1837; and that subscriptions for stock were then and there received. That on the 16th of October, 1837, defendants, with one Silas Finch, now deceased, and one Morgan L. Collins, who is a citizen of Ohio, were elected directors of said banking association, and then and there entered upon their duties as directors. That a president and cashier were elected, and that the defendants, claiming to have complied with all the provisions and requirements of the above act to constitute a body corporate, to wit, on the 5th December, 1837, had a large amount of notes engraved, which were filled up and signed by the cashier and president, and commenced doing business as a banking association, and continued such business until the 1st September, 1838, when said bank failed, and ceased paying its notes, debts, and liabilities in specie, and also then and there ceased doing business as a bank, and became insolvent, and is still insolvent. That the defendants, as directors, became subject to an act entitled "An act to amend an act entitled an act to organize and regulate banking associations, and for other purposes," approved 30th December, 1837, and which took effect the 10th January ensuing. And the plaintiff avers that he is the bearer and legal owner of the notes of said bank to the amount of fifteen hundred dollars, &c. Two general counts were added to the special count. The defendants filed a general demurrer.

In the argument the defendants insist—First, "that the laws under which the Bank of Saline was organized are unconstitutional." The constitutionality of these acts was considered and decided by this court, in the case of Falconer v. Campbell [Case No. 4,620], and being satisfied with that opinion, we deem it unnecessary again to examine the question. The second ground of objection is—that "the declaration does not show that the defendants, as directors, are liable for the debts of the bank, declared on."

The 25th section of the act of the 15th of March, 1837, provides, that: "The total amount of debts which such (banking) associations shall at any time owe, exclusive of property deposited in the bank, shall not exceed three times the amount of capital stock actually paid in and possessed; and for all excess and all deficits occasioned by the insolvency of such bank, the directors, in the first place, shall be liable in their individual capacity, in the full amount of their real and personal property;

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

and each other stockholder shall thereafter be also liable to the amount of stock which he shall hold in such association, in proportion to his or her amount of stock: provided, that any director who, if present, shall enter his protest, or, if absent, shall within five days after his return to said bank, enter his protest against certain loans, discounts, or issues, shall not be liable, further than other stockholders, on such loans, discounts, or issues." Under this section, it is contended that the defendants, as directors, can only be made liable for excess of debts incurred by the bank beyond the limitation imposed. And this construction is not controverted by the plaintiff. That part of the section which imposes a liability on the directors, contemplates two distinct grounds on which they are to be charged: 1st. For all excess of debts above three times the amount of captital stock paid in; and, 2d. For all deficits occasioned by the insolvency of the bank. In this view, the directors are liable for all excess of debts, without regard to the insolvency of the bank; and they are responsible for all deficits, in case of insolvency, without reference to excess of debts incurred. The words seem to be susceptible of no other construction. If the section intended to make the directors liable for excess of debts only in case the bank were insolvent, a different phraseology would have been used. But they are made liable for "all excess of debt and all deficits occasioned by the insolvency of the bank." Excess of debts beyond the limitation may be incurred, and yet the bank may remain solvent; and it may become insolvent without incurring any obligation beyond three times the amount of its capital stock. And can it be doubted that in either of these cases the words cited make the directors liable; in the one case for the excess of debts, and in the other for the amount of deficits. If we are to judge of the intention of the legislature by the natural import of the words used—and I know of no other rule of construction—this must be the result. The proviso only exonerates a director from liability, except as a stockholder, from those debts accruing from "loans, discounts or issues" against which he has protested. There is then nothing in the proviso to modify or restrain the liability of the directors on the happening of the contingencies named, except as to debts against which a protest has been made.

But there is no liability of the defendants under this section shown in the declaration. It is neither averred that an excess of debts, beyond the limitation, to the amount of the plaintiff's demand was incurred, nor that the deficit on the insolvency equalled that sum. That the bank became insolvent is alleged, but there is no averment as to the amount of the deficit. In this respect the declaration is defective. The action being in the nature of a penalty, all the grounds on which the liability was incurred should be specifically stated. But it is insisted that the liability of the defendants attaches under the amendatory bank law of the 30th of December, 1837, which took effect the 10th of January following. The 21st section of that act provides: "That the total amount of debts which such banking association shall at any time owe, exclusive of property deposited in the bank, shall not exceed three times the amount of capital stock actually paid in and possessed; and for all debts of such banking association, the directors thereof, if such association shall become insolvent, in the first place, shall be liable in their individual capacity to the full amount which such insolvent association may be indebted," &c. The bills on which this action is founded bear date the first of January, 1838, and as no time is averred when these bills were issued by the bank, it is insisted that the day of their date must fix the time of their emission. And that as this was prior to the amendatory law, there can be no liability of the defendants under the above section. That from the nature of this law it must receive a strict construction. That at the time the debt set up by the plaintiff was incurred by the bank, the law then in force imposed a limited and different liability on the defendants, which cannot be increased or modified by the amendatory law. That the legislature had not the power to give the second act a retrospective effect; and if they had such power, that in no part of the act does it appear that such an effect was intended to be given to it.

On the other side it is contended that the power reserved by the legislature in the first law to "alter or amend the act, and to dissolve any association to be incorporated under its provisions, by a vote of two-thirds of each house," places the whole charter under legislative discretion. That if the legislature may dissolve the charter, they may change it so as to increase or modify the liability of the defendants, as well as it regards past as future transactions. The power reserved in the first law may be exercised at the discretion of the legislature. Under it the charter may be dissolved or modified, but acts which were in themselves innocent, or involved only a limited responsibility, cannot be essentially changed by subsequent legislation. But it is not perceived how this principle is involved in the present case. Under the amendatory law the directors are made responsible for the debts of the bank, on its becoming insolvent. And it appears from the declaration that the Saline Bank became insolvent the first of September, 1838. This was long after the amendatory law took effect. The act of insolvency fixes the responsibility of the defendants. We must look to that act, and not to the time the debts of the bank were contracted. Without reference to the time the debts were incurred, the act declares if the bank shall become insolvent, the directors shall be liable for the full amount of its debts. Now it can be a matter of no importance when the debts were contracted. The Saline Bank

does not appear to have become insolvent by issuing the notes on which this action is founded. It did business up to the first of September, 1838, when it became insolvent. If the act of insolvency, on which the liability of the defendants attaches, had occurred before the amendatory act took effect, the objection of the defendants' counsel would be unanswerable. For aught that appears, the notes in question were properly issued by the bank, for its business was continued many months afterwards. From the face of the declaration, the bank must be presumed to have been in a solvent state, not only when these notes bear date, but on the 10th January, 1838, when the amendatory law took effect. The defendants, then, were the directors of a solvent bank, when this law prescribed their duty. Their functions were discharged under it, and they were subject to all its provisions. Eight months after the law was in force the bank became insolvent, and under the act they were made liable, by this insolvency, for the debts of the bank. Now would it not be a most strange and forced construction, to hold, that they are only liable for debts contracted after the law took effect? The law declared, if the bank became insolvent under their management, they should be responsible for all its debts. And this provision applies as well to banks in operation, as to banks that might afterwards be established. If this be not the true construction of the act, the provision was worse than useless in regard to existing institutions. If the directors under it can only be held liable for debts contracted after the law took effect, the main object of the legislature will be defeated. They unquestionably intended to secure a faithful discharge of duty by the directors of banks in operation. And no hardship is perceived in applying the provisions of the law to existing banks. If the insolvency existed before the law took effect, the directors could not be held liable under it. But if the insolvency occur under the law, why may they not be held responsible. They were aware of the responsibility under which their duties were discharged, and if, with their eyes open, they incur the penalty, ought it not to be enforced against them? No retrospective effect is given to the law by this construction. The contingency on which the liability attaches happens under the law. And the debts of the bank then existing, are the only debts for which the directors are liable. They knew the amount of the debts when the law took effect; and the bank being then solvent, they were bound to keep it so. And if, by increasing its responsibilities, they reduced it to insolvency, are they not justly, as the law provides, bound for its debts? The time at which those debts were contracted is not referred to in the law, nor is it of any importance. The time of the insolvency only is important. This makes the directors responsible for the existing debts of the bank.

The objection that the special count does not aver that the notes described in it were neither presented to the bank, nor paid by it, seems not to be well taken. The general averment in the conclusion of the declaration that the bank had not paid, though often requested, &c., is sufficient under the circumstances of the case. Indeed the averment of insolvency would seem to render unnecessary a presentation of the notes. The organization of the bank is well alleged in the special count. And as this count is deemed sufficient to maintain the action by the court, the objections to the general counts will not be examined.

It is objected that the remedy of the plaintiff is in equity and not at law. The 42d section of the act to provide for the voluntary dissolution of corporations, &c., approved April 15th, 1839, provides that "whenever a creditor of a corporation shall seek to charge the directors, trustees, or other superintending officers of such corporation, or the stockholders, on account of any liability created by law, he may file his bill for that purpose, in the court of chancery, which shall possess jurisdiction to enforce such liability, and may proceed thereon as in other cases," &c. This law gives jurisdiction to a court of chancery, in a case like the present. But this does not take away the common law jurisdiction, which gives an appropriate remedy. If the creditor wishes to prosecute the directors of the bank only, he must bring his action at law. A remedy by bill in chancery subjects him to delay, and a distribution of the assets of the bank. By the 43d section of the above act, if the bank has no effects, a decree may be made against the directors. But the 44th section provides that, "upon a final decree upon any application to restrain a corporation, or upon any bill filed against the directors or stockholders, the court shall cause a just and fair distribution of the proceeds of the property and effects of such corporation, to be made among its fair and honest creditors, in the order and proportion herein before provided," &c. This remedy then is very different from the remedy by action at law. The personal liability of the directors for the debts of the bank, "in the first place" as provided by the act, is not enforced by a chancery proceeding. But if there were no difference in this respect, the remedy at law would not be impaired by the relief which a court of chancery may afford. In no part of the act is it provided that the relief by bill shall be exclusive.

It is insisted if an action of law may be sustained under the statute, it should be brought against each director individually. Under both statutes, the directors, on the insolvency of the bank, are made jointly liable for its debts. They should then be sued

jointly, as has been done in this case. But it is objected, that on a joint liability of individuals, all must be sued. And that in the present case, Collins, who was a director, and jointly liable with the other defendants, has not been sued. Collins, it is averred in the declaration, is a citizen of Ohio, and consequently not within the jurisdiction of the court. The 1st section of the act of congress of 1839 obviates this exception. It expressly authorises the court to take jurisdiction "and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree entered thereon shall not conclude or prejudice other parties not served with process." But as the act authorises a party not served with process, and who may be without the jurisdiction of the court, voluntarily to appear, it is insisted that the process should be against such party, otherwise he cannot claim the benefit of the statute. Under the limited jurisdiction of this court, the plaintiff must allege, in his declaration, the citizenship of the defendants, as well as of himself. Not being a citizen of Michigan, he could not declare against a citizen of Ohio. Such an error would be fatal on demurrer. The form of pleading must be adapted to the requisitions of the statute. Should Collins in this case voluntarily appear and claim under the statute to be made a defendant, the court would give leave to the plaintiff to amend his declaration to meet the case. But unless this contingency shall occur, no reason is perceived for changing the form of the declaration. The excuse for not making Collins a defendant is sufficiently alleged. The demurrer is overruled.

[See Case No. 17,549.]

Case No. 17,549.

WHITE v. HOW et al.

[3 McLean, 291.] [1]

Circuit Court, D. Michigan. Oct., 1843.

BANKS—LIABILITY OF DIRECTORS—NOTES FRAUDULENTLY CIRCULATED—ACTS OF AGENT—PLEA OF DISCHARGE IN BANKRUPTCY.

1. A plea to an action against the directors of a bank, under the Michigan act of 1837, which makes them personally liable, where the bank is insolvent, &c. which avers the notes on which the action was brought were fraudulently put into circulation, is no answer to the declaration.

2. The plaintiff must be connected with the fraud, or at least have had notice of it.

3. A bank is answerable for the acts of its agent. And it is immaterial how notes get into circulation, if they come into the hands of the holder bona fide.

4. The proceeding by the bank commissioners under the statute is no bar to an action against the directors, to make them personally liable.

5. All that the holder of the notes could claim, from such a proceeding, would be a pro rata payment of the assets.

6. That plea is defective which, admitting its averments to be true, does not constitute a bar to the action.

7. A plea of bankruptcy which sets out the certificate and discharge, as required in the 4th section, is good.

[Cited in Lathrop v. Stuart, Case No. 8,113.]

Mr. Seaman, for plaintiff.

Romeyn & Miles, for defendants.

McLEAN, Circuit Justice. This action is brought against the defendants, as directors of the Saline Bank of Michigan, charging them with the amount of plaintiff's demand, under the statutes of the state, for a violation of law which regulated their duties. At October term, 1842, this case was before the court on a demurrer to the declaration, which was overruled, and leave was given to the defendants to plead, &c. [Case No. 17,548].

The 25th section of the act of the 15th of March, 1837, in relation to banks, declares, that, if the total amount of debts shall at any time exceed three times the amount of capital stock paid, "for all such excess and all deficits, occasioned by insolvency of such bank, the directors, in the first place, shall be liable in their individual capacity," &c.

The general issue was first pleaded.

2. That the bank notes on which the action is founded, with others, came into the possession and control of one Lewis Goddard, who, without the sanction of the bank, fraudulently used the same for his own purpose, and that the bank never received any value therefor. Without this, that the notes described in the plaintiff's declaration, as held by him, were issued by said bank. To this plea there was a demurrer. This plea is bad. It would not be sustainable if the action were against the bank. It is a well-established rule that every legal intendment is made against the plea. It does not show how the notes came into the hands of Goddard. If they were placed in his hands as agent of the bank, it would be clearly bound for any exercise of bad faith on his part, unless fraud in the plaintiff were alleged, which is not done. But, admit that the notes were obtained by Goddard fraudulently and put into circulation, if they come into the hands of an innocent holder in the ordinary course of business, the bank is bound to pay them. The notes were payable to bearer, and passed by delivery. It is then a matter of no importance, as regards the right of the plaintiff, how the notes were put into circulation, if they came into his possession without notice of fraud or unfairness; and as this is not averred in the plea, it cannot be presumed. 1 Bos. & P. 650; Bay v. Coddington, 5 Johns Ch. 56–58; Story, Ag. 451, 453, 464–467.

3. The defendants plead that the bank commissioners, on the 1st of November, 1838, filed a bill against the bank, under the act of

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

the state, and that before the commencement of this suit John B. Guilteau was appointed by the chancellor receiver of the property and effects of said bank, with all the power and authority, and subject to all the obligations and duties imposed upon such receiver, by the statute in such case made, and that he continued to be such receiver till after the commencement of this suit, &c. And they further aver, that before the commencement of this suit, the notes were deposited with said receiver as a part of the liabilities of said bank, and were held by him in trust for the owners thereof, to be paid out of the assets of the bank. And the defendants aver that the said notes were in the hands of the receiver a long time after the suit was commenced.

This plea is no answer to the declaration. There is no averment that any part of the notes were paid by the receiver, or that he had any assets in his hands out of which they could be paid. The proceeding under the statute was with the view of closing the operations of the bank, and to secure its creditors. The present action is against the directors, on a liability incurred by them personally, by excessive issues of paper. The proceeding under the statute is no bar to this action. All that could be claimed by the defendants is, that the assets of the bank should be applied pro rata to discharge the notes held by the plaintiff; but there is no averment of assets.

4. This plea varies in language from the third, but is not different in principle.

5. This plea sets out the proceeding in chancery, injunction, receiver, and avers that at the time of the appointment of the receiver the notes were the property of the bank, in the possession of its agents and officers. This is not a sufficient answer to the declaration. The facts of the plea may all be admitted, and yet it does not follow that the plaintiff has no right to recover. The question is, were the notes on which the action was founded the property of the plaintiff, and is he still the owner, now that he asks judgment on them? A traverse, then, of the facts of the plea would not raise the main point in the case, as to the right of the plaintiff. A traverse must not be of matter of inducement, but of the main and turning points in the case.

The same remarks apply to the 7th plea. Upon the whole, the demurrer to the pleas above enumerated is sustained. There is still a plea of bankruptcy by Wallace, one of the defendants. It is objected that this plea is defective, as it does not set out the proceedings under which the bankruptcy was decreed. The fourth section of the bankrupt law provides, that "such discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence, of itself, in favor of such bankrupt," &c. The plea is substantially good. It is not necessary to set out in such plea more than the certificate and discharge duly authenticated. The above provision makes these evidence, and conclusive evidence, unless the proceedings shall be shown to have been fraudulent.

WHITE (JACKSON v.). See Case No. 7,151.

Case No. 17,550.

WHITE v. JONES.

[6 N. B. R. 175;[1] 29 Leg. Int. 325.]

District Court, D. Kentucky. 1873.

BANKRUPTCY—CONSIGNMENT TO INSOLVENT—RIGHT TO PROCEEDS—EVIDENCE.

A. consigned goods to B. with orders to sell them and take negotiable notes payable to his order. B. sold the goods to C. taking negotiable notes payable to himself instead of to A. At the time of the sale, C. was accommodation endorser for B. to a large amount. B. discounted the notes above mentioned and paid the proceeds to C. to apply towards taking up the notes on which C. was endorser. B. was insolvent at this time, and shortly thereafter was adjudged a bankrupt. His assignee brought suit and recovered the amount thus paid to C. on the ground that he, C., had reasonable cause to believe B. was insolvent when he received the money. A. filed a bill in equity to recover the money in the hands of the assignee, claiming that as it never belonged either to B. or C. he ought to be allowed to assert his right to it. The court held that it was not shown that the money paid to C. by B. was the product of the sale of A.'s goods, that although the bill alleges the whole of it was thus derived, and the allegation is not denied by the answer, the allegation is not on this account to be taken as true, that it is only an allegation of some fact which is presumed to be within the knowledge of the party answering, that can be taken as true, simply because it is not denied. The court further *held* that the fund having been recovered not in virtue of any right in the complainant personally, but in virtue of the rights of the bankrupt's creditors generally and in virtue of the clear legal right of all the creditors, under the bankrupt law, it must be distributed among them generally and not given to one.

Some time prior to February twenty-seventh, eighteen hundred and seventy-one, the complainant, White, consigned to the bankrupts, Schickedantz & Sewell, one hundred and twenty-five barrels of whisky, for sale, directing them to sell and take negotiable notes, payable to his order. Schickedantz & Sewell sold all the whisky, between the twenty-seventh of February, eighteen hundred and seventy-one, and March fourth, following, to Boes & Lucking, taking negotiable notes payable to themselves instead of White. At the time of the sale, Boes & Lucking were accommodation endorsers for Schickedantz & Sewell to the amount of six thousand four hundred dollars. Schickedantz & Sewell caused all the notes which they had received on the sale of whisky to be discounted in bank, and sometime be-

[1] [Reprinted from 6 N. B. R. 175, by permission.]

tween the first and fifteenth of March, eighteen hundred and seventy-one, paid to Boes & Lucking six thousand two hundred dollars, with the understanding that Boes & Lucking would appropriate the same to the taking up of the bills on which they were endorsers, as mentioned above. Schickedantz & Sewell, at the time of the payment to Boes & Lucking, were insolvent, contemplated insolvency, and were, on the eleventh of April, eighteen hundred and seventy-one on the petition filed against them by one of their creditors, John D. Harris, adjudged bankrupts. Afterward S. E. Jones, the defendant, as assignee of the estate of Schickedantz & Sewell, brought suit against Boes & Lucking, under the provisions of the thirty-fifth section of the bankrupt act, and recovered from them the six thousand two hundred dollars, on the ground that the payment had been made by Schickedantz & Sewell, at a time when they were insolvent, and that Boes & Lucking, who were their creditors, had reasonable cause to believe them to be insolvent, and that the payment made by them was a preference, and a fraud upon the bankrupt act. In this suit it did not appear that the six thousand two hundred dollars, which had been paid to Boes & Lucking, was the same money that was derived from the discount of the notes given by them on account of White's whisky, but it did appear that the money was for the most part withdrawn from the bank by Schickedantz & Sewell, and mingled with their other moneys. The bill, however, alleges that the money paid to Boes & Lucking was the proceeds of the sale of White's whisky, and this is not denied by the answer of the assignee. The complainant, White, seeks to recover the money in the hands of the assignee which was recovered from Boes & Lucking, claiming that, as it never belonged to Schickedantz & Sewell, or to Boes & Lucking, he ought to be allowed now to assert his right to it, the same as if it had been found by the assignee in the hands of Schickedantz & Sewell in trust for complainant. That the fraudulent transfer to Boes & Lucking did not confer any rights upon the assignee in regard to the fund, other than what he would have had if such transfer had not been made.

BALLARD, District Judge. I have reluctantly come to the conclusion that complainant has not made out a case which entitles him to any relief. It is not shown, that six thousand two hundred dollars, paid by Schickedantz & Sewell to Boes & Lucking, were the product of complainant's whisky. I may conjecture that a part, nay, that a large part of this sum was derived, but the fact is not satisfactorily proven. The bill, it is true, alleges that the whole of it was thus derived, and the allegation is not denied by the answer, but the allegation is not on this account to be taken as true. The rule in chancery pleadings is not that every allegation of a bill be taken as true, simply because it is not denied in the answer. If any allegation is to be taken as true, simply because it is not denied, it is only an allegation of some fact which is presumed to be within the knowledge of the party answering. Now there is no ground for presuming that Jones knew that the money which Schickedantz & Sewell paid Boes & Lucking was derived from complainant's whisky; and, therefore, if I have stated the rule of equity pleading correctly, the allegation of complainant's bill, that it was so derived, though not denied by Jones, is not to be taken as true. But assuming the fact to be as alleged, still it is undeniable that complainant could not recover the money from Boes & Lucking without showing that they knew it. The moment the money was paid to them, under circumstances which were entirely lawful, but for the provisions of the bankruptcy statute, it was free from all trust and claim in behalf of the complainant. There is no allegation in the bill that Boes & Lucking knew whence the money paid them was derived, and, therefore, it must be assumed they were ignorant of the fact. Now, I think if complainant could not have followed the money into the hands of Boes & Lucking; if his lien on the trust in it was destroyed when it was received by Boes & Lucking, then he cannot follow it into the hands of the assignee in bankruptcy who recovered it of Boes & Lucking, not on the ground that they received it knowing the complainant's right or claim, but on the sole ground that they received it contrary to the provisions of the bankruptcy statute.

It cannot be maintained that the assignee holds the money subject to the same trust and equities which attached to it when it was in the hands of the bankrupts. If he had received it from them, or had received it as their right, then he would have no better right to it than they, and if in his hands, it would be subject to every equity to which it was subject in their hands. But he did not receive it from them or recover it on the ground of any right in them. They had effectually parted with their right. The assignee recovered it in spite of their effort to part with it, and not as their representative, or as the representative of complainant, but as the representative of the bankrupts' creditors. He recovered not because the bankrupts had defrauded complainant, but because they had committed what is made by the thirty-fifth section of the bankrupt act a fraud on their creditors generally. As I view the case, the fund having been recovered, not in virtue of any right in complainant personally, but in virtue of the rights of the bankrupts' creditors generally; not in virtue of any peculiar equity in any particular creditor, but in virtue of the clear legal right of all the creditors under the bankrupt

law, it must be distributed among the creditors generally, and not given to one. Let the bill be dismissed with costs.

WHITE v. JONES. See Case No. 16,945.

WHITE v. JUDGES. See Case No. 15,501.

WHITE (KIRKPATRICK v.). See Case No. 7,850.

WHITE (LAWRENCE v.). See Case No. 8,147.

Case No. 17,551.

WHITE v. LEAHY.

[3 Dill. 378.] [1]

Circuit Court, D. Kansas. 1874.

JUDICIARY ACT — CHOSE IN ACTION — RIGHTS OF ASSIGNEE—SUIT IN FEDERAL COURT.

Under the 11th section of the judiciary act [1 Stat. 78] the assignee of a chose in action may sue in the federal court if the assignor might at the time suit was brought have there prosecuted the suit if no assignment had been made; and this, although the assignor was at the time the assignment was made, a citizen of the same state with the maker.

[Cited in Jones v. Shapera, 57 Fed. 461.]

Bill to foreclose mortgage brought by the plaintiff as an assignee of the note and mortgage in suit. The plaintiff is a citizen of Missouri. The maker of the note secured by the mortgage, and who is the mortgagor, and is also the present defendant, is a citizen of Kansas, and was at the time the note and mortgage were made and assigned to the plaintiff. The payee at the time the note was made and the mortgage executed was also a citizen of Kansas, and he was also a citizen of that state when he indorsed the note and assigned the mortgage and delivered the same to the plaintiff in Missouri. But at the time this suit was brought he (the payee) was a citizen of another state (Texas) than Kansas. The question was, whether this court had jurisdiction of the suit.

N. C. McFarland, for plaintiff.

McComas & McKeighan, for defendant.

DILLON, Circuit Judge. The judiciary act (section 11) provides that no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless a suit might have been prosecuted in such court to recover the said contents if no such assignment had been made," etc.

If no assignment of this note had been made, the assignor might, being at the time when suit was brought a citizen of Texas, have then commenced it; and under the statute his assignee has the same right. If the restriction on the assignee does not exist at the time suit is commenced, the court has jurisdiction if the case involves the requisite amount and is between a citizen of the state where the suit is brought and a citizen of another state. The plea to the jurisdiction is overruled. Plea overruled.

See Thaxter v. Hatch [Case No. 13,866], and the change in the 11th section of judiciary act by the act of March 3, 1875 [18 Stat. 470].

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

WHITE (LEWIS v.). See Case No. 8,335.

WHITE (McDONALD v.). See Case No. 8,769.

WHITE v. McDONNELL. See Case No. 12,202.

Case No. 17,552.

WHITE v. McDONOUGH.

[3 Sawy. 311.] [1]

District Court, D. California. March 24, 1875.

LIABILITY OF MASTER OF VESSEL — SOLDIER DISCHARGED AT SEA—STATUS.

1. The master, as well as the owners of a vessel, is a common carrier, and is personally responsible for his own negligence and misfeasances.

2. A soldier on board ship, for whose transportation the government had contracted, was discharged at sea during the voyage. *Held*, that after his discharge the legal relation of passenger to master did not exist between him and the master, and that it was no breach of duty on the part of the master to allow the soldier to be subjected to military discipline as he was when the contract for carrying him was made and the voyage began.

[Cited in brief in Spohn v. Missouri P. Ry. Co., 87 Mo. 77.]

This is a libel filed against the master of the steamship Montana to recover damages for an assault alleged to have been committed, in the presence of and with the express consent of the defendant, upon the libellant, by the commanding officer of troops on board the ship.

The libellant was a musician in the regular army, and as such was put on board the Montana, at the mouth of the Colorado river, for transportation, with a detachment of two hundred and thirteen officers and men. The transportation was paid for by the government.

While at sea the libellant's term of service expired, and he received an honorable discharge in due form.

After libellant had received his discharge, the colonel commanding the troops, or his adjutant, for some breach of military discipline, ordered him below to work in the coal hold, and the order was enforced, so far as to keep libellant below a short time. The next day he was ordered to be taken below again, and before going White went to the master of the ship with his discharge, which the master read. White demanded protec-

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

tion of him, claiming to be a citizen and passenger.

The master went to the colonel commanding the troops and stated White's complaint to him. The colonel replied by reading the sixtieth article of war, and claiming that White was still serving with the army under that article, and told the master he had better not interfere. The master then told White he could do nothing for him, and White went below again, where he stayed about three minutes. He was kept under guard all of one day. It is not claimed that White was treated with any undue rigor or severity, if he was subject to military discipline, and it is admitted that the same acts done without authority to a passenger, in the ordinary sense of that word, would be gross ill treatment and wholly unjustifiable.

G. W. Tyler, for libellant.
W. W. Crane, for defendant.

HILLYER, District Judge. The first point argued by the defendant, with much seeming confidence, is that White cannot maintain this action against the master of the ship. If White, it is said, was a passenger, and the passenger contract was violated, his remedy is against the owner. The master being merely the agent of the owners, his omission to perform a duty which the owners may have owed to the passenger, under their contract as common carriers, does not give the passenger any right of action against the master.

No authorities were cited in support of this position; and I do not think the law will sustain it.

Both the owners and the master are regarded as common carriers. For his own negligences and misfeasances, the master is liable, and there appears to be no distinction in principle between this case and many which are found in the books against the masters, such as for injuries to property arising from his negligence or unskillfulness, permitting one of his subordinate officers to maltreat a seaman, for indecent behavior to a female passenger, and the like.

The master has duties and obligations of his own for a breach of which he is personally responsible. Among his duties is that of interposing his authority to protect both passenger and seaman from maltreatment while on board his ship. "He is armed," says the judge of this court, "with absolute authority and corresponding responsibilities. He has such authority—and a like duty—to protect the crew from the brutality of officers. What he permits he is justly considered to commit; and he permits that which he does not by a prompt exercise of his authority, prevent." Anderson v. Ross [Case No. 361]. In respect to passengers the master owes a still higher and more delicate duty. Chamberlain v. Chandler [Id. 2,575].

The libel in this case states a good ground of action against the master, and if the proofs support it, the libellant ought to have a decree for damages.

It is urged that White was not a passenger in the proper sense of that word; that soldiers on board are not passengers, and that White after his discharge continued under the military jurisdiction of the officers commanding the detachment of soldiers.

The truth is, that White was neither passenger nor soldier at the time the alleged wrongs were done to him. He had made no contract for his carriage on the ship; that was with the government. The legal relation of master to passenger did not exist; nor was White a soldier after his discharge; nor did he come within the sixtieth article of war, as a person serving with the armies of the United States in the field. "Persons serving with the armies," says Benet, (page 29), "include all who derive their compensation from private sources as servants," etc. The article evidently refers to persons who connect themselves voluntarily with the army. After White was discharged, he insisted on his rights as a citizen; did not willingly connect himself with the command for any kind of service, and it seems to me that the conduct of the officer in command was arbitrary and unjustifiable either by law or military necessity.

It has been held that a man may be aboard of a ship and be neither master, crew, cargo nor passenger, and that soldiers on board under the command of their officers are not passengers in the strict sense. The Merrimac [Case No. 9,473]. In the case of The Hanna, 15 Law T. (N. S.) 334, Dr. Lushington held that one who had paid no passage-money, but who went on board at the request of the master and messed with him upon the understanding that he should do what he could in the work of the ship for his passage, was neither crew nor passenger; that he was, in fact, a nondescript.

White's status on board, after his discharge is equally hard to describe. This case must be decided on its own peculiar facts, and the question is whether, under all the circumstances, there was any breach of duty on the master's part.

The government had contracted for his transportation to San Francisco, and White would have no action against the master for a breach of that contract. The Merrimac, supra. White cannot sue as a passenger for a breach of the master's express or implied contract with him, for there was none. White came on board as a soldier, subject to the orders of the officer in command, and the master left him in that condition, and did transport him with the rest of the command, as the contract with the government required. Was the master bound to take notice of the change in White's relations to the military authorities which happened during the voyage—a change entirely independent of his contract and to

which he had neither assent nor dissent to give? At the time White received the treatment complained of, he was dressed in army clothing and was messing with the soldiers. It seems to me that under these circumstances the master was not required to do more than he did do for White's protection. His duty, under the contract with the government, was to transport the two hundred and thirteen officers and men (White being one of them) to San Francisco, safely and securely. This he did. While this contract was being performed, it was not competent for the government, by the act of discharge, or White, by receiving it, to change its terms so as to give White new rights, or impose new obligations on the master. Therefore, when the master left White to the control of the military, as he was when he came on board, he violated no duty which the law imposed upon him as a carrier of passengers, under the existing contract.

Nor do I think it would be right, in any event, to hold that the master was bound to know and to say that White was not subject to military discipline. White wore the dress of a soldier, drew government rations and messed as and with the soldiers; and when the colonel insisted that he was a camp-follower and claimed a right to subject him to military discipline as such under the sixtieth article of war, while I think the colonel, although appearances were in his favor, was wrong, it would be unreasonable to hold the captain responsible for an error in the construction of a law of the army with which and the practice under it, he was ignorant. Besides all this, the colonel with his two hundred and thirteen men, was able to enforce his construction of the article against the master, for the time being, if he saw fit, and he did manifest a determination to do so.

Upon the whole case, then, I think the libel must be dismissed, with costs, and it is so ordered.

WHITE (McGINNITY v.). See Case No. 8,802.

Case No. 17,553.

WHITE v. MACON.

[3 Cranch, C. C. 250.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.

ACCOUNT—EVIDENCE.

If an account be received and not objected to for several years, the jury may infer that it is correct.

[See Baker v. Biddle, Case No. 764; Bainbridge v. Wilcocks, Id. 755.]

Indebitatus assumpsit for goods sold and delivered.

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

The defendant, by letter, acknowledged himself to be indebted to the plaintiff, but did not state the amount. A witness testified, that afterwards, and about three years before the commencement of this suit, he forwarded to the defendant an account, a copy of which he annexed to his deposition.

Mr. Coxe, for plaintiff.

Mr. Barrell, for defendant.

THE COURT (THRUSTON, Circuit Judge, absent), instructed the jury, at the prayer of the plaintiff's counsel, that if they believed from the evidence, that the defendant received that account, and there be no evidence that he objected to its amount, they may infer that it was correct.

Verdict for plaintiff, $103, and interest from 2d October, 1821.

Motion for new trial overruled. See 5 Har. & J. 63.

WHITE (MALLORY v.). See Case No. 8,993.

WHITE (MARIA v.). See Case No. 9,076.

Case No. 17,554.

WHITE v. NICHOLLS et al.

SAME v. ADDISON.

[1 Hayw. & H. 123.] [1]

Circuit Court, District of Columbia. December 29, 1842.[2]

LIBEL—PRIVILEGED COMMUNICATIONS.

1. A petition for the removal of an officer addressed to the president is a privileged paper, and being such, the plaintiff, in an action for libel, can give in evidence the falsehood of the charges contained in the petition, or want of probable cause for the charges contained in said paper.

2. Quære, whether, in an action for libel, any other paper than the publication itself could be given to prove malice on the part of the defendant.

At law. These actions were founded on a letter addressed to the president of the United States by the defendants, Charles C. Fulton, E. M. Linthicum, Rap. Semmes, O. M. Linthicum, Wm. Robinson, Wm. S. Nicholls and Paul Stevens, and written by the defendant, Henry Addison, the successor of the plaintiff [Robert White] in the office of the collector of the port of Georgetown.

Brent & Brent and Francis S. Key, for plaintiff.

John Marbury, for defendant Addison.

Joseph H. Bradley, for other defendants.

The declaration in both suits contained each two counts, and were essentially the same, and depended upon the same facts. That the defendants published several libels; by rea-

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

[2] [Reversed in 3 How. (44 U. S.) 266.]

son of the publication of said libels plaintiff was removed from his office of collector of the port of Georgetown and was deprived of the emoluments and income of said office. The defendants pleaded not guilty. The causes came on for trial and were tried together. Certain instructions were prayed for by the counsel for the plaintiff common to both. Exceptions were taken by the plaintiff on the court refusing to give the instructions as prayed. The jury brought in a verdict of not guilty in both cases.

These cases were taken to the supreme court of the United States on exceptions, where the judgments of the circuit court were reversed and the causes remanded for a new trial. 3 How. [44 U. S.] 266.

NOTE. The supreme court, through Justice Daniels, said, in 3 How. [44 U. S.] 287: "That the excepted instances shall so far change the ordinary rule with respect to slanderous or libellous matter as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion." After deciding that malice may be proved, the court proceeded to remark (page 291) that the only remaining question necessary to be considered in these cases, is that which relates to the rulings of the court below, excluding the publication declared upon from going to the jury in connection with other evidence to establish the existence of malice. And, on page 292: "If the publication declared upon was to be regarded as an instance of privileged publication, malice was an indispensable characteristic which the plaintiff would have been bound to establish in relation to it. The jury and the jury alone, were to determine whether this malice did or did not mark the publication. The rule has, by numerous adjudications, been placed beyond doubt or controversy, that the question of malice is to be submitted to the jury upon the face of the libel or publication itself."

WHITE (NICHOLLS v.). See Case No. 10,235.

Case No. 17,555.

WHITE v. PERRIN.

[1 Cranch, C. C. 50.] [1]

Circuit Court, District of Columbia. Jan. Term, 1802.

CONTRIBUTION BY SURETY.

Judgment will not be rendered on motion of one surety against another, unless the insolvency of the principal be fully proved.

Motion by White, under the act of assembly, Rev. Code, 292, for judgment against Perrin as a co-surety for Miller; Kennedy, the creditor, having recovered judgment for the whole debt against White.

Refused, because the insolvency of Miller was not fully proved.

WHITE v. RAFTERY. See Case No. 8,775.

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

Case No. 17,556.

WHITE v. RED CHIEF.

[1 Woods, 40.] [1]

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

CONFISCATION OF HOSTILE VESSEL—CHARACTER OF OWNER—RESIDENCE WITHIN INSURRECTIONARY LINES.

1. A capture of a steamer, within the insurrectionary district, by the forces of the United States, vested in the government of the United States an absolute title to the property, without the necessity of any legal condemnation.

2. The fact that the libellant, who was at the time of the capture resident in the district in insurrection, afterwards came into the United States and took the oath prescribed by the acts of congress, could not divest the title of the government.

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

C. S. Kellogg and R. H. Shannon, for libellant.

C. Roselius and R. Waples, for respondent.

WOODS, Circuit Judge. The libel in this case was filed June 3, 1864, and alleges in substance that libellant is a resident of the city of New Orleans, and that the steamer libelled was in charge of S. B. Holabird, chief quartermaster of the department of the Gulf. That libellant is the lawful owner of the steamer Red Chief, and for a long time had the possession of her as owner. That on the 11th day of March, 1863, libellant purchased said steamer at Shreveport, Louisiana, for his own individual use and profit. That on the 12th of March, 1863, while libellant was making a trip on his own account for private parties on the Mississippi and Red rivers, the so-called Confederate States government seized and impressed said boat against his will and consent. That a military force with an officer was sent on board said steamer and he was compelled to submit to their orders. That the so-called Confederate States government, by its officers and men, took said steamboat to Port Hudson, where it remained till that place surrendered to the United States forces on July 8, 1863, when said boat was taken in possession and turned over to said Holabird, chief quartermaster of the department of the Gulf. That libellant is and ever has been a loyal citizen of the United States, and has never aided or abetted the Rebellion by word or deed, but has taken the oath prescribed by the proclamation of the president of December 8, 1863, and before then, to-wit, on October 15, 1863, had taken an oath to support, protect and defend the United States against internal, civil and foreign enemies.

This is the case as stated by the libellant, and upon his own showing, I think his libel ought to be dismissed. According to the libel the libellant, at the time of his purchase of the Red Chief, and of her seizure by the Confederate forces, was resident and doing

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

business within the enemies' territory, and whatever his private sentiments may have been, he was in contemplation of law an enemy of the United States. "This court," says Mr. Chief Justice Chase, in Mrs. Alexander's Cotton, 2 Wall. [69 U. S.] 419, "cannot inquire into the personal character and dispositions of individual inhabitants of every territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each state or district in insurrection against the United States must be regarded as enemies, until by the action of the legislature and the executive, or otherwise that relation, is thoroughly changed." This steamer then was not only the property of an enemy, but was taken from him by the troops of the insurgents, and used in carrying on the war against the United States. While so used, she was captured by the military forces of the United States. Even in the possession of the libellant, the capture would have been justified, by the peculiar character of the property. Mrs. Alexander's Cotton, supra. It is well known that steamers constituted one principal reliance of the insurgents as a means of transportation for troops, commissaries' supplies and munitions of war. A fortiori in the hands of the insurgent troops, and actually in use by them in promoting the Rebellion, was this steamer a proper object of capture by the union forces? After her capture, and while still in the possession and use of the United States forces, the libellant seeks to regain possession of her and take her from the hands of her captors, by an appeal to the admiralty courts of the United States. We think it clear that he had no claim. The title of the United States was perfect and complete by capture in war and was not open to adjudication in the courts.

The fact that the libellant afterwards came within the United States military lines, and took the oath referred to in his libel, could not divest the title of the government. That was perfect and was not liable to any such defeasance. But it is charged in the libel that there had never been any legal adjudication or condemnation of the steamer. No legal condemnation was necessary or proper. By express provision of the act of March 12, 1863 (12 Stat. 820), captured property might either be sold and the proceeds turned into the treasury or it might be appropriated to public use on due appraisement. There is nothing in this record to show that this property was not so appropriated to the public use. Commencing legal proceedings is a novel method of wresting from the hands of military captors property taken from the enemy in open war. I find nothing in this record to show that libellant has any title to the property libelled. The libel is therefore dismissed at the costs of the libellant.

WHITE (SEVIER v.). See Case No. 12,681.

Case No. 17,557.

WHITE v. SWIFT.

[1 Cranch, C. C. 442.] [1]

Circuit Court, District of Columbia. July Term, 1807.

BOND—ACTION AGAINST SURETY.

In an action against a surety in a bond to perform a decree, it is not necessary that notice of the decree should have been given to the principal.

Debt on a bond conditioned that one Henfry should perform the decree of the court in a chancery attachment, and pay the amount of such decree. Judgment for the plaintiff on demurrer.

The question was, whether notice of the decree ought to be given to the principal, before you can sue the bond against the surety.

WHITE (THORNE v.). See Case No. 13,989.

WHITE (TOLER v.). See Case No. 14,079.

WHITE (TRYON v.). See Case No. 14,208.

WHITE (TURNER v.). See Case No. 14,264.

WHITE (UNION PAPER COLLAR CO. v.). See Case No. 14,396.

Case No. 17,558.

WHITE v. UNITED STATES.

[1 Hayw. & H. 127.] [2]

Circuit Court, District of Columbia. Jan. 7, 1843.

CRIMINAL LAW—EVIDENCE—MANNER OF OBTAINING CONFESSION.

It is not proper to ask a witness on cross-examination to explain by what process of examination or what influence he expected to use to bring the prisoner to confess the offence with which he was charged, when asked permission to take the prisoner to a private room. But he may be asked what influences he had used to obtain a confession from the prisoner

The traverser, Samuel White, was indicted for the larceny of one bank check of the value of thirty dollars; two cloth coats of the value of forty dollars; two pairs of pantaloons of the value of twenty dollars; one linen shirt of the value of three dollars; and two pocket handkerchiefs of the value of two dollars, of the moneys, goods and chattels of one John White. The said Samuel White was found guilty and sentenced to suffer imprisonment and labor in the penitentiary of the District of Columbia for the period of eighteen months, to take effect one day from and after the rising of the next term of the circuit court.

James M. Carlisle and James Hoban, for the traverser.

P. R. Fendall, for the United States.

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

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

The following bill of exceptions was signed by DUNLOP, Circuit Judge:

Upon the trial of this cause, the United States proved by Dr. Mayo, a competent witness, that he was present at the magistrate's office in Alexandria where the prisoner was then in custody upon a warrant issued upon the charge of stealing the goods named in the indictment; that the prisoner there constantly denied having any knowledge of the offence charged, and upon being applied to, directed the officer where his lodgings were, and that the officer and the witness went thither and searched, but found nothing. That they returned to the office aforesaid, and asked the prisoner for the key of his trunk; that he told them the trunk was not locked, and thereupon they returned and found that the trunk was not locked; and upon searching it, found a shirt and a pocket handkerchief which, by the same witness, the United States gave evidence tending to identify as one of the shirts and one of the handkerchiefs mentioned in the indictment; and that the shirt so found was worth three or four dollars; and that the handkerchief so found was worth two dollars; and that they were the property of Speaker White. That the prisoner said the shirt had been given to him by a woman whom he named, and that the pocket handkerchief was purchased by him at a certain store in Baltimore, at a corner which he named. That the prisoner was committed for further examination, and was again examined in Washington county, before Justice Morsell. That the same evidence was there given, and that the prisoner positively denied and persevered in denying that he had any knowledge of the offence. That Lambert S. Beck, a constable of the county, was there present, and had the prisoner in his custody; that the said Beck said to the witness Mayo that he, Beck, had a particular talent at getting confessions out of prisoners; and that the said Beck, upon permission being granted by the magistrate, took the prisoner into another room, and in a few minutes returned and said that the prisoner had made a full confession of being guilty of stealing all the articles named in the indictment. And further, the United States proved by said Lambert S. Beck, that witness was at Justice Morsell's office when the prisoner was brought thither by constables Statford and Hancock. Speaker White made his complaint then of having been robbed. The shirt and handkerchief before spoken of were produced; the prisoner claimed them as his own; said shirt was given to him by a woman, whose name he gave, but said he could not tell where she lived. When he took the prisoner into the room as aforesaid, he proceeded to ask the prisoner where the rest of the goods were, and said there is no doubt the person who stole some of them stole all. The witness told the prisoner not to say anything unless he, the prisoner, took them. The witness then proceeded to tell the prisoner that the shirt and handkerchief before mentioned were fully identified and proven to have been stolen from Speaker White, and that it was also proven that all the articles which are now named in the indictment were stolen from the said Speaker White at the same time; and that he, the witness, was familiar with law and the decisions of the circuit court of this District in such cases; and that they had expressly decided that the identification of any one article found in the prisoner's possession, as one of several articles stolen at the same time, was proof enough to convict him of stealing the whole; and that he, the prisoner, would certainly be convicted of stealing all the articles which are now named in the indictment; that the witness was anxious to recover the rest of the clothes and articles for Mr. White, and he, the prisoner, might as well tell all about it; that he, the witness, then asked the prisoner what he had done with the other articles which he was charged in the indictment with having stolen or which he had stolen (the witness was not certain which form of expression he used, but was certain that he used one or the other), from Speaker White. Whereupon the prisoner told him where some of them were, and the witness repeated the same question in the same form as to the other articles except the check. And further, that at the magistrate's office Speaker White charged the prisoner with stealing the check. The United States further proved by Hugh B. Sweeny, a competent witness, that the prisoner presented at the Bank of Washington, where the witness is teller, for payment, a check, and that the witness asked the prisoner where he got it, and the prisoner replied, "Oh! Mr. White has got his pantaloons, sir;" that the payment was refused and the check returned to the prisoner. That said check was drawn by one J. T. Moorehead; that said drawer had no funds in the bank at the time of drawing or of presentation as aforesaid, but that the bank had sometimes paid his checks when they only held his orders upon the sergeant-at-arms of the house; but that at the period referred to they had no such orders. That the said check was to the order of John White, and that there was endorsed the name of the said John White in his own handwriting, with which the witness was acquainted. And the signature of the said Moorehead as drawer of the check was genuine, and that the witness was acquainted with the said Moorehead's handwriting; that the witness never saw the check again after so seeing it as aforesaid in the possession of the prisoner; that at the magistrate's office, where Speaker White made his complaint, he stated that the check and the other things named in the indictment were stolen at the same time; that the prisoner was present on that occasion and denied that he had been at the bank; that the witness understood Speaker White when so speaking of the check to speak as prosecutor. And thereupon the prisoner, by his counsel, objected, that the confession of the prisoner

made to the said Beck, under the circumstances set forth in the evidence aforesaid, is not admissible and competent evidence against him upon this indictment to go to the jury; but the court overruled the objection and allowed the said confession to go to the jury. And the prisoner by his counsel proceeding in the cross-examination of the said Lambert S. Beck, put to him the following question: "Explain to the jury by what process of examination, or by what influences you expected to use to bring the prisoner to confess the offence with which he was charged, when you asked permission to take him to a private room for that purpose, as stated in your answer to a preceding question." To which question the United States, by their attorney objected as not competent to be put to and answered by said Beck. And thereupon the court refused to allow the said question to be put and would not allow the same to be put or answered, but allowed the counsel to ask Beck, what influences, if any, he had used to obtain a confession from the prisoner.

The prisoner by his counsel excepted to the decision of the court, overruling his objection to the admissibility of the confessions given in evidence by Beck, and also excepted to the refusal of the court to allow the question on cross-examination as aforesaid to be put and answered, and prayed the court to sign and seal this, his bill of exceptions, which was accordingly done.

On the case being argued by the counsel for the plaintiff in error and by the attorney for the United States, it was decided that there was no error in the judgment of the criminal court. The judgment was thereupon affirmed.

WHITE (UNITED STATES v.). See Cases Nos. 16,673–16,686.

Case No. 17,559.

WHITE v. VERMONT & M. R. CO.

[21 Law Rep. 469.]

Circuit Court, D. Massachusetts. Dec., 1858.[1]

CIRCUIT COURT — JURISDICTION — ACTION BY ASSIGNEE OF BOND.

1. Under the eleventh section of the judiciary act, the circuit court has no jurisdiction of an action brought by an assignee on a bond which is filled up and declared upon as payable to order.

2. By a statute of Massachusetts (St. 1852, c. 76), bonds or obligation under seal, issued by a corporation, are made equally negotiable with promissory notes. *Held*, that in order to give jurisdiction to the circuit court of an action on such bond by an assignee, it must appear that the title being made capable of passing by delivery, did so pass from the first taker after the act went into operation.

[This was an action brought by Selden F. White against the Vermont & Massachusetts Railroad Company upon certain bonds.]

[1] [Reversed in 21 How. (62 U. S.) 575.]

H. G. & H. M. Parker, for plaintiff.

Mr. Hutchins, contra.

CURTIS, Circuit Justice. This is an action of debt founded on obligations of the defendants under their corporate seal, brought by the plaintiff, a citizen of the state of New Hampshire, against a corporation, created by and having its place of business in the state of Massachusetts. It appears by the agreed statement of facts, that these instruments were originally issued to and held by citizens of Massachusetts. Under the eleventh section of the judiciary act, this court has not jurisdiction unless they were payable to bearer. They are declared upon and are now filled up as payable to order, and not to bearer. If it be admitted that the plaintiff have the option to treat them as payable either to order or bearer, upon which I give no opinion, he has elected the former. After this I cannot pronounce them payable to bearer.

There is another view of the facts, which is also decisive on the question of jurisdiction. It is agreed that these instruments were issued with the place for the name of the payee in blank, and that in point of fact they passed from hand to hand by sale and delivery. At the common law they were not negotiable, being writings obligatory under the seal of the corporation. A statute of Massachusetts, passed March 30, 1852 (St. 1852, c. 76), provides that bonds and other obligations under seal, purporting to be payable to bearer, or some person designated as bearer, or payable to order, which have been, or hereafter shall be issued by any corporation or joint stock company, are made negotiable, in the same manner and to the same extent as promissory notes were then negotiable. These bonds bear date some years before this statute was passed. It does not appear that the first taker sold and delivered them after the statute went into operation; and consequently, it does not appear their legal title was capable of passing by delivery, and did so pass from the first taker. If not, this is a suit to recover the contents of a chose in action in favor of an assignee, and within the prohibition of the eleventh section of the judiciary act. Where promises are made to bearer, and such promises, in point of law enure directly to the bearer, and he is capable of sustaining an action in his own name as the promisee, it has been held he is not an assignee, within the meaning of the eleventh section of the judiciary act. But if these bonds were issued to and transferred by the first taker before the date of the act, and were valid promises to him, they were not then legally negotiable by delivery; and if made so after they were originally issued and negotiated by the first taker, the holder would, in my opinion, be an assignee, within the meaning of that section. He would be the owner of a promise, originally made to another, and which that other alone

could enforce at law, until, by a subsequent provision of law, authority was given to such holder to negotiate the obligation, and to sue on it in his own name. For these reasons I am of opinion the suit must be dismissed for want of jurisdiction.

[This cause was carried on writ of error to the supreme court, where the above judgment was reversed. 21 How. (62 U. S.) 575.]

Case No. 17,560.

WHITE v. WASHINGTON.

[2 Cranch, C. C. 337.] [1]

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

WARRANT OF JUSTICE—SUFFICIENCY.

The warrant of a justice of the peace for the violation of a by-law, must set forth the offence substantially within the purview of the by-law.

[Cited in Delany v. Washington, Case No. 3,755.]

This was an appeal from the judgment of a justice of the peace for the penalty of ten dollars, upon a warrant for running a horse in one of the streets of Washington, contrary to the by-law. By the by-law of the 9th of December, 1809, it is enacted "that it shall not be lawful for any person or persons to run an animal of the horse kind, in any of the streets or avenues in the city of Washington, within three hundred yards of any house or building in said city, under a penalty of ten dollars for each offence." Neither the warrant nor the judgment of conviction stated the running to be "within three hundred yards of any house or building in the said city."

THE COURT (THRUSTON, Circuit Judge, contra), was of opinion, that the charge was too vague, and did not describe an offence under the by-law, and reversed the judgment.

WHITE (WESTON v.). See Cases Nos. 17,458 and 17,459.

WHITE (WHETCROFT v.). See Case No. 17,507.

Case No. 17,561.

WHITE et al. v. WHITMAN.

[1 Curt. 494.] [2]

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

PLEA IN ABATEMENT — SUIT PENDING IN STATE COURT—AFFIDAVIT.

1. The pendency of a prior suit in a state court is not a good plea in abatement to a suit in personam in this court.

[Cited in Lyman v. Brown, Case No. 8,627; Loring v. Marsh, Id. 8,514; Cook v. Burnley, 11 Wall. (78 U. S.) 668; Pendergast v. The General Custer, 10 Wall. (77 U. S.) 218; Stanton v. Embry, 93 U. S. 554; Brooks v. Mills Co., Case No. 1,955; Hughes v. Elsher, 5 Fed. 264; Latham v. Chafee, 7 Fed. 522; Olney v. Tanner, 10 Fed. 105.]

[Cited in O'Reilly v. New York & N. E. R. Co., 16 R. I. 396, 19 Atl. 245; Smith v. Lathrop, 44 Pa. St. 330.]

[See Ex parte Balch, Case No. 790, note.]

2. Such a plea must show jurisdiction of the former suit, if pending in a court not under the same sovereignty.

3. The absence of an affidavit, verifying the facts alleged in the plea, is fatal.

[Cited in Bellamy v. Oliver, 65 Me. 109.]

The defendant pleaded in abatement as follows: "And the defendant comes and defends, &c., when, &c., and says that he ought not to be held to answer to the above writ and declaration of the plaintiffs, but the same ought to abate; because he says that the said plaintiffs heretofore, to wit, at the honorable superior court, holden at Brooklyn, in and for the county of Windham, in the state of Connecticut, on the second Tuesday of April, A. D. 1853, impleaded the said defendant in an action of the case, and for the same cause in the declaration aforesaid above-mentioned; which said action of the said plaintiffs, against the said defendant, still remains depending and undetermined, as by the files and records of said superior court, now remaining in said superior court, (a copy whereof, duly authenticated, is here shown to the court,) appears; and the said defendant avers, that the said Henry Whitman, defendant, named in said action of the plaintiffs in said superior court pending, and the said Henry Whitman, now defendant, are one and the same person, and not other and different. Wherefore, he prays judgment if he ought to be held to answer to the writ and declaration, and that the same abate, and he be allowed his costs. By his attorney."

Mr. Jenckes, for plaintiffs.
Mr. Carpenter, contra.

CURTIS, Circuit Justice. The pendency of another action for the same cause in a foreign court, is not a good plea in abatement at the common law. The question is, whether the court of the state of Connecticut is to be considered a foreign court, within the meaning of this rule. In Browne v. Joy, 9 Johns. 221, it was held that such a plea of a former action in another state court, was not a good plea; and in Walsh v. Durkin, 12 Johns. 99, the same law was held applicable to a plea of a former suit pending in a circuit court of the United States. These cases seem to me to have been correctly decided. Though the constitution and laws of the United States require, that the judgments rendered in one state shall receive full faith and credit in another, yet, in respect to all proceedings prior to judgment, the courts of the different states, acting un-

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

[2] [Reported by Hon. B. R. Curtis, Circuit Judge.]

der different sovereignties, must be considered as so far foreign to each other, that a remedy sought by judicial proceedings under one, cannot be treated as a mere and simple repetition of a remedy sought under another. There may be real advantages to be gained, in respect to the property on which an execution may be levied, or otherwise, by resorting to an action in another state. And the same considerations are applicable to a second suit in a circuit court of the United States, while one is pending in a state court. In Wadleigh v. Veazie [Case No. 17,031], Mr. Justice Story declared that such a plea could not be allowed. In this case, the plea is also insufficient, for other reasons. It does not show that the court of Connecticut has jurisdiction of the action there pending; and for the reasons given in Newell v. Newton, 10 Pick. 470, this is a fatal defect. Nor is it verified by affidavit, as is required by the eighth rule of the court, if any matter of fact is contained in it; and this plea does contain two traversable facts: that the parties and the cause of action are the same. Trenton Bank v. Wallace, 4 Halst. [9 N. J. Law] 83. The demurrer is sustained, and the defendant must answer over.

WHITE (WORTENDYKE v.). See Case No. 18,050.

WHITE, The CAROLINE A. See Case No. 2,421.

WHITE, The MARIA. See Case No. 9,083.

Case No. 17,562.

In re WHITEHEAD.

[2 N. B. R. 599 (Quarto, 180); 1 Chi. Leg. News, 326.] [1]

District Court, S. D. Georgia. April 9, 1869.

BANKRUPTCY PROCEEDINGS — COSTS — HOMESTEAD EXEMPTION—PURCHASE-MONEY MORTGAGE.

1. The bankrupt is not entitled to the exemption of a homestead out of land mortgaged by him at the time of its purchase, to secure the payment of the purchase-money, until the said mortgage is satisfied.

[Cited in Re Brown, Case No. 1,980.]

2. The costs and expenses of the bankruptcy proceedings are entitled to priority of payment out of the funds in court derived from the sale of the property.

The report of the register was as follows:

I, Frank S. Hesseltine, register of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause, the following questions arose pertinent to said proceedings, and were stated and agreed to by R. K. Hines, Esq., who appeared for G. B. Lamar, creditor, and Wright & Warren, who appeared for the bankrupt. On the 16th day of November, 1858, John B. Whitehead, the bankrupt, purchased from one W. W. Cheever, a tract of land in the state of Georgia, receiving a deed to the land and giving his notes secured by mortgage on the said land for the purchase-money. On the 28th of November, 1858, Cheever transfers said notes and mortgage to G. B. Lamar, who has proven his claim in this court. The tract of land constitutes the bankrupt's entire estate, and under paragraph 2013 of the Code of Georgia, and section fourteen of the bankrupt act [of 1867 (14 Stat. 522)], he claims for himself and two children sixty acres of said land, including the dwelling-house thereon as a homestead, or in lieu thereof five hundred and twenty dollars in money, to be derived from the sale of said land. He further claims that the costs of the proceedings in bankruptcy shall be paid out of his said estate, which claims are opposed by the said G. B. Lamar, creditor.

As to the first question submitted, is the bankrupt entitled to the exemption of a homestead out of land mortgaged by him at the time of the purchase to secure the payment of the purchase-money? it is my opinion that he is not. I am well satisfied, from a careful examination of the law as laid down in the Code of Georgia, that it does not give to the head of a family a homestead out of land thus encumbered. That lien is a valid lien, authorized by statute; and the law does not anywhere provide for its displacement in favor of the creator of the lien, for the purpose of providing him with a homestead. It is true that, on the delivery to him of the deed, the title to the land is in the purchaser, and that "a mortgage in this state is only a security for a debt and passes no title." Irwin's Code, § 1914. Yet the supreme court of this state, in Scott v. Warren, 21 Ga. 408, decided that a judgment of older date than a mortgage could not first be satisfied out of land, where the mortgage was taken as security for the purchase-money at the time of its sale. The conveyance and mortgage were regarded as the several parts of one agreement—the sale as only a conditional one, the condition being expressed in the mortgage passed to the vendor at the time of this delivery of the deed.

The courts, by many decisions that I need not cite, seem to regard the title to real estate not paid for, and obtained by giving back to the grantor, at the time of his deed, a mortgage deed to secure the faithful payment of the purchase-money, as at the best but a conditional title, good and complete when the terms and conditions of the sale shall be complied with by the payment of the purchase-money.

The Code, under the section on "Property Exempt from Sale," paragraph 2013, says: "The following property of every debtor who is the head of a family shall be exempt from levy and sale; * * * nor shall any valid lien be created thereon, &c." From

[1] [Reprinted from 2 N. B. R. 599 (Quarto, 180), by permission. 1 Chi. Leg. News, 326, contains only a partial report.]

this, and from what is contained in all this section touching exemption, I determine that the debtor who seeks to have a homestead set apart for himself and family must first have a full and complete ownership and title to the property; it must be entirely his property, unsaddled with any encumbrance, lien, or condition affecting his title thereto. To use the phrase I have given above to express such titles as the bankrupt's, it must not be a conditional title. And further, that after he has had set off to him a homestead out of his property, he cannot of himself create any valid lien thereon. The Code does not deny the head of a family the right to create a lien on property not exempted in accordance with the provisions of the homestead act. He is free to do what he will with his own, convey or mortgage it; and I hold that if he mortgages back land to secure the payment of the purchase-money, it is a good and valid lien, such as the law will uphold and protect for the vendor against the mortgagor or any other person. By the new constitution of the state of Georgia, it is specially provided that the homestead shall not be exempt from levy or execution for the purchase-money of the same.

As to the second question: Are the costs of the proceedings in bankruptcy to be paid out of the proceeds derived from the sale of his estate? The costs of the court in the proceedings under which the estate of the bankrupt has been administered upon, and the expenses attendant upon that administration, have priority or preference in the order for a dividend under section twenty-eight of the bankrupt act. The costs still remaining unpaid in this suit under which this property has been sold, and the proceeds to be distributed, should be paid out of the fund in court.

Respectfully submitted to your honor for your decision thereon.

Frank S. Hesseltine, Register.

ERSKINE, District Judge. The conclusion at which Mr. Register Hesseltine arrived in the matter of John B. Whitehead, certified to the judge of this court, is correct, and his decision is therefore affirmed, and the clerk will so certify to Mr. Hesseltine.

Case No. 17,563.

WHITEHEAD v. JONES.

[2 McLean, 28.] [1]

Circuit Court, D. Michigan. Oct. Term, 1839.

NOTICE OF PROTEST—EVIDENCE.

1. The indorsement of a clerk, in the office of a notary, on the protest of a note for non-payment, that notice was duly served, is not evidence.

2. The deposition of the clerk should have been taken.

3. The usages of an office, as regards the service of a notice, cannot make that evidence which is in itself not so.

McLEAN, Circuit Justice. This action is brought against the defendant as indorser, on a promissory note for the payment of one thousand dollars, at the Michigan State Bank. When the note became due it was proved, by the protest and statement of the notary, that, at maturity, it was presented to the bank, and payment demanded, but the note was not paid. The notary stated, it appeared from an indorsement on the protest, that regular notice was given to the indorser. That it was the uniform practice of his office to serve a personal notice, where the indorser lived in the city, or leave it at his residence or place of business. But he had no knowledge of notice being given in this case. The indorsement was made by one of his clerks, who gave the notice, he presumes, but who has left the state. The plaintiff, also, proved that the defendant, in conversations respecting the note frequently, stated no objections to the payment of it, except that it was usurious.

This evidence is clearly insufficient to charge the indorser. There was no admission, or waiver, on his part, of the notice; and there is no evidence that it was served. The indorsement of the clerk, on the protest (he being living), that due notice was given, does not prove the fact. Nor, under the circumstances, can the usages of the office, as stated by the notary, supply the defect. The deposition of the clerk, who is supposed to have served the notice, should have been taken. The indorser is not chargeable, except on strictly legal principles; and these principles cannot be relaxed.

The plaintiff suffered a nonsuit.

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

Case No. 17,563a.

WHITEHEAD v. The TEMPEST.

[22 Betts, D. C. MS. 71.]

District Court, S. D. New York. 1855.

ACCIDENT TO TOW—LIABILITY OF TUG.

[A tug engaged to tow a schooner from one anchorage in New York harbor to another is not responsible for the safe transportation of the schooner over sunken rocks, provided she exercise ordinary care and skill in directing the movements of the two vessels.]

BETTS, District Judge. The owner of the schooner Eclipse files this libel to recover damages to the schooner by her striking on a rock in the East river nearly opposite the foot of Tenth street. The allegation of the libel is that the master of the schooner hired the steamboat, being a regular tow boat, engaged in the business of towing vessels for hire, and the master of the steamboat agreed to tow the schooner safely and securely from her anchorage in the North river to a berth at Eighteenth street, on the East river, and in so doing he

used so little, or such bad, care, skill, and management that, whilst being towed, the schooner, without fault on her part, was by the fault, negligence, and improper or unskilful conduct and management and navigation of the steamboat, drawn, driven, or caused to strike a reef of rocks, and was thereby greatly injured and damaged. The answer avers that the steamer was a regular tow boat, engaged in the business of towing vessels for hire in the bay and harbor of New York, and at the time complained of was hired by the master of the schooner to tow her, as charged in the libel; but denies that any agreement was made to tow her safely and securely, or that the steamboat took the schooner in possession otherwise than fastening to her as a tow, and avers that the schooner remained in possession and under control of her own officers and crew whilst so in tow. The answer further denies that it was agreed on the part of the steamboat to pilot the schooner on such towage. It was proved that the tow boat was hired to tow the schooner round for $10, and fastened alongside of her. The master and crew of the schooner remained on board that vessel, and managed her helm, under direction of the master of the tug. The master of the schooner swears he gave the draught of his vessel to the master of the tug. The latter denies that fact, but says he afterwards heard from another person that the schooner drew twelve feet of water. The tug passed a sunken reef of rocks without touching, but the schooner rubbed in passing over, and had her keel torn off. At about the same instant, two of the large Sound boats were near these vessels, passing up in the same direction on the opposite side of the river, and in their movement they created a swell and fall of the surface of the water of about two feet. The master of the tug testifies but for that casualty the schooner would have gone clear of the reef. The master testifies that the perturbation of the water from their movement had not reached the schooner at the time of the accident.

The tug, under this mode of hiring and employment, did not become responsible for the safe transportation of the schooner over the rocks. Her undertaking charged her with no more than the exercise of ordinary care and skill in directing the movements of the two vessels. She did not become subject to the liabilities of a common carrier, and it is doubtful if it was even a bailee for hire. Wells v. Steamboat Nav. Co., 2 Comst. [2 N. Y.] 208; The Princeton [Case No. 11,434].

The question then is plainly whether ordinary skill and diligence were used by the master and crew. This undoubtedly may depend upon the nature of the difficulty encountered. There is more reason for holding her responsible for not avoiding an object in open view (The Express [Case No. 4,598]) than a hidden one, as a rock under water (3 Hill, 1). But, even as to the first, a mistake of judgment in approximating the danger, or adopting the method for avoiding it, does not render the tug answerable for the consequences. The Princeton [supra].

I do not think the testimony shows any want of ordinary care in the tug in carrying the schooner over the reef under circumstances where the master had reasonable ground to believe both his boat and the schooner could go safely. The evidence is not very satisfactory that the swell occasioned by the passing of the two large steamers had any injurious effect upon the depth of water, but it is not found by the libellant that the ordinary depth at that time of tide was not such as to afford a probably safe passage for the schooner. The evidence is in counterpoise whether the master of the schooner gave her draught of water to the master of the tug, and the libellant cannot take advantage of that particular as an affirmative fact tending to prove negligence.

On the whole case I am of opinion that the libellant has not proved the accident happened to the schooner through the want of ordinary care and skill on the part of the tug. Had the schooner been a ship of large draught, the presumption might be different. Libel dismissed.

Case No. 17,564.

In re WHITEHOUSE.

[1 Lowell, 429;[1] 4 N. B. R. 63 (Quarto, 15).]

District Court, D. Massachusetts. March, 1870.

JUDGMENT FOR DECEIT — ARREST OF BANKRUPT DEFENDANT.

A bankrupt arrested on an execution issued on a judgment in an action for deceit is not entitled to be relieved on habeas corpus, for the arrest is in an action founded on fraud.

[Cited in Warner v. Cronkhite, Case No. 17,180; Re Pitts, Id. 11,190.]

[Cited in Donald v. Kell, 111 Ind. 3, 11 N. E. 783; Hamilton v. Reynolds, 88 Ind. 195; Wade v. Clark, 52 Iowa, 159, 2 N. W. 1040.]

R. I. Burbank and R. Lund, for petitioner.

W. H. Towne, for creditor.

LOWELL, District Judge. During the pendency of his proceedings in bankruptcy, to quote the language of section 26 of the act [of 1867 (14 Stat. 529)], the bankrupt was arrested on an execution issued from the superior court and petitions for a writ of habeas corpus. The record of that court, if admissible, shows that the judgment was based upon a verdict rendered in an action for deceit, and was rendered before the bankruptcy. The question submitted is, whether the arrest is within the exception of section 26, as being in an action founded upon a debt or claim from which the bankrupt's discharge, if obtained, will not release him. By the consent of the parties I have consulted with Judge Shepley upon this point, and we think that the petitioner is not entitled to be discharged from arrest. The civil action in which he is arrested is distinctly and solely founded on fraud, and so is within the

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

equity of the exception of section 33. It is argued with a good deal of force that a judgment merges the original cause of action, and converts what was an unliquidated demand for damages into a debt, and that it is altogether immaterial what the nature of the original demand may have been.

We are of opinion, however, that the record of the action in which the execution issues, may be looked at, and if it shows a material and traversable allegation of fraud as its sole foundation, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him. The execution is a writ issued in the cause, and the arrest is an arrest in a civil action. I do not intend to express any opinion upon the question whether a judgment in an action of contract, in which an allegation of fraud, if made, would be immaterial, might not be such a merger or waiver as is contended for. It might be very difficult to admit evidence to vary or contradict the record in favor of the creditor, when the debtor would be concluded on his side. Nor do I even mean to say that a suit on this judgment might not remove the fraud beyond the view of the court. In the Case of Devoe [Case No. 3,843], I decided that an arrest on mesne process in an action for deceit was within the exception and not to be relieved against, and I have seen no reason to change that opinion. I now decide that an arrest on execution in a similar action, comes within the same rule.

Writ refused.

Case No. 17,565.

WHITEHOUSE v. GRAND TRUNK RY. CO.

[2 Hask. 189.] [1]

Circuit Court, D. Maine. Nov., 1877.

ACTION AGAINST RAILROAD COMPANY — PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE — RIDING ON ENGINE—COLLISION.

1. The defendant, by introducing evidence in defense, waived its request, made at the close of the plaintiff's evidence, that the court direct a verdict for the defendant.

2. The defendant, by its rule, entitled, "General orders to engineers," providing, "no person shall be allowed to ride on the engine without the permission of the engineer," placed in the hands of the engine driver, authorized him to permit the plaintiff's intestate to ride upon the engine.

3. It was for the jury to say, whether the injury received by plaintiff's intestate while so riding was occasioned solely from causes not incident to such exposed position.

4. The defendant is liable for injuries received by plaintiff's intestate while so in the exercise of due care and so lawfully riding upon its engine running on schedule time with the right of way and carefully and properly managed and controlled, occasioned by collision with another of its engines, wrongfully and negligently despatched to meet upon the same track the engine upon which the plaintiff's intestate was so riding.

Case for injuries received by plaintiff's intestate, wherefrom he died after lingering a short time, occasioned by the careless and negligent management of defendant's engines and trains. Plea, the general issue. Verdict for the plaintiff for $5000. The defendant moved for a new trial for misdirection, and because the verdict was both against law and evidence.

Thomas H. Haskell and Charles W. Goddard, for plaintiff.

John Rand, for defendant.

Before SHEPLEY, Circuit Judge, and FOX, District Judge.

FOX, District Judge. The deceased was about twenty years of age, and at the time of his death was a fireman in the employ of Boston & Maine Railroad. In March, 1875, he visited his parents at Lewiston in this state, and on the morning of the fifth of that month went to the Lewiston depot to take the train for Portland. He was there introduced by his brother, a locomotive engineer, to Cummings, the engineer of the train, and was invited by Cummings to ride into Portland with him on the engine. He took a seat on the engine, and on their way to Portland a collision occurred at North Yarmouth with an engine coming in an opposite direction under the charge of Noyes, and Whitehouse was injured so that he died the same day. The collision was occasioned entirely through the negligence of Noyes.

Upon the close of the plaintiff's case, the defendant's counsel requested the court to direct the jury to return a verdict for the defendant, which was refused, for the reason that testimony had been offered by the plaintiff, tending to show that for fourteen years it had been customary for the engineers on this road to allow persons to ride on the engines, and which it was claimed by plaintiff's counsel the jury might find to have been done with the knowledge and sanction of the defendant. The defendant then offered testimony bearing upon this point, and also its book of rules and regulations. By thus proceeding in defense, the defendant must be considered as having waived its request for instructions on the plaintiff's case as it originally stood, and the correctness of the rulings upon all the testimony presented to the jury at the close of the cause are alone presented for revision on this motion for a new trial, the jury having rendered their verdict for $5,000 damages.

This book of rules and regulations is a small pamphlet of about fifty pages, a copy of which was given to each of the employés engaged in working the line. There had been different editions, but the one in use at the time of the accident was issued in 1873. The duties of the different classes of the employés of the

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

road are therein specifically set forth under various heads, printed in large type, so that any employé could easily turn to that portion of the book descriptive of his duties. On page 16 is found a title or division which reads as follows: "General Orders to Engineers." Under this title or division there are twenty-four rules, all relative to the various duties of the party in charge of the engine. It is conceded by the counsel that the word "engineer" in this title was intended to and can only refer to those who are entrusted with the control of the locomotive upon the line of the road, and who are sometimes known as enginemen or engine drivers, but generally as engineers.

The first rule under this title is "that the engineman of every train must be in attendance and see that his engine is in working order, &c."

Rule III is as follows: "No person, except the engineman and fireman, shall be allowed to ride on the engine without the permission of the general manager, superintendent, engineer, or chief officer of the locomotive department. Conductors and brakemen in charge of trains, or off duty, on no account to be allowed to ride on the engine."

The charge of the court relative to this rule was, "that it did not prohibit Cummings from inviting and allowing Whitehouse to ride on the engine, and that from Cummings' testimony they would be authorized to find that Whitehouse at the time of the collision was lawfully on defendant's engine. Under this rule, had Cummings authority to invite Whitehouse to ride on the engine? It would seem to be perfectly clear that he had; that the rule itself in terms authorized the engineer to receive on his engine, at any time, any one he saw fit so to do.

It is argued that the engineer, upon whom by this rule was conferred this authority, is the civil engineer of the road; and it was shown that there were, in the dominion of Canada, in the employ of this road, four civil engineers. These persons do not precisely correspond to the description of the party called for by the rule, as in that, the word employed is simply engineer, whilst those, who are now claimed to have been intended, were known, as Spicer, their superintendent, states, as "chief engineer and assistant engineers." From the word found in the rule, simply "engineer," it would be difficult to decide whether upon the chief or his assistants was thus conferred this authority; but without relying on this answer to the suggestion that the civil engineers of the company were the parties upon whom, as engineers, it was intended to confer this authority, as one member of the court, I am of opinion that these are not the engineers called for by this rule. They were all in Canada; not one within the limits of the state; their duties did not bring them in communication with the locomotives or their movements up and down the line; they have no particular knowledge or information which would specially designate them, as peculiarly qualified to act in this behalf, and when needed, if the emergency should arise in this or the adjoining states, they would be beyond reach of inquiry, except after long delay.

On the contrary, it cannot be questioned that occasions are constantly arising when it is necessary that one or more of the servants of a railroad, or other persons, should be speedily transported to some portion of the line of the road, as for instance in case of accident or injury to the road bed, &c. If a locomotive is at hand ready to move, who so well qualified to judge of the propriety of receiving such persons upon the engine as its engineer? Being constantly upon the road, acquainted with its condition as well as with his engine and tender, and their fitness for the contemplated purpose, and of the movements of all other trains, he could on the instant determine whether or not it was proper to allow such persons on his engine. Some one upon the train or the engine should be clothed with the authority and the power so to act, and it is for the interest of the road that the engineers should be authorized so to do, and thereby save the delay, which might otherwise ensue in obtaining the assent of the other persons named in the rule. A competent engineer is much better qualified than any other servant of the company to decide whether or not it is expedient to allow persons to ride with him upon his engine, and for this reason he may well have been selected as one of those to be entrusted with this authority.

Waiving all conjecture and theory as to whom the defendant intended by the use of this word engineer, let us see what has actually been said and done in relation to it by the company; for whatever may have been its intentions, if it has not succeeded in clearly manifesting the same by the rule it must abide the consequences. If a party executing an instrument leaves anything ambiguous in its expressions, such ambiguity must be taken most strongly against itself. It has issued its "general orders to engineers" and placed them in the possession of every hand on the line. Its "engineers" is the class of servants to whom these orders are addressed, and to these rules these engineers are compelled to look to ascertain what their orders are, and there they read what they are prohibited from doing and what they are authorized to do; upon an application to them by a party for permission to ride on the engine, they must turn to the rules and "general orders to engineers" to ascertain who may consent thereto, and on the succeeding page they read, that the "engineer" is authorized to grant such permission. It is beyond question, that when any engineer should consult these rules as to his duties upon this subject, he would find that some person described as an engineer was thereby authorized to grant this permit, and why should it be contended that such en-

gineer was of a different class and of a different department than those for whom these rules were prescribed, and who were directed there to search for thier orders and duties. By page fifth they were notified "that no excuse would be received for want of knowledge of these rules." It being conceded that these rules were for the guidance of this class of servants described in their very title as "engineers," when in terms engineers are there found clothed with this power, why should we be called upon to give a different signification to this word engineer in the one instance, from what, it is admitted, was intended to be its manifest signification in the other?

It should be remembered that these rules, designated as "general orders for engineers," are not, and do not purport to be made for the guidance of civil engineers. They would not expect to find their duties defined under that head, and would never consult these rules with such an object, while on the contrary, the locomotive engineer is furnished with them for this sole purpose, to instruct him as to his duties in connection with his engine and its general management.

Argument cannot make it any plainer than is the simple statement of the proposition itself. "General orders" for the engineers are issued by the company, and in these very orders, among other powers and duties conferred upon its engineers, they are to determine when it is proper for others to ride on the engine. The whole of this portion of these rules relates to locomotive engineers alone, and what they shall or shall not do, and it is playing fast and loose with this word to insist that on the one page engineer is intended to describe an engine driver, and on the next, without any explanation whatever, that it shall mean a civil engineer, who in no way has anything to do with the movements of the trains or engines. Throughout the United States this word "engineer," when used in connection with railroads, is invariably employed to designate the party in charge of the locomotive. In scores of opinions in the reports of the decisions of the courts of the various states, this word is so employed; and by Worcester and Webster, an "engineer" is defined as "one who manages an engine," an "engine man," "an engineer."

The jury were instructed, "that if S. D. Whitehouse by his own negligence occasioned or contributed to the injury, the plaintiff could not recover; that if they find it was negligence on Whitehouse's part to ride on the engine, the plaintiff cannot recover; that the injury must have been occasioned by the negligence of defendant or its servants to render it accountable."

Other instructions were given to the jury, which were read from Philadelphia & R. R. R. v. Derby, 14 How. [55 U. S.] 470, and the same which were given to the jury in that case and sanctioned by the supreme court, the principal one being that if the deceased was lawfully on the engine of the defendant at the time of the collision, by the license of the defendant, and was then and there injured by the negligence or disobedience of orders of the company's servants then and there employed on the railroad, the defendant is liable for the injury done and suffered by said Whitehouse. The correctness of this and the other instructions read to the jury from that case is not subject to question in this court, as they were in the very language which there received the approval of the supreme court.

Judge Grier, on page 484 of that case, says: "The liability of the defendants below for the negligent and injurious act of their servant, is not necessarily founded on any contract or privity between the parties, nor affected by any relation, social or otherwise, which they bore to each other. * * * The maxim of respondeat superior, which by legal imputation makes the master liable for the acts of his servant, is wholly irrespective of any contract, expressed or implied, or any other relation between the injured party and the master. If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him and injures his property or person, it is no answer to an action against the master for such injury, either that the plaintiff was riding for pleasure, or that he was a stock holder in the road, or that he had not paid his toll, or that he was the guest of the defendant or riding in a carriage borrowed from him. * * * In this view of the case, if the plaintiff was lawfully on the road at the time of the collision, the court was right in directing the jury that none of the antecedent circumstances or accidents of his situation could offset his right to recover. * * * When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence.

The same rule is recognized in Nolton v. Western R. Corp., 15 N. Y. 444, where the road carried a passenger gratuitously who was injured in the mail car, he being a mail agent. The court (pages 447, 448) says: "My conclusion therefore is, that this action cannot be maintained upon the basis of a contract expressed or implied. It necessarily follows that it must rest exclusively upon the obligation which the law always imposes upon any one who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken. The principle, upon which a party is held responsible, does not differ very essentially in its nature from that which imposes a liability upon the owner of a dangerous animal, who carelessly suffers such animal to run at large, by means of which another sustains injury. The basis of the liability

is * * * the culpable negligence of the party."

The defendant requested the court to instruct the jury, "that, if plaintiff's intestate was riding upon the locomotive, he was guilty of a want of due care and cannot maintain this action; that a person travelling upon a railroad is not exercising reasonable care in riding upon the locomotive, and that Whitehouse was travelling without right and at his own risk."

By these requests, defendant claimed that the court should rule as matter of law, that Whitehouse was guilty of negligence by riding upon the locomotive and was there at his own risk; but the court did not adopt this view, but submitted the whole to the jury for their consideration to find whether Whitehouse was or was not guilty of negligence; and we think this ruling was correct under all the circumstances of the case.

In Railroad Co. v. Stout, 17 Wall. [84 U. S.] 664, the supreme court says: "That although the facts are undisputed, it is for the jury and not the judge to determine whether proper care was given, or whether they establish negligence."

We hold if Whitehouse was rightfully on the locomotive by the consent of the defendant under the authority delegated by it to its engineer by rule III, the defendant became answerable for any injuries Whitehouse might sustain from a collision with an engine coming in an opposite direction, which collision was occasioned by the negligence of the servants of the defendant; that under such circumstances he did not assume the risk of such negligence.

Conceding that an engine is not so safe a position as a passenger car, and that if he had been on the car he would not have been hurt, yet it cannot be said that his being on the engine contributed to the immediate cause of the accident. It was said by Pollock, C. B., in Greenland v. Chaplin, 5 Exch. 246: "Where the negligence of the party injured did not in any way contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action."

Whitehouse, being upon the engine not only lawfully, but by the assent of the defendant through one of its agents, who was by their rule authorized to permit him to be there, he on his part thereby assumed only those risks ordinarily incident to his being upon the engine, such as for instance, a greater liability to be thrown from the engine by its irregular movements, etc., and he cannot be said to have agreed to exonerate the defendant from accountability for its negligence. His position upon the engine, even if imprudent and injudicious, he being there with the defendant's consent, does not deprive him of all redress and protection from the defendant's wrong conduct. It may be quite injudicious for a man to build a building, or pile his wood on his own land in direct proximity to the line of a railroad, and yet it has been decided that under such a condition of things, if his property is destroyed by the negligence of the company, he may have complete redress.

The risks under such circumstances, which the party assumes, are those which necessarily attend the situation when conducted with ordinary care and prudence, and he cannot be presumed to have agreed to exonerate the company from liability for wrongs inflicted by its negligence.

In Willis v. Long Island R. Co., 34 N. Y. 676, which was an action for injury to a passenger when standing on the platform, the court says: "There is no rule of the common law which makes it the duty of the passenger to the carrier to select a position in the vehicle least exposed to danger through the wrongful act of the proprietor. A seat on the outside of a stage coach may be more hazardous than an inside seat if the driver negligently overturns it on a pavement or a hillside, but the selection of that position is neither negligence per se, nor tributary in a legal sense to the injury. Their position, whether judiciously or injudiciously selected, so far as their passengers are concerned, was lawful under these circumstances as between them and the company; and in legal contemplation, it neither caused nor contributed to the injury. The law on this subject was settled in the leading case of Carroll v. New York & N. H. R. Co., 1 Duer, 571, in which this question was directly involved, and the judgment in the superior court in that case was subsequently affirmed in this court."

So in Colegrove v. New York & H. R. Co., 6 Duer, 382, affirmed in 20 N. Y. 492, in which the plaintiff, a passenger, while riding on the platform of one of the cars was injured in a collision, the judge instructed the jury: "The first question to be disposed of is, whether the plaintiff in standing on the platform was himself guilty of such negligence as exempts the defendants from liability. The general rule is that where a party by his own negligence contributes to bring about the occurrence by which the injury is effected, he cannot recover. Now standing upon the platform of the car could, in itself, have had no effect in producing the collision by which the injury was effected. Of itself, therefore, it would be no defense to the company in case of an accident occurring. I mean the mere fact of standing upon the platform of the car." The court, on page 416, says:

"The collision was the proximate, direct, immediate and sole cause of the injury. It is true that, if the plaintiff had not been within the reach of its influence, he would not have been injured. But on the facts as proved, he was in no sense in fault, as between him and either defendant, in being where he was. He was not as to either of them wrongfully there. He owed no duty to either of them which required him to be elsewhere. If he had been

off of the train, the collision would have occurred. His being where he was, not being wrongful as to either defendant, nor a failure to perform any duty which he owed to either of them, it is no defence to an action brought to recover damages caused by their negligence, that the position, in the event of such negligence, a negligence which no one could foresee or had the slightest reason to anticipate, was one of more danger than a seat in one of the cars, and that if he had been seated he might not have been injured. The law looks to the proximate cause of the injury. When a plaintiff did nothing which conduced to that, and at the time of its occurrence, he was lawfully in the position which he occupies, and there is no negligence in not anticipating or foreseeing the possibility of an injury from the negligence of others which, if it should occur, would endanger his safety in any part of the train, and it is by such negligence that he is injured, then there is no negligence on his part, in the legal sense of the term, which contributed to the accident or to injure him."

In Zemp v. Wilmington & M. R. R. Co., 9 Rich. Law (S. C.) 84, the passenger was on the platform and was injured, and he recovered, it being held to be a question for the jury whether his negligence contributed to the injury. See, also, Dunn v. Grand Trunk Ry. Co., 58 Me. 191, and the cases there cited.

In Kerwhaker v. Cleveland, C. & C. R. Co., 3 Ohio St. 172, it is said to be the settled law, "that where the negligence of the defendant is proximate and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault; and when the plaintiff, in the ordinary exercise of his own rights, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care and caution on the part of the defendant, he is entitled to reparation, for the reason that, although by allowing his property to be exposed to danger, he took upon himself the risk of loss or injury by mere accident; he did not thereby discharge the defendant from the duty of observing ordinary care and prudence, or in other words, voluntarily incur the risk of injury by the negligence of another." These remarks were applied where a party thus exposed his property; but they are equally applicable, when, under the same circumstances, he suffers personal injury.

In Keith v. Pinkham, 43 Me. 501, the rule is well stated. That case was an action for damages caused by the negligence of the driver to a passenger riding on top of the coach, and who was requested to take an inside seat, and told "that if he continued on top, he did it at his own risk." The learned chief justice says: "It may be true that the plaintiff, by riding outside incurred the peculiar risks, if any there were, arising from his exposed situation. But that is all. He did not assume those resulting from the negligence of the defendant, or those in his employ."

In Peoria, P. & J. R. Co. v. Champ, 75 Ill. 577, it is said that when the plaintiff is guilty of contributory negligence, the railway company is not relieved from its duty to observe all reasonable precautions to prevent injury to the property of the plaintiff.

The instructions given to the jury were read from Philadelphia & R. R. Co. v. Derby, and the facts of that case were very similar to the present; there the plaintiff was invited to ride on the road in a locomotive car engine by its president, and was injured by negligence of those in charge of another engine, and recovered for his injuries. Such a car, as we understand it, is constructed with an engine on the forward part of the car, and seats in the rear, and in many respects is a more dangerous vehicle than the ordinary locomotive upon a passenger train. The latter is run according to time tables, having the right of way, while the locomotive car is like a "wild engine," running as it may, and obliged to keep clear of all other trains, and thus exposed to much greater risk. If a collision occurs, a locomotive car, as we have seen them, is not as heavy and strongly built as the ordinary locomotives, and would, therefore, be much more easily broken and destroyed; and in no respect would it prove as safe a conveyance for a person, accustomed to running on a locomotive, as the locomotive itself. If Derby was guilty of negligence in riding on such a car, it is remarkable that it was never suggested by the counsel of the road, and that the supreme court should have held the defendants liable.

So in the case of The New World v. King, 16 How. [57 U. S.] 469, where one who had formerly been a waiter on the boat was allowed a free passage by the master, and he was injured by an explosion, the steamer was held chargeable for the injury. It was a libel in admiralty, where the question of contributory negligence was for the court, and neither of the courts before which the case was heard intimated that the defendant could succeed on that ground, which they certainly would have done, if the theory of the defence in the present suit is sustainable.

Certainly, King by voluntarily going in the steamer exposed himself to the dangers of the explosion from which he would have been exempt had he remained ashore; and why should he not have been equally chargeable with negligence by subjecting himself to the danger of an explosion, if the deceased is here to be held chargeable with negligence in exposing himself to the danger of collision by riding on the engine? The risk in both cases was altogether too remote, as the party had a right to expect ordinary care and caution would be observed on the part of the carrier. If a collision occurred, the party on the engine was exposed to greater risks than if he had remained at home, and such was also the exact position of King, if the boiler should explode while he was on board; but each party had a right to act on the presumption that noth-

ing of the kind would occur, and that if it did, the law would require an indemnity from the carrier for his neglect.

There is one case not upon the briefs which is directly in point, and which was decided by a very able tribunal, the supreme court of Maryland. Cumberland & P. R. Co. v. Maryland, 37 Md. 156. In that case, the deceased was a brakeman in the service of the company, and his place was in the middle of the train when in motion. On the day of the injury, he left his place on the train and rode for about half a mile on the tool box of the engine, near the boiler. The train stopped, and after standing still for about five minutes, the engine exploded and he was killed. Evidence was offered tending to show that the explosion was owing to the engine being defective and the master mechanic incompetent.

The court was asked to instruct the jury that if the deceased's place was on the middle of the train and he rode on the engine and was on it at the time the accident happened and that but for this conduct on his part the injury inflicted upon him and for which the suit was brought would not have been inflicted upon him, the plaintiff was not entitled to recover.

This was refused. The judge submitted to the jury the question whether at the time of the accident the deceased was using ordinary care and did not contribute to his own death by the want of it; and in its opinion the full court says: "What constituted negligence or ordinary care, or the want of it in the party, contributing to his death, * * * are questions according to the nature of the evidence in this case to be determined by the jury from all the facts and circumstances. It is their province from the controverted facts to make the reasonable deductions, and these questions must be referred to the jury. The fifth prayer proposed virtually to withdraw the question of negligence or want of ordinary care on the part of the deceased from the jury, and to have it determined by the court upon the proposed hypothesis of facts as a question of law, and it was on that account properly rejected. In our opinion the facts stated in the prayer do not authorize the court to pronounce as matter of law that they constitute such contributory negligence as would prevent a recovery by the appellee. The case is not of that character in its circumstances as to warrant the intervention of the court in withdrawing the question from the jury." That case is almost identical with the present on the question of contributory negligence, and it in all respects accords with our rulings at nisi prius.

In the case of Railroad Co. v. Stout, 17 Wall. [84 U. S.] 661, Hunt, J., declares the rule to be this: "That while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts."

The counsel for defendants rely on Robertson v. New York & E. R. Co., 22 Barb. 92, where the party was injured while on the locomotive; but the fact, that he was told before he got on the engine that it was contrary to defendant's rules, gave him full knowledge that he was unlawfully on the engine, and so was without redress.

In Hickey v. Boston & L. R. Co., 14 Allen, 432, the supreme court of Massachusetts ruled as a matter of law that a passenger standing on the platform of the railroad car could not recover for damages he sustained, as he was guilty of contributory negligence. Under all the circumstances of the present case, we think the better course was that sanctioned by the supreme court of Maryland and adopted here, to submit the question of negligence to the jury, since the party injured was a fireman accustomed to ride on locomotives, and who was on defendant's engine at the time by the sanction of the defendant, thereby distinguishing the present from the Massachusetts case.

It is said that five thousand dollars was excessive damages. In the opinion of the court, if either party has reason to complain of the amount of the verdict, it is not the defendant.

Motion overruled.

Case No. 17,566.

WHITEHOUSE v. TRAVELERS' INS. CO.

[7 Ins. Law J. 23.] [1]

Circuit Court, D. New Hampshire. Oct., 1877.

ACCIDENT INSURANCE — CONSTRUCTION OF POLICY —EXTERNAL SIGN OF INJURY—RIGHT TO EXAMINE DECEASED.

[1. An intention on the part of the company to deceive cannot be presumed from the fact that some portions of the policy are printed in smaller type than other portions, the former being referred to in the latter.]

[2. Nor is the fact that the company made an autopsy on deceased's body any evidence of fraud, when the right to do so is given by the policy.]

[3. A nose bleed may be regarded as an "external and visible sign" of the injury, within the meaning of a provision that the insurance shall not extend to any injury of which there is no such sign.]

[Cited in Wehle v. United States Mut. Acc. Ass'n, 31 N. Y. S. 868.]

CLARK, District Judge (charging jury). The plaintiff in this case is Ephraim H. Whitehouse, administrator of the estate of Horace Gowan. He is the nominal party upon the record of the court, entitled to bring the action; but the person for whose benefit the sum sued for is to be recovered, if recovered at all, is Mrs. Gowan, the widow of Horace Gowan. He seeks to recover upon a policy of insurance against death resulting from accident, by which the sum of three thousand dollars was insured, in case of his death by accident, to be paid to his wife; the allega-

[1] [Reprinted by permission.]

tion being that death happened to him by accident, and that the company has not paid the same to his widow, or wife, as agreed. The suit is for the violation of that contract, for the benefit of the wife. The suit was originally brought in the state court, as was suggested to you, and has been removed by due process of law from the state court into this court. Comments were made, on the one side and the other, upon the transfer of the cause from the state court to this court, as if it might be a matter of prejudice to the defendant, that he had transferred the cause into this court. But it cannot be so, gentlemen. The right which the law gives him, or gives the defendants, to transfer the cause here, would be of little, or very much less, value, if upon the trial, it was to tell against them. But for certain reasons, in certain causes, the law of the United States provides that causes may be transferred from the state courts into the United States courts, and there tried. Complying with that law, this cause has been transferred here, and the consideration of that transfer may be laid entirely out of the case by you, and receive no consideration whatever. It is not a matter with which you have to do in finding your verdict, in any way. It was a right which the defendant had. It is to be presumed, or it is to be taken for granted, that he exercised that right properly and rightfully. The state court would not have transferred the cause here, and this court would not have received and would not try the cause, unless it had been properly brought there. Justice, gentlemen, is said to be blind; and this is true, and should be true in one regard: that she is blind to the parties, as they stand before her. She cannot be blind as to the cause and witnesses and testimony, because, if she were, she never would decide the cause rightly, unless by accident; but, as to the parties, she holds her scales even, or should, and she is blind. You are the organs, gentlemen, of justice. If she be blind as to the parties, you must, if you would do justice, also be blind as to the parties. You must not know this defendant as a corporation. Holding the scales evenly between the two, you must say what is the fact, upon the evidence. It is a high duty, gentlemen; it is a difficult duty. There is a reason to believe that jurors do not always act with these high motives, but the court has no doubt in this cause, that, disregarding all considerations and suggestions of that kind, you will turn your attention to the evidence on the points of the case, and decide by the evidence. The cause is not very wide in its scope. The facts are few. The evidence is somewhat voluminous, and the witnesses, numerous; but the evidence and witnesses are to be received and weighed by you as bearing mainly upon two or three important facts. There may be other facts which tend to decide these two or three important facts, which you will consider; but what I mean is, that the evidence all hinges on, or is chiefly applicable to, two or three important questions.

But, before I come to these questions, I want to make a suggestion or two to you, which are called out by the counsel on the one side and the other, and principally by some remarks of the counsel for the plaintiff, in regard to fraud in this case. It is a well-established maxim of law, gentlemen, that fraud never is to be presumed. That is, you are never to take it for granted that people have acted fraudulently; you are rather to take it that they have acted honestly, until the evidence shows you that they have acted otherwise. Now it is contended by the plaintiff's counsel that this company have been fraudulent in this transaction, in the issuing of this policy; and he adduced as proof the fact that certain portions of the policy are printed in smaller letters than other portions, contending that the intention was to deceive; because, if there were no intention to deceive, there would not be any fraud. It is alleged that fraud consists in the use of smaller type in certain parts of the policy. But if you will examine this policy, you will find that the conditions relied upon are referred to in the large type, and the attention is called to them in such a way as entirely to negative the idea that the company meant to conceal them. I say this much to you on this point because it seemed to me, I frankly say, that the evidence did not seem to warrant the remarks of counsel. I have not the least doubt, gentlemen, that the counsel was well-intentioned in the matter. He put forward the best side of his case, but I felt it due to you, due to justice, that I should make the above statement.

I shall have occasion to say one thing, if I do not forget it, in regard to the autopsy. Perhaps I might as well say it here, lest I should forget it, as at any other time. Complaint was made by counsel for the plaintiff that this defendant exercised the privilege, if you call it so, or that he undertook to make an autopsy when this man was lying dead, before he was buried. Now if you will examine this policy, gentlemen, you will find here a provision made for that very purpose,—a provision in this policy that in case of death, or any other time, when accident occurs, the company shall have the right to examine, and you will see the necessity of it, gentlemen. I comment now upon this, as it was adduced as evidence of fraud. You will see the necessity of such a condition or right as this in insurance policies, where a man might die and be buried, and it be alleged afterward that the death was caused by accident, whereas, if an autopsy had been made, it might have been shown otherwise; or, where death did not occur, it might be shown what the disability was, or the extent of the accident was, to know how much should be paid. So, having secured that right, gen-

tlemen, to make that examination, it was only exercising a right which they had by their contract.

But the plaintiff says further to you, gentlemen, that they called the agent of the company, and did not call the attending physician, to make such autopsy: but, gentlemen, it was no more the part of the defendant company to call the attending physician, than it was of Mrs. Gowan. If she wanted him there, it was very easy for her to call him in; and you will weigh, gentlemen—you will weigh the considerations as showing to you whether this defendant practiced any fraud in this regard, and give such weight as it deserves. If there was fraud, or improper acts, on the part of the defendant, of course you will give the plaintiff the benefit thereof, and it will be the duty of the court to instruct you so to do; while, on the other hand, the court feels bound to say that the plaintiff cannot set up fraud on the part of the defendant, unless he produces evidence of it. The contract provides, gentlemen,—I will read it, gentlemen,—"The said sum insured to be paid to Sarah F. Gowan, wife, or her legal representatives, within ninety days after sufficient proof that the insured, at any time within the continuance of this policy, shall have sustained bodily injuries, effected through external, violent, and accidental means, within the intent and meaning of this contract, and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof; or if the insured shall sustain bodily injury by means aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business, then, on satisfactory proof of such injuries, he shall be indemnified against loss of time thereby, in a sum not exceeding twenty-five dollars per week for such period of continuous total disability as shall immediately follow the accident and injuries aforesaid, not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident;" and all this, gentlemen, in large print. It goes on: "Provided always, that this insurance shall not extend to any injury of which there shall be no external and visible sign, nor to any case except where the injury aforesaid is the proximate and sole cause of the disability or death." That is in small type, but in large type, "Provided that the accident shall be the sole cause of death."

Now in order to enable the plaintiff to recover under this policy, gentlemen, it is incumbent on the plaintiff to prove to you that this injury or accident was the cause of death, and the sole cause. It is also incumbent on him to prove that the injury or accident left some external, visible mark of its happening, or of injury to the person, and, if he fails to prove either of these points, he must fail in his case; because, gentlemen, a policy of insurance is a contract to be governed by the rules applicable to other contracts generally, and parties are not to be held liable for that which they do not undertake, or for that to which they do not agree, and in this case it was agreed between the parties that this plaintiff should not recover in case of death, unless an accident is solely and independently the cause of death. That is the undertaking. It is also agreed between the parties that this plaintiff should not recover unless the accident left signs of the injury, external and visible, and neither you nor the court, gentlemen, have any right to travel out of this contract, and beyond it, and say that the party shall pay the sum, unless liable under this contract; and I might say, gentlemen, that it would be little less than judicial robbery, if, going outside of the contract, from any motive not arising within, and proper for the court, the defendant should be compelled to pay; but, gentlemen, on the other hand, if this accident has happened, and has come within the terms of the contract, it is the right of the plaintiff to recover this amount, and it would be your duty so to award it. The plaintiff is entitled to the full benefit of this contract, interpreted fairly and properly, equally with the defendant.

Now, then, with these views, gentlemen, you will approach the evidence and see what it tends to prove. Of some things there is no dispute,—they may be taken for granted. I think it is not disputed that this is the contract made by the parties; it is not disputed that proper notice was given to the defendant upon the happening of this accident; it is not disputed—no question has been made—but what this plaintiff here is the administrator of Gowan's estate, though no proof of it has been given. It seemed to be taken for granted. Unless he were the administrator, as claimed, he could not recover; but I take it for granted he is. There is no dispute that on the twenty-ninth of May, 1875, Horace Gowan was thrown from his wagon, thrown on the ground, and the seat of the wagon thrown on him; that he recovered himself, got up from the ground, took up the seat, and went to the stable; that at that time, when inquired of if he was hurt, he said, "No" or "Not much," "He guessed not," and that afterward he complained of injury in the head and back, soreness in his side; that on Monday he did not labor much, if any, nor Tuesday, nor Wednesday. I think so much has been shown by the evidence, and will be admitted, so that there can be no question in regard to these facts. On Thursday, or some time after,—I don't know as it appeared exactly when; I understood, however, one witness to say on Thursday, he took his bed; by another witness about a week after the accident,—but on some day, took his bed, and

the sickness ran on until the twenty-third day of June, when he died. Now you will see, gentlemen, it becomes material for you in the first instance, to inquire whether the injury received in this case was such that it left visible, external marks. I think it is admitted by the plaintiff's counsel that no witness has testified that it did; but counsel say that it may be inferred from the circumstances, that you may suppose that it was so. Now, if the evidence, gentlemen, satisfies you, if the evidence satisfies you there were external marks, you may so find, but you cannot suppose it, if the evidence does not tend to show it. Things are not to be taken as suppositions, which are required for the fulfillment of a contract; they are bound to prove it. But, gentlemen, visible signs of an injury would not be confined to scratches or bruises, or broken limbs; there might be other indications, as, for instance, if you were satisfied that the nosebleed that he had at some times was the direct result of an injury, then that would be visible, would be a sign; but the complaint of pain is no visible sign, because that is something you cannot see; the complaint of soreness is no sign, because that you cannot see. The policy provides it shall be visible,—something that can be seen; so if you were satisfied, gentlemen, even after two or three weeks, that the bloody discharges from the bowels was the direct result of the injury, that would be received as a visible sign of injury; but if it did not result directly from that, it would not be; and I call your attention to this point of the case first, gentlemen, because, if the evidence satisfy you that, notwithstanding he fell and was sore and stiff, if it satisfy you there was no visible sign of injury, you would be bound to find for the defendant, and in this connection you may weigh the complaint made by him to Dr. Stackpole. Dr. Stackpole was his attending physician, and you may inquire if Dr. Stackpole had been told of this accident, whether he would not have examined so as to have seen; and, further, you may inquire whether there would not have been at the autopsy something to show, externally, that there was an injury received. But, gentlemen, if upon the evidence, you should be satisfied there was an external, visible injury, your next inquiry will be, what was the cause of the death? And here the court say to you, gentlemen, in order to entitle the plaintiff to recover, you must find that the accident,—the falling from the wagon and the bruise,—was the direct cause of the death; because, by the contract, the defendants undertook to pay this money only upon condition that the accident alone, independent of every other cause, occasioned the death. It may be said, gentlemen, that this is strange and severe, but it is precisely the thing that this plaintiff, or the intestate, Mr. Gowan, agreed to. He agreed, that he was only to have this sum paid to his wife in case of his death, when the death resulted only from the accident. Now it is contended on the part of the plaintiff, gentlemen, that the death did result directly from the accident, and that is a question for you to determine. It is contended, on the other hand, that it did not result wholly from the accident, but that it resulted from some supervening or intervening cause, such as disease. Now this may be difficult for you to determine, but you must bring to it the best consideration you can upon the evidence that is before you.

The science of medicine, gentlemen, is an uncertain science, but the medical men are the best evidence we can have upon certain points; because they are men supposed to be informed, and there are no other persons supposed to be so well informed. We will not say how well they may be informed, or whether they can always tell the actual condition of a patient, or cause or character of a disease, or whether they do not miss it a great many times; but is there anybody any better informed in subjects or matters incident to their profession? And in this case they are the only witnesses before you, and you must be governed by their testimony. They are the only witnesses put before you by which you can judge what was the nature of the disease, or what was the cause of death. I am not going to recapitulate minutely that testimony. I am not going to take up the testimony of one physician or another, and detail to you the substance, or the exact words of what each one said. You will remember it, gentlemen, and you will give due attention to it, and such weight as you think it deserves. But because I do not call your attention to it, you will not therefore disregard it. I am not much in the habit of calling the attention of the jury to the evidence, unless on important points, because you as jurymen sit here, and hear the testimony, as well as myself, and you are peculiarly the judges of the testimony, and the effect to be given to it. I am not to say, gentlemen, how much weight is to be given to the testimony of Dr. Stackpole, of Dr. Jewett, of Dr. Ham, or of any other one of the witnesses who have been put on the stand; that is your duty,—your privilege. You might say, "I believe this man;" I might say, "I do not." Your belief is to govern, not mine. But sometimes when there is doubt in what has been said, then reference may be had to the minutes of the court, or, if there has been a stenographer, to his minutes, to the minutes of the counsel. In this case, Mr. Gowan received an injury, in a few days took his bed; it appears, from the testimony of Dr. Stackpole, had feverish symptoms, some headache, and that he treated it in a certain way, but that Dr. Stackpole did not at any time suspect there was an injury which was the cause of the condition of the patient, until he was told. That after he had been sick for some two or three weeks—I think three weeks—the day before he died, Dr. Jewett was called in as

consulting physician, and he testified that the man was then in a dying condition, and I do not remember that the doctor said that he gave his opinion of what he thought was the matter with him. I do not remember that there was any discussion at that time, or anything said between Drs. Stackpole and Jewett that the man had received an injury. But the disease or sickness ran along, until as said before, on the twenty-third day of June he died. Then the counsel for the defendant went to the house, and requested from Mrs. Gowan a statement of the case, a history of it, and she gave it; then they made an examination or autopsy of the body. Now, the physicians tell you, gentlemen, what is the benefit of an autopsy or examination, and how much they can tell, or what they can tell, in certain cases thereby; and those who made it say to you, gentlemen, and those who saw it, that they were certain sure indications found that this man died of typhoid fever, and it does not appear that that examination showed any other cause of death. I think one of the witnesses said the parts—the upper parts—were healthy, but it does not appear that they discovered any injury, or any appearance of an injury, from the accident which happened, but that they did discover a certain condition of the glands and parts of the smaller and larger intestines, which certainly marks typhoid fever. Now, here comes in your duty, gentlemen, to judge between what is said on the one side between the happening of the accident, between the falling of the man from the carriage, between his complaints of pain in his head, and pain in his shoulder, and of the general feverish symptoms, and of this condition of the bowels after death, and then it is for you to say what was the probable cause of that death. If you find that the probable cause of the death upon the testimony was the accident, and that directly and independently of any other cause, then you will find for the plaintiff; but if you should find, gentlemen, that the accident was not the cause of death, or that the accident would not have produced death unless fever set in, or some other disease, then you must find for the defendant, because this will govern the case. The contract was that this accident, solely and independently of any other cause, should occasion the death to entitle to recover.

Some things have been said, gentlemen, in regard to some of the witnesses in this case, some of the physicians, that they had never seen a case like this, or had never seen an autopsy in a case of typhoid fever; that what information they had was from the books. We all know, gentlemen, that experience is a good teacher, though old President Lord, at Dartmouth, used to say she was sometimes rather hard; but a great deal of the information that a physician gets he must necessarily get from his books, and because he gets his information from books he is not therefore to be cast out and laid aside; but you are to weigh him as you would any other man, with the knowledge, experience, and information that he has. You would give to the man who had seen a great many cases more credit than you would to one who had not seen them. By way of illustration: I can remember very well where in a case of smallpox in a family, two parties died and were buried, and only until the third person was attacked, and another physician was called, was the disease ascertained, the symptoms are so varied and uncertain. So these physicians say that in the first two or three weeks the symptoms of some diseases do not manifest themselves, so they are able to say certainly what the disease is. That may be called the infirmity of human nature, the uncertainty of a professional man, who cannot see what does not show itself. He may judge or guess. Some symptoms are common to various diseases, but you will judge, on the whole, gentlemen, on the description given you by all the physicians, whether this was a case of accident occasioning death directly, or whether it was a case of accident where another disease supervened, and was in part or wholly the cause of death. As I said before, if you should find that typhoid fever supervening was wholly or in part the cause of death, you must find for the defendant; but if, on the other hand, gentlemen, you are satisfied that death resulted directly from this accident, you should find for the plaintiff, because it was undertaken by the defendant that in the case of death resulting entirely from accident, no other cause supervening or aiding, they would pay three thousand dollars; and, if it did so happen, this plaintiff in interest is entitled to have that sum at your hands.

If you should come to the conclusion, gentlemen, that the plaintiff is entitled to recover, he would be entitled to recover the sum of three thousand dollars and interest from the day that the provision in the policy provides, within ninety days after proof thereof. Ninety days from the second of September would be the time interest should be cast, some time in December the interest would begin to run. If then, gentlemen, on the whole case you should find that the plaintiff, upon the points I have suggested to you, is entitled to recover, you will take the sum of three thousand dollars, and cast the interest upon it from ninety days after the second of September, 1875. It would be some time in December.

That, I think, gentlemen, is all that is necessary that I should say to you in regard to this case.

One suggestion, perhaps, I ought to make to you, gentlemen, and that is, you cannot adopt a theory without proof. You would not be justified to find that this party died by accident or died by fever, unless you are satisfied, upon the proof, that there was fever; neither would you be justified in finding that he died from a shock to the spine or brain, unless there was proof.

The jury found a verdict for the defendant company.

WHITELY (HUSSEY v.). See Case No. 6,950.

Case No. 17,567.

WHITELY et al. v. RIDDICK.

[Chase, 540.] [1]

Circuit Court, D. North Carolina. June Term, 1869.

EXECUTION SALE — APPLICATION OF PROCEEDS — —PRIOR JUDGMENT OF STATE COURT.

1. Land having been sold under execution upon a judgment of the United States circuit court, that court will not, upon motion to that effect, appropriate the proceeds to an older judgment of a state court. The holder of the older judgment should issue his execution and sell the land.

2. Semble: a purchase of land sold under an execution from the United States circuit court, does not take the land free from the lien of an older judgment of a state court.

Parker recovered a judgment for three hundred and eight dollars and thirty-four cents with interest, against Riddick & Stallings in the superior court of the state of North Carolina, for the county of Perquimans, on April 15, 1867. On this judgment a fi. fa. was issued on August 27, 1867, which was levied on September 10, 1867, "on the farm whereon Riddick lives." By this levy, under the laws of North Carolina, Parker acquired a lien on the lands so levied on. No sale having been made on this execution, on October 24, 1867, a venditioni exponas was issued returnable to the spring term of 1868, of the superior court of Perquimans, but just about that time, the commanding officer of "Military District Number Two," as North Carolina was then known to the federal military authorities, issued an order known as "Military Order No. 10," prohibiting sales on executions out of the courts of North Carolina, and staying proceedings for the collection of debts to the extent in said order set forth. The sheriff of Perquimans accordingly returned his writ as stayed by military order No. 10. After this judgment, levy, and issue of the venditioni exponas, Whitely, Stone & Co. recovered judgment at the November term of the court against Riddick for the sum of nine hundred and sixteen dollars and twenty-nine cents, interest and costs. On this judgment a fi. fa. was issued and levied January 13, 1868, on the same tract covered by Parker's levy of September 10, 1867. Under the levy the land was sold, and bought by the plaintiffs. On the return of the writ to this court with the proceeds of sale, Parker appeared and moved the court to order the money in the hands of the marshal realized under Whitely, Stone & Co.'s execution, to be paid over to him, because, as he contended, he had the prior lien, which he was prevented from asserting by the military authority of the United States, while the plaintiffs were allowed to go on and sell the property under their junior lien.

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

W. H. N. Smith, for Parker.

In Harbin v. Carson, 4 Dev. & B. 388, it is held that after a sale under a fieri facias, the land may be sold under a venditioni exponas issuing upon an attachment, the lien whereof overreached that of the fi. fa., and the purchasers at the last sale acquired title. This, however, is overruled, and the contrary declared in McMillan v. Parsons, 7 Jones [N. C.] 163. The contest must be as to the disposition of the money, as the first sale transfers the title.

In case of several executions from different courts, and a sale under a junior execution, the title passes, and the plaintiff in the senior execution must look to the proceeds of sale, by a rule for their application to his debt. Jones v. Judkins, 4 Dev. & B. 454.

Rogers & Bachelor, for Whitely, Stone & Co.

CHASE, Circuit Justice. This is a motion to appropriate money made by the sale of land under an execution issued from this court, to the satisfaction of a judgment rendered in a state court, and having a prior lien upon the land.

Whitely, Stone & Co. recovered a judgment at the November term, 1867, of the circuit court for the district of North Carolina, for nine hundred and sixteen dollars and twenty-nine cents, with three hundred and thirty-six dollars and nine cents damages, and forty-three dollars and ninety-nine cents costs, with interest from November 25, 1867.

Upon this judgment a fi. fa. was issued, returnable June 7, 1868; which was returned with the following endorsements, made by the deputy of the marshal: "Levied on one hundred acres of land, more or less, adjoining the land of F. H. Russell and Solomon Eason, and lying on Perquimans river swamp, it being the home tract of said Riddick, one hundred and fifty acres woodland, more or less, lying on the Dismal swamp, January 13, 1868."

The first-mentioned tract of land, in the said levy, was bid off by J. W. Albertson, attorney for Whitely, Stone & Co. for four hundred and forty-five dollars; the second by the same for fifty dollars, making in the whole four hundred and ninety-five dollars. The levy also embraced some chattel property returned not sold for want of bidders.

Prior to this proceeding, at the spring term of the superior court of the state of North Carolina, for Perquimans county, James H. Parker had recovered a judgment against Willis D. Riddick and James W. Stallings for three hundred and eight dollars and thirty-four cents, with interest from January 29, 1861, and four per cent. additional interest on the principal, from August 10, 1861, to April 15, 1867 (the date of the judgment), and costs.

On this judgment a fi. fa. was issued on August 27, and was levied September 10,

1867, "on the farm whereon W. D. Riddick lives, adjoining lands of E. N. Riddick, and also the store of W. D. Riddick."

No sale was made under this execution, and on October 24, 1867, a venditioni exponas was issued, returnable at the spring term of 1868 of the superior court, and was returned "no sale on account of military order No. 10."

It is agreed that the land levied upon under this judgment was the home tract levied upon under the judgment of this court. Upon this statement, it is clear that the Parker judgment is the older and better lien upon the land.

The only question is whether in this court, upon motion, an order can be made appropriating the proceeds of sale under the junior judgment to the satisfaction of the elder lien.

It is not doubted that, if both judgments had been rendered in the same court, the order suggested might be made.

The court, having control of its own process, might make the necessary order distributing the money, and protecting the rights of all parties by the requisite entries. But we do not see how this can be done in a court of the United States on a motion for appropriation to a judgment of a state court.

It is suggested that the order for the appropriation asked for might be made conditionally upon the production of evidence of satisfaction of the judgment in the state court. But it is obvious that satisfaction in the state court must depend upon the action of that court. In the particular case before us, no difficulty might arise or harm ensue. But the principle, if adopted and acted upon, of determining upon motion in a national court upon rights acquired in a state court, could hardly fail of embarrassing results in practice.

It is enough for the present case that there seems to be no recognized rule of law which requires one court to give effect, in this way, to the judgments and decrees of another; and that no case is produced in support of the motion addressed to us.

It is argued only that the sale, on the circuit court judgment, will carry the title, and so defeat the lien of the state court judgment by taking from under it the land on which it operates.

The case of McMillan v. Parsons, 7 Jones [N. C.] 166, is cited in support of this view. The most that can be said of that case is, that the learned chief justice questioned a judgment of the supreme court of North Carolina, asserting the opposite doctrine that a purchaser under a junior took subject to the superior lien of an elder judgment. We understand that the doctrine, stated by the chief justice, that a title to land unaffected by the older lien can be made by sale under the junior judgment, is now the recognized law and practice of this state. But we do not understand that this doctrine has ever been applied to a sale under an execution from a court of the United States. We can perceive reason for its application to sales under judgments of the same court, and, perhaps, of different courts of the same state, when an elder judgment creditor lies by, and permits a sale under the junior judgment and distribution of the proceeds. But these reasons do not seem to us applicable to judgments of courts of different sovereignties.

If the land could not be sold under the Parker judgment, and a good title made to the purchaser, a court of equity would doubtless interpose; and, all parties being before it, would marshal the liens, and distribute the proceeds of the sale made, if uncontested, according to priorities; but it seems to us, that the remedy of the plaintiff in the motion is complete at law. He has a judgment and levy, and the elder lien; and has nothing to do but to issue his vendi., and sell the land.

The motion must be overruled.

Case No. 17,568.

WHITELY v. SWAYNE.

[4 Fish. Pat. Cas. 117.] [1]

Circuit Court, S. D. Ohio. Feb., 1865.[2]

PATENT FOR INVENTION — PRESUMPTION AS TO VALIDITY—REISSUED PATENT—OATH OF PATENTEE.

1. It would be straining the doctrine of presumptions in favor of the legality of the acts of a public officer to an unreasonable extent, to hold that a patent is legal and valid where the records and papers of the office show conclusively that essential statutory provisions had been disregarded.

[Cited in Poage v. McGowan, 15 Fed. 399.]

2. An oath that an original patent "is not fully valid and available" to the patentee, is not such an oath as is required by law, and it was an excess of authority on the part of the commissioner to grant a reissued patent upon such an oath.

3. Whether the oath of an assignee to the specification accompanying an application for a reissue, while the patentee is alive and able to verify, is a compliance with the statute, quære?

4. If by the elastic or expansive power of a reissue, machines are made infringements, not a single element of which was described in the original, it is an abuse of the right of reissue equivalent to a positive fraud.

This was a bill in equity [by William N. Whitely against William Swayne] filed to restrain the defendant from the infringement of letters patent [No. 10,967] for an "improvement in clover and grass-seed harvesters," granted to Thomas S. Steadman, May 23, 1854; assigned to complainant and reissued to him in two divisions, June 19, 1860 [Nos. 985 and 986].

S. S. Fisher, for complainant.

D. Wright, for defendant.

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

2 [Affirmed in 7 Wall. (74 U. S.) 685.]

LEAVITT, District Judge. This is a bill in equity, brought by William N. Whitely, for an alleged infringement of reissued patents 985 and 986, dated June 19, 1860, granted to Whitely as the assignee of T. S. Steadman. The patent to Steadman is dated May 23, 1854, and purports to be for "a new and useful improvement in clover and grass-seed harvesters." The infringement alleged is in vending a machine known as the "Kirby Harvester," patented to William A. Kirby and David M. Osborne, assignees of Byron Densmore, on February 10, 1852. The bill prays for an injunction restraining the defendant from the sale of the Kirby harvester, and for an account of profits arising from the infringement complained of. The allegations of the bill are general as to the infringement, and there is no statement or specification of the parts or elements of the machine sold by the defendant, which infringe the machine described in said reissued patents.

The amended answer of the defendant sets up three several grounds of defense to the bill, which are in substance: (1) That the said reissued patents under which the complainant claims, are void as having been granted without a compliance with the prerequisites of the patent laws, and also for fraud in their procurement. (2) That the improvements claimed by Steadman in his patent, and by the complainant as embraced in the reissues, are not new, but had been patented and known to others, and in use, prior to the date of Steadman's patent. (3) That the machines sold by defendant do not infringe any of the devices described and claimed by Steadman as his invention, or covered by the reissues to Whitely as his assignee.

The legality and validity of these reissues will first be considered. If they are successfully impeached on either of the grounds stated, the complainant's bill can not be sustained, and there will be no necessity for passing on the questions of novelty and infringement.

The intelligent consideration of the character, force, and effect of these reissues, requires some reference to the history of Steadman's invention, as presented by the proofs and exhibits before the court. These show that on June 13, 1852, Steadman filed a caveat in the patent office in which he claims to have discovered some new and useful improvement in a machine for "harvesting clover and grass seed." The main element of the invention claimed was a device or mechanical arrangement for raising and lowering the main frame or box, with the cutting apparatus, while the machine was in operation, without interfering with the meshes of the system of cog-wheels used as a part of the machinery.

On February 5, 1853, Steadman filed a formal application for a patent for the improvements claimed as his invention. In this application the name of the machine is the same as in the caveat. On February 2, 1854, the commissioner of patents returned the papers to Steadman, with a letter informing him that his application had been rejected. The reasons for the rejection do not appear. On February 23, Steadman by letter withdrew his application, and at the same time transmitted a new application, which was filed in the patent office, March 4, 1854. The name of his invention was the same in this application as in that previously filed, namely: "New and useful improvements for harvesting clover and grass seed." The specification accompanying the second application differs in some important particulars from the first. He states his claims under the new application as follows: (1) The arrangement of the cutters in combination with the comb, operating in the manner and for the purpose described; (2) the rake S, in combination with the cutters, as described; (3) certain levers or pulleys arranged for raising or lowering both sides of the machine when in motion, and by which the ground wheels are retained in their place while the box is passing over stones and other obstructions.

On April 14, 1854, the commissioner of patents returned these specifications for correction. By a letter of that date, Steadman is informed that his third claim is rejected, for the reason that he had been anticipated in all the devices claimed in it as new, and that they had been patented to other inventors. The third claim was therefore erased; and on May 23, 1854, a patent issued embracing only the first and second claims, as before set forth.

These are all the facts which it is important here to notice in connection with the emanation of Steadman's patent. And here it will be proper to notice the evidence before the court, as to the operation and practical value of the machine thus patented to Steadman. The witness on this subject is Frederick Hatch, who lived in the same town, in the state of New York, in which Steadman resided, and who was familiar with the progress of his invention, and who states fully the various modifications and improvements made by Steadman in his machine prior to the date of his patent. He lived in the immediate vicinity of Steadman's shop, and was frequently in it, witnessing his efforts to perfect his machine. The first machine made by Steadman, the witness thinks, was in the year 1850. He made two others, the last in 1853 or 1854. The witness does not say positively that the last one was made after the patent issued, but the inference is strong, from all the facts stated, that it was so made. He states that he was an eye-witness to the practical working of the machine last made. It was used in his father's field in gathering clover seed, but was a failure for that purpose. It took off only about half the heads of clover, much of which flew over the box of the machine. The witness also states that the machine was not so constructed as to run on the ground, and was designed simply to take off the heads of clover, and that he had no knowledge that it was used for any other purpose. He states also, that the three

machines made by Steadman were sent to different places, and he does not know what became of them. There is no evidence before the court that they were used, or could be used, as practical implements for harvesting clover and grass seed; nor is it claimed by the complainant that they were available for that purpose.

The fact next to be noticed in the history of this patent is the application to the patent office by the complainant, as the assignee of Steadman, for a reissue based on that patent. His petition for this purpose was filed April 2, 1860, nearly six years after the date of Steadman's patent. He asks to be allowed to surrender that patent, and that three new letters patent may issue to him for separate parts of the invention.

He recites in the petition, that letters patent were granted to Steadman, May 23, 1854, "for improvements in harvesting machines," and that they were assigned to him December 27, 1859. This petition was accompanied by a specification dated March 27, 1860, signed by complainant in the presence of two witnesses, and sworn to before a justice of the peace in the state of Ohio. There are some peculiarities connected with this application and specification, and the action of the patent office in relation to them, which deserve special notice as bearing upon the question of the legality of the reissues to the complainant, and the allegation of unfairness or fraud in obtaining them. Copies of these papers are among the exhibits in the case, duly authenticated by the certificate of the commissioner and the seal of the patent office. In connection with these papers, the deposition of Homer Peck, then an examiner in the office, who passed upon the application of the complainant, is also before the court. From these it appears the examiner was so fully satisfied that the description of the improvements alleged to have been the invention of Steadman, as contained in the complainant's specification first filed, involved such a departure from the original invention and claim, that he ordered the whole to be stricken out, and a specification entirely new to be filed. A copy of this specification, as canceled by the examiner, is among these exhibits. I do not propose, nor is it necessary for the purpose of the inquiry now before the court, to recite this specification and claim. It is of great length, and details with great minuteness, the invention for which the complainant sought for a reissue. One fact, however, may be noted as very significant, that in this specification the complainant persisted in calling Steadman's invention an improvement in "harvesting machines." The witness, Peck, states very fully in his deposition the reasons for the rejection of the complainant's specification. He objected to the title of "harvesting machines," by which Steadman's improvement was designated by the complainant, and required the name given by Steadman, namely, "an improvement in clover and grass-seed harvesters," to be used. He gives as the reason for this, "that the machine was so constructed as to be incapable of the functions of harvesting grass or grain as a reaping or mowing machine." The witness states very minutely various other terms and forms of expression used by the complainant in his first specification, as wholly inadmissible, and not within the scope or meaning of the improvements as claimed and patented to Steadman. It may be noticed here, that the witness, Peck, states distinctly, in answer to a question put to him, that the machine described by Steadman could not be successfully used as a reaper or mower, and he gives very clear reasons as the basis of this opinion.

As before stated, so decisively objectionable were the specification and claim of the complainant as embracing an entirely different invention from that patented to Steadman, that the whole was stricken out and canceled, except the name of the complainant subscribed to the specification, and the names of the attesting witnesses. And on June 4, 1860, a new specification was filed by the complainant as a substitute for the original, which was not sworn to by the complainant, or attested by witnesses. Upon this new specification and the claims appended to it, the reissued patent 985 was finally granted by the commissioner. I do not propose here to notice the description of the improvement, or the specific claims on which this patent issued. Nor is it necessary to notice separately the facts connected with reissue 986 as a part of the history of the patents under which the complainant claims. They are essentially the same as those referred to in connection with reissue 985. And all the legal grounds of objection apply equally to both.

The points of inquiry on the facts before the court, as already stated, are: (1) Whether the statute on the subject of reissued patents in all its material requirements has been complied with. (2) Whether these reissues were unfairly or fraudulently obtained.

The 13th section of the patent act of 1836 [5 Stat. 122], provides: "That whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative or invalid by reason of a defective or insufficient description or specification, * * * if the error has or shall have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, * * * to cause a new patent to be issued to the said inventor, for the same invention, for the residue of the period, then unexpired, for which the original patent was granted, in accordance with the patentee's corrected description and specification." A subsequent part of the section declares that in case of the death of the patentee, or an assignment of the original pat-

ent, the right to surrender and to a reissue shall vest in the executor, administrator, or assignee.

The points of inquiry before the court, as already stated, are: (1) Whether the essential requirements of the statute as to the reissues have been complied with. (2) Whether the inference of unfairness or fraud in obtaining the reissues, is sustained by the facts.

As to the first of these inquiries, it is insisted by the counsel for the complainant, that the decision of the commissioner of patents in granting the reissues is conclusive, and that the court can not look into any thing that transpired antecedently to the grant, to impeach the validity of the reissued patent. This is undoubtedly the settled law in this country, so far at least as the identity of the original invention, and the invention as described and claimed in the application for the reissue, unless fraud in the transaction is alleged. The commissioner is supposed to have all the qualifications necessary to an intelligent decision of that question, and there are strong reasons why his action should be regarded as final. Such, I understand to be the doctrine of the supreme court of the United States, as announced in numerous reported cases. [Stimpson v. Westchester R. Co.] 4 How. [45 U. S.] 404; [O'Reilly v. Morse] 15 How. [56 U. S.] 62; [Battin v. Taggert] 17 How. [58 U. S.] 84; Law's Dig. 617. But I am not aware that the supreme court have decided in any case that it is not competent to inquire whether the commissioner has exceeded his authority in granting a patent without a compliance with the requirements of the statute. He has clearly no power to dispense with what the statute declares to be necessary prerequisites to the grant. And if it appears from the papers and records of the office in evidence, that the statutory requirements have not been complied with, it is within the power of a court, and its plain duty, to hold the patent to be void. Such was the doctrine announced by Judge Hall in the case of Ransom v. Mayor, etc., of New York [Case No. 11,573]. The learned judge says: "Things specified in this section (6th section of the act of 1836) are prerequisites to the granting of a patent, and unless these prerequisites are complied with, a party sued for an infringement of the patent may show that they have not been complied with, and in that mode defeat the action of the supposed inventor." The soundness of this doctrine can not be successfully controverted. It would be straining the doctrine of presumptions in favor of the legality of the acts of a public officer to an unreasonable extent, to hold that a patent is legal and valid where the records and papers of the office show conclusively that essential statutory provisions had been disregarded.

Now, it is clear there were at least two of the important requisites of section 13 of the act of 1836, before quoted, in relation to reissues, which were not complied with by the complainant in obtaining his reissues. (1) He does not aver in his bill, or make oath in his application, nor does it otherwise appear, that Steadman's invention as patented, was "inoperative or invalid," in the sense of those terms as used in the statute. The allegation in the bill is merely "that the description and specification of the said patented invention being defective and insufficient * * * said patent was by your orator returned," etc. Nor did the complainant in his application for a reissue make oath that the patent to Steadman was "inoperative or invalid" for any reason whatever. He swears "that he verily believes that by reason of an insufficient or defective specification, the aforesaid letters patent granted to T. S. Steadman, is not fully valid and available to him." The statute requires as a condition on which a reissue shall be granted, that the original patent shall have been "inoperative or invalid by reason of a defective or insufficient description or specification, if the error has or shall have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention." The complainant did not make the oath required by the statute; nor was there any evidence before the commissioner of patents proving that the Steadman patent was "inoperative or invalid," for the reason stated in section 13, or for any other reason. And the reason why this oath was not made, and could not be made, is most obvious from the evidence before the court. The patent to Steadman was not "inoperative or invalid" by reason of a defective or insufficient specification. The machine described by him, with the improvements claimed as his invention, was just as efficient for the purpose for which it was designed, viz: the "harvesting of clover and grass seed," as from the description of his mechanical devices it was capable of being. That it failed in its practical operation for that purpose, was not owing to any "defective or insufficient description or specification," but to inherent defects or infirmities in the structure, which prevented it from being practically useful for the purpose for which it was invented. And that it was not owing to any defect in his description or specification is proved by the fact that Steadman, after the machine failed on trial, never made an effort to perfect it by an amended specification. It is moreover apparent from the fact that the machine as described in the complainant, Whitely's, specification, upon his application for a reissue, was no more available as a harvester of clover and grass seed than when constructed according to Steadman's specification. There is no pretense that the complainant, after the reissues to him, ever constructed a machine according to his specification, or authorized any other person to make, use, or vend the machine under his

patent. In fact, the presumptions, as will be noticed hereafter, are strong that he never intended to use the patented machine.

It is clear, therefore, that these reissues, for the reason stated, were not granted in accordance with the statute. The Steadman patent was not inoperative or invalid, in the sense of the statute; and the oath of the complainant that it was not "fully valid and available to him," is not the equivalent for the oath required by law. The statute embraces only the right to a reissue where from an unintentional error in the description of the invention, the patent is wholly "inoperative or invalid." It is not enough that the applicant for the reissue should swear, or prove, that the patent is not fully valid and available to him. This does not meet the clear and explicit requisition of the statute; and it was an excess of authority on the part of the commissioner to grant a patent upon such an oath.

There is, however, another fatal objection to these reissues based on the fact proved by the exhibits in the case, that no oath appears to have been made to the specification on which the reissues were granted. Neither Steadman, the patentee, nor the complainant, as assignee, has made such oath. The facts in relation to the application for the reissue have already been referred to. They appear fully from the deposition of Peck, the patent office examiner, and the fac simile copies of the papers in the patent office. From these the proof is clear that the original specification was prepared by the complainant and sworn to in Ohio, before a justice of the peace of that state. It was forwarded to the patent office, and upon examination was found to be, substantially, an application for a patent for a grain harvester and mower, instead of an implement for gathering clover and grass seed as before noticed. The description of the alleged improvements was so palpably variant from the invention described by and patented to Steadman, that the examiner rejected it and ordered the entire paper to be canceled, and every part of it was stricken out except the formal beginning and the conclusion. A new specification was then prepared as the basis of the reissues applied for, and filed as a substitute for the original. And the description of the improvement, as contained in the substitute, was, in many essential particulars, different from the original. But the substituted specification was not sworn to, either by the patentee or the assignee. I shall not here examine or decide whether, upon an application by an assignee for a reissue, the patentee being alive and no reason being shown why he did not verify the specification by his oath, the oath of the assignee is a compliance with the statute. It is not controverted that the oath either of the assignee or patentee is required by the statute and by the rules of the patent office. And it results clearly, that the disregard of this statutory requirement invalidates these reissues. There are other exceptions to the reissues, on the ground that the prerequisites of the statute have not been complied with, which I do not think it necessary to notice or discuss.

The important question whether these reissues were fraudulently obtained, and therefore void, is yet to be considered. If there is any doubt as to the correctness of the conclusion just announced on the question discussed, it would seem there could be none as to the fraudulent purpose of the complainant in procuring the assignment from Steadman, and in his application for reissues based on his patent. I do not propose the discussion of all the points in the case, connected with the question of fraud. There are some general aspects of the subject that seem entirely conclusive. There can be no doubt that the complainant procured the assignment from Steadman with full knowledge that the machine for improvements, on which the patent issued, was a machine for harvesting clover and grass seed, as the name in the patent indicated, and for nothing else. It may also be presumed that he was aware that for that purpose it was practically unavailable. The testimony on this point has been referred to in a previous part of this opinion, and need not be repeated here. The evidence is clear, that upon actual trial, Steadman's machine failed to answer the expectations of the patentee. No more than three of the machines were ever made by Steadman; and the proof is, that the last trial of the machine took place in 1853 or 1854, when it was wholly abandoned as worthless.

Until the year 1860, it seems to have been, if not among the lost arts, at least among the lost things of earth. The complainant, by means not proved in the case, obtained knowledge of the existence of Steadman's patent, and in 1860, obtained an assignment. What consideration he paid, if any, does not appear. It may be presumed it was merely nominal. But the complainant was doubtless aware that although Steadman's invention was worthless for the only purpose for which it was intended, the patent was nevertheless valid, and could be assigned in law. There is no reason to suppose that the complainant, in procuring the assignment, intended to avail himself of the machine as a clover-seed and grass harvester. This is apparent from the fact that he has not constructed, or authorized others to construct, the machine since the assignment. The irresistible inference, therefore, must be—and this inference is sustained by his subsequent conduct—that his intention was to surrender the patent, and by some artful change in the description of the machine, some additions to the devices described and claimed by Steadman, to obtain reissues enlarging the scope and operation of his invention, and thus to metamorphose the machine into a grain harvester; or, if that failed, so to

change the specification as to cover certain elements and combinations then used, or to be used, in grain harvesters and mowers, or other machines; and thus to lay those constructing, vending, or using such machines, under contribution to him as infringers of his reissued patents. If such was the purpose of the complainant, his conduct was tainted with fraud from the beginning. And in confirmation of this, I quote the following from the opinion of the supreme court in the case of Brooks v. Fisk, 15 How. [56 U. S.] 220: "It is deemed proper to remark that the fact of procuring a patent for a new and useful machine in 1845, under the assumption of a reissue, which was not useful as patented in 1828 for want of feed and pressure rollers, now used as alleged in defense, would present a question of fraud committed on the public by the patentee, by giving his reissued patent of 1845 date as an original discovery made in 1828, thereby overreaching similar inventions made between 1828 and 1845."

Now, it is clear that the facts do show that it was at first the design of the complainant, by means of reissued patents to be obtained under Steadman's patent for improvements in a clover and grass-seed harvester, to acquire an exclusive right for an operative and practical grain harvester and mower, which should date back to the emanation of Steadman's patent of 1854; and thus make all liable as infringers who, after that time, had used any of the parts or elements of the combinations covered by his reissues. It clearly appears that in the complainant's original specification accompanying his application for reissues, such was his design. In that he designates Steadman's invention as a "harvesting machine," and he describes devices, and uses terms and forms of expression only applicable to such a machine. As already stated, this specification was rejected by the examiner of patents, and for reasons contained in his letter of April 19, 1860, in which he informs the complainant that "the description enlarges the scope of the invention so as to embrace other distinct improvements invented and subsequently patented by others." This was the exact case put by the supreme court in the case of Brooks v. Fisk, before referred to, as constituting a fraudulent reissue.

It can not be denied that this was a very bold attempt, through a reissue, to practice a fraud on the patent office and the public. And as showing the animus of the complainant, it throws a cloud over his conduct as connected with this transaction. Though foiled in his purpose of metamorphosing the Steadman invention into a reaper and mowing machine, and getting reissued patents covering devices and combinations that never entered into Steadman's brain, and which he did not therefore claim, and some of which had been previously patented to other persons, he made another attempt by other means, to accomplish his purpose. His first application being rejected as wholly inadmissible, he filed another with the hope and intention, by an artful description of Steadman's patented invention, in which his claims were to be ingeniously modified, enlarged, and misstated, to convince the patent office that his claim to a reissue was for the "same invention," to obtain patents substantially embracing some of the important elements and devices of a grain harvester, then well known and extensively used. The object was palpable, namely: to subject those making, selling, or using such harvesters, or other machines with similar devices and combinations, to liability as infringers of his reissued patents. This is what Judge Grier, in delivering the opinion of the supreme court in the case of Burr v. Duryee, 1 Wall. [68 U. S.] 580, very aptly says is entitled to rank "inter ingenuas artes." Strangely enough he succeeded in procuring from the patent office no less than three reissued patents for alleged separate parts of Steadman's simple claims to improvements in a machine for gathering clover and grass seed by cutting, or, more properly, pulling off the seed heads and depositing them in a box forming a part of the machine.

It is not proposed to analyze critically the claims covered by Steadman's patent, as contrasted with those contained in the complainant's reissues. It will be enough to state them to convince any one that they are not identical and do not describe the same invention. It has been before noticed, that the two claims of Steadman's patent were: "First: The arrangement of the cutters in combination with the comb, operating in the manner and for the purpose described. Second: The rake S in combination with the cutters described." The third claim, which related to the devices for raising and lowering the machine when in motion, was rejected at the patent office as wanting novelty, and being covered by other patents. It is plain from this—and such is the evidence—that these claims pertained to a clover and grass-seed harvester, and could not be used for any other purpose. But these simple claims are swelled into large dimensions under the ingenious manipulations of the complainant. In the reissue 985 he says: "What is claimed as the invention of the said Thomas S. Steadman, and is desired to be secured by letters patent, is the main frame or box A, which carries the pinion which drives the cutters, in combination with the arm or supplementary frame J, provided with the axle t, and the main wheel and gearing as described for the purposes specified. I also claim the arm or supplementary frame in combination with the master wheel and gearing when said arm or supplementary frame is so connected with the main frame as to vibrate from and around the pinion shaft, substantially as shown and described for the purpose set forth."

And in his claim for reissue 986, the complainant says: "What is claimed as the invention of the said Thomas S. Steadman, and is desired to be secured by letters patent is, in combination with the main frame or box A, an arm or supplementary frame F, on which is formed or secured the master-wheel axle, the employment of a retaining arc H, or its equivalent, the whole constructed or arranged in such a manner that the main frame or box, and arm or supplementary frame with its master-wheel axle, will be held in parallel planes, relatively to each other while they are moving up and down, substantially as and for the purposes herein set forth." There was a third reissue for another part of Steadman's invention not in controversy, and which need not be set forth.

Now, the proof is clear, that the improvements in the clover and grass-seed machine, as patented to Steadman, and the entire machine with these improvements, was wholly incapable of performing the functions of a grain harvester or mower. The testimony of the witness Peck, and other witnesses, is explicit on this point. Yet the complainant in his specifications and claims, connected with his reissues, has described and claimed as the invention of Steadman, devices and combinations never conceived of by him. And this obviously for the fraudulent purpose of including devices and combinations used in perhaps all the grain harvesters and mowers in the country. I do not think it important minutely to compare the claims and devices of Steadman, as patented to him, and those described and claimed by the complainant as the basis of his reissues. That there is no substantial identity between them sufficiently appears from reading the two. It is moreover apparent from the fact that Steadman, while the owner of his patented invention, never claimed or pretended that it was infringed by any grain harvester or mower then known. From the date of his patent in 1854 until the reissue to the complainant in 1860, no such claim or pretense was set up by Steadman. Yet, the complainant now, under the sweeping reach of his claims, and the allegation that they include Steadman's invention, and nothing more, has sued a vender of the Kirby grain harvester, as an infringement of his reissue. It seems clear to the court that this is a fraudulent abuse and perversion of the statute regulating and allowing reissues.

It is gratifying to know that the supreme court of the United States have evinced, in their late decisions, a laudable determination to arrest the abuses and frauds which are of such frequent occurrence under the statute allowing reissued patents. In the case of Burr v. Duryee, 1 Wall. [68 U. S.] 577, Judge Grier, in giving the opinion of the court, says:

"The surrender of valid patents, and the granting of reissued patents thereon, with expanded or equivocal claims, where the original was clearly neither 'inoperative or invalid,' and whose specification is neither 'defective or insufficient,' is a great abuse of the privilege granted by the statute, and productive of great injury to the public. This privilege was not given to the patentee or his assignee, in order that the patent may be rendered more elastic or expansive, and therefore more 'available' for the suppression of all other inventions."

These remarks seem to apply with great force to the present case. No one can claim that under the original patent to Steadman there is a single element described by him, that is infringed by the Kirby grain harvester, and if by the "elastic or expansive" power of his reissues, he has succeeded in bringing that machine, and other similar machines, within the scope and operation of his patents, it is an abuse of the right of a reissue, equivalent to a positive fraud.

For the reasons stated, the complainant's bill must be dismissed. I have not thought it necessary to inquire into, or pass any judgment upon, the issues made in regard to the questions of infringement or novelty. The evidence on these points is voluminous, and in some respects conflicting. I have examined it carefully, but am not prepared to give a definite opinion. Though I may say, that, as to the infringement alleged, the evidence at least renders it exceedingly doubtful whether it is made out.

I have only to add, in conclusion, that I am unwilling, unless the facts and the law imperatively demand it, to put into the hands of the complainant the opportunities which a decree in his favor would afford, of pursuing and annoying others for the alleged infringement of the rights secured to him by his reissued patents. I can not shut my eyes to these results. This bill asks for an injunction against the defendant to restrain him from selling the Kirby harvester, and for an account of profits. A decree against him as a mere vender of that machine, except as to costs, would not probably affect his interests to any very serious extent. But can it be doubted that with a decree in his favor in this case, establishing the legality and validity of his reissues, the complainant would at once proceed against manufacturers, and all who vended or used the machine, unless they would pay tribute to him. Those who did not choose to submit to his terms, would be visited with injunctions, and otherwise annoyed, greatly to their injury and that of the public. The Kirby harvester is a very popular and useful labor-saving agricultural implement, and is extensively manufactured in various parts of the country. I can not consent to render a decree based on a claim of such doubtful equity as that asserted by the complainant, which in its results may lead to the stoppage of these manufactories, and involve their proprietors in the most vexatious and expensive litigations. I am unable to perceive that the complainant has

made out a case of such clear and palpable equity, as will justify a decree involving such consequences.

[On appeal to the supreme court the above decree was affirmed. 7 Wall. (74 U. S.) 685.]

Case No. 17,569.

WHITEMAN et al. v. The NEPTUNE.

[1 Pet. Adm. 180.] [1]

District Court, D. Pennsylvania. 1806.

SEAMEN'S WAGES — FORFEITURE AND WAIVER THEREOF — DEDUCTIONS—RECEIPTS IN FULL—FRAUD AND DECEPTION.

1. If forfeitures are incurred and the services of the seamen again accepted, not under a new contract, but under the old one, the forfeiture is thereby remitted and the faults are forgiven.

2. Deductions from wages may be made for voluntary and unfaithful absence from duty, even where the seamen are again accepted on their return to duty.

[Cited in brief in Hart v. The Otis, Case No. 6,154.]

3. Receipts in full by seamen will always be disregarded, when they have been hurried into unjust compliances by fraud, deception, threats, or other improper conduct, palpably imposing on, deceiving, overawing or misleading them. But discharges given with due deliberation and full explanation of circumstances, should not be set aside on light grounds.

[Cited in The Topsy, 44 Fed. 632.]

BY THE COURT. The Neptune on her return from St. Domingo for Philadelphia, put into Charleston, South Carolina, in distress. She lay there, fitting and repairing, two months and a few days. The crew, as it was alleged, and appeared by an entry in the log-book, absented themselves for more than forty-eight hours, without leave, and thereby forfeited their wages. But a short time before the vessel's sailing, and after a long absence from duty, in consequence whereof other hands had been employed in the ship's duty and outfit, they were again received on board. It did not appear, though it might have been otherwise, that any terms were made, as conditions of reinstatement under their old contract—nor were the transactions at Charleston minutely investigated. On their arrival at Philadelphia, the seamen claimed full wages; and the owner refused to pay them for the time they had intermitted their services at Charleston, under an idea that they had forfeited their wages to the time of the arrival of the ship there, by desertion. But the owner offered them the alternative, of payment of the whole for the voyage, with the deduction for the time of absence at Charleston, or that they should institute a suit in the district court, and he would abide by the decision of that court as conclusive. The mariners took time to consider of the proposition, and after several days agreed to it. They were paid their wages, with the deduction mentioned by the owner; and each gave a receipt in full for the balance. The clerk who paid them explained to each of them the mode of adjusting the account, and they received, and gave a discharge for the sums severally stated to be due, as the full balance, and without objection; on the contrary they generally acknowledged they had misbehaved themselves at Charleston. Notwithstanding this discharge, thus deliberately executed, the seamen now claim the wages deducted, and allege, that they had misapprehended their rights, and that the receipt was given under a mistake, as they supposed they had forfeited their wages when in fact they had not; and if the forfeiture had been incurred at Charleston, it was done away by their being received on board again, without terms, and under the old articles. The receipt, it was said, did not bar their recovery; and decisions of this court were cited to shew that discharges thus given, were only prima facie evidence of payment. If fraud or mistake could be shewn, the whole demand was open for investigation. Several cases were cited, to shew the latitude allowed for such enquiries. 1 Pow. Cont. 144, and two cases in P. Wms.

The general principles stated have been rules of decision, in the court, for many years. But every cause must be governed by circumstances peculiar to itself, where these are strong enough to warrant an exception. I abide by the general principles so frequently tested and established, seeing no reason or authority to alter them. If forfeitures are incurred, and the services of the seaman again unconditionally accepted, and not under a new, but the old, contract, forfeitures are done away, and faults forgiven. But I have always permitted deductions for voluntary absence from duty; and have allowed charges, if they exceeded these deductions, and were inevitable, to be made for hiring others to perform the services the absent mariners were bound to render. It would be unreasonable that the mariner should gain, and the ship lose, pecuniary advantages, by his voluntary and unfaithful conduct in the abandonment of his duty. When a mariner, under certain circumstances, is withdrawn, by a force he cannot resist, from the performance of his duty, the law continues his right to wages. He must balance this benefit by just compensation and amends, when his services cease by his own conduct, and voluntary dereliction of the duty his contract compels him to fulfill.

The question in this cause is reduced to the point of alleged mistake; on which it is endeavoured to repel the bar produced by the receipt in full. Where seamen have been hurried into unjust compliances, by fraud, deception, threats or other improper conduct, palpably imposing, deceiving, overawing, or misleading them, I have disregarded receipts for full payment. But discharges given with due deliberation, and full explanation of circumstances, should not be set aside on light grounds. There will be no end to controversy, if due care is not taken on this subject. It would be highly improper to coun-

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

tenance such laveering (to use a sea phrase) as seems to have been practised in this case. If openness and simplicity be characteristic of some, low cunning is not less conspicuous in other sailors. The complainants had a full opportunity of considering and knowing their own rights, and of taking advice. They had the choice of accepting the offer, or proceeding at law, with an assurance of submission to the first decision; and by such submission avoiding the delay and expense of an appeal, which to a sailor, eager to receive, and lamentably prone rapidly to spend, his wages, is tantamount to a denial.

Appeals are, too frequently, only productive to rapacious dealers, who buy for trifles, procrastinated claims. It is notorious in this court, that appeals (always desirable to me in doubtful or difficult causes) are too often entered, or threatened, in plain cases, by a defeated, and of course, discontented, party; who, viewing only his own side of the question, easily persuades himself that he is in the right, to force seamen into compliances with litigated deductions. Yet, in the present case, where avowedly no appeal was contemplated, the seamen could not be induced to risk a legal enquiry, which seems now to have been an after-thought; or, if intended, artfully concealed, to obtain from the merchant, as much as he would pay. Parties and counsel in suits know well, that legal proceedings are attended with no small expense, and not a little uncertainty. The consideration of avoiding litigation, and that under a consciousness of misconduct, weighed with the seamen, against their loss by deduction, from the whole of their claim. Most suitors experience the importance of such considerations, even where no sense of improper behaviour exists. I do not therefore see the mistake, said to be made by these mariners, in the light stated by their counsel. I am more certain of the mistake they have gone into, by entering into a controversy, which on both sides appears to have been relinquished. After professing to have acted under misapprehension, it is not to be tolerated in the mariners, that they should take advantage of the misapprehension of the merchant, who paid them, under the idea of putting an end to a dispute, in which he is finally involved. The transactions at Charleston are not in proof; but if the whole subject was before me, and any thing should appear due from the seamen, it is not probable they can refund any sum overpaid. It is not proper that the merchant should be placed, by a deceptious accommodation on the part of the mariners, in a situation to incur the risk. I dismiss the claim with costs.

NOTE. In the 6th section of the mariner's act, the mode of proceeding in cases of seamen's wages, is pointed out. The judge of the district, or, if he resides more than three miles from the place, any judge or justice may proceed in a summary way, and determine a controversy so far as to certify or not, as the case may be, cause for issuing admiralty process. If cause is certified, the suit proceeds in the district court; if not, it precludes farther investigation, and places the party defeated in a situation not to admit of a course to bring the point before a superior tribunal, in the form he wishes. These preliminary enquiries are only where a procedure in rem is contemplated; and are not frequently final. They change into a proceeding in personam too often, as the seaman has several remedies. It is then a perplexing continuance of controversy, when parties are embittered and litigious. It is not pleasant for a judge to review his own decision, though the cause may in form be different. Prejudices may, unperceived by one, of the best inclinations, steal into the mind, and pride of opinion may have an influence felt, without being directly known. Parties do not generally submit to the first opinion of either judges or justices, most seldom to those of the latter, of whom there are not many sufficiently acquainted with maritime laws, to have a proper view of the subject. This as often continues as closes litigation. Causes are brought into court, after these prefatory enquiries, either to appeal, which may now be done in demands for fifty dollars, a sum injuriously too small, to compel compromise, or under a hope of producing an opposite decision. It is at least multiplying chances; which will, at times, operate in suits, as well as in other transactions among mankind. There are some cases "rari nantes in gurgite vasto," where new evidence, or farther investigation, very properly changes opinion. In the case in question, the cause is now in court.

WHITE ROCK MANUF'G CO. (STILLMAN v.). See Case No. 13,446.

Case No. 17,570.

The WHITE SQUALL.

[4 Blatchf. 103.] [1]

Circuit Court, S. D. New York. Sept. 25, 1857.

SUIT IN REM — DISCHARGE ON STIPULATION — RETURN OF VESSEL TO MARSHAL—VALIDITY OF ORDER.

1. Where, in a suit in rem against a vessel, she was discharged on the usual stipulation for value, and afterwards, during the pendency of the case in this court, on appeal, the respective proctors consented in writing to a return of the vessel into the custody of the marshal, and to her sale by that officer, and she was sold, and an order was obtained from the circuit judge, directing the clerk to enter an order according to such consent: *Held*, on a motion made to vacate such order, by a person who claimed to have an interest in the vessel, and who was not a party to the suit, that the judge had no jurisdiction or power to make the order.

2. The court has no power to order back into the custody of the marshal a vessel which has been fairly discharged from arrest on a stipulation.

[Followed in The Jack Jewett, Case No. 7,121. Cited in The Thales, Id. 13,855; Home Ins. Co. v. The Concord, Id. 6,659; The Old Concord, Id. 10,482; Roberts v. The Huntsville, Id. 11,904; U. S. v. Ames, 99 U. S. 42; The William F. McRae, 23 Fed. 558.]

3. The case of The Union [Case No. 14,346], cited and approved.

This was a libel in rem, filed in the district court, to enforce the payment of a

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

bottomry bond. The vessel was discharged from the arrest on the usual bond being given, under the act of congress of March 3, 1847 (9 Stat. 181). A decree was subsequently rendered in the district court for the libellants, condemning the vessel for the sum of $17,594.63, which, after reciting that she had been discharged under the act of congress, gave judgment against the stipulators in pursuance of said act. [Case No. 5,239.] An appeal was taken from that decree to this court, and duly perfected. [Case unreported.] Pending that appeal, and before any hearing thereon, a stipulation was entered into between the proctors for the respective parties, providing for a sale of the vessel upon certain terms and conditions therein mentioned, and, among others, consenting to a return of the vesssel into the custody of the marshal, and also to a sale of her by that officer. She was subsequently sold. On the 14th of May, 1857, an order was obtained from the circuit judge out of court, directing the clerk to enter an order of record according to such stipulation. A motion was now made by a person who claimed to have an interest in the vessel, but who was not a party to the cause, to vacate such order.

Erastus C. Benedict, for the motion.
Edward H. Owen, for purchaser.
Edward H. Seymour, for libellants.

NELSON, Circuit Justice. I am satisfied that the order made by me was improvidently granted, and that I had no power to make it; and, as the question is presented on a motion made by a party who claims to have an interest in the vessel, and who was not a party to the libel or the proceedings in the cause, I shall direct that the order entered upon the filing of the consent of the proctors for the respective parties be vacated, and that the rights of all persons concerned be left to stand upon the written stipulation entered into by the proctors. The purchaser at the sale of the vessel has appeared and opposed this motion; but, as he had full notice of the proceedings, and of the claim that the order of sale was invalid, and would be contested, I perceive no equity entitling him to any particular favor. Indeed, were it otherwise, it would not change my decision, as I vacate the order on the ground that I had no power or jurisdiction to make it.

Since the granting of the order, I have had occasion to look deliberately into the question as to the power of the court to order back into the custody of the marshal a vessel which has been fairly discharged from arrest on a stipulation, and am satisfied that the court possesses no such power. The reasons for this conclusion were given in the case of The Union [Case No. 14,346], decided at this term. Such I understand, also, to be the rule of the English admiralty. The Kalamazoo, 9 Eng. Law & Eq. 557; The Hope, 1 W. Rob. Adm. 154; The Volant, Id. 383; 15 Law Rep. 563.

Order vacated.

WHITE SQUALL, The (GARDNER v.). See Case No. 5,239.

WHITE WATER VALLEY CANAL CO. (CONWELL v.). See Case No. 3,148.

WHITEWATER VALLEY CANAL CO. (VALLETTE v.). See Case No. 16,820.

Case No. 17,571.

WHITFIELD v. ALLISON.

[2 Am. Law Rev. 188.]

District Court, D. Mississippi. 1867.

RUNNING OF LIMITATIONS — SUSPENSION BY CIVIL WAR.

[The suspension of the federal court in Mississippi by reason of the Rebellion suspended the running of limitations as to persons having a right to pursue their remedies in that court.]

HILL, District Judge, held that the time during which the United States court for the district of Mississippi was suspended, from about the 9th of January, 1861, to the 1st of June, 1866, must be deducted from the time constituting the bar under the statute of limitations; the complainant having, from the execution of the obligation, been and remained a citizen of another state, and entitled to bring his bill in the United States court,—in other words, that the supension of the court, by reason of the Rebellion, suspended the statute of limitations as to all persons having a right to pursue their remedies in the national courts, the functions of which were so suspended.

[See Case No. 12,006.]

[Nowhere fully reported; opinion not now accessible.]

WHITFIELD (BAILEY v.). See Case No. 748.

Case No. 17,572.

WHITHED v. PILLSBURY.

[The case reported under above title in 13 N. B. R. 241, is the same as Case No. 762.]

Case No. 17,573.

Ex parte WHITING.

In re DOW et al.

[2 Lowell, 472;[1] 14 N. B. R. 307.]

District Court, D. Massachusetts. March 24, 1876.

PLEDGEE OF BANKRUPT — SURPLUS PROCEEDS OF SALE—APPLICATION ON ANOTHER DEBT.

Where A. was a creditor of a bankrupt for two distinct debts, and held shares of stock in

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

pledge for one of them, with a statutory power of sale existing at the date of the bankruptcy, *held*, he could apply the surplus proceeds of the shares, after paying the first debt, to the payment of the second.

[Cited in Re Thomas, Case No. 13,886; Re Voetter, 4 Fed. 634; Re McFay, 13 Fed. 444.]

[Disapproved in Brown v. New Bedford Institution for Savings, 137 Mass. 265. Cited in Ex parte Nason, 70 Me. 367.]

In bankruptcy. Petition to prove against the joint estate and the separate estate of one of the partners such debt as should remain after applying the proceeds of certain collateral security.

G. Putnam, Jr., for petitioner.
W. B. Durant, for assignee.

LOWELL, District Judge. The facts, as I understand them, are, that in 1874 the firm of Dow, Hunt, & Co., the bankrupts, of which firm A. C. Cushing was a partner, borrowed $3,000 of a savings-bank, for which they, as a firm, and Cushing and the petitioner, Whiting, individually, gave their joint and several promissory note. This note the petitioner paid to the bank in full, after the failure of Dow, Hunt, & Co., but before their bankruptcy. The parties differ in their mode of looking at this note. The petition represents it as signed by Dow, Hunt, & Co., and Cushing, as principals, and by the petitioner as surety, while the answer represents it to be the note of Dow, Hunt, & Co. as principals, and Cushing and the petitioner as co-sureties, and alleges that the money went to the firm exclusively. Upon the face of the note I should suppose that the answer puts the contract correctly, and I shall so consider the case for the purposes of the present decision, though it is a point upon which evidence outside of the note is of course admissible. In 1875, the petitioner lent $1,396 to the firm of Dow, Hunt, & Co., and Cushing transferred to him eight shares of the capital stock of the Hingham Steamboat Company as collateral security, which Whiting promised to return on payment of the $1,396 with interest. This debt was overdue and unpaid at the time of the bankruptcy. This stock is worth more than $1,396 and interest, and the assignee has offered to pay the amount of that debt upon a reconveyance of the stock. The question is, whether Mr. Whiting can hold the surplus proceeds of the shares by way of set-off against Cushing's other debt to him, for contribution as co-surety of the note above mentioned.

I have had occasion more than once to look carefully at the cases on the subject of mutual credit in bankruptcy; and while the decisions in this country agree entirely, as far as they go, with those made in England, the subject has been more fully considered in that country, as is natural, the bankrupt law having been in force there for a much greater length of time. The leading cases on the subject are Rose v. Hart, 8 Taunt. 499; Young v. Bank of Bengal, 1 Moore, P. C. 150, much more fully reported 1 Deacon, 622; Naoroji v. Chartered Bank of India, L. R. 3 C. P. 444; Astley v. Gurney, L. R. 4 C. P. 714. All those cases should be studied.

[2] [That the courts of the United States have followed the liberal construction of the English judges of the matter of mutual credit in bankruptcy and insolvency, see American Notes to Rose v. Hart, 2 Smith, Lead. Cas. 293; McLaren v. Pennington, 1 Paige, 102; Van Wagoner v. Paterson Gaslight Co., 23 N. J. Law, 283; Aldrich v. Campbell, 70 Mass. [4 Gray] 284; Clarke v. Hawkins, 5 R. I. 219; Medomak Bank v. Curtis, 24 Me. 36; Phelps v. Rice, 51 Mass. [10 Metc.] 128; Myers v. Davis, 22 N. Y. 489; Morrow's Assignees v. Bright, 20 Mo. 298]. The result of them is, that a creditor who, at the time of the bankruptcy, has in his hands goods or chattels of the bankrupt with a power of sale, or choses in action with a power of collection, may sell those goods or collect those claims, and set them off against the debt the bankrupt owes him; and this, although the power to sell or to collect were revocable by the bankrupt before his bankruptcy; or, in other words, the occurrence of bankruptcy in such cases gives a sort of lien which did not exist before. This has been the law ever since Rose v. Hart, 8 Taunt. 499. Before that decision, it was admitted even in cases where there was no power of sale. Young v. Bank of Bengal, ubi supra, adds this limitation, and this only, that if the right to sell the pledge does not arise until after the bankruptcy, then there is no set-off for the surplus; for the reason that the assignee might redeem instantly, before any such power existed, and the creditors shall not be prejudiced by any failure or neglect to redeem; or, to put it in another way, that the rights of the parties are fixed at the date of the bankruptcy.

I have not overlooked the fact that in Young v. Bank of Bengal a good deal is said about the agreement to return the surplus. In this case there is an agreement to return the shares when the debt is paid. I do not consider the case cited to stand on this ground, but on that already mentioned, that the credit did not exist at the date of the bankruptcy. See that case explained by Parke, B., one of the judges who decided it, in Alsager v. Currie, 12 Mees. & W. 751, and by the judges in the late cases above cited. I apprehend that, when shares are conveyed in this way as collateral security, the law implies a promise to return them on the payment of the debt, and its expression cannot properly affect the case. In all the cases there has been either an express or an implied promise by the agent or other person having the property, that he would faithfully account for it and pay over its proceeds; but this does not prevent a set-off in bankruptcy. And the weight of authority is that a promise of this sort does not bar

[2] [From 14 N. B. R. 307.]

a set-off, either under the ordinary statutes or under the bankrupt act, unless the property has been intrusted to the agent for a particular purpose inconsistent with such an application of the surplus, so that this would be a fraud or breach of trust. See Key v. Flint, 8 Taunt. 21, and Buchanan v. Findlay, 9 Barn. & C. 738, for cases of this sort; and, for the general rule, Cornforth v. Rivett, 2 Maule & S. 510; Eland v. Karr, 1 East, 375; Atkinson v. Elliott, 7 Term R. 378; [Marks v. Barker, Case No. 9,096; Mayer v. Nias, 8 Moore, 275; Groom v. West, 8 Adol. & E. 758].[3]

In this case, the debt of $1,396 was overdue and unpaid, and by a statute of Massachusetts Mr. Whiting had a right to sell the shares after giving a certain notice. This law enters into the contract of the parties; and though there is no evidence of a power of sale conferred by Mr. Cushing (the form of the transfer was not put in evidence), yet they will be taken to have understood that there would be a power of sale in accordance with the statute. On the day of the bankruptcy, Cushing was indebted to the petitioner for one-half the note of the firm actually paid by his cosurety, the petitioner, two weeks or more before that time. This makes out a case of mutual credit upon the authorities cited and the others which have followed them: a debt due from Cushing to the petitioner, and choses in action of Cushing's, with a present power of sale in the petitioner's hands.

I understood that both parties submitted the matter to my decision, and accordingly I have decided it. It was said at the argument that the petitioner did not care to prove against Cushing's separate estate, as there could be no dividend. If so, it would not be necessary to decide the whole case now. When one partner has pledged his shares for the debt of the firm, proof may be made in full against the assets of the firm, because it is only when the proof is against the same estate which furnished the security that a sale and application of the security is required by the bankrupt law [of 1867; 14 Stat. 517]. Petition granted.

Case No. 17,574.

In re WHITING.

[1 Wkly. Notes Cas. 30.]

District Court, E. D. Pennsylvania. Oct. 14, 1874.

SUIT AGAINST BANKRUPT — DELAY IN OBTAINING DISCHARGE.

[Leave granted creditors to sue the bankrupt owing to his unreasonable delay in seeking to obtain a discharge.]

Application of certain creditors (heretofore filed) for leave to sue bankrupt in state court, the bankrupt having unreasonably delayed his endeavor to obtain his discharge. Personal notice of such application had been given the bankrupt.

Mr. Huey, for creditors.

THE COURT ordered that the creditors of the bankrupt have leave to institute and prosecute, respectively, suits against him in like manner as if bankruptcy proceedings had not been instituted, provided, however, that no execution be levied of any property, estate, or effects which were his at the commencement of the proceedings in bankruptcy.

WHITING, In re See Case No. 7,991.

WHITING (ADAMS v.). See Case No. 69.

WHITING (BAKER v.). See Cases Nos. 786, 787.

Case No. 17,575.

WHITING v. BANCROFT.

[1 Story, 560.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1841.

CUSTOMS DUTIES—ACT OF 1832 — WORSTED AND WOOLLEN BINDINGS.

The 25th clause of the 2d section of the tariff act of 1832, c. 227 [4 Stat. 590], includes within its terms all bindings, whether they are worsted or woollen.

Assumpsit to recover back money paid to the defendant, the late collector of the customs in Boston, while in office, for duties on goods, asserted to be not liable to the duty. The money was paid under protest. Plea, the general issue.

At the trial, it appeared, that the goods imported by the plaintiff, on which the duties were levied, were "worsted bindings." It was contended by the plaintiff: (1) That these bindings were "worsted stuff goods," in the sense of the tariff act of July 14th, 1832, c. 227, § 2, clause, and also of the tariff act of 1833, c. 55, § 4 [4 Stat. 630], and therefore were not liable to any duty whatsoever, under the 4th section of the act of 1833, c. 55. (2) That, if liable to any duty, they were not liable to the duty of 25 per cent. under the same section and clause, as "bindings," because that clause applies only to woollen and not to worsted bindings; but, at most they were to be deemed non-exempted articles, and liable only to 15 per cent. duty, ad valorem, under the 25th clause of the same section of the act. The court reserved the former question for argument; and the jury found a verdict for the defendant upon the ground, that in the commercial sense, these bindings were not "worsted stuff goods."

C. P. Curtis, for plaintiff.

Franklin Dexter, Dist. Atty., for the United States.

The argument of C. P. Curtis, for plaintiff, was as follows: The verdict has established, that the merchandise entered by the plaintiff, and on which he was obliged to pay the duties now sought to be recovered back,

[3] [From 14 N. B. R. 307.]

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

though composed entirely of worsted, does not fall within the description of "worsted stuff goods." The question, then, is, whether it is liable to 25 per cent. duty under the woollen clause in section 2, art. 2, of the tariff act of 1832, or to 15 per cent. as an unenumerated article.

The plaintiff contends for the latter. The scope of the clause in question is to fix the duties on articles of wool, or of which wool is a component part, and all articles, mentioned therein, are taken to be of that material, except such as are described as being of a different material; such as worsted shawls, worsted yarn, worsted stuff goods, &c. Bindings are found in company with mits, gloves, blankets, hosiery, carpets, carpeting, &c., all of which are woollen goods; some of them, (such as blankets, &c.), are uniformly made of wool, and the others are often of that material. "Noscitur a sociis" is a well founded maxim, applicable to revenue as well as to penal laws. The 7th clause of section 2 of the tariff act of 1828 [4 Stat. 272], shows clearly, that the bindings intended were woollen bindings; and this clause is the predecessor, and almost counterpart of the one under consideration. If then, mits, gloves, bindings, blankets, hosiery, &c. are found to be not composed of wool, they do not come within the provision aforesaid, but fall under some other enumeration, as silk, cotton, leather, &c., or are embraced in the sweeping clause imposing a duty of 15 per cent. on all articles not enumerated or specified. This rule has been applied in this manner in the case of Adams v. Bancroft [Case No. 44], where the collector demanded and received of Adams, on an invoice of silk gloves, duties, at the rate of 25 per cent. on the authority of the 2d article of 2d section, above mentioned, imposing that duty on "gloves." The importer contended, that the material, of which they were composed, took them out of that clause, and that by the act of 1833, they were free; and this was the judgment of the circuit court. The learned judge, in giving the opinion says; "The 2d paragraph of the 2d section of that act (1832) appears to me to refer entirely to goods composed wholly or in part of wool." Now, construing this clause according to the ordinary rules of interpretation of statutes of this sort, it seems to me difficult to maintain, that any other articles were within the scope of the paragraph, than those, which were wholly of wool, or of which wool is a component part.

Now, it was testified by all the witnesses, on each side, that the merchandise in question was composed entirely of worsted; and it is known to the court, that worsted is a distinct article in commerce from wool. It seems clear, then, that these bindings are not subject to the duty claimed and received by the collector, as woollen articles. Bindings are of different materials,—silk, cotton, leather, wool, worsted, and even of gold,—and are subject to different rates of duty, or are free from duty, according to the material, of which they are composed.

There does not appear to be any specified duty for worsted bindings; and we therefore believe, that they fall under the 25th clause of sect. 2d, and are subject to the duty of 15 per cent. only. In that case the plaintiff is entitled to recover back the excess paid by him, with interest.

Franklin Dexter, for the United States.

(1) The 2d article, 2d section, of the tariff act of 1832, the defendant contends, is not the "woollen clause," as distinguished from "worsted," but it is the "woollen and worsted clause." It contains express duties on worsted yarn and woollen yarn, on "worsted stuff goods," and on Brussels and Venetian carpets.

(2) It does not appear, that there are any such things known as woollen bindings.

(3) The argument supposes, that articles named, which may be of wool or worsted, are only covered by this clause, when made of wool. If so, Brussels and Venetian carpeting, (believed to be made of worsted,) would be non-enumerated, which is not probable from the whole purview of the statute.

(4) In the case of Adams v. Bancroft [supra], this clause was called the woollen clause, as distinguished from silk only; the phrase was used diverso intuitu, to bring this case within that. All worsted goods must have been exempted, as all silk goods are, and then worsted bindings would have been free.

(5) "Bindings" mean all bindings, unless otherwise provided for. "Cotton bindings" are provided for in the 3d clause of the 2d section. "Leather bindings," by the 21st clause, &c.

C. P. Curtis, in reply.

(1) The 2d article, 2d section, refers to articles of wool alone, unless otherwise expressly mentioned.

(2) The plaintiff contends, that these are woollen bindings; but if these are not, that will not justify the government in levying the woollen duty on worsted goods.

(3) The plaintiff has no information, whether Brussels and Venetian carpets are of wool or worsted. He believes they are of wool; but he deems it not important; for, of whatever material composed, they are described specifically by the terms, by which they are known in commerce. From their being found in the woollen clause, the presumption would be, that they are of that material.

(4) The plaintiff does not claim, that worsted bindings are free (as they would be, if of silk); but that, there being no specific duty on them, they are embraced in the general clause, including all non-enumerated articles.

STORY, Circuit Justice. The jury having found, that these worsted bindings were not "worsted stuff goods," in the commercial sense of the terms, it follows of course, that

they are not free under the tariff act of 1833, c. 55, § 4, which exempts all "worsted stuff goods" from duty, the prior tariff act of 1832, c. 227, § 2, having imposed a duty upon "worsted stuff goods" of ten per cent. ad valorem. The remaining question, which was reserved at the trial, is, whether these worsted bindings are to be deemed non-enumerated articles, liable to a duty of 15 per cent. ad valorem, under the 25th clause of the 2d section of the tariff act of 1832, c. 227, or are liable to a duty of twenty-five per cent., as being embraced within the 2d clause of the same section, which levies that duty, among other things, on "mits, gloves, bindings, blankets, hosiery," &c. It is impossible fully to comprehend the argument, without a recital of the whole clause. It is in the following words. "Second. On all milled and fulled cloth, known by the name of plains, kerseys, or kendal cottons, of which wool shall be the only material, the value whereof shall not exceed thirty-five cents a square yard, five per centum ad valorem; on worsted stuff goods, shawls, and other manufactures of silk and worsted, ten per centum ad valorem; on worsted yarn, twenty per centum ad valorem; on woollen yarn, four cents per pound, and fifty per centum ad valorem; on mits, gloves, bindings, blankets, hosiery, and carpets and carpeting, twenty-five per centum, except Brussels, Wilton, and treble ingrained carpeting, which shall be at sixty-three cents the square yard, all other ingrained and Venetian carpeting, at thirty-five cents the square yard; and except blankets, the value whereof, at the place from whence exported, shall not exceed seventy-five cents each, the duty to be levied upon which, shall be five per centum ad valorem; on flannels, bockings, and baizes, sixteen cents the square yard; on coach laces, thirty-five per centum; and upon merino shawls made of wool, all other manufactures of wool, or of which wool is a component part, and on ready made clothing, fifty per centum ad valorem." Now the argument turns upon this, that the "bindings" spoken of in this clause, are not all bindings whatsoever, but only such as are woollen bindings, as contradistinguished from worsted bindings.

In examining the clause in question, it is clear, that it applies solely to articles composed in whole or in part of wool, using the latter word in its comprehensive sense, as applicable to the raw material, and not merely to its commercial sense, when incorporated into a particular fabric or manufacture. There is no doubt, that, in a commercial sense, worsted goods are distinguishable from woollen goods; and so accordingly this clause treats them, although wool is a constituent part of all worsted goods; for worsted is but wool, spun and twisted in a particular manner. The point of the argument, therefore, must turn upon this, that the duty on "mits, gloves, and bindings," in this clause, is not intended to cover all sorts of mits, gloves, and bindings, manufactured out of wool, but only such as would be denominated woollen mits, gloves, and bindings. The argument derives some force from the immediately antecedent article mentioned being "woollen yarn"; and hence the maxim, "Noscitur a sociis," is said to be applicable to it. But in construing the clause, it seems to me, that the whole must be taken together. The first branch of the clause embraces all milled and fulled cloth known by the name of plains, kerseys, and kendal cottons, of which wool is the only material; next, comes worsted stuff goods, &c.; next, worsted yarn; next, woollen yarn; and then, mits, gloves, bindings, blankets, hosiery, and carpets. Now, certainly, in this very connexion, we find goods enumerated, which either are, or at least may be, composed of worsted. No one, I suppose, doubts, that there are, or may be worsted mits, worsted gloves, worsted bindings, and worsted hosiery, as well as woollen; and therefore there is nothing in the language, which necessarily or naturally limits it to the one class, rather than the other. Why, then, should it not be construed to embrace both, since it is found in a clause equally embracing woollen and worsted goods, and there is nothing pointing specially to one in preference to the other? And, indeed, since the language is general, "mits, gloves, bindings, hosiery," &c., why should it not be applied to all mits, all gloves, all bindings, all hosiery, whatever are the component materials, upon the ground of the very maxim, "Noscitur a sociis;" the clause embracing, in all other respects, woollen and worsted goods only, with the single exception of "shawls and other manufactures of silk and worsted," and that very exception being inapplicable here?

The case of Adams v. Bancroft [Case No. 44], turned upon very different considerations, growing out of another distinct clause (the 15th) of the same section. That clause levied a duty of a very different sort upon "all manufactures of silk, or of which silk shall be a component part"; and the court held, that French silk gloves, being a manufacture of silk, could not have been within the purview of the second clause respecting mits and gloves; otherwise it would involve a direct repugnancy between the two clauses of the section. To give full effect to each clause, the court said, that the second clause was applicable solely to mits and gloves, which were wholly or in part composed of wool; and the other clause, to mits and gloves, which were wholly or in part composed of silk. By implication and inference, therefore, the reasoning of the court in that case, would lead us to the conclusion, that the second clause would embrace worsted mits, worsted gloves, and worsted bindings. That point, however, not being then directly before the court, the present case is not necessarily governed by it.

My opinion, upon the best reflection, which I have been able to bestow upon the subject, is, that all bindings, whether woollen or worsted, are within the purview of the second clause; and to construe worsted bindings to be without it, and woollen bindings to be within it, would be, not to interpret the clause upon its general import and the context, but to insert qualifications and limitations, where the act declares none. The motion, therefore, for a new trial upon the reserved point, must be overruled.

Case No. 17,576.

WHITING et al. v. BANK OF THE UNITED STATES.

[1 McLean, 249.] [1]

Circuit Court, D. Kentucky. May, 1835.[2]

BILL OF REVIEW—TIME OF FILING—FINAL DECREES—MORTGAGE FORECLOSURE—CONFIRMATION OF SALE.

1. A bill of review is brought for errors apparent on the face of the decree.

2. It is the nature of a writ of error.

3. And the time within which a bill may be filed is limited to five years, by analogy to the limitation of the writ of error.

4. A decree of sale of mortgaged premises, is a final decree.

5. A confirmation of the sale, on the return of the commissioner, if erroneous, affords no ground on which to reverse the original decree.

Mr. Levering, for complainants.

Mr. Pirtle, for defendants.

McLEAN, Circuit Justice. The complainants state that in 1823, the president, directors and company of the Bank of the United States filed their bill against Ruggles Whiting, Enfield Johnson, and Gabriel J. Johnson, stating, that they, in connection with a certain James D. Breckenridge, on the 9th August, 1820, executed their mortgage to the said bank on several lots contiguous to Louisville, to secure the payment of the sum of $9,931.37, which Whiting owed to the bank; which sum was not paid, and the bank prayed the mortgaged estate might be sold to satisfy the mortgage. And at November term, 1826, a decree ordering a sale was pronounced, &c. And the 2d March, 1827, the lots were sold to the bank, at public sale, for the sum of seven thousand dollars. And the complainants represent that before the day of sale Ruggles Whiting deceased, and left several minor children, as heirs, who were not made parties to the proceedings; and the complainants pray that the proceedings and decrees and sale in the cause may be opened, and they permitted to redeem the premises sold, for the following reasons: 1st. It was irregular and erroneous to entertain the bill and pronounce the decree for foreclosure and sale, without the mortgagor, Breckenridge, being made a party. 2d. It was irregular and erroneous to sell the property mortgaged, without a revival of the suit against the heirs of the decedent Whiting. 3d. It was unjust and oppressive to sell in the manner and at the price the land was sold for.

The answer states that the death of Whiting was not known at the time of the sale; that the sale was open and fair, and that the bank has sold the lots since the purchase, to various individuals, who have, or some of them have, again transferred lots to others, and that improvements have been made on them, so that the property is now of immense value.

This bill, although somewhat informal, was designed as a bill of review for errors apparent on the face of the decree complained of; and yet, the principal ground relied on is, the death of Whiting, which did not take place until a short time before the sale of the property. This property was owned by Gabriel J. Johnson, in remainder, Mrs. Enfield Johnson having a life estate in it; and Johnson mortgaged it to James D. Breckenridge to indemnify him as his indorser; and Johnson being indebted to Whiting, and Whiting to the bank; to secure which last debt, Whiting, Johnson and Breckenridge, joined in the mortgage to the bank.

The first objection to the decree is, that Breckenridge, being one of the mortgagors, was not made a party to the suit. The answer to this is, that Breckenridge does not complain of the decree. And if he shall make no complaint, what right have the heirs of Whiting to complain on his account. They do not even allege, that their interests were in the least degree affected, on account of this omission, in the proceeding. If Breckenridge's interests have been injured by the decree, he has a right to file his bill and set the proceedings aside, so far as regards his own interests; but it is very clear that the heirs of Whiting cannot, on this ground, ask the court to open up the decree. It does not, in fact, appear that Breckenridge was materially interested in the decree. He was the indorser of Johnson, to pay the debts, in whole or in part, for which he executed the mortgage; and it does not appear, that he was responsible beyond the amount for which the mortgaged premises were sold. We are therefore of opinion, that the omission to make Breckenridge a party, is not such an error in the proceeding, as will authorize the court, at the instance of the present complainants, to open up the former decree.

The second ground, that the decree was irregular and erroneous to sell the mortgaged premises, without a revival against the heirs of Whiting, is the one principally relied on, for the reversal of the decree.

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

[2] [Affirmed in 13 Pet. (38 U. S.) 6.]

As before remarked, a bill of review lies for error apparent in the decree. Some courts have held that, on a bill of review, any error in the pleadings or evidence may be examined. But the rule is, that this proceeding does not embrace errors which do not appear in the decree. Where the evidence is made a part of the decree, by reference, it constitutes a part of the record; but the sale of the premises in this case is an act done subsequent to the decree, and is rather a consequence of the decree, than a part of it. And if there were error in this, it surely would be no ground on which to open up the decree of sale, unless such decree should be considered interlocutory and not final. The decree of the sale was final between the parties. It fixed their rights and responsibilities, and can no more be considered an interlocutory decree than a judgment at law. The decree was followed by an order of sale, and an actual sale of the premises; as a final judgment is followed by an execution, and a sale of property to satisfy it. In this case then the decree was final, and in no just or technical sense an interlocutory one. And if there be an error in the proceedings subsequent to the decree, it would seem to afford no ground for a bill of review, but redress should be sought by motion at the proper time or in some other form. It would be a singular proceeding to reverse the decree in this case, for the alleged error in the sale. Had the death of Whiting been made known to the court, before the sale was confirmed, the court would probably, as they did in the case of Page's Ex'rs v. Brackenridge [Case No. 10,661], direct the sale to be set aside, and notice given to the heirs of Whiting. But, it appears that the heirs can have but little, if any interest in the property; unless they can take advantage of the immense improvements made on the lots and their great rise in value. It may be to them, or to their assignees, an object of speculation; but are they in justice and by the rules of chancery proceedings entitled to the prayer of their bill.

How have they been injured? Some of the witnesses say that if the lots had been sold in a somewhat different manner, they might have brought some five or ten hundred dollars more at the sale. But this is rendered extremely doubtful, by other facts proved in the case. Their ancestor, Whiting, is proved to have been insolvent, by a large amount, at the time of his decease. A sum much larger than the alleged difference of the sum for which the lots were sold, and for which they might have been sold under the most favorable circumstances. But Whiting never had a title to the mortgaged premises. The fee was in Johnson his debtor. Many years have elapsed since this sale was made; the property has gone into the hands of strangers, who now own it, and who have expended large sums of money in improving it. With its improvements, the property may now be worth several hundred thousand dollars. And the owners of the property are not made parties to this suit. Are their rights to be acted on, when they have had no day in court. Their interests are directly involved, and the court cannot grant the prayer of the complainants, without disturbing these interests; and indeed, without wholly subverting them. By the act of congress, a writ of error is limited to five years; and the supreme court have decided that the same limitation applies to a bill of review, which is in the nature of a writ of error. The decree complained of was entered at November term, 1826, and the sale was confirmed in March, 1827. And it appears that the present bill of review was filed in May, 1833. So that whether the original decree or the confirmation of the sale, be considered the final decree, the limitation had expired before the filing of the present bill. And the bank sets up the lapse of time, as a bar to the complainants' bill, The final decree was the decree of sale, and not the confirmation of the sale. And no doubt can exist that on this ground the complainants are bound by the statute; and, it is not perceived, that on either of the other grounds assumed, are they entitled to the reversal of the original decree. The bill must be dismissed at the costs of the complainants.

This cause was taken to the supreme court by an appeal, and the above decree was affirmed. 13 Pet. [38 U. S.] 6.

Case No. 17,577.

WHITING v. GRAVES et al.

[3 Ban. & A. 222;[1] 13 O. G. 455.]

Circuit Court, D. Massachusetts. Feb., 1878.

INVENTION BY EMPLOYEE—RIGHTS OF EMPLOYER—ASSIGNMENT AND LICENSE—EQUITABLE RIGHTS AND REMEDIES.

1. An employment to invent and perfect machinery for a particular purpose, while it will operate as a license to the employer to use machines invented by the employee, and put in use under such employment, will not, of itself, confer upon the employer any legal title to the invention itself or to the letters patent protecting it.

[Cited in Wilkens v. Spafford, Case No. 17,659; Hapgood v. Hewitt, 119 U. S. 233, 7 Sup. Ct. 197.]

2. Where the inventor assigns his inventions to a party to whom the patent is subsequently issued as the assignee of the inventor, upon a verbal agreement that the assignee shall pay the expense of the patents for one-half interest in it, the manufacture and sale of the patented articles by the defendants, to whom the patentee has assigned his equitable interest in the patents, is not infringement.

[Cited in Marsh v. Newark H. & V. Mach. Co. (N. J. Err. & App.) 29 Atl. 483.]

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

3. The inventor had an equitable title to one-half of the patents.

4. In a court of equity a party holding an equitable title cannot be ousted of his equitable rights by the holder of the legal title, who in such case stands in a court of equity as trustee for the use of the party beneficially interested.

[This was a bill in equity by George A. S. Whiting against John A. S. Graves and others for the alleged infringement of letters patent No. 176,636, granted to E. L. Howard April 25, 1876.]

Thomas William Clarke, for complainant.
George D. Moyes, for defendants.

SHEPLEY, Circuit Judge. The complainant, being about to start a factory for the manufacture of fancy dry goods, employed Elijah L. Howard as a machinist, at a salary of twenty-one dollars a week. The complainant states the employment as follows: "I also engaged a machinist, whose duties were the making and keeping in order of ruffling, ruching, and fluting machines, and all attachments or machinery required for the manufacturing of any goods which might be necessary to be made." Complainant, however, on being interrogated as to what information he communicated to Howard, as to the duties and services expected of him, replies: "I told him that I should require him to make what machinery was necessary, and keep it in repair."

Howard testifies that complainant, being about to start a rival factory for the manufacture of rufflings, in which sewing-machines were to be used, wanted a man to take charge of his machinery; that Howard was introduced to him by one Leavitt as a competent man for that service; that Whiting agreed to employ him. He testifies: "He was to pay me twenty-one dollars a week; that was all the agreement made."

It is apparent from the complainant's statements, as well as from the testimony of Howard, that there was nothing in the original contract for service which would give Whiting any legal or equitable title to any letters patent for any inventions Howard might make. During the term of his employment, patents for a number of inventions made by Howard were issued to Whiting, his employer, to whom the right in the inventions had been assigned by Howard, at or before the times of making the applications. Many of these were for such little additions to sewing and other machines as were necessary to adapt them to the making of flutings, ruffles and ruchings. As these were adaptations of machinery to the special business of Whiting, and the expenses of the applications and the patent fees were paid by him, it seems to have been considered by both parties that Whiting had the sole interest in the patents. Two patents, however, were issued in the name of Whiting for the inventions of Howard, for contrivances applicable to sewing-machines generally, being for improved mechanisms for operating such machines. It is claimed on the part of the complainant that he is the sole owner of these letters patent, and that Howard has no legal or equitable interest therein. The defendants claim that Howard, the inventor, is entitled to an equitable interest in one-half of the rights under these two patents.

Whiting contends, and in substance testifies, that Howard went to Whiting with an understanding that he should make improvements in the machinery of Whiting's factory to the best of his ability, and Whiting should have the fullest benefit of them; and the patents upon these inventions were procured merely for business protection by Whiting, and the manufacture for sale of the machines was an afterthought. Even if this were so, there would seem to be no good reason why Howard should not receive some benefit from the use of his inventions in other factories than Whiting's, and from the sale of his inventions to others. It was no part of the original employment of Howard, according to Whiting's statement of his understanding of it, to invent machinery for general use, but only in the factory of Whiting. This was a factory not for making and selling machinery, but for manufacturing fancy dry goods with the aid of machinery. The employment to invent and perfect machinery for that purpose, while it would operate as a license to Whiting to use machines invented by Howard, and put in use under such employment, would not, of itself, confer upon Whiting any legal title to the invention itself, or to letters patent protecting it. Whiting states in his testimony that he had no thought of patenting any inventions at the time of the employment of Howard, and that the patent business never occurred to his mind at that interview. Yet, it is contended that when the applications were made for the patents on the treadles, Howard assigned the inventions to Whiting without any consideration other than what would arise from the nature of the employment, and that the legal and equitable title to the letters patent is so absolute in Whiting that he is entitled to treat Howard and the defendants who are using the treadles under Howard, as infringers. Whiting states that subsequently to the time when the patents for the two treadles were issued, he agreed to give Howard one-half of the profits from the manufacture and sale of the Howard treadles as long as Howard remained in his employment. It appears that a separate account was opened on Whiting's books under the head of the "Howard Treadle Account."

Howard, on the contrary, testifies that Whiting said he would pay the expense of the patent on the first treadle for one-half interest in it; that he subsequently told him he had the papers made in his own name, assigned to himself, and that at any time Howard wanted a transfer of his interest in those papers, he would do so; and that when he proposed to have the second treadle invention patented, he said he would make the same terms as on

the first patent; that he (Howard) assented to that, and the papers were made accordingly.

Three witnesses, Graves, Weston and Kenerson, all testify to conversations at different times with Whiting, in which he stated to them, respectively, that he was to pay the expenses of obtaining the patents for one-half interest in them, and was to assign one-half to Howard whenever he wanted it. This seems to fully confirm Howard's statement of the transaction, and Whiting's version of the arrangement is uncorroborated by any witness, and is not consistent with the attendant facts and circumstances proved in the case. After Howard left the employment of Whiting, he assigned his equitable interest in these two patents to the defendant Graves. Under this assignment the defendants, Graves and Abercrombie, his partner, have made and used the patented treadles. As it is clear upon the evidence in this record that Howard had an equitable title to one-half these two patents, the defendants cannot be held to infringe. In a court of equity a party holding an equitable title cannot be ousted of his equitable rights by the holder of the legal title, who in such a case stands in a court of equity as trustee for the use of the party beneficially interested. Continental Windmill Co. v. Empire Windmill Co. [Case No. 3,142]; Clum v. Brewer [Id. 2,909]; Woodworth v. Cook [Id. 18,011]; Price v. Dyer, 17 Ves. 357; 1 Story, Eq. Jur. § 161.

The defendants' plea is sustained, and the bill dismissed with costs, and decree will be entered accordingly.

WHITING (WINDSOR v.). See Case No. 17,868.

WHITING, The CATHARINE. See Case No. 9,069.

Case No. 17,578.

WHITLOCK et al. v. The THALES.

[20 How. Prac. 447.]

District Court, S. D. New York. 1860.

ADMIRALTY JURISDICTION — LIEN FOR MATERIALS AND SUPPLIES—HOME AND FOREIGN PORTS.

[1. The federal courts sitting in admiralty have jurisdiction of a suit to enforce an alleged lien for materials and supplies furnished to an American vessel in an American port which is foreign to her home port. The jurisdiction of the court and the rights and remedies of the parties are determinable upon the same principles as in cases where the materials and supplies were furnished in a port of a foreign country.]

[2. A libel to enforce an alleged lien for necessary materials and supplies furnished to the master in a foreign port where no funds of the owner were available need not specify the particulars and amounts which make up the claim, and the evidence by which they are to be proved. These are matters to be ascertained by investigation after a reference.]

[This was a libel by Benjamin M. Whitlock and others against the barque Thales to enforce an alleged lien. The case was heard upon exceptions to the libel.]

The libellants allege that they are merchants, doing business in co-partnership in the city of New York, and that the barque is an American vessel, belonging to the port of New York, and is now at that port; that on the 28th of August, 1856, on a voyage to Buenos Ayres, she was at anchor at or near the port of Pensacola, in the state of Florida, which was not her home port, when she was driven on shore at that place in a gale of wind, and suffered great damage thereby; that she was subsequently got off and carried into Milton, in the same state, where it was found necessary to have her furnished certain supplies, and undergo thorough repairs, to render her seaworthy and fit her for her voyage; that Captain Harry T. Howland, her master, then in command of her, not having any funds to pay for such repairs and supplies, and her owners, then and still residing in New York, having no credit, or means of credit, in Pensacola or Milton, where the barque was a foreign vessel, applied to the firm of Keyser, Judah & Co., commission merchants, residing at Pensacola, to obtain the repairs, supplies and advances necessary for said vessel, on the credit of the vessel, who thereupon furnished the same on the faith and credit of the vessel, on or before November 15th, 1856, to the amount of $9,410.13, and thereby acquired a lien on her for such sum, and became assignees of such lien; that after such advances and repairs were made, and the vessel was fully equipped and repaired, the said master, on the 15th of November, 1856, at Pensacola, whilst a maritime lien existed on the vessel therefor, in order to procure money to discharge such lien, made and delivered to said Keyser, Judah & Co. two drafts or bills of exchange of that date, on Daniel L. Sturges, a part owner of the barque, one payable thirty days after sight, and the other sixty days after sight, each for the sum of $4,793.28, including therein $176.43 discount on exchange on said drafts, in addition to $9,410.13, the sum and amount of such supplies and expenditures; that on the 17th of November, 1856, Keyser, Judah & Co., for value received, indorsed the said bills of exchange, and at the same time, for value received, assigned and transferred to the libellants all claims and demands in favor of said Keyser, Judah & Co. against the barque, and all liens upon her to which they were entitled by reason of repairs, supplies and necessaries so furnished by them to her; that the said bills of exchange were duly presented to the said Daniel L. Sturges, and accepted by him, and the one payable thirty days after sight was duly paid by him at maturity; but the one payable sixty days after sight has been but in part satisfied by the acceptor, and a large balance still remains due and unpaid thereon; that the libellants are now owners of the same, and of the liens on the barque for the repairs, supplies and advances aforesaid, and are ready to deliver up and cancel the bill of exchange upon the lien being satisfied and discharged. The libellants pray process in rem, and judgment

against the barque, for the balance due on the demand aforesaid, with interest.

The claimant appeared to the above action and filed exceptions to the sufficiency of the allegations of the libel to entitle the libellants to maintain the suit and relief prayed for: 1st. Because the barque is an American vessel, and that advances and repairs were made in a port of the United States, and not in a foreign port, and no lien therefor attached to the vessel. 2d. Because it does not appear by the libel that the owners of the vessel were at the time absent from the place where the advances and repairs were furnished. 3d. Because the libel does not state with sufficient exactness what the liens were for, nor when or how they were assigned to Keyser, Judah & Co. 4th. Because the libel does not state separately, and with certainty, what amount of supplies and repairs were furnished by Keyser, Judah & Co. to the barque, and what money was advanced by them, and to whom, and for what purpose. 5th. Because the libel does not state facts sufficient to give the court jurisdiction, or to warrant the decree prayed for.

C. L. Benedict, for claimants.
D. McMahon for libellants.

BETTS, District Judge. The case comes before the court for decision upon the pleadings alone, and the exceptions interposed by the claimants, are tantamount to a demurrer to the libel. Ben. Adm. §§ 466, 468; Betts, Adm. 48. Some of the objections are formal in their character, and may, if well taken, be obviated by the libellants in reforming their libel. Others go to the merits of the case and are peremptory and final in their character. The question upon the merits presented on the face of the libel, is whether the admiralty courts of the United States can take cognizance of a claim over a lien supposed to be acquired against a vessel for labor, materials and supplies furnished her in a port foreign to her own within the United States; that is, whether a vessel owned in New York, on a voyage to Buenos Ayres, being driven by stress of weather into a port in Florida, and there obtaining necessary repairs and supplies on credit, is subject to an action in rem therefor, in this district, on her return to it. The libel avers that the credit was procured by the master of the vessel for her necessities, and that he had no funds to pay for them, and that her owners resided in New York, and had no credit or means of credit in Florida to supply her wants.

A question would hardly have been mooted in this court upon this point, as the law in respect to the scope of maritime jurisdiction was accepted and administered here prior to the decision of the case of Pratt v. Reed, 19 How. [60 U. S.] 359, by the supreme court in December term, 1856, and the case which followed in the same court, of The Jefferson v. Beers, 20 How. [61 U. S.] 393, December term, 1857, and the case in this court of The Coernine [Case No. 2,944]. But it is insisted on the part of the claimants in this cause that the former doctrine in relation to the jurisdiction of the admiralty over maritime liens upon American vessels arising out of contract, is so modified and restrained as to prevent its exercise unless in cases of bottomry, or express hypothecation, or that species of credit tantamount to them.

I consider it unnecessary to recapitulate the authorities which introduced or sanctioned the rule of maritime law, which has long prevailed in the admiralty courts of this country, that a credit given a vessel on the application of her master in a foreign port, for labor, materials, or supplies furnished to her necessities, constitutes a lien on the vessel as a security for such credit, if the master had no funds or credit at the place by which he could obtain them, or the owners were without such means which the master could command; because that doctrine was fully examined and ratified by the supreme court in the case of Thomas v. Osborne, 19 How. [60 U. S.] 22. There was a difference of opinion on the bench, as to the fact whether the credit in that case was given to the vessel or personally to the master, but the judgment of the court was pointed and explicit that the case was one of a maritime lien and of admiralty jurisdiction, if the credit in the case was given to the vessel. Had the transaction upon which this suit is founded, occurred in a port out of the United States, the facts alleged upon the libel and admitted by the exceptions, would indisputably be embraced within the principles and terms of the rule declared and adopted in the decision of Thomas v. Osborne [supra].

The case of Pratt v. Reed [supra], decided nearly simultaneously with that of Thomas v. Osborne, differs from it in these two particulars: 1st, that the credit in the former was obtained in a port of the United States, foreign to the home port of the vessel, and that the master, who obtained it, was also owner of the vessel; but there is no manifest disaccord in the doctrines declared in the two cases, as to the character and degree of the necessities required (i. e. for supplies to the vessel and the pledge or credit of the vessel), in order to render the advances procured in her favor a lien on the vessel, except the declaration of the court in Pratt v. Reed, that "it is a misapprehension to suppose circumstances of less pressing necessity for supplies and repairs, and an implied hypothecation of the vessel to procure them will satisfy the rule than is sufficient to justify a loan of money on bottomry for the like purpose." There may be distinctions between the foundations of a bottomry contract, and an implied or simple hypothecation creating a lien, but that is not a point important to consider in this case.

The decision in The Coernine [supra], in this court, was placed upon the facts and rule stated in Pratt v. Reed, and does not attempt to extend that principle a shade beyond. The case of The Jefferson v. Beers, 20 How. [61

U. S.] 393, does not appear to me to involve any point of jurisdiction applicable to the question in controversy in this cause. It appears aimed chiefly to determine that admiralty courts cannot take cognizance of claims or contracts touching the construction of vessels in ports of the United States. The other questions discussed on that decision supply no doctrines controlling the facts of this case.

I am of the impression that there is practically no distinction between the rights and remedies of the libellants upon this cause of action, whether incurred in a port out of the home port, and therefore in that sense in a foreign port, or in one territorially alien and foreign to the United States. The term is of the same import, applied to either locality. In Pratt v. Reed, the court seem to consider each to be of the same signification, because they say "this is the case of a foreign ship, the vessel belonging at Buffalo as her home port, and the debt contracted at Erie, in the state of Pennsylvania."

In my opinion the libel sets forth facts which constitute a lien upon the vessel, and a right of action in this court in favor of the libellants, to enforce it, and that a decree upon the merits must be rendered in their favor, overruling the exceptions interposed on the part of the claimants.

The pleading in the libel is sufficiently full. It is unnecessary to spread out the evidence upon which the allegations rest. The particulars and amounts which make up the claim are matters for reference, or for investigation on trial, if the claimants come into court upon answer. A case of necessity for the credit procured by the master, and the consequent lien, is sufficiently shown by the libel; and as those averments now stand before the court admitted by operation of the exceptions, the libellants are entitled to a decree for their debt and condemnation of the vessel to satisfy the same. The amount to be ascertained by reference to a commissioner to determine and report it to the court.

The claimants may, however, have leave to put in an answer to the merits within ten days after notice of this decree, and on payment of costs to be taxed.

[See Cases Nos. 13,855 and 13,856.]

Case No. 17,579.

WHITMAN v. BUTLER.

[8 N. B. R. 487.] [1]

District Court, D. Rhode Island. Sept. 23, 1873.

BANKRUPTCY—MORTGAGED PROPERTY—ENJOINING SALE—AUTHORITY OF ASSIGNEE.

1. An injunction to restrain a mortgagee from making a sale of real estate belonging to a bankrupt will be granted when it appears that the mortgagee made a sale of the property before the adjudication of bankruptcy, but the purchaser, under advice of counsel, declined to make payment and receive deeds therefor, and the sale sought to be enjoined is made under the same terms as before with the appendix, "the above property will be sold for account of whom it may concern."

2. The words of the appendix, "for account of whom it may concern," cannot be construed to affect the assignee and mortgagee.

3. This court can rightfully interfere even though it be alleged that the mortgagee will be injured thereby, its right being simply to regulate through the assignee, the modes and means of foreclosing the mortgage.

[Cited in Schulze v. Bolting, Case No. 12,489.]

4. The first sale was, in reality, no sale, and hence, from and after the adjudication, the mortgagee's rights and powers to sell were such, and only such, as could be exercised consistently with the provisions of the bankrupt law, and under that law the assignee is really the agent both of the mortgagee and the other creditors.

In bankruptcy.

Metcalf & Bradley, for petitioner.

Mr. Van Slyck, for respondent.

KNOWLES, District Judge. Henry Whitman, assignee in bankruptcy of Lewis P. Child, having filed his bill in equity, containing all apt and proper allegations and prayers, by petition ancillary to that suit, prays the court for a preliminary injunction to restrain the defendant, William Butler, from making sale at auction of three several parcels of real estate, under the power of sale contained in seven several mortgages held by him, executed by the bankrupt, Child, between the 31st of March, 1870, and the 14th of March, 1873, inclusive. To the pleas, allegations and evidence of the parties, I have given due consideration; the results of which I would now announce in terms as brief as may be. The controlling facts are few and undisputed, and in regard to the principles of law involved, the learned counsel of the parties were understood to be at variance on no point of much practical importance.

It appears that on the 15th of July last, the respondent, in virtue, as claimed, of his powers as mortgagee with power to sell, made sale by auction of divers parcels of real estate embraced in his aforesaid mortgages, among which parcels were two of the three described and referred to in the petition under consideration. And further, it appears, that the purchasers of these two parcels, acting, as they allege, under advice of eminent counsel, decline both to make a cash payment of five per cent. of the purchase money on the day of sale, or to make payment and receive their deeds, on the 25th of July, as prescribed by the conditions of sale, in no one of which, it is proper to remark, was embodied even an intimation, that if the purchaser refused to consummate the sale, the property would be, on a given day, or at any time, again exposed to auction on his account and risk. And thereupon, it appears, the respondent, on the 2d of August, again, as mortgagee aforesaid, advertised the said two parcels in the same terms as before, but with an appendix in these words: "The above property will be sold for account of whom it may concern." The de-

[1] [Reprinted by permission.]

fendant, it also appeared, on the 19th of July, announced an intended sale by him as mortgagee as aforesaid of a third parcel of land, embraced in each and all of the said seven mortgages, but not offered for sale with the other parcels on the 15th of July. By agreement, the sales of each and all of these three parcels are postponed until the 22d of September inst., subject to the action of this court upon the pending petition.

Now the records of the court show that on the 17th of July, proceedings in bankruptcy were instituted against said Child, and that on the 26th of July he was adjudged a bankrupt; and also that afterward, August the 12th and 13th, Henry Whitman, being chosen and duly appointed his assignee, accepted the trust, and received from the register conveyance of the bankrupt's property in due course of law. Upon this state of facts, the petitioning assignee asks that the respondent be enjoined from making sale of said parcels, as proposed, and the two questions presented to the court are: First, can the court rightfully interfere between the parties in this matter? and, secondly, if the court have the requisite power, will it exercise that power against the protests, and to the injury, as alleged, of the respondent?

The right of the court, for satisfactory cause shown, to interpose, as prayed, is not understood to be questioned seriously at this late day in any section of the country. In an opinion reported in Re Snedaker [2] is found an expository paragraph, embodying views believed to be now everywhere recognized as incontrovertable. Treating of the relative rights and duties of the assignee in bankruptcy and the creditor of the bankrupt, secured by pledge or lien of any kind, the learned court says: "For just and equitable purposes and to guard against fraud, the act rightfully takes the pledged property or lien out of the power of the secured creditor's control or management in reducing it to money in his chosen way without responsibility, and places it in the hands of the assignee of the bankrupt, who, being an agent of the court, and at the same time the representative of the rights of all parties in interest is supposed to be above all temptation to fraud, and directs him in such capacity and under the pledge of his official bond as assignee, and under the direction of the court, to convert such mortgaged or pledged property into money, and to distribute the same under the provisions of the act, with due regard to all the priorities shown to exist in the proceedings in bankruptcy by the proof of the claims against the bankrupt. So far from taking any right or rights from the secured creditors, under the mortgage, lien or pledge by which he holds the same, it simply regulates the modes and means of foreclosing the mortgage or other lien, and of reducing such security to money, in order that the court may be able to enforce exact justice, and to see that the rights of all the creditors are secured to them under the proof of claims, and under the law.

Under this view of the law, it must be conceded and held that from and after the 26th of July, the respondent's rights and powers as a mortgagee, with power to sell, were such, and only such, as could be exercised consistently with the provisions of the bankrupt law. Prior to that date, his right and duty were to make sales and account for proceeds conformably with the requirements of the deed of mortgage; but after that date—"ita lex scripta est"—his right was to adjust his claims with the assignee, if happily he could, or to prosecute them adversely against the estate or the assignee, in mode and manner as prescribed by the bankrupt act, or in "masterly inactivity," as it were, patiently to await the action of the assignee—under the law not less his agent and representative than the agent and representative of the bankrupt and of his other creditors. So far, therefore, as concerns the parcel of land first advertised for sale on the 19th of July, and never yet exposed at auction, it is clear that the respondent must be restrained from selling save in conjunction with and with the assent, express or implied, of the petitioning assignee.

And now, as concerns the two parcels, which the respondent proposes to expose at auction a second time, "by virtue of a power of sale contained in seven deeds of mortgage"—but, it is to be noted, "for account of whom it may concern," is the status of these distinguishable in any material respect from that of the third parcel? On the 15th of July, these were set up at auction and stricken off to the bidders, the bidders, bound by the conditions, to pay down on the day of sale five per cent. of the purchase price, and to pay the residue and receive their deeds on the 25th of July. The cash payments were not made, nor does it appear that any purchaser made tender of the purchase price or demand for his deed, on the 25th. No deed passed. The attempt to sell proved, in fact, abortive, and the respondent accordingly, on the 2d of August, in effect saying to the world that no sale had been made on the 15th, advertises the said parcels for sale anew, as above stated. The new sale if made, so far as appears, would be nothing more, nothing less, than a sale under the power by the mortgagee, as would have been the first, had it been consummated by payment and conveyance. The adding to the advertisement the note, that the property will be sold for account of whom it may concern, cannot be construed as affecting the rights and duties of the assignee and the mortgagee, as indicated or defined in Re Snedaker, above quoted. The petition in bankruptcy against the mortgagor having been filed on the 17th of July, and he having been declared a bankrupt on the 26th, his property of every kind passed into the custody of the law, as of the 17th, and thereafter, the rights and powers of the mortgagee creditor were such, and such only, as are by the bankrupt law ac-

[2] [See note at end of case.]

corded to such a creditor, under such circumstances; and under that law, as we have seen, any sale of the property not authorized by the court's order, or approved by the assignee, must be held by the bench to be without law and against law.

I must be understood as here speaking only of the two parcels in question, of which no conveyance has been made. Of the dealings of the mortgagee, after the 17th of July, with or in relation to other parcels struck off at the auction of the 15th, I have no occasion here to speak. Those dealings, for aught that I would here be understood to intimate, even by implication, may have been unexceptionable in any court, whether of law, equity or bankruptcy. Sufficient it is that I here adjudge that the mortgagee's attempt or purpose to make sale anew of the aforesaid two parcels, is one which the court, on the assignee's petition, is bound to enjoin. Upon that officer the law devolves the responsibility of administering the assets of the bankrupt, empowering him to adjust the claims of mortgage and other lien creditors as he best may, or to surrender to the encumbrancer the property in question; or to dispose simply of the bankrupt's interests in the same, or (the court so ordering, upon cause shown) to sell the encumbered or mortgaged property free and exempt from all claims whatsoever, and thus compel the lien creditor to prosecute his claim against the proceeds of sale deposited in the court's registry, in manner and mode as prescribed in the bankrupt act. Upon the assignee, I repeat, the law imposes this responsibility, and confers these powers and rights; and, as is obvious, not unwisely. He is the creditor's as well as the court's officer, chosen by them, and it is to be presumed that the creditors always look to it that their nominee is in all regards competent and trustworthy. Finally, until better advised, the court must hold and rule that on the appointment of the assignee, the legal duty of the mortgagee respondent was to report to him, the assignee, the state and condition of affairs as between himself and the bankrupt's property under encumbrance to him, and devolve upon him the responsibility of repudiating or enforcing the contracts, if any, which he, the mortgagee, acting on behalf of the bankrupt mortgagor, had completed or initiated. The bankrupt law, while (as held in this district,) it requires the assignee to regard and respect all existing equities between the bankrupt and his creditor claimants, secured and unsecured, rightfully, on the other hand, requires, unless otherwise agreed and arranged with the assignee, that such claimants, the secured as well as others, shall make proof of their claims, in the mode and manner prescribed by that act, as a condition precedent to the payment of, or any payment on account of such claims. The assignee, it must be borne in mind, is the agent and representative of the secured creditor as well as of the unsecured, and bound, therefore, if satisfied that a claim is just, and a valid encumbrance, to arrange for its satisfaction at the earliest moment possible:—and it is not unusual in this district to insert in an order for a sale of property free from all encumbrances, a direction that the amount agreed or ascertained to be due an encumbrancer, be paid by the purchaser to him, as the equitable owner rather than to the assignee vendor.

Of the policy or impolicy of exposing the said two lots at auction a second time, under the mortgages, as advertised, I deem it necessary to say but a few words. One fact is in itself conclusive. The mortgagee has once sold them;—but the purchasers, under advice, distrusting the title proffered, refuse to accept their deeds, and this, it is admitted at the bar, is now known to the public at large, and were it not would necessarily be made known on the auction ground. Who, the petitioner may well ask, can be expected to bid for them, agreeing to take the title offered, even the half of their market value, assuming the title were unexceptionable? There is now,—rightfully or wrongfully,—a cloud dark and dense upon the title. Such is the fact, and in view of that, and irrespective of other considerations that might be suggested, it may well be doubted if the interests of any party can by possibility be promoted by a sale as contemplated by the respondent. That such a sale may, not to say must, prove injurious to the interests of the creditors at large is apparent,—assuming, as the court must, in view of the allegations in the complainants' bill, and his affidavits, that after satisfying all valid encumbrances upon the estates in question, there may remain a balance—more or less—for distribution among creditors in general.

If it were a conceded fact, as alleged by the respondent, that the property embraced by his mortgages, cannot by possibility be made to yield the amount justly due him, and also conceded that his mortgages are all valid and operative, as he deems them to be, and his claims under them indisputable, and that the sales of the 15th of July were not open to question, it might well be expected that between him and the assignee no controversy would arise. The assignee, it is to be presumed, would consent that the respondent deal with the property as he should see fit, without interference on his part. But unhappily, upon each and all of these points, the parties are as yet, according to the record, widely at variance, and upon and in regard to them, therefore, the court cannot, at this stage of the suit, express, entertain, or even form an opinion. Injunction as prayed for will be ordered.

[NOTE. The following case, cited in the text, is reprinted from 3 N. B. R. 629 (Quarto, 155), by permission.]

In re SNEDAKER.

(Supreme Court of Utah Territory.)

HAWLEY, J. The question before the court is a motion made on the part of Henry J. Faust, assignee in bankruptcy of the estate of

the said J. M. Snedaker, based upon the opinion of the said assignee, setting forth, among other things, that F. D. Clift, one of the creditors of said bankrupt, held a mortgage lien upon certain real estate mentioned in said petition, belonging to the said estate, as security for the payment of a certain debt of the said bankrupt, in the sum of six thousand dollars, and that the said Clift, without regard to the said bankrupt proceedings, had commenced independent proceedings in the Third judicial court to foreclose his said mortgage, and that such proceedings were now pending and undetermined therein, and thereby prayed that an injunction might issue to restrain said proceedings, etc.

In examining this case, it must be borne in mind that the primary and chief design of the bankrupt act is to distribute the bankrupt's estate among his creditors, under the provisions of the act. Mortgage and other liens that have been obtained fairly and in good faith are recognized and protected by the act when the mortgagee or lawful holder thereof conforms to its provisions for the purpose of establishing and realizing upon such security. But, to do this, the secured creditor, in availing himself of such special priority over other creditors, and especially after insolvency and bankruptcy, and notice thereof, have taken place, and proceedings in bankruptcy have been commenced against the mortgagor, who has been duly adjudged a bankrupt, as in the case at bar, must take notice of such proceedings, and have due respect to the same, as well as to the provisions of the bankrupt act under which they have been commenced, or otherwise confusion would be liable to arise between conflicting rights and interests, and thereby some of such rights might be placed in jeopardy. All the other creditors, who have recourse only upon the remaining estate, have equities in the mortgaged estate; and wherefore such equities should be carefully watched and protected, and, if possible, made available for the universal good of such other creditors.

In weighing the very able arguments of counsel on both sides of the question, and in applying the several authorities introduced by counsel, and in order to a just and proper appreciation of them, it becomes necessary to analyze the several bankrupt acts upon which they were severally made; or, at least, so far as the motion under consideration renders it necessary. In doing this, we will give a synoptical statement of the acts of 1841 and 1867, or rather of such sections of them, respectively, as bear upon the questions involved.

By the act of 1841 (sections 3, 5, 6, and 11) we find the following powers granted: First. The jurisdiction of the court extended to all cases, and controversies in bankruptcy between bankrupt and creditors, to all cases and controversies between creditors and assignee, to all cases and controversies between assignee and bankrupts, and to all acts, matters, and things to be done under the bankruptcy until the final distribution and settlement of the estate, and the close of all the proceedings in bankruptcy. See section 6. Second. The assignee was invested with all the rights and powers of the bankrupt. Section 3. Third. All suits in law or equity pending, in which the bankrupt was a party, could be prosecuted and defended by the assignee to a final conclusion. Section 3. Fourth. All creditors proving their debts could not maintain any suit at law or in equity against the bankrupt. Section 5. Fifth. "The assignee has full power and authority, under the directions of the court, to redeem mortgaged or other pledged property, real and personal, and to discharge such liens therefrom." Section 11.

By the act of 1867, we have the following provisions: "Jurisdiction of Court. The jurisdiction of the bankrupt court shall extend to all cases and controversies arising between the bankrupt and creditors who shall claim any demand under the bankruptcy; to all collections of the assets of the bankrupt; to the ascertainment and liquidation of liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties, and the due distribution of the assets among all the creditors." Section 1. "Powers of Assignee. The assignment shall relate back to the commencement of proceedings in bankruptcy, and by operation in law the title of all real and personal estate shall rest in the assignee, though attached by mesne process within four months; all rights of redeeming of the estate, all rights in equity, choses in action, patents and patent rights, and copyrights, all debts due him or to others for his use, and all liens and securities therefor; he may sue for and recover the estate, debts, and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy." Section 14. "No person shall be entitled to maintain an action against an assignee, for anything done by him, without twenty days' notice," etc. "The assignee shall have authority, under direction of the court, to redeem or discharge any mortgage, or conditional contract, or pledge, or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the consideration thereof, or to sell the same, subject to such mortgage lien, or other incumbrances. The assignee shall demand and receive from all persons holding the same, all the estate assigned or intended to be assigned under this act," etc. Section 15. "If an action is pending in behalf of the debtor, the assignee shall be admitted to prosecute the action in his own name." Section 16. "First. When a creditor has a mortgage or pledge of real or personal property, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be first admitted as a creditor only on the balance after deducting the value of the property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court may direct; or, Second. The creditor may release or convey his claim to the assignee, upon such property, and be admitted to prove his whole debt; or, Third. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or, Fourth. The assignee may sell the property, subject to the claim of the creditor thereon. Whichever course of policy may be adopted, the assignee or creditor respectively, shall execute all deeds and writings necessary to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt." (Section 20.) "Creditors proving their claims are not allowed to maintain any suit at law or in equity against the bankrupt." Section 21. "No creditor, whose debt is provable under the act, shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the debtor's discharge shall have been determined. If, however, the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment to ascertain the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."

By a careful examination of the above abstract of the said provisions of these two bankrupt acts, it will be observed, that the act of 1867 contains, upon the questions involved in the motion under consideration, many provisions not in the act of 1841. In addition to the jurisdiction conferred upon the federal courts by the act of 1841, we find the act of 1867 to

contain authority for the ascertainment and liquidation of liens, and other specific claims for the adjustment of the various priorities and conflicting interests of all parties concerned, and for the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors, under the acts. In addition to the act of 1841, the assignee can sell mortgaged property subject to liens, or, by agreement with the holder of the security, fix the value of the incumbered property over that of the debt for which it is held as security, or release to the creditor the bankrupt's right of redemption, on receiving from him the excess of the value of the mortgaged property over that of the debt, and may, with the bankrupt, execute deeds to such mortgaged property when so disposed of. The assignee, as a further power, may also receive or demand, from all persons holding the same, all the estate assigned or intended to be assigned under the act. And, as a further power, it prohibits all creditors, whose debts are provable under the act, from prosecuting to final judgment any suit at law, or in equity therefor, against the bankrupt, until the debtor's discharge shall have been determined. And, as a further power, it provides, that, if such mortgaged property is not sold, or released, or delivered up to the assignee, the creditor holding the same shall not be allowed to prove any part of his debt. In addition to these further powers under the act of 1867 to the prescribed oath of a secured creditor, set forth in form No. 21, which must be considered and taken to be, so far as it has application, a part of the act itself, this prescribes, after setting forth and describing the secured creditor's claim, that the bankrupt is justly and truly indebted to him in the sum of ——— dollars, for which said sum, or any part thereof, he has not, nor has any person by his consent, order, or to his knowledge or belief, for his use, received any security or satisfaction whatsoever, save and except the mortgage hereinafter mentioned; that the claim was not procured for the purpose of influencing the proceedings under the act of congress entitled, "An act to establish an uniform system of bankruptcy throughout the United States," approved March 2, 1867. That no bargain or agreement, expressed or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of said claim, or any part thereof, against said bankrupt, or to take or receive, directly or indirectly, any money, property, or consideration whatsoever, whereby the vote of such creditor for assignee, or any other action on the part of such creditor, or any other person, in the proceedings, under said acts, has been, is, or shall be, in any way affected, influenced, or controlled; and then further prescribes that such creditor shall add to such proof of his claim a particular description of the debt, and also of the property held by him as security, and the estimated value of such security or property.

These additional powers, contained in the act of 1867, are very great, and seem to justify the conclusions that all the property and equities of the bankrupt, whether mortgaged, pledged, or otherwise encumbered, and in whosesoever hands the same may be, shall be delivered up to the assignee, subject to all bona fide liens, to be by him disposed of for the benefit of the creditors; and, further, that the avails thereof be distributed by him to the creditors under the act; and that, in the sale of mortgaged or other pledged property, he shall have due respect to such liens thereon. It is but just, as well as a compliance with the spirit, if not with the letter, of the act, that all the property, rights, and equities of the bankrupt should not only pass to, but be actually taken and disposed of or converted into money by, the assignee, and then distributed by him under the act, according to the rights of the several creditors, having respect to priorities. It is but just, as well as a compliance with the spirit, if not with the letter, of the act, that the secured creditors, as well as the others, should be required, under the solemnities of a proper oath or oaths, to prove before the register their several claims, and the value of the property held by them for the security of their claims; or otherwise a wide door would be left open for the perpetration of fraud against all other creditors. By the act of 1841 no creditor or other person coming in and proving his debt or other claims shall be allowed to maintain any suit at law or in equity therefor; but by the act of 1867, in addition to the above provisions, it is further provided: "No creditor whose debt is provable under the act, shall be allowed to prosecute to final judgment any suit at law or in equity therefor, against the bankrupt, until the debtor's discharge shall have been determined" (see section 21); and, by the 20th section: "A creditor having a mortgage or pledge of real or personal property, or a lien thereon for securing the payment of a debt owing to them from the bankrupt, he shall be admitted as a creditor only on the balance, after deducting the value of the property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court may direct," etc. By the terms of the act of 1867, it is manifest that a secured creditor, by proving his claim against the bankrupt before the register, who in and by a proper oath sets forth and particularly describes his mortgage, lien, or other security, and the property so pledged and its value, and thereby claims to be entitled to share in the balance of the assets for only the balance of his claim, after realizing what he may out of his said securities, must and will be fully protected by the bankrupt court in his rights in the premises according to such proof. Such proof, so far from destroying or making void his mortgage, lien, or security, establishes the same, and also secures to himself, with it, his right under the act to share in all other of the assets of the bankrupt with other creditors, for whatsoever balance of his said claim as remains unpaid after giving full and exact credit for the amount he may have realized upon the sale of the property so pledged to him in good faith.

For just and equitable purposes, and to guard against fraud, the act rightfully takes the pledged property or lien out of the power of the secured creditor's control or management, in reducing it to money in his chosen way, without responsibility, and places it in the hands of the assignee of the bankrupt, who, being an agent of the court, and at the same time the representative of the rights of all parties in interest, is supposed to be above all temptation to fraud; and directs him in such capacity, and under the pledge of his official bond as assignee, and under the directions of the court, to convert such mortgaged or pledged property into money, and to distribute the same under the provisions of the act, with due regard to all priorities shown to exist in the proceedings of bankruptcy by the proof of the claims against the bankrupt. So far from taking any right or rights from the secured creditors under the mortgaged lien or pledge by which he holds the same, it simply regulates the modes and means of foreclosing the mortgage or other lien, and of reducing such security to money, in order that the court may be able to enforce exact justice, and so that the rights of all the creditors are secured to them under the proof of claims and under the law. If, by some of the provisions of the act, there is a seeming right of the secured creditor to stay out of the bankrupt court with his claim, and pledged property of the bankrupt to secure the same, and also a seeming right to be left alone with both claim and security, with the right, by himself, or under the powers and jurisdiction of some other court, to foreclose and sell the same, and

liquidate his own debt, and to return the balance, if any, to the bankrupt, or to the assignee of the bankrupt, yet it must be conceded that there are other provisions, which we have above set forth, which, properly, or even strictly, construed, prohibit such creditor from so doing, and compel him to come into the bankrupt court for his rights under the act. It is a general rule that the several provisions of the act must be so construed as to gain effect and harmony to the same in its true spirit and manifest intention of the same; its primary and chief design being, as we have before said, to distribute the bankrupt's estate among his creditors according to justice and equity, having due regard to all priorities, mortgages, and liens under the act; and for that purpose, and to that end, the court being granted equitable jurisdiction, and clothed with all powers, at law or in equity, over all matters pertaining to the bankrupt's estate, with the especial view to carry out such designs, the conclusion that all the property, choses in action, and effects, and interest, and equities of the bankrupt must be brought into the bankrupt court for settlement, disposition, and distribution under the act, is inevitable. Sections 1, 14, 15, 16, 20, 21.

The authorities cited by counsel in behalf of the said secured creditor were rendered under the act of 1841, and while they are sound and controlling under that act, and the state of facts they set forth, they are not in point nor of weight under the provisions of the act of 1867, on the points arising in this case. In re Davis [Case No. 3,618], decided by his honor, Judge Treat, of Missouri, is not strictly in point, yet it approaches so near in principle, that it sheds much light upon the questions involved in the motion under consideration. While we are not now called upon to decide the question which he decided in that case, still we must say that much of his argument commends itself to our judgment; but we are not quite prepared to say with him, as he said in that case, that a sale under such circumstances, made by a trustee or mortgagee, is absolutely void. Nor are we prepared to say that he is not right, but we have no hesitation in saying that such a sale, in our judgment, would be voidable.

From the premises and conclusions above expressed, it is manifest that this court has jurisdiction over the property mentioned in the bankrupt's petition, and has power to restrain the said secured creditor and other persons from prosecuting in the said district court the said proceedings to foreclose said mortgage lien upon the said property; and we are also of the opinion that, under the circumstances, facts, provisions, and powers of the bankrupt act, this court, having jurisdiction, is bound to exercise the same, and that, therefore, an order should be made in this case in conformity to the prayer of the said petitioner.

STRICKLAND, J. I fully concur in the above opinion.

Case No. 17,579a.

WHITMAN v. JAMES.

[5 Ban. & A. 575.] [1]

Circuit Court, S. D. New York. July, 1880.

PATENTS—PRELIMINARY INJUNCTION.

In this case a preliminary injunction was granted, restraining the infringement of the complainant's patent by the defendant.

This was a motion for a preliminary injunction to restrain the infringement of letters patent, No. 199,948, granted to James G. Wilson, February 5th, 1878, for an improvement in connecting blind slats, consisting of a peculiarly shaped distance-piece in combination with the suspending wires and diamond-shaped slats. A defence of want of novelty was set up on the ground that one Niernsee had suggested taking mortised pieces of wood similar to the blind, and using them to cover up the steel band where it showed between the slats; and also by reason of the English patent to Alexander Clark, No. 1,803, of 1863. The title of the complainant [Edmund S. Whitman] was also disputed, on the ground of certain partnership arrangements between Wilson, the patentee, and the defendant [John D. James].

Francis Forbes, for complainant.

Samuel Keeler and W. C. Donn, for defendant.

BLATCHFORD, Circuit Judge. That the defendant has infringed the claims of No. 199,948 is plain and is not denied. The English patent No. 1,803 fails to show the characteristic of No. 199,948, which is that the distance-pieces are to be cut to exactly equal lengths, and the cut ends are to be parallel to each other, and are to come in contact with the upper and lower surfaces of the slats, and are to be parallel to such surfaces, and that at the same time such surfaces are placed at an angle with the vertical supporting wires, and the upper edge of each slat is above the lower edge of the slat above it, the blind being an open blind and not a close blind. The suggestion of Niernsee did not go to the extent of the invention.

Whatever right the defendant had to use the patent expired when the last partnership was dissolved. The title of the plaintiff is clear. There has been sufficient acquiescence and possession.

The injunction is granted as to No. 199,948.

WHITMAN (PITTS v.). See Case No. 11,196.

WHITMAN (WHITE v.). See Case No. 17,561.

WHITMAN, The ABBY. See Case No. 15,

WHITMORE (MARSH v.). See Case No. 9,122.

Case No. 17,580.

In re WHITNEY et al.

[2 Lowell, 455; [1] 14 N. B. R. 1; 8 Chi. Leg. News, 195.]

District Court, D. Massachusetts. Dec., 1875.

BANKRUPTCY — OBJECTIONS TO DISCHARGE — CONSENT OF CREDITOR—PECUNIARY CONSIDERATION—FRAUD.

1. If the assent of a creditor to the discharge of a bankrupt is procured by a pecuniary con-

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

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

sideration moving from a third person, with no conceivable motive but to benefit the debtor, the presumption is very strong that the payment was made in behalf of the bankrupt.

2. Where a creditor, whose debt, after being proved, had been bought for more than its value by the brother of one of a bankrupt firm, signed an assent to the discharge of both bankrupts, and there was a signature later than his, under circumstances which proved that the assent was influenced by the purchase, *held*, that the privity of the bankrupt to the fraud was immaterial, and the bankrupt's discharge was refused.

[Cited in Re Sawyer, Case No. 12,395.]

3. Where an assent to the discharge of two bankrupt partners was written on one piece of paper, and the signature of a creditor was procured by a pecuniary consideration in behalf of one bankrupt, *held*, that neither could be discharged.

[In the matter of Whitney & Munson, bankrupts.]

R. M. Morse, Jr., for opposing creditors.

N. B. Bryant, for bankrupts.

LOWELL, District Judge. The third specification of objection to the discharge of the bankrupts is, that they, or some person in their behalf, procured the assent of Reuben G. Morse, a creditor, to their discharge, by the payment of money. The evidence tended to show that the brother of one of the bankrupts bought the claim of Morse, which had been proved against the estate; that the name of Morse is signed to the assent after four others, and before the sixth and last. It appeared that the negotiation for the purchase of this debt was conducted like any other purchase, Morse asking $300, and obtaining only $200. Nothing was said about discharge, so far as the witnesses recollected, and it was not proved when the assent was given. The brother testified that he bought the debt for the chance of the dividend, that he had had no communication with the bankrupts before buying, and that afterwards his brother told him he did not want to hear any thing about it, lest fraud should be charged. I am satisfied, from the clear weight of the evidence, that no one of ordinary business capacity could have bought this debt with any expectation of a dividend exceeding $200; for this, among other reasons, that he could probably have bought the whole assets for that price, instead of a rather small fraction thereof. Upon the whole, I feel justified in believing, though against the positive testimony of the purchaser, that he must have had some other end to attain than the receipt of a dividend; and none can be thought of but that which was attained. By the English law, when the certificate of discharge required the assent of creditors, it was held to have been obtained by fraud, if any one, even without the knowledge of the bankrupt, paid money to induce a creditor to sign it. Robson v. Calze, 1 Doug. 228; Holland v. Palmer, 1 Bos. & P. 95. Lord Eldon regretted that the law had gone to such a length as to make void a certificate obtained by inducements offered to a friend or enemy, without any privity on the part of the bankrupt, and when, as he said, the bankrupt perhaps would have abhorred such means of procuring it. Ex parte Butt, 10 Ves. 359; Ex parte Hall, 17 Ves. 62. And he is said to have permitted a bankrupt in one case to apply for his discharge anew. Ex parte Harrison, Buck, 227, note.

Our statute speaks of a consideration given "in behalf" of the bankrupt, and was perhaps intended to vary the strict rule to some extent.

[I have held that where the evidence was clear and undisputed that the opposition of a creditor had been bought off by one who was a surety of the bankrupt on certain bonds in court, which it was for the interest of the surety to have discharged, and the surety acted wholly on his own account and without consultation with or care for the bankrupt, the discharge could not be vacated for that cause; the payment not having been one in behalf of the bankrupt, in the sense of the law. That creditor had signed no assent.] [2] Ex parte Briggs [Case No. 1,868]. But I observed in that case that different considerations might arise when a signature of a creditor had been obtained by money and placed upon the paper in such a way that it might have influenced other creditors to sign. This has been always held to be in itself a fraud on creditors, independently of any clause in a statute, and without regard to who has done it. Jackson v. Lomas, 4 Term R. 166; Leicester v. Rose, 4 East, 372; Dauglish v. Tennent, L. R. 2 Q. B. 49; Philips v. Dicas, 15 East, 248. There is, besides, this circumstance in the present case: that the payment was made by a friend, with no conceivable motive but to benefit the bankrupt. In such a state of things it would be unsafe not to have the presumption a very strong one, I will not say conclusive, that such a payment is made in the debtor's behalf. In many of the decided cases it has appeared that the consideration has moved from a friend or relative of the debtor, and it would be very easy, of course, to conceal the motive. If it were clearly proved, as in the case already referred to, that a distinct and intelligible motive had influenced the action of the third person, and that the debtor was ignorant of the action until after it had been committed, I am still of the opinion that the certificate ought not to be refused, unless other creditors may have been misled. I do not find that the debtors have made out such an exceptional case. I am obliged to say "debtors," because the paper was a joint one; and, though the claim was bought by the brother of only one of them, it operates to the advantage of both, and must be presumed to have been done in behalf of both. Discharge refused.

[2] [From 14 N. B. R. 1.]

Case No. 17,581.

In re WHITNEY.

[18 N. B. R. 563.] [1]

District Court, S. D. New York. Jan. 9, 1879.

BANKRUPTCY—STAY OF PROCEEDINGS—REMEDY BY ARREST.

1. A stay of proceedings, subsequent to final judgment, for the purpose of putting in motion the remedy of arrest which is reserved to the creditor, is not allowable under sections 5106, 5107, Rev. St. U. S.

[Cited in Re Pitts, Case No. 11,190.]

2. Prior to the commencement of the proceedings in bankruptcy, a surrogate's decree was docketed against the bankrupt for the payment of moneys misappropriated by him as administrator, and an appeal taken from a decision of the surrogate refusing an application for a commitment of the bankrupt for failure to pay. Upon such appeal, pending the bankruptcy proceedings, the decision of the surrogate was reversed, and the proceedings remitted to him, to enforce the proper remedy against the person of the bankrupt. *Held*, that the proceedings could not be stayed, under section 5106, so as to prevent an application to the surrogate for a commitment.

[In the matter of Oliver B. Whitney, a bankrupt.]

Bernard & Fiero, for the motion.

Chas. A. Fowler, for the bankrupt.

CHOATE, District Judge. This is a motion to vacate or modify a stay of proceedings. The creditor, Townsend, is the owner, by assignment, of certain claims against the bankrupt for moneys received by him as administrator, and which he has misappropriated, for the payment of which a final decree was entered by the surrogate, which decree has been docketed and an execution issued thereon returned unsatisfied. The surrogate, on the 7th of May, 1878, refused the petitioner's application for a commitment of the bankrupt for failure to pay said moneys, on the ground that the claim was merged in a judgment recovered by her against the administrator and his sureties on his administrator's bond. She appealed to the general term of the supreme court, and on the 19th of September, 1878, the decision of the surrogate was reversed, and the proceeding was remitted to the surrogate for the enforcement of the proper remedy against the person of the bankrupt. Thereupon the bankrupt appealed to the court of appeals, where the judgment of the supreme court was affirmed. The debtor's petition in bankruptcy was filed August 31, 1878, pending the first appeal. On the 13th of December, 1878, on affidavit by the bankrupt that the proceeding sought to be stayed was on a provable debt, this stay was granted. The proceedings before the surrogate prior to the application for a commitment were equivalent to a final judgment for these moneys, and what the judgment creditor now seeks to do is to obtain from the surrogate the order for the commitment of the bankrupt which the surrogate before refused, and to proceed on that to his arrest. If the order of arrest had been actually procured before the bankruptcy, and were now in force, the arrest would not be enjoined or discharged, because the debt was clearly one, as the state supreme court and court of appeals have held, created by the defalcation of the bankrupt while acting in a fiduciary character, and therefore not dischargeable in bankruptcy. The finding of the state court thereon is conclusive in this court. It has been held that whether a debt is dischargeable or not, proceedings will be stayed pending the application for a discharge, if the debt is provable (In re Rosenberg [Case No. 12,054]), and this claim is clearly provable. But the question now raised is, whether, under section 5106, the proceedings should be stayed, so as to prevent an application to the surrogate for a commitment. That section forbids the carrying-out of any suit to final judgment pending the question of the discharge. It seems that where the suit has already proceeded to final judgment before the bankruptcy, this section does not authorize the stay of proceedings to enforce that judgment against the person of the bankrupt by arrest, where the arrest is not forbidden by section 5107, and I think that a fair construction of the two sections does not allow a stay of a proceeding, subsequent to final judgment, for the purpose of putting in motion the remedy of arrest which is reserved to the creditor. Proceedings subsequent to final judgment, which would operate to affect the property of the bankrupt, are stayed upon a different principle, and to prevent interference with his estate, to which creditors, through the assignee, are entitled. See In re Vogel [Id. 16,983].

Stay modified, so that it shall not prevent proceedings upon the basis of the surrogate's decree for commitment and arrest of the bankrupt.

[1] [Reprinted by permission.]

WHITNEY, In re. See Case No. 4,672.

WHITNEY (ALBERS v.). See Case No. 137.

Case No. 17,582.

WHITNEY v. ARTHUR.

[Cited in Birtwell v. Saltonstall, 39 Fed. 384, and referred to in executive document No. 22, p. 52, 47th Cong. U. S. Nowhere reported; opinion not now accessible.]

WHITNEY (BENTON v.). See Case No. 1,335.

WHITNEY (BLANCHARD v.). See Case No. 1,519.

Case No. 17,583.

WHITNEY v. CARTER.

[Fess. Pat. 130.]

Circuit Court, D. Georgia. 1810.

PATENTS—WHAT IS PATENTABLE—EFFECT OF IMPROVEMENTS—WHITNEY COTTON GIN.

[1. A patent is not grantable for a principle merely, but only for an application of a prin-

ciple, whether previously known or not, to some new and useful purpose.]

[2. To defeat a patent an alleged concealment of a part of the invention must appear to have been made, for the purpose of deceiving the public, and a mere error of judgment, at the time of applying for the patent, in determining what was the best form to be given to a particular feature of the machine, will not have that effect.]

[3. The Whitney patent for a cotton gin discloses an extremely useful and novel invention, and is valid.]

At a circuit court of the United States for the district of Georgia was tried the case of Eli Whitney v. Isaiah Carter, for infringing a right vested by patent for a new and useful improvement in the mode of ginning cotton. The plaintiff supported his declaration by proving the patent, model, and specification, and proving the use of the machine in question by the defendant. He also introduced the testimony of several witnesses, residing in New Haven, to prove the origin and progress of his invention. The defendant rested his defence on two grounds —First, that the machine was not originally invented by Whitney; second, that the specification does not contain the whole truth relative to the discovery.

General Mitchel, of counsel for the defendant, produced a model, which was intended to represent a machine used in Great Britain for cleaning cotton, denominated the "Teazer" or "Devil." A witness was produced who testified that he had seen in England, about seventeen years ago, a machine for separating cotton from the seed which resembled, in principle, the model now exhibited by the defendant. Another witness testified that he had seen a machine in Ireland, upon the same principle, which was used for separating the motes from the cotton, before going to the carding machine. By the machine, of which a model was exhibited, the cotton is applied, in the first instance, to the rollers, made of iron, revolving inversely. By these rollers the fibres are separated from the seeds, and protracted within the sweep of certain straight pieces of wire, revolving on a cylinder, which tear and loosen the cotton as they revolve. It was contended by the defendant's counsel that this model conforms in principle to Mr. Whitney's machine; and that the evidence given in support of it established the presumption that he must have derived the plan of his machine from a similar one, used in the manufactures in Great Britain.

In support of the second ground of defence, evidence was produced to show that Mr. Whitney now uses, and that the defendant also uses, teeth formed of circular plates, instead of teeth made of wire. And it was contended that this was a departure from the specification, and an improvement on the original discovery, which destroys the merit of that discovery and the validity of the plaintiff's patent. It was also contended that the plaintiff had concealed the best means of producing the effect contemplated.

Mr. Noel, of counsel for the plaintiff, in opposition to the first ground of defence, stated two points: (1) That if the principle be the same, yet the plaintiff's application of the principle, being new, and for a distinct purpose, has all the merit of an original invention. (2) That the principle of Mr. Whitney's machine is entirely different from that exhibited by the defendant. He defined the term "principle," as applied to the mechanic arts, to mean the elements and rudiments of those arts, or, in other words, the first grounds and rule for them. That for a mere principle a patent cannot be obtained. That neither the elements, nor the manner of combining them, nor even the effect produced, can be the subject of a patent; and that it can only be obtained for the application of this effect to some new and useful purpose. To prove this position several examples were stated of important inventions, for which patents had been obtained, which had resulted from principles in common use, and an argument of a celebrated judge at Westminster Hall was cited, in which it was asserted that two thirds or three fourths of all patents granted since the statute passed are for methods of operating and manufacturing, producing no new substances, and employing no new machinery; and he adds in the significant words of Lord Mansfield: "A patent must be for a method detached from all physical existence whatever."

The second point was principally relied on, to wit, that the principle of Mr. Whitney's machine is distinct from that produced by the defendant, and new in its origin. It consists of teeth, or sharp metallic points, of a particular form and shape, and its application is to separate cotton from the seed; whereas, the principle of that model exhibited by the defendant, and of every other machine before invented, and used for the same or a similar purpose, consists of two small rollers, made of wood or iron. In illustration of this point, the plaintiff's counsel cited the following extracts from the opinion of the court, delivered by Judge Johnson, in December term, 1807, in the case of Whitney and others v. Fort,[1] upon a bill of injunction.

"To support the originality of the invention, the complainants have produced a variety of depositions of witnesses, examined under commission, whose examinations expressly prove the origin, progress, and completion of the machine by Whitney, one of the co-partners. Persons who were made privy to his first discovery testify to the several experiments which he made in their pres-

[1] [Also cited in Motte v. Bennett, Case No. 9,884; Wilton v. Railroad, Id. 17,857; and Phil. Pat. 416. Nowhere reported; opinion not now accessible.]

ence, before he ventured to expose his invention to the scrutiny of the public eye. But it is not necessary to resort to such testimony to maintain this point. The jealousy of the artist to maintain that reputation which his ingenuity has justly acquired urged him to take unnecessary pains on this subject. There are circumstances within the knowledge of all mankind, which prove the originality of this invention more satisfactorily to the mind than the direct testimony of a host of witnesses. The cotton plant has furnished clothing to mankind before the age of Herodotus. The green seed is a species much more productive than the black, and by nature adapted to a much greater variety of climate; but by reason of the strong adherence of the fibre to the seed, without the aid of some powerful machine for separating it than any formerly known among us, the cultivation of it could never have been made an object. The machine, of which Mr. Whitney claims the invention, so facilitates the preparation of this species for use, that the cultivation of it has suddenly become an object of infinitely greater importance than that of the other species ever can be. Is it then to be imagined that if this machine had been before discovered, the use of it would ever have been lost, or could have been confined to any tract of country left unexplored by commercial enterprise? But it is unnecessary to remark further on this subject. A number of years have elapsed since Mr. Whitney took out a patent, and no one has produced, or pretended to prove the existence of, a machine of similar construction or use."

With regard to the utility of this discovery, the court would deem it a waste of time to dwell long on this topic. Is there a man who hears us who has not experienced its utility? The whole interior of the Southern states was languishing, and its inhabitants emigrating, for want of some objects to engage their attention, and employ their industry, when the invention of this machine at once opened views to them which set the whole country in active motion. From childhood to age, it has presented us a lucrative employment. Individuals who were depressed with poverty, and sunk in idleness, have suddenly risen to wealth and respectability. Our debts have been paid off, our capitals increased, and our lands have trebled in value. We cannot express the weight of obligation which the country owes to this invention; the extent of it cannot now be seen. Some faint presentiment may be formed from the reflection that cotton is rapidly supplanting wool, flax, silk, and even furs, in manufactures, and may one day profitably supply the want of specie in our East-India trade. Our sister states also participate in the benefits of this invention; for, besides affording the raw materials for their manufactories, the bulkiness and quality of the article afford a valuable employment for their shipping.

The second objection relied on by the defendant was "that the specification does not contain the whole truth respecting the discovery." To this it was answered that by the testimony it appears Mr. Whitney, in the original construction of his machine, contemplated each mode of making the teeth, and doubted which mode was best adapted to the purpose. If the alteration, which forms the basis of this objection, has the merit of an improvement, how far does it extend? An improvement, not in the principle, nor in the operation of the machine, but in making one of its component parts, merely in forming the same thing to produce the same effect by means somewhat different. In the case above cited, Judge Johnson remarked on this point as follows: "A Mr. Holmes has cut teeth in plates of iron, and passed them over the cylinder. This is certainly a meritorious improvement in the mechanical process of constructing this machine. But at last, what does it amount to, except a more convenient mode of making the same thing? Every characteristic of Mr. Whitney's machine is preserved. The counsel for Whitney admitted that an improvement in a particular part of the machine would entitle the inventor to a patent for that specific part, but not for the whole machine, as in the case of Boulton v. Bull [2 H. Bl. 463], where a patent was granted for an invention to lessen the quantity of fuel in the use of a certain steam engine." It was decided "that the patent was valid for the improvement, but that it gave no title to the machine itself."

It was also stated that by experiments made on the plaintiff's model, in the face of the court and jury, and by testimony produced, it was apparent no improvement had resulted from this alteration; that no beneficial change, or amendment in the principle had taken place; nor had the effect been aided or facilitated. In the charge of the court to the jury, Judge Stevens remarked that the case cited, Whitney and others v. Fort, was decided without any evidence on the part of the defendant; that, from the testimony now produced, his opinion is that the plaintiff must have received his first impressions from a machine previously in use on a similar principle; and that an improvement had been made as to the teeth, by which the merit of Mr. Whitney's invention was diminished. For these reasons, Judge Stevens had some doubts whether the plaintiff ought to recover. Judge Johnson remarked that, after hearing the evidence which had been relied on by the defendant, he remained content with the opinion which he had given in the case of Whitney against Fort; and that he was also as fully satisfied with the charge he was about to give as any he had delivered. That, as to the origin of this invention, the plaintiff's title remained unimpeached by any evidence which has been adduced in this cause. He agreed with the plaintiff's counsel that the legal title to a patent consists, not in a principle merely, but in an application of a principle, whether previ-

ously in existence or not, to some new and useful purpose. And he was also of opinion that the principle of Mr. Whitney's machine was entirely new, and that it originated with himself, and that it had no resemblance to that of the model exhibited by the defendant.

He considered the defendant's second objection equally unsupported, and referred to the sixth section of the patent laws of the United States, by which it is required that the concealment alleged, in order to defeat the patentee's recovery, must appear to have been made for the purpose of deceiving the public. That Mr. Whitney, in the original formation of this machine, could have no motive for such concealment, and that in making use of wire in preference to any other mode he appears to have acted according to the dictates of his judgment. The error related to a point not affecting the merits of his invention, or the validity of his patent. Verdict for the plaintiff. Damages $1,500.

WHITNEY (CONSOLIDATED FRUIT-JAR CO. v.). See Cases Nos. 3,132–3,134.

WHITNEY (COOK v.). See Case No. 3,166.

Case No. 17,584.

WHITNEY v. EAGER.

[Crabbe, 422.] [1]

District Court, E. D. Pennsylvania. May 24, 1841.

SEAMEN'S WAGES — RECEIPT — RELEASE OF COMPLAINTS.

1. Where the payment of a seaman's wages is refused unless he signs a receipt containing a release of all complaints against his officers, no attention whatever will be paid to such release.

[Cited in Hanson v. Fowle, Case No. 6,042.]

2. The court will consider the situation of the parties in fixing the amount of damages to be awarded.

This was a libel for assault and battery [by F. Gerard Whitney, mariner, against John Eager, master of the brig Oriole]. It appeared, beside the evidence of the assault and battery, that a receipt by the libellant, which contained a release of all complaints on his part against his officers, had been signed by him as the only means of obtaining his wages, which were refused to him unless this was done.

Mr. Waln, for libellant.

Mr. Gillou, for respondent.

HOPKINSON, District Judge. In deciding questions of this sort, between the master of a vessel and his men, it has been my endeavor to preserve the ship from the danger to which she would be exposed by the refractory disobedience and turbulence of the crew, and at the same time to protect the crew from cruelty and unnecessary violence on the part of the master. Indeed, one of the most effectual means of securing their submission, even under ill-treatment, is that they shall be assured they will receive redress at the end of the voyage for any abuse of the power of the master over them. I have, in a late case, explained the principles on which my decisions are founded in such cases. I would avoid on the one hand, encouraging frivolous and vexatious complaints; and, on the other, be ready to give adequate redress for real and substantial injuries.

To maintain the necessary discipline of the ship, great power is given to the master, and obedience and non-resistance are exacted from the seamen. But the master is not therefore constituted an unrestrained tyrant, nor the sailors made his defenceless victims. They are always and everywhere under the protection of the law, whether in the service of their own country, or on the most distant seas. They must be patient and submissive under suffering, and wait for the season of redress, when the same power of the law which has sustained the master in his authority, will make him account for his abuse of it.

In this case there has been a clear and gross abuse of authority, a wanton cruelty, which neither the law nor common humanity can justify. Not a witness, except the first mate (his aider and abettor), has said a word for the captain, and the mate has been able to tell but a poor story for him. On the other hand, two of the seamen, the cook, the steward, the second mate, and another seaman, Alfred Courcelot, a clearheaded, intelligent young man, brother-in-law to one of the owners, all agree as to the excessive cruelty of the captain in beating the libellant, who has marks of it on his person to this day. The most unaccountable circumstance of the case is the want of any provocation, much less justification, for this violence. Even the first mate can make out nothing for the defence, except that the libellant did not steer well; except this, and accidentally, when washing the deck, spilling some water on the captain's new boots, no pretence has been set up for the beating, kicking, and seizing up of the libellant, and the unmerciful lashing inflicted upon him. All the witnesses testify to his peaceable temper and good conduct.

As to the receipt extorted from the libellant, as the condition of payment of his wages, by which he was required not only to acquit the owners of any claim for wages, but to release the officers of the ship from all claims and damages; it has, more than once been decided in this court, that no attention will be paid to such releases. An acquittance for the wages is the proper object and office of the receipt to be given on the payment of them; and to couple it with a release to the officers for all personal wrongs and injuries, especially where the

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

wages are denied without it, will always be regarded as an attempt to impose upon the seaman, and as betraying a consciousness of wrong, and a desire to get rid of it in this way. The libellant in this case refused to sign this paper, until he found he could not obtain his wages without it.

I have been surprised that the owners of vessels do not give some attention in selecting their masters, to the temper and manners of the individual. In passenger ships these are matters of real importance. What can be more disagreeable and disgusting to passengers than to witness daily, or hourly, the indulgence by the master, of a violent and cruel temper, and to hear from him coarse and abusive language, accompanied by vulgar swearing in his intercourse with the crew?

The damages claimed in this libel are $5,000. This is probably as much as the respondent would get in ten years of his life, and more than the libellant could earn in his whole life. This will not do; we must not become oppressors in our endeavors to punish and prevent oppression. We must consider the situation of both parties, and while we can imagine a case between parties in which this amount of damages would not be excessive for the same assault, it cannot be a case between the master and mariner of a ship. We must not bring distress and ruin on the one, to redress a wrong to the other; for the assault complained of, although severe and unjust, has produced no serious and permanent consequences to the libellant. It is enough that the respondent shall receive a lesson to restrain his temper, and to know that whatever his power may be at sea, a greater power is at home, to call him to account for the use he has made of it. This, with a reasonable compensation to the libellant, for his injuries, will fully meet the justice of the case.

Decree for the libellant for $100, and costs.

Case No. 17,585.

WHITNEY et al. v. EMMETT et al.

[Baldw. 303; [1] 1 Robb, Pat. Cas. 567.]

Circuit Court, E. D. Pennsylvania. April Term, 1831.

DEPOSITIONS—EXAMINATION OF WITNESS IN COURT—PATENTS—UTILITY—PRIOR KNOWLEDGE AND USE—IMPROVEMENTS—NOVELTY—SUFFICIENCY OF SPECIFICATIONS—DISCLAIMERS—CONSTRUCTION OF STATUTES.

1. If the deposition of a witness who is attending in court is read without objection, he may be examined in chief by the party who read his deposition.

2. A patented invention is deemed useful if it is not frivolous; the want of utility is good cause for not granting the patent, but not for setting it aside.

[Cited in Rowe v. Blanchard, 18 Wis. 442.]

3. The prior knowledge and use of the invention which avoids a patent, relates to the time of the application, not the discovery, and to public use with the knowledge and privity of the patentee, not to a private or surreptitious use in fraud of the patent.

[Cited in Allen v. Blunt, Case No. 217; Kelleher v. Darling, Id. 7,653; Bates v. Coe, 98 U. S. 46.]

4. If the application is made in a reasonable time after the discovery, any intermediate knowledge or use will not affect the patent. But the invention must be new to all the world.

5. If the patent is for an improvement, it must be substantially new, one capable of application by the means pointed out by the patent, specification, drawing, model and the old machine.

6. If by these means the invention and the mode of using it, are intelligible to persons skilled in the subject, the requisites of a specification by the third section of the act of 1793 [1 Stat. 32] are complied with.

[Cited in Davoll v. Brown, Case No. 3,662.]

7. It is not necessary that the disclosure of the secret should be such as to enable the public to use the invention after the patent has expired, as in England, such being the consideration on which patents are granted there. The difference between their patent laws and ours explained.

8. If the patent is broader than the invention, if not sufficiently descriptive, taken in connection with the specification, &c., the plaintiff cannot recover. But though the patent is too broad in its general terms, it will be limited by a summary and disclaimer, if they show the thing intended to be patented, and that no claim is made to any thing before known or used.

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

9. A patent is a contract with the public in the terms of the law, which must be complied with in the same good faith as other contracts, but as it gives a right of property, it ought to be protected by a liberal construction of the law and the acts of the patentee.

[Cited in Davis v. Leslie, Case No. 3,639; Woolridge v. McKenna, 8 Fed. 659.]

[Cited in brief in People v. Hulburt, 46 N. Y. 113. Cited in U. S. v. Cottingham, 1 Rob. (Va.) 620.]

10. A circuit court can give a judgment declaring a patent void only in the cases provided for in the sixth section. If the patent is defective for any other cause, the court can only render a general judgment for the defendant.

11. What is a proper subject for a patent, &c.

This was an action to recover damages for the violation of a patent for an improved method of making glass knobs, as described in the specification. "To all persons to whom these presents shall come, Henry Whitney, agent of the New England Glass Company, and Enoch Robinson, mechanician, both of Cambridge in the county of Middlesex, and state of Massachusetts, send greeting: Be it known, that we, the said Henry Whitney and Enoch Robinson, have invented, constructed, made and applied to use, a new and useful improvement in the mode of manufacturing by machinery, at one operation, glass knobs or trimmings for doors, stoves, drawers, sideboards, bureaus, wardrobes, and all kinds of furniture, and other things where glass handles, knobs or ornaments may be used and fastened by spin-

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

dles running through the centre of them, specified in the words following, to wit: This improvement in making knobs, consists in compressing them in moulds, in the manner following. The mould is made of a composition of brass and copper, cast steel or other metal, of a size and shape suitable to contain the knob, of which mould a model and drawing is deposited in the patent office. It is in two parts, a top part and bottom part; the lower or bottom part is to receive the melted glass and form the main part of the knob, and the top part is to press the knob, form its ornamental face, and to perforate it with a pin longitudinally. The bottom part is made in two pieces, fastened together by a hinge on the backside, with handles on each side, in front, to open and shut it, and a clasp to fasten it together, while receiving the melted glass and the impression. The bottom part terminates upward by a tube, cylindrical or nearly so, from one-eighth to four-eighths of an inch high, according to the size of the article to be made, into which the top part of the mould enters to compress and form the knob and stamp its face. The top part is of a size and shape suitable to enter and fill the cylindrical space at the top of the bottom part; on its face or underside is a die, figured with circles, rings, hearts, roses, leaves, fruit, animals, or any other fancy or ornamental shape, which has been or may be used in brass or other ornaments, or the face may be made plain. Into the top part is fastened a steel pin, of a square, round or any other shape, projecting from it perpendicularly downward, of a length sufficient to penetrate quite through the article to be made. To reject the surplus quantity of glass and prevent its accumulation in the mould from the quantity displaced by the pin in perforating the knob, a hole nearly of the size and shape of the pin, is made perpendicularly downwards through the under part of the bottom piece of the mould, through which the surplus glass is driven by the expression in forming the article. To use the mould, we place the bottom part on a table, on which is perpendicularly erected a standard twelve or fourteen inches high, for the purpose of attaching to it a lever, to force down the top part and give the impression, and to hang a gate turned on a pivot, to which the top part of the mould is fixed. On the end of the lever behind the standard, a spiral or other spring is fastened, which is also fastened to the table, to suspend the top part of the mould when it is raised by the lever. The position of the top is so adjusted, with reference to the bottom part of the mould, by a guide fastened to the standard, that when the power is applied to the lever to compress the glass, the top exactly shuts into the bottom part and forces the pin through the knob into the hole below it. The mould being thus prepared for use, the top is raised by the lever and turned a little on one side by the gate to give room to drop the melted glass into the bottom part of the mould. The glass is then gathered from the pot and dropped into the bottom part of the mould, which is already closed and secured against opening by the clasp; the gate is then turned back against the guide, so that the top of the mould is brought directly over the bottom, and by the application of power to the lever the article is at once compressed, formed and finished; the top is then raised by the lever, the clasp on the bottom part is unfastened, the mould is opened by the handles, and the knob taken out so entirely finished, that it only requires fire polishing to make it a neat article fit for immediate use. We do not claim to be the original inventors of the mould, as applied to the formation of glass wares, but admit that for many purposes it has been heretofore used. Our invention consists in this, a new combination of the various parts of the mould, with the use of the pin and machinery before described, in such a manner as without any blowing to produce a finished knob with a hole perforated through it, and a neck or enlargement, so that it will not come out of the mould without opening it, at one operation, by compression merely. In testimony that the above is a true specification of our said improvement, as above described, we have hereunto set our hands and seals, this 22d day of August, in the year of our Lord 1826."

A drawing and model of the improved machine were produced at the trial, as also the old machine, and the one used by the defendants, which was alleged to be the same in substance as the one patented; the fact and extent of the infringement were admitted, as well as the general utility of the improved machine, so far as was required by law. The cause turned on the validity of the patent, which was alleged to be void, because the invention was not new, and the specification defective; much evidence was heard and read on the questions of fact, but no questions of law arose except such as were founded on the patent and specification.

C. Ingersoll and C. J. Ingersoll, for defendants.

The patent is void on account of the defect in the specification, in not describing what parts of plaintiff's machine are old and what parts are claimed as his invention; it is the more necessary in this case as the patent embraces the whole machine, whereas it is admitted that only parts were invented by the plaintiffs. If the improvement is not so specified as to discriminate between the original and improved machine, and the patent is taken according to its terms, it is broader than the invention, and therefore void. Whittemore v. Cutter [Case No. 17,601]; 11 East, 110. The law requires the specification to explain the precise improvement patented; if it is for a new combination of the old parts, the improved mode of operation and construction must be particularized; if for any new parts or additions, they must be specified, and their connection with the old parts explained. The specification is defective in both particulars; the law requires that it should set out every thing necessary to enable others to avoid any interference with the thing invented, to describe it in such clear terms that others

can use it, and the public have the benefits of it after the patent right has expired, otherwise it is void, although we do not make out a case of fraudulent addition or concealment, according to the terms of the sixth section of the law. If the specification is not strictly conformable to law, the patent is void, to whatever cause it is owing; it must speak for itself (Sayer, 254), so as to be intelligible without extraneous explanation, for the full and perfect explanation and description of the thing patented is the consideration of the grant, for the want of which it is void. [Evans v. Eaton] 7 Wheat. [20 U. S.] 423; [Evans v. Hettich] Id. 468. A perfect description is the plaintiff's only title which he must make out affirmatively on the face of the specification, for the benefit of the public, who are parties to all suits on patents, and public policy declares them void if they do not meet every requisition of the law. Davies, Pat. Cas. 55, 56. Patents being monopolies, in derogation of common law rights, are deemed odious in the law, unless they are clearly for an invention of the patentee; if the subject matter is not new, though new to the inventor, his patent is void, or if the patent embraces any thing not new. In this case the summary, which is the outline of the patent, refers to the whole machinery, without a clue to separate the old from the new, the parts disclaimed are useless, and those claimed are a mere change of the forms and proportions of the old parts. Judging from the specification, the patent is not for an improvement on a machine, or an improved machine, but for a result which is pointed out, it is wholly obscure as to the mode of operation, and the particular combination of the old and new parts which produce this result, on this account the patent is void But if it is valid the plaintiff cannot recover in this case, because his patent is for a combination of machinery, and he has not shown that our machine adopts his whole combination,—Barrett v. Hall [Case No. 1,047], —or in what particular it is an infringement of his right.

Mr. Cadwalader and Mr. Sergeant, for plaintiffs.

If inventors are not protected, great injustice is done them, because they cannot be restored to their rights after they have disclosed their invention to the public by a specification, which enables any person to take advantage of it. In this case the invention is very plainly described in detail in the body of the specification, and in summing it up at the close, by declaring it to consist of a new combination of the various parts of the mould, &c., disclaiming its original invention and admitting its former use. It is not necessary to describe the old machine or its parts, which are as well known and familiar to a person who understands machinery, as a watch; a patent for an improvement on a watch is good without describing the watch (Davies, Pat. Cas. 45, 56); so of a steam engine (8 Durn. & E. [8 Term R.] 98), or an improvement in mill machinery ([Evans v. Eaton] 3 Wheat. [16 U. S.] 511). The specification is addressed to engineers and persons skilled in the business to which the improvement relates. Davies, Pat. Cas. 214, 216. If they understand the invention, and can produce the result, the object of the law is answered; when others are enabled to make the improved machine from the directions given in the specification, this is the scope and end of the matter (Pl. 18), required by the law; and when this can be done the patent is good, though the description may be imperfect, if it is not designedly so to mislead the public (Gray v. James [Case No. 5,718]; Whittemore v. Cutter [Id. 17,601]), and the disclosure made in the same good faith that is required in other contracts. 14 Ves. 131, 136; 1 Durn. & E. [1 Term R.] 606. By applying the specification to the old and improved machines, and putting them into operation, the invention is at once intelligible; and the summary and disclaimer limit it to the new combination (Moody v. Fiske [Case No. 9,745]; 8 Durn. & E. [8 Term R.] 103), so that it is as broad as the patent. By applying the same test to the defendants' machine, it is apparent that the whole improvement of the plaintiffs is used. If they allege that any part of what is claimed as the invention had been known or used before our application for a patent, the burden of proof rests on them to prove it to have been a public use, and not one in fraud of the patent, or after notice of the application. Pennock v. Dialogue, 1 Pet. [26 U. S.] 4, 14. Patents give a right of property in the invention; they are construed as other grants are, liberally, in favor of the grantee, and so that they shall be sustained, where there has been a substantial compliance with the law, and the subject-matter is a practical improvement. 11 East, 110; 2 H. Bl. 495; 1 Durn. & E. [1 Term R.] 606.

Before BALDWIN, Circuit Justice, and HOPKINSON, District Judge.

BALDWIN, Circuit Justice (charging jury). The plaintiff's patent is for a new and useful improvement, in the mode of manufacturing glass knobs by machinery at one operation, by spindles running through the centre of the knob, without blowing. The specification describes the manner of doing it, and concludes with a declaration, summing up the invention and disclaiming the right to the exclusive use of the mould, as formerly used, but claiming the invention to be a combination of the parts, with the use of the pin and machinery before described. It is admitted by the defendants that they have infringed the right of the plaintiffs as claimed by their patent, to the extent set forth in an account furnished under an order on the equity side of this court; also that the subject matter of the patent is so far useful as to come within the meaning of the law. But it is contended that the patent is void for two reasons. (1) Because the thing patented was not a new invention of the plaintiffs. (2) Because the specification which ac-

companies the patent is defective, in not discriminating between the old and new machine, and specifying the improvement patented; and by embracing in it the old parts of the machine, making the patent broader than the invention. These objections depend on the acts of congress directing patents to be issued on certain conditions, which must be complied with in order to give action to the special authority conferred. [Pennock v. Dialogue] 2 Pet. [27 U. S.] 18, 21. The subject of a patent is "the invention of any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereon, not known or used before the application. Act 1793, 1 Story's Laws, 300, 301 [1 Stat. 318.]

No question is raised as to the utility of the plaintiff's machine; the word "useful" in the law is well settled to be used in contradistinction to frivolous improvements and inventions, or such as are injurious to the public. Lowell v. Lewis [Case No. 8,568]; Earle v. Sawyer [Id. 4,247]. The want of utility may be a good reason for not issuing a patent, but is no cause for avoiding it. Gray v. James [Id. 5,718] and [Id. 5,719]; Kneass v. Schuylkill Bank [Id. 7,875.] The first important inquiry therefore is whether the plaintiffs' patent is for a new improvement or invention made by them. It had been the subject of much difference of opinion, whether the words "not known or used before the application" in the first section, meant, "but had been in use or described in some public work anterior to the supposed discovery," as in the sixth section, or "known or used previous to such application for a patent," as in the first section of the act of 1800. 1 Story's Laws, 752 [2 Stat. 37]. It had been decided in the circuit courts that the previous knowledge and use related to the discovery, and that a patent was good though the invention was known and used at the time of the application, as the patent would relate to the discovery, unless the patentee had permitted its use under such circumstances as to authorize the presumption of abandonment, or dedication of the invention to public use. Goodyear v. Mathews [Case No. 5,576]; Morris v. Huntington [Id. 9,831]; Woodcock v. Parker [Id. 17,971]; Dixon v. Moyer [Id. 6,931]; Pennock v. Dialogue [Id. 10,941]; Treadwell v. Bladen [Id. 14,154]; Evand v. Weiss [Id. 4,572]; 4 Mass. 111. But in Pennock v. Dialogue, the supreme court have referred the words "known and used" to the application for the patent, according to the construction given by the English courts to the statute 21 Jac. I. c. 3, § 5 (3 Ruffh. St. 92), the words of which are, "which others at the time of making such letters patent and grants shall not use," which is thus construed, "for albeit it were newly invented, yet if any other did use it at the making of such letters patent, or the granting the privilege, it is declared and enacted to be void by this act. 3 Co. Inst. 184. Vide Evans v. Eaton, 3 Wheat. [16 U. S.] 514, S. P. A previous use to avoid a patent must not be a private or surreptitious use in fraud of the patentee, but a public use by his consent, by a sale by himself, or by others with his acquiescence, by which he abandons his right, or disables himself from complying with the law; it is deemed a fraud in law to take out a patent after such use. Pennock v. Dialogue [supra]; Holt, N. P. 58, 60.

But unless the invention has been more or less used by others, or publicly communicated by the patentee, his patent will be sustained; the rule is well illustrated in the English cases, as adopted by the supreme court. If the first inventor makes the discovery in his closet, and confines the knowledge to himself, such knowledge will not invalidate a subsequent patent to another for the same thing. On the other hand, though persons engaged in the business to which it relates are generally ignorant of the invention, yet if one person had used it for some time with the knowledge of his two partners, and two servants engaged in its manufacture, and it appeared that a chemist had, in conversation with the patentee, suggested the basis of the invention; or when he had been informed of it by a person whom he employed to make models of the machine; or had adopted a machine which had been in a degree before used by a few, though a general ignorance of it was proved by many persons engaged in the trade, the patent is not good. Davies, Pat. Cas. 61; 2 H. Bl. 470, 487; 8 Taunt. 396, &c., and cases cited; s. c. 4 E. C. L. 375.

The priority of knowledge and use is a question of fact, which a jury may decide on the evidence of one witness; though numerous others of the greatest knowledge and skill in the matter are wholly ignorant of the invention, the question is on the credibility, not the number of witnesses. 8 Taunt. 395; Dixon v. Moyer and Pennock v. Dialogue [supra]. The time during which the thing patented had been known and used is not material, the criterion is its public, not its private or surreptitious use, but the use with the consent of the inventor express, or implied from circumstances. A patentee may take a reasonable time to make his specification, drawings, model, to try experiments on the effect and operation of his machinery, in order to know whether the thing patented can be produced in the mode specified; he may disclose his secret to those he may wish to consult, or call to his assistance any persons to aid him in making or using his machine, and preparations for procuring his patent. So if the machine is to operate publicly, as in steam boats, a public experiment may be made, or if the patentee is informed that others are using his invention, he may disclose it to them in order to give notice of what it consists, and caution them against its infringement. In either of these and like

cases, a disclosure of the secret would not be such previous knowledge, or the use of the invention be such an use, as would impair the patent if taken out in a reasonable time after the discovery, the question of due diligence or negligence is for the jury on all the circumstances of the case. Though the discovery by the patentee is new, yet if he is guilty of negligence in procuring his patent, by which the invention has become publicly known, and used by any persons, he has no right of action, the use must be surreptitious in fraud of his right in order to protect it. As to the novelty of the invention the rule is this, "it must be new to all the world, not the abstract discovery, but the thing invented, not the new secret principle, but the manufacture resulting from it; it must be new at the time of the application for the patent, in the words of the law. [Pennock v. Dialogue] 2 Pet. [27 U. S.] 20, 22. But it will be considered as new then, if the application is within a reasonable time after the discovery, if the patentee has not sold or permitted the use of the invention. There is this difference between the patent law of England, and the United States, arising out of the phraseology of their respective laws; the words of the statute of James are, "new manufacture within this realm," which are held to authorize a patent for an invention known and used in other countries, if it is new in England. 1 Salk. 446, 447. By the act of 1800, which is a gloss or commentary on the act of 1793,—[Pennock v. Dialogue] 2 Pet. [27 U. S.] 22,—the patentee must prove that the "invention hath not been known or used in this or any foreign country," hence it is held void if known or used before any where. Gray v. James [Case No. 5,718]; Reutgen v. Kanowrs [Id. 11,710]; Dawson v. Follen [Id. 3,670]; Evans v. Hettick [Id. 4,562]; Mellus v. Silsbee [Id. 9,404]. The novelty of an invention is either the manufacture produced, or the manner of producing an old one; if the patent is for the former, it must be for something substantially new, different from what was before known; if the latter, the mode of operation must be different, not a mere change of the form and proportions; if both are the same in principle, structure, mode of operation, and produce the same result, they are not new, though there may be a variance in some small matter for the purpose of evasion, or as a colour for a patent. Nor is a discovery of some new principle, theory, elementary truth, or an improvement upon it, abstracted from its application, a new invention. But when such discovery is applied to any practical purpose, in the new construction, operation or effects of machinery or composition of matter, producing a new substance, or an old one in a new way, by new machinery, or a new combination of the parts of an old one, operating in a peculiar, better, cheaper, or quicker method, a new mechanical employment of principle already known, the organization of a machine embodied and reduced to practice on some thing visible, tangible, vendible, and capable of enjoyment, some new mode of practically employing human art or skill. It is a "discovery," "invention" or "improvement," within the acts of congress, and a "new manufacture by the statute of James." Odiorne v. Winkley [Id. 10,432]; Lowell v. Lewis [Id. 8,568]; Evans v. Eaton [Id. 4,560]; Dixon v. Moyer [Id. 3,931]; Pennock v. Dialogue [Id. 10,941]; [Evans v. Eaton] 7 Wheat. [20 U. S.] 361, 431; 8 Taunt. 391; 4 Burrows, 2361; 2 H. Bl. 468; 8 Durn. & E. [8 Term R.] 95; 2 Barn. & Ald. 349; Whittemore v. Cutter [Case No. 17,601]; Earle v. Sawyer [Id. 4,247]. A patent may be for a mode, or method of doing a thing, mode when referred to something permanent, means an engine or machine, when to something fugitive, a method, which may mean engine, contrivance, device, process, instrument, mode and manner of effecting the purpose; the word principle may mean engine in an act of parliament under which the patent issued, or may mean the constituent parts thereof. A patent for a method of producing a new thing, may apply to the mechanism, a new method of operating with old machinery, or producing an old substance; a patent for a mode or method detached from all physical application, would not refer to an engine or machine, but when referred to the mode of operation, so as to produce the effect, would be considered as for an engine or machine. The words used as mode or method, are not the subject of the patent; it is the thing done by the invention, and patents are so construed ut res magis valeat quam pereat.

On this principle the patent of Mr. Watt "for a method of lessening the consumption of steam and fuel in fire engines," was sustained; as the intent was apparent, no technical words were deemed necessary to explain its object; and it was held to be a patent for an engine, machine and manufacture; such is the established law here and in England. [Evans v. Eaton] 3 Wheat. [16 U. S.] 512; 8 Durn. & E. [8 Term R.] 107, 108; 3 Ves. 140. You will apply these rules and principles of law to the whole evidence, without regarding so much the words as the evident intention of the patent; ascertain what is the subject matter of the patent, and the thing patented, next whether it was invented by the plaintiffs, and then whether it had been known and used before the application for the patent, in this or any other country, in such a manner as, within the rules laid down, would invalidate the right of the privilege granted.

The plaintiffs must make out their case to be within the law in all the particulars required; slight evidence is sufficient. 1 Durn. & E. [1 Term R.] 606, 607; [Pennock v. Dialogue] 2 Pet. [27 U. S.] 18, 19. If you believe plaintiffs' witnesses, their testimony is in law sufficient to establish their right, so

far as respects their invention and its novelty; the burthen of proving the previous invention, knowledge or use of the thing patented is on the defendants. They have given evidence sufficient in law to prove it, if you are satisfied of its truth in fact; the plaintiffs must rebut it by legal and credible evidence, or your verdict must be for the defendants. On this part of the case you will decide according to your opinion as to the matter of fact. Should you find that the plaintiffs are the inventors of the thing patented, and that it was not known or used so as to affect the validity of the patent, the next question is one of law, whether the invention claimed is a proper subject matter for a patent. On this point we have no hesitation in instructing you, that it is an improvement on a machine, manufacture or composition of matter, within the words and meaning of the law.

The next inquiry is, whether the patent is affected by the objections founded on the specification, viz., that it is broader than the invention, and otherwise defective. This depends on the construction of the words used to denote the intention of grantor and grantee, "as the end and scope of the matter, which is the matter itself, and the intent thereof also accomplished." Pl. 18a. The patent is for a new and useful improvement in the mode of manufacturing glass knobs, which is broad enough to include the whole machinery described in the specification, including the old machine and the old process of manufacture, not claimed by the plaintiffs as their invention. But the subsequent words summing up the invention intended to be patented, disclaiming the invention of the mould and other parts of the old machine, and declaring the patent to be for a new combination of the various parts of the mould, with the use of the pin and machinery before described, operate as a proviso restraining and limiting the patent to the object so specified, and excepting all other parts from the more general description. The disclaimer, at the close of the specification, estops the patentee from setting up any privilege to the part disclaimed, and the summary is equally binding on him, as a limitation to the thing patented. Moody v. Fiske [Case No. 9,745]; Kneass v. Schuylkill Bank, supra; Treadwell v. Bladen [Id. 14,154]; 8 Durn. & E. [8 Term R.] 96, 103, 107. The specification is a part of the patent, and, taken together, they show that the subject matter patented is not the old machine, or its constituent parts in their distinct operations; but the combined result of the new and old machinery, produced by a new combination, addition and improvement. "The distinction between a machine and an improvement on a machine, or an improved machine, is too clear for them to be confounded; a grant of the exclusive use of an improvement in a machine, principle or process, is not a grant of the improvement only but the improved machine, an improvement on a machine and an improved machine are the same." [Evans v. Eaton] 3 Wheat. [16 U. S.] 456, 509, 517; [Id.] 7 Wheat. [20 U. S.] 356, 423; Kneass v. Schuylkill Bank [Case No. 7,875]; Treadwell v. Bladen [Id. 14,154]; Whittemore v. Cutter [Id. 17,601]. A patent for a machine, consisting of an entire new combination of all its parts, is good, thought each part has been used in former machines, if the machine is substantially new in its structure and mode of operation; but if the same combination existed before, in machines of the same nature, up to a certain point, and the invention consists in adding some new machinery, in some improved mode of operation, or some new combination, the patent must be limited to the improvement, if it includes the whole machine it cannot be supported. [Evans v. Eaton] 7 Wheat. [20 U. S.] 430, 431; 2 Marsh. C. P. 211, 213; 2 H. Bl. 487; Evans v. Eaton [Case No. 4,559]; Whittemore v. Cutter [supra]; Moody v. Fiske [supra]; Pennock v. Dialogue [supra]. A patent must not be broader than the invention, or it will be void, not only for so much as had been known or used, before the application, but also for the improvement really invented. Bull. N. P. 76; 11 East, 110; Woodcock v. Parker [Case No. 17,971]; Odiorne v. Winkley [Id. 10,432]; Lowell v. Lewis [Id. 8,568]; Moody v. Fiske [supra]. The improvement patented must be the improvement invented. 8 Taunt. 394; 3 Mer. 629. If for a discovery, it must be for something new, not for an improvement only, each item must be a new invention, and the discovery must not fail in a material part. 2 Barn. & Ald. 345, 351; 4 Barn. & Ald. 549, 552; 1 Durn. & E. [1 Term R.] 605, 606; 2 Marsh. C. P. 213, 214; [Evans v. Eaton] 7 Wheat. [20 U. S.] 430. If for an improvement on a machine, the patentee must show the extent of the improvement, so that a person who understands the subject may know in what it consists. [Evans v. Eaton] 3 Wheat. [16 U. S.] 518. It need not describe the old machine, but must limit the patent to such improvement. [Id.] 7 Wheat. [20 U. S.] 435.

In using the word patent, in reference to the description of the thing patented, we must be understood as including the patent, the specification attached to it, with the model and drawing in the patent office, all of which are to be taken together as the description. In deciding on its sufficiency the court inspect the whole description as one paper, which they assume to be true in fact, and if found to be in conformity with the requisitions of the law, so that it appears with reasonable certainty, either from the words used or by necessary implication, in what the invention or improvement consists, as claimed by the patentee, they will adjudge it sufficient. Lowell v. Lewis [supra]. A description, though in some respects obscure, imperfect, or not so intelligible as to fully answer all the objects of the law, is

good if it enables the court to specify the improvement or invention patented, from the face of the patent and accompanying papers. It is enough if there is a substantial description of the thing patented, though defective in form or mode of explanation. In this respect the papers will be viewed in the same light as a declaration in a suit at law; the court, looking on them as a statement of the patentee's right and title, will overlook all defects in the mode of setting it out, if it contains a substantial averment of such matter as suffices in law to make out a cause of action. This is a question of law which the court decides, it is a question for the jury to decide, whether the statements are true in fact; the court does not look beyond the patent and the other papers, but the jury decide from the papers, the evidence of the witnesses, an inspection of the old and new machine and the model, to ascertain whether in point of fact the specification, as made out at the trial, is sufficient. [Evans v. Eaton] 7 Wheat. [20 U. S.] 366, 428, 433, 435; [Evans v. Hettich, Id.] 456, 457; 11 East, 113; 14 Ves. 131, 135; 3 Ves. 140; Langdon v. De Groot [Case No. 8,059]; Sullivan v. Redfield [Id. 13,597]; 1 Durn. & E. [1 Term R.] 602, 604; 8 Durn. & E. [8 Term. R.] 100, 108; 2 H. Bl. 473; 8 Taunt. 401; Lowell v. Lewis [supra].

In the present case our opinion is, that the description is sufficient in law, but whether it is sufficient in fact, is for you to decide according to your own opinion on the evidence, a comparison of the old and new machines, the mode of operation, the effect produced, and an examination of the model and all the papers. If the new machine, and its mode of construction and operation, is so explained as to enable you to specify the distinct improvement patented, then the specification is good in law and fact, unless it appears that something has been omitted which is required by the acts of congress to make the patent valid. The third section of the act of 1793 directs certain things to be done by the applicant for a patent before he is entitled to it, and gives the reasons therefor, but does not declare that the patent shall be void, if all the acts directed have not been complied with previously to its being granted. The sixth section specifies the cases in which the patent shall be void, which are not the omission of what was directed in the third section, but the defendant proving "that the specification filed by the plaintiff does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the described effect, which concealment or addition shall fully appear to have been made for the purpose of deceiving the public, or that the thing thus secured by patent was not originally discovered by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery of the patentee, or that he had surreptitiously obtained a patent for the discovery of another person, in either of which cases judgment shall be rendered for the defendant, with costs, and the patent shall be declared void." It is the exclusive province of the legislature to discriminate between what acts are to be done to authorize a patent to issue, and those which will make it void if done or omitted. When this has been done in clear explicit terms, a court cannot superadd requisites to the grant of the patent, or include other acts than those specified, which authorize them to declare it void, or so declare it if the specified acts or omissions are not proved to be fraudulent, or the thing patented was not new, &c. Laws are construed strictly to save a right or avoid a penalty, they are construed liberally to give a remedy, or to carry into effect an object declared in the law; but if a court, by construction, add an object not so declared, apply the penal provisions of the law to a case not within its definition, or exclude from the remedy provided a case defined, it is judicial legislation of the most odious kind, necessarily retrospective, and substantially and practically ex post facto. It is equally so to confound the parts of a law which are merely directory as to the acts to be done, with those which prescribe acts as conditions precedent to the vesting a right, or define those acts or omissions which authorize a court to annul a grant; for the direct effect would be, to impose on a plaintiff in a patent cause a forfeiture of his right by construction, when by the provisions of the law he was entitled to damages treble the amount of the injury he had sustained. No case could arise in which the language of the supreme court, in Fletcher v. Peck, would be more forcibly applicable; the character of ex post facto legislation, so severely reprobated in their opinion, would not depend on the tribunal which exercised it. Vide 6 Cranch [10 U. S.] 138, 139.

We cannot therefore give our sanction to the positions assumed by the defendants' counsel, that the patent is void if the specification is in any respect defective or for whatever cause, and that the public are parties to all suits for the infringement of patent rights. Congress have, in the sixth section, prescribed the rules of our decision in cases between individuals, and defined the causes for declaring a patent void on proof by a defendant; the trial is on a question of property, of private right, unconnected with the public interest, and without any reference to the public, unless a case is made out of a design to deceive them, and we cannot better express our sentiments on this subject, than in the words of a great English judge: "It is said it is highly expedient for the public, that this patent having been so long in public use, after Mr. Arkwright had failed in that trial, should continue to be open; but nothing could be more essentially mischievous, than that questions of

property between A and B, should ever be permitted to be decided upon considerations of public convenience or expediency. The only question that can be agitated in Westminster Hall is, which of the two parties, in law or justice, ought to recover." By Lord Loughborough. Arkwright v. Nightingale, Davies, Pat. Cas. 56.

We know of no principle which affords to this court a safer guide in administering justice in this building. Congress seem to have adopted it in the tenth section, by authorizing the district court in certain cases, by a summary process in the nature of a scire facias, to repeal the patent, which is a public prosecution in which public considerations operate, the sixth section is confined to civil suits in the circuit court. Herein consists an important difference between the patent law of England and this country. The statute of James I. did not regulate the action for an infringement of a patent right, consequently the English courts could only render judgment for the defendant, if the patent was not valid; they could not declare it void by a regular judgment, and the plaintiff could bring successive actions. The patent could be annulled, only by a scire facias in chancery, at the suit of the king. Rex v. Arkwright, Davies, Pat. Cas. 144. And in a suit for damages, nothing could be decided but the right of property. Davies, Pat. Cas. 56. The law of England having been thus declared in 1785, accounts for the sixth and tenth sections of the act of 1793, which were evidently predicated on these decisions, and passed with a direct reference to them, as held by the supreme court in [Pennock v. Dialogue] 2 Pet. [27 U. S.] 14. In referring to the English adjudications on the statute of James, we must therefore be careful to take the expressions of the judges in civil suits at common law, that a "patent is void," as not meaning that it becomes void by a judgment in favour of a defendant, on the ground of its invalidity in law; but only that it is voidable in chancery on a scire facias for that cause, and in a court of law, void as a legal foundation for an action for damages. A judgment in a court of law concludes only the parties to the suit, the patent may be given in evidence in other suits against new defendants, till it is cancelled in chancery; here it becomes annulled by a judgment in favour of a defendant in a circuit court, on proof of the kind required by the sixth section, or a judgment in the district court against the patentee, according to the provisions of the tenth. In England a patent is granted as a favour, on such terms as the king thinks proper to impose. Godson, Pat. 46, 48; 4 Barn. & Ald. 553. Here a patent is a matter of right, on complying with the conditions prescribed by the law. Morris v. Huntington [Case No. 9,831]. There the patent is not accompanied with a specification, none is filed or enrolled at the time, but it is done within the period prescribed in a proviso, setting forth the requisites of the specification, as conditions to be performed in order to make the patent valid, if not done it declares the patent void; these conditions are in the discretion of the king, but neither they nor the objects or reasons for granting the patent are declared or set forth; but the patent contains a declaration, that it shall be construed and adjudged, most favourably and benignly for the best advantage of the grantee, notwithstanding any defective and uncertain description of the nature and quality of the invention and its materials. Godson, Pat. 50, 155, 157, and cases cited; Bull. N. P. 76; 11 East, 107; 14 Ves. 136.

In deciding on the sufficiency of these specifications, Lord Mansfield states the questions to be, whether it is sufficient to enable others to make up the thing patented, and the public to have the benefit of the invention after the patent has expired. Liardet v. Johnson (1778) Bull. N. P. 76, 77. These are the two tests which are applied to the specification, not by the words of the statute, but by the courts, in order to effectuate its supposed policy, as is very clearly expressed by Buller, J., in Rex v. Arkwright. "The party must disclose his secret, and specify his invention in such a way that others may be taught by it to do the thing for which the patent is granted; for the end and meaning of the specification is to teach the public after the term for which the patent is granted what the privilege expired is, and it must put the public in possession of the secret in as ample and beneficial a way as the patentee himself uses it. This I take to be clear law as far as respects the specification, for the patent is the reward which, under an act of parliament, is held out for a discovery, and therefore, unless the discovery be true and fair, the patent is void. Davies, Pat. Cas. 106, 128. Such is the settled rule in England. Id. 55–60; 1 Durn. & E. [1 Term R.] 605, 608. In its practical application it has been uniformly held, that the clearness of the specification must be according to the subject matter of the patent, it is addressed to persons in the profession, having knowledge and skill in the subject matter, from the nature of their business; if they can so understand it as to make the thing patented, by following the directions of the specification and plan, taking the old machine to their assistance, without any new invention of their own, then the patent is good, though men ignorant of the subject to which it relates may not understand it. Davies, Pat. Cas. 56, 128; 11 E. C. L. 472; 11 East, 108.

The patentee must specify his invention clearly and explicitly; any ambiguity affectedly introduced into the specification, or any thing done to mislead the public, will make it void. 1 Durn. & E. [1 Term R.] 606, 607. If the specification is sufficient in any part, any other part which is not necessary to understand it may be rejected as surplusage. 2 H. Bl. 489; 11 East, 111. One part may be sub-

stituted for another. 1 Car. & P. 566; 11 E. C. L. 468. If the patentee of an old machine procures a new patent, with certain improvements on the old machine, reciting the old patent, and with a specification of the whole machine so improved, but not describing the new parts or referring to the old specification, the new patent was held good by a reference to the old specification and drawing, and comparing the new with them. 11 East, 101, 113. The patent of Mr. Watt was sustained on the same principle; the description was held good by referring a workman to the old engine. The great object of the specification is to prevent the public from being misled by an evasive one having such tendency; a patent is a bargain with the public, in which the same rules of good faith prevail as in other contracts, and if the disclosure communicates the invention to the public the statute is satisfied. 14 Ves. 131, 136; 1 Durn. & E. [1 Term R.] 606, 607. As the English statute does not require a specification, these rules and principles are matters of judicial construction, on which the English courts act without any statutory directions. Their patent law is a proviso, excepting from the general prohibition of grants of monopolies by the king, "grants of privilege" "for the sole working or making of any new manufacture within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters and patents shall not use, so as they be not contrary to law," &c. 3 Ruffh. St. 92, § 5. On this proviso their whole system of jurisprudence as to patents is built, by a series of adjudication according to what the judges presumed to be the object and intention of parliament. The silence of the law left a wide field open to the discretion of courts, in adopting such rules as would best effectuate its design, and best promote the interests of the public. But in this country the law is more explicit.

The constitution gives congress the power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." This is a declaration by the supreme law of the land, of its objects and purposes, and the means of effecting them, which leaves no discretion to the judges to assign or presume any other or different ones. The acts of congress of 1790 (1 Story's Laws, 80 [1 Stat. 109]), and of 1793 (1 Story's Laws, 300 [1 Stat. 318]), are the execution by congress of their constitutional powers; the title of these acts is "to promote the progress of the useful arts;" the mode of doing it is by granting patents pursuant to the enacting clauses. The conditions of such grants are prescribed, among which is a specification or description of the invention to be patented, the requisites of which are defined: "And shall deliver a written description of his invention, and of the manner of using, or process of compounding the same, in such full, clear and exact terms as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound and use the same. And in case of any machine, he shall fully explain the principle and the several modes in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions." As to the specification then nothing is left to construction as to its requisites or purposes, both are so clearly defined, and in such a manner as to leave no discretion in courts to presume what was intended, to alter, add or diminish, where the law is so explicit. With the constitution, the English statute and the adjudication upon it before them, congress have declared the intention of the law to be to promote the progress of the useful arts by the benefits granted to inventors; not by those accruing to the public, after the patent had expired, as in England. This is most evident from their imposing as conditions, that the invention must be new to all the world, and the patentee be a citizen of the United States. If public benefit had been the sole object, it was immaterial where the invention originated, or by whom invented; but being for the benefit of the patentee, the meritorious cause was invention, not importation, and the benefit was not extended to foreigners, in which respects the law had been otherwise settled in England. Here the patent contains no proviso declaring it void, if the specification is not in conformity with the law; this is provided for in the sixth section as a substitute for the proviso, and defines the causes for which a circuit court can adjudge a patent void, in a civil suit, for defects in the specification. These are concealment or addition, fully appearing to have been made for the purpose of misleading the public, which is wilful fraud clearly proved; but the court cannot bring within this definition a patent with a specification defective on other grounds, still less act upon the English principle, that the specification is for the purpose of giving the public the benefit of the invention, after the expiration of the patent, as that would be in contradiction to the act of congress expressly assigning other reasons. Such has been the uniform construction of the law in the circuit courts, that a patent can be declared void for no other defect in the specification than fraudulent concealment or addition. Gray v. James [Case No. 5,718]; Reutgen v. Kanowrs [Id. 11,710]; Park v. Little [Id. 10,715]; Lowell v. Lewis [supra]; Whittemore v. Cutter [Case No. 17,600]; [Evans v. Eaton] 7 Wheat. [20 U. S.] 429, 430.

No discretion is left to the circuit courts to annul a patent for any reason not contained in the acts of congress; they have not left us free to infer motives, objects and grounds of supposed policy for requiring specifications; the third section of the act of 1793 defines them without any declaration, that the patent shall be void if the specification is defective.

English decisions therefore, founded on the assumed reason for the grant of a patent, are not of authority here where the constitution and laws give other reasons, and omit the one founded on the public benefit to result from the disclosure after the expiration of the privilege. You will therefore not make that a subject of deliberation, for it is not material whether the public can profit by the invention during or after the term of the patent. The true inquiry is whether, in the spirit of the law, the plaintiffs have made such a description of the thing patented as to distinguish it from all others before known, and to enable others skilled in the matter, to make, compound or use it, and to explain the principle and mode of application by which it can be so distinguished from other inventions. If from the patent, specification, drawings, model and old machine, clear ideas are conveyed to men of mechanical skill in the subject matter, by which they could make or direct the making of the machine by following the directions given, the specification is good within the act of congress. [Evans v. Eaton] 3 Wheat. [16 U. S.] 518; [Evans v. Eaton] 7 Wheat. [20 U. S.] 435. If the plaintiffs' patent is valid, it gives them a right of property in the thing patented, which is entitled to full protection in courts, the wise policy of the constitution and laws, for securing to inventors the exclusive privilege to use their discoveries for a limited time, has been fully illustrated by the great results produced by the skill of our citizens. Intended for their protection and security, the law should be construed favourably and benignly in favour of patentees, in the spirit of the proviso in patents in England. When the invention is substantially new, is useful to the public, and the disclosure by the specification and other papers, is made in good faith, and fairly communicated in terms intelligible to men who understand the subject, juries ought to look favourably on the right of property and to find against a plaintiff only for some substantial defect in his title papers, or proof.

Having given you our opinion on all the questions of law applicable to the case, it is submitted to your verdict. If you think the thing patented not new, but had been known or used any where, before the application for the patent, you will find generally for the defendants; so you will find, if the alleged improvement is in fact only a change of the form and proportions of the old machine or process. If you think the specification, &c. not descriptive of the invention, so as to be in compliance with the requisitions of the third section of the law, through accident, mistake or ignorance, you will find for the defendants, and specify the ground of your verdict. If you think the defect in the specification was intended to mislead the public, or should find against the plaintiffs on any other ground specified in the sixth section, you will specify it in your finding, so that the court may render the proper judgment, either generally for defendants, or add a judgment the effect of which will annul the patent. If you think the plaintiffs have made out their case, you will find such damages as they have proved they have actually sustained, they must prove their damages, if they have not done so you are not to supply the defect.

Verdict for plaintiffs 500 dollars.

A motion was made for a new trial for excessive damages, which was argued at October term 1831.

Mr. C. Ingersoll and Mr. C. J. Ingersoll, for defendant.

The jury have exceeded the actual damage sustained by the plaintiff, which the law has made the standard for their verdict. By the fourth section of the law of 1790 (1 Story's Laws, 81 [1 Stat. 109]), the plaintiff was to recover "such damages as shall be assessed by a jury"; by the fifth section of the act of 1793, "three times the price of a license to use the invention" (1 Story's Laws, 302 [1 Stat. 318]); by the third section of the act of 1800 (1 Story's Laws, 753 [2 Stat. 37]), "three times the actual damages sustained from or by reason of such offence." The meaning of this clause is apparent by a reference to the statute of Jac. I. § 4, "shall recover three times so much as the damages he or they shall have sustained by means or occasion," &c. 3 Ruffh. St. 92. By adding the word "actual," congress intended to exclude potential or speculative damages. "Actual" means "real, not potential" (Johns. Dict.); "real or effective," "that exists actually," "existing in fact" (Webst. Dict.); not what may be. Whittemore v. Cutter [supra]. The court must decide what are actual damages, even in case of a tort the jury ought to give the reasons of their verdict. Comb. 357; 2 Wils. 160. The court may ask them what they have made the standard of their verdict in patent cases. Whittemore v. Cutter. In [Gray v. James] supra, Judge Washington referred to the profitable use of the invention by the defendant. In 3 Wheat. [16 U. S.] Append. 26, the value of the use to the defendant is stated as the rule of damages. The injury done to the character of the plaintiffs was by the defendants making an inferior article, the reduction of the price by competition are merely speculative damages; the actual damage sustained, is to be ascertained as in cases of waste, the value of the property or estate wasted. The actual loss sustained by the infringement of a patent, is the profit made by the defendant while he uses the invention, the saving of labour by the improved machine, without regarding the value of the use of the parts not patented; the difference in the profits resulting from the use of the old as compared with the new, calculated by the time and extent to which the defendants have used it, is the true rule. In this consists the difference between a common law tort and a patent tort, in the former the jury have a discretion in award-

ing damages, in the latter they have a standard prescribed to them, as definite as on a contract for the payment of money or the delivery of goods; the damages cannot exceed the interest, so in patent cases, the defendant's profits are the measure of the plaintiff's loss.

Mr. Cadwalader and Mr. Sergeant, for plaintiffs.

The third section of the act of 1800 is a substitute for the fifth section of the act of 1793, and actual damages mean, the injury actually sustained, and the consequences of the infringement, which are not too remote to be traced to it, the words "for or by reason of," &c. put a patent tort on the same footing as any other tort. Gray v. James [supra]. A consequence of increased competition is a reduction of profits, the putting an inferior article into the market tends to throw out the pressed knob and substitute the blown knob in its place, whereas, on a fair comparison, the pressed are preferred. Here, as the infringement has been intentional, the plaintiff ought to recover the difference between the cost and the selling price of the knobs made by the defendants, by the use of the plaintiffs' improvement, which the jury have not exceeded, though they might have made an allowance for damages occasioned by wilful vexation, as may be done in trover. 6 Serg. & R. 426. No new trial will be granted, unless there has been a plain mistake in law or fact (3 Bin. 320); or if damages are too small or too large, unless for some other cause in addition (Walker v. Smith [Cases Nos. 17,086 and 17,087]). The case in Comb. 357, 358, only shows that the jury will not be allowed to exercise a despotic power. In Whittemore v. Cutter [supra], 350 dollars were given for merely making the machine, and a new trial refused. S. P., Gray v. James [supra]. These cases establish the rule that the jury may judge of the actual damage, as in the case of tort generally; those which affect the person or reputation of another are exceptions. The true question is, not what profits the defendants have made by the infringement, but what loss the plaintiffs have sustained; of this the jury are the proper judges, and the court will not disturb their verdict, unless they decide positively that the plaintiffs have not sustained 500 dollars damages in any view of the case. The jury may ascertain the damages from any cause which has injured the plaintiff, the difficulty of liquidating them under any definite head, as a matter of account, is no objection to their putting an estimate on the amount; as the loss of sales which the plaintiffs would have made had there been no infringement. In a word, the jury may allow the plaintiff whatever they may think from the evidence he has lost by the violation of his right by the defendants, and put him in the same situation as if he had had the exclusive use of his invention during the time the defendants have used it.

HOPKINSON, District Judge. The motion for a new trial in this case is rested on the alleged excessiveness of the damages. The act of congress gives the rule of damages, and if it has been violated, the verdict ought not to stand; on the other hand, the finding of a jury on a question so peculiarly within their province, will not be disturbed, unless it be made clear that they have disregarded and exceeded the measure of the law.

The congress of the United States, after two attempts, which proved to be unsatisfactory, to fix the amount of damages to be recovered from any person who should make, devise, use or sell the thing whereof the exclusive right is secured to a patentee, by an act passed on the 17th of April, 1800, established a rule which has since remained as the law of such cases. The third section of the act enacts, that any person offending as above mentioned "shall forfeit and pay to the said patentee, his executors, administrators and assigns, a sum equal to three times the actual damage sustained by such patentee, his executors, administrators or assigns, from or by reason of such offence." The practice under this act has been for the jury to find the actual or single damages, which are afterwards trebled by the order or judgment of the court.

It is obvious that the directions of the last act of congress are not, and could not be precise on such a subject, and that a considerable latitude is necessarily given to the jury in estimating what they shall consider to be the actual damage sustained by a patentee by the violation of his right; and the courts of the United States have shown no disposition to draw the power of the jury, in this respect, within close and narrow limits. The elements of such a calculation in various cases that occur, are so various, and sometimes in their nature so uncertain, that the estimate of a jury must be very extravagant to enable the court to say, that they have so disregarded the rule of the law, and so clearly exceeded the limits of their authority, that their verdict cannot be supported. Are the jury to take as the actual damage sustained by the patentee, the benefit or profit made and received by the offender by the use of the invention? or the profit which the patentee would have made by the same use of his invention, but has lost by the illegal interference with his right? May they deduce the latter from the former, and consider proof of the profits made by the offender to be evidence in fact of the injury or damage sustained by the patentee? This is broad ground, on which the jury may rightfully move; and the error of their calculation must be made clear and certain, before the court can undertake to correct it by overthrowing their verdict. Still wider limits have been insisted upon for the jury by the counsel of the plaintiffs. They have contended that, as an item in the estimation of actual damages, the jury may examine and determine the loss sustained by the reduction of the price of the articles manufactured by the

patented machine, in consequence of the competition brought into the market against them, when the patentee had a right to a monopoly; and going yet further, they say, that the injury done to the reputation of the manufacture, by the inferior skill and workmanship of the offender, may be fairly and legally brought into the calculation of actual damage. Whether this may or may not be done, must depend upon the particular case under consideration, and the nature of a question of damages shows that what may be a good rule in one case, would be altogether inadmissible in another. All the items or elements above mentioned may be brought into the account, provided that there be evidence satisfactory to the jury to bring them within the character and description of "actual damages," proved in fact to have fallen upon the plaintiff, "from or by reason of" the offence of the defendant; but they should not be allowed when they are merely hypothetical, imaginary or speculative. It is not enough that injury may have been suffered by these means; the plaintiff has a right to recover only such damages "as he can actually prove, and has in fact sustained." It must not rest in conjecture, but must be susceptible of proof, and be actually proved.

While the courts of the United States sitting on patent cases, have adhered to these principles in their construction of the act of congress, they have not been inclined to interfere with verdicts, but keeping them within this boundary, have rather given a loose rein to juries in the exercise of their power over the damages. This is abundantly shown by the cases referred to at the bar. In Whittemore v. Cutter [Case No. 17,601], decided in 1813, the question of the damages to be recovered for the violation of a patent right, was considered by Judge Story. In that case, the plaintiff proved only that the defendant had made his patented machine, and not that he had ever used it. Here there was neither profit made by the defendant or lost by the plaintiff, nor any reduction of the price of the article manufactured by a competition in the market; nor an injury to its reputation by inferior workmanship. Where then are we to look for the constituents of damage in such a case? The counsel for the plaintiffs contended, "that although there is no evidence of actual damage, the jury ought to give damages either to the full value of the expense of making the machine or of the price at which such a machine might be sold." The judge rejected these pretensions for the most satisfactory reasons. He stated to the jury, that "it is clear by the statute that only the actual damages sustained can be given;" and he explains this actual damage to mean "such damages as the plaintiff can actually prove, and has in fact sustained, as contra-distinguished to mere imaginary or exemplary damages." This is a rational and satisfactory interpretation of the phrase. The judge thus instructs the jury, that "if they are of opinion that a use of the machine is actually proved, the rule of damages should be the value of the use of such machine, during such illegal use." This language is not exactly precise. It is not clear whether the judge would be understood; when he speaks of the value of the use of the machine, "he means its value to the illegal use of it, or the value which its owner could or might have derived from it during the time of the illegal use." The rules are or may be very different. If the latter were intended by the judge, it is in fact the direct and actual damage sustained by the patentee; if the former, it is the profit or advantage made of the machine by the offender, which may be more or less than the patentee would have derived from it. We see, however, no objection to another explanation of the language of the judge, that is, that the jury ought to take the value of the use of the machine to the spoliator, not as the direct ground of their verdict, but as a test or means by which, in the absence of other proof, they might estimate the damage done to the plaintiff. In either construction the judge meant to conform to the language of the act of congress, and affirm the rule he set out with, "that only the actual damage sustained can be given." The jury gave 350 dollars single damages, finding at the same time, "that the defendant was guilty of making the machine only;" no attempt appears to have been made to disturb the verdict, although the judge had charged the jury, that in such a case, "the plaintiff can recover nominal damages."

The case of Gray v. James [Case No. 5,718], decided in this circuit in 1817, was an action for violating the plaintiff's patent right in the art of cutting and heading nails by one operation. Jacob Perkins was the inventor of this machine, which was so defective that, after a trial, it was altogether abandoned; and it did not appear that it had ever been used afterwards by any person. The defects of Perkins's patent were cured by one Jesse Reed, who patented his improved machine; but the two machines were precisely on the same principle. The jury gave a verdict for the plaintiff, and assessed his single damages at 750 dollars. A motion was made on the part of the defendant for a new trial and in arrest of judgment. One of the reasons in support of the motion was, that the damages given by the jury were excessive, and the argument was, that Perkins's machine was acknowledged by himself to be worthless; and that it was in fact thrown away as a useless thing, and was so considered by those who knew any thing about it, consequently his assignees sustained no damage by the use which the defendant made of it. The judge was of opinion that "the premises may be admitted, and yet the argument terminated in what is called a non sequitur." We can-

not say that we are satisfied with the ingenious reasoning of the learned judge, to support this opinion; nor do we see how the owner of a thing, absolutely worthless, and which he had thrown away as useless, can sustain any actual damages, by the use of this thing made useful only by being combined with some thing else, or so changed in its operation by an invention to which the owner of the worthless machine had no title or claim. He has lost nothing, he has been deprived of nothing that was of any value to him, what then has been his injury or damage? If the act of congress had given the advantage or use made by another of a particular machine as the rule of damages, then indeed a worthless invention, made valuable by an improvement, might entitle the inventor to compensation for the use of his invention, and perhaps on principles of equity and justice, he ought to have it. But the law does not take this rule, but the damages actually sustained by a patentee by the use of his invention, and not the value that has been imparted to it by a subsequent inventor; nor the use which such inventor has made of it, provided he has not by such use inflicted any loss, injury or damage upon the patentee. His damages, and not another's gain, are made the rule for the jury. It is not like the case of Whittemore v. Cutter [supra], where the machine made by the defendant was the same with that patented by the plaintiff, and where we have agreed that, in the absence of other evidence, the jury may assume the value of the use of the machine to the spoliator as proof of the damage or injury done to the patentee. The judge who decided the case of Gray v. James [supra], seems to be hardly satisfied with supporting the verdict on the reasoning we have quoted, for he adds, "but the fact is that Perkins's machine was proved at the trial to possess intrinsic value on the single ground of saving labour, whether the value so proved justified the jury in finding the damages which they did, is a question of which this body were the proper judges upon the evidence laid before them, and the court sees no reason to find fault with them."

A patentee however whose invention, though worthless to himself, has become useful to another may not be deprived of it without his consent, for it is his property; nor can another use it for any purpose without responsibility to him. Such as it is, of much value or little value, or of no value, the law has guarantied the exclusive possession of it to the inventor, and the law will prevent any interference with his right, and every use of the thing invented against the will of the owner. Although no damages can be recovered by the provisions of the act of congress, in a case where no damages have actually been sustained, the patentee has nevertheless a remedy for the invasion of his right peculiarly appropriate for such a case. He may have an injunction upon the wrong doer, which will prevent the unauthorized use of his invention, and put it in his power to compel the invader either to abandon it or make him a just compensation for the use of it. The court would exercise this power to do what is right and equitable between the parties, and so as to prevent imposition and wrong by either.

Without embarrassing the question now to be decided with a review of all the evidence that has been brought into the discussion, it will be sufficient to advert to the admitted fact that the defendants manufactured five hundred and seventy-one dozen of glass knobs, by the use of the machine invented and patented by the plaintiffs; all of which were sold by the defendants, with the exception of some that were imperfect. From the bill produced of one of the sales, these knobs were sold at a great profit. The profit obtained by the defendants on the sale of these knobs was a fair and legal subject for the calculation and judgment of the jury on the evidence laid before them; and they had the same right to take this profit as the rule or measure by which they would estimate the actual damage sustained by the plaintiffs by this invasion of their rights. Although the profit gained by the defendants is not the amount to be recovered by the plaintiffs as their damage, yet it is that from which a calculation or estimate of that damage may be rightfully made by the jury. If in this case the jury have taken this profit as their guide and measure in assessing the actual damage sustained by the plaintiffs, can the court say that they have done wrong, or that under the evidence laid before them we could give them a better rule? Can we say that they have exceeded the power and discretion allowed to them, so that it becomes the duty of the court to undo all that they have done, and set aside their verdict as contrary to the law or evidence of the case? we think not.

If the payment of the sum for which a judgment must be rendered against the defendants shall be oppressive or inconvenient to them we shall regret it, because they appear to have acted under a mistaken opinion of the rights of the plaintiffs, from misinformation in relation to the validity of their claims of invention, and not from an obstinate or malicious design to injure them or benefit themselves by a wilful disregard of the rights of the plaintiffs. An intelligent and impartial jury have passed upon the case; "and the court sees no reason to find fault with them." The plaintiffs having established their right, and having no reason to apprehend any further interference with it, it would have been satisfactory to the court if some reasonable and liberal compromise could have been made with the defendants, who appear to be industrious and

useful mechanics, which would have made our judgment unnecessary. We do not feel authorized to press the suggestion further.

Rule discharged.

Case No. 17,586.

WHITNEY et al. v. The EMPIRE STATE.

[1 Ben. 57.] [1]

District Court, E. D. New York. May, 1866.

COLLISION IN HELL GATE—STEAMER AND SCHOONER—BEATING OUT TRACK—STEAMER NOT STOPPING—EVIDENCE—STATEMENTS OF CREW.

1. The schooner Gold Fish was coming through Hell Gate to New York, on an ebb tide, with a six-knot breeze from W.N.W. She stood over from Negro Point, close-hauled on her starboard tack, till near Hallett's Point, and then tacked off to the northward. Before going but a short distance, she was run into by the Empire State, which was bound from New York. The collision occurred in the afternoon. For the steamboat it was urged: (1) That the schooner, after coming about, ought to have remained in the wind long enough to allow the steamboat to pass her. (2) That the schooner was negligent, in that after she came about she let her sheets flow, and remained in the steamboat's track. (3) That the schooner did not run out her tack towards Hallett's Point. *Held*, that the circumstances make out a case where the burden of proof is on the steamboat to show by preponderating evidence that she was prevented from passing in safety by some fault in the management of the schooner.

2. It was not the duty of the schooner to remain in the wind. What the law requires of a sailing vessel in a narrow channel is to beat out her tack, and having done so, to come about with all possible dispatch upon the other, leaving to an approaching steam vessel the responsibility of being in a position to enable her to do so without danger.

[Approved in The Northern Warrior, Case No. 10,325. Cited in The Free State, Id. 5,090; The Renovator, 30 Fed. 195; The Servia, Id. 508; The A. W. Thompson, 39 Fed. 116.]

3. Though there may be cases where a departure from this rule would be justified, and even required, the present is not one. No sailing vessel in Hell Gate can be asked to check her headway to enable a steamboat to pass her at Hallett's Point.

4. The weight of evidence is against the defence that the schooner's sheets were let loose. Testimony of the men on board the schooner, respecting their own acts, must be considered as outweighing the statements of persons from the steamboat.

[Cited in The Hope, 4 Fed. 93.]

5. The rule requiring a sailing vessel to beat out her tack does not require her in all cases to go as near the shore as the depth of the water will permit, without reference to other exigencies. A schooner tacking above Hallett's Point is entitled to come about in time to insure avoiding the reef at the Point, and the place must vary according to the capacity of each vessel and the strength of the wind and tide.

6. The fact that the answer when put in did not deny the averment of the libel that the tack was properly beat out, is to be considered on a conflict of testimony on that point, even though the answer was allowed to be amended on the hearing by inserting such a denial.

7. Evidence of conversations with the crew of the schooner is entitled to little weight in determining disputed questions of fact, especially where the statements are denied by the witnesses on the stand, and are inconsistent with the cotemporary act of demanding pay for their vessel.

[Cited in The Hope, 4 Fed. 96; The Roman, 14 Fed. 62.]

8. The steamer was in fault in not stopping in time, and that, having selected the most hazardous course, by not waiting till the schooner had passed her to the northward, and having failed of success in it, she must be held responsible for the damages.

In admiralty.

Benedict, Burr & Benedict, for libelants.

I. T. Williams, Esq., for claimants.

BY THE COURT. This action is brought by the owners of the schooner Gold Fish, to recover damages caused by the sinking of that vessel in a collision with the steamboat Empire State, which occurred at Hell Gate, in March, 1864.

The proofs presented by the respective parties, while they are conflicting as to some of the main features of the case, establish without serious conflict the following facts. The schooner was bound to New York, and reached Hell Gate about 4:30 o'clock, p. m., the wind blowing then a six-knot breeze from about W. N. W. and the tide running the strength of the ebb. The steamboat Empire State was proceeding from New York, and when above Blackwell's Island the persons in charge of her saw the schooner approaching the Gate, close-hauled upon her starboard tack, from Negro Point. The steamboat then sheered and proceeded on toward Hallett's Point, and when near the Point, the wheel of the steamer was put hard-a-port, in order that she might be on a swing to starboard when she should strike the tide at the Point, which, owing to the abrupt turn of the Gate there, flows rapidly past the point, over toward Mill Rock, and at right angles with the channel below. No other change in the helm of the steamboat was made, nor was her engine then stopped, and accordingly the steamboat passed round the Point, swinging as she passed it, till she came head to the tide. While the steamboat was on the turn, the schooner was observed to be coming about. The engine of the steamboat was then stopped and backed, but before the vessel could get sternway on her she came in contact with the schooner, striking her on her larboard side, and cutting her down so as to make it necessary to run her ashore on Ward's Island, where, being loaded with lime, she took fire and burned up. These circumstances make out a case where the burden of proof is upon the steamboat, if she would avoid responsibility for the loss, to show by preponderating evidence, that she was prevented from passing the schooner in safety by some fault in the management of the schooner. This burden has been assumed, and it is contended that the proofs show that the schooner was in fault for not remaining in the wind after she came about long enough to have enabled the steam-

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

boat to pass by outside of her. There is evidence in the case indicating that this view of the duty of the sailing vessel was entertained by those in charge of the steamboat, and that, in choosing their course for passing the schooner, they relied in some measure upon the schooner's aiding them by remaining in the wind. Indeed, one of the witnesses greatly relied on by the respondent makes the failure of the schooner to do this his principal ground of objection to the navigation of the schooner. But this objection rests upon a misapprehension of the duty of a sailing vessel under circumstances like the present. What the law requires of a sailing vessel in a narrow channel is to beat out her tack, and having beat it out, to come about with all proper dispatch upon the other, leaving to the steam vessel the responsibility of being in a position to enable her to do so without danger. This is the general rule, and although there may be cases where a departure from it would be justified, and even required, the present is not one. In the swift tide and dangerous channel of Hell Gate, no sailing vessel can be asked to check her headway to enable a steamboat to pass her at Hallett's Point. See Twibell v. The Keystone, Nelson, J. [Case No. 14,285]. This objection to the navigation of this schooner must therefore be overruled.

The next objection taken by the respondent is that the schooner, after she came about upon her larboard tack, flowed up her sheets, and so remained, with her broadside to the steamboat, and directly in her course, when by properly handling her sails she could have gone on past the bows of the steamboat in safety.

A careful examination of the testimony offered upon both sides as to this point has satisfied me that the weight of evidence upon the point is clearly in favor of the libellants. The pilot and crew of the schooner are positive in their statement that the schooner filled away and kept full till the instant of collision, all the sheets except that of the gaff topsail being properly trimmed. This testimony being of the persons actually in charge of the sheets, and respecting their own acts, must be considered as outweighing the statements of persons from the other vessel. Moreover, the statement of the crew of the schooner is confirmed by the fact, which is nowhere contradicted, that the main and jib sheets were both made fast with an extra turn which was not intended to be unloosed in tacking, and which was not unloosed to make the tack in the present case, and which could not, without more delay than here appears, have been unloosed after the vessel came about head to the steamboat. In addition to this, it is to be remarked that the answer makes no allusion to any such fault in the navigation of the schooner, and that the testimony of the crew of the schooner, which was given before the point appeared in controversy, when examined is found incidentally to disprove the charge. I have no hesitation, therefore, in coming to the conclusion that the schooner cannot be held to be in fault in regard to the management of her sails after she came about.

The remaining fault charged upon the sailing vessel, and the one most strenuously urged, is that she did not beat out her starboard tack. The duty of a sailing vessel to beat out her tacks when meeting a steamer in narrow water, is unquestionable; but this rule does not require the sailing vessel in all cases to go as near to the shore as the depth of the water will permit, without reference to the other exigencies of the channel. In beating through a passage like Hell Gate, tacks must be made with reference to the safe passing of points and shoals ahead, and when approaching Hallett's Point with a strong ebb tide, a sailing vessel is entitled to come about in time to insure avoiding the reef at that point, although she may not be at the time of tacking as near the Long Island shore as the depth of the water would permit her to go. The end of the southern tack of sailing vessels from Negro Point is therefore no fixed point, but must vary according to the capacity of each vessel and the strength of the wind and tide at the time. This being so, it seems clear that the opinion of those engaged in the navigation of the sailing vessel, who knew the capacities of their vessel, and can most accurately judge as to the effect which the wind and tide are having upon her, is entitled to more weight, as showing the proper place for the tack, than opinions formed by persons aboard a steamboat approaching from below. In this case the testimony of the persons on board the schooner is positive and emphatic that they proceeded as far upon the tack as it was safe for them to go. The schooner was in charge of a regular Hell Gate pilot of experience, and no circumstance is proved which would make any departure from this course necessary or proper, or which would be likely to lead to any error of judgment. The steamer was in full view, and there was nothing in her method of approaching the tide at Hallett's Point to indicate that she intended to pass to the southward of the schooner. No alarm upon the schooner at the time is shown. She had a fine working breeze, and, as appears in evidence, was a vessel which worked with unusual celerity. Moreover, the whole tack was necessary for her to insure the passage of the Gate, without reference to the presence of an approaching vessel. It would seem to be highly improbable that under such circumstances the pilot of the schooner would have thrown his vessel into the wind before his tack was accomplished, and when her destruction was almost certain to ensue. It would require a very strong array of evidence to satisfy the mind against the positive statements of the persons working the schooner, and against all the probabilities of the case, that so extraordinary a manœuvre was attempted by the schooner. The evidence introduced by the respondent upon this point I have examined with care. I find some of it positive to the effect that the schooner tacked in mid-channel; other portions of it I find are inconsistent with the testimony given by the libellants; and aft-

er giving to it all the weight to which it is entitled, it has failed to convince my mind that the management of the schooner was faulty in not beating out her tack. With regard to this fault also, I notice that the original answer filed in the cause made no mention of it, and did not deny the averment of the libellants that the tack was properly beat out; and although when the cause was called on for hearing, upon the application of the respondent, the answer was permitted to be amended by inserting a denial of this averment, so that issue is now properly taken upon this question of fact, yet in determining it, the circumstance that while it is now made the principal issue, no such fault was charged by the owners of the steamer when they swore to and filed their answer, is entitled to be considered. If the omission to beat out the tack was then deemed the great fault on the part of the schooner, it is difficult to account for its omission in the original answer, when the facts attending the collision were fresh in the recollections of all.

Looking at the whole case, my conclusion is that the collision in question was not caused by any fault of the schooner, but by the fault of the steamboat in not stopping in time to allow the schooner to beat out the tack and pass the steamer's bows in safety. The testimony of the pilot of the steamer shows this. He states that when he saw the schooner, he determined to pass to the northward of her, and expected her to tack to the southward of him as he was passing, and come out under his stern. The steamboat was accordingly sheered, but not stopped, below Hallett's Point, and when she struck the tide, in passing the Point, was allowed to take it more broadly upon her side than usual, which would have the effect to carry her further to the northward. The effort to time the speed of the steamer, so as to bring her opposite the schooner at the time of the tack, failed. The schooner, under the full strength of a powerful tide and full breeze, and being, as appears in evidence, an uncommonly quick worker, reached her place for tacking sooner than was anticipated, and when it was impossible for the steamer to pass her bows to the northward as had been intended. The engine was at once stopped and reversed, and with the helm hard-a-port, an effort was made to pass to the southward; but owing to the position which the steamer had assumed in the tide, she could not sheer rapidly to starboard, and before she had time to change her direction materially, the schooner was under her bows. Had the steamer taken up the tide in the ordinary manner, intending to pass to the southward of the schooner, it is quite possible, as the event showed, that she might have passed in safety, for a small sheer would have swung the steamboat sufficiently to have cleared the schooner. But however this may be, had the steamer stopped her engine before she began to pass the point, all possible danger of collision would have been avoided. It cannot be claimed that there was any difficulty in her stopping below the point; and if, as proved by some of the witnesses, and as conceded by the counsel of the respondent, the tack was made when the steamer was abreast of Flood Rock, it was clearly the duty of the steamer to wait a moment before attempting to pass the point. Having selected the most hazardous course, and having failed of success in it, she must be held responsible for the damages which ensued. In arriving at this conclusion, I have attached little or no importance to the great mass of testimony introduced in the case, relating to conversation had with the crew of the schooner after the accident. This description of testimony, although often proved in actions for collisions, has, in most cases, been held by the court to be entitled to little weight, in determining disputed questions of facts appertaining to the navigation of the respective vessels; and where statements are denied by the witnesses upon the stand, and seem inconsistent with the cotemporary act of demanding payment for their vessel, I dismiss the evidence as of too uncertain a character to be relied on. The decree must be in favor of the libellants, with an order of reference to ascertain the amount of their damages.

[For a hearing on exception to the commissioner's report, see Case No. 4,473.]

Case No. 17,587.

WHITNEY v. FORT.

[Cited in Motte v. Bennett, Case No. 9,884. Nowhere reported; opinion not now accessible.]

Case No. 17,588.

WHITNEY v. FORT.

[Cited in Phil. Pat. 416; Wilton v. The Railroads, Case No. 17,857; Motte v. Bennett, Id. 9,884. See Whitney v. Carter, Id. 17,583, where an extended quotation from the opinion is given. Nowhere more fully reported; opinion not now accessible.]

WHITNEY (HARDING v.). See Case No. 6,052.

Case No. 17,589.

WHITNEY v. HUNTT.

[5 Cranch, C. C. 120.] [1]

Circuit Court, District of Columbia. March Term, 1837.

AUTHENTICATION OF DEPOSITIONS — NEGOTIABLE INSTRUMENTS—DEMAND OF PAYMENT—ADMISSIBILITY OF DECEASED NOTARY'S BOOKS—PROVINCE OF JURY.

1. A deposition taken in Louisiana before a person who calls himself "a commissioner duly appointed by the district court of the United States for the Eastern district of Louisiana, under and by virtue of the act of congress [2 Stat. 679] entitled 'An act for the more con-

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

venient taking of affidavits and bail in civil causes depending in the courts of the United States,'" and inclosed and directed to the clerk of this court, may be read in evidence to the jury, without further authentication.

2. Extracts from the notarial book of a deceased notary in Louisiana (proved by a witness who has the lawful possession of the book, and is authorized by the laws of Louisiana to certify the same) may be given in evidence in this court, to prove demand of payment of a promissory note, and notice to the indorser.

3. The court will leave it to the jury to decide, from the evidence, where the indorser (the defendant) resided when the note fell due, and whether the post-office to which the notice was sent was the nearest post-office to the defendant's residence; and will instruct them that if the notice was put into the post-office and directed to the defendant at the post-office nearest to his residence, it was sufficient notice, and that the holder had used due diligence in that respect.

Assumpsit [by Joseph Whitney] against [Thomas F. Huntt] the indorser of three promissory notes of Moses Duffy, dated at New Orleans on the 23d of June, 1824, and payable respectively, at one, two, and three years, each note being for the sum of $363.-81⅔.

Upon the trial, Mr. Hale, for the plaintiff, offered to read, in evidence to the jury, the deposition of one Felix Percy, taken before T. W. Collens, who certifies himself to be "a commissioner appointed by the district court of the United States for the Eastern district of Louisiana, under and by virtue of the act of congress, entitled, 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States.'" The deposition was sealed up by the commissioner, and directed "to the clerk of the circuit court of the District of Columbia, for the county of Washington." The act of congress referred to is the act of the 20th of February, 1812, c. 348 (2 Stat. 679), which authorizes the circuit court of the United States, in any district, &c., "to appoint such and so many discreet persons, in different parts of the district, as such court shall deem necessary to take acknowledgments of bail and affidavits; which" "shall have the like force and effect as if taken before any judge of the said court," &c. And by the act of March 1, 1817, c. 30 (Pamph. Laws, 212, 3 Stat. 350), entitled, "An act in addition to an act, for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," it is enacted, "That the commissioners who now are, or hereafter may be, appointed by virtue of the act entitled an act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States, are hereby authorized to take affidavits and bail in civil causes, to be used in the several district courts of the United States; and shall and may exercise all the powers that a justice or judge of any of the courts of the United States may exercise by virtue of the thirtieth section of the act entitled an act to establish the judicial courts of the United States." By the act of April 8, 1812 (2 Stat. 701), the district court of the United States, for the state of Louisiana, has the powers of a circuit court.

R. S. Coxe, for defendant, objected to the deposition, and contended that the commissioners, under the act of 1812, were only authorized to take depositions, &c., in causes depending in their own courts, or in the district courts, under the act of 1817. That the appointment of the commissioner should be authenticated by the record; and the deposition should have been directed to this court, and not to the clerk.

THE COURT (MORSELL, Circuit Judge, contrà) permitted the deposition to be read. It went to prove the entries made in the notarial book of a deceased notary-public, in New Orleans, as to the demand of payment of the notes, and the notice given to the indorser, the defendant. By those entries it appeared that payment of the first note was demanded of the maker in person, and notice given in person to the defendant. That the notice as to the second note, was by letter addressed to the defendant, "at Camp's Post-Office, near Iberville, Louisiana." And as to the third note, by letter addressed to the defendant, "in the Parish of Iberville, in Louisiana." Parol evidence was also offered that the defendant said that in regard to two of the notes, the plaintiff would be unable to prove notice to him; that he did not live in or near Iberville when the same fell due. He also mentioned Baton Rouge as a place in or near which he resided at the time. Evidence was also given that Iberville is a large parish in Louisiana, on both sides of the Mississippi; that on the east side it extends up to within about ten miles of Baton Rouge, and on the other side, opposite or nearly opposite Baton Rouge, and many miles below. That the defendant was an officer in the army, and was on public service during the time he resided up the Mississippi; and that the arsenal and military post of the United States was at or immediately in the vicinity of Baton Rouge, on the side of the river opposite to the town of Iberville, and several miles therefrom. Whereupon the defendant's counsel prayed the court to instruct the jury, that from the evidence aforesaid they could not infer that due notice was given to the defendant of the demand and refusal of the maker of said notes, to charge the indorser.

But THE COURT refused to give the instruction as prayed, and instructed them that if they should be satisfied, by the evidence, that the defendant resided at or near Iberville, in Louisiana, at the time of the protest of the said note, payable two years after date, and that Camp's Post-Office, mentioned in the certificate of the deceased notary, as stated in the deposition of Felix Percy, was

the post-office at Iberville, and that it was the nearest post-office to the residence of the defendant at that time, it was sufficient notice to the defendant, and that the holder had used due diligence in that respect. To which refusal and instruction the defendant excepted, as well as to the admission of the deposition of Felix Percy.

The jury found a verdict for the plaintiff, for the amount of the two first notes.

No writ of error was issued, and the judgment was satisfied.

Case No. 17,590.

WHITNEY v. JANESVILLE GAZETTE.

[5 Biss. 330; [1] 5 Chi. Leg. News, 469.]

Circuit Court, W. D. Wisconsin. June, 1873.

LIBEL DEFINED—MALICE—JUSTIFICATION—MITIGATING CIRCUMSTANCES—PLAINTIFF'S BAD CHARACTER.

1. Printed slander is a higher offense than merely speaking the defamatory words.

2. A publication without justification or lawful excuse, and calculated to injure the reputation of another, and expose him to hatred or contempt, is a libel.

3. The words are to be taken in their ordinary sense, and if directly calculated to degrade a man in the estimation of his acquaintances, and to injure his business character, they are actionable per se, without proof of malice or special damages.

4. An account of an assault and battery, if correctly given as an item of local news, cannot be complained of. But though the plaintiff may have been the aggressor, and have violated the law, this did not authorize the writer to go outside of the transaction, and reflect upon the plaintiff's personal and business character, unless the strictures were true.

5. If the charge is false, malice need not be proved, it will be implied. Good motives will be implied from the truth of the charge.

6. The truth of the publication is the only perfect answer and bar, and the justification, to be complete, must be co-extensive with the libel.

7. If mitigating circumstances are offered in evidence, to repel the presumption of malice, it must be shown that the defendant knew of them at the time of making the charge.

8. Defendant may show that plaintiff's reputation sustained no injury, because he had none to lose.

9. He is presumed to be of good character until the contrary is shown, and the burden of proof is on the defendant. It is his general reputation, and not his reputation as to any particular transaction, which is in issue.

This was an action of libel by William H. Whitney against the Janesville Gazette. The alleged libelous publication consisted of an article about three-fourths of a column in length, published in the issue of January 24, 1871, and headed "A Desperate Assault on a Peaceable Citizen." It gave an account of an assault by the plaintiff upon one Tompkins, a jeweler in Janesville, in his store. The plaintiff entered by breaking the glass in the window. The affair took place in one of the most prominent streets in Janesville, and created considerable excitement at the time. The plaintiff laid his damages at $10,000.

I. C. Sloan and H. S. Orton, for plaintiff.

Charles G. Williams and J. B. Cassoday, for defendant.

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

DAVIS, Circuit Justice (charging jury). This case has been tried with eminent ability, and it becomes the duty of the court before you pass upon it, to aid you, within legal rules, in reaching a proper conclusion. This action is for printed slander, which has always been regarded as a much higher offense than where the defamatory words were merely spoken. In written, or printed slander, the act is more deliberate than barely speaking the words, and the injury resulting from the publication more serious and mischievous. On this account, written or printed slander is punishable by indictment, as well as by civil action, which is not the case with oral slander.

A publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred or contempt, is a libel. The effect of the words used is the test of whether they are actionable or not, for the injury caused by the slander depends on the meaning which any reasonable man would give to the words on reading them. The ordinary sense of those words is to be taken as the meaning of the party who employs them. And if the import of the words, as they may be fairly understood by those who read them, is directly calculated to degrade the man in the estimation of his acquaintances, and to injure his business character, they are in themselves actionable, and do not require proof of malice, or that any special damage has resulted from their publication, for every one is presumed to intend the natural and necessary consequences of his own conduct. To say of a person that he is a professional swindler, is actionable, because every one would understand that the accusation was that he made a practice of defrauding others by imposition or artifice. And to accuse a man of bringing another to financial ruin, by his machinations, is libelous. Such a charge necessarily conveys the idea that the accused party, by contrivance, brought about this result, and is a serious damage to his reputation.

Whether the particular publication which is the subject of this inquiry is within the rules which we have laid down for your guidance, and therefore libelous, is a question upon which you are to exercise your judgment, and pronounce your opinion as a question of fact. The whole article is to be taken together in determining the character of it. It sets out with an account of a serious affray, in which the plaintiff and one Tompkins were

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

concerned, and which produced great excitement in the community of Janesville. The writer then says that this man Whitney (the plaintiff in this action) has figured rather conspicuously for some time past, to the disadvantage of the business interests of Janesville, and then proceeds to give an account of Whitney's dealings with S. C. Spaulding, Mr. Denell, W. L. Gookins and Tompkins, upon whom the assault was made, and after stating that Tompkins, while Whitney was absent, locked the store door, to prevent Whitney from packing up the goods until some sort of a settlement was effected, says: "This was the occasion of the assault which produced great excitement for a time, as the sympathies of the public are with the victims of this professional swindler." The article winds up as follows: "Mr. Whitney is a resident of New York city, and has his headquarters on Broadway. We understand that his ways are not as light as are those of good and honest men."

The account given by the writer of the occasion and circumstances attending this assault and battery are not complained of, and the evidence relating thereto offered by the defendant was excluded by the court, as not pertinent to the issue. This account, as an item of local news, if correctly given, could not be complained of.

It may be that Whitney may have been the aggressor in this assault, and may have violated the law, and behaved badly; but this did not authorize the writer to go outside of this transaction and compose an article reflecting injuriously upon Whitney's personal and business character unless the strictures were true. It is for the statements contained in this portion of the article that the plaintiff sues. Taking the whole article together, what does it mean, and what would men of ordinary intelligence understand by it? It is for the jury to say. Do the words used convey the meaning that Whitney was guilty of dishonest practices in his business dealings with the several persons mentioned? If so, unless they are true, the plaintiff has suffered, and is entitled to compensation for publication. It is true, there is no action for the words of mere general abuse, but do not these words import that Whitney dealt dishonestly with the persons named? Could the writer have meant to charge anything less than this, when he winds up his account of Whitney's transactions in Janesville, by stating that the sympathies of the public were with the victims of this professional swindler, and could the reader of the article have understood it in any other way?

Whether the reader of this article would understand the writer as intending to charge Whitney with swindling everybody with whom he had dealings, or only those persons who are named in the article, may admit of some question. It is for the jury to say whether this charge was meant and would be understood as being restricted to Whitney's dealings with Spaulding, Denell, Gookins and Tompkins. And it is for the jury to say whether or not the injury to Whitney is greater or less, according to the enlarged or restricted sense of these words, as they may find them to have been used. In connection with this point the closing part of the article is to be considered by the jury. It winds up, as we have seen, by stating the residence of the plaintiff, and that the writer understood "that his ways are not as light as those of good and honest men." Were these words meant, and would they be understood as applying to the Janesville transactions, or to the general character of the plaintiff? If the latter, then the jury are to say whether or not they convey a general charge of dishonesty, and are calculated still further to bring Whitney into disgrace and disrepute.

Does the whole publication hold the plaintiff up to reproach or disgrace in his business relations, either with specific persons or the public generally? If so, it is a libel. As we have stated, malice need not be proved; it will be implied if the charge is false. As malice is inferred from the falsity of the charge, so good motives will be implied from the truth of the charge. And this leads us to consider the defenses to this action. There can be but one perfect answer and bar to it, and that is that the publication is true. And the justification to be complete must be co-extensive with the slander. It is apparent from the evidence that the charge of general swindling and dishonest practices has not been sustained. Has it been sustained, if the jury believe the publication was meant and would be understood as limiting the charge to the dealings with the persons named in Janesville?

On this point there can be no doubt, for there is not a particle of evidence, to show that Whitney ever dealt unfairly with Spaulding or Denell, or had anything to do with the pecuniary embarrassments of either. Nor is there any evidence that he swindled Tompkins or dealt dishonestly with him. The most that can be said in regard to the evidence on this subject is, that there was a misunderstanding in relation to the time allowed to Tompkins, within which to determine whether or not he would buy the goods. There was no moral turpitude involved in the transaction. The defendants, then, having failed to show any improper dealings with Spaulding, Denell and Tompkins, were not justified in the charge which they made in relation to those dealings. The justification to be complete, must extend to every part of the defamatory matter, which could by itself form a substantive ground of action.

But by the law of this state, the defendants may prove, in mitigation of damages, such facts as tend to prove the truth of the charge and yet fall short of it. And it is in this view that the jury will consider the evidence relating to the dealings of Whitney with Gookins. It is not the purpose of the

court, in view of extended remarks by counsel on both sides, to comment on this evidence and explain it. It is one of the main features of the case, and presents a question of fact, on which the jury are peculiarly qualified to pass. If, on fairly considering the whole evidence bearing on this point, you are of opinion that there is nothing to impeach the fair dealing of Whitney with Gookins, then the libel in this particular is also false, and the offense of the publication of it is in no respect mitigated. On the contrary, if the jury believe, from the evidence, that Whitney was guilty of dishonest practices in his dealings with Gookins, and tried to cheat him, this will be weighed and considered by them in mitigation of damages. The evidence on the subject consists mainly of the testimony of the parties themselves. The jury should weigh all the facts and circumstances detailed by the parties, and say where the truth of the matter is. Mitigating circumstances are offered in evidence to repel the presumption of malice. Where this is the case it should be shown that the defendants knew of them at the time they made the charge. On this point, the jury will recollect the testimony given by the writer of the article and by Gookins, and reconcile it, if they can. If they are not able to do this, then to say what is the truth about it.

The plaintiff's general character is in issue in this action, and the defendants may show that the plaintiff's reputation has sustained no injury, because he had no reputation to lose. This they have endeavored to do by the deposition of two witnesses from New York, and this proof has been met by the deposition of four witnesses from there and by the oral testimony of one witness from this city.

We do not care to comment on this testimony, for the jury will recollect it. It is for you to say whether the attack made on the general character of the plaintiff has or has not been sustained. He is presumed to be of good character until the contrary is shown, and the burden of proof on this point is on the defendants. It is the plaintiff's general reputation taken as a whole, and not his reputation as to any particular act, or in any particular transaction, that is the subject of injury in determining this point. The jury will take the case and do justice between the parties.

The jury found a verdict for the plaintiff for eleven hundred dollars.

NOTE. A publication calculated to make the party infamous, odious, or ridiculous, is prima facie a libel, and implies malice. White v. Nicholls, 3 How. [44 U. S.] 266; Dexter v. Spear [Case No. 3,867]; Com. v. Clap, 4 Mass. 163; Gathercole v. Miall, 15 Mees. & W. 319, 344; O'Brien v. Clement, Id. 435. Rules of construction applicable to a libelous publication. Kerr v. Force [Case No. 7,730]. "Libel," defined. Hillhouse v. Dunning, 6 Conn. 391, 407; Steele v. Southwick, 9 Johns. 214; State v. Farley, 4 McCord, 317; Clark v. Binney, 2 Pick. 113; Cooper v. Greeley, 1 Denio, 347; Newbraugh v. Curry, Wright, N. P. (Ohio) 47. The whole publication, in connection with the circumstances, should be construed together. Graves v. Waller, 19 Conn. 90, 94. A malicious publication is held to be actionable, when speaking the same words would not be. Thorley v. Lord Kerry, 4 Taunt. 355; McClurg v. Ross, 5 Bin. 218; Fonville v. M'Nease, Dud. (S. C.) 303. Though an editor has the right to publish the fact that a person has been arrested, and upon what charge, he has no right to presume that he is guilty. Usher v. Severance, 2 Appl. 9. Aspersions upon an author's moral character, printed in a criticism on his books, are libelous. Cooper v. Stone, 24 Wend. 434. If the defendant intends to rely on the truth of the publication, either in bar or mitigation of damages, he must plead it specially. Barrows v. Carpenter [Case No. 1,058]; Stow v. Converse, 4 Conn. 17, 33; Mix v. Woodward, 12 Conn. 262, 289; Torrey v. Field, 10 Vt. 353; Shirley v. Keathy, 4 Cold. 29; Hagan v. Hendry, 18 Md. 177. In mitigation, the defendant may show the general bad character of plaintiff, and any fact which tends to disprove malice. Sheahan v. Collins, 20 Ill. 325; Maynard v. Beardsley, 7 Wend. 560; Young v. Bennett, 4 Scam. 43; B. v. I., 22 Wis. 372. The defendant's justification must be as broad as the charge. Skinner v. Powers, 1 Wend. 451; Brooks v. Bemiss, 8 Johns. 455; Stilwell v. Barter, 19 Wend. 487. The truth of the libel, when it does not negative the intention to defame the reputation of the plaintiff, cannot be shown in defense, but it may be shown that the purpose was justifiable. Com. v. Clap, 4 Mass. 163; Com. v. Blanding, 3 Pick. 304; and in Swift v. Dickerman, 31 Conn. 285, it is held, that the truth in an action of slander cannot be shown in mitigation of damages. If a plea of justification is made in good faith, evidence insufficient to prove it should be considered in mitigation. Thomas v. Dunaway, 30 Ill. 373. But if introduced for the purpose of further injuring plaintiff, they are an aggravation. Id. But mere failure to prove justification does not entitle the plaintiff to exemplary damages. Rayner v. Kinney, 14 Ohio St. 283. Where mitigating circumstances are offered in evidence to repel the presumption of malice, it should be shown that the defendant knew of them at the time he made the charge. Swift v. Dickerman, 31 Conn. 285. It is a general rule in actions of a criminal or quasi criminal nature, that evidence of general good character cannot be introduced, unless the opposite party has offered evidence attacking the character. Bracy v. Kibbe, 31 Barb. 273; Shattuck v. Myers, 13 Ind. 46; Reed v. Williams, 5 Sneed, 580.

Case No. 17,591.

WHITNEY v. The MARY GRATWICK.

[2 Sawy. 342.] [1]

District Court, D. California. Feb. 3, 1873.[2]

MASTER'S LIEN FOR WAGES UNDER STATE STATUTE.

The master of a vessel exclusively engaged in navigating the interior waters of this state may maintain a libel, in rem, for his wages and advances—when a lien therefor is created by the state law.

[Cited in The Louis Olsen, 52 Fed. 653; The City of Norwalk, 55 Fed. 106; The Julia, 57 Fed. 235; The Louis Olsen, 6 C. C. A. 608, 57 Fed. 846.]

[This was a libel for wages by W. J. Whitney against the scow-schooner Mary Gratwick.]

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

[2] [Affirmed by circuit court, case unreported.]

D. J. Sullivan, for libelant.
Leander Quint, for claimant.

HOFFMAN, District Judge. The libel in this case is filed by the master, in rem, against the above named vessel, to recover his wages, and for supplies furnished by him during various voyages between different places on the Bay of San Francisco. The claimant excepts, on the ground that the master has no lien on which to maintain a libel, in rem, for wages or supplies.

It is well settled that in all suits by material men, for supplies, repairs or other necessaries furnished to domestic ships, the libellant may proceed, in rem, against the vessel wherever, by the local law, a lien is given to material men for such supplies, repairs or other necessaries. This right was expressly recognized by rule 12 of the supreme court, and though, by the amended rule of 1859 this right was taken away, it has been explicitly declared by the supreme court that the amendment was not adopted on the ground of any supposed want of jurisdiction in the admiralty courts to enforce such liens, but on considerations of policy and convenience. In 1872 rule 12 was again amended, so as to permit all material men to proceed against the ship in rem. This last amended rule differs from the original rule of 1844, in not restricting the right of domestic material men to proceed, in rem, against the vessel, to those cases where a lien is given by the local law. It is unnecessary to inquire whether by this amended rule the supreme court intended to overturn the authority of the case of The General Smith [4 Wheat. (17 U. S.) 438], in which it was held that, in respect to materials and supplies furnished a ship in the port, or state to which she belongs, the case is governed by the municipal law of the state; or to consider whether the supreme court can, by adopting a rule of practice, change the law as established by its own judicial decision in a case regularly and formally submitted to it. For the purposes of this case, it is sufficient to say that by rule 12 of 1844, and the amended rule of 1872, and in numerous decisions both of the supreme and district courts, the principle is recognized, that where, by the lex loci contractus, a lien is attached to a contract maritime in its nature, the courts of admiralty will give effect to the right so created by a proceeding in rem.

The latest case to which this principle has been applied by the supreme court, is Ex parte McNeil, 13 Wall. [80 U. S.] 236. In that case an application was made for a petition to the judge of the United States district court for the Eastern district of New York, to restrain him from enforcing a decree rendered by him in favor of a pilot, for the half pilotage allowed by the laws of New York, to pilots whose services have been offered and declined. The suit does not appear to have been in form in rem. The libel was filed against the owners of the vessel, who were not found; the vessel was then attached, whether by a process in rem or under a writ of foreign attachment, does not clearly appear. But the court, in its opinion, states the grounds relied on in support of the application, as follows: (1) That the district court had no jurisdiction of the cause of action stated in the libel; and (2) that no lien existed on the vessel enforceable in the admiralty.

With reference to this last objection, the court held that though a state law cannot give jurisdiction to a national court, it may yet give a right of such a character, that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper national tribunal, whether it be a court of equity, of admiralty, or of common law.

In the able paper on "Admiralty Rule 12," in the American Law Review for October, 1872, this decision is treated as establishing not only that the tender of services by a pilot is a maritime transaction, of which the court of admiralty had jurisdiction, but also that the lien of the pilot created by the laws of New York, is a lien enforceable in the court of admiralty. The same principle has been applied in several instances by the district courts to the case of masters of foreign vessels, where, by the law of the flag, they were entitled to liens for their wages. The New Jersey [Case No. 5,233]; The Havana [Id. 6,226]; The George Prescott [Id. 5,339]; The Sailor Prince [Id. 12,219]; The Island City [Id. 7,109]; The Pawashick [Id. 10,851].

In the case of The Young Mechanic [Case No. 18,180], Mr. J. Curtis considers, in an elaborate opinion, the nature of the lien upon domestic ships, created by local law in favor of material men. He holds that it is identical with the jus in re or maritime lien given by the maritime law to material men on foreign vessels.

It seems clear, therefore, that the master's contract, being in its nature maritime, and enforceable in the admiralty by a suit in personam, it will also be enforced in rem, if, by the law of the state where the contract was made and the services performed, a lien in his favor is created. The laws of this state declare, in the most explicit terms, that steamers, vessels and boats shall be liable for services rendered on board, and for supplies furnished for their use at the request of their respective owners, masters, agents or consignees, and that such causes of action shall constitute liens upon all steamers, boats, vessels, etc. Prac. Act, § 317.

I am unable to perceive how the master who has rendered services or furnished supplies at the request of the owner, agent or consignee, can be deprived of the benefit of these provisions.

The exceptions must be overruled, and the claimant assigned to answer on the merits.

[On appeal to the circuit court, the above decree was affirmed at the July term, 1874, per Mr. Justice Field. Case unreported.]

Case No. 17,592.

WHITNEY v. MOWRY.

[2 Bond, 45; 3 Fish. Pat. Cas. 157.] [1]

Circuit Court, S. D. Ohio. Feb., 1867.

PATENTS—PRESUMPTIONS—EFFECT OF EXTENSION—CONSTRUCTION OF SPECIFICATIONS—INFRINGEMENT—METHOD OF MAKING CAR WHEELS.

1. The original presumptions of novelty and utility arising from the grant of a patent are strengthened by its extension.

[Cited in Cook v. Ernest, Case No. 3,155.]

2. Asa Whitney was the first person to apply a process of slow cooling, analogous to annealing, in the manufacture of chilled cast-iron wheels, thereby preventing inherent strains from unequal contraction.

3. This invention was not anticipated by the ordinary process of annealing metals as applied to wheels, other than car wheels.

4. The application of annealing to the art of manufacturing car wheels was new and patentable.

5. The phrase, "a point a little below that at which fusion commences," in Whitney's patent, gives a maximum of temperature, and does not imply that a lower temperature was not inconsistent with his invention.

6. "A little below fusion" does not mean "incipient fusion," or iron in a "semi-plastic state," but a point so far below fusion as to prevent the destruction of the chill.

7. A specification is addressed to workmen skilled in the art to which the invention relates, and something may properly be left to their judgment and discretion.

8. The process described in the patent of A. L. Mowry, dated May 7, 1861, of annealing car wheels, in pits, by charcoal interlaid between the wheels, is substantially the same as that patented to Asa Whitney.

9. Neither Whitney nor Mowry claim the apparatus. The invention of Whitney consists in the process, and this is infringed by Mowry.

10. Where charcoal was placed in a pit, into which a red-hot wheel was lowered, igniting the charcoal, and afterward charcoal and wheels were introduced alternately, *held*, that the wheels were placed in a "previously heated furnace" within the meaning of Whitney's patent.

11. The inventor of an improvement is not entitled to use the original invention.

12. An appeal, and the bond given in pursuance thereof, do not vacate or suspend an order of injunction.

[Cited in Brown v. Deere, 6 Fed. 490; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 805.]

[Cited in Tyler v. Superior Court of Sonoma Co. (Cal.) 13 Pac. 857.]

This was a suit in equity, brought to restrain the infringement of letters patent "for an improvement in the process of manufacturing cast-iron railroad wheels," granted to Asa Whitney, April 25, 1848, and extended April 25, 1862, for seven years. The facts, and material portion of Whitney's specifications, sufficiently appear in the opinion of the court.

The disclaimers and claim of the patent were as follows: "I do not claim to be the inventor of annealing castings made of iron or other metal, when done in the ordinary way; nor do I claim to be the inventor of any particular form or kind of furnace in which to perform the process; but what I do claim as my invention, and desire to secure by letters patent, is the process of prolonging the time of cooling, in connection with annealing railroad wheels, in the manner above described; that is to say, the taking them from the molds in which they are cast before they have become so much cooled as to produce such inherent strain on any part as to impair its ultimate strength, and immediately after being thus taken from the molds, depositing them in a previously heated furnace or chamber, so constructed, of such materials, and subject to such control, that the temperature of all parts of the wheels deposited therein may be raised to the same point (say a little below that at which fusion commences), when they are allowed to cool so fast, and no faster than is necessary for every part of each wheel to cool and shrink simultaneously together, and no one part before another."

Henry Baldwin, Jr., and S. S. Fisher, for complainant.

Bartley & Burnett and Collier & Heath, for defendant.

LEAVITT, District Judge. The bill alleges an infringement, by the defendant, of the complainant's patent for improvements in the manufacture of railroad car wheels, originally granted to him on April 25, 1848, and extended for seven years from April 25, 1862. The answer of the defendant, as first filed, denies the novelty of the complainant's patented invention, and also denies the infringement charged in the bill. He admits that he has been, and now is, extensively engaged in the manufacture of car wheels at Cincinnati, but avers that the wheels are annealed and prepared for use by a different process from that described and claimed in the complainant's patent, and in accordance with the claims and specification of a patent granted to him, dated May 7, 1861. By an amendment to the answer, allowed by the court during the hearing, the defendant sets up, as a further ground of defense, the want of utility in the improvements patented to the complainant. The issues then made by the pleadings are, therefore: First, the novelty of the complainant's invention; second, its utility; and, third, its infringement by the defendant. These issues will be considered in the order stated. But before proceeding to their consideration, it may be pertinent to remark, that from the great mass of the evidence adduced by the parties, it will be impossible, without an unwarrantable expansion of this opinion, to refer in detail to all the facts on which the conclusions of the court are based. I have carefully

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

considered the evidence, as also the extended and able arguments of the counsel, and will, with as much brevity as possible, state the results.

1. First, as to the novelty of the invention patented to the claimant. The allegations of the answer, assailing the novelty of the invention, are: "That, in so far as the complainant, in his said letters patent, claims to be the inventor of reheating car wheels after their removal from the molds, or of a continuing process of removing them, while at a red heat from the molds, and, without allowing them to cool, placing them, in that state, in a previously heated furnace or chamber, and there reheating them to a high temperature, and then allowing them to cool gradually; such claim is beyond the invention of complainant, and his said letters patent are void, for the reason that the same process was known and used long prior to such alleged invention by the complainant." The defendant then specifies more than twenty persons to whom the complainant's process was known, and by them used, in different places in the United States, prior to the date of his patent. He also refers to twenty or more works or printed publications in this country and in Great Britain, in which it is averred the complainant's process is described.

Before advancing further in considering the question of novelty, it will be necessary to state at least the outlines of the complainant's process, as set forth in his specification and claim. In the patent, the invention is designated as "a new and useful improvement in the process of manufacturing cast-iron railroad wheels." In his specification, the complainant calls it "a new and useful improvement in the process of manufacturing cast-iron railroad wheels." And he says: "My improvement consists in taking railroad wheels from the molds in which they are ordinarily cast, as soon after being cast as they are sufficiently cool to be strong enough to move with safety, or before they have become so much cooled as to produce any considerable inherent strain between the thin and thick parts, and putting them, in this state, into a furnace or chamber that has been previously heated to a temperature as high as that of the wheels when taken from the molds. As soon as they are deposited in this furnace or chamber, the opening through which they have been passed is closed, and the temperature of the furnace or chamber and its contents gradually raised to a point a little below that at which fusion commences, when all the avenues to and from the interior are closed, and the whole mass left to cool no faster than the heat it contains permeates through, and radiates from, the exterior surface of the materials of which it is composed. By this process all parts of each wheel are raised to the same temperature, and the heat they contain can only pass through the medium of the confined atmosphere that intervenes between them and the walls of the furnace or chamber; consequently the thinnest and thickest parts cool simultaneously together, which relieves them from all inherent strain whatever, when cold." After referring to the drawings descriptive of the furnace, the patentee adds: "To heat this furnace I have used anthracite coal, it requiring less than one-fourth of a ton to anneal two tons of wheels." He also provides for other kinds of fuel for heating the furnace, but declares that by whatever means the heat is produced, the furnace or chamber must be so constructed as that the operator can control the quantity and intensity of the heat used "by admitting more or less of it into the chamber, and excluding it entirely." After stating the advantage of annealing car wheels by this process, as adding to their strength and durability, and as being more economical than any other known process, he disclaims the annealing of castings in the ordinary way, and also says he does not "claim to be the inventor of any particular form or kind of furnace in which to perform the process." And he adds: "But what I do claim as my invention, and desire to secure by letters patent, is the process of prolonging the time of cooling, in connection with annealing railroad wheels in the manner above described—that is to say, the taking them from the molds in which they are cast, before they have become so much cooled as to produce such inherent strain on any part as to impair its ultimate strength, and immediately after being thus taken from the molds depositing them in a previously heated furnace or chamber, so constructed, of such materials, and subject to such control, that the temperature of all the parts of the wheels deposited therein may be raised to the same point (say a little below that at which fusion commences), when they are allowed to cool so fast, and no faster than is necessary for every part of each wheel to cool and shrink simultaneously together, and no one part before another." Such is substantially the specification and claim of the complainant, stated in such full, clear, and exact terms as that an intelligent mechanic in that department, according to the testimony of a well-qualified expert in that case, could readily follow the process described.

Before referring to the evidence offered as impeaching the novelty of the complainant's patented invention, it is proper to remark, that the evidence to sustain such a claim must be strong and conclusive, to justify a judgment setting aside the patent as void for want of novelty. The presumption of law is with the complainant upon this issue, arising not only from the grant of the original patent, but from its extension for seven years after its expiration. The statute authorizing the extension of a patent is too well known to require special reference or citation. It is sufficient to say that it imposes on the head of the patent office the duty of a critical revision of the grounds on which the original patent was granted. He must be satisfied, not only that the invention was new, but that it had proved of great practical utility to the public, and that the patentee had used proper diligence in bringing the invention into public use, and had not been

sufficiently remunerated, as the conditions on which alone the patent can be extended. And the statute requires notice of the application for the extension, so that all persons opposing it may have the opportunity of making their objections. A patent which successfully undergoes this scrutiny, without any modification of the original claim and specification, has very strong presumptive claims to validity, as being both new and useful. Another fact strengthening this presumption is, that the complainant, for eighteen years before the commencement of this suit, had practically and successfully practiced his patented method of annealing car wheels, during which time, as the proof shows, nearly five hundred thousand car wheels were manufactured and sold at his foundry in Philadelphia. But how does the issue of novelty stand upon the evidence? The complainant's patent bears date in April, 1848, but it appears that his application for a patent dates back to August 2, 1847, which is to be viewed as the date of his invention. All the witnesses agree, that prior to that time, no car wheel, made of cast iron, was known having the required qualities of durability and strength. The art of casting in chills as it is called—that is, casting in a mold, the outer circumference of which was iron instead of sand—was previously known and practiced. This produced a hardened surface of the periphery of the wheel; but in casting, the thick and thin parts of the wheel contracted unequally, and the result was an inherent strain between the periphery or tread of the wheel, and its inner parts, that greatly impaired the strength and durability of the wheel. Prior to the date of the complainant's invention, several devices had been resorted to, and patented, designed to remove the injurious effects of this inherent strain. The first remedy for this difficulty was to cast the hub in sections, dividing it into four parts. After the wheel had cooled, and the process of contraction ended, the spaces between the divided parts of the hub were filled with some fused metal, and the hub thus made solid. But this method involved a waste of time, and was too expensive for practical use. It was found, too, that the wheel was sometimes distorted, so as to be useless. It appears that the next device for avoiding the inherent strain was to make the plate, or thin part of the wheel, of a curved form, so that in cooling, the curve in the plate would be straightened. There were also patents for other plans, embodying changes in the shape of the wheels to overcome the effects of unequal contraction in cooling, and thus avoiding the inherent strain. But none of these inventors seem to have conceived the idea of making a practical car wheel with straight plates, so annealed and cooled as to leave it strong and durable, and uninjured by the unequal contraction of its parts. It is safe to say, that up to the date of the complainant's invention, the process of prolonging the time of cooling the wheel, in the mode described and claimed by him, and thus overcoming the difficulties of the prior methods, was unknown. Several intelligent witnesses sustain this conclusion in a manner that frees it from all doubt.

I have not deemed it necessary to advert to the publications referred to in the defendant's answer as anticipating the complainant's invention. They prove, undoubtedly, that the process of annealing metals has been long known, and that various plans and modes of accomplishing it have been described by scientific writers. But the evidence is clear, that casting railroad car wheels is a distinct branch of the art of casting, and that none of the printed works referred to, describe or apply to that art. One witness examined as an expert, and apparently well acquainted with mechanical science, testifies that in none of those works is the complainant's process of making car wheels alluded to or described. There is some reference to annealing wheels, other than car wheels, but none to any wheel cast with a chill, and therefore it has no application to the process described by, and patented to, the complainant.

Without enlarging on the question of the novelty of this invention, I have no hesitancy in the conclusion that the evidence is entirely satisfactory to prove that the process of prolonging the cooling of car wheels, and thus avoiding inherent strains, is due to the thought and inventive talent of the complainant. And I can not, perhaps, more appropriately close my remarks on this point than by quoting what was said in relation to it by my learned brother, Mr. Justice Swayne, who sat with me on the hearing of the application for an injunction, at the last April term of this court. His remarks on that occasion show a very intelligent apprehension of the subject, and are very pertinent to the question now under consideration. The learned judge, speaking for the court, said: "Our impression is, that the patent may be sustained on the ground of a discovery. Annealing is undoubtedly an old invention, but as applied to car wheels, may be valid as a discovery applied to car wheels. It strikes us, as the case is presented, we may fairly hold, and are bound to hold, that the patentee and complainant did discover a mode of overcoming this difficulty (the inherent strain of the wheels) by his process. That result is a meritorious one, and we should be inclined, at the final hearing, as we are now, to give such a construction to this patent as will sustain his claim to that invention, and give him the fruits of his discovery. There is no proof that he was not the inventor or discoverer of that art, and the application of that art." Such were the views of the learned judge, upon the case as presented on the application for the injunction. I may add, that the evidence on

the final hearing, instead of detracting from the correctness of these views on the question of the novelty of complainant's invention, as covered by his patent, has strengthened and confirmed them. Several reliable witnesses, familiar with the progress of making car wheels from their first introduction in this country, agree in their testimony, that, up to the time of this invention, no successful method of making them had been discovered; and that the complainant's process of prolonged cooling was the first known which overcame the defects in all wheels previously made. In the language of one witness: "It enabled a better wheel to be produced at a less cost than had been the case before his invention." And again: "There was a general confidence felt in regard to their strength as well as durability, which never had been the case regarding other wheels."

2. But, as before noticed, the complainant's patent is assailed, as being void for want of utility in the invention as described in his specification. The argument urged, as sustaining this ground of defense, is, that the claim for the discovery of the prolonged cooling of the wheels, after their removal from the mold, and their deposit in the pit or furnace, is that the temperature of all parts of the wheels "may be raised to the same point (say a little below that at which fusion commences)" * * * and that the effect of this high degree of heat is, either to destroy wholly the chill of the tread, or so to impair it, that the wheel will be practically of no value. This point is most strenuously insisted on by the counsel for the defendant; and if sustained by a fair construction of the patent, and the evidence as to the result of the application of the complainant's process of annealing car wheels, will be fatal to his claim in this suit. The want of utility in a patented invention is a valid objection to the patent; but it is well settled that courts will not inquire astutely into the degree or measure of its utility, and unless it appears that the invention is wholly worthless or frivolous, the patent will be sustained. It may also be pertinent to remark, on this question, that the presumption of utility arising from the grant of the original patent, its extension by the commissioner of patents, and the long and successful use of the patented process, as in the case of novelty, requires clear and explicit proof of its inutility, to justify a judgment declaring the patent void.

With these preliminary remarks, I will state briefly my views upon the point under consideration. It involves, obviously, a mixed question of construction and of fact. And it is proper, first, to settle what is the fair import and extent of the complainant's claim as to reheating the wheels, when placed in the furnace or chamber. In the description of his process he provides, after requiring the wheels to be thus placed, that "the temperature of the furnace or chamber, and its contents, be gradually raised to a point a little below that at which fusion commences." These words are substantially repeated in the claim, in a parenthesis, in this form: ("say a little below that—the point—at which fusion commences.")

It must be conceded that this claim, as to the degree of heat to which the wheels are to be subjected, is not stated with the precision and definiteness that is desirable. But it is a settled rule in the construction of patents, that the specification is to be liberally construed; and effect, if possible, is to be given to the claims of the patentee, so as to give him all the benefits of his invention. If, with a fraudulent purpose of concealing the invention, or any material part of it, he omits, or erroneously describes any essential element, the patent is absolutely void. But there is no claim, or pretense, that the complainant had any such purpose, in describing his process. And there is no reason to doubt, that, in referring to a degree of heat a little below the point of fusion, he indicated the degree which, in the hands of an operator of skill and judgment, would effect, practically and successfully, the object of his invention. He avoids the point of incipient or actual fusion, but requires the heat to be a little below that point. This expression clearly imports some latitude of discretion in the operator. It clearly does not require that the temperature of the wheels shall be raised to the precise point above which fusion would commence. It must be presumed that the inventor knew, that if the wheels were heated to incipient fusion, or to the degree immediately below, they would be so soft as not to retain their shape or symmetry in their position in the chamber or furnace, and that thus their utility would be destroyed. It is not supposable that the inventor intended what would destroy the very object he had in view, namely, to make a wheel in which the chill of the periphery should be preserved, and the inherent strain, from unequal contraction, avoided. I am clear that the patent may be regarded as claiming, by the fair import of the words, "a little below the point of fusion," such a degree of heat as is necessary to effectuate the intention of the inventor. His object was to guard against the point of fusion, and, also, against a temperature so low that an inherent strain would be produced between the thin and the thick parts of the wheel. He says, expressly, they must not be allowed to cool, after removal from the mold, to a degree which will cause this strain. That it was not in the mind, or according to the purpose of the patentee, that the temperature of the wheels should be limited to the exact point, just below where fusion begins, is inferable from a claim in the body of the specification, providing that the degree of heat must be left somewhat to the judgment of the operator.

Having referred to two plans for the construction of the chamber or furnace, either of which, he says, may be adopted, he adds this clause: "In either case, however, the furnace or chamber must be made of such form and have such appendages connected with it as to enable the operator to control the quantity and intensity of the heat used, by admitting more or less of it into the chamber, or of excluding it entirely." This seems to imply that a range of degrees of heat was contemplated by the patentee, the highest of which should be a little below where fusion commences, and the lowest above the point where the wheels would be liable to cool to such a degree as to produce an inherent strain. And this was clearly to be judged of, and controlled by, the operator. Upon the whole, as a question of construction, I can not find any sufficient basis for the conclusion that this patent must be held as a nullity, because the patentee has designated the point a little below where fusion begins, as the temperature to which the wheels are to be raised, after being placed in the furnace. So narrow a construction of a patent, which has been extensively and successfully used for eighteen years, can not be sustained. If it were conceded, that the effect of the heat, if raised to the point stated, would be to impair the chill of the wheel, or even to destroy it, I should hesitate to pronounce the patent invalid, in the face of the fact that operatives, who have manufactured wheels under this patent, for years, were almost invariably successful in producing car wheels of the most approved and practical character.

It is hardly necessary to refer to the numerous authorities in which it has been held, that in constructing machines, or carrying into effect a process, under patents, something must be left to the judgment and discretion of the mechanic, or operative, to whom the work is committed. The patentee, in his specification, addresses himself to those who are supposed to be familiar with the invention covered by the patent. And if the patentee has conformed to the requirement of the statute, by describing his invention "in such full, clear, and exact" terms as that one skilled in the branch to which it pertains, can construct it, if a machine, or carry it successfully into effect, if a process, his patent is sustainable.

It is hardly necessary to refer, at length, to the evidence offered by the defendant, to prove that car wheels, annealed strictly according to the process claimed and described in the complainant's specification, would be so far deprived of their chill as to render them useless. There are several witnesses, who state it as their opinion, that, if the wheels are raised to a temperature, when placed in the furnace, a little below the point of fusion, the chill would be impaired or wholly destroyed. These opinions, however, are based on mere speculation, and are not the result of actual experiments in annealing car wheels. Some of these witnesses have evidently misunderstood the claims of this patent. One seems to suppose it requires the wheels to be heated to "incipient fusion," and another speaks of them as in a "semi-plastic" state. Both are evidently mistaken as to the calls of the patent in this regard. One witness, Renwick—a very learned expert, called by the complainant—gives it as his opinion, on his cross-examination, that if the wheels, when placed in the furnace, were subjected to a long continued heat, a little below the point of fusion, the effect would be seriously to impair the chill. But the patent does not contemplate that they shall remain for any length of time at this high heat. On the contrary, it is distinctly stated in the specification, that as soon "as all parts of the wheel are raised to the same temperature, * * * all the avenues to and from the interior are closed, and the whole mass left to cool, no faster than the heat it contains permeates through, and radiates from, the exterior surface of the materials of which it (the furnace) is composed." From the heat required in the furnace when the wheels are placed in it, it is obvious that but a short space of time will be required to produce this equability of temperature; and this being effected, the process of cooling immediately commences.

It is by no means clear, from the evidence, that if the claim of the patent, requiring the wheels to be heated to a point a little below where fusion commences, is construed with the strictness claimed by the defendant's counsel, that the effect would be to destroy the chill, and thus impair the utility of the wheel. Several witnesses, familiar with this process from the date of complainant's patent, testify that in his extensive foundry wheels have been made and annealed in exact accordance with the patent, and without any change or modification. If this is the fact, it negatives, conclusively, the inference that the patented process, whatever construction is given to the claim, is injurious to, or destructive of, the chill of the wheel.

But if the views stated on the point under consideration are erroneous, there is another ground on which the claim of defendant's counsel, that the patent is void for inutility, must be overruled. It is apparent, from the specification, that the preservation of the chill of the wheel, by the process of annealing described, is not the only object deemed important and sought to be attained by the patentee. The prevention of any inherent strain is claimed as a part of the invention. And the witnesses who express the opinion that the high heat required for the wheels must impair or destroy the chill, say that the inherent strain would be prevented. The result would be, upon their theory, that while the tread of the wheel would be too soft for durable service, it would not be worthless, and would have, at least, the merit of being free

from any inherent strain. The wheel would not be as valuable as it would be, upon the supposition that the periphery was so far hardened by the chill as to make it more durable and useful, but the removal of the strain would impart to it a degree of utility sufficient to sustain the patent.

But it is not necessary further to pursue this branch of the case. I am clear in the conclusion, that neither upon the law nor the facts is the defense of the want of utility in this invention so made out as to require the judgment of the court that the patent is void on that ground.

3. The remaining issue to be disposed of is, whether the defendant has infringed the exclusive right of the complainant under his patent. The infringement is denied in the answer, and the onus of proving it is thrown on the complainant. The answer avers that the defendant has not manufactured or sold car wheels, "which have been subjected to the treatment or process described or specified in said letters patent of the complainant, or to any process or treatment substantially or practically similar in its nature or its effects." The defendant also avers, in his answer, that he was the first and original inventor of certain improvements in annealing car wheels, for which he obtained letters patent, dated May 7, 1861, and he avers, "that he has manufactured and annealed car wheels according to the process described in his said letters patent, and not otherwise." It may be well to notice here that neither the complainant nor the defendant claims, as a part of his invention, the form or structure of the furnace or pit in which the wheels are annealed. The complainant says in his specification: "Nor do I claim to be the inventor of any particular form or kind of furnace in which to perform the process." The defendant says: "I do not claim as my invention, or any part thereof, the pits, flues, or currents of air for the purpose herein described."

The question of infringement is, therefore, limited to the inquiry whether there is a substantial identity between the processes of annealing car wheels, as patented to, and used by, the parties respectively under their patents. The process of the complainant, as embodied in his patent, has been noticed before and need not be repeated here. The defendant, in his claim, says: "What I claim as new, and desire to secure by letters patent, is: The employment of charcoal, or other equivalent combustible substance, interlaid between the wheels, in a pit, in combination with an aperture d, for regulating the supply of air to the same, to prolong the combustion of the fuel, and retain the heat for the purpose herein described." In the second paragraph of his specification, he describes the character of his invention substantially as embodied in his claim just quoted, but with more particularity. He there says: "The purpose of the charcoal interlaid with the wheels is to heat the wheels in the pit to a proper temperature, prolonging the heat, and permitting them to cool gradually in a given time;" elsewhere stated to be about seventy-two hours. In another place, he states: "The operation of my invention is as follows: A layer of charcoal having been placed on the perforated bottom c, of the annealing pit, the wheels, as they are turned out of the molds, red-hot, are placed in the pit, with a layer of charcoal between each wheel; a layer of charcoal being laid on the uppermost wheel, and on this a perforated metal plate is placed; the charcoal becoming now ignited by the hot wheels, the cover of the pit is then laid on, and the damper opened so as to admit just sufficient air to effect the combustion of the contained charcoal." In further explaining his process, the defendant says: "It is well understood that chilled car wheels require to be cooled by a process which will permit the different parts to adjust themselves to each other, and accommodate the unequal contraction which results from the process of chilling." A comparison of the claims and specifications of these patents shows clearly that both had the same object in view, namely, annealing car wheels by a proper increase of heat after they were placed in the pit or furnace, and providing for their gradual and prolonged cooling, so that when cooled the tread, or periphery, should be of suitable hardness, and the strength of the wheels not impaired by the strain resulting from the unequal contraction of the parts. The issue in this case, on the question of infringement, seems, therefore, to be reduced to this inquiry, whether these patentees accomplish, by the annealing processes which they describe and claim, the same result by substantially the same means. The law applicable to identity is so well settled and understood that it is useless to extend this opinion by the formal citation of authorities. It is a conceded principle that a patent for a mechanical structure, or a process to effect a specific purpose, does not embrace every possible means of effecting the same result. The true inquiry is, whether the machine or process charged to be an invasion of an exclusive right of a patentee embodies the idea or conception of the original inventor, and accomplishes it by substantially the same means. A patentee is protected from the use of all plans or devices, which, however seemingly different from the patented invention, are the same in principle and operation.

This is a question of fact to be decided by the testimony, and to that I will briefly refer, remarking that the only points really in controversy are: (1) Whether the defendant provides for reheating the wheels when removed from the molds to the furnace or pit; (2) whether he claims the process of prolonged cooling as a part of his invention; and (3) whether his method of heating the furnace or pit is substantially the same as that described by the complainant. On these points I need not again refer to the claims of the two patents, as they have been already cited. The

reheating of the wheels in the pit, and the prolonged cooling after being heated to the proper temperature, are clearly claimed by the defendant in his specifications as elements of his process. The complainant heats the furnace, previously to the wheels being placed in it, by the combustion of anthracite coal or other suitable material; the defendant reheats by placing charcoal at the bottom of the pit, to be instantly ignited by the first red-hot wheel deposited, and then placing a layer of charcoal on each successive wheel, thus producing what one witness calls an "incandescent mass" in the furnace, and heating the whole to a high temperature. It was well and pertinently remarked by Judge Swayne, on the hearing of the application for an injunction in this case, after a critical comparison of both patents in reference to the specification of the defendant, that there were "very numerous analogies, though the collocation was a little different." And there seems to be no reason to doubt the correctness of the learned judge's conclusion.

It has been noticed in a previous part of this opinion that one of the defendant's counsel strenuously insisted, in his argument, that there was a palpable difference in the practical operation of the processes claimed by these parties in this: that if the specification of the complainant's patent is strictly followed, a wheel is produced with its chill so far impaired or destroyed as to render it useless; and that, therefore, the defendant's process is dissimilar, as its result is a perfect and practical wheel. This point is disposed of by the construction given to the complainant's patent, to the effect that he does not require or provide for a reheating of the wheel to an extent which destroys its usefulness.

On the question of the identity of the two processes a number of witnesses have testified on both sides. I have examined their evidence with care, but can not, without an unreasonable extension of this opinion, refer specially to it, or analyze the views and statements of the different witnesses. There is, undoubtedly, some conflict in the evidence on this point; but, in my judgment, that which sustains the substantial identity of the process of the complainant and the defendant greatly preponderates. The defendant's witnesses say they are different, because the complainant provides that the furnace or chamber, in which the wheels are placed after being taken from the molds, is previously heated to a high temperature, while, by the defendant's process, the furnance or chamber is not heated when the first wheel is deposited, and becomes gradually heated as each wheel is placed in position. Some express the opinion, from what is a clear misapprehension of the description of the defendant's process, that there is no reheating of the wheels after being removed from the molds. Others, again, think there is no claim by the defendant for the prolonged cooling of the wheels, as provided for in complainant's specification. And others say the heat of the wheel, by defendant's process, is not the same in all its parts; that the hub and rim of the wheel lose heat, while the temperature of the plate only is raised in the furnace or chamber. There are also, perhaps, some other points of disagreement stated by some of the witnesses to which I have not adverted. But all the evidence of this character seems to be fully met by the views and opinions of the experts who testify for the complainant. They are believed to be entirely truthful and reliable, and certainly evince a high degree of intelligence with reference to the subjects to which their attention is directed. One witness says: "In my opinion, the process of annealing car wheels, set forth in said Mowry's patent, is, in substance, a variation or modification of the process described in the said patent of the complainant; the process in said patent (Mowry's) embodying, in substance, the whole of the process described in said patent of the complainant, and the variations, consisting in the use of a particular fuel (charcoal) and of a furnace specially adapted to the employment of such fuel, for the purpose of increasing the temperature of the wheel." He then states at length his reasons for this conclusion, saying, at the close of his statement: "Although these differences constitute a variation in the mode of practicing the process, they do not so change it, in my opinion, as to make it substantially different from the process described in said complainant's patent." Another witness says: "I regard said apparatus of Mowry, in principle, mode of operation, and construction, as substantially identical with that patented to Whitney. I think that the processes are the same." This witness also states that the only difference between the two is in the mode of heating the wheels after being placed in the chamber or furnace, and that this is only a formal difference. A witness, who appears to have had much experience in making car wheels, and to be well acquainted with the business, speaking of the processes of the complainant and defendant, says: "I believe them to be substantially the same in principle, mode of operation, and effect produced." Another witness testifies that "the process described by the defendant is identical, in operation and results, with that patented to the complainant; both taking red-hot wheels before they are injured by contraction in cooling, putting them in a furnace, chamber, or pit, then raising the temperature of the wheels to a uniform degree throughout, and then permitting them to cool slowly, that when cold, no strain is left upon them by unequal shrinking." The complainant, as a witness, swears: "The only difference, in my opinion, between my process and that of Mr. Mowry is that incident to the different fuels used by each; the effect is the same in both cases."

The evidence seems to be very conclusive that the two processes are substantially identical, and that the variations in the mode of using them are merely formal, and do not imply a difference in principle. The conception embodied in the invention of the complainant is most clearly reproduced in the patent of the defendant. And if it were true, as contended by the defendant's counsel, that his process produces a more perfect and valuable wheel than that of the complainant, it would not protect him from liability for an infringement, if he adopts, substantially, the essential elements of the original invention. If he was the inventor of an improvement, new and useful, it was properly the subject of a patent, but would not authorize him to appropriate, as his own, the invention of the complainant.

The law on this subject is well settled by numerous adjudications of the courts of the United States. Without quoting at length the decisions of these courts on this point, I will merely refer to the cases in which the principle is involved. Winans v. Denmead, 15 How. [56 U. S.] 342; Goodyear v. Railroad [Case No. 5,563]; Goodyear v. Day [Id. 5,566]; McCormick v. Seymour [Id. 8,726]; Sickels v. Borden [Id. 12,832]; Tilghman v. Mitchell [Id. 14,043].

It is my conclusion that the issues of novelty, utility, and infringement are all with the complainant, and that a decree must be entered in his favor.

Decree for perpetual injunction and account.

After the entry of the decree, the defendant moved to set the same aside, and to modify it, so as to allow defendant to continue his manufacture, under proper security, until the coming in of the master's report. It was contended, on behalf of defendant, that when the report was confirmed and final decree entered, the appeal bond would operate as a supersedeas to the order of injunction; and as the defendant might then go on unchecked, he ought not to be enjoined absolutely, pending the investigation before the master. Barnard v. Gibson, 7 How. [48 U. S.] 650. The complainant insisted that the appeal bond did not supersede the injunction; that the supersedeas did not extend beyond the money judgment and costs (Merced Min. Co. v. Fremont, 7 Cal. 130; Hart v. Mayor of Albany, 3 Paige, 381); and that the merits of the case having been fully heard, and the equity having been found with the complainant, he was entitled to his injunction as soon as the issues of the validity of the patent and the infringement by the defendant were passed upon by the court.

LEAVITT, District Judge. After a careful consideration of the question, and after conference with SWAYNE, Circuit Justice, I am satisfied that the law and practice have very well settled that the appeal, and bond given in pursuance thereof, do not vacate or suspend the order of injunction; they affect only the collection of the amount adjudged as damages and costs. I can not, therefore, see that the proposed modification of the decree would result in anything beneficial to the defendant. I have no doubt of the power of the court, in a proper case, to interpose and modify the order by suspending the operation of the injunction. If a reasonable doubt existed in the mind of the court as to its decision upon the merits; or if there were any reason to suppose that the injunction had been indiscreetly granted, it would be quite proper to make such a modification. But in the present case I have no such doubt; my mind is quite clear that the defendant does infringe this patent, and that the patent is valid. I do not think, therefore, that under the circumstances of this case the motion ought to be granted.

Motion overruled.

[See Cases Nos. 17,593 and 17,594.]

Case No. 17,593.

WHITNEY v. MOWRY.

[4 Fish. Pat. Cas. 141.] [1]

Circuit Court, S. D. Ohio. Oct., 1868.

PATENTS—NOVELTY AND UTILITY—INFRINGEMENT—MEASURE OF PROFITS—CAR WHEELS.

1. The novelty, utility, and vitality of Whitney's patent, lies in the reheating of car-wheels, in combination with slow cooling them.

2. If the proof were that up to the point where the wheels were ready to be subjected to some annealing process, they were worthless—had no actual or market value—and could not have until subjected to the process covered by the plaintiff's patent, then perhaps the entire amount of profit made by the manufacture of the wheels would be the measure of damages.

3. Irrespective of that particular aspect, the case would seem to be one for the apportionment of damages.

4. If a party invent a machine having no salable commercial value, and then use in connection with it the invention of another, no matter how slight, which gives it its entire market value, it would seem, at first, that the amount to be recovered should be the entire amount of profit.

5. But if the thing made be of considerable magnitude and cost, and the invention applied to it be slight in cost and value, and yet so attracting to the public taste that no one will buy the original article without the addition of the new invention, it would seem to be a hard measure of justice in a court of equity to give the entire profit to the patentee of the small and trivial invention.

6. Case referred back to the master to report whether the wheels made and sold by the defendant had, or could have been made to have, any market value without being subjected to the process patented to the complainant, and if so, how much additional and greater market value, if any, they derived from being subjected to said patented process.

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

These were motions to confirm and reject the report of the master to whom had been referred the inquiry as to the profits derived by the defendant from the infringement of letters patent for "method of annealing and cooling cast-iron car-wheels," granted to Asa Whitney, April 5, 1848, and extended for seven years from April 5, 1862. The original case is reported in Whitney v. Mowry [Case No. 17,592]. The master reported profits from the manufacture of car-wheels made by the infringing process amounting to about ninety thousand dollars. He also reported that the defendant had manufactured car-wheels without annealing, prior to the adoption of the infringing process and after its discontinuance by reason of the injunction; that the unannealed wheels sold for the same price as the annealed, while the latter cost about twenty-five cents each more than the former. The complainant claimed the entire amount of profit as reported by the master, while the defendant insisted that no profits had been made by the use of the patented process.

Henry Baldwin, Jr., and S. S. Fisher, for complainant.

C. B. Collier and E. M. Stanton, for defendant.

SWAYNE, Circuit Justice. The only question before us, as the case has been presented in the argument just closed, is, whether by the master's report, as it stands, the plaintiff is entitled to the entire amount of profits which have been made by the defendants as estimated. If that be clear, we need no further light on the subject, and there is no necessity for referring the matter back to the master for a further report, and for him to take further testimony in the case, leading to the proper solution of this point.

The claim of the patent is as follows: "I do not claim to be the inventor of annealing castings made of iron, or other metal, when done in the ordinary way." That ordinary way is well understood in the history of the arts, and need not be remarked upon. "Nor do I claim to be the inventor of any particular form or kind of furnace in which to perform the process." There is here a clear implication and recognition of the right of others, notwithstanding the patent of the plaintiff, to perform this annealing process in the ordinary way, by means of a furnace used for that purpose. "But what I do claim as my invention, and desire to secure by letters patent, is the process of prolonging the time of cooling, in connection with annealing railroad wheels in the manner above described—that is to say, the taking them from the molds in which they are cast before they have become so much cooled as to produce such inherent strain on any part as to impair its ultimate strength, and immediately after being thus taken from the molds, depositing them in a previously heated furnace or chamber, so constructed, of such materials, and subject to such control, that the temperature of all parts of the wheels deposited therein, may be raised to the same point (say a little below that at which fusion commences) when they are allowed to cool so fast and no faster, than is necessary for every part of each wheel to cool and shrink simultaneously together, and no one part before another."

Here, it will be observed, in relation to this claim, that two things are claimed, and every thing else is disclaimed: (1) The reheating of the wheel to be annealed, and that reheating, in connection with the slow-cooling process, which slow-cooling process was known before in the history of the arts. The reheating is that which is claimed to be new, and which this court has found, heretofore, to be new; this combination of the reheating with the old thing—the slow-cooling of the wheel. Now pursuing this line of thought and analysis, we find that railroad wheels are to be made of the same dimensions as before; they are to be of the same configuration as before; they are to be made of fused metal as before; the metal is of the same kind as before; it is to be fused in the same manner as before, it is to be introduced into the proper molds in the same manner as before; the wheel is to be completed—aside from the annealing process—in the same manner as before, it is to be taken from the molds in the same manner as before. Up to this point the process of the patentee toward the accomplishment of the ultimate result, is just the same as would be pursued if the plaintiff's process had never been invented. Here the roads fork, and the divergence commences. Now any person, irrespective of this patent, after the wheel has reached the point mentioned, would have the right, in consistency with this patent, immediately to put it into a pit—the right would exist, as I understand is conceded, to apply hot sand, sand previously heated—the right would exist to close the pit, and exclude the air, and to subject the metal to the annealing process by slow cooling, as the phrase is, to such extent as this means or any other means known in the history and practice in the art of annealing prior to that time, might suggest. The plaintiff then availing himself of all these means and instrumentalities, interposes, in the progress of the construction and completion of the wheel, a new element, the right to use which exclusively is secured to him; and that new element is simply, after the wheel has been taken from the mold, and has been placed in the pit, to subject it to a reheating—a tempering which involves the reheating of the iron structure; and then that reheating is to be connected with the old process of slow cooling. In this reheating, in combination with slow cooling, lies the novelty, the utility, the vitality of this patent.

Viewing this subject in this light, it does not seem to us that there is any thing in the case—any fact or feature which should take it up from the rule laid down by the supreme court—and which stands unshaken, in the case of

Seymour v. McCormick, 16 How. [57 U. S.] 480.

Now I have referred to this extent upon the case as presented, irrespective of one element, to which I am now about to address myself, and in reference to which, I submitted to counsel who argued this question one or two inquiries, the answers to which then seemed to me, and still seem to me, to be very material, and which I understand are not answered by the report of the master.

There is proof in the case that car-wheels, annealed in modes known in the history and application of the art, otherwise than by the mode involved in the invention of the plaintiff, have a market value—that they have been sold and used—that they are still sold and used. But upon this subject the proof is not clear or full, nor by any means conclusive. Nor has the master categorically reported upon this particular point. All this is preliminary, as it regards this view of the subject, and this proposition. If the proof were, that when the wheels were made up to that point—when they are to be subjected to some annealing process—if the proof were that the wheel, at that point, was worthless—had no actual or market value—was worth nothing to the maker, and could not be of any value to him until subjected to the process covered by the plaintiff's patent, then, perhaps, and I use that word upon reflection, then, perhaps, it might be said that if the wheel had no value before being annealed according to the process of the plaintiff, and after being so annealed, its value involved a particular amount of profit, more or less; perhaps it might be said the entire amount of profit made by the manufacture of the wheel was due to the process of the plaintiff, and that, therefore, would be the standard and measure for the recovery of damages.

Now the master, as I understand, has not presented the case in this aspect. Irrespective of this particular aspect, we have no hesitation in saying that this is a case proper for the apportionment of damages. But it seems to us that it might as well be claimed that the plaintiff was entitled to the entire profit of the running gear, other than the wheel, or upon the entire car, involving the running gear as well as the body of the car, as the entire profit made upon this wheel. The master has not reported on this subject; and here it seems there is clearly wanting an element to enable us to arrive at a proper conclusion on this particular point; and as it may possibly come before us hereafter, on the report of the master, I wish here to make one or two additional suggestions. So far as I know, this question is a new one, and I have as yet been unable to come to any conclusion on the subject entirely satisfactory to my own mind. But it would seem to be very clear that if a party invent a machine, or any thing else that is perfectly valueless, having no salable commercial value, and which in every other respect is worthless because he can not sell it; and then use in connection with that machine or structure, or article, whatever it may be, the invention of another, no matter how slight that invention may be, which gives it its entire market value, it would seem at first view that the amount to be recovered should be the entire amount of profit, because there is a proximate, inseparable connection between the old, or useless article sold by means of the new invention, which could not have been sold otherwise. In the case of a close monopoly, there is a profit made which it would seem, at first view, is entirely due to the infringement of the patent right of another; and it would seem that the infringer ought not to be permitted to say, under such circumstances, that there should be an apportionment of the profits. But, on the other hand, take the case for instance of a railroad car, or any thing else, the making of which involves a large expenditure of money; and then by the application of the invention of another, slight and trifling in its character—of very little cost—of no value, except in connection with that structure, the application of that slight improvement is sufficient to turn the scale in the market, so that nobody will buy the article except in connection with the patented invention. Suppose, in further illustration of this view of the subject, it be a railroad car, the cost of which is thousands of dollars, and some little invention is made in regard to the interior structure of the car, or in its ornamentation, which is patentable under the act of 1861; yet the slight, the simple thing is such as to strike the public taste and judgment, and have such an effect in the commercial world that nobody will buy the article without that invention; yet it would seem to be a pretty hard measure of justice in a court of equity, to say that the entire profits made on that large article should go into the pockets of the inventor and patentee of this small thing, which had been used without license or authority in connection with it.

I therefore have to remark, as it regards this particular question, we intend to leave the case open. The case must go back to the master, for a fuller report upon the general subject, which was adverted to this morning, and discussed this afternoon, in connection with damages, and to which the court has adverted just now. The question must go to the master to take testimony, and report what portion of the profits made by the defendant are due to the use of the invention of the plaintiff by him, without authority; and it may be said further, that this general inquiry would involve a further element relating to the subject. The inquiry may be more specific, to the extent of requiring the master to take testimony, and report whether the wheels were not worth something, without the use of this invention, whether they could have been sold at all. If he finds they could not, then the question to which I have adverted will come before the court for consideration. If he finds there is a sale for wheels not covered by this patent; if he finds the wheels could have been made marketable and salable, though not so

salable as if the process of the plaintiff had been used, then he will have to inquire what portion of the profits which the defendant realized is due to the use of the process covered by the plaintiff's patent. With the case before us in this single aspect, we shall then be prepared to dispose of this question; until then, we feel that the question is not ready for us; we shall terminate the argument, and refer the case back to the master, in conformity with the directions just submitted.

In the administration of justice in this class of cases, I have found it a saving of time and expense, beside giving specific instructions to the master, to direct that he take testimony and report upon any other subject according to the direction of counsel in the case on either side. As my associate on the bench, who heard the case originally, suggests, we do not mean to throw the rein loose on the neck of the master, and let him go where he chooses. We do not want him to go over ground on which he has already gone. The testimony to be sought is additional to the testimony already taken, and on a point not already reported upon.

[See Case No. 17,594.]

Case No. 17,594.

WHITNEY v. MOWRY.

[4 Fish. Pat. Cas. 207.] [1]

Circuit Court, S. D. Ohio. Aug., 1870.[2]

EXTENSION OF PATENTS—CONCLUSIVENESS OF COMMISSIONER'S ACTION—CONSTRUCTION OF SPECIFICATIONS—INFRINGEMENT—ESTOPPEL—MEASURE OF PROFITS.

1. The action of the commissioner in extending a patent is judicial in its character, and can not be collaterally brought under review as matter of defense in a suit against an alleged infringer.

2. Nor can an infringer be allowed to defend upon the ground that the extension was obtained by the patentee by means of fraud and perjury.

3. Whatever else Whitney's patent may be for, it is clearly for the process described, as an entirety.

4. It is not proper, upon a motion to confirm or reject the master's report, to consider open any question which was foreclosed by the decree by which the case was referred to the master.

5. When, therefore, the master based a finding upon the hypothesis that the defendant did not infringe the patent, *held*, that such hypothetical finding ought not to be in the record.

6. The defendant having used the process of the patentee before the bill was filed, and down to the grant of a perpetual injunction, must be held to be estopped from insisting that a portion of the process is entirely useless, if not injurious.

7. Every doubt upon the question of utility should be resolved against an infringer who uses the patented process.

[Cited in Lehnbeuter v. Halthaus, 105 U. S. 97.]

8. Where the defendant manufactured wheels by the process of the patentee, and made large profits from such manufacture, and the master reported that precisely such wheels could not be made without infringing the patented process, but that wheels of the same material, size, shape, and weight could have been manufactured by other processes at less cost, and that such wheels would have had the same market value as those which the defendant made, *held*, that the complainant was entitled to the entire profit of the manufacture.

These were motions upon exceptions to the final report of the master, to which reference has been made in a former report of this case [Case No. 17,593]. The whole amount of profits, as reported by the master, being the whole profit of the manufactured wheel, was over one hundred and eleven thousand dollars, and for this sum a final decree was entered in accordance with the opinion.

H. Baldwin and B. R. Curtis, for complainant.

C. B. Collier and E. M. Stanton, for defendant.

SWAYNE, Circuit Justice. This case was finally heard upon the merits by my Brother Leavitt, the district judge holding the circuit court. He decreed that a perpetual injunction should be awarded, and that an account should be taken of the profits made by the defendant in violation of the rights secured to the complainant by his patent. The case was referred to a master to take the account. The master performed this duty, and reported the results. Both parties excepted, and the case is now before me upon these exceptions. They have been fully and ably discussed by the counsel upon both sides. At the hearing, a preliminary motion was submitted by the defendant for leave to amend his answer by setting up that the extension of the patent was obtained by the complainant by means of fraud and perjury. This motion also was very fully argued. Upon that subject, it is sufficient to remark, that the extension can not be questioned in this proceeding. Such an inquiry can be gone into only in a proceeding had directly for that purpose. The action of the commissioner was judicial in its character, and can not be collaterally brought under review as matter of defense in a suit against an alleged infringer. The question was fully considered in the case of Providence Rubber Co. v. Goodyear, 9 Wall. [76 U. S.] 788. Such was the unanimous judgment of that tribunal.

The complainant filed two exceptions to the supplemental report of the master, dated September 17, 1868. They are as follows: "First exception. The evidence does not warrant the master in finding, as matter of fact,

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

[2] [Reversed in 14 Wall. (81 U. S.) 620.]

'that the defendant did not, when he began the use of said process, nor afterwards, while he continued its use, make any difference in the quality of iron used for the manufacture of car-wheels, nor in the weight or form of car-wheels, nor by reason of the use of such process, in their price.' Second exception. The evidence does not warrant the master in finding, as matter of fact, 'that the defendant was unable to discover that his business was increased by the use of said process; that it was with a great deal of difficulty that he introduced the annealed wheels; that the railroad companies purchasing from defendant preferred the old wheels, that is to say, those manufactured by the process used by the defendant prior to April, 1861, for one or two years after the new annealed wheels, that is to say, the wheels annealed by the process complained of in this cause, were first introduced; and that since the defendant has been enjoined in this cause, and has abandoned the use of the process complained of, he has had the same customers—excepting the Little Miami and the Columbus and Xenia Railroad Companies, and it does not appear that said companies have withdrawn their custom on account of said abandonment—and has sold the wheels he has since manufactured without the process complained of as readily as those manufactured by the use of said process, and at the same prices.'"

The ground of these exceptions is, that the facts found are not warranted by the evidence before the master. In my judgment they are sustained by that evidence, and the exceptions are, therefore, overruled.

The complainant also excepted to certain parts of the supplemental report of the master of March 23, 1869. The parts of the report to which these exceptions refer are as follows: "'II. If, as is claimed by the defendant's counsel, there is no infringement of the complainant's patent unless the wheels are subjected to the process of reheating, that is to say, if the process of slow cooling used in connection with the reheating is old, and not a part of the complainant's invention, nor included in his patent, the master finds that no part of the profits realized by the defendant from the manufacture and sale of said wheels was due to the use by him of the complainant's invention.' 'V. The master finds that the wheels aforesaid could have been removed from the molds and finished without being subjected to the reheating process—(1) by placing them in pits as soon as they could be handled, covering them with hot sand, and thereby slow cooling them; (2) by placing them in like manner in pits, without any fuel, covering the pits, and thereby slow cooling them.' The master finds that wheels so manufactured have, and did have from April 1, 1861, to April 7, 1867, a market value equal to that of wheels manufactured by the use of the process complained of in this cause. But I find that wheels of the material, size, shape, and weight of those manufactured by the defendant, could have been manufactured without the use of extraneous heat, and at less cost by either of the methods described in finding V of this report, and that wheels so manufactured would have had the same market value, in the market where the defendant sold said nineteen thousand eight hundred and nineteen car-wheels, as if extraneous heat had been applied to them, as described in the complainant's patent, or as used by the defendant."

The first part of the report covered by these exceptions is not very clearly expressed. It was not denied or questioned by the defendant's counsel until very recently—so far as I am advised—that the patent does cover the entire process which it describes, of slow cooling in connection with reheating. At the hearing upon the merits, it was expressly admitted by one of the counsel for the complainant, that reheating alone, in connection with subsequent slow cooling, was the invention or discovery of the patentee and what the patent was for. It was conceded that slow cooling was in prior use and previously well known. It was also conceded that slow cooling without reheating would not be an infringement of the patent. The language of the counsel referred to was: "If he (Mowry) does not think, as his counsel have argued, that there is any thing in Whitney's idea of reheating, let him adopt Lobdell's dry sand process, or some other that is obviously different from ours, so that," etc. This construction was not dissented from by the other counsel upon the same side who participated in the argument.

It has since been, and is now, claimed by the complainant that the patent covers not only the reheating and slow cooling in combination, making the entire process described, but also the several parts of the process taken separately, including slow cooling without reheating, as where slow cooling alone is used by the alleged infringer. On the other hand, I understand it was claimed before the master by the defendant, that the patent is to be so construed as to limit its effect to reheating, and that if the defendant used slow cooling in connection with reheating, as described in the specification, he is to be held liable only so far as his profits are shown to have been increased by the element of reheating; hence the finding of the master under consideration. To this view of the subject I can not accede.

Whatever else the patent may be for, it is clearly for the process described as an entirety. All the wheels to which the master's account relates were finished by both reheating and slow cooling. This brings the case clearly within the patent.

I do not deem it proper to consider open any question which was foreclosed by my learned brother in settling the decree by which the

case was referred to the master. Whether slow cooling without reheating is covered by the patent, and whether the patentee was the original and first inventor of that process as applied to car-wheels, are inquiries wholly outside of the case and not necessary to be considered in its proper determination. This hypothetical finding of the master ought not, therefore, to be in the record. For these reasons the exception is sustained.

The other exceptions relate to the master's conclusions from the testimony touching the several propositions of fact which the exceptions involve. I think the testimony sustains the findings, and therefore overrule the exceptions.

The defendant excepts to the following portions of the master's report of March 23, 1869: " 'I. If, as is claimed by complainant's counsel, the entire process of reheating and prolonged cooling, used by the defendant in the manufacture of said wheels, was an infringement upon the complainant's patent, the master finds that the total profits realized by the defendant from the manufacture and sale of said wheels, was due to the use by him of the complainant's invention.' 'III. The master finds that, had said wheels, manufactured by the defendant, been left to cool in the open air, they would have had no market value as car-wheels; they would have been worth only the value of the iron of which they were made. Reheating in connection with slow cooling, or slow cooling without reheating, is indispensable to make marketable cast-iron car-wheels of the configuration of those made by the defendant. IV. The master finds that there is no reheating process for the manufacture of cast-iron car-wheels outside of the complainant's patent.' Complainant's counsel ask for the following findings: '(1) That the wheels of which the master has taken an account, made and sold by the defendant, were annealed wheels, and were sold as annealed wheels.' This I adopt as a finding, and hereby report it as such to the court. '(2) That the process patented to the complainant, and, as found by the court, used by the defendant in the manufacture of said wheels, conferred upon them their entire market value, and their entire value above their weight in iron.' If the court shall decide that the complainant's patent includes prolonging the time of cooling the wheels, as used by the defendant, I adopt this as a finding; but if the complainant's patent covers only the application of extraneous heat to the wheels after they are taken from the molds, I decline to make this finding. '(3) That no process of annealing, in connection with prolonged cooling of cast-iron car-wheels, other than that patented to the complainant April 5, 1848, and that described in the patent of May, 1861, appears to be or to have been known in the manufacture of iron car-wheels.' Taking 'annealing' to mean 'reheating' in connection with slow cooling, I adopt this as a finding, and report it as such. '(4) That the said wheels made by the defendant required no treatment, other than that described in the said patent of complainant, to complete them as annealed wheels.' This I adopt as a finding, and report it as such to the court. '(5) That the said annealed wheels made and sold by the defendant could not have been made by any process outside of the complainant's patent.' This will be considered in connection with the requests by counsel for defendant, as follows: I am requested by counsel for defendant to embody in my report the specific inquiries addressed to me by the court, and to answer them in the affirmative or negative, as the fact may appear. 'First. Whether the wheels made and sold by the defendant had, or could have been made to have, any market value without being subjected to the process patented to the complainant. Second. If they had, or could have been made to have, such value by any annealing or slow cooling process outside of the complainant's patent, how much additional and greater market value, if any, they derived from being subjected to said patent process.' I find that said annealed wheels (using the term 'annealed' in the sense above indicated) could not have been made by any process outside of the complainant's patent. The application of extraneous heat in the manner described in the complainant's patent, and as used by the defendant in the manufacture of said wheels, retrieves the metal, in some degree, from the strain which begins the moment the wheels are cast, and, in so far as that is accomplished, the wheels are strengthened, and their liability to break overcome. This retrieving is accomplished only by the application of extraneous heat, and extraneous heat can not be applied without infringing complainant's patent. Precisely the wheels, then, that the defendant manufactured could not have been manufactured without using the process patented to the complainant, or its equivalent. And the defendant excepts to so much of said findings and report, as may be construed to mean that the 19,819 car-wheels made and sold by the defendant, had any greater market value by reason of the application to them of extraneous heat in the annealing pits, than they would have had if they had been left to cool there by a retention of their own heat, for the reason that the entire testimony taken pursuant to the order of the court, including the testimony of the complainant, shows that no additional market value is given to car-wheels by the application to them of extraneous heat in the process of cooling them."

The exception to the first finding must be overruled.

The construction of the patent which the finding assumes is the one given to it by Judge Leavitt, and it was concurred in by both the judges when the application for a preliminary injunction was heard. Whether the patent reaches further, and is also for each of the parts severally of the process which it describes, is a proposition, as before remarked, not necessary to be considered.

The exceptions to the 3d and 4th findings are also not well taken. Those findings, in my judgment, are fully sustained by the evidence.

The responses of the master, made at the request of the counsel of the parties, are, I think, correct. The exception to this part of the report is overruled.

The last exception is without foundation. The fact of which it is predicated does not exist. There is nothing in the report which can be construed to mean what is suggested. On the contrary, the master says: "But I find that wheels of the material, size, shape, and weight of those manufactured by the defendant, could have been manufactured without the use of extraneous heat, at less cost, by either of the methods described in finding V of this report, and that wheels so manufactured would have had the same market value in the market where defendant sold said 19,819 car-wheels, as if extraneous heat had been applied to them, as described in complainant's patent, or as used by the defendant."

It was strenuously insisted by the counsel for the defendant, at the hearing upon the exceptions, that reheating "to a point a little below that at which fusion commences," called for by the specification, would destroy the chill and ruin the wheels, as shown by the testimony of Major Wade and others, and that it is in proof by the complainant's own witnesses, that he did not himself carry the reheating to near so high a degree. This point was disposed of by Judge Leavitt in the construction which he gave to the patent. I regard that as conclusive at this stage of the case. If an error was committed it must be corrected by the appellate tribunal.

It was also insisted, with no less zeal, that reheating is shown by the testimony to be entirely useless, if not injurious. This point also is in effect disposed of by my learned brother. If this were not so, the defendant could not be permitted to avail himself of this defense. He used reheating in connection with slow cooling before the bill was filed and down to the hearing of the application for a preliminary injunction. He was then advised by the court that, in their opinion of the case as presented, he was violating the complainant's patent, but was permitted to go on until the final hearing upon the merits, under a bond to account for his profits. He did so go on until a perpetual injunction was granted. The 19,819 wheels were all finished by reheating as well as slow cooling. Under these circumstances he should be held to be estopped from insisting on this proposition. The evidence on the subject is contradictory, but every doubt should be resolved against him.

The report of the master, with the single exception before stated, is confirmed, and a final decree will be entered accordingly.

[Reversed by the supreme court in 14 Wall. (81 U. S.) 620.]

Case No. 17,595.

WHITNEY v. OLNEY et al.

[3 Mason, 280.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1823.

WILLS—DEVISE OF MILL.

A devise of a mill with appurtenances conveys, not the buildings merely, but the land under and adjoining which is necessary to the use, and is actually used with it.

[Cited in Sheets v. Selden, 2 Wall. (69 U. S.) 182; Pullan v. Cincinnati & C. R. R. Co., Case No. 11,461; Bank of British North America v. Miller, 6 Fed. 551; Miller v. Alliance Ins. Co. of Boston, 7 Fed. 651.]

[Cited in Ammidown v. Granite Bank, 8 Allen, 291; Wooley v. Groton, 2 Cush. 309; Johnson v. Rayner, 6 Gray, 110. Cited in brief in Eliot v. Carter, 12 Pick. 440. Cited in McShane v. Carter, 80 Cal. 314, 22 Pac. 179; Endsley v. State, 76 Ind. 469; Branson v. Studabaker, 133 Ind. 165, 33 N. E. 104; Indianapolis, D. & W. Ry. Co. v. First Nat. Bank, 134 Ind. 131, 33 N. E. 680; Maddox v. Goddard, 15 Me. 224; Hammond v. Woodman, 41 Me. 181. Cited in brief in Esty v. Baker, 48 Me. 498; Jewett v. Whitney, 51 Me. 238. Cited in Woodman v. Smith, 53 Me. 81; Page v. Esty, 54 Me. 330; Cunningham v. Webb, 69 Me. 96; Dunklee v. Wilton R. Co., 4 Fost. (N. H.) 496; Winchester v. Hees, 35 N. H. 49; Tabor v. Bradley, 18 N. Y. 113. Cited in brief in Comstock v. Johnson, 46 N. Y. 619. Cited in Doyle v. Lord, 64 N. Y. 436. Cited in brief in Murphy v. Campbell, 4 Pa. St. 484. Cited in Matteson v. Wilbur, 11 R. I. 549; Butcher v. Creel, 9 Grat. (Va.) 202. Cited in brief in Cross v. Pike, 59 Vt. 324, 10 Atl. 526; Walker v. Wilson, 13 Wis. 528. Cited in brief in Wilson v. Hunter, 14 Wis. 684. Cited in Smith v. Ford, 48 Wis. 166, 4 N. W. 468.]

Ejectment for a moiety of a parcel of land with a paper-mill, called the "Brown George," and other buildings, and all the right of water and privileges thereto belonging. Plea, the general issue. At the trial the facts appeared as follows: Col. Christopher Olney, by his will 29th May, 1812, made the following devises: First, he gave to his son Christopher C. Olney, for his natural life, a certain lot of land with the dwellinghouse, &c. in Providence; also all the land which the testator had in said Providence within certain boundaries, which he stated. Next he gave to his son Nathaniel G. Olney, during his life, all his mansion house where he then lived, &c. and all the lands lying easterly and westerly of the said lands devised to Christopher C. Olney (stating the boundaries,) "excepting the Brown George paper-mill and appurtenances." Then followed this clause: "Further it is my will, that my said sons, Christopher and Nathaniel, shall have and possess my two paper-mills, namely, the Rising Sun and the Brown George, so called; and I devise the same to them as tenants in common in equal shares during the times of their natural life, together with all the machinery and appurtenances to said mills at the time of my decease," &c. The testator further devised,

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

that if his son Christopher C. had issue at his death, then that such issue should take in fee simple all the estate he had devised to his son Christopher for life; and so in like manner to the issue of his son Nathaniel the estate he had devised to him for life. The plaintiff [Hercules Whitney] claimed under the devise to Christopher C. and his issue. The principal point was, what passed to Christopher by the devise of a moiety of the mill, called the "Brown George"; the defendant [James N. Olney] contending, that a moiety of the building only passed, and no part of the land under the same or belonging to, and used with the same.

The jury under the direction of the court, found a verdict for the plaintiff for a moiety of the Brown George and the land under and appurtenant to the same. A motion was made, and argued, for a new trial, but finally overruled, the court expressing an opinion confirming that delivered at the trial.

Tibbets & Crapo, for plaintiff.

Mr. Searle and Tristam Burgess, for defendants.

STORY, Circuit Justice. My opinion is, that by the devise of the mill and its appurtenances all the land under the mill, and necessary for the use of it, and commonly used with it, passed to the devisees. The exception of the Brown George paper-mill and appurtenances, in the devise to Nathaniel G. Olney, is not an exception of the mere building, but of the land under and appertaining to, and used with, the mill. Whatever was saved by the exception, passed by the subsequent devise of the mill. I do not proceed upon the ground, that the land was a mere appurtenance to the mill; but that it was parcel thereof. It is true, that land cannot strictly be appurtenant to land so as to pass under the term "appurtenances" (Com. Dig. "Grant," E. 9; Plow. 170; Doane v. Broad Street Ass'n in Boston, 6 Mass. 332; Buck v. Nurton, 1 Bos. & P. 53); but where the intention is clearly expressed, that land should pass under that name, the law will give effect to the grant, notwithstanding the misnomer. Thus, where it was averred in pleading, that certain land was appertaining to a messuage; the court held, that in point of law it could not be appurtenant to the messuage; but that it was nevertheless well in a grant, because it shall be intended to mean such land as is usually occupied with the messuage or lying with the messuage; and therefore a demise of a messuage "with the lands to the same appertaining," is good to pass such lands as were usually occupied, used, or lying with the messuage. Plow. 170. See, also, Bryan v. Wetherhead, Cro. Car. 17; Hearn v. Allen, Id. 57; Gennings v. Lake, Id. 168, 169; Com. Dig. "Grant," E. 9. If this be so in a grant, the law will construe the words still more favourably in a devise. Therefore in Boocher v. Samford, Cro. Eliz. 113, it was held, that lands usually occupied with a house, though at a distance from it, might well pass by a devise of it, as a tenement with its appurtenances, in which H. dwelleth in E. See, also, Cro. Eliz. 704; Com. Dig. "Grant," E. 9, 10; 1 Bos. & P. 53; 1 P. Wms. 603; 3 Wils. 141; 2 Wm. Bl. 1148; Doe v. Collins, 2 Term R. 498. In these cases the lands pass, not as appurtenances, but as parcel of the granted or devised premises, upon the intention of the parties collected from the instrument, and explained by reference to the facts.

But in the present case I lay no stress whatsoever upon the words in the devise, "with the appurtenances." The land under the mill and adjacent thereto, so far as necessary to its use, and commonly used with it, passed by force of the word "mill." It is not necessary, in order to pass lands, that they should be specially designated by that name. A grant of a messuage conveys all the land within the curtilage thereof; so the grant of a house. Shep. Touch. 94; Com. Dig. "Grant," E. 6. The only ground, upon which a doubt could be entertained, is a dictum in Lord Chief Baron Comyn's Digest ("Grant," E. 9), where he says: "By the grant of a mill cum pertinentiis the close where the mill is, or the kiln there, does not pass without more;" and for this he cites 1 Sid. 211, 1 Lev. 131, which are different reports of the same case. The case itself does not support any such doctrine. The question there was, not whether the land, on which the mill stood, passed under a grant of the mills with the appurtenances, but whether a kiln on another part of the close passed under the word "appurtenances." And the court held, that it did not, "for by the grant of a messuage or lands cum pertinentiis any other land or thing cannot pass, though by the words 'cum terris pertinentibus,' it would." And Windham, J., said, if all the matter had been found, and that the kiln was necessary for the use of the mill, and without which it could not be useful, the kiln had passed as part of the mill, though not as appurtenances. In the English translation of Levinz's Reports, by Sergeant Salkeld, there is an error, which probably led to the mistake. It is there said: "And whether the kiln and the parts of the close, on which they (i. e. the mills) stood, should pass to the plaintiff, was the question." The original is: "Et si le kill et le parts del close, sur que il estoit (i. e. the kiln stood) passe al plaintiff fut le question. Et tenu cleerement que ils (il) ne passe." The case is much more fully and accurately reported in 1 Keb. 736, where the facts are stated as found on a special verdict. O. was seized of a manor and messuage, and a close, and having two mills on the west side, and of a kiln, which he newly erected on the other side; then by metes and bounds he divided the close, and enfeoffed the plaintiff of the west part of the close, and the mills with the appurtenances; afterwards he assigned the other part of the close with the manor to the defendant; and "whether to these ancient mills, the kiln will, being severed, pass as ap-

purtenant, having been enjoyed and used" with them, was the question. The court held that it did not. Keeling, C. J., said: "It passeth not, being neither found necessary, or belonging to the mill." Windham, J., said that the special verdict was short, and that it did not appear that it was a kiln purposely erected for the use of the mill, "in which case it would have been parcel." And in substance this is the same as may be gathered from the brief note in 1 Sid. So that the case, when examined, proceeds upon a principle recognizing that which has been adopted by this court.

The good sense of the doctrine on this subject is, that under the grant of a thing, whatever is parcel of it, or of the essence of it, or necessary to its beneficial use and enjoyment, or in common intendment is included in it, passes to the grantee. In common sense and in legal interpretation, a mill does not mean merely the building in which the business is carried on, but includes the site, dam, and other things annexed to the freehold, necessary for its beneficial enjoyment. Judgment for the plaintiff. See Leonard v. White, 7 Mass. 6; Luttrel's Case, 4 Coke, 86a.

WHITNEY (POTTER v.). See Case No. 11,341.

Case No. 17,596.

WHITNEY et al. v. ROLLSTONE MACH. WORKS et al.

[2 Ban. & A. 170; [1] 8 O. G. 908.]

Circuit Court, D. Massachusetts. Oct. 27, 1875.

INFRINGEMENT OF PATENTS—PRELIMINARY INJUNCTION—WHEN GRANTABLE.

1. Where the defendants manufactured under the sanction of a patent of prior date to those held by complainants, which prior patent expired before any proceedings were instituted by the complainants to secure or protect their right, *held*, that a preliminary injunction should not be granted against the defendant, even though the complainants were able to show that the defendants infringed upon their patents, and that the inventions secured to them antedated the patent under which the defendants had been manufacturing.

[Cited in U. S. v. Harris, Case No. 15,315; Washburn & Moen Manuf'g Co. v. Griesche, 16 Fed. 670.]

2. Where the complainants have submitted for so long a space of time to the manufacture and use by the defendants of the infringing machine, without enforcing their rights by proceedings at law or in equity, they have lost the right to invoke the summary process of the court, by an injunction pendente lite, and must await the decree of the court upon the final hearing.

In equity.

Rice & Pratt, for complainants.

D. H. Merriam and T. L. Wakefield, for defendants.

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

SHEPLEY, Circuit Judge. Complainants claim under letters patent granted to William D. Sloan, March 31, 1857, No. 16,936, extended for the term of seven years from March 31, 1871, and also under letters patent to Baxter D. Whitney, August 7, 1860, No. 29,534, extended for the term of seven years from August 7, 1874. Defendants are manufacturing automatic lathes for turning and finishing irregular forms like those described in letters patent granted to Cheney Kilburn, dated November 22, 1859, No. 26,192. Complainants having commenced proceedings in equity for an injunction and account now ask for a preliminary injunction.

The patent of Cheney Kilburn has expired by limitation, and has not been extended. It was prior in date to the patent of Baxter D. Whitney, but from the affidavits and other documentary evidence it would appear that application of Whitney and the invention of Whitney each antedated the invention and application of Kilburn. The defendants manufactured machines under the Cheney Kilburn patent, during the term for which the letters patent were granted, and have continued to manufacture the same machine since the patent expired. During the original term of the Kilburn patent no proceedings were instituted by Whitney or his assignees against Kilburn, or the defendants, or any other persons manufacturing, vending, or using the invention described in the specifications of his patent. More than five years since one of the complainants notified a party making use of the Kilburn machine that he should treat it as an infringement of the Whitney patent, and should at some future time endeavor to put a stop to the manufacture. This notice appears to have been communicated to the defendants. They continued the manufacture openly under a claim of rights, and published circulars with an engraved cut of their machine, and a claim that the Kilburn patent antedated the complainants', and have continued, with the knowledge of the complainants, to advertise and manufacture the same machines. No attempts have been made by the complainants to enforce their supposed rights against the defendants until the filing of the bill in this case.

From the evidence to be found in ex parte affidavits, and from a comparison of the two machines, I am satisfied, for the purposes of this hearing, that the Kilburn invention embraces all substantial elements and combinations of the Whitney invention, and that the Whitney invention antedated that of Kilburn; but, upon the state of facts exhibited in the record in this case, after the complainants have submitted for so long a space of time to the manufacture and use of the Kilburn machine without enforcing their rights by proceedings at law or in equity, they have lost the right to invoke the summary process of the court by an injunction pendente lite, but must await the de-

cree of the court upon a final hearing, when the rights of the parties can more accurately be determined, before summarily putting stop to a manufacture, which, commenced under the sanction of letters patent, has so long continued without interruption. The complainants do not show any adjudication sustaining the validity of their patent, nor, as against the Kilburn patent or these defendants, do they prove any such public acquiescence or exclusive possession, or any such diligence on their own part, as would entitle them to invoke the festinum remedium of a preliminary injunction.

Motion for preliminary injunction overruled.

WHITNEY, The ELI. See Case No. 4,345.

WHITNEY ARMS CO. (UNITED STATES RIFLE, ETC., CO. v.). See Case No. 16,793.

Case No. 17,597.

WHITON v. CHICAGO & N. W. R. CO.

[2 Biss. 282.] [1]

Circuit Court, E. D. Wisconsin. April Term, 1870.[2]

ACCIDENT AT RAILROAD CROSSING — NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE — EXCESSIVE SPEED — RINGING BELL — PROVINCE OF COURT AND JURY—NEW TRIAL—MEASURE OF DAMAGES.

1. Where three persons, having waited for a freight train to pass, at the crossing of a frequented street, then cross the track, and two of them are struck by a switch train on an adjoining track, and killed, there being at the time a strong wind blowing, the bell on the switch train not having been rung, and the survivor having neither seen nor heard the switch train until after the accident, the circumstances are not such as to warrant the court in instructing the jury in an action brought by the representative of one of the deceased persons that the plaintiff could not recover.

2. Although the freight train was running at a higher speed than allowed by law, and probably if it had not been passing, the accident would not have occurred, nevertheless the only effect of the passing of that train was to modify or influence the conduct of the others, and the fault of the freight train is too remote in law to constitute one of the causes of the accident.

3. This court is, however, not prepared to say that every person who, in a populous town at a railroad crossing, fails to pause and look up and down the track, is guilty of such negligence as to prevent a recovery for an injury inflicted by the flagrant wrong of those in charge of a passing train.

4. The bell should be rung not only before crossing a street, but so long as there is danger of encountering passers-by.

5. The courts are much influenced by the conduct of the defendant, and, if the wrong is flagrant, are inclined to hold that to be the cause of the injury.

6. While there are some things as to which it might be the duty of the court to charge that they constitute negligence, there are many others which the court must leave to the jury to decide. The court properly charged the jury that if the bell of the switch train was not rung, that was negligence, and left it to them to decide whether the person injured had been negligent.

7. Where, on the objection of a party, competent evidence has been excluded, he cannot urge that as error on motion for a new trial.

8. Where the jury rendered a verdict for the highest sum allowed by statute, five thousand dollars, it being shown that the person killed was a superior woman—as wife, mother, and member of society—there is nothing in the amount of the verdict to authorize the court to interfere.

Motion for a new trial after a verdict by a jury for $5,000 damages for death of plaintiff's wife by alleged carelessness of the defendant.

Conger & Sloan, for plaintiff.

Pease & Ruger, for defendant.

Before DRUMMOND, Circuit Judge, and MILLER, District Judge.

DRUMMOND, Circuit Judge. This is an action under the statute of this state brought by the plaintiff for the death of his wife, caused by the alleged wrongful act of the defendant. Mrs. Whiton and Mrs. Woodward, in December, 1864, resided near each other on Bluff street, in Janesville, in this state. One morning near Christmas of that year, they left home and proceeded along the north side of Bluff street, until they reached Academy street. They then turned south on the west side of Academy street until they arrived at the railway crossing. At that time there were four tracks crossing Academy street, on the same level, extending north-east and south-west, the street there running about north and south. The two most north-westerly tracks belonged to the Milwaukee & Prairie du Chien Railroad, and the other two to the defendant. When they arrived at the railroad crossing, a freight train was passing the street in a north-easterly direction, on the south track of the Milwaukee & Prairie du Chien Railroad, at a rate of speed unauthorized by the law of this state. Mrs. Whiton and Mrs. Woodward therefore stopped until the freight train had passed. Standing there with them, also waiting for the freight train, was Mr. Jacob C. Rice, the sole surviving witness of what immediately occurred. It was about eleven o'clock. The morning was quite cold, with a very strong wind blowing from the south-west. There was some snow falling at the time, and there were a few snow piles lying near the track, apparently previously thrown off the track. While the freight train was going up the track, a switch train was backing down in a south-west direction, on the south track of the defendant. The tender came first, then the engine, and next a freight car attached to the engine. Mr. Rice was standing very near the freight train as it crossed Academy street, and as soon as it passed, he instantly, with a quick step, crossed over the railroad

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

[2] [Affirmed in 13 Wall. (80 U. S.) 270.]

tracks, and after having crossed the tracks a rod or so, he heard a scream, turned round and saw that Mrs. Whiton and Mrs. Woodward had been struck by the tender of the switch train. Mrs. Woodward was almost instantly killed, and Mrs. Whiton, after lingering a few weeks, died from the effects of the injury. As Mr. Rice crossed he cast his eyes at the track, and saw nothing in the way, and so passed on till he was arrested by the cries of the ladies. He did not see the switch train before, nor as he crossed, and heard no signal bell from that train.

The questions submitted to the jury were: (1) Whether Mrs Whiton's death was caused by the negligence of those who had the management of the switch train; and (2) was Mrs. Whiton herself guilty of any fault or negligence which contributed to that result? And the jury having found negligence in the defendant, and none in Mrs. Whiton, the question is whether there is any error of fact or law to prevent judgment on the verdict. We think there is not.

In looking through the various objections made by the defendant to the rulings of the court in receiving or rejecting testimony on the trial, we see nothing material to the issue decided erroneously against the defendant, and we think under the facts of the case it would have been error for the court to instruct the jury as requested by the defendant, that the plaintiff could not recover.

As to the negligence of the defendant, the court in substance instructed the jury that it was the duty of those having the management of the switch train to cause the bell of the engine to be rung a sufficient time before crossing Academy street to give warning to any passengers on that street desirous of crossing, and to keep it ringing until the tender had crossed the street, and also that it was the duty of those having the management of the train to keep a proper lookout in the direction the train was moving, and particularly under the circumstances of the case—a freight train going up one of the tracks, the switch train just approaching a much frequented place, and a violent southwest wind blowing at the time.

As to the negligence of Mrs. Whiton, the court in substance instructed the jury that she was required to exercise that degree of prudence, care and caution incumbent on a person possessing ordinary reason and intelligence under the special circumstances of the case, having regard to the fact of its being a railroad crossing, and another train crossing the street, for which she had to wait in company with Mrs. Woodward, and therefore she should have used extra care, prudence and caution. The court declined to say to the jury how she must dispose of her limbs, her eyes or her ears, but left it to the jury to find whether she had been guilty of any fault which contributed to her death, and said that, if she had, the plaintiff could not recover even though the defendant had been guilty of negligence. The court also told the jury before they could find a verdict against the defendant they must be satisfied its employés were guilty of negligence, and that such negligence caused her death. As to the damages, the court instructed the jury that they could give nothing for feeling, sympathy or mental suffering, but that they were restricted to the rule of pecuniary injury alone resulting from the death of Mrs. Whiton, to the plaintiff; that it was almost impossible to lay down any fixed rule on the subject; that it largely rested in the sound reason and discretion of the jury—taking all the facts of the case into consideration—her personal qualities, her ability to be useful and to earn money.

This is the general aspect of the case. It may be proper now to advert to some special objections taken to the rulings of the court in the instructions given and refused.

There were several instructions asked which proceeded on the assumption that the freight train, in running too fast on the Milwaukee & Prairie du Chien track, proximately caused the death of Mrs. Whiton. The instruction given on this point was that the only effect of the freight train being there under the circumstances mentioned was to modify or influence the conduct of those on the switch train, and of Mrs. Whiton, and consequently the court considered the fault of the freight train, as connected with the death of Mrs. Whiton, as too remote in law to be regarded as the cause of her death. We see no reason to change this opinion. Undoubtedly, it may be said that if the freight train had not been there Mrs. Whiton would not have been killed. So she might have escaped if Mrs. Woodward had not been with her, or if they had not followed directly after Mr. Rice.

It is insisted that if the bell of the switch train had been rung for some time before, it need not have been up to the time of crossing the street. The object of ringing the bell is to give warning. The passengers in this case were on the west side of Academy street; a freight train shut out the view of the switch train. As long as there was risk of encountering passengers, the bell should have been rung to attract their attention.

Many instructions requested by the defendant were to this effect—that it was the duty of Mrs. Whiton before attempting to cross the track to look carefully up and down to see what obstacle was in the way, and even to stop for that purpose, and if this was not done it was negligence. The court instructed the jury that Mrs. Whiton must have observed due care, caution and prudence. These imply needful and usual foresight and watchfulness. We are not prepared to say that any person who, in a populous town, at a railroad crossing, in walking on a street, shall fail to pause and look along the track, is guilty of such negligence as to prevent a recovery for injury inflicted by the flagrant

wrong of those on a passing train. We have to take men and women as they are, and judge of them by their conduct under such circumstances. Suppose the reason the person does not look up or down the track, is that the bell of the engine is not rung. And can an engine be permitted to recklessly run over passengers, because if they do not get out of the way they are in all cases guilty of contributory negligence? The very object of ringing the bell is to attract attention. It will often happen, as indeed observation proves, that persons walking over a railroad track on a public street of a town will be more or less pre-occupied, and those who control so powerful an instrument of destruction as a locomotive in motion, are required to ring the bell to make them watchful. It will be found on examination of the cases in those courts which will not permit a recovery where there has been any fault whatever on the part of the person injured, that they are very much influenced by the conduct of the other party. If the wrong is flagrant they are inclined to hold that to be the cause of the injury. A very striking illustration of this is to be seen in two cases recently decided in England in the court of exchequer, the one following the other in the same volume of reports. In the first the railway company was thought free from fault, and the rule as to contributory negligence by the deceased was stated with some stringency; but in the second, where the railroad company was guilty of gross negligence, it was held the case was properly left to the jury, although the evidence showed the deceased, as he crossed the track, was looking down on the ground.

In fact, while there are some things about which all intelligent men agree, and as to which it might be the duty of the court to charge that they constituted negligence, yet there are many others where the court must leave it to the jury to decide whether or not negligence is established, and therefore it is by no means uncommon to find a court in the same charge to a jury, declaring that if a certain fact exists it is negligence, and if another, that it is for the jury to determine; and this must be so as long as negligence in any of its bearings is a mixed question of law and fact. The court instructed the jury in this case if the bell of the engine of the switch train was not rung so as to give warning to Mrs. Whiton, it was negligence, and the court refused to instruct the jury that she had been guilty of negligence, but left that to the jury to determine. We think this was correct, and we see no reason for disturbing the verdict because on either point it was not warranted by the evidence. We think the testimony indicated that the bell of the engine was not rung as it approached Academy street so as to give warning to them on that street. Neither the engineer nor the fireman saw Mrs. Whiton or Mrs. Woodward before they were struck by the tender; they therefore were not on the lookout for the street. As to the negligence of the employés of the defendant in the conduct of the switch train, there can be no doubt the finding of the jury was warranted by the evidence. Of the conduct of Mrs. Whiton at the moment we know nothing except what may be inferred from the result. No living witness, so far as we know, saw her from the instant that she moved to cross the tracks until she was struck. We do not know whether she glanced along the track, or saw the switch train, and if she did we are ignorant of the impression made on her mind—whether she thought it moving or standing, we cannot tell. She had to pass over about thirty feet, probably a little further, from the spot where she stood waiting for the freight train to cross, until she reached the track on which the switch train was moving. What was seen or heard in that brief time by Mrs. Whiton is very much matter of conjecture. The chances are that she and Mrs. Woodward followed Mr. Rice immediately, and while he, walking faster, escaped, they were killed. Now, if the bell of the engine had been ringing as they started, what would have been its effect on them? This as well as other facts connected with her conduct were left to the jury to decide.

It is also claimed by the defendant that since the trial it has been ascertained that Mrs. Whiton, while on the spot, and very soon after the accident, said she did not hear the bell, and inference is thence sought to be drawn that she did not see the switch train. The plaintiff offered to prove the declarations of Mrs. Whiton, and the defendant objected, and they at the time were excluded, subject, however, to the right on the part of the plaintiff to have the matter reconsidered. The opinion of the court on this point was not subsequently taken, and therefore the ruling remained as made at the instance of the defendant. We think it would be something unusual to grant a new trial to a party for the reason that the court had not admitted testimony excluded at his instance. We are induced to think the declarations were competent evidence, but we do not see how their exclusion injured the defendant. If the proof had been admitted, it seems to us, to say the least, it would have operated quite as much against the defendant as otherwise.

Various instructions were requested upon the subject of damages, all of which were refused, and the jury instructed as heretofore stated. It is confessedly a most difficult matter to deal with, and from the nature of the case does not admit of any fixed rules. The statute itself, while confining the recovery to the pecuniary injury resulting from the death, does not specify in what it shall consist. The jury in this case found the highest sum allowed by the law, five thousand dollars, and though the testimony bearing on this branch of the case was quite

indefinite, yet it showed clearly that Mrs. Whiton was a superior woman, as wife, mother, and member of society, and there is nothing in the amount of the verdict to authorize the court to interfere on that ground.

NOTE. This case was affirmed by the supreme court (13 Wall. [80 U. S.] 270). Company is bound to use care and dilligence to prevent injury to persons at crossings. Bradley v. Boston & M. R. Co., 2 Cush. 539; Macon & W. R. Co. v. Davis, 18 Ga. 679; Augusta & S. R. Co. v. McElmurry, 24 Ga. 75; Barrett v. Midland R. Co., 1 Fost. & F. 361; Curtis v. Central Ry. [Case No. 3,501]. As to what constitutes negligence on the part of a passer-by at a crossing, consult Chicago & R. I. R. Co. v. Still, 19 Ill. 500; Beiseigal v. New York Cent. R. Co., 33 Barb. 429, s. c. 34 N. Y. 622; Milwaukee & C. R. Co. v. Hunter, 11 Wis. 160; Evansville & C. R. Co. v. Lowdermilk, 15 Ind. 120; Ohio & M. R. Co. v. Gullett, Id. 487; Wilds v. Hudson R. R. Co., 29 N. Y. 315; Newson v. New York Cent. R. Co., Id. 383; North Pennsylvania R. Co. v. Heileman, 49 Pa. St. 60; Catawissa R. Co. v. Armstrong, Id. 186; Galena & C. U. R. Co. v. Dill, 22 Ill. 271; Ernst v. Hudson R. R. Co., 24 How. Prac. 97. Whether neglect to give signal is conclusive evidence of negligence. Galena & C. U. R. Co. v. Dill, 22 Ill. 271; Chicago & R. I. R. Co. v. Reid, 24 Ill. 144. Where no signal is given, effect of negligence of injured party. Steves v. Oswego & S. R. Co., 18 N. Y. 422; Dascomb v. Buffalo & S. L. R. Co., 27 Barb. 221; McGrath v. Hudson R. R. Co., 32 Barb. 144. The New York court of appeals has recently ruled that although a traveler must make vigilant use of his eyes and ears in approaching a railroad track, to ascertain if there is a train approaching, he is not bound to stop for the purpose of listening, nor, if in a vehicle, to get out and go forward upon the track, nor to stand up in the vehicle to get a better view of the track. Davis v. New York Cent. & H. R. R. Co., 47 N. Y. 400. But as to what he must do, consult Gorton v. Erie Ry. Co., 45 N. Y. 660; Wilcox v. Rome, W. & O. R. Co., 39 N. Y. 358. Consult also the following decisions in regard to the duty of travelers in crossing a railroad track, and of company in giving signals, etc.: Chicago & R. I. R. Co. v. Still, 19 Ill. 500; Chicago & N. W. R. Co. v. Sweeney, 52 Ill. 325; Chicago & A. R. Co. v. Gretzner, 46 Ill. 74; Toledo, W. & W. R. Co. v. Baddeley, 54 Ill. 19; Havens v. Erie Ry. Co., N. Y. 296, approving Ernst v. Hudson R. R. Co., 39 N. Y. 61; Wilcox v. Rome, W. & O. R. Co., Id. 358.

WHITON, The T. F. See Case No. 13,849.

Case No. 17,598.

In re WHITTAKER.

[4 N. B. R. 160 (Quarto, 41).] [1]

District Court, D. North Carolina. 1870.

NOTE—STATE CURRENCY—REBELLION—BANKRUPTCY.

Proof of a note payable "in current money of the state" in which it is made, is, if not otherwise open to objection, allowable; and even though the state in which the note is made payable should at the maturity of the note be in rebellion, and it be claimed that such a demand should not be proved in bankruptcy as payable in lawful currency of the United States, but in the state treasury notes of the state in which the note was made, the objection cannot be sustained, and the owner of the note will be entitled to have his debt estimated at its face, with interest, in lawful money.

In bankruptcy.

BROOKS, District Judge. The opinion of this court is required upon a certificate of Mr. Register Shaffer, filed under the provisions of the 6th section of the bankrupt law [14 Stat. 518]. The certificate of the register sets forth that Joseph B. Balchelor, the assignee of Whittaker, acting in behalf of the general creditors of the bankrupt, objects to the allowance, at its nominal value, of a note proved and filed by H. O. Parker, as the present owner of the debt, against the estate of the bankrupt. The following is a copy of the obligation proved and filed: "Three years after date, with interest from date, we or either of us, promise to pay to H. B. Whittaker, two thousand dollars, current money of the state, for value received. Witness our hands and seals this 18th March, 1861. Thos. G. Whittaker. S. M. Williams. Alfred Williams. [Seals.]"

It is contended by the counsel for the assignee that this obligation should be regarded as of the value of two thousand dollars in state treasury notes, at the time the same became due, to wit: March 18, 1864, and that only such value is now due, together with interest from the former date to the present time. The counsel for the creditor (Mr. Parker), on the other hand, contends that this obligation is solvable only in good and lawful currency of the United States. That such is the true and legal import and meaning of the words "current money of the state." This leads us to the inquiry whether North Carolina treasury notes, such as were from time to time issued and put in circulation during the Rebellion, was "current money of the state," within the legal import and meaning of that term.

After a full consideration of the question, I am of the opinion that they were not, and indeed could not be, current money of any state for the payment of debts, while the express prohibition remains in the constitution of the United States against the emission of bills of credit by the state. It may be conceded that the expression "current money of the state," is sufficient to show that it was intended by the parties to this contract that it should be paid with a medium or money other than gold or silver coin, but this would not justify the conclusion that unlawful money should be received at any value, in discharge of the obligation. To say nothing of the unlawful purpose with which all the issues or emissions of North Carolina treasury notes were made, no act could be more clearly in violation of the 10th section of the constitution than all the different issues of treasury notes were, whether made under the provisions of ordinances of the convention or acts of the leg-

[1] [Reprinted by permission.]

islature. That which the supreme law declares shall not be made, surely cannot be authorized by any inferior or subordinate power, not only to be made, but so emitted as to answer the important uses of current money. I would not be understood as declaring that an obligation promising to pay any given amount in North Carolina treasury notes was void (if a medium answering that description was in circulation at the date of the contract); however clearly such medium or money might have been created in violation of the constitution or in hostility to the federal government, unless it should appear that the contract upon which obligation was based, was in some way conducive to the violation of the law, for the contrary has been decided by the circuit courts, and more recently by the supreme court of the United States in the case of Thorington v. Smith, 8 Wall. [75 U. S.] 1. In that case the contract between the parties was held to be for the payment or delivery of a stated sum in confederate treasury notes. And the court say, that in the absence of proof that the contract between the parties was made with the view and intent to further the Rebellion by giving circulation to the money, or in some other way aiding in hostilities against the government, on such a contract the value of the confederate money at the time of payment, if it had any, might be recovered: upon the principle that the confederate money, while it had a value in the markets, when not used in any contract in aid of the Rebellion, was as any other commodity; and a party might, if he saw proper, accept an obligation from another to pay or deliver it.

Then we must inquire what medium was contemplated by the parties to this contract, as receivable in discharge of it at the end of three years from March 18, 1861. Surely North Carolina treasury notes were not contemplated; for to attribute to the payers in the note such foresight, would be giving to him the character of a prophet. That though no such medium or money as North Carolina treasury notes existed, yet such would be issued if the constitution should be so altered as to permit it, and if not, that they would be made in violation of it; and yet such a construction would deny to him the forecast to see that after the notes would be issued, they would also become almost wholly worthless, and this before the maturity of his note! North Carolina treasury notes surely were not contemplated by the parties to this contract at the time the same was made. Then what was contemplated as receivable and payable in discharge of the note?

Chief Justice Chase, in delivering the opinion of the court in Thorington v. Smith [supra], says: "It is quite clear that a contract to pay dollars, made between the citizens of any state of the Union while maintaining its constitutional relations with the national government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence." North Carolina had, in no legal sense, defied the authority of the United States until after March 18, 1861. The same eminent judge, in a case recently before him in the circuit court of Virginia, declared that a contract for payment in current money of Virginia, was not solvable in Virginia bank notes, after they had fallen in value to a greater per centum than eleven per cent. compared with any legal tender medium. Is it not more reasonable to suppose that all the parties contemplated payment in some lawful money of the United States, or other medium of equal or very nearly equal value, in some medium which the law would regard as current at maturity? This is the conclusion to which I have arrived from the language employed in expressing the contract, and from all attendant circumstances.

It is admitted that the proof of debt is regular. That H. O. Parker is the bona fide owner by indorsement of the debt, and I have assumed that all the parties were residents of North Carolina at the date of the contract. If it were otherwise, however, it would not be more favorable to the assignee. In the distribution of the assets of this estate, the creditor, H. O. Parker, is entitled to have his debt estimated at two thousand dollars, with interest from the 18th of March, 1861, in lawful money.

Let this be certified to A. W. Shaffer, register.

Case No. 17,599.

WHITTAKER et al. v. The J. A. TRAVIS.

[7 Chi. Leg. News, 275.]

District Court, E. D. Wisconsin. 1875.

MARITIME LIENS—SUPPLIES AND REPAIRS IN HOME PORT.

The court is constrained to hold, in view of the new twelfth rule, and of the decisions made since its adoption, that the libelants had a right to proceed in rem against the schooner Travis, for the repairs and materials made and furnished by them at the home port upon the credit of the vessel.

[Cited in The J. E. Rumbell, 148 U. S. 17, 13 Sup. Ct. 502.]

[This was a libel by Thomas Whittaker and others against the schooner J. A. Travis, her boats, etc., to recover for supplies furnished the schooner.]

DYER, District Judge. The libel alleges that between the 10th December, 1873, and the 5th May, 1874, the libelants performed labor and furnished materials in repairing the schooner J. A. Travis, at the port of Muskegon, in the state of Michigan, at the request of the master and owner, and upon the sole credit of the vessel, and that there is due and owing to libelants, on account of such labor and materials, $3,190.

James Bonnell intervenes for his interest as mortgagee, and in his answer, sets up a mortgage on the vessel, executed April 17th, 1872, by the then owners, to secure the payment of $2,524.93 payable in installments, and upon which mortgage, he alleges, there is due $887.47 with interest at ten per cent. from April 17th, 1872. The vessel has been sold, and the fund realized, except as the same has been applied in payment of seamen's wages, lies in the registry of this court, for distribution as may be ordered. The repairs were made upon the vessel at her home port; and the allegations of the libel are that they were made upon the credit of the vessel. It is claimed by libelants that they had a maritime lien upon the vessel for the amount claimed to be due them on account of the repairs, and that such lien is paramount to the intervenor's mortgage. It is claimed by the mortgagee, Bonnell, that the libelants had no such lien, and that from the fund in court, his mortgage must be first paid.

It will be seen, therefore, that the case involves the question whether, as the repairs were made in the home port, the libelants have a maritime lien upon the vessel and can maintain a proceeding in rem. The decision of this question involves the difficult task of considering numerous decisions upon this and kindred questions affecting admiralty jurisdiction, and especially of determining the scope and construction of the 12th rule in admiralty as originally established, then repealed, and finally amended by the supreme court of the United States.

By the civil law, a lien is given upon a vessel for repairs and supplies whether the vessel was at her home or in a foreign port at the time such repairs and supplies were made and furnished. A different doctrine was, however, adopted by the English courts, which held that no lien in admiralty exists by reason of repairs and supplies furnished in the home port of the vessel and such is the present doctrine of those courts, as shown by the cases cited upon the argument. The constitution extends the judicial power of the United States "to all classes of admiralty and maritime jurisdiction." Const. U. S. art. 3, § 2. In 1789, congress passed an act in relation to process to be used in the courts which had been established, and therein directed, that the forms and modes of proceeding in courts of maritime jurisdiction, should be according to the course of the civil law. [1 Stat. 93.] Difficulties arose, as pointed out by Chief Justice Taney in the case of The St. Lawrence, 1 Black. [66 U. S.] 522, in following the provisions of this act, and by a subsequent act of May 8, 1792 [1 Stat. 275], it was provided that "the forms of writs, executions and other process, except their style and the forms and modes of proceeding in suits, in those of common law shall be the same as are now used in the said courts respectively, in pursuance of the act entitled 'An act to regulate processes in the courts of the United States;' in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity, and to courts of admiralty, respectively, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule to prescribe to any circuit or district court concerning the same." It was under this act, and an act passed August 23, 1842 [5 Stat. 516], enlarging the power conferred by the act of 1792, that the supreme court derived its authority to make rules regulating procedure in admiralty.

Subsequent to the passage of the act of 1792, but prior to adoption of any rule or regulation of procedure, the case of The General Smith, 4 Wheat. [17 U. S.] 438, was decided, in which case it was held, as Chief Justice Taney states the decision in the case of The St. Lawrence, 1 Black. [66 U. S.] 529, "that where, upon the principles of the Maritime Code, the supplies are presumed to be furnished on the credit of the vessel, or where a lien is given by the local law, the party is entitled to proceed in rem in the admiralty court to enforce it; but where the supplies are presumed by the Maritime Code to be furnished on the personal credit of the owner or master, and the local law gives him no lien, although the contract is maritime, yet he must seek his remedy against the person and not against the vessel. In either case, the contract is equally within the jurisdiction of a court of admiralty. And it is obvious from this decision, that the court considered the process in rem given for repairs or supplies to a domestic vessel by the courts of admiralty, in those countries where the principles of the civil law have been adopted, as forming no part of the general Maritime Code, but as local laws, and therefore furnishing no precedent for similar cases where the local law is otherwise." This case was decided in 1819. It was followed in 1833 by the case of Peyroux v. Howard, 7 Pet. [32 U. S.] 324, and in 1839 by the case of New Orleans v. Phoebus, 11 Pet. [36 U. S.] 275.

In 1844 the supreme court promulgated the following rule, known as rule 12: "In all suits by material-men for supplies or repairs or other necessaries for a foreign ship or for a ship in a foreign port, the libelant may proceed against the ship and freight in rem, or against the master or owner alone, in personam; and the like proceeding in rem shall apply to cases of domestic ships, where, by the local law, a lien is given to material-men for supplies, repairs or other necessaries." By this rule, the proceeding in rem

was limited to cases of foreign ships, or ships in a foreign port, except where, in cases of domestic ships, the local law gave a lien. And it will be seen that the rule simply reaffirmed the principle or adopted the course of practice laid down in the case of The General Smith, 4 Wheat. [17 U. S.] 438. The adoption of the rule in 1844 was followed by decisions of the supreme court in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, decided in 1848, and in People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393, decided in 1857, both of which cases reassert the doctrine laid down in the case of the General Smith.

The proceeding in rem against domestic vessels in cases where the local law conferred a lien, was, however, found inapplicable, and to be attended with embarrassments growing out of the diverse statutory limitations in different states, and on the 1st May, 1859, the supreme court repealed rule 12, and adopted the following: "In all suits by material-men for supplies or repairs, or other necessaries, for a foreign ship or for a ship in a foreign port, the libelant may proceed against the ship and freight in rem, or against the master or owner alone in personam, and the like proceeding, in personam, but not in rem, shall apply to cases of domestic ships for supplies, repairs or other necessaries." By this rule the proceeding in rem was restricted to cases of foreign ships, or ships in a foreign port.

It is true, as stated by Judge Woodruff in The Edith [Case No. 4,283], that by the course of decision down to the adoption of the new rule in 1859, "the supreme court affirmed that the contract for repairs and supplies to a vessel is a maritime contract, and within the jurisdiction of the district courts, as courts of admiralty; that the contract for supplies and repairs to a foreign vessel is attended by a maritime lien in favor of the material man, or repairer, as an incident to the contract, which would be enforced in the admiralty; that the contract for supplies and repairs to a domestic vessel in her home port is attended by no such incident; that no maritime lien is implied therein or created thereby; and that, although the admiralty had jurisdiction of the contract, and would sustain suits thereon in personam, there is no lien by maritime law upon the vessel itself, to be enforced as such." This course of decision, it may be added, was followed by the supreme court in other and later cases. The Belfast, 7 Wall. [74 U. S.] 625, decided in 1868; The Kalorama, 10 Wall. [77 U. S.] 208, decided in 1869. In 1866 the court held, in the case of The Moses Taylor, 4 Wall. [71 U. S.] 411, that a statute of the state of California authorizing actions in rem against vessels for causes of action cognizable in the admiralty, invested the courts of California with admiralty jurisdiction; that by act of congress such jurisdiction was exclusively vested in the federal courts, and that the state court of California had no jurisdiction of a proceeding in rem against a vessel, under such statute, for a breach of contract to transport a passenger from New York to San Francisco. The same principle was followed in Hine v. Trevor, 4 Wall. [71 U. S.] 555, which was a case involving a similar statute in Iowa.

Following all these decisions, and in May, 1872, the supreme court, by amendment, again changed rule 12 so that it should read as follows: "In all suits by material-men, for supplies or repairs, or other necessaries, the libelants may proceed against the ship and freight in rem, or against the master or owner alone in personam." Apparently, this rule, as now established, destroys all distinction between foreign and domestic ships, so far as process is concerned, in suits for supplies, repairs, or other necessaries.

It is argued that there are decisions to the effect that under the present rule all ships, whether foreign or domestic, and whether in a foreign or the home port, are liable for repairs and supplies furnished on the credit of the ship, and that a proceeding in rem may in all cases be maintained for the recovery of a claim for such repairs and supplies.

In the case of The St. Lawrence, 1 Black. [66 U. S.] 526, Chief Justice Taney very clearly shows that these rules do not at all involve a question as to the extent of the admiralty jurisdiction granted by the constitution. He says: "There is a wide difference between the power of the court upon a question of jurisdiction, and its authority over its mode of proceeding and process, and the alteration in the rule applies altogether to the character of the process to be used in certain cases, and has no relation to the question of jurisdiction." In other words, the jurisdiction of the courts cannot be enlarged or diminished by a mere rule of practice, but process and mode of procedure may be regulated by rule, and it is the exercise of this latter power that is involved in the establishment of the rule in question. Following the principle of this decision, I think it inaccurate to say, that the change in rule 12, proprio vigore, gives to a maritime contract the qualities of a maritime lien, or that it establishes a maritime lien where before there was none. In my judgment, the true position in sustaining a proceeding in rem upon a claim for repairs or supplies made and furnished in the home port is, that by the maritime law, where such repairs or supplies are made and furnished upon the credit of the vessel, there exists a lien which under the present rule may be enforced by a proceeding in rem against the ship and freight. And in determining whether a claim for supplies or repairs in the home port is a maritime lien, the rule as now established is important to be considered as indicating a conclusion of the court that in all suits for supplies, repairs or other necessaries, whether furnished in the home or a foreign port, the libellant may proceed against the ship in rem;

and as evincing a contemplated departure from the past course of decision on the question of maritime liens for repairs and supplies.

A comparison of the three forms of rule 12, shows that the change last made is radical. Originally, the proceeding in rem was distinctly restricted to cases of foreign vessels or vessels in a foreign port, except where the local law gave a lien, in which cases, the proceeding would lie against a domestic vessel. By the change made in 1859, the proceeding in rem was in all cases confined to foreign ships or ships in a foreign port, and was in no case to apply to domestic vessels. By the change of 1872, the proceeding in rem is permitted in all suits for repairs or supplies, and no distinction is named between foreign and domestic vessels. The decisions of the supreme court holding that no maritime lien arises for repairs made and supplies furnished in the home port of the vessel, were all made prior to the adoption of the present rule. There are decisions of several eminent district judges to the effect, that by the rule of 1872, the supreme court intended to declare that a maritime lien arises upon a contract for repairs or supplies whether the vessel be foreign or domestic. Nevertheless, I have hesitated upon the question, because that court has not yet, by formal decision, enunciated that principle, and reversed its previous decisions which have been so long the law of the land. I have not, however, been able, in view of the language of the new rule, the history of the changes made in the rule as first established, the utterances of the courts since this question has arisen, and upon principle, to escape from the conclusion that, in the adoption of the rule of 1872, the supreme court foreshadowed an adjudication that material-men have a lien by the general maritime law without distinction between foreign and domestic vessels and foreign or home ports.

Soon after the adoption of the new rule it was held by Judge Miller, of this district, that a libel can be maintained for repairs and supplies furnished to a domestic vessel at the home port, and that the alteration of rule 12 was intended to place contracts for repairs and supplies for all vessels on an equality as to proceedings in admiralty. The Selt [Case No. 12,649]. This was followed by a decision by Judge Blatchford in The Circassian [Id. 2,726], in which he held that "the rule of 1872 provides, and was intended to provide, that in every case of a contract for supplies, etc., to a vessel, domestic or foreign, being a maritime contract, process in rem against the vessel, or in personam against her master or owner, may optionally be resorted to where a suit is required to enforce the contract." In the case of The Augusta [Id. 647], Judge Deady decided that "the effect of the rule in its present form is to do away with the distinction which prevailed after the decision in the case of The General Smith, supra, between foreign and domestic ships, and ships in home or other ports, and to make all ships, as such, liable for repairs, supplies, or other necessaries, furnished at the express or implied request of the owner or master." The decision of Judge Treat in Taylor v. The Commonwealth [Id. 13,788], is to the same effect, though there are some conclusions in the opinion in which I am unable to concur. Justice Miller, of the supreme court, sitting as circuit judge, while reversing the decision of Judge Treat in that case on the point that the libelant had waived his lien, expresses the opinion that a maritime lien exists for supplies and repairs furnished on the credit of a vessel at the home port. His utterance is significant, as indicating in some degree the purpose of the court of which he is a member, in amending rule 12. Taylor v. Com. [Id. 13,787]. In The Lottawanna [20 Wall. (87 U. S.) 201], Justice Clifford speaks of the little or no difficulty arising in the practice both previous and subsequent to the adoption of the rule of 1844, and until its repeal in 1859, as most or all of the states enacted laws giving a lien for the protection of material-men in cases of repairs and supplies furnished to a ship in her home port. Speaking of the repeal of the old twelfth rule and the adoption of the new rule, which did not authorize a proceeding in rem, except where there was a claim founded on a maritime lien against a foreign ship, or against a ship in a foreign port, he says: "Attempts were made by the states to obviate the embarrassment which grew out of the repeal of that rule and the adoption of the new rule, withdrawing the use of the process in rem from the district courts to enforce the payment of claims for repairs and supplies furnished to domestic ships; but this court decided in several cases, that the state legislatures could not create a maritime lien, nor could they confer jurisdiction upon a state court to enforce such a lien by a suit or proceeding in rem, as practised in the admiralty courts. Much embarrassment has existed ever since the old twelfth admiralty rule was repealed, as the new rule makes no provision to enforce the payment of contracts for repairs and supplies furnished to domestic ships, except by a libel in personam. Repeated judicial attempts have been made to overcome the difficulty, none of which have proved satisfactory, because they failed to provide a remedy in the admiralty by a proceeding in rem. Inconveniences of the kind have been felt for a long time, until the bench and bar have come to doubt whether the decision that a maritime lien does not arise in a contract for repairs and supplies furnished to a domestic ship is correct, as it is clear that the contract is a maritime contract, just as plainly as the contract to furnish such repairs and supplies to a foreign ship or to a domestic ship in the port of a state other than that to which the ship belongs. Such a remedy is not given even in the latter case unless the repairs and supplies were furnished on the credit of the ship, and it is difficult to see why the same remedy may not be given in the former case if the repairs and supplies were obtained by the

master on the same terms. These and many other considerations have had the effect to create serious doubts as to the correctness of the decision made more than fifty years ago, that a maritime lien does not arise in such a case."

Judge Longyear in the case of The Champion [Case No. 2,583], says that in the United States "the maritime lien was at first adopted as it was administered in England, together with all its inconsistencies and incongruities as applied to the condition of things here. The incongruity of limiting the jurisdiction to tide water has already been abandoned, and has ceased to mar the harmony of the system; and, judging from the recent amendment of admiralty rule 12, by the supreme court, and certain foreshadowings by recent enunciations from the bench of that court, and to which may be added a recent decision by the district court for the Eastern district of Missouri, it is evident that this other is about to meet the same fate."

Such are the views and indications of the courts which have thus far given any expression upon the question. It seems that by the repeal of the rule of 1844, and the adoption of the new rule of 1859, all authority for the use of the process in rem against domestic vessels, when, by the local law a lien was given, was taken away. Attempts of the states to obviate the difficulty were followed by decisions that the state legislatures could not confer upon state courts jurisdiction to enforce a maritime lien by a proceeding in rem. This took away all power in admiralty to enforce the payment of claims for repairs and supplies furnished to domestic ships, except by a libel in personam. Then followed the new rule of 1872. Its language is broad and comprehensive. It authorizes a proceeding in rem in all suits by material-men for supplies or repairs. I cannot resist the conclusion that it was intended to clear up all difficulties, and that by its adoption the court must be understood as intending to obliterate the former prevailing distinction between foreign and domestic ships, and ships in foreign or home ports. Upon principle, why should that distinction exist? In the case of a foreign ship, or a ship in a foreign port, there can be no lien for repairs or supplies, unless they are furnished on the credit of the ship. Why should not the same remedy be given in the case of a domestic ship, when the repairs and supplies are furnished solely on its credit? The contract in both cases is a maritime contract, and there seems no solid ground for a distinction, where the contract is made upon the faith and credit of the vessel.

Judge Benedict, in his work on Admiralty (§ 272), says that it is not easy to see how any difference can exist in principle between foreign and domestic ships. "If one is a ship or vessel, so is the other; and the same law and the same reason which gives a lien in the one case gives it in the other."

In the case of The Kate Tremaine [Case No. 7,622], Judge Benedict says that the doctrine declared in the Case of The General Smith "has given rise to numerous attempts to create state admiralty proceedings, framed for no other purpose than to avoid its effect, and which have proved to be snares. * * * It declares an exceptional doctrine which is at war with all the analogies of the maritime law, and which has been continually assailed as without support in authority, and without foundation in reason; and which, I think, must in fairness be said to have failed to secure a resting-place in the maritime law of America." In the same opinion, Judge Benedict further says that many of the peculiar notions of maritime jurisdiction derived from England "have at last been expelled from the jurisprudence of America, and the opinion is widely expressed that their offspring should follow them. The court will then be relieved from the necessity of holding that the residence of the ship-owner, which is considered immaterial as affecting the master's contracts of affreightment, or his contracts with the tug, or the pilot, or the crew, becomes all at once very material when his contract is for the food of the master, pilot, and crew."

In recognition of the necessities of the vast shipping and commericial interests of the country, the exercise of admiralty jurisdiction within the limitations of the constitution and the laws of congress, has been gradually enlarged and former restrictions abandoned. I think the new twelfth rule marks a further step in that direction, and I am constrained to hold, in view of that rule and of the decisions made since its adoption, which I have cited, that the libelants had a right to proceed in rem against the schooner Travis for the repairs and materials made and furnished by them at the home port, upon the credit of the vessel.

In the case of Edwards v. Elliott [21 Wall. (88 U. S.) 532], decided by the supreme court at the October term, 1874, the opinion in which case is found in a note to the case of The Tuttle, 13 Am. Rep. 273, it was held that builders and material-men have no lien for labor done and materials furnished in the construction of a vessel. The decision is based wholly upon the ground that a contract to build a vessel is not a maritime contract. The case, therefore, has no application, as it is settled that a contract to repair is a maritime contract.

Funds furnished in a foreign port for repairs to a ship have priority as a lien over existing mortgages. The Emily B. Souder [17 Wall. (84 U. S.) 666]. If there is now a maritime lien for repairs in the home port, the above principle applies as in case of repairs in a foreign port, and the lien of the libelant is not subordinate to the claim of the mortgagee. Libelants will be first paid the amount of their claim from the fund in court.

WHITTAKER (KARR v.). See Case No. 7,613.

WHITTAKER (UNITED STATES v.). See Case No. 16,687.

WHITTEMORE (ALLEN v.). See Case No. 241.

WHITTEMORE (BROWN v.). See Case No. 2,033.

Case No. 17,600.

WHITTEMORE v. CUTTER.

[1 Gall. 429; [1] 1 Robb. Pat. Cas. 28.]

Circuit Court, D. Massachusetts. May Term, 1813.

PATENTS — ASSIGNMENT OF MOIETY — JOINT ACTIONS—INFRINGEMENT—MEASURE OF DAMAGES—ISSUANCE OF PATENT — OMISSION OF OATH — CONCEALMENTS AND DEFECTS.

1. Under the patent act of February 21, 1793, c. 11 [1 Stat. 318], if the patentee has sold out a moiety of his patent right, a joint action lies, by himself and his assignee, for a violation of it.

[Cited in Bryan v. Stevens, Case No. 2,066a; Blanchard v. Eldredge, Id. 1,510; Moore v. Marsh, 7 Wall. (74 U. S.) 521, note; Wilson v. Rousseau, Case No. 17,832; Stein v. Goddard, Id. 13,353; Brooks v. Bicknell, Id. 1,944; Potter v. Holland, Id. 11,329; Meyer v. Bailey, Id. 9,516.]

[Cited in brief in Carter v. Bailey, 64 Me. 460.]

2. The making of a patented machine fit for use, and with design to use it for profit, in violation of the patent right, is of itself a breach of the patent right, for which an action lies.

[Cited in Brooks v. Bicknell, Case No. 1,944; Hogg v. Emerson, 11 How. (52 U. S.) 607; Butz Thermo-Electric Regulator Co. v. Jacobs Electric Co., 36 Fed. 197.]

See Woodcock v. Parker [Case No. 17,971]; Odiorne v. Winkley [Id. 10,432]; Lowell v. Lewis [Id. 8,568]; Evans v. Eaton, 7 Wheat. [20 U. S.] 356; Dixon v. Moyer [Case No. 3,931]. See, also, Whittemore v. Cutter [Case No. 17,601].

3. If there be a mere making and no user proved, nominal damages are to be given to the plaintiff. Where the law gives a remedy for a particular act, the doing of that act of itself imports a damage, for which an action lies.

[Cited in Smith v. Pearce, Case No. 13,089; Allen v. Blunt, Id. 217; Byam v. Bullard, Id. 2,262.]

[Cited in brief in Appleton v. Fullerton, 1 Gray, 190. Cited in Fullam v. Stearns, 30 Vt. 455.]

4. If the oath, required by the patent act previous to the issuing of a patent, be not taken, still the patent is valid.

[Cited in Lowell v. Lewis, Case No. 8,568; Crompton v. Belknap Mills, Id. 3,406; Tonduer v. Chambers, 37 Fed. 338; Hartshorn v. Eagle Shade Roller Co., 18 Fed. 91; Holmes Burglar Alarm Tel. Co. v. Domestic Telegraph & Telephone Co., 42 Fed. 222; Beach v. American Box Mach. Co., 63 Fed. 604.]

[Cited in Dyer v. Rich, 1 Metc. (Mass.) 191.]

5. Under the patent act, no defect or concealment in any specification is sufficient to avoid a patent, unless it be with intent to deceive the public.

[Cited in Whitney v. Emmett, Case No. 17,585; Hogg v. Emerson, 6 How. (47 U. S.) 482; Forbes v. Barstow Stove Co., Case No. 4,923; Webster Loom Co. v. Higgins, 105 U. S. 588.]

6. Counsel fees for prosecuting the suit are no proper item of damage in an action for violation of a patent.

[Cited in Boston Manuf'g Co. v. Fiske, Case No. 1,681; Allen v. Blunt, Id. 217; Oelrichs v. Williams, 15 Wall. (82 U. S.) 230.]

[See Bancroft v. Acton, Case No. 833.]

This was an action for the violation of a patent right in a machine for the making of cotton and wool cards. A verdict having been returned against the defendant, he moved for a new trial upon several grounds, which will appear in the opinion of the court.

STORY, Circuit Justice. Several objections, which were taken to the opinion of the court delivered to the jury at the trial, have been argued on the motion for a new trial, and we are now to pronounce as to their validity.

The first objection is founded on the incompetency of the plaintiffs to maintain the present action; one of the plaintiffs being the original patentee, and the other an assignee of a moiety of the patent right, deriving his title under the patentee. It is contended, that no action will lie in this court for an infringement of a patent right in favor of an assignee, unless he be the assignee of the whole title and interest. And the language of the fourth section of the act of February 21, 1793, c. 11 [1 Stat. 322], and the case of Tyler v. Tuel, 6 Cranch [10 U. S.] 325, are relied on in support of the position. It is true, that a party relying on an action given by a statute must bring himself within the provisions of the statute. But where, as in the present case, the law is remedial, it should receive a liberal construction, to effectuate the intentions of the legislature. Upon the very rigid construction, which is assumed by the defendant's counsel, an action could not be maintained, where a joint patent should be obtained by two persons, and one of them should assign his whole interest. The action could not be jointly brought by the patentees, because one would have parted with his whole interest; nor jointly by the patentee and the assignee, for it would then be open to the very difficulty which is pressed upon us in this case; nor by either party separately, for it would be splitting the cause of action. Other cases might be put, in which the parties would be wholly without remedy. We are well satisfied, however, that the direction given at the trial on this point was correct. The statute gives to the assignee all the right and responsibility, which the original inventor had in the undivided portion of the patent, which is conveyed; and an action may well be maintained by all the parties, who at the time of the infringement are the holders of the whole title and interest. The case of Tyler v. Tuel [supra] is clearly distinguishable. In the first place, it was brought by persons, who did not purport to have the whole patent right in themselves. In the next place, there was, technically speaking, no assignment of the patent right. The instrument could only oper-

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

ate as a covenant or license for the exclusive use of the patent right in certain local districts. But a patent right itself is unsusceptible of local subdivision. Nor is the present case within any of the mischiefs, which were pressed on the court in that case. The language of the fourth section does not seem to have contemplated the case of joint inventors: yet there can be no doubt, that being within the reason of the clause, they must be held within the purview. If either should die, can there be a question that the executor or administrator might well maintain an action jointly with the survivor for an infringement? and in what substantial respect can an assignee in law be considered as distinguishable from an assignee in fact? Upon the most mature reflection, we are satisfied that this objection cannot prevail upon the footing of the statute; and if urged at common law, the case of Boulton v. Bull, 2 H. Bl. 463, where the action was brought by the inventor and his assignee of two thirds of the patent right, would afford a complete answer.

Another objection is to the direction, that the making of a machine fit for use, and with a design to use it for profit, was an infringement of the patent right, for which an action was given by the statute. This limitation of the making was certainly favorable to the defendant, and it was adopted by the court from the consideration, that it could never have been the intention of the legislature to punish a man, who constructed such a machine merely for philosophical experiments, or for the purpose of ascertaining the sufficiency of the machine to produce its described effects.

It is now contended by the defendant's counsel, that the making of a machine is, under no circumstances, an infringement of the patent. The first section of the act of 1793 expressly gives to the patentee &c. "the full and exclusive right and liberty of making, constructing, using, and vending to others to be used" the invention or discovery. The fifth section of the same act gives an action against any person, who "shall make, devise, and use or sell" the same. From some doubt, whether the language of the section did not couple the making and using together to constitute an offence, so that making without using, or using without making, was not an infringement, the legislature saw fit to repeal that section; and by the third section of the act of April 17, 1800, c. 25 [2 Stat. 37], gave the action against any person, who should "make, devise, use or sell" the invention. We are not called upon to examine the correctness of the original doubt, but the very change in the structure of the sentence affords a strong presumption, that the legislature intended to make every one of the enumerated acts a substantive ground of action.

It is argued, however, that the words are to be construed distributively, and that "making" is meant to be applied to the case of a composition of matter, and not to the case of a machine. That it is clear, that the use of certain compositions (as patented pills) could not be an infringement, and unless making were so there would be no remedy in such cases. We cannot feel the force of this distinction. The word "making" is equally as applicable to machines, as to compositions of matter; and we see no difficulty in holding, that the using or vending of a patented composition is a violation of the right of the proprietor.

It is further argued, that the making of a machine cannot be an offence, because no action lies, except for actual damage, and there can be no actual damages, or even a rule for damages, for an infringement by making a machine. We are however of opinion, that where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party. Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage. On the whole, we see no reason for departing from the plain import of the language of the statute, and this objection also must be overruled.

Another objection is to the direction, that the oath taken by the inventor not being conformable to the statute formed no objection to the recovery in this action. The statute requires that the patentee should swear, "that he is the true inventor or discoverer of the art, machine, or improvement." The oath taken by Whittemore was, that he was the true "inventor or improver of the machine." The taking of the oath was but a prerequisite to the granting of the patent, and in no degree essential to its validity. It might as well have been contended, that the patent was void, unless the thirty dollars, required by the eleventh section of the act, had been previously paid. We approve of the direction of the court on this point, and overrule this objection.

Another objection is to the direction respecting the specification. It was as follows: "That if the jury should be satisfied, that the specification and drawings, filed by the patentee in the office of the secretary of state, were not made in such full, clear, and exact terms and manner as to distinguish the same from all other things before known, and to enable any person skilled in the art or science, of which it is a branch, or with which it is most nearly connected, to make and use the same, this would not be sufficient to defeat the right of the plaintiffs to recover in this action, unless the jury were also satisfied, that the specification and drawings were thus materially defective and obscure by design, and the concealment made for the purpose of deceiving the public. In this respect our law differed from the law of England. That if the specification and drawings were thus materially defective, it afforded a presumption of a designed concealment, which the jury were to judge of.

That in deciding, as to the materiality of the deficiencies in the specification and drawings, it was not sufficient evidence to disprove the materiality, that, by studiously examining such specification and drawings, a man of extraordinary genius might be able to construct the machine, by inventing parts, and by trying experiments. The object of the law was, to prevent the expenditure of time and money in trying experiments, and to obtain such exact directions, that, if properly followed, a man of reasonable skill in the particular branch of the art or science might construct the machine, and, if from the deficiencies, it was impracticable for such a man to construct it, the deficiencies were material." In order fully to understand the objection to this direction, it is necessary to advert to the third section of the act of 1793, which specifies the requisites to be complied with in procuring a patent, and the sixth section of the same act, which states certain defences, of which the defendant may avail himself to defeat the action, and to avoid the patent. The third section, among other things, requires the party applying for a patent to deliver a written description of his invention, and of the manner of using, or process of compounding the same, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art or science, of which it is a branch, or with which it is most intimately connected, to make, compound, and use the same; and in the case of any machine, he shall fully explain the principle, and the several modes, in which he has contemplated the application of that principle, or character, by which it may be distinguished from other inventions. The sixth section provides, among other things, that the defendant may give in his defence, that the specification filed by the plaintiff does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the described effect, which concealment or addition shall fully appear to have been made for the purpose of deceiving the public. It is very clear, that the sixth section does not enumerate all the defences, of which the defendant may legally avail himself; for he may clearly give in evidence, that he never did the act attributed to him, that the patentee is an alien not entitled under the act, or that he has a license or authority from the patentee. It is therefore argued, that if the specification be materially defective, or obscurely or so loosely worded, that a skillful workman in that particular art could not construct the machine, it is a good defence against the action, although no intentional deception has been practiced. And this is beyond all question the doctrine of the common law; and it is founded in good reason; for the monopoly is granted upon the express condition, that the party shall make a full and explicit disclosure, so as to enable the public, at the expiration of his patent, to make and use the invention or improvement in as ample and beneficial a manner as the patentee himself. If therefore it be so obscure, loose, and imperfect, that this cannot be done, it is defrauding the public of all the consideration, upon which the monopoly is granted. Bull. N. P. 77; Turner v. Winter, 1 Term R. 602. And the motive of the party, whether innocent or otherwise, becomes immaterial, because the public mischief remains the same. It is said, that the law is the same in the United States, notwithstanding the wording of the sixth section, for there is a great distinction between a concealment of material parts, and a defective and ambiguous description of all the parts; and that in the latter case, although there may be no intentional concealment, yet the patent may be avoided for uncertainty as to the subject matter of it. There is considerable force in the distinction at first view; and yet, upon more close examination, it will be difficult to support it. What is a defective description, but a concealment of some parts, necessary to be known in order to present a complete view of the mechanism? In the present case the material defects were stated, among other things, to consist in a want of a specific description of the dimensions of the component parts, and of the shapes and position of the various knobs. Were these a concealment of material parts, or a defective and ambiguous disclosure of them? Could the legislature have intended to pronounce, that the concealment of a material spring should not, unless made with design to deceive the public, avoid the patent, and yet that an obscure description of the same spring should at all events avoid it? It would be somewhat hazardous to attempt to sustain such a proposition.

It was probably with a view to guard the public against the injury arising from defective specifications, that the statute requires the letters patent to be examined by the attorney general, and certified to be in conformity to the law, before the great seal is affixed to them. In point of practice, this must unavoidably be a very insufficient security, and the policy of the provision, that has changed the common law, may be very doubtful. This, however, is a consideration proper before another tribunal. We must administer the law as we find it. And, without going more at large into this point, we think that the manifest intention of the legislature was, not to allow any defect or concealment in a specification to avoid the patent, unless it arose from an intention to deceive the public. There is no ground therefore, on which we can support this objection. Considering however the importance of the question in a general view, if the cause had rested on this point, I should have been disposed to have had it certified, on a division of opinion, for the determination of the supreme court.

Another objection is to the direction to the jury, that the letters patent were to be considered as granted for an improvement in manufacturing cards, and not for the whole machine described in the specification. This direction was given under impressions derived from the case of Boulton v. Bull; but we are now satisfied, that the direction was erroneous. The declaration is for an infringement of the patented machine, and although the letters patent state, that the grant is for "a new and useful improvement in manufacturing cards," yet the specification must be considered as controlling the generality of expression, and limiting the grant to the machine specifically described therein. It is indeed clear, from all the other papers in the cause, that the invention and the patent have always been considered by the patentees as confined to a specific machine.

The last objection, which has been urged, is to the direction, that the extraordinary expenses of vindicating the right of the plaintiffs, such as counsel fees and expenses of witnesses beyond the taxable costs, ought to be considered as items of actual damage. And such, at the trial, we had considered the established rule to be in estimating damages in cases of mere tort, whether the action was for the redress of a personal injury, or the vindication of a personal right. Since the trial, however, we have seen the case of Arcambal v. Wiseman, 3 Dall. [3 U. S.] 305, in which the question, as to counsel's fees, was directly before the supreme court. There can be no doubt that the case was founded on a tort; and we feel ourselves bound by that decision, whatever might have been the opinion we should otherwise have been disposed to entertain.

For the errors, therefore, in the two last exceptions, a new trial must be granted. A new trial awarded.

[For another hearing of this cause, see Case No. 17,601.]

Case No. 17,601.

WHITTEMORE et al. v. CUTTER.

[1 Gall. 478; 1 Robb. Pat. Cas. 40; Merw. Pat. Inv. 411.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1813.

INFRINGEMENT OF PATENT RIGHT — IDENTITY OF MACHINES—MEASURE OF DAMAGES.

1. If a person be the inventor of an improvement only, and not of the whole machine, he is entitled to a patent for no more than his improvement.

See note to Woodcock v. Parker [Case No. 17,971].

[Cited in Re Hebbard, Case No. 6,314; Smith v. Downing, Id. 13,036.]

[Cited in Holliday v. Rheem, 18 Pa. St. 469.]

2. What constitutes the identity or diversity of two machines, so as to give or take away the right to a patent.

See Gray v. James [Id. 5,718]; Phil. Pat. 128–133, where the cases are cited and commented on.

[Cited in Smith v. Downing, Case No. 13,036; Singer v. Walmsley, Id. 12,900.]

[Cited in Tillotson v. Ramsay, 51 Vt. 314.]

3. If a machine produce several different effects, by a particular combination of machinery, and these effects are produced in the same way in another machine, and a new effect added, the inventor of the latter cannot entitle himself to a patent for the whole machine.

See note to Woodcock v. Parker [supra].

[Cited in Whitney v. Emmett, Case No. 17,585; In re Hebbard, Id. 6,314.]

[Cited in Dunbar v. Marden, 13 N. H. 317.]

4. If an inventor make a gift of his invention to the public, and suffer it to go into general use, he cannot afterwards resume the invention, and hold a patent.

See Morris v. Huntington [Case No. 9,831]; Mellus v. Silsbee [Id. 9,404]; Bedford v. Hunt [Id. 1,217]; Gray v. James [supra]; Pennock v. Dealogao, 2 Pet. [27 U. S.] 1; Wyeth v. Stone [Case No. 18,107]; Reed v. Cutter [Id. 11,645]; Saunders v. Smith, 3 Mylne & C. 711, 735.

[Cited in Bartlette v. Crittenden, Case No. 1,082; Shaw v. Cooper, 7 Pet. (32 U. S.) 317.]

[Cited in Earl v. Page, 6 N. H. 479.]

5. In an action for a violation of a patent right, the plaintiff can recover for actual damages only, and not for a vindictive recompense.

6. If a user of the patented machine be proved, the measure of damages is the value of the use, during the time of the user. If a making only of the machine be proved, the plaintiff is entitled to nominal damages only. Neither the price, nor the expense of making the machine, is a proper measure of damages.

[Cited in Earle v. Sawyer, Case No. 4,247; Allen v. Blunt, Id. 215; Steam Stone-Cutter Co. v. Sheldons, 21 Fed. 876.]

[Cited in Ogden v. Marshall, 8 N. Y. 344; Pegram v. Stortz (W. Va.) 6 S. E. 501.]

7. In an action on a patent right, the jury are to find single damages, and the court will treble them.

This was an action [by Amos Whittemore and others against William F. Cutter] for the infringement of the plaintiff's patent right, as set forth in the declaration. The cause was tried before Judge STORY, at this term, in the absence of the district judge; the verdict, found by the jury at a former term, having been set aside, and a new trial granted. [Case No. 17,600.]

Dexter & Prescott, for plaintiff.

Mr. Pitman, for defendant.

STORY, Circuit Justice (charging jury). If the plaintiff, Amos Whittemore, be not the inventor of the whole machine, but only of an improvement thereof, his patent is too broad, and is utterly void; for it is clearly a patent for the whole machine. Whether he be the inventor of the whole machine is, under all the circumstances of the case, a question of fact. It is difficult to define the exact cases, when the whole machine may be deemed a new invention, and when only an improvement of an old machine; the cases often

[1] [Reported by John Gallison, Esq. Merw. Pat. Inv. 411, contains only a partial report.]

approach very near to each other. In the present improved state of machinery, it is almost impracticable not to employ the same elements of motion, and in some particulars, the same manner of operation, to produce any new effect. Wheels, with their known modes of operation, and known combinations, must be of very extensive employment in a great variety of new machines; and if they could not, in the new invention, be included in the patent, no patent could exist for a whole machine embracing such mechanical powers. Where a specific machine already exists, producing certain effects, if a mere addition is made to such machine, to produce the same effects in a better manner, a patent cannot be taken for the whole machine, but for the improvement only. The case of a watch is a familiar instance. The inventor of the patent lever, without doubt, added a very useful improvement to it; but his right to a patent could not be more extensive than his invention. The patent could not cover the whole machine as improved, but barely the actual improvement. The same illustration might be drawn from the steam engine, so much improved by Messrs. Watt & Boulton. In like manner, if to an old machine, some new combinations be added, to produce new effects, the right to a patent is limited to the new combinations. A patent can, in no case, be for an effect only, but for an effect produced in a given manner, or by a peculiar operation. For instance, no patent can be obtained for the admeasurement of time, or the expansive operations of steam; but only for a new mode or new application of machinery, to produce these effects; and therefore, if new effects are produced by an old machine in its unaltered state, I apprehend that no patent can be legally supported; for it is a patent for an effect only. On the other hand, if well known effects are produced by machinery in all its combinations entirely new, a patent may be claimed for the whole machine. So if the principles of the machine are new, either to produce a new or an old effect, the inventor may well entitle himself to the exclusive right of the whole machine. By the principles of a machine, (as these words are used in the statute) is not meant the original elementary principles of motion, which philosophy and science have discovered, but the modus operandi, the peculiar device or manner of producing any given effect. The expansive powers of steam, and the mechanical powers of wheels, have been understood for many ages; yet a machine may well employ either the one or the other, and yet be so entirely new, in its mode of applying these elements, as to entitle the party to a patent for his whole combination. The intrinsic difficulty is to ascertain, in complicated cases like the present, the exact boundaries between what was known and used before, and what is new, in the mode of operation. The present machine is to make cotton and woollen cards. These were not only made before the present patent, by machinery, but also by machinery which, at different times, exhibited very different stages of improvement. The gradual progress of the invention, from the first rude attempts to the present extraordinary perfection, from the slight combination of simple principles to the present wonderful combinations, in ingenuity and intricacy scarcely surpassed in the world, has been minutely traced by the witnesses on the stand.

The jury then are to decide, whether the principles of Mr. Whittemore's machine are altogether new, or whether his machine be an improvement only on those, which have been in use before his invention. I have before observed, that the principles are the mode of operation. If the same effects are produced by two machines by the same mode of operation, the principles of each are the same. If the same effects are produced, but by combinations of machinery operating substantially in a different manner, the principles are different. The great stages, (if I may so say) in making the cards by Whittemore's machine, which admit of a separate and distinct operation in the machinery, are: (1) The forming and bending the wire; (2) the pricking the leather; (3) the sticking the wire into the leather; and (4) the crooking the wire after its insertion. Were either of these effects produced in the machines formerly in use by a combination of machinery, or mode of operation, substantially the same as in this machine? If so, then clearly his patent could only be for an improvement, and of course it is void; if not, then his patent is free from any objection on the ground of being broader than this invention. It will not be sufficient, to protect the plaintiff's patent, that this specific machine, with all its various combinations and effects, did not exist before; for if the different effects were all produced by the same application of machinery, in separate parts, and he merely combined them together, or added a new effect, such combination would not sustain the present patent, any more than the artist, who added the second hand or repeater to a watch, could have been entitled to a patent of the whole watch. Bovill v. Moore, 2 Marsh. C. P. 211; Hill v. Thompson, 8 Taunt. 375; Brunton v. Hawkes, 4 Barn. & Ald. 540; Minter v. Mower, 1 Nev. & P. 595. Nor will it protect the plaintiff's patent, that Mr. Amos Whittemore was the inventor of all the material improvements in the old machine, (as is asserted) if he suffered them to be used freely and fully by the public at large for so many years, combined with all the usual machinery; for in such a case I think he must be deemed to have made a gift of them to the public, as much as a person, who voluntarily opens his land as a highway, and suffers it to remain for a length of time devoted to public use. How far there is any such acquiescence or assent to such public use is of course open to the consideration of the jury. Such are the material principles, which as to this point I think it proper to state.

As to the rule, by which the plaintiff's damages are to be estimated, it is clear by the statute, that only the actual damages sustained can be given. By the terms "actual damages," in the statute, are meant such damages, as the plaintiffs can actually prove and have in fact sustained, as contradistinguished to mere imaginary or exemplary damages, which in personal torts are sometimes given. The statute is highly penal, and the legislature meant to limit the single damages to the real injury done, as in other cases of violation of personal property, or of incorporeal rights. In mere personal torts, as assaults and batteries, defamation of character, &c. the law has, in proper cases, allowed the party to recover not merely for any actual injury, but for the mental anxiety, the public degradation and wounded sensibility, which honorable men feel at violations of the sacredness of their persons or characters. But the reason of the law does not apply to the mere infringement of an incorporeal right, such as a patent, and the legislature meant to confine the damages to such a sum, as would compensate the party for his actual loss. If the jury are of opinion, that an user of the machine is actually proved in this case, the rule of damages should be the value of the use of such a machine, during the time of the illegal user. If the jury are of opinion, that a making of the machine only is proved, as there is no evidence in the case, to show any actual damages by the making, they ought to give nominal damages to the plaintiffs. For where the law has given a right, and a remedy for the violation of it, such violation of itself imports damage; and in the absence of all other evidence, the law presumes a nominal damage to the party.

The counsel for the plaintiffs have argued, that although there is no evidence of actual damage, the jury ought to give damages either to the full value of the expense of making the machine, or of the price, at which such a machine might be sold. But neither of these estimates can form a rule for damages for the illegal making of the machine. As to the expense of making the machine, it is obvious that it is an expense altogether incurred by the defendant, and is not a loss sustained by the plaintiffs. The latter neither found the materials nor the labor. How then can it be an actual damage sustained by them? As to the price, for which such a machine would sell, it is open to the same and to this farther objection: that the price is compounded of the value of the materials and the workmanship, and also of the right of user of the machine. Now, admitting the plaintiffs recover in this action, there can be no pretence, that thereby a legal right will pass to the defendant to use the machine made by him. Every future use will be an infringement of the plaintiff's patent; and therefore if the plaintiffs could in this suit recover such price, they not only would recover for materials and labor, which they never furnished, and for a right of user which never passed from them, but also for that, which might lawfully be the subject of another action, viz. the future user of the defendant's machine; so that there might be a double recovery for the same supposed injury.

At the former trial, the court were pressed with the difficulty of finding any rule to estimate the plaintiff's damages, when none were actually proved, by the making of the machine; and I still adhere to the decision then made, that in such case the plaintiffs con recover nominal damages only. The jury, if satisfied of the plaintiff's right to recover, will estimate the plaintiff's single damages, according to the principles which I have stated, as they shall find the facts of a making or of a user of the machine. The court will treble the damages found by the jury in awarding the proper judgment.

The jury found a verdict for the plaintiffs, that the defendant was guilty of making the machine only, and assessed single damages at $350.

Case No. 17,602.

WHITTEMORE v. HERBERT.

[2 Cranch, C. C. 245.] [1]

Circuit Court, District of Columbia. May Term, 1821.

ACTION AGAINST INDORSER.

In an action against the last indorser of a promissory note, it is not necessary to prove the prior indorsements.

Assumpsit against the last indorser of Francis Adams's promissory note for $1,668. A prior indorsement of J. D. Herbert was made "by F. Adams, attorney in fact of J. D. Herbert."

Mr. Swann, for defendant, contended that the plaintiff must prove F. Adams's authority to indorse for J. D. Herbert.

But THE COURT (THRUSTON, Circuit Judge, absent) decided it not to be necessary, as every indorser is to be considered as the drawer of a new bill.

A bill of exceptions was taken, but no writ of error was prosecuted.

WHITTEMORE (TAPPAN v.). See Case No. 13,750.

WHITTIER (UNITED STATES v.). See Case No. 16,688.

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

Case No. 17,603.

WHITTLE v. FARMVILLE INS. CO.

[3 Hughes, 421.] [1]

Circuit Court, D. South Carolina. Dec., 1877.

FIRE INSURANCE — PROOFS OF LOSS — WAIVER — MISSTATEMENTS BY INSURED—OVERVALUATION OF PROPERTY—BREACH OF CONDITIONS.

1. Where a local agent of a fire insurance company, after a fire, made out and forwarded for the insured proofs of loss, not entirely in compliance with the requirements of the policy, and the company afterwards objected to paying but on other grounds than such irregularity in the proofs of loss, *held*, that the company thereby waived all objections on that score.

2. If the insured is in apprehension of a fire at the time of taking out a policy, but states that he is not, he is not entitled to recover on his policy.

3. If the insured grossly exaggerates the value of his property at the time of taking out his policy, he is not entitled to recover.

4. The burden of proof is upon the insurer to show violation of the conditions of the policy.

At the trial of this cause before a jury, at which the jury rendered a verdict for the plaintiff [Emanuel Whittle] for the amount of $2,100 for damages by fire, with interest and costs, the court gave the following instructions or charge to the jury bearing upon the evidence in the cause.

BOND, Circuit Justice. If the jury find from the evidence that the property mentioned in the policy of insurance was totally destroyed by fire, and that Whittle, the insured, within a day or two gave notice of its destruction to the agent of the company from whom he got his policy, and requested him to make out his proofs of loss, which the agent did, but not in conformity to the requirement of the policy; and if they find further that the agent wrote to the company stating what he had done, and asking the company to adjust and pay the loss, and that the company replied that they would adjust the same, and then stated what they would do, and that after the adjustment the insurance company refused to pay the loss on other grounds than the incompleteness of the proofs of the loss, and made no objection to them, then these are circumstances from which the jury may find that the company acquiesced in the sufficiency of the proofs, which, if the jury find, the informality of the proofs is not a bar to the plaintiff's recovery. If the jury find from the evidence that at the time of his application for the policy in evidence, the plaintiff Whittle was in apprehension of incendiarism, and represented in his application he was in no apprehension of incendiary fire, then he is not entitled to recover. And if the jury find from the evidence that the plaintiff in his application for insurance and notice of loss grossly exaggerated the value of the property insured or burnt, then he is not entitled to recover.

The burden of proof is on the insurance company to show violation of any condition in the policy set up in the answer.

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

WHITTLESEY (WOVEN WIRE MATTRESS CO. v.). See Case No. 18,058.

Case No. 17,604.

WHITTON et al. v. The COMMERCE.

[1 Pet. Adm. 160.] [1]

District Court, D. Pennsylvania. 1798.

SEAMEN'S WAGES—FORFEITURE.

The seamen had been absent from the ship forty-eight hours, and were entered in the log-book as deserters. They were received again on board, and on the return of the ship they claimed wages for the voyage. The court was of opinion that the mariners having been received on board again, the forfeiture of their wages was waived, and a decree was entered for the libellants.

[Cited in The Mentor, Case No. 9,427; The Philadelphia, Id. 11,084; The Nimrod, Id. 10,267; Sherwood v. McIntosh, Id. 12,778; Sculley v. The Great Republic, Id. 12,571.]

The brig Commerce had been on a long circuitous voyage of between two and three years. She touched at a foreign port, on her way home, where, on a difference with the master, the seamen went on shore, as it was alleged, without the master's leave. An entry, agreeably to the act of congress, was made in the log-book, of their having been absent without leave, for the space of forty-eight hours. The seamen denied the accuracy of this entry. A reconciliation took place at the foreign port, and the sailors were received, without any new agreement. They continued to perform their duty until the arrival of the brig at Philadelphia, where the voyage ended. A suit was commenced against the master and owner for the balance of wages for the voyage. The entry on the log-book before stated, was offered to repel their claim to all wages precedent thereto, which were said to be forfeited.

BY THE COURT. This is an attempt at severity, which the law will not justify. It is much to be desired that all our mercantile citizens better understood those principles of the maritime laws, which in courts of justice we are bound to follow. Crimes and offences of seamen are rigorously punished; but mariners, with all their too numerous faults, are considered by all maritime nations objects of national concern. Their contracts are placed under the cognizance of national courts, bound to proceed by fixed rules, and circumscribed by principles of law. Seamen are deemed the sin-

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

ews, or more aptly in our ships, called "the hands," of naval power, strength and security. Without the aid of this intrepid and hardy class of men, under national government and direction, commerce might be annihilated. An extended sea coast, convenient for trade and a source of wealth, would be subjected to invasion by foreign foes, and depredations by neighbouring freebooters; and so become a ruinous curse, instead of a public blessing. To say, that without commerce, the nation would have no seamen, is true; but it is as true, that without national protection, in which mariners bear a prominent part, there would be no commerce. The uses made of them in commerce, though of primary importance, are not exclusively regarded. They are encouraged and protected by all the maritime laws, for other and more extensive national purposes, as well as for those in which commercial individuals employ, and profit by, their services. Their frailties are by these laws forgiven; and their offences, so far as these affect contracts, are pardoned on repentance, compensation or offer of amends and return to their duty. Public policy and private justice, as it is fit they should, here move together.

In the case before me, it is unnecessary to enquire into any other fact, than that of the mariners having been again voluntarily received on board, by the master, after the alleged forfeiture. This fact is conceded: the master's thus having received the mariners on board, is a waiver and pardon of the forfeiture, had the fact, on which that forfeiture is said to have been incurred been ever so clearly established. It does not supercede the principle, and is immaterial, whether the forfeiture attached under a law of the United States,[2] or in virtue of the general principles of maritime law. Our law only declares when in particular enumerated circumstances forfeiture shall accrue; but it does not furnish any rule for the case now under consideration. This point has been repeatedly decided in this court, in a great number of instances. The decisions are supported by authorities ancient and modern. In the thirteenth article of the laws of Oleron, and twenty-fifth of those of Wisbuy [Fed. Cas. Append.][3] it will be seen that "the master may turn off a mariner for a lawful cause; but if the mariner compensates for his fault, and the master, nevertheless, refuses to admit him again, the mariner may follow the ship to her destined port, and he shall be paid his wages as much as if he had made the voyage in the same ship. If the master hires a less able seaman, and there happens any damage by it, the master is to make it good." By the law of Oleron (article 13 [Fed. Cas. Append.]) an "offer to make amends and return to duty" amounts to satisfaction.[4] Here is a stronger case than that before me. A mariner not simply absenting himself without cause, but turned off for a lawful cause, must be received again. From other authorities it appears that the mariner should "repent and make an offer of satisfaction and return to duty, in due time;" that is, before the master has hired another equally able seaman, in his place, or otherwise fairly rendered it impracticable without injury to the owner, to receive him again. And on this ground it has been contended, that where the fault has incurred actual forfeiture of wages, the master is not compellable, though he may consent to receive the mariner again. I think he is bound to receive the mariner, on the terms before stated. The consent and agreement to receive him, is the strongest evidence of satisfaction given, or not insisted on. This consent and agreement to continue his services, is in contemplation of law, a complete waiver and forgiveness of all offences and faults which would have in-

[2] The amount of the forfeiture of wages, has been disputed; and endeavoured to be confined to the wages due from the last port of delivery precedent to the desertion, under the idea that the right to them was vested, and not affected by the subsequent misconduct. But the words of the 5th section of the mariner's act, seems to be too comprehensive for this limitation, "he shall forfeit all the wages due to him." The wages for the section of the voyage unfinished, are not due until it is completed, though payments pro rata are often decreed, when casualties prevent the seaman from fulfilling his contract, or the master by voluntary discharge, or dismission for lawful cause, warrants a discretionary construction, by interrupting the progress of the agreement. If seamen commit faults so gross, they subject themselves, by their own acts, to all consequences.

[3] The laws of Wisbuy were as famous in, and influential over, all the northern maritime countries of Europe, as were those of Rhodes, the Consolato del Mare, or Roll of Oleron, in the scenes of their respective operations. These laws are ancient, but posterior to those of Oleron, though the commerce of the northern nations who adopted them was extensive, and their hardy enterprizes celebrated long before their promulgation. The Swedes were famed for nautical skill, and superiority in the construction of their ships, in the time of the Romans. Wisbuy was a city in Gothland; in the Swedish dominions, once a mart the most flourishing in Europe; it is now a ruinous monument of abject and deplorable decay. Its laws yet remain in extensive credit and operation, thus long after its commercial importance is blotted out. It affords another lesson of humility, written for the instruction, and monitory to the cupidity and pride, of man.

[4] See note in the case of a ship's steward. In certain cases no amends can be made; and an unqualified rejection of the mariner, liable to no obligation to receive him again, has been held legal. In all the cases (and I have had many) of seamen discharged in foreign ports for lawful causes I have enjoined on the masters (as directory to their future conduct) the necessity of payment to the time of discharge; to enable the seamen to subsist, and return home. Since the law of the United States expressly directing masters to bring home every member of their crew (in a capacity to return), I have without examination, left this law to its own operation; never having had a judicial opportunity of giving any opinion upon it.

terrupted or destroyed the contract. But all demands for damages and contributions for losses, which warrant deductions from amount of wages, are unextinguished. Embezzlement, frauds, wilful negligences, and other misconduct, chargeable against the quantum demanded, remain open for enquiry and compensation.

The balance of wages, for the voyage, was decreed, after allowing all legal deductions.

Case No. 17,605.

WHITWELL v. PULASKI COUNTY.

[2 Dill. 249.] [1]

Circuit Court, E. D. Arkansas. 1873.

COUNTY WARRANTS—NEGOTIABLE BONDS—POWER TO FUND DEBT.

1. Where the statute of the state provided that the county court (the body having the management of county affairs) shall issue ordinary county warrants of a prescribed form for all sums of money found due from the county, it was *held* that the county court had no implied authority to fund outstanding warrants by the issue of negotiable bonds payable at a fixed future time, and which, if valid, would change and enlarge the liability of the county.

2. Such bonds under the legislation of the state are ultra vires, and impose no liability upon the county even when in the hands of a holder for value.

This is an action by the plaintiff, a non-resident holder of about $75,000 of the bonds of the county of Pulaski. Each of the bonds, except as to date, amount, and name of payee, is of the tenor following:

"State of Arkansas. Pulaski County Funded Debt. Five Hundred Dollars. No. 16. $500. One year after date the county of Pulaski will pay five hundred dollars to M. K. Starke, or bearer, with interest at the rate of eight per centum per annum. This bond is issued in payment of the outstanding scrip of said county under an order of the county court of July term, A. D. 1871, and is receivable in payment of the funded debt tax of 1871. Given at Little Rock, Arkansas, this 15th day of August, 1871. In witness whereof the seal of the county court and the signatures of the presiding judge and clerk are hereto affixed. D. Reeve, Presiding Judge. (L. S.) G. W. McDearmid, Clerk."

No question is made upon the form of the complaint which refers to and makes the bonds in suit part thereof. By demurrer to the complaint the county raised the question of the authority of its officers to issue the bonds. It was conceded by counsel that there was no express statute, general or special, authorizing the issue, and the right was claimed by implication.

Benjamin & Barnes, and T. D. W. Yonley, for plaintiff.

A. H. Garland, and Gallagher & Newton, for the county.

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

DILLON, Circuit Judge. The demurrer to the answer presents the question whether the county of Pulaski had authority to issue the bonds in suit. The county affairs in this state are under the management and control of the county courts, whose jurisdiction and powers are prescribed by statute. Among other powers, these courts are authorized "to audit, settle, and direct the payment of all demands against the county," and they have jurisdiction "in all matters relating to county taxes, disbursement of money for county purposes, and in any other case that it may be necessary for the internal improvement and local concerns of the county." Gould's Dig. p. 317, § 7. By statute it is also provided that "where any county court shall ascertain that any sum of money is due from the county to any person, an order shall be made allowing the same and directing the clerk to issue a warrant therefor, which shall be of the following form." The form prescribed consists of a direction to the treasurer to pay to ——, or bearer, —— dollars, ——, naming the particular fund, if any, and signed by the clerk.

The question as to the implied authority of counties generally to issue negotiable paper does not arise in this case, for here the statute contains a specific direction that when money is due from the county it shall be evidenced by ordinary county warrants. This excludes any implied authority, which might otherwise be contended to exist, to issue negotiable bonds or paper. The bonds in suit recite on their face that they are issued in payment of the outstanding scrip of the county, and are receivable in payment of the funded debt of 1871, and draw interest at the rate of eight per cent. per annum. Negotiable bonds, payable at a fixed future date, and meanwhile drawing interest at a rate exceeding the rate which in any event an ordinary warrant can draw, and payable out of a specific tax fund not applicable to the payment of ordinary warrants, are, in form, and substance, and effect, different from the warrants which counties are authorized to issue.

It is conceded by the counsel for the plaintiff that there is no express authority in any statute for the order of the county court made at the July term, 1871, for the funding of the outstanding scrip of the county, and under which the bonds in suit were issued. If these bonds did not change and enlarge the liability of the county, it might be argued that they should be treated as the substantial equivalents of warrants. But if valid, they do change and enlarge the liability of the county. They draw interest at a greater rate than warrants, and this for a fixed future period. If bonds payable in one year are valid, so likewise

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

would be bonds payable in twenty or fifty years. Other provisions of this statute limit the amount of taxes which may annually be levied by the county authorities for the payment of its ordinary liabilities, including outstanding warrants. See Kinsey v. Pulaski Co. [Case No. 7,830]. But there is no such limit upon the amount of taxes which may be levied for the payment of the authorized funded debts of the county.

It is precisely because there is a substantial difference between these bonds, assuming their validity, and the usual county warrant, that we may suppose that creditors were willing to surrender their warrants and take the bonds. The action of the county officers in issuing the bonds is ultra vires, and imposes no liability upon the county.

We need not now state what remedies the holders of these bonds may have, but undoubtedly they may compel the county to re-deliver the warrants surrendered, if not canceled, or new warrants in their place.

Demurrer sustained.

NOTE. Nature of county warrants, and distinction between them and negotiable bonds; and as to implied authority to issue negotiable paper, see the cases cited in Dill. Mun. Corp. §§ 406, 407. Statutory power to issue county orders held to confer no power to issue negotiable bonds payable at a future day, where the difference is essential. Goodnow v. Commissioners of Ramsey Co. (1865) 11 Minn. 31 (Gil. 12); County Com'rs v. Carter, 2 Kan. 115; Hull v. County, 12 Iowa, 142. The same principle is declared by the supreme court of the United States in the recent case of Britton v. Police Jury, 15 Wall. [82 U. S.] 566, where the implied authority of a county to issue negotiable paper to raise money, or to fund outstanding indebtedness, was denied.

WHITWELL (THOMASSEN v.). See Cases Nos. 13,928–13,930.

WHITWILL (LEONARD v.). See Case No. 8,261.

Case No. 17,606.

In re WHYTE.

[9 N. B. R. 267.] [1]

District Court, E. D. Michigan. Jan. 23, 1874.

BANKRUPTCY—PROOF OF DEBT BY AGENT.

The absence of a claimant, which will render a proof of debt by an agent admissible, must be "from the United States;" nor will the oath of an agent, that he is better acquainted with the facts than his principal, render the deposition of the agent alone admissible as proof of debts.

[Distinguished in Re Watrous, Case No. 17,270. Cited in Re Jackson, Id. 7,123.]

[In the matter of William Whyte, a bankrupt.]

It appears from the register's certificate that in the course of proceedings before him, Clarence H. Walker offered to prove, by his own oath, a debt against said bankrupt's estate in favor of S. W. Walker & Co., which firm, he stated, was composed of Samuel W. Walker and Robert M. Gray; that Mr. Walker was then absent in Cincinnati, in the state of Ohio, and that Mr. Gray was then confined at his house by sickness, so that he was unable to testify. Mr. Walker claimed to have a full power of attorney from the firm of S. W. Walker & Co., authorizing him to transact any business on their behalf, and by virtue of this authority he claimed the right to prove a debt due to his principals against said bankrupt's estate. The register declined to accept the proof offered, and certified the question arising thereon into court for determination.

By HOVEY K. CLARKE, Register in Bankruptcy:

Section twenty-two [14 Stat. 527] provides, with considerable minuteness of detail, what a proof of debt shall contain. It must set forth the demand, the consideration, and whether any and what securities are held for it. It will be observed that these requirements are more than would be necessary to sustain an action of assumpsit in a common law court. But the act goes farther even than this, and specifies who shall make the proof; it must be the claimant "in person, unless absent from the United States, or prevented, from good cause, from testifying." And, moreover, general order thirty-four, provides that when a proof of debt is made by an agent, the deposition must state the reason why it is "not made by the claimant in person," in order, as I suppose, that the officer taking it may know whether the reason be such as the statute recognizes as sufficient to authorize him to dispense with the oath of the claimant in person. In this case the reason offered why one of the parties, Mr. Gray, does not make the proof, I regard as sufficient. But the other partner, Mr. Walker, is not absent from the United States, nor prevented by any cause from testifying, which does not apply to every non-resident, or even temporarily absent, creditor. To allow the agent in this case to make the proof on the ground that his authority from his principals is ample, is in effect to declare that creditors hold the provision of the act, requiring proofs to be made in person, entirely at their discretion.

I cannot think that this was the intention of the act. Its provisions are peculiar. Not only must the original indebtedness be established by an oath, but the continued existence of it, at the time of proving, must be also shown on oath; and whether any and what securities are held for it. And to the showing of all this, by a person having the greatest interest to be correctly informed on the whole subject, it seems to be the purpose of the act, that every creditor shall be held for the benefit of every other creditor, with the two exceptions only as specified. It was urged before me that the knowledge of the agent in this case was, in fact, superior to that of the absent partner. The statute, however, has made no such exception. Having

[1] [Reprinted by permission.]

made two, and two only, I do not feel at liberty to admit another, as I should if I were to take proofs by agents in all cases where their knowledge of the facts was superior to that of their principals. This would be an excellent reason for admitting such testimony in a common law action; but a different rule has been prescribed by the bankrupt act, and, I think, with good reason. It is not sufficient to make a prima facie case, to be rebutted or diminished by a set-off. In proving debts in bankruptcy the claimant is the plaintiff, all the other creditors are the defendants; who, however, have generally no knowledge, nor means of knowledge, as to any defense that may exist. Hence the propriety of requiring the claimant's oath as to the state of the whole account. In every large commercial house the clerk who sells the goods is ordinarily much better informed as to the origin of the debt than the principal; but whether the goods have been paid for or not, is often entirely within the knowledge of another clerk, who knows more about this than his principal; and whether any security has been taken may be known only to another, although this last fact is more likely than either of the others to be known to the principal, and not to his clerks. All these facts which go to make up the account and its condition at the time of proof is what the bankrupt act intends shall be shown on oath to entitle a claim to participate in the distribution. The law, as I think, wisely, provides that the claimant must take the responsibility in person of stating them; and to allow him to evade it whenever his agent is willing to swear that he knows more about the facts than his principal, is to open a wide door for the evasion of one of the most useful and practical provisions of the bankrupt act concerning the proof of debts.

LONGYEAR, District Judge. I hereby approve the foregoing decision.

WIBERG (WITHERELL v.). See Case No. 17,917.

Case No. 17,607.

WICK v. The SAMUEL STRONG.

[Newb. 187;[1] 6 McLean, 587.]

District Court, N. D. Ohio. July, 1855.

ADMIRALTY JURISDICTION — LIENS OF MATERIAL MEN—CONSTRUCTION OF STATE LAW—FOLLOWING STATE COURTS.

1. A question of jurisdiction being a preliminary inquiry, it is proper that it should be brought to the consideration of the court at the earliest opportunity.

2. The district courts of the United States have a general admiralty jurisdiction in rem, in suits brought by material men against foreign ships, and in cases of domestic ships where the local law gives a lien.

[Cited in The Richard Busteed, Case No. 11,764.]

3. The act of the legislature of Ohio entitled "An act providing for the collection of claims against steamboats and other water crafts and authorizing proceedings against them by name," passed February 26, 1840, and the act explanatory thereof, passed February 24, 1848, does not create a lien; it only affords a remedy. These statutes, being in derogation of the common law, should be construed strictly.

[Cited in brief in Thorsen v. The J. B. Martin, 26 Wis. 494.]

4. Where a state statute has received a construction by the supreme state courts, that construction is binding upon the federal courts.

5. The supreme court of the state of Ohio have decided that their water craft law does not create a lien. See Jones v. The Commerce, 14 Ohio, 410.

The schooner Samuel Strong was built at the mouth of Black river, Lorain county, in this state, in the summer of 1847, by citizens of that county. In the course of her construction she contracted a large debt to the libellant [Lemuel Wick], then and still a resident of Cleveland. She was originally registered at the port of Cleveland, and was run by the parties who built her until in or about the month of July, 1848, when her then owners sold one-half of her to parties in Wisconsin, and her registry was changed from the port of Cleveland to the port of Chicago. On the 18th of June, 1855, the schooner, then lying in the port of Cleveland, was attached by the libellant. The present claimants, who allege themselves to be bona fide purchasers and sole owners of the schooner, filed their claim and also their answer, which, among other grounds of defence, excepted to the jurisdiction of the court over the schooner, upon the ground that the statute of this state known as the "Common Carrier" act (Swan, St. p. 185) did not create a lien but conferred a remedy merely. In order to save costs, it was agreed by the counsel that the motion to dismiss the libel should be heard before any steps were taken to substantiate the libellant's claim, or the other grounds of defence.

Otis & Sears, for the motion.
Keith & Coon, against the motion.

WILLSON, District Judge. The libel in this case was filed on the 18th of June, 1855. It seeks to enforce a lien for materials furnished by the libellant, from May to October inclusive, in the year 1847, in the building of said schooner at Black river, in the district of Ohio. The libellant is now, and was in the year 1847, a resident of the city of Cleveland; and in the third article of his libel, he avers among other things, that by the maritime law, and the law of Ohio, a lien is given him in the premises, which he can enforce and by which he can obtain redress in admiralty.

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

To the libel a defence is interposed by Walker, Bean & Alvord, claimants, and residents of the state of Wisconsin, who have duly filed their claim, answer and exceptions. The defence made by the pleadings consists of—(1) The statute of limitation, in bar of recovery after the lapse of six years from October, 1847. (2) A judicial sale of the schooner Samuel Strong, by virtue of a decree in admiralty, rendered by the United States district court for Wisconsin, on the 19th of May, 1851, in a cause civil and maritime. (3) That this court has not jurisdiction of the subject matter of this suit.

I have not thought it necessary to examine all the questions which arise out of this record, because from the view I have taken of it, the decision of the cause must turn upon the single question of the jurisdiction of the court, and as the question of jurisdiction is in its nature a preliminary inquiry, it is certainly proper, in whatever form it may be presented, that it should be brought to the consideration of the court at the earliest opportunity, and be decided before incurring expenses which would be rendered fruitless by the dismission of the cause for want of jurisdiction.

It is claimed by the counsel for the libellant in this case, that a maritime lien and a proceeding in rem are correlative, and that wherever a proceeding in rem is competent, a lien exists, and vice versa. This is true beyond a question, when a proceeding in rem in the admiralty court for wages, salvage, collision or bottomry, goes against the ship in the first instance. But this rule does not obtain in the case of a domestic vessel for materials furnished, and when the question of lien depends upon the local statute. This is evident from the language of the 12th rule in admiralty prescribed by the supreme court of the United States. This rule provides that "in all suits by material men for supplies or repairs, or other necessaries, for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem, or against the master or the owner alone in personam. And the like proceedings in rem shall apply to cases of domestic ships, when, by the local law, a lien is given to material men for supplies, repairs or other necessaries." It may, therefore, be laid down as a well established principle of maritime law, fully recognized by the federal judiciary, that the district courts have a general admiralty jurisdiction in rem, in suit, by material men, in cases of foreign ships, or ships of another state; and that in cases of domestic ships no lien is implied, unless the local law gives lien; in which event it may be enforced in the district court. In the case of The General Smith, 4 Wheat. [17 U. S.] 438, the court decided with great clearness that, "when the proceeding is in rem to enforce a specific lien, it is incumbent upon those who seek the aid of the court, to establish the existence of such lien in the particular case. When repairs have been made or necessaries have been furnished to a foreign ship, or to a ship in a port of a state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for security, and he may well maintain a suit in rem in admiralty to enforce his right. But in respect to repairs or necessaries in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state, and no lien is implied unless it is recognized by that law." The case before us is one where the materials were furnished to a home vessel in her home port, and the question for the court to determine is, whether the law of Ohio gives a lien, for materials furnished in the building of a ship or vessel in this state, which can be enforced in admiralty.

It is claimed by libellant's counsel that such a lien is given by an act of the legislature of Ohio entitled "An act providing for the collection of claims against steamboats and other water crafts, and authorizing proceedings against the same by name," passed February 26, 1840, and the act explanatory thereof, passed February 24, 1848. The first section of the act of 1840 provides "that steamboats and other water crafts navigating the waters within and bordering on this state, shall be liable for debts contracted on account thereof, by the master, owner, steward, consignee, or other agent, for materials, supplies, or labor, in the building, repairing, furnishing or equipping the same, or due for wharfage," &c. In the second section it is provided that "any person having such demand, may proceed against the owner or owners, or master of such craft, or against the craft itself." The next section merely gives directions how to proceed to obtain a warrant of seizure when the craft itself is sued; and the fourth section enjoins upon the clerk to issue a warrant returnable as other writs, directing the seizure of such craft by name or description, as provided in the third section of the act, or such part of her apparel or furniture as may be necessary to satisfy the demand, and to detain the same until discharged by due course of law. These are the main provisions of the statute, at least so far as the statute itself concerns our present inquiry. Does this statute give a lien in the technical legal sense of the term? or in other words, does the lien attach to the water-craft, except on seizure, by virtue of the warrant issued, and in the mode and under the regulations prescribed in the statute?

It was clearly the object of the legislature in passing this act, to subject water craft, of the description named, to be sued, whose owners resided out of the state, or if residents, whose names were unknown to the

creditors. The evil formerly existing, and intended to be remedied by the law, was, that creditors could not always discover the names of the owners; and without having their names they could not bring suit against the person, or by attachment against the property. I regard this law as affording a remedy only. There are no words in the act expressly giving a lien, and in the language of the court in the case of The Huron v. Simmons, 11 Ohio, 458: "The boat's responsibility is not in the nature of a lien." I apprehend that it is the seizure which creates the lien, and that until the water craft is actually taken by warrant, and in the mode prescribed by the law, no lien attaches to the property. This statute is said to be a transcript of the New York statute, under which liens have been enforced by adjudications of the federal courts in admiralty proceedings. The statute of New York provides for proceedings in rem, in almost the precise language of the Ohio statute, except in one important particular. It declares "that ships or vessels of all descriptions, &c., shall be liable for all debts contracted by the master, commander, owner or consignee thereof, on account of any work done, or any supplies or materials furnished by any mechanic or tradesman, or others on account, or towards the building, repairing, fitting, furnishing or equipping such ships or vessels, and that such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture, and shall be preferred to all other liens thereon, except for seamen's wages."

These statutes are in derogation of the common law, and by a well established rule should be construed strictly. But I can conceive no rule of construction by which a creditor, with a claim fairly established against a vessel under the New York statute, could be divested of his lien, or be deprived the right of enforcing it in the admiralty. His lien, by law, attaches the moment the debt is contracted. By the Ohio statute, it is provided simply, that the vessel shall be liable, and, as in a case of an execution, a lien is established when seizure is made of the property. The Ohio water craft statute of 1840 was not intended by its authors to become a lien law in the legal sense of the term; had it been so, the legislature would have so declared it, and it is legitimate to look to the subsequent legislation of the general assembly to ascertain the intention of the law making power. The legislature of Ohio, on the 11th of March, 1843, passed "an act to create a lien in favor of mechanics and others in certain cases." In the first section it is provided, that any person who shall perform labor, or furnish materials or machinery, for constructing, altering, repairing any boat, vessel or other water craft, or for erecting or repairing any house, &c., shall have a lien to secure the payment of the same, upon such boat, vessel or other water craft, and upon such house, &c. This section gives the creditor a specific lien, which, by the act, continues two years from the commencement of the work. It is known, denominated and recognized, as a lien law. If the law of 1840 gave a lien which attached before seizure, what reason or necessity for the act of 1843?

But whatever may be my own views as to the intent and construction of this water craft law, I am bound to follow and adopt the construction given to it by the supreme court of Ohio. In cases depending on the statutes of a state, the federal courts adopt the construction of the state, when that construction is settled or can be ascertained. Chief Justice Marshall, in delivering the opinion of the court in the case of Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 152, remarked that "this court has uniformly professed its disposition in cases depending on the laws of a particular state, to adopt the construction which the courts of the states have given to those laws." This course is founded on the principle supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of government. On this principle the construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the constitution, laws and treaties of the United States. What, then, have been the adjudications upon this question by the supreme court of Ohio? In the early cases in which that court were called upon to give a construction to this act, we find but little to aid in determining the question before us. The first case, 10 Ohio, 384, merely decides that a suit cannot be sustained for debts incurred prior to the passage of the act. The case in 11 Ohio, 438, decides, that suits may be brought under the act for provisions and other necessary supplies. These are the points decided. Yet we find the obiter dicta of the judges delivering the opinion, in the two cases, in direct conflict. In the first case Judge Hitchcock says—"This law gives a lien upon such crafts for certain claims against them." In the second case, Judge Reed says —"The boat's responsibility is not in the nature of a lien." And up to the time of the decision of the case of The Waverly v. Clements, 14 Ohio, 28, this question was regarded as open and unsettled by the supreme court; for the judge, in delivering the opinion of the court in that case, used the following language: "It seems to us entirely unnecessary to decide whether the liability of the boat for the debts contracted on her account, is strictly to be regarded as a lien or not. When it becomes necessary to decide that point, our opinions will be expressed; but sufficient unto the day is the evil thereof." Whatever dicta may be found, therefore, in the reported cases previous to this, should not be regarded as binding authority. In the case

of Jones v. The Commerce, Id. 410, the question was fairly and legitimately raised, and decided with great clearness and ability by the court. I shall make no apology for quoting somewhat at length from the opinion of the court, delivered in that case, by Judge Birchard. After stating the case he proceeds to comment on the language of the act, and says: "The craft 'shall be liable.' These words have sometimes been spoken of as creating a lien for the demand. But these words are not those usually employed in statutes when the legislature intend to create a lien, strictly speaking. The first section of the act regulating judgments and executions (Swan, St. p. 467) provides that 'lands, tenements, goods and chattels shall be subject to the payment of debts, and shall be liable to be taken on execution and be sold.' Here the words are the same, and yet this part of the act has never been construed to create a lien. The owner, notwithstanding this clause, can transfer any of the property named, and clothe the bona fide vendor with a good title, no matter how much he may be indebted. The second section creates a lien: The lands, &c., 'shall be bound' from the date of the judgment: The goods and chattels 'shall be bound' from the time they are seized in execution. Now if the intention had been to create a lien, that is, to bind the boat, instead of creating a liability to mesne process and be substituted as defendant in place of the owners, the fair presumption is, that the words and phrases commonly used to convey that intention, and not those used to convey a different meaning, would have been employed. We therefore declare that the first section of the act does not create a lien. It merely declares a liability, leaving the mode of enforcing it to the subsequent provisions in the act." I have quoted the language used by the court in deciding the case referred to, lest its force might be lost. Aside from its binding authority, I regard the decision as founded on reason and sound principles of law. Neither do I consider its authority invalidated by the case of Webster v. The Andes, 18 Ohio, 187. The language of the court in that case took a wide range, but the question we are now considering was not legitimately involved in its decision.

It is to be regretted that the legislature, in conferring quasi admiralty powers and jurisdictions upon the state courts, should have so framed that act as to deprive a class of creditors (whose interests it evidently sought to advance and protect) from availing themselves of a court of admiralty to enforce their claim: and I have no doubt that the same reasons which induced the passage of the act of 1840, will prompt future legislation to enable the federal as well as the state courts, to carry out the just intentions of the authors of the act referred to.

As the law now is, I am constrained to dismiss this libel for want of jurisdiction.

Case No. 17,608.

WICKE v. KLEINKNECHT et al.

[1 Ban. & A. 608; [1] 7 O. G. 1098.]

Circuit Court, S. D. New York. Dec., 1874.

PATENTED MACHINE—LIMITED LICENSE TO USE—UNLAWFUL USE—DEMAND FOR ROYALTIES—EFFECT.

1. Where a machine was licensed for use in a particular territory, *held*, that the use of it by subsequent purchasers, in territory other than that for which it was licensed, was unlawful.

2. The mere fact that the agent of the patentee, after the transfer of the machine to the unlicensed territory, demanded of the purchasers the back royalties due upon it, for use in the licensed territory, conferred no right to use it outside the territory named in the license.

In equity.

This was an action brought by the complainant [William Wicke], assignee of the invention for a specified territory, under the patent of George Wicke, granted June 16, 1863, for a "machine for nailing boxes." The complainant, by assignment, acquired the exclusive right under said patent for the state of New York. The remaining territory was owned by the original patentee, but the complainant was his attorney, authorized to collect royalties and grant licenses for said territory. Under this power of attorney he licensed one Oppel to use one of the patented machines in Newark, New Jersey. Oppel sold this machine to the defendants [Henry Kleinknecht and others], who took the same to New York, and there used it. Suit was brought, and defendants pleaded an implied license, which, they claim, they derived from the complainant, through his demand on them for payment of certain royalties due from Oppel at the time he sold the machine.

A. V. Briesen, for complainant.

J. Van Santvoord and F. Forbes, for defendants.

BLATCHFORD, District Judge. The evidence in this case leaves no doubt that the plaintiff is entitled to a decree. By the purchase, by one of the defendants, from Oppel, of the machine in question, and by the transfer from Oppel to such defendants, of the rights of Oppel, under the written license given by George Wicke to Oppel, neither of the defendants acquired any right to use such machine in the territory belonging to the plaintiff under the patent. The plaintiff was the agent of George Wicke, in respect to the license to Oppel, and he never demanded any license fee from either of the defendants, in respect of any other use of the machine, than a use of it under and in accordance with the terms of the license to Oppel, which did not embrace a use of it in territory owned by the plaintiff. Oppel had no right to use the

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

machine in the plaintiff's territory, and could convey none. The plaintiff has given no license, direct or indirect, express or implied, to either of the defendants to use the machine in his territory.

[NOTE. For another case involving this patent, see Wicke v. Ostrum, 103 U. S. 461.]

WICKER (HOPPOCK v.). See Case No. 6,701.

WICKERLY (HURST v.). See Case No. 6,940.

Case No. 17,609.

WICKERSHAFF v. JONES.

[2 Whart. Dig. 413.]

Circuit Court, E. D. Pennsylvania. May, 1848.

PATENTS FOR INVENTIONS—EVIDENCE.

[Cited in 2 Whart. Dig. 413, to the point that the presumption of novelty and usefulness arising from the issue of a patent may be rebutted by affidavits on an application for an injunction, if the patent is not ancient. Nowhere reported; opinion not now accessible.]

Case No. 17,610.

WICKERSHAM v. SINGER.

[1 McA. Pat. Cas. 645.]

Circuit Court, District of Columbia. July, 1859.

CONSTRUCTION OF PATENT LAWS—COMMISSIONER'S JURISDICTION — INTERFERENCES — PAROL EVIDENCE — LACHES OF INVENTOR — OFFICE PRACTICE.

[1. All the laws on the subject of patents should be construed together, and in a liberal spirit, for the purpose of making the parts of the system consistent and harmonious with one another.]

[2. The commissioner has jurisdiction, under the act of 1839 (section 7), over the question of the abandonment by an applicant of his invention to the public.]

[3. The rule that parol evidence is inadmissible to vary or contradict a written instrument does not apply as against persons who are strangers to the instrument, and not in privity of estate or interest with the parties thereto; and such strangers may always show that any statements or recitals therein prejudicial to their rights are false.]

[4. An inventor of an improvement in sewing machines applied for a patent early in 1851, but withdrew his application shortly afterwards, and took no further steps in the matter until 1858. A subsequent independent inventor, however, obtained a patent in the summer of 1851. Both parties lived in the same city, and were rival manufacturers and venders of sewing machines. The second inventor had first put his machines in use in 1850, and in 1853 they were commonly and notoriously in use and on sale in the city. The first inventor went to Europe in 1854, and returned in 1856. It was proved that on his return the details of the rival's invention were communicated to him in full. He took no action, however, until two years and four months later, when he filed a new application. *Held*, that by reason both of his presumptive and his actual knowledge, and his supineness in asserting his rights, he had so acquiesced in the public use and sale as to preclude him from claiming an exclusive right to invention.]

[5. The withdrawal of an application, and the return of $20 of the fee, is not, of itself, an abandonment of the invention to the public, but is an equivocal act, to be interpreted by surrounding circumstances, and affected, upon a second application, by the intervening conduct of the party as respects diligence or neglect and delay, in the same manner as in the case of an original application. Therefore, where an application was filed in 1850, withdrawn in 1851, and not renewed until 1858, and it appeared that a subsequent original inventor obtained a patent in 1851, and put the invention in public use and on sale with the knowledge of the first inventor, and without objection from him, the renewed application by the latter could not be made to relate back to his original application, so as to obviate the effect of his intervening laches.]

[Cited in Re Dedericks, Case No. 3,734.]

[6. The action of the office in twice returning the specifications and drawings to the applicant, because they did not conform to the regulations of the office, is not to be construed as a rejection of the claims, and does not relieve the inventor of the duty of prosecuting his application with due diligence.]

[Cited in Re Dedericks, Case No. 3,734.]

[7. Poverty is not to be accepted as an excuse for delay when it appears that during the period of the delay the inventor was able to find money and friends to prosecute other applications for patents both in this country and England, and even to go to England himself to urge his claims.]

[This was an appeal by William Wickersham from a decision of the commissioner of patents in an interference declared between the appellant's application and the patent of I. M. Singer for improvements in sewing machines.]

B. R. Curtis, for appellant.
Chas. M. Kellar, for appellee.

MERRICK, Circuit Judge. The claim in this case is for two improvements upon sewing machines, the first being for the application of a feed mechanism, consisting of a roughened wheel combined with a spring pressure plate, which enables an operator to sew seams of any shape or curvature with equal facility as straight seams could have been previously made; and the second claim is for placing the feeding wheel in such position that its operative part shall project through the surface of the table of the machine so as to act upon the fabric served in a convenient way for advancing the material to the needle and for disengaging the portion already stitched. The interference is most clearly stated, as is the whole history of the case, in the well-considered report of the revisory board of the office, which forms the basis of the commissioner's decision. The commissioner, upon that report, decided that Wickersham was the prior inventor of these improvements, but rejected his claim for a patent because of abandonment, laches, and two years' public use by his allowance.

The reasons of appeal present three points of alleged error in that decision: First. That

the commissioner has no jurisdiction to inquire into and determine upon the matter of abandonment. Second. That there was never an abandonment of the claim by Wickersham. Third. That the period of two years' public use, with the knowledge and allowance of the applicant, is not to be computed from the date of his present application, but that this is purged by the original application, made in February, 1850, and withdrawn in 1851 on account of mistaken or erroneous suggestions from the then commissioner. The jurisdiction of the commissioner over the question of abandonment has been repeatedly asserted by successive commissioners with great force of reasoning, and on two occasions has been unequivocally upheld on appeal by Judge Morsell; first in the case of Mowry v. Barber [Case No. 9,892], and again in the case of Ellithorp v. Robertson [Id. 4,409]. Upon careful consideration of the arguments in this case, I find no ground on which the correctness of those rulings can be impeached. It is said that no power or jurisdiction can be exercised by the commissioner which has not been granted him by the statutes; that this power has not been expressly granted, and that the policy of the law is to withhold this investigation from him, and to reserve it for settlement by a jury after a patent shall have been granted.

No one will deny that the commissioner must look to the statutes creating his office and defining his duties for every power which he can exercise; but it by no means follows that every power and jurisdiction must, upon the face of the statute, appear in words of express reference and definition. All the laws made upon the same subject are to be construed together, and the meaning of the legislature to be gathered from every part and from the general policy designed to be carried out by the several enactments. A liberal interpretation for the purpose of making the parts of a system consistent and harmonious with one another is admitted to be a proper rule of construction; and in regard to the patent laws themselves, the greatest of American judges has declared that they "ought to be construed in the spirit in which they have been made."

Now, the counsel of the applicant admits in his argument that although the commissioner of patents is not mentioned in the seventh section of the act of 1839, nor, so far as the section itself discloses, alluded to in the clause saving to the applicant the effects of any use in public short of two years in duration, yet he must by necessary intendment have the duties prescribed to him by the sixth section of the act of 1836 modified by that section so far as to make it his duty to grant a patent under that sixth section, notwithstanding a public use or sale of the invention, unless that public use or sale has continued for more than two years prior to his application. The disability springing out of abandonment is not only found in this seventh section, but is found in the same clause, and is made an alternative to the vice of two years' public use. If, then, the commissioner is enjoined, although nowhere named in that section, not to reject a patent except on proof that the invention has been in public use or on sale for more than two years, how can the other alternative be discarded from the sentence, to wit, "on proof of abandonment of such invention to the public?" This will be the more apparent if we invert the order of succession of the two parts, and read the latter part of the section with no other change than this insertion, as follows: "No patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application aforesaid, except on proof that such purchase, sale, or prior use has been for more than two years prior to such application for a patent or of abandonment of such invention to the public." Now, considered with reference to the section taken by itself, this inversion of the two parts of the sentence does violence neither to its apparent meaning nor to its grammatical construction; and it makes manifest that if to carry out the design of the legislature it be necessary for the true reading of the last branch of the sentence that the words "by the commissioner" be interpolated after the words "no patent shall be held to be invalid," the same interpolation should be extended and applied to the other branch declaring the effect of an abandonment. Indeed, but one reason for so forced a separation of these two matters of inquiry is assigned, which is, that the party ought to have an opportunity afforded him by the emanation of a patent to test this question before a jury, who alone are fitted to try questions involving fraud or intent; and that otherwise, upon error committed by the commissioner, the party would be without remedy; but a reference to the sixteenth section of the act of 1836, and the tenth section of the act of 1839, furnish an answer to this objection. It is there provided that a disappointed applicant may file his bill in equity for redress; and according to the course of the court of chancery, if the judge thinks the case proper for a jury he may order an issue to be tried before a jury to enlighten his conscience upon the matters of fact in controversy. But were this remedy not open to the party it would be strange indeed to construe the law as requiring the commissioner to issue a patent upon a state of case which, when next day made apparent to a court of law or equity, would require that court to pronounce the patent utterly void. It is said that the law never requires vain things to be done; but to require a commissioner of patents to issue a worthless and void patent would be worse than vain. It would be to direct that persons should be armed with a warrant under the great seal

of the United States, in order to go into all the courts of justice in the land to hunt down their fellow-citizens with oppressive, idle, and vexatious litigation. A body of laws designed "to promote the progress of science and the useful arts" could never "be construed in the spirit in which they have been made" if the statutes were interpreted so as to produce results like these. I think, therefore, that the first reason of appeal cannot prevail, and that the jurisdiction of the commissioner over the question of abandonment is clear under the seventh section of the act of 1839, and that it is unnecessary to resort in aid of the jurisdiction to the eighth section of the act of 1836, from which indeed strong arguments might be drawn to show that he possessed the power upon an issue of interference if he had it not upon all forms of application for patents.

The controlling principles of law by which the claims of the applicant, under the second and third grounds of alleged error, are to be weighed in connection with the facts disclosed upon the record, may best be stated in the language of the supreme court, as follows: "It is the unquestionable right of every inventor to confer gratuitously the benefits of his ingenuity upon the public; and this he may do either by express declaration, or by conduct equally significant with language, such, for instance, as acquiescence with public knowledge in the use of his invention by others; or he may forfeit his rights as an inventor by a willful or negligent postponement of his claims, or by an attempt to withhold the benefit of his improvement from the public until a similar or the same improvement should have been made and introduced by others. Whilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded. Considerations of individual emolument can never be permitted to operate to the injury of these." Kendall v. Winsor, 21 How. [62 U. S.] 329. And again, in the often-quoted case of Shaw v. Cooper, 7 Pet. [32 U. S.] 321, the court say: "The acquiescence of an inventor in the public use of his invention can in no case be presumed where he has no knowledge of such use; but this knowledge may be presumed from the circumstances of the case."

The prominent facts of the case are that Wickersham made an application for a patent for sundry improvements upon sewing machines, embracing the two claims now in question, on the 13th of February, 1850. On the 20th, his specifications and drawings were returned to him for the purpose of having them put in proper shape for adjudication. On the 15th of March he transmitted new drawings and specifications, returning at the same time the originals, as instructed. These new specifications and drawings, not purporting to be additional to, but substitutes for, the original, nowhere contained any allusion to the claims now in question. They, too, were returned, because not conforming to the regulations of the office and the express requirements of the statute; and in reference to the claims in this second set of drawings and specifications, the office letter of April 5th, 1850, inclosing them for further amendment in compliance with the terms of the law, suggested that, so far as appeared, only the first of the improvements therein claimed was patentable. Without further attempt to amend his application or to procure any determinate action of the office, the case remained in this predicament until on the 28th of May, 1851, he wrote to the office, withdrawing his application and requesting return of $20 under the law. The amount of $20 was accordingly returned to him on the 12th of June, 1851, after an intermediate letter of the 6th of June reiterating his application for withdrawal and directing the mode of transmitting the $20. From that time to the 2d of October, 1858—the date of his oath to present application—he made no movement towards a renewal of his pretensions before the office, nor, for aught that appears in the testimony, did he make any effort to get others to assist him in prosecuting or renewing the claim, although he made efforts to procure patents for other matters. Meantime, I. M. Singer, the contestant, who appears upon the face of the record to have been likewise a bona-fide, original inventor of these same improvements, (and, to say the least of them, in a more complete and better form, if not thereby independently patentable, by the substitution of the roughened or corrugated feed wheel for one armed with numerous sharp-pointed projections,) made applications, dated, respectively, on the 18th of October, 1850, and on the 15th of March, 1851, which, being diligently and persistently urged before the office, resulted in patents of August 12th, 1851, (No. 8,294,) amended and reissued October 3d, 1855, (No. 278,) covering the first and most important of the two claims, and in a patent of November 4th, 1856, (No. 16,030,) covering the second improvement. Singer's machine was first used in Boston, the place where Wickersham lived in the fall of 1850, (Potter's deposition, eighth interrogatory, and Roper's deposition, eleventh, twelfth, and thirteenth interrogatories,) containing both these improvements. In 1853 Singer's machines were commonly and notoriously in use and on sale in Boston. (See Bradshaw's deposition to recross interrogatories 4 and 5.) Did Wickersham know of their use at that time, he being at the same time in the same market a manufacturer and vender of rival sewing machines, as appears by the testimony? (See depositions of Arnold and Butterfield.) And is it fair to presume this knowledge "from the circumstances of the case," to use the language in Shaw v. Cooper? But there is another item of proof to be found upon the records of the patent office and among the files sent to me which seems to have escaped the observation of the counsel on both sides, which proves be-

yond controversy that Wickersham was all this while keenly alive to his interests, conversant with the state and progress of the art, watchful of all competitors, and aware, to say the least that Singer was a manufacturer of sewing machines I refer to his letter of protest to the office, dated March 14th, 1853, in which he objects to Singer's being allowed a patent for an improvement in the use of a straight needle in sewing machines. After all this, it is true that Wickersham went to England in January, 1854, and remained abroad until the close of the year 1855 or beginning of 1856. Whatever knowledge he may have derived of Singer's use of his improvements, is not to be excepted out of his memory nor to be abated from the legal operation of delay in asserting his rights on account of his absence beyond seas for these two years. But suppose it were even so that up to the time of his return from Europe he had no knowledge of the public sale of his improvements, how stands the case afterwards? According to the testimony of Webster (answer to twenty-sixth interrogatory, page 21) and the testimony of Potter (answer to fourth interrogatory, page 55, and to eleventh and twelfth cross-interrogatories, page 57) the inventions of Singer were carefully explained to him by Potter, a party interested in procuring testimony to defend these identical claims, and Wickersham, on the trial in New York in May or June, 1856, was examined as a witness against Singer upon these claims. The witness Potter does indeed say that in any conversation he may have had with Wickersham subsequent to May or June, 1856, he may not have adverted to the points involved in these claims, because they had subsided in importance in regard to the after-stages of the controversy. But he nowhere says in his cross-examination, as intimated by counsel to have been the purport of his answers to the eleventh and twelfth cross-interrogatories, that he had not distinctly explained and unfolded the whole matter to Wickersham in his interviews in the spring; and there is no qualification of Webster's statement that the whole matter was fully disclosed in April, 1856. If, then, Wickersham was all the while alive to the importance and value of his invention, and designed, so soon as pecuniarily able, to renew his application for a patent, it passes human credulity to believe that he did not know in the spring of 1856 of the public use and sale of the improvements in question. If still too poor to renew his application, a cheap and obvious way of asserting his exclusive claims was open to him, viz., by warning Singer that he himself was the original inventor, and notifying him that he still insisted upon his claims and meant to vindicate them at the proper time and in the proper way. But nothing of this sort appears in the testimony, nor is there any word to warn Singer of any exclusive claim of another; but, on the contrary, so far as Singer is concerned, the conduct of those suits and Wickersham's participation in them as a witness were the broadest proclamation that these improvements were free and common property to the whole world, and that no human being was to be restricted from their free and unbought use

Now, from May or June, 1856, down to October, 1858, two years and four months at the lowest calculation, Wickersham interposes no objection to the public sale and use by Singer of his invention. But it is argued that the power of attorney executed by Wickersham in favor of Henry B. Renwick, dated April 11th, 1856, discloses an assertion of right and a purpose to prosecute his claim to a patent. Potter's deposition to fourteenth cross-interrogatory explains the reason why that instrument was drawn in the form it bears; that the sole object of executing it was to procure Wickersham's drawings and specifications from the patent office, to be used in evidence in the suits of Singer against Grover & Baker and Wheeler & Wilson in New York; and that it was his habit to adopt that form of power for similar purposes. Furthermore, that he never promised Wickersham to renew his application, nor was he ever requested to do so. And Renwick, in answer to the ninth interrogatory, page 60, says that he neither took any steps to procure Wickersham a patent, nor was he ever requested to do so. Potter states, also, in answer to the fourth interrogatory, that when Wickersham signed that power of attorney he expressly said that he wished it understood that they (Grover & Baker and Wheeler & Wilson, or their agents) should pay Renwick, and that he should be put to no expense about it. The learned counsel for the applicant has argued that "if the well-settled rules of law prevail," the purport of this instrument cannot be changed by parol; "and that this document is conclusive to show that within two years after Singer had obtained his first patent Wickersham had not consented or allowed the public use of his invention, but was asserting his right and contemplating its prosecution." There is no such rule of law in regard to written instruments where they are invoked to effect the rights of third persons—strangers to the instrument—and not in privity of estate or interest with the parties thereto, but, on the contrary, parol proof is always open "to third persons who, if it were otherwise, might be prejudiced by things recited in the writings contrary to the truth, through the ignorance, carelessness, or fraud of the parties, and who therefore ought not to be precluded from proving the truth, however contradictory to the written instruments of others." Supreme court of the United States in case of Burreda v. Silsbee, 21 How. [62 U. S.] 169.

From the prominent facts of the case which have been adverted to, it will appear that prior to 1854 the facts and circumstances within reach of Wickersham furnish the strongest presumption of his knowledge of the use in public of this invention as embodied

in the Singer machines; and that in the spring of 1856 knowledge in fact of Singer's assertion of right was communicated to him, and that he so acquiesced in that public use as to prevent him from ever after asserting his exclusive right to the invention, unless his continued supineness is to be purged, in contemplation of law, by the circumstances connected with his first application, so as to carry back and connect by legal relation his present application to the date of his first application in February, 1850. The decisions of Judge Woodbury in the case of Adams v. Edwards [Case No. 53], of Judge Nelson in Wilder v. Gayler [Id. 17,649], and of Judge Grier in Rich v. Lippincott [Id. 11,758], are relied upon as settling by the highest authority that if a first application is withdrawn, either for the sake of the money on account of poverty, or under a mistake—if it was rejected by the office under a mistake and the inventor yielded, but on discovering his mistake, or being better advised, made a new application within a reasonable time—there is in such case no abandonment of his invention, and the second application will relate back to the first. To understand the rulings of these eminent judges it is necessary to advert to the state of facts to which in the instances given their decisions were applied. They were all three given in suits upon the same patent and upon the same state of facts, which were substantially as follows: Daniel Fitzgerald filed an application for a patent for an improved fireproof safe on the 1st of April, 1836, which was rejected in September following; and on the 22d of December he applied for a patent for the combination of a desk and safe, which was granted in August, 1837. Fitzgerald was in partnership with one Sherwood, who applied for a patent for a rotating safe, which was issued in May, 1837. On the 27th of June, 1837, after Sherwood's patent, and pending his application for the desk and safe combined, Fitzgerald wrote to withdraw his first application of April, 1836, and it was withdrawn in September, after his patent for the combined safe and desk was issued. Both Fitzgerald and Sherwood continued to make safes, not using the mechanical contrivances they had patented. In January, 1838, Fitzgerald applied for a patent for a safe substantially the same as his first application, which was rejected and subsequently withdrawn. In March, 1838, Fitzgerald assigned his patent of 1837 to Wilder, and agreed to make all necessary application for improvements and additions. In 1839, April 11th, Wilder, as assignee of Fitzgerald, again applied for a patent for a salamander safe, varying somewhat the description, upon which, after various rejections and modifications of specification, a patent was granted in June, 1853. It appeared also that prior and subsequent to the issue of the patent of August, 1837, Fitzgerald and Wilder had made and sold salamander safes, describing them as patented; and there was also evidence to show that Fitzgerald claimed and represented to Wilder that his patent of August, 1837, embraced the salamander safe; that when Wilder discovered that the patent did not, as he had supposed, cover the salamander safe, but only the combination of desk and safe, he made efforts to obtain one that would. Upon that state of facts it was held by the several judges above named that if Fitzgerald or his assignee supposed their patent of 1837 covered the invention of a salamander safe, when in fact it did not, and that under that supposition they made and sold safes for more than two years prior to their application of 1839, and that the application of 1839 was filed upon the discovery that their safes were not protected by that patent, and that this application was made with diligence after such discovery,—then the application of 1839 related back to application of 1836, which was erroneously rejected in 1836. The jury found these facts to exist, and thereupon the patent of 1853 was sustained. The precise language which Judge Nelson used in his instruction upon the case may be found at page 585 of 10 How. [51 U. S.] in case of Wilder v. Gayler, and will here be quoted to prevent the office from misapprehending, by reason of the arguments filed in this case, the form of his ruling: "If they (the jury) found that Daniel Fitzgerald was the first and original inventor of said improvement, as set forth in said patent, and had not abandoned or dedicated the same to the public, but had with reasonable diligence pursued his invention till he had perfected the same, and used due diligence in applying for and pursuing his application for a patent until he obtained the same, then he was entitled to recover." Upon that charge and that evidence the finding was for the plaintiff. In other words, the jury ascertained by their verdict that the first application of 1836 was withdrawn by Fitzgerald, upon the idea that the application and patent issued a few months later covered the invention; that he continued uniformly and unremittingly to assert exclusive right over the invention, selling it as patented; that so soon as he discovered that he was mistaken, and that the patent under which he was operating did not cover the invention, the assignee renewed his application and had the mistake corrected—certainly within twelve months, for his assignment bore date March 28th, 1838, and the renewed application was filed April 11th, 1839, and, as appears from other parts of the testimony, this discovery must have been subsequent to August, 1838—the time of a certain contract between Wilder and William Adams and others, which gave rise to the suit before Judge Woodbury.

It appears, then, from these decisions that the withdrawal of an application and the return of twenty dollars—part of the patent fee—is not of itself an abandonment or dedication of one's invention to the public, but is an equivocal act, to be interpreted by surround-

ing circumstances, and to be affected upon a second application by the subsequent conduct of the party—his diligence or his neglect and delay—in the same manner as his conduct is to be weighed in regard to an original application; and so I understand the practice of the office to have been to receive renewed applications, either for the whole or a part of a rejected claim, where good cause and due diligence are shown. The claims of Singer himself in this case show that they were embraced in his first application, omitted from his patents, and afterwards awarded to him—the one in his renewed patent of 1854 and the other upon the crowning of his persistent applications and continued claim down to 1856. With regard to the first, it perhaps more properly falls within the class of reissues under the thirteenth section of the act of 1836 and the eighth section of the act of 1837; but not so with the patent of 1856, which is not a reissue.

How stands the case of Wickersham in this regard? I think it has very properly been argued that there never was any rejection by the office of his claims to the present invention. The law requires explicitly that the applicant shall file a clear and intelligible representation of his invention and claims of novelty in both specifications and drawings, to be signed by him and attested by two witnesses; and when papers are filed without these due formalities, it is the duty of the office to decline to act upon them in their imperfect state, and to return them to the party, with such suggestions as may present themselves for the better information of the party. Certain suggestions were made to Wickersham and communicated by note of February 20th, 1850. A new set of specifications and drawings, by their appearance manifestly substitutional, and not merely additional or amendatory of the first, were shortly forwarded, and these were again returned, for the purpose of being authenticated according to law by office letter of April 5th, 1850. Neither in these specifications or drawings nor in any of the models did the claims now in question appear; and of course in reference to this second set must that office letter be understood; nor, indeed, even so understood, can it be regarded as a final judgment upon his case. He seems to have made no further effort to comply with the law until he withdrew the case. It certainly is not the duty of the office to stand at the elbow of applicants to unfold to them the importance of their inventions and to explain to them everything which they might do to procure a patent. Persons are presumed to possess a reasonable amount of intelligence and acquaintance with the modes of doing business. It would be impossible for the patent office to conduct its varied and multiplied business if its officers were charged with the duty of preparing each man's case for him and watching carefully that he fall into no mistake of fact or law; and should the office itself make a mistake in its judgment upon a case which does not create a delusion in the mind of the party as to his rights, can he repose upon that mistake, and make it operate as an indefinite excuse to him for delaying the further prosecution of those rights, either by endeavoring to convince the office by claim for rehearing of a palpable error or by resorting to the easy and expeditious means for revising their decision upon appeal, as the statutes provide? Now, that Wickersham was led into no mistake or delusion as to his rights by any supposed decision of the office, is manifest from the testimony of his own witness upon questions put by his attorney. At page 20, deposition of Justus Webster, answer to sixteenth interrogatory, "he (Wickersham) has told me since that he made an application himself, and that it was rejected; he felt very much disappointed, and he thought he was rejected because he made the application himself instead of employing an attorney." Here, by his own admission, he was led into no mistaken opinion of his rights by the action of the office, but distinctly avowed afterwards his full knowledge and confidence in them. The excuse of mistake, then, is taken away from his unbroken repose of more than seven years. But his poverty is assigned as a reason for not applying earlier. The measure of poverty which one must possess before he is required to exercise any diligence to prosecute his rights is not to be found in the statute. It is an excuse very readily made, which yet should not too readily be listened to. If a man be utterly destitute of money and without friends, and incapable thereby of prosecuting an enterprise, much indulgence may be shown him; but where he has the means of carrying on sundry enterprises of a kindred sort, equally demanding money and friends, and does carry them on, his election to pursue those other enterprises will not be regarded in the law as an excuse for delay in the one where valuable rights of others equally meritorious with himself, and, in the outset of their successful struggles, equally poor, are to be prejudiced. An election thus made for his supposed advantage or gratification at the time, according to the plainest principles of equity, must not be invoked for the subsequent detriment of another innocent party. It appears that Wickersham applied for five several patents in this country and for one in England during this period, and that he was not without credit and means to go to England in 1854 in pursuit of success. These repeated applications to the patent office furnish, also, another presumption as to the suggestion made of his ignorance of business, to wit, that he must have become by this frequent intercourse with the office sufficiently conversant with the patent laws and the mode of doing business to vindicate his rights, if they had been deemed by him of sufficient importance. The foregoing comparison of the facts of this case with the facts in the case of Fitzgerald, show that although the doctrine of the relation of a patent to the

initiatory proceedings (a doctrine also familiarly applied in matters of land grant to connect an original claim and survey with a junior patent of land in favor of a diligent party, so as to cut out a senior patent procured upon a junior survey and claim) may be resorted to for the purpose of upholding a patent for a valuable discovery, yet the doctrine will not be applied to a case which does not present the element of "due diligence in applying for and pursuing his application for a patent until he obtains the same."

Upon the points, then, of abandonment and want of diligence and of refusal to connect the present application with that of February, 1850, by relation, and also of the public use of the invention for more than two years with the knowledge and consent of Wickersham, I am of opinion that the judgment of the office was correct.

Now, therefore, I, William M. Merrick, an assistant judge of the circuit court of the District of Columbia, do certify to the Hon. William D. Bishop, commissioner of patents, that having duly assigned a time and place for hearing the above-entitled cause, and having considered the reasons of appeal filed by the appellant and the grounds of the decision of the commissioner in the case, and having attentively examined the testimony and read the arguments filed by counsel for both parties, I do adjudge and determine that the decision of the commissioner upon the points involved in said reasons of appeal be, and the same is hereby, affirmed, and that the application of William Wickersham in the premises be finally rejected.

[For another case involving this patent, see note to Singer v. Walmsley, Case No. 12,900.]

WICKES v. The CIRCASSIAN. See Cases Nos. 2,720a and 2,726.

Case No. 17,611.

WICKHAM v. BLIGHT.

[Gilp. 452.] [1]

District Court, E. D. Pennsylvania. May 9, 1834.

WAGES OF SEAMEN—DETERMINATION OF AMOUNT.

1. The court will be very reluctant to get rid, by any equitable or convenient construction, of the unequivocal provisions of the act of 20th July, 1790, which oblige a master who carries out a seaman, without first making a written contract, to pay him the highest wages of the port at which he shipped.

[Cited in The Atlantic, Case No. 620.]

2. Where shipping articles have been signed by a seaman and delivered to the master, and the amount of wages is omitted by mistake or accident, without fraud, it is competent to either party to show, by parol testimony, what the contract was in relation to wages.

[Cited in The Antelope, Case No. 484.]

[1] [Reported by Henry D. Gilpin, Esq.]

The libel in this case, which was filed on the 28th April, 1834, set forth that the libellant [Marine T. Wickham] signed an agreement on the 5th December, 1832, to perform a voyage in the ship Eliza, from Philadelphia to Canton and back. The libellant does not allege that any rate of wages was stated in the agreement, but declares that he faithfully performed his duty during the voyage, and that by reason of his services the sum of one hundred and twenty-eight dollars and sixty-six cents is due. The respondent [William P. Blight, owner of the ship Eliza], in his answer, admits the signing of the shipping articles and the performance of the services, but alleges that the libellant was received on board the vessel before her departure at his own request, for the purpose of acquiring a knowledge of seamanship, and that he agreed to perform the voyage without wages, and signed the articles accordingly.

It appeared that the shipping articles, which were produced by the respondent, had been regularly signed by the libellant, but that no amount of wages was stated; thereupon the counsel for the libellant offered to give parol evidence of the rate of wages at which he shipped. To this evidence the counsel for the respondent objected.

Mr. Badger, for libellant.

Mr. Dunlap, for respondent.

HOPKINSON, District Judge. This is a libel for wages for services as a seaman on board the ship Eliza, on a voyage from Philadelphia to Canton, and back to Philadelphia. The libellant signed the shipping articles, but no rate of wages was carried out or inserted in the column prepared for that purpose, nor in any other part of the articles. The libellant offers to prove, by parol evidence, the rate of wages for which he shipped, and the proof is objected to by the respondent.

The questions now to be decided are on this objection. (1) Does this omission or imperfection in the articles so destroy their whole effect, that there is no agreement in writing made between the seaman and the master of the vessel? (2) Is it an agreement in writing to render the services without wages? (3) Is the omission to be considered a fraud or mistake which may now be supplied by parol evidence?

In the first case, that is, of a seaman taken and carried out without a contract in writing being first made and signed by the seaman, it is declared by the act of congress, that the master shall pay to such seaman, the highest price of wages, which shall have been given at the port or place where such seaman shall have been shipped, for a similar voyage, within three months next before the time of such shipping: and a penalty is also inflicted on the master, and the seaman is declared not to be bound by the regula-

tions, nor subject to the penalties or forfeiture specified in the act. The construction or intent of this enactment is thrown into some uncertainty, by a difference of opinion between two learned and experienced admiralty judges. In the case of Jameson v. The Regulus [Case No. 7,198], Judge Peters said that he has been of opinion that the agreement of the parties, though verbal, supersedes the provision of the law, that an unarticled seaman shall be paid the highest wages. Of course, he construes the act to mean, that such wages shall be paid only where there has been no agreement whatever between the seaman and the master, and does not extend it to the case where the agreement has not been made in writing: that is, he thinks that where there has been an agreement for the rate of wages, it may be proved and shall be received as the contract of the parties, and govern the case, although not made in writing. Judge Story (Abb. Shipp. 433) does not seem to be satisfied with this opinion, although he does not expressly repudiate it, nor was he called upon to do so. He says, no case is referred to, where such a decision has been made, and that it requires very grave consideration, how far such a verbal agreement should be admitted to supersede the positive directions of the statute as to the highest wages. I shall leave this question as it stands, between these learned judges, until a case shall occur in which it will be required of me to decide it; only intimating, as I have done on other occasions, my strong reluctance to get rid of the plain and unequivocal language of the statute, by equitable or convenient constructive limitations or modifications. But I cannot say, in this case, that the contract is absolutely not in writing. The articles are signed by the seaman, and delivered to the master. The difficulty is, to say what it is in respect to the wages. It is a clear and written contract on every other subject. It is an imperfect written contract.

2. Can we consider this omission to state the rate of wages, this blank not filled in the articles, as an affirmative contract that the libellant agreed to serve without wages? This is the defence taken in the respondent's answer, and not that there was no written agreement. It is true, that such agreements are sometimes made by novices, who are desirous of obtaining instruction and experience in the business and duties of a seaman; and when it so appears in the contract when such intention is declared, there is nothing unreasonable in it, to bring it into question. But I cannot infer it from a mere omission, and that by the master himself, or the mate, whose duty it was to make the contract complete, and to state, that the services were to be given without wages, if such were the fact. I cannot make an affirmative contract out of a negative circumstance, which admits of another explanation or interpretation. The seaman was called upon merely to sign his name to the articles; he did so. All the rest it was the duty of the master to do in the manner prescribed by the act of congress; and, if there was a contract for wages, he shall not escape from it, and have the services of the seaman without compensation, by omitting or neglecting to put that contract in writing.

3. The last view of the case is, was the omission a fraud or mistake, and if so, may it not be supplied or rectified by parol evidence? Is it not an ambiguity, which may be explained? In Pennsylvania (Dinkle v. Marshall, 3 Bin. 587) declarations of a grantor, even in the case of a deed (and this is not an instrument of that legal solemnity, but a personal contract), at and immediately before the sealing and delivery, are admitted to show the intention of the parties, so far in contradiction of the deed, as to prove that the grantor did not intend to convey, what might be included in the description of the deed. Evidence may also be given to prove what passed before and at the time of the execution of the deed, if the party offering the evidence alleges fraud or mistake in the transaction. In the case of Abbot v. Massey, 3 Ves. 148, a bequest was made to Mrs. G., and the chancellor referred it to the master to receive evidence to show who was intended by the initial. So where the surname was given in a will, but not the Christian name, the party claiming a legacy was allowed to produce parol proof (Price v. Page, 4 Ves. 680), and, where in an agreement to deliver goods, there is a blank for the quantity, parol evidence may be admitted to show the quantity. It could not be evidence to contradict any part of the written agreement, but merely to supply an omission. Phil. Ev. 475.

I consider the omission to put the rate of wages into this contract, or to state expressly that the libellant was to serve without wages as an omission, a mistake on the part of the master himself, and without any fault on the part of the seaman, and that it is now competent for either party to show what the contract was in relation to wages, to supply the omission in the written agreement arising from this mistake. I am entirely satisfied that no fraud was intended by it.

HOPKINSON, District Judge, admitted the evidence.

Decree. That the libellant, Marine T. Wickham, recover and have paid to him the sum of sixty dollars, with costs.

Case No. 17,612.

WICKHAM v. DILLON.

[2 West. Law Month. 511.]

Circuit Court, N. D. Ohio. Oct., 1860.

CONFLICT OF LAWS — TRANSFER OF CHATTELS—VALIDITY—ASSIGNMENT FOR CREDITORS —RELEASE CLAUSE.

1. The transfer of personal chattels is governed by the law of the owner's domicil, if the contract of transfer was made there, though the chattels may be, at the time, in another state, by the laws of which the transfer would be void.

2. The laws of Virginia sustain a voluntary assignment by an insolvent debtor of all his property to trustees for the benefit of his creditors; although certain creditors are preferred, upon condition that they shall accept a distributive share, and release the balance of their debts.

3. Such an assignment, made at his domicil, by a citizen of Virginia, is a valid assignment, in this state, of goods then within this state, belonging to the assignor; though such an assignment, made in this state, by a citizen thereof, would, by our laws, be fraudulent and void.

4. This is a general rule, founded on the comity of nations.

5. The principle of this case is, that a transfer, by the act of the owner at his domicil, by assignment or otherwise, of personal property, wherever it may be, is governed by the same rule of law as if it were then present at the owner's residence.

[This was an action by William S. Wickham and William S. Gosham against Moses Dillon to recover the value of 20 boxes of dry goods. Heard on motion for a new trial.]

D. Peck, for plaintiffs.

Stanton & McCook, for defendants.

WILLSON, District Judge. This is a motion to set aside the judgment obtained by the plaintiffs at the July term, 1855, and for a new trial. Two causes are assigned in support of it. The first is, that the cause was tried in the absence of the defendant and his counsel, and that said counsel were unavoidably absent through sickness. Second, that the verdict is against the evidence.

The court would grant this motion without hesitation on the first cause assigned. But as all the evidence in the case is in writing, we are asked by counsel on both sides, to review it, and grant or overrule the motion as the law and the testimony shall appear in the examination of the case on its merits.

The action is in trover, brought by the plaintiffs (as assignees and trustees of Marx Graff, of Va.,) to recover the value of 20 boxes of dry goods. The defendant claims to hold these goods as sheriff, by virtue of a writ of foreign attachment, issued by the court of common pleas of Jefferson county, Ohio, against Marx Graff, at the suit of Martin Lewis & Co. From the evidence on file, it appears that in the summer of 1851, Marx Graff, a resident merchant of Wheeling, had become largely indebted to Eastern creditors for goods and merchandize. Of these goods, on their arrival at Wheeling (and before being unpacked), in August, 1851, he sold to Raphael Myerson 27 boxes, for $8,000, and took his note for the amount. Myerson shipped the goods from Wheeling to Steubenville, in the state of Ohio, and on the 2d of September placed them in store with Alexander Doyle, and took from him a warehouse receipt for the same. The goods remained in Doyle's warehouse until the 19th of November, at which time the plaintiff Wickham took possession of them by virtue of said warehouse receipt, and a written order of that date from Myerson to Doyle, for the delivery of the property to plaintiffs. This order and the warehouse receipt were taken by the plaintiffs, as assignees of Graff, in discharge of Myerson's note of $8,000. On the 21st of November, while the plaintiffs were in the act of transhipping these goods at Steubenville, the defendant Dillon, acting as sheriff of Jefferson county, seized and took into his own possession 20 of said boxes of goods, under and by virtue of the attachment process of Martin Lewis & Co. aforesaid. The plaintiffs claim title to the goods in question from Graff, who, on the 19th of November, 1851, executed and delivered to them at Wheeling, in the state of Virginia, a deed of trust of all his property for the benefit of his creditors, without any reservation whatever in restriction of title. The trust deed was duly acknowledged and recorded on the day of its execution and delivery, and the conveyance in all respects as to form was made in accordance with the laws of Virginia. This deed of trust provides, that the trustees shall sell the property as may seem proper in their discretion, on credit or for cash. They shall first pay the costs which accrue in the execution of the trust. "They shall disburse the residue in payment and satisfaction, pro rata, of all other just debts due or to become due from the said Marx Graff to any creditor or creditors, who shall, within six months from the date of this deed, assent to the terms thereof by subscribing a release to be appended thereto, whereby the said creditor or creditors shall, in consideration of his or their claim or debt coming in for participation of the said balance, pro rata, discharge and forever release and acquit the said Marx Graff and his representatives from all responsibility for any portion, if any of such debt, claim or demand remains unpaid in the pro rata distribution of said balance, excepting, however, expressly from all benefit under the operation of this deed, any creditor or creditors who may within that period issue any legal process against the goods of the said Marx Graff, or against his person; and the residue of said fund, if any remain, shall be divided pro rata among those creditors who shall fail and refuse to come in and within said six months execute and deliver such release; and

the residue, if any, they shall pay over to the said Marx Graff or his assignees."

At the time of these transactions, the plaintiffs, Myerson and Graff, were all citizens and residents of Virginia, and the sales and paper transfer of title to the property named, were made in the city of Wheeling.

Upon this statement of facts, three questions of law are presented for our consideration: (1) Is the deed of trust, in construction and effect, to be governed by the laws of Virginia, where it was made and where the parties to it resided, or is it to be governed by the laws of Ohio, where the property is found? (2) If the former, is the deed then valid and effectual in Virginia for the legal transfer of the property? (3) Is there such evidence of fraud on the face of the transaction, that will make the transfer void, as to creditors?

It is a principle of international law, that courts shall take notice of, and give effect to, the title of foreign assignees of an insolvent debtor, whether the insolvent made the transfer himself, or the law of the state of his domicil made it for him; and it is for this reason, that the succession to, and distribution of, personal property, is regulated by the law of the owner's domicil, and not by the lex loci rei sitæ. This rule is founded, as well in the necessity to secure justice by avoiding conflicts of jurisdiction in matters affecting title, as to promote comity among states and nations. In the case of Philips v. Hunter, 2 H. Bl. 402, this question came before all the judges of the exchequer chamber on error from the king's bench. That high court fully sustained the principle as laid down by Lord Camden in Jollet v. Deponthieu [1 H. Bl. 132, note], decided in 1769, and adopted, as sound law in England, the decision of Lord Kenyon in Hunter v. Potts, 4 Term R. 182. This last case established the great doctrine, that the title of the foreign assignee of an insolvent debtor's estate, under the law of the bankrupt's domicil, was to be preferred to the subsequent attachment of the domestic creditor, made (in that case) in America under the law of Rhode Island. And it has been decided, over and over again, by the English courts, that a failing debtor, before the actual issuing of the commission of bankruptcy, might assign his property abroad as absolutely as if it had been in his own tangible possession; and that such assignee was entitled, by operation of law, to deal as he might have done with his property. The lex domicilii, in respect to personal property, has been adopted by the highest judicial tribunals in the United States, and in so doing our courts have broadly declared, that in the general disposition by the owner of personal property in one country, it will effect it everywhere, because in regard to the owner's control over it, personal property has no locality. The application of this principle impairs no right, but promotes general justice, and is founded on the mutual respect, comity and convenience of commercial states and communities. Bank v. Donnally, 8 Pet. [33 U. S.] 371; 4 Johns. Ch. 460; 8 Paige, 446–519.

The status or capacity of Graff, therefore, to make the deed, and the construction and effect of the deed itself, depend on the laws of Virginia. What, then, is the legal effect of this deed in Virginia? It is urged that the deed is void, because it is made to prefer creditors. By the 6th section of the ordinance of convention, the state of Virginia adopted the common law of England and the acts of parliament of a general nature in aid thereof, prior to the 4th year of the reign of James I. That ordinance, which was adopted in 1776, is still in force, except in such modifications as have been made by the legislature of the state. It is not pretended, however, that any such modification has been made, affecting the right of a failing debtor to so dispose of his property, as to make a preference in the payment of his creditors. The common law of England declares that "it is neither immoral or illegal to prefer one set of creditors to another." In Nunn v. Wilsmore, 8 Term R. 528, Lord Kenyon says: "Putting the bankrupt laws out of the case, a debtor may assign all of his effects for the benefit of particular creditors." And in the case of Small v. Oudley, 2 P. Wms. 427, where an assignment was made to a favored creditor, to secure money lent by him to a merchant only the day previous to the commission of the act of bankruptcy, the court, in deciding the case, said: "There may be just reasons for a sinking trader to give a preference to one creditor before another—to one that has been a faithful friend, and for a just debt lent him in extremity, when the rest of his debts might be due from him as a dealer in trade, wherein his creditors may have been gainers; whereas the other may be not only a just debt, but all that such creditor has in the world to subsist on; in such case the trader honestly may, nay ought, to give the preference." In language equally strong, the same principle was maintained by the court in Cock v. Goodfellow, 10 Mod. 489, and so of numerous other English cases. Under the ordinance of 1776, the highest judicial tribunal of Virginia, has adopted the decisions of the English common law courts on this question.

Mr. Justice Carr, in giving the opinion of the court of appeals in M'Cullough v. Sommerville, 8 Leigh, 427, says: "It is unquestionable that a debtor in failing circumstances, may prefer one creditor or one set of creditors to another; nor is his right to do so at all weakened or impugned by the maxim that equality is equity. This maxim is justly a favorite one in the courts of equity in cases to which it applies; but can not be permitted to interfere with the right which the debtor has to secure this or that creditor

or class of creditors in preference to others."

I know this doctrine is repugnant to the legislative policy of the state of Ohio. But it is the law of the domicil of the parties where the deed was made and the law obtains in giving effect to the deed, and transferring the legal title to the property, unless there is something else in the transaction which renders it fraudulent in contemplation of law; and this brings us to the only remaining question in the case: Is there such evidence of fraud in the transaction or on the face of the deed, that will make the transfer void, as to creditors? The original sale of the goods by Graff to Myerson, would doubtless have been declared fraudulent, had the goods, while in the hands of Myerson, been seized under legal process against Graff by his creditor. The circumstances of that sale had all the indicia of an intent to defraud creditors. The facts that the goods were purchased by Myerson without examination, and without being unpacked from the original boxes and sent hastily out of the state, would be sufficient to raise a legal presumption of fraud in a contest between Myerson and an attaching creditor of Graff. But the assignment to the plaintiffs by Graff of all his property for the benefit of his creditors on the 19th of November, and the subsequent cancelling of the $8,000 note, and the receipt of the goods therefor by the assignees, placed the whole matter upon a footing as if no sale had been made to Myerson at all. The goods and property being placed in the hands of trustees to pay creditors, negatives any presumption of intent to defraud creditors. If the deed is valid and effectual for the purposes intended by it, then the title to the goods was perfected in the plaintiffs, and they were not thereafter subject to legal process against the assignor. But it is said that this deed has the evidence of fraud on the face of it, inasmuch as it demands a general release of the whole debt of each of the creditors, upon the payment of a part. If Graff gave up all his property, and in doing so, had a right to pay one in exclusion of others, with what propriety can he be charged with fraud, because he preferred those who should relinquish all claim upon his future earnings? To set aside this deed as fraudulent, because in its provisions those creditors are preferred who accept its terms, is really to deny the right to prefer at all; and this right, we have seen, is clearly established in Virginia. Where the failing debtor has assigned all of his property for the benefit of his creditors, and where there is no concealment, it is in accordance with the current authority of all the English cases, that such compositions are just and lawful. Jackson v. Lomas, 4 Term R. 166. So, in Brashear v. West, 7 Pet. [32 U. S.] 615, Chief Justice Marshall, in deciding the case, says: "Humanity and policy plead so strongly in favor of leaving the product of his future labor to the debtor who has surrendered all his property, that in every commercial country, except our own, the principle is established by law; and this furnishes a very imposing argument against its being a fraud." The authority of this last case was fully recognized by the Virginia court of appeals in Skipwith's Ex'rs v. Cunningham, 8 Leigh, 271, when the court unhesitatingly sustained a deed nearly similar in all of its provisions to the one now drawn in question before this court. There the deed was made by Richard M. Cunningham to Brodnax and Osborn, by which Cunningham, a failing debtor, conveyed all of his property (excepting notes to the amount of $300, which he retained to pay honorary debts) in trust for the benefit of his creditors. By the terms of the deed, the trustees were, in their discretion, to sell the property for cash or on credit, and out of the proceeds to pay first, the expenses of the trust, and then to pay and satisfy all the claims specifically enumerated, as debts of superior honorary obligation, and disburse the residue in the payment, pro rata, of all the just debts due from said Cunningham to any other creditor or creditors who should, within four months after the date of the deed, assent to the terms thereof, by subscribing a release to be appended thereto, whereby the said creditor or creditors should, in consideration of his or their claim or debt coming in for participation of the said balance, pro rata, discharge and forever acquit the said Cunningham, his heirs and administrators, from all responsibility for any portion (if any) of such debt or claim as might remain unpaid in the pro rata distribution of the said balance—excepting, however, expressly from all benefit under the operation of the deed, any creditor or creditors, who might, within that period, issue any writ of capias ad satisfaciendum against the body, or writ of fieri facias against the goods, or other process or execution against the lands of the said Cunningham, &c. The deed of Cunningham was sustained in every particular by the Virginia court of appeals.

It is not a little singular, but so it is, that the deed from Graff to his trustees, in purpose and terms, is almost in hæc verba with that of Cunningham to his trustees. Hence the facts in the case before us are substantially res adjudicata. We therefore hold, that the legal title of all Graff's property became vested in the plaintiffs by virtue of the deed which is in evidence, and that such title was a barrier against any process of law against the property.

The motion for a new trial is overruled.

WICKHAM (UNITED STATES v.). See Case No. 16,689.

Case No. 17,613.

WICKHAM v. VALLE et al.

[11 N. B. R. 83.] [1]

Circuit Court, E. D. Missouri. 1875.

ASSIGNMENT IN BANKRUPTCY — EFFECT — WIFE'S CHOSES IN ACTION.

Under the provisions of the bankrupt act [14 Stat. 517], the choses in action of the wife, not reduced to possession of the husband, do not pass to the assignee. The husband's power to make an assignment of his own volition does not pass to the assignee, more especially when at the date of the bankruptcy the husband had not the power to reduce to possession immediately.

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

This was a bill in equity brought in the district court by the assignee in bankruptcy of John R. Picton, against the executors of Jules Valle, deceased, the bankrupt, and his wife, to require the executors of Valle to pay to complainant the share of the personal property and estate of the testator bequeathed to Zoe Valle, wife of J. R. Picton, as residuary legatee, when the estate should be settled, and to enjoin the executors from making any further payments to the bankrupt and his wife. Jules Valle, the father of bankrupt's wife, made his will, duly proved in March, 1872, in which, after devising and bequeathing property to his wife and in lieu of dower, he devised and bequeathed the residue of his estate to his children in equal parts, the wife of the bankrupt being one of such children. Picton was adjudged a bankrupt on petition of creditors in July, 1873, and complainant was appointed assignee. The personal property of the testator consisted entirely of stocks, bonds, notes, and cash, amounting to about eight hundred thousand dollars, bequeathed to the seven children as residuary legatees in equal parts, so that the share of the bankrupt's wife would have been about one hundred thousand dollars. By the statutes of Missouri, estates may be closed in two years after grant of letters, and all debts not presented within that time are barred. The bill alleged that at the annual settlement in June, 1873, the balance in the hands of the executors was eight hundred and ninety-one thousand nine hundred and ninety-four dollars and eighty-three cents, and that all the debts had been paid, and that at the June term, 1874, of the St. Louis probate court, a final settlement would be due, and the legatees could demand payment of their legacies. The bill prayed, that the executors might be enjoined from making any payment to the bankrupt, J. R. Picton, or to his wife, Zoe Valle, and that they be required to account to and with the assignee for the share of Zoe Valle in the personal estate.

The defendants demurred to the bill for want of equity, which was sustained by the district court [case unreported], and complainant appealed to the circuit court.

Mr. Whittelsey, for complainant, cited the following authorities: As to frame of the bill: Mitford v. Mitford, 9 Ves. 87, and note (Sumner's Ed.); Pierce v. Thornely, 2 Sim. 169; s. c., 2 Eng. Ch. R. 167; Ripley v. Woods, 2 Sim. 167. As to the effect of the assignment in bankruptcy: 2 Kent, Comm. 135, 136, and notes; Id. 138, notes a, b; Wheeler v. Bowen, 20 Pick. 563; Hayward v. Hayward, 20 Pick. 517; Strong v. Smith, 1 Metc. (Mass.) 476; Smith v. Chandler, 3 Gray, 392; Bates v. Dandy, 2 Atk. 207; Mitford v. Mitford, 9 Ves. 87; Davis v. Newton, 6 Metc. (Mass.) 537; Gray v. Bennett, 3 Metc. (Mass.) 522; Jewson v. Moulson, 2 Atk. 417; Shaw v. Mitchell [Case No. 12,722]; Outcalt v. Van Winkle, 1 Green, Ch. [2 N. J. Eq.] 513. As to an assignment under the laws of Missouri: Leakey's Adm'r v. Maupin, 10 Mo. 368; Gillet v. Camp, 19 Mo. 404; Wood v. Simmons, 20 Mo. 363; Croft v. Bolton, 31 Mo. 355; Clark v. National Bank of Missouri, 47 Mo. 17; Woodford v. Stephens, 51 Mo. 443; Sitz v. Deihl, 55 Mo. 17, 21. That a legacy or distributive share of an intestate is a chose in action: 2 Kent, Comm. 135; Schuyler v. Hoyle, 5 Johns. Ch. 196; Carteret v. Paschal, 3 P. Wms. 197; Bates v. Dandy, 2 Atk. 206; Wall's Guardian v. Coppedge, 15 Mo. 448; Thomas v. Kelsoe, 7 T. B. Mon. 521.

Mr. Clover, for defendants, admitted that under the English bankrupt law and decisions, the husband's power over his wife's choses in action would vest in the assignee, but claimed that no such effect could be given to the act of 1867, and cited Shay v. Sessamon, 10 Barr [10 Pa. St.] 432; Gallego v. Chevalle [Case No. 5,200]; Wheeler v. Moore, 13 N. H. 478; In re Snow [Case No. 13,142]; Krumbaar v. Burt [Id. 7,944]; Dold's Trustee v. Geiger's Adm'r, 2 Grat. 98; Andrews v. Jones, 10 Ala. 400.

MILLER, District Judge. Held, that under the provisions of the bankrupt law of 1867, the wife's chose in action, not reduced to possession by the husband at the time of the bankruptcy, did not pass to the assignee; more especially as in this case, when the bankrupt at the date of the bankruptcy had not the power of immediate reduction to possession, but having only a power and no vested interest in the property itself. Decree affirmed.

[1] [Reprinted by permission.]

Case No. 17,614.

WICKS v. ELLIS.

[Abb. Adm. 444.] [1]

District Court, S. D. New York. Jan., 1849.

ADMIRALTY—RESPONDENT'S DISCHARGE FROM ARREST—SUIT BY MINOR—GUARDIAN AD LITEM.

1. A motion to discharge respondent from arrest, on the ground that the libellant has no legal cause of action against him, will not be granted where the affidavits read upon the motion in behalf of the respective parties, are contradictory as to the merits of the cause.

2. In an action by a minor to recover wages as seaman, the respondent is not entitled to require the appointment of a guardian ad litem or next friend for the libellant.

[Cited in The David Faust, Case No. 3,595; The State of New York, Id. 13,328; The Melissa, Id. 9,400.]

This was a libel in personam, by Daniel Wicks against John Ellis, to recover seamen's wages. The respondent now moved, upon affidavits, that he might be discharged from arrest, on the ground that the libellant had no legal cause of action against him; or that, if the suit were not dismissed, a guardian might be appointed for the libellant, and he be required to file security for costs, on the ground that he was not twenty-one years of age.

BETTS, District Judge. The first branch of the present motion cannot be granted, because it turns upon the merits of the cause, in respect to which the parties stand in direct contradiction as to the facts. The controversy between them cannot be disposed of summarily by the court upon ex parte affidavits. It must be determined upon proofs and upon a regular hearing.

The nonage of the libellant does not entitle the respondent, as of right, to the relief asked by the second branch of his motion. He must, at least, show that he may lose some advantage of defence or recovery (as of costs,) if the case is allowed to proceed to contestation in the name of the libellant alone. Admiralty courts allow a minor to recover in his own name wages earned in sea-service when the contract on which he sues was made personally with him, and it does not appear that he has any parent or guardian or master entitled to receive his earnings. In this case the libellant swears that he always makes his own contracts of hiring, and that he receives to himself the wages earned, and that there is no other person entitled to receive them. The respondent gives no evidence disproving these allegations; and it appears that the libellant is nineteen or twenty years old, accustomed to transact business for himself, and that he is not, therefore, to be presumed to require, from imbecility of age, the protection of a next friend or guardian to manage his suit. The libellant is also a privileged suitor, not under obligation to file a stipulation for costs; nor could his prochein ami be required to do so. Dist. Ct. Rules, 45, and Add. Rule, April, 1847. There is, under these circumstances, no equitable ground laid for the interposition of the court to prevent the libellant from proceeding in his own behalf; and if the objection is foundation for legal defence to the action, the respondent must be put to his plea to the competency of the libellant. When, however, the action is for other causes than the recovery of wages, and security for costs must be given, admiralty courts conform to the course of practice prevailing in other courts in respect to parties disqualified from suing in their own rights. Betts' Adm. 18.

The motion is denied; but without costs as against the respondent. Order accordingly.

[1] [Reported by Abbott Brothers.]

Case No. 17,615.

WICKS et al. v. PERKINS.

[1 Woods, 383: [1] 13 N. B. R. 280.]

Circuit Court, E. D. Texas. May Term, 1871.

BANKRUPTCY—MORTGAGEE'S CLAIM—NECESSITY OF PROOF.

The lien of a mortgage creditor on the real property of a bankrupt is not lost by his failure to prove his debt, so that after the end of the proceedings in bankruptcy, he cannot enforce his lien.

[Cited in Re Cooper, Case No. 3,190; Cottrell v. Pierson, 12 Fed. 806; Gildersleeve v. Gaynor, 15 Fed. 103.]

[Cited in Burtis v. Wait, 33 Kan. 482, 6 Pac. 785.]

In equity. [Suit by the assignee in bankruptcy of George A. Wicks & Co. against Henry E. Perkins.] On exceptions to the sufficiency of a plea to the bill of complaint.

Peter W. Gray and W. B. Botts, for complainant.

John W. Harris and Branch T. Masterson, for defendant.

WOODS, Circuit Judge. The bill was filed on September 10, 1870, and alleges in substance, that on the first day of April, 1867, the defendant, Henry E. Perkins, being indebted to George A Wicks & Co., in a large sum of money, made and delivered to said Wicks & Co. his four promissory notes of that date, for $4,214.29 each, payable to their order at the Houston Insurance Company in the city of Houston, in six, twelve, eighteen and twenty-four months respectively, with eight per cent. interest. On the same day, in order to secure the payment of said notes, Perkins executed to Andrew J. Burke a deed of trust in the nature of a mortgage, conveying to him certain real estate in the Eastern district of the state of Texas. The said deed of trust was subject to the condition, that if said Perkins should pay the notes aforesaid when they fell due, the deed should be void, otherwise the said Burke was authorized to sell at public

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

sale the property conveyed to him by said deed, and apply the proceeds of the sale to the payment of the principal and interest due on said notes, and the surplus, if any, he was required to pay to said Perkins. The said notes were afterwards, and before maturity, transferred to complainant, together with the benefit of the security of said deed of trust. The bill further alleges that Perkins failed to pay the notes at their maturity, and the trustee, Burke, has failed and neglected to execute the powers conferred on him by the deed of trust. Perkins still remains in possession of the said real estate, and at the December term, 1868, of the district court of the Eastern district of Texas, applied for and obtained his discharge in bankruptcy; that John W. Harris, one of the defendants, claims to have purchased said real estate included in said deed of trust, at a sale thereof by the assignee in bankruptcy of said Perkins, but no valid sale of said lands was made that could in equity affect complainant's lien; no valid order or decree of the court for the sale of said lands was made so as to affect said lien; that no person authorized so to do has ever applied for such order of sale, and complainants never had notice of such proceedings as required by law, and that no lawful order for sale of said lands has ever been made by the court having jurisdiction thereof. The bill prays that said lands may be sold disincumbered of any claim or title of said Harris, and the proceeds applied to the payment of the amount due on the notes secured by said deed of trust. To this bill a plea is interposed which alleges in substance, that on the 23d day of December, 1868, the defendant, Perkins, filed his petition to be adjudged a bankrupt; that on the 3d day of February, 1869, he was so adjudged; that the debt of complainants was provable in bankruptcy; that complainants had notice of the proceedings in bankruptcy before the filing of their bill of complaint, and that they neglected and failed to prove their debt in the said proceedings in bankruptcy as required by law. The case is submitted on the sufficiency of this plea.

It appears from the pleadings that Perkins, the bankrupt, received his final discharge before the filing of the bill in this case. The plea, therefore, presents the question, whether the lien of a mortgage creditor on the real estate of the bankrupt is lost by his failure to prove his debt, so that after the termination of the proceedings in bankruptcy he cannot enforce his lien.

I think this proposition must be decided in the negative. A secured creditor can resort to one of these remedies: (1) He may rely upon his security. (2) He may abandon it and prove the whole debt as unsecured; or (3) he may be admitted only as a creditor for the balance remaining after the deduction of the value of the security. If he takes either of the two courses last named, he must of course prove his debt. But suppose he chooses to rely upon his security, there is no positive provision nor is there anything in the policy of the bankrupt law requiring proof of the debt, unless he seeks the aid of the bankrupt court to enforce his lien. By the 20th section of the bankrupt act [14 Stat. 526], the assignee may sell incumbered property of the bankrupt subject to the claim of the secured creditor thereon This he may do without petitioning the court or without any order of the court, but where he so sells he does so subject to all lawful incumbrances, and can convey no higher or better interest. The proceeds of the sale are supposed to be the price and value of the interest so sold, with a knowledge of incumbrances. Such a sale does not therefore affect the lien of the creditor. Is it lost by the mere fact that he does not prove his debt? I think not. He may rest on his security and enforce it at any time he pleases, either before or after the end of the proceedings in bankruptcy. Of course he loses any claim against the bankrupt personally, but he still has the right to proceed against the property the lien on which the law has preserved to him. The only objection to this view is found in the opportunity it might afford the bankrupt to shield his property from the claims of just creditors by covering it with fraudulent liens. The answer to this is that it is always in the power of the assignee, if he suspects that the property of the bankrupt has been fraudulently incumbered. to obtain an order of court to sell it free from incumbrances, and compel the lien holders to make good their claims by proof before a distribution of the proceeds of the sale. The fact that an assignee asks for a sale of property subject to incumbrances is an admission on his part that the incumbrances are bona fide. On such a sale the lien of the creditor is left intact, and he can take his own time to enforce it.

After the end of the proceedings in bankruptcy, the lien creditor may apply to any court of competent jurisdiction to enforce his claim. This is what the complainants in this case have done. The property according to the averments of the bill was sold subject to their lien, and they have not lost their lien by failing to prove their debt. I think therefore that the matter set forth in the plea is no sufficient answer to the bill. The plea must therefore be overruled.

Case No. 17,616.

WICKS v. STEVENS.

[2 Woods, 310; 2 Ban. & A. 318.] [1]

Circuit Court, E. D. Texas. May Term, 1876.

PATENTS FOR INVENTIONS—REVOLVING COTTON PRESSES—REISSUE OF PATENT—APPLICATION OF INVENTION—ABANDONMENT OF CLAIM.

1. When the question of the applicability of an invention to revolving cotton presses, other than

[1] [Reported by Hon. William B. Woods, Circuit Judge, and by Hubert A. Banning, Esq., and Henry Arden Esq., and here reprinted by permission.]

portable ones, had been raised in the original application and abandoned, and therefore had not been inadvertently or accidentally overlooked, a reissue of the patent by which the invention is made to apply to stationary as well as portable presses is improper and void.

[Cited in Russell v. Dodge, 93 U. S. 464; Manuf'g Co. v. Corbin, 103 U. S. 792.]

2. The alleged improvement to revolving cotton presses, patented to Rhodom M. Brooks in 1866, and extended in 1872, was known and used long before Brooks applied for his patent. The patent is therefore void.

In equity. Heard upon pleadings and evidence for final decree. The bill was filed to prevent an infringement of certain letters patent granted to one Rhodom M. Brooks for improvements in cotton presses, and for an account of profits. The complainant [John W. Wicks] was assignee of Brooks' patents for a portion of Texas; and the defendant [E. F. Stevens] was an agent for the sale of cotton presses manufactured by one W. H. Reynolds, of New Orleans, under certain patents posterior in date to Brooks', and for different parts of the press. The complainant alleged that the latter were an infringement of Brooks' patent. The defendant placed himself on two grounds of defense: (1) that Brooks' patents were void; (2) that he did not infringe them. A contest had taken place between one Douglass and others, assignees of Brooks, and Reynolds and others, in New Orleans, with partial success on each side; the defendant claiming, however, that the decision was substantially in his favor, and pleading it as res judicata in this case. But as the record in that case was not in a shape to render it conclusive on the question made in this case, it was not noticed in the opinion of the court. The Brooks patents sued on were two: first, a patent for alleged improvements in screw presses, dated July 23, 1872, being a reissue of a patent for an improvement in portable revolving screw presses, dated November 6, 1866; secondly, a patent for an improvement on the original invention, dated April 14, 1868. The claims in the reissued patent of 1872 were quite different from that in the original of 1866, and were apparently made in reference to all revolving presses; whereas, the original was confined to portable revolving presses, that could be carried from one place to another. The defendant insisted that the extension of the new patent to all kinds of revolving presses, stationary as well as portable, rendered the reissued patent void, inasmuch as the question of the applicability of the invention to presses other than portable ones had been raised in the original application, and abandoned; and therefore had not been accidentally or inadvertently overlooked. But if the reissued patent was still to be confined to portable presses, then, that he did not infringe, for his presses were not portable ones; but were fixed in the gin house. The defendant contended, further, that if the reissued patent was to be extended to all revolving presses, then it was void, because all the pretended improvements contained in it were known and used in stationary presses long before the date of Brooks' patent. It was not seriously contended that the patent of 1868 was infringed by the defendant; the whole controversy rested upon the construction and validity of the reissued patent of 1872.

Ballinger & Rhodes, for complainant, cited Blake v. Stafford [Case No. 1,504]; Conover v. Dohrman [Id. 3,120]; Hailes v. Van Wormer [Id. 5,904]; Wing v. Richardson [Id. 17,869]; Tompkins v. Gage [Id. 14,088]; Roberts v. Harnden [Id. 11,903]; Whipple v. Middlesex Co. [Id. 17,520].

Mr. Mason, for defendant, cited Curt. Pat. pp. 251, 256, 269, 289, 345 (note 2), 329; Gould v. Rees, 15 Wall. [82 U. S.] 187; Prouty v. Ruggles, 16 Pet. [41 U. S.] 341; Silsby v. Foot, 14 How. [55 U. S.] 219; Burr v. Duryee, 1 Wall. [68 U. S.] 531.

BRADLEY, Circuit Justice. Construing the reissued patent of 1872 to apply to stationary as well as revolving presses, the question of infringement is not hard to determine. It had three claims: First, the combination of a revolving press-box, with follower and screw-rod and a stationary nut (or their mechanical equivalent), substantially as set forth. An inspection of the defendant's machine shows at once that it has this combination. The second claim is for a press box confined within a revolving frame composed of metallic bars and cross-ties, and a bed or bottom (or their mechanical equivalent), substantially as set forth. The defendant also uses this combination; the wooden bars, bolts and rods being mechanical equivalents of the metallic bars and cross-ties of Brooks' patent. The third claim is for the collar surrounding the stationary nut and placed between the metallic cross-ties, or their mechanical equivalents, substantially as and for the purposes set forth. The apparent object of this collar is to steady the frame containing the press box, and to keep it plumb and perpendicular whilst revolving. The defendant, instead of a collar having the specific form of Brooks', accomplishes the same object by an eye or hole in what he calls the metallic arch. This metallic arch with its eye is in fact a collar surrounding the stationary nut, substantially as and for the purposes subserved by the collar in Brooks' press. It is not placed between the metallic cross-ties described by Brooks, it is true, for the defendant does not use them; but the metallic arch is equivalent to the metallic cross-ties taken in connection with the cross-beam to which they are attached, so far as it affects the use of a collar. I consider the defendant's apparatus to be substantially the same thing as that claimed by the plaintiff. In my opinion, therefore, the defendant infringes all the claims of the reissued patent of 1872.

(The circuit justice having then examined the patent of 1868, and decided that the de-

fendant did not infringe it at all, proceeded as follows:)

It appearing that the defendant infringes the patent of 1872, the next question to be solved is, whether that patent is valid.

1. Was it a legal reissue of the patent of 1866? The patent of 1866 was confined to portable revolving cotton presses. I assume that the reissued patent extends to all cotton presses, stationary as well as portable, for, if confined to the latter, the defendant does not infringe it. Had this extension to stationary presses been omitted in the original patent by accident or mistake, it might be corrected in the reissued patent. But its application to revolving presses generally was first claimed and then abandoned in the application for the original patent of 1866, and the claim as finally made by the patentee, and to secure which alone his patent issued, was for a combination applicable to portable presses only. It cannot be said, therefore, that a neglect to claim the combination as applicable to revolving presses generally was an inadvertence, accident or mistake. It was an exclusion, designed and understood at the time. Attempts to grasp claims by means of reissued patents, which, whilst the evidence is fresh at the time of the original application, the patentee would not have the hardihood to make, are getting too frequent, and are too often acquiesced in by the patent office. Perhaps this is not to be wondered at when we consider the persistency with which claims once abandoned are pressed upon the department after the evidence of their futility has been forgotten.

2. But aside from this objection to the patent, there is abundant evidence to show that the alleged invention was known and used by others long before Brooks applied for a patent. Under this head the following evidence has been adduced by the defendant: First, he introduces the patent of one Elliott, granted in 1850, for an improved cotton press. This press had a revolving frame containing a press box, and a screw rod attached to the follower which pressed the cotton, and was operated in the same general way as Brooks'; but the nut was not stationary as specified in his first claim, being fixed in the cross beam of the revolving frame; nor was the press box confined within a revolving frame composed of bars and ties like those described in the second claim of Brooks, and it had no collar surrounding a stationary nut. Therefore, if these peculiarities of Brooks' press are material, he was not anticipated in the use of them by Elliott. In Elliott's press, the nut revolves with the press box and frame, and the screw rod does not revolve, being fixed in a cross beam, the ends of which slide up and down in grooves of the side frame. In Brooks' press, the nut is stationary, being fixed in the cross beam above, whilst the screw revolves with the press box and frame, being fixed to the follower. In the one, the rod is fixed and the nut revolves; in the other, the nut is fixed and the rod revolves. The result is the same in both cases, namely, the pushing of the follower and the pressure of the cotton. The change is one of mere form, and is hardly the subject of invention. But there is other and abundant proof that both forms were in use long before the date of Brooks' patent.

(The circuit justice then examined the evidence of the witnesses in detail, on the subject of prior knowledge and use of the combinations claimed in Brooks' patent, and came to the conclusion that he was not entitled to be called the first and original inventor. He continued:) His press may be more neat and compact in its construction than other presses, and it may be a better press in every way; but if it is, he must rely on its comparative excellence and the consequent demand for it in the market, and not on a monopoly of the whole market for his compensation.

I find nothing elicited by the evidence of the plaintiff to refute the conclusions deduced from that of the defendant. Much of it is occupied with characteristics of the Brooks' press, which it possesses in common with other and older presses, or which have not been claimed in Brooks' patent as his invention. It must be remembered that revolving presses and portable presses, and presses with iron straps, etc., were known before Brooks applied for a patent, or he would have inserted a claim for them. Therefore, all the commendations bestowed on Brooks press (so called) for any of these matters, by witnesses whose observation had not extended beyond this press, go for nothing in the case. In my judgment, the complainant's title to the combinations of parts which the defendant infringes has been successfully impeached; and on either of the grounds taken by the defendant, the bill must be dismissed. Bill dismissed.

WICKS (WEED SEWING MACH. CO. v.). See Case No. 17,348.

WICKWARE (LAWRENCE v.). See Case No. 8,148.

WIDDINGTON (SCOTT v.). See Case No. 12,547.

WIEDE v. HOME INS. CO. See Case No. 17,617.

Case No. 17,617.

WIEDE et al. v. INSURANCE CO. OF NORTH AMERICA. SAME v. INTERNATIONAL INS. CO. SAME v. HOME INS. CO.

[3 Chi. Leg. News, 353.]

Circuit Court, D. Minnesota. June, 1871.

ACTIONS ON SEVERAL INSURANCE POLICIES—TRIAL BEFORE SAME JURY—PROOFS OF LOSS—FALSE STATEMENTS—FAILURE OF INSURED TO ANSWER QUESTIONS—NEW TRIAL—EXCESSIVE VERDICT.

1. Where several actions on policies of insurance are brought by the same plaintiffs against different companies, and the questions are the same, the evidence the same, and the

counsel the same, the court may order them all to be tried to the same jury.

[Cited in Mutual Life Ins. Co. v. Hillmon, 145 U. S. 293, 12 Sup. Ct. 912.]

2. A mere failure by the assured to answer questions respecting the loss *held*, under the terms of the policy, not to "forfeit" or "avoid" it, but only to suspend the right to payment until the answers are given.

3. False swearing by the assured in preliminary proofs, or in an examination under oath required by the policy in any material matter, with intent to mislead, avoids the policy; but honest mistakes do not have this effect.

4. Duty of court to grant new trials where the verdicts are against the law and evidence discussed by DILLON, Circuit Judge, and a new trial was conditionally granted after five juries had decided the same issues in the same way.

Allis, Gilfillan & Williams, for plaintiffs.

E. A. Storrs and Lamprays & Brisbin, for defendants.

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

DILLON, Circuit Judge (charging jury). 1. These are actions brought by the plaintiffs against the several insurance companies above named to recover on policies respectively issued by them. Because the questions to be tried were precisely the same, the evidence the same, the counsel the same, and for other reasons, the court, before the commencement of the trial, ordered that these causes should be tried before the same jury, who were, however, to try them in the same manner precisely as if each was separately on trial. The evidence introduced is equally applicable to all the causes, and no application has been made by counsel to have all but one case withdrawn from the jury, and no reason has been seen by the court why this jury cannot try the issues in one as well as the issues in all, for, when under the pleadings and the evidence you have decided one case you have decided all—they are all alike; but you will return separate verdicts in each.

2. The plaintiffs were, on the 22d day of February, 1867, grocery merchants in this city, and on that day their store was consumed by fire. The plaintiffs had in various insurance companies policies insuring their stock of goods against loss or damage by fire to the amount of $54,600. Among the companies whose policies were held by the plaintiffs were the present defendants, the Insurance Company of North America, the International Insurance Company, and the Home Insurance Company of New York. That there was a fire, and that the plaintiffs' stock of goods in the building at the time was consumed, there is no controversy. But there is a controversy, and a very important one, concerning the extent of this loss; in other words, respecting the amount in value of the goods covered by the policy and destroyed by the fire. The defenses made in the answer, and relied upon on the trial, are two: (1) A denial of the amount of the loss as claimed by the plaintiffs. (2) Attempts by the plaintiffs to defraud the companies by false swearing as to the value of the goods destroyed, in the proofs of loss, and as to facts touching the loss in examinations under oath, required by the policies, and to which the plaintiffs submitted themselves, and attempts to defraud by other means, such as false entries in books, etc. These defenses will be referred to presently, but there is no defense pleaded based upon the refusal by plaintiffs to furnish invoices or copies of invoices of property destroyed.

3. Before proceeding to a consideration of the main defenses above mentioned, your attention will be called to a point made by the defendants, based upon the refusal of one of the plaintiffs to answer certain questions put to him when being examined under oath under the policy respecting the loss. It appears that on or about the 3d day of April, 1867, Charles Wiede was examined at length, and that examination is in evidence. In the course of that examination certain questions were put to Charles Wiede, which he refused to answer. After this refusal the examination was continued, read over and signed, and appears to be sworn to by him. It is admitted that in point of fact the agents of the insurance companies knew the facts connected with the settlements or proposals to settle with the other companies, and the basis and terms thereof. Under these circumstances the defendants claim that under the policies the effect of the refusal to answer these questions is to defeat the plaintiffs' right to recover. But the court (adhering to the view taken by Mr. Justice Miller at a former trial) is of opinion that by the terms of the policies a mere failure to answer does not "forfeit" or "avoid" the policy, but only suspends the right to payment until such answers are given; that such a defense by the companies is in the nature of abatement, showing no present right of recovery, and should be pleaded separately from the defense of "fraud" or "false swearing," which, if established, are a complete bar to a recovery at any time on the policies; it is not so pleaded, and hence the defendant's defense, based on a refusal to answer certain questions, is not well made. The court need not, therefore, consider the effect of a refusal to answer certain questions in the course of an examination where the examination nevertheless proceeds, and is completed, accepted and signed. This brings us to what, under the issues, the court holds to be the material questions in the case.

4. A question which lies at the basis of this controversy is the value of the merchandise on hand at the time of the fire. On this point the parties differ widely. In the proofs of loss dated in March, 1867, the plaintiffs stated the value of the goods destroyed by the fire at $70,654.85. The same sum was stated as the amount of the loss by the plaintiff, Charles Wiede, in his examination in

April, 1867, under the policy. The petitions in these cases filed and sworn to in July, 1867, also state the actual cash value of the property destroyed to be the said sum of $70,654.85. On the trial the plaintiff as a witness states the value of the stock on hand to be less than that sum, but to be the sum of $60,000 or $61,000, and more than equal in value to the total insurance thereon, which was the sum of $54,600. On the other hand, the companies in their answer claim that the actual value of the merchandise destroyed by the fire did not exceed $20,000, and on the trial claim that it did not exceed more than the sum of about $29,000. In support of the plaintiff's claim and statement as to value, certain books of account which escaped the fire are adduced and in evidence. The testimony of two persons who had been in the plaintiffs' employment, as to the value of the stock on hand at the time of the fire, has been also produced, and some other circumstances laid before you to support the plaintiffs' claim as to the extent of their loss.

The defendants produce evidence of different kinds with a view to sustain their claim that the plaintiffs have greatly exaggerated and overstated their loss: (1) There is the testimony of witnesses familiar with the value of such merchandise generally, and who saw the plaintiffs' stock not long before the fire, and formed and have stated an opinion as to its value. (2) Proposals to and settlements with other companies for the same loss on the basis that the value of the goods destroyed was the sum of $29,261.36. (3) Evidence that the plaintiffs in the course of negotiations for settlement with other companies admitted that the amount claimed in the proofs of loss was too much, and that their real loss was only the said sum of $29,261.36 or thereabouts. The plaintiffs deny that any such admission was made. (4) Evidence of other wholesale grocery merchants in St. Paul, showing the average proportion which the amount of sales bore to the amount of stock. Beaupre states the average with him to be about one-fourth; Presley, average proportion, one-fourth; Borup, one-sixth; McQuillan, one-sixth; Bohur, one-tenth; Kelley, one-sixth to one-seventh; Constans, one-eighth to one-tenth. The plaintiffs claim that their sales for the year preceding the loss were $118,000 or thereabouts. They claim to have on hand about $60,000 worth of merchandise at the fire, showing that their stock on hand equaled one-half of the amount of their sales. This circumstance the plaintiffs offer evidence to explain on the ground that unlike the other merchants, they were holding for speculation, and not for daily and immediate sale, a large quantity of tobacco and cigars—viz., the sum of about $22,000. The defendants claim that the books of account, because only part are produced, and because of the manner in which they were kept, are unreliable and of little weight. The plaintiffs claim that their settlements and proposals to settle on the basis of a total loss of $29,261 were made, not because that was the real loss, but because they thought it better to take that and get their pay without delay than to have trouble in litigation.

You will consider all these circumstances and all others in evidence bearing on the question of value, and from a consideration of all determine what was the real value of the goods on hand at the time of the fire. That the companies insured in the aggregate goods to the amount of $54,000, is no evidence whatever that the goods destroyed were worth that sum, or that there was that amount of goods on hand at the time the policies were issued. The burden of proof is on the plaintiffs to satisfy you by the weight of evidence what was the actual cash value of the goods on hand at the time of the fire. If the loss was less than the sum insured, the plaintiffs, if entitled to recover, can recover only in the proportion which the actual loss bears to the whole amount insured on the goods consumed by the fire. As to the defense of fraud and false swearing, it is claimed by the defendants that the plaintiffs, under the conditions of the policies, have forfeited all right to recover by reason of fraud and false swearing. The conditions referred to are substantially the same in all of the policies—viz.: If the assured "shall make any attempt to defraud the company by false swearing or otherwise, then and in every such case the policy shall be null and void." If this defense is in your opinion true, the plaintiffs cannot recover; but the burden of proof is upon the defendants to establish it under the answer setting up the defense of "false swearing." The court instructs you that false swearing by the assured, either in the preliminary proofs of loss, or in the examination on oath as required by the policy in a matter material to the right of recovery of the company, with intent to mislead the company, would work a forfeiture of the policy, and false statements by the assured on such examination, with intent to deceive and mislead the companies relative to the terms of settlement by the assured with other companies which had insured the same property are material, and if established will defeat any right to recover under the policy. The plaintiffs are not entitled to a verdict if they intentionally stated their loss under the conditions of the policies, that is, in the manner prescribed in the policies, greater than it was in reality, although you should be of the opinion that they had suffered some loss, for the reason that being guilty of willfully false statements, they cannot appeal successfully to a court of justice to aid them in obtaining the value of the property destroyed. But if these plaintiffs made out their proofs of loss from their best recollection, aided by such books and papers as escaped destruction by fire, and if they had no intention of stating

such loss incorrectly or deceiving the defendants by such statements, then they can recover their pro rata loss, although you should be satisfied that they claimed more than the evidence, in your opinion, would warrant. Honest mistakes in regard to values and amounts of loss should not defeat a recovery. The law grants indulgence where the statements are innocently made, but if it was the purpose of the plaintiffs to deceive and mislead the defendants by their statements, in other words, commit a fraud, they can have no relief in a court of justice.

There is another subject to which the court would call the attention of the jury, and that is this: The plaintiffs must, when examined as witnesses in their own behalf, give you an honest and truthful account of all the facts in the case to which their attention is directed, and if, in your opinion, they have knowingly and willfully sworn falsely upon the trial, when interrogated in regard to any of the facts in controversy, you will be justified in disregarding all of his or their testimony which is not corroborated by other evidence. Now the books of the plaintiffs have been offered in evidence, and are to be considered by you so far as you are satisfied they are reliable. The correctness and truthfulness of any of the entries in them it is for you to determine upon. You are to take them and form your judgment upon their reliability as giving an accurate and correct account of the plaintiffs' business, so far as they relate to such business in connection with all of the evidence in the case. The court cannot point out to you what testimony in relation to them you are to believe or what you are to discredit. These books are not to be considered as conclusive evidence of the correctness or truthfulness of the entries appearing in them, and if you discredit the testimony of plaintiffs given in support of them, after considering all of the evidence in the case, you may reject them entirely in determining the value of the property destroyed by the fire; and you are the exclusive judges of the weight and effect of the evidence.

With these observations the court submits to your deliberate and conscientious determination. A contract of insurance is one with respect to which the law requires both from the company and the person insured, fairness, honesty, and good faith. Whoever sues upon an insurance policy puts these in issue and submits them to the jury and the court. If there is an honest loss, and no fraud or false swearing to the extent of that loss, the companies should be made to pay it. But if the loss be not a real one, or if it is attempted to be magnified by the proofs of loss, and otherwise with a view to deceive and mislead the companies into paying more than is just and right, this the law wisely declares shall forfeit the right to receive anything. You have nothing to do with the result of any former trials, nor why a prior decision in the Home Company case was reversed by the supreme court. Some appeals by counsel have been made to you in favor of and some against corporations. They have no place here. You are to decide these questions in the same manner as if the controversy were between two individuals. The law knows no distinction; the jury's oath forbids them from making any. It would be a just and deserved reproach to the jury system and the law, and a bad state of society, if any suitor or class of suitors had their legal rights decided, not by evidence but by prejudice. It is an easy thing to follow the bias of our sympathies or the dictation of our prejudices; but, when these stand in the way of consciencious convictions of duty arising from the evidence and the law, a jury should not hesitate. The main question here is one of good faith and fairness; this you should decide upon the whole evidence, and according to its fair weight in such way as shall show that you have intelligently considered it, and have been guided by your reason in the discharge of your important and responsible duty.

Under this charge of the court, and the evidence as reviewed by the judge, the jury returned a verdict for a total loss; or, in other words, found that the goods in the store at the time of the fire amounted to $54,600, the amount of the total insurance. This was in face of the admitted fact that the plaintiffs had settled with other companies on the basis of $29,261.36, and of the further fact that one of the plaintiffs, on the trial, admitted that he had sworn such sum to be the actual amount of their loss in the proofs of loss submitted to such companies. The verdict was so clearly contrary to the evidence in the case, that the court immediately set it aside, and, in doing so, DILLON, Circuit Judge, made the following remarks:

"In this case the jury has discharged its duty, and no doubt conscientiously, but the court has also a duty equally important. Courts are not organized to record verdicts which are unsupported by the evidence, and it is their duty to set all such verdicts aside; and it must be understood that there are two ordeals to pass in this court. The jury have negatived the charge of fraud, and with that finding we shall not interfere; but if ever a fact was proved and demonstrated in a court of justice, it was shown in this case that the plaintiffs' loss did not exceed thirty thousand dollars. The plaintiffs' books furnished no basis from which the value of the stock could be ascertained. Their reliability rests upon the interested testimony of the plaintiffs alone. How the conclusion was reached that the value of the plaintiffs' stock was equal to or exceeded the sum of fifty-four thousand dollars it is difficult to understand. It is an admitted fact that the plaintiffs settled with several of the companies on the basis of $29,261.36 as the total loss, and it is shown by Breme, by Durand, Chase, Eaton and French that the plaintiffs admitted that to be the actual amount of their loss. Opposed to this

we have the almost unsupported testimony of the plaintiffs. We have also the testimony of St. Paul merchants showing that the plaintiffs could not have had, at the time of the fire, more than thirty thousand dollars' worth of stock. With the views which we entertain of the evidence in this case, we could not record this verdict without abdicating our functions as a court. This we are not prepared to do. We shall grant a new trial in this case, giving the plaintiffs, however, permission to remit the verdict to the basis of a total loss of $30,000. Judge Miller has repeatedly expressed his regrets to me that he did not set aside the verdict in the underwriter's case—the last one tried. The defense in this case is stronger even than the one made in that, additional evidence for the defense having been introduced upon this trial."

The counsel for the plaintiffs, on the following day, submitted some remarks criticising the action of the court, and claiming that the court, in setting aside the verdict, had invaded the province of the jury; to which the court then responded in the following remarks, which define the duties of juries and the rights of courts:

DILLON, Circuit Judge. The counsel for the plaintiffs seem to be laboring under a radical misapprehension as to the distinction which exists between the respective provinces of courts and juries. They are distinct. It is for the jury to find the facts, but it is for the court to instruct them as to the law, and it is the duty of the jury to follow those instructions. The court must not, and I certainly would not, invade in the slightest degree the province of the jury, nor will I permit the jury to invade the province of the court. The law has invested judges with certain powers, requiring them to be so exercised that verdicts rendered against the law and against the evidence should be set aside. A judge who fails to perform that duty is not fit to sit upon the bench; and so essential is this power in courts, that without it juries would not be in existence to day. I am satisfied, and it is the experience of every lawyer, that these powers are exercised by the courts by far too seldom. I appreciate the boundary line which separates the powers and duties of courts and juries. I shall always be careful not to overstep it, and shall be equally careful that juries do not invade mine. While I sit on the bench I will not surrender my judgment as to what my own duty requires of me, nor will I sustain a verdict which I know to be wrong by twelve men, nor by twelve times twelve men. We might safely appeal as to the propriety of our action in these cases to the intelligent conviction of every person who heard this trial, and even, could it be done, to the inner heart of this very jury. The defendants were powerful corporations, and sympathy for the comparatively weak in contests against the strong and the powerful is one of the noblest attributes of human nature. The jury undoubtedly yielded to this natural sympathy, and this is probably the explanation of their verdict. While we cannot be surprised that this sympathy should be felt by them, it is nevertheless the duty of both courts and juries to remember, and in that our safety rests, that courts are organized for the administration of justice, and the law knows no difference so far as their rights, as they shall appear from the evidence, are concerned, between individuals and corporations.

We have carefully deliberated upon the conclusion which we have reached, and are satisfied that we could not be justified in permitting the verdict in these cases to stand. And we make this order—That the defendants' motion for a new trial will be granted, unless the plaintiffs' counsel will remit on the basis of a total loss of $30,000, in which case, on the defendants filing a waiver of all error and right to appeal, the motion for a new trial will be denied.

After consideration the plaintiffs complied with the condition required of them by filing a remittitur, and the companies complied with the condition required of them by stipulating to waive errors, and judgment was entered accordingly.

WIEDE v. INTERNATIONAL INS. CO. See Case No. 17,617.

Case No. 17,618.

In re WIEGAND.

[14 Blatchf. 370.] [1]

Circuit Court, S. D. New York. Dec. 29, 1877.

EXTRADITION PROCEEDING—FINDING OF COMMISSIONER—CONCLUSIVENESS.

In a case of extradition, before a United States commissioner, where he has before him legal and competent evidence relating to the charge against the accused, it is his judicial duty to judge of the effect of such evidence, and neither the duty nor the power to review his action thereon has been conferred on any other judicial officer.

[Cited in Re Fowler, 4 Fed. 317.]

[In the matter of Eberhard Wiegand. On habeas corpus.]

Abram J. Dittenhoefer, for accused.

Edward Salomon, for the German Government.

BLATCHFORD, District Judge. It is admitted that the offence of embezzling public money is within the treaty, and that the documentary evidence put in on the part of the German Government is properly authenticated under the act of congress, and is legally evidence under said act, to be considered on the question of the criminality of the accused. It is also conceded that the accused is to be regarded as having been

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

committed by the commissioner for extradition for the offence charged, of having embezzled public money.

The counsel for the accused contends that the commissioner ought not to have committed the accused for extradition, because he had not before him evidence of a competent character sufficient to establish probable cause to believe the accused guilty of the crime of embezzling public money. The commissioner had before him, as evidence on that subject, what purported to be a letter from Wiegand, of June 5th, 1877, and sundry entries made by Wiegand in books kept by him. The commissioner was the sole judge of the weight to be given to this evidence, subject only to a review by the president. There was sufficient evidence before him for him to say that he was satisfied, on legal grounds, that the letter in question was proved to have been written by Wiegand, and that the entries in question were made by the hand of Wiegand. It is determined in this court (In re Stupp, [Case No. 13,563]; In re Vandervelpen [Id. 16,844]) that, in a case of extradition before a commissioner, where he has before him documentary evidence from abroad, properly authenticated under the act of congress, and such as is made evidence by such act, and which relates to the charge against the accused, it is the judicial duty of the commissioner to judge of the effect of such evidence, and that neither the duty nor the power to review his action thereon has been conferred on any other judicial officer. This province of the commissioner extended to a determination of the question as to whether the embezzlement was a continuing embezzlement.

I do not consider the case as to the crime of forgery, for, the accused is legally held in custody under the warrant of arrest and the commitment thereon, which warrant and commitment are for the crime of embezzling public money as well as for the crime of forgery, and this is a proceeding on habeas corpus, and not a proceeding in review of the action of the commissioner, as on a writ of error.

The writs of habeas corpus and certiorari are discharged, and the accused is remanded to the custody of the marshal under the process returned as the cause of imprisonment.

Case No. 17,619.

In re WIELARSKI.

[4 Ben. 468; [1] 4 N. B. R. 390 (Quarto, 130).]

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

BANKRUPTCY—PENDENCY OF PREVIOUS PROCEEDINGS—STAY.

If a bankrupt files two petitions, setting forth the same debts, and the first one is still pending, proceedings under the second one will be stayed.

[Cited in Re Flanagan, Case No. 4,850.]

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

In December, 1868, the bankrupt [Jacob Wielarski] filed his petition, and was adjudged a bankrupt, and an assignee was appointed. That proceeding being still pending, the bankrupt filed another petition, in December, 1870, setting forth the same debts, which was referred to a different register. At the first meeting of creditors, a creditor appeared and objected to any action during the pendency of the previous proceedings. The register was of the opinion that the objection was well taken, and certified the question to the court, as follows:

[I, Edgar Ketchum, one of the registers of said court in bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr. J. P. Solomon, who appeared for the bankrupt, and Mr. Henry Brash, who appeared in person, as one of the creditors of the said bankrupt. The bankrupt, in December, 1868, filed in this court his petition in bankruptcy, and it was referred to Mr. Register Allen, who made adjudication thereon, and issued his warrant for the first meeting of creditors, which was held, and at which an assignee was appointed. The matter of said petition is still pending, without any discharge or discontinuance, and, while so pending, the bankrupt filed his petition in this matter in December, 1870, and the same debts are set forth and the same creditors named in both petitions. Mr. Brash, now attending the first meeting of creditors in this matter before me, objects to proceeding for a choice of assignee herein, during the pendency of the former petition, on the ground of irregularity, which he insists the court will not allow, and I am of opinion that his objection is well taken.] [2]

BLATCHFORD, District Judge. The register is correct in his view. The clerk will enter an order staying further proceedings in this matter until the further order of the court. If any good reason exists for going on with the proceedings in this matter, it may be shown to the court.

Case No. 17,620.

In re WIENER.

[14 N. B. R. 218; [1] 3 N. Y. Wkly. Dig. 95.]

District Court, D. Massachusetts. March 31, 1876.

BANKRUPTCY—WITHDRAWAL OF PROOF—LEAVE OF COURT.

The power of the court to authorize a creditor to withdraw a proof that has been filed inadvertently is wholly discretionary, and will

[2] [From 4 N. B. R. 390 (Quarto, 130).]

[1] [Reprinted from 14 N. B. R. 218, by permission.]

not be exercised merely for the purpose of allowing a creditor to continue an arrest of the bankrupt which was made before the commencement of the proceedings in bankruptcy.

In bankruptcy.

LOWELL, District Judge. Swett, Bullock & Co., creditors of the bankrupt, allege that they made proof of their debt at the first meeting by mistake, and wish to withdraw it, for the reason that a suit is pending by them against the bankrupt, in which he was arrested on mesne process, and that they believe they can show such fraud on his part as will enable them to prevent his discharge from such arrest. These creditors voted at the first meeting, and one of them was elected assignee, and accepted the trust, but they afterwards, on the same day, presented this petition to withdraw, being informed by counsel that the proof might operate to discharge the bankrupt from arrest.

The petitioners say they bring themselves within the words used by me in Hubbard's Case [Case No. 6,813], of persons proving under a mistake of law, but being able to restore all things to the position they were in when the proof was made. This may be so, but the whole law is not often decided in one case. The power of the court to authorize creditors to retract a mistake is one that is wholly discretionary, and must be so. If the proof discharges the arrest, its withdrawal may reinstate it, no actual discharge having occurred in the meantime; but is this such a restoration as a court ought to grant? The purpose of the law of imprisonment for debt in Massachusetts is to oblige a fraudulent debtor to pay one creditor; and the charges of fraud and their consequences are merely a means to this end; but they are very stringent means, and if certain frauds are proved, the debtor may be sent to prison, as a convict, unless he pays the debt. Such a payment by a bankrupt would be illegal, and he might be sent to jail by this court for making it, and I am asked to restore the bankrupt to this position. If the expectation is that payment may be made by his friends, there is no reason that I should put this coercion upon them. The state law is plainly made for solvent persons who are dishonest and trying to defraud the plaintiff. No good reason has ever been given for the omission by congress to discharge from arrest persons already in custody at the time of the bankruptcy, and if the creditor himself has released him, though by inadvertence, I know of no good reason why I should interfere to return him to custody. If by this means any good could probably result to the general creditors, or any rights of property or liens be restored to an inadvertent creditor, I should, of course, order it. This is the meaning of Hubbard's Case. In this I make no such order. Petition denied.

Case No. 17,621.

WIENER v. The RAFAEL ARROYO.

[4 Am. Law J. (N. S.) 81; 5 Pa. Law J. Rep. 52; 26 Hunt, Mer. Mag. 337.]

District Court, E. D. Pennsylvania. July 25, 1851.

AFFREIGHTMENT—NONDELIVERY OF CARGO—BILL OF LADING—RIGHTS OF FACTOR CONSIGNEE.

[A factor consignee, who is in advance to the shipper, acquires, by the execution and delivery of a clear bill of lading, a property in the goods, and a right to their delivery by the ship, which cannot be divested by any subsequent acts of the shipper and the master.]

[This was a libel in admiralty by Heinrich Wiener against the Rafael Arroyo for the nondelivery of certain goods.]

Porter & Fisher, for libellants, cited Abb. Shipp. (Am. Ed.) p. 400; Howard v. Tucker, 1 Boyd, Adm. 712; Pickard v. Sears, 6 Adol. & E. 474; Berkley v. Watling, 7 Adol. & E. 29; Lickbarrow v. Mason, 2 Term R. 76; Keener v. Bank of U. S., 2 Barr [2 Pa. St.] 239; Newbold v. Wright, 4 Rawle, 212; Iddings v. Nagle, 2 Watts & S. 22; Bolton v. Colder, 1 Watts, 363; Rapp v. Palmer, 3 Watts, 179; The Reeside [Case No. 11,657].

Gerhard & Henry, contra.

KANE, District Judge. This is the case of a libel by the consignee of goods for a failure to deliver them according to contract. Schleicher & Co., manufacturers at ——, sent certain goods to Bremen, to be there shipped by Bachman, a forwarding merchant, to the libellant, Wiener, at Philadelphia. The city of Bremen is not accessible to large vessels, and it is the practice, in consequence, to transport goods that are intended for exportation, by lighters to Bremen-haven, some miles lower down the Weser, where they are received on ship board. The bill of lading is signed when the goods are delivered to the lighterman; and as it is known with certainty beforehand whether the ship will be able to carry all the goods that come down for her to Bremen-haven, the custom is said to prevail of giving the master a memorandum of defeasance called a "revers," by which the bill of lading is declared to be null as to the part of the cargo not actually taken on board. Bachman sent down the goods by a lighter, taking from the master of the Rafael Arroyo a clean bill of lading, in which Wiener was named as consignee, and executing at the same time the customary "revers." The goods, however, were either not received on board the vessel in consequence of her being already full, or they were landed again after she had proceeded some miles, in consequence of her being obliged to return to have her cargo restowed. The bill of lading came to the libellant by the vessel, with a letter of advice from Bachman, which however made no mention of the "revers;" but the goods of course were not delivered in Philadelphia according to the terms of the bill. They arrived

in another ship some weeks afterwards, and while this suit was pending.

So far as third persons are concerned, the master and his vessel are bound absolutely by the terms of the bill of lading. No agreement or understanding between the parties to the shipment can vary or affect this liability. Stille v. Traverse [Case No. 13,444]. The asserted usage of the port of Bremen may interpret and define the reciprocal engagements of the shipper and the carrier, for the bargain between them must be understood as made with reference to it. But as to the rest of the world, the bill of lading is a negotiable instrument known as such to the law merchant every where and the obligations which it imports appear upon its face.

The real question in this case is whether the libellant had a property in the goods before their arrival and delivery to him; for if he is merely the representative of the shipper, his rights may perhaps be restricted by a reference to the Bremen usage. In general, it is true that as against the shipper a factor consignee has not such a property until the goods are actually in his possession, even though he be also a creditor; unless there has been some act of appropriation to his use by the shipper, something to indicate that the shipment was intended for the protection at least of the factor. Kinlock v. Craig, 3 Durn. & E. [3 Term R.] 122, 787; Walter v. Ross [Case No. 17,122]. But as between the carrier and the consignee the law is different. The factor consignee acquires by the execution and delivery of the bill of lading a qualified or contingent interest which it is not in the power of the carrier nor except under certain circumstances of the shipper, also to divest or question. See Anderson v. Clark, 2 Bing. 20. The right of the consignee to sue in assumpsit or in trover at his election assumes this. Now the fact is not disputed that the libellant was at the time of shipping, and has since continued to be, in advance to the shippers; and there is nothing from which we can infer that the shipment was not intended to secure him for his current advances. The shipper does not stand in his way. The decree therefore must be for the libellant for costs; the goods having since been delivered to him.

P. C., decree accordingly.

WIESTER (JEFFRIES v.). See Case No. 7,254.

Case No. 17,622.

WIGFIELD v. DYER.

[1 Cranch, C. C. 403.] [1]

Circuit Court, District of Columbia. June Term, 1807.

AMENDMENT OF PLEADING.

When leave is given to amend on payment of costs, the payment is not a condition precedent, unless so specially expressed in the order.

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

There had been a plea in abatement, upon which the plaintiff had leave to amend on payment of costs. The amendment was immediately made at the last term, no costs being paid; and a rule laid on the defendant to plead, which rule had not been complied with.

Mr. Morsell, for plaintiff, moved for judgment on the rule to plead.

F. S. Key, for defendant, objected that the plaintiff had not paid the costs and therefore ought not to have the benefit of the amendment and his rule. And the court at first inclined to that opinion, considering the payment of the costs as a condition precedent. But on reflection and inquiring of the bar as to the practice, and on examining the court's notes of cases, and finding no case in which the question had been before made,—

THE COURT said that they understood the general practice to be not to insist on the payment of costs in such cases as a condition precedent. However, there might be cases in which the court, in their discretion, would direct the costs to be first paid.

WIGG, Ex parte. See Case No. 2,348.

Case No. 17,623.

In re WIGGERS.

[2 Biss. 71; [1] 2 Chi. Leg. News, 385.]

District Court, N. D. Illinois. Nov., 1868.

BANKRUPTCY PROCEEDING—DISCHARGE—JUDGMENT FOR TORT—RELEASE FROM ARREST—JURISDICTION OF DISTRICT COURT.

1. A judgment for tort is discharged under the bankrupt law.

[Cited in Hun v. Cary, 82 N. Y. 80.]

2. A bankrupt arrested under a ca. sa. issued upon such a judgment will be released by this court, even though the state court had refused so to do.

[Cited in Ex parte Schulenberg, 25 Fed. 212.]

3. The jurisdiction of the district court is exclusive, and its authority paramount, and it will protect the bankrupt in the manner contemplated by the law.

4. As to arrest, there is no distinction between mesne and final process.

[Cited in Re Pitts, Case No. 11,190.]

Thomas had recovered a judgment for a tort against Wiggers in the state court. On the 18th of May, Wiggers filed his petition in bankruptcy, scheduling this judgment. On the 23d, Thomas sued out of the state court a capias ad satisfaciendum on his judgment, under which Wiggers was arrested on the morning of the 25th. Afterwards, on the same day, Wiggers was duly adjudicated a bankrupt by the register. The state court having refused to release the debtor—holding that the judgment creditor might prove his claim in bankruptcy, or hold the defendant in custody at his election, and that the ca.

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

sa. is not a "civil action," nor included in the clause for the prevention of arrest—this application was made for an order to discharge the debtor from arrest.

Spafford & McDaid, for creditor.
Hervey, Anthony & Galt, for bankrupt.

DRUMMOND, District Judge. The only question is as to the true construction of the last clause of the 26th section of the bankrupt law. This judgment was recovered for a tort, but it is still a debt, because it has passed into judgment. It is clear that the bankrupt law intends to discharge the debtor from debts or judgments obtained for a tort, as well as on simple contracts. Otherwise it would have placed them among the exceptions in the section.

There is no distinction between an arrest on mesne and final process. To be sure, before judgment, this claim is, as it were, in fieri, and after judgment it becomes res adjudicata; but so far as arrest is concerned the intent and object of this clause in the bankrupt law are the same.

The fact that an application has been made to the state court cannot be considered as final and binding. The main point is whether this law is paramount, and whether it is the duty of this court to see that a suitor within its jurisdiction is protected in the manner contemplated by law. This law gives exclusive jurisdiction to this court, and declares in what manner proceedings shall be instituted and continued. It was obviously the object of the law to bring the bankrupt at all times within the control and disposition of this court, and the state courts cannot have control over the bankrupt in a manner different from that authorized by the law itself.

Debtor discharged.

See In re Book [Case No. 1,637], and Comstock v. Grout, 17 Vt. 512.

WIGGIN, Ex parte. See Case No. 17,060.

Case No. 17,624.

WIGGIN v. COFFIN.

[3 Story, 1.] [1]

Circuit Court, D. Maine. May Term, 1836.

MALICIOUS PROSECUTION—EVIDENCE OF MALICE—EXCESSIVE DAMAGES—NEW TRIAL.

1. Malice, in the sense of the law, does not presuppose personal hatred or revenge, but may, under certain circumstances, be implied either from a total want of probable cause, or from gross and culpable omission to make suitable and reasonable inquiries.

[Cited in Hamilton v. Smith, 39 Mich. 229.]

2. Any act is malicious, which is wrongfully and willfully done, with a consciousness that it is not according to law or duty.

[Cited in Gee v. Culver, 13 Or. 600, 11 Pac. 302.]

3. To support an action for a malicious prosecution, it must appear that the prosecution was both malicious and without probable cause.

[Cited in Folger v. Boyington, 67 Wis. 447, 30 N. W. 715.]

4. A new trial will not be granted for the purpose of introducing evidence, which, although newly discovered, is merely cumulative, or which was either known before, or might, by due diligence, have been discovered before the former trial. A verdict will not be set aside unless there be strong ground to believe, that the jury acted under some gross mistake of law or of fact, or under some improper bias, or undue influence.

[Cited in Taylor v. Carpenter, Case No. 13,785.]

[Cited in Florida Ry. & Nav. Co. v. Webster, 5 South. 720, 25 Fla. 421; Pegram v. Stortz, 6 S. E. 503, 31 W. Va. 253.]

5. Where, in an action for a malicious prosecution, the defendant openly admitted the innocence of the plaintiff, although he insisted, that he acted in the prosecution from probable cause, and the plaintiff admitted, that the defendant acted without bad motives, although rashly and improperly, and the jury gave a verdict for $1,500, it was *held*, on a motion for a new trial, that the present case was a case for compensatory and not for vindictive damages, and that, as the damages were excessive, the verdict should be set aside, and a new trial granted.

Case for a malicious prosecution. The declaration charged—that the said [George W.] Coffin, maliciously contriving to injure the said [Benjamin] Wiggin and to destroy his character and reputation, falsely, maliciously, and without any just or probable cause, made complaint and swore before the police court of Boston against the said Wiggin, that he, with one Walter Janes and others, at Bangor, did, on the 15th day of June last past, unlawfully and wickedly conspire together to defeat the sale of the lands of the commonwealth of Massachusetts offered for sale at public auction on the 19th day of June in Bangor, by bidding therefor, under a false pretence of purchasing the same, a greater sum than any other person would offer, whereby the said land was struck off to him and them, the sale thereof being thereby defeated, and the said commonwealth being thereby defrauded; that the said Wiggin, in virtue of a warrant sued out upon the said complainant, was arrested and brought before the said court at a distance of 250 miles from his home, and in a state other than that wherein he had his usual abode, and was ordered to recognize in the sum of $1,000 to appear and answer before the said court at a future day; that the said Wiggin was kept under arrest for eighteen days, within which time he was brought before the said court at four different times, at which the said Coffin was witness against him; and that the said court, after a full hearing of the case, adjudged that the said Wiggin was not guilty, and that there was not probable cause to believe that he was guilty, of the said supposed offence, and caused him to be discharged out of custody. The damages were laid at $5,000. Plea, the general issue.

At the trial at May term, 1835, a great deal

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

of evidence was offered on each side, the substance of which was as follows: To support the issue on his part, the plaintiff offered in evidence a complaint made by the defendant against the plaintiff before the police court in Boston, on the 20th July, A. D. 1833, charging the plaintiff with a conspiracy with one Janes et als. to defraud the commonwealth of Massachusetts: and a warrant founded on the said complaint, upon which the plaintiff was arrested and carried before the said court. He also offered a copy of the record of the said police court, by which it appeared, that, after examination, it was adjudged, that there was no probable cause to believe, that the plaintiff was guilty, as set forth in the complaint, and he was finally discharged.

The plaintiff also introduced Walter Janes as a witness upon the stand, who testified, that he was at the land sale at Bangor, which had been before referred to, and after he had bid off the three first townships, the plaintiff, who was also there, said to him: "Let me bid, as they will not run me, as they will you," and he accordingly bid upon one, which was struck off, and his (Wiggin's) name was mentioned as the purchaser, upon which he immediately said to the auctioneer: "Don't use my name," and some one then gave the name of Huntingdon. That the bidding by Wiggin was for him (Janes). That he never had any conversation with Wiggin previous to the sale about bidding at the sale. That he never saw Wiggin from the time he first learnt there was to be such sale, until he saw him at Bangor on the day immediately preceding the sale. That he did not know that Wiggin had any knowledge of his (Janes's) intention to bid. He further testified, that the defendant never asked him to exhibit any authority, or if he had any, and never asked him to perform the conditions of sale. That the defendant appointed Tuesday then next to meet him at the land office in Boston, to carry the sale into effect, but the defendant was not there on Tuesday as agreed. That he never told the defendant, that there had been an agreement between himself and a man at the eastward to bid off at the sale. That he never told him that he had seen the same person in Boston both before and after the sale. That he never told him, that while in Bangor, a paper of instructions was drawn up in Judge Williamson's office, and no such paper ever was drawn up. That he never insinuated, or gave Coffin to understand, that Wiggin was concerned in the transaction, and that the defendant never inquired, before the making of his complaint, whether Wiggin was concerned or not. That he never received any money or check from Wiggin in relation to that business, and that he never gave the defendant to understand, that he had received any money or pay from Wiggin. That he inquired of Coffin at the police court why he put Wiggin's name into the complaint, to which defendant replied, that it was necessary to do that in order to get hold of him (Janes). That he also asked the defendant, if he had seen the affidavits made by himself and Wiggin, to which he replied, that he had. The witness then asked him if he was satisfied, that Wiggin had nothing to do with the business, to which he made no answer. That at the hearing before the police court the defendant testified, that it was not Wiggin, who gave the name of Huntingdon as the purchaser of the lot knocked off to Wiggin's bid, and that the defendant never mentioned Wiggin's name to the witness, either verbally or in writing, before he made the complaint, nor ever gave any intimation, that he attributed any blame to the plaintiff before he appeared in the police court, and that the witness told the defendant, that he was surprised, that he put Wiggin's name into the complaint, as he had nothing to do with the business. On cross examination he testified, that he did not inform the defendant before the sale, that he was authorized to bid for Huntingdon. That he once borrowed a sum of money, a little over a hundred dollars, of the plaintiff, for which he gave him his note, and soon afterwards paid it. That this was before the sale, and before his failure in business, which was in April. That witness boarded in the same house with the plaintiff from the middle of February to the first of March, and that the witness never saw him afterwards until he met him at Bangor the day before the sale. That he thought, that the money, which he had before stated he had borrowed of the plaintiff, was borrowed and repaid while they boarded together.

The plaintiff also introduced Samuel Veazie as a witness, who testified, that the defendant was reputed to be a man of property, and Thomas A. Deblois, who testified, that the house, which the defendant occupied in Boston, was worth from twelve to fifteen thousand dollars.

The defendant also introduced the deposition of N. O. Pillsbury, which is on file, and John Godfrey as a witness, who testified that he saw the plaintiff in Boston, in the latter part of April, 1833—he could not say whether it was before or after the land sale before referred to had been advertised.

W. P. Fessenden and Mr. Sprague, for plaintiff.

Godfrey & Longfellow, for defendant.

STORY, Circuit Justice, in summing up to the jury, said: There were two things, which must concur in the present case to entitle the plaintiff to recover. The first is the want of probable cause for the prosecution. The second is malice in the defendant in carrying on the prosecution. If either ground fail, there is an end of the suit. The learned counsel for the defendant has insisted, that where all the facts are proved, the question, whether there is probable cause or not for the prosecution is mere matter of law. Perhaps in the abstract this may be

in a certain sense true, where all the facts and circumstances are fully admitted and established. But even then, it is difficult to say, whether the question of probable cause is not an ultimate question of fact, to be determined by the jury under the exposition of the law by the court, applicable to the point.

In the present case, the jury must look to the whole evidence in order to arrive at the proper conclusion; for the facts are not all admitted; and in the conflict of evidence the jury must necessarily pass upon the comparative value and credibility of the testimony on each side. In respect to the question of probable cause it will mainly turn upon the following considerations. If the jury find that Wiggin was intimate with Janes in Boston in the months of February, March, and April, and after the advertisement by Coffin, as agent of the state of Massachusetts for the sale of the public lands at Bangor; and that Wiggin knowing Janes to be insolvent was apparently acting in concert with Janes at the sale, and did, in the name of Huntingdon and as his agent, actually bid off the township, and authorized it to be set down to Huntingdon as the highest bidder, having no authority so to do; or that Wiggin, acting in concert with Janes for a fraudulent and secret purpose of their own, and knowing that Janes had no authority from Huntingdon, allowed and countenanced Janes in having it set down to Huntingdon as the highest bidder; and further, that Janes made the statements to Coffin, which Coffin afterwards related to the attorney general of Massachusetts as testified to in the deposition of the latter; then it seems to me, that these facts, so established to the satisfaction of the jury, would constitute a probable cause for the prosecution on the part of Coffin, if he firmly and sincerely believed them, and had no knowledge of any other facts or circumstances, which ought to control the natural inferences derivable from them. These facts and circumstances seem in the evidence to be so connected together as to their bearing and influence on the case, that it is difficult to separate them, without impairing the force of all. They are links in one common chain of evidence, where one that is broken may essentially impair the use of the whole. If, on the other hand, the jury are not satisfied, that, in substance, the foregoing facts and circumstances are made out, so as justly to lead to a common presumption of their being parts or links of one meditated transaction, that does not seem a solid ground upon which to rest the conclusion that a probable cause for the prosecution is made out.

In respect to the other point, whether the prosecution was malicious, as well as without probable cause, (for both must concur to support the action), malice may be justly deduced from the total want of probable cause; for in the sense of the law that is a malicious act which is done wilfully by a party against his own sense of duty, and right. It has been truly said, that an act unlawful in itself and injurious to another is considered both in law and reason to be done with a malicious intent (malo animo) toward the person injured. Duncan v. Thwaites, 3 Barn. & C. 556. Malice in the sense of the law does not necessarily presuppose in the party a personal hatred or revengeful spirit against the party injured. It is sufficient to constitute it a malicious act, that it is wrongfully and wilfully done, with a consciousness that it is not according to law or duty. See Dexter v. Spear [Case No. 3,867]; Duncan v. Thwaites, 3 Barn. & C. 556; Pattison v. Jones, 8 Barn. & C. 578; Bromage v. Prosser, 4 Barn. & C. 247. See, also, U. S. v. Coffin [Case No. 14,824]; U. S. v. Taylor [Id. 13,624]. Mr. Justice Bayley laid down the true exposition in an important case, and said: "Malice in common acceptation means ill-will against a person; but in its legal sense it means a wrongful act done intentionally and without just cause or excuse." Bromage v. Prosser, 4 Barn. & C. 247, 255. And malice may not only be presumed from the total absence of probable cause; but also from gross and culpable negligence in omitting to make suitable and reasonable inquiries. A fortiori, it may be properly inferred, where the party has been guilty of gross misstatements for the purpose of misleading the prosecuting officers of the government, and to influence them to give wrong advice as to the right and duty to prosecute. If in the present case Coffin was guilty of wilful misstatements to the attorney general of Massachusetts for such a purpose, it would afford a very strong presumption of malice.

Verdict for plaintiff, $1,500.

A motion was subsequently made for a new trial, and argued at May term, 1836 (at Portland).

Godfrey & Greenleaf, for defendant.
Fessenden & Sprague, for plaintiff.

STORY, Circuit Justice. The motion for a new trial has been made upon two grounds: (1) Newly discovered and cumulative evidence. (2) That the damages are excessive. In respect to the first ground, the evidence is to the following points: (1) Wiggin's conduct at the sale of the land, his bidding off the same, and Janes being present. (2) Wiggin being in Boston and his intimacy there with Janes. (3) The discovery of Mr. Attorney General Austin's original letter. It is a general rule, that a new trial will not be granted for the purpose of introducing mere cumulative evidence, although newly discovered. For this I need not do more than refer to the cases of Ames v. Howard [Case No. 326], Steinbach v. Insurance Co., 2 Caines, 129, Smith v. Brush, 8 Johns. 84, and Pike v. Evans, 15 Johns. 210. Nor will a new trial be granted where, by due diligence, the facts

might have been discovered before the former trial. And this is strongly applicable to the letter of Mr. Attorney General Austin. A fortiori it will not be granted where the defect became known to the party at the trial, and he then had an opportunity of applying to the court for a continuance of the cause, to enable him to procure the evidence, and he elected to proceed with the trial. This is directly applicable to the same letter; for a copy was produced at the trial, and offered as evidence and rejected; and no delay was then asked for to search for or to obtain the original. In each of these views we should feel great difficulty in granting a new trial to let in the new or cumulative evidence. Neither will the court grant a new trial merely upon the ground, that the jury have come to a different conclusion as to the facts, or drawn a different conclusion from the facts, from that to which the court would have arrived, if it involved no palpable mistakes of law or fact. To justify the court in granting a new trial in cases of this sort, there must be strong ground to believe that the jury have acted under some gross mistake of law or fact, or under some improper bias, or some undue influence, which misled their judgment.

Then as to the second point, the excessive damages. It is here material to consider the state of the case as it was presented at the trial. It then turned altogether upon the question, whether the defendant had probable cause for the prosecution and whether he acted from malice. To establish the plaintiff's right to recover, it was necessary to show, that the defendant acted not only without probable cause, but also from malice. Both were requisite to be proved on behalf of the plaintiff in order to sustain the action. Malice might be inferred from the want of probable cause, under many circumstances, but it does not necessarily flow as a consequence from the want of probable cause. Now, at the trial, the plaintiff expressly admitted, that the defendant was not governed by any malignant motives, or bad passions, or wilful purposes. But the argument was, that his conduct was grossly rash, and against his true sense of duty, and under improper excitement. On the other hand, the defendant admitted, that he was now satisfied, that the plaintiff was not guilty of any offence; but he insisted that he, the defendant, acted at the time of the prosecution upon probable cause, and without any sort of malice, either in fact or in construction of law. What are the facts in evidence? The defendant was a public officer; and the question was whether he really acted within the line of his duty, and from a sense of duty, or otherwise. He asked the advice of the attorney general. Did he honestly state the case to the attorney general as he then believed the case to be? Did he honestly act under the advice of the attorney general? These constituted the chief grounds of inquiry upon which his defence rested at the trial.

The principal grounds on the other side to establish the want of probable cause and malice were: (1) That the crime was alleged in the complaint to have been committed in Boston; yet there was no proof that the plaintiff was at the time there, or entered into any conspiracy there. The plaintiff was in Boston before the 3d of March; but the defendant wholly failed in proving that he was there after that day. But it might nevertheless be true, that the defendant might have been informed and might have sincerely believed, that the plaintiff was in Boston after that day. Indeed, if Janes told him, what he asserted to the attorney general, Janes had told him, he had probable ground for believing it to be a fact. But it was said that Janes never gave any such information to the defendant, as the defendant asserted to the attorney; and if so, and the defendant wilfully misrepresented the fact to the attorney general, it was doubtless proof of malice. Janes certainly denied, that he ever gave such information to the defendant. And if his testimony was to be believed, then it was strong evidence against the defendant. But it was impossible not to feel at the trial, that Janes' credit was shaken, and that his testimony was open to many grave objections, that ought to have withdrawn from it any great credit. But the jury must have acted upon it and given it entire credit, or they could not have given their verdict for the plaintiff. Indeed they must have believed from that testimony, that the defendant acted from wilful, meditated malice, or they could not have given such a verdict as they did give. It is true that a court of law will not set aside a verdict upon the ground of excessive damages unless in a clear case, where the jury have acted upon a gross mistake of facts, or have been governed by some improper influence, or bias, or have disregarded the law. See Thurston v. Martin [Case No. 14,018]. But then in many cases the court is driven to such a conclusion from the actual circumstances in evidence, and the line of defence. If in the present case there was on the part of the defendant a want of probable cause; yet if he acted under a mistaken sense of duty, and without any intention of oppression, it was, at most, a case for compensatory and not for vindictive damages. It was a case for such compensation in damages as might fairly be allowed not only for the injury done to him, but also for the expenses, which he had incurred in vindicating his character from such an accusation. But as the defendant openly and freely admitted at the trial the entire innocence of the plaintiff, and attempted no justification, it was certainly not a case for vindictive damages. We think, that, under all the circumstances, the damages were excessive. The jury mistook their proper duty, and went far beyond what the facts and the law would justify. There was not even the ground shown, that the defendant was a

person of much property. Under such circumstances the question with the court has been, whether the verdict should be set aside absolutely, or to give the plaintiff an election to remit what the court should deem to be a clear excess. If we were satisfied that the case was a clear one, for reasonable damages, we might incline to adopt the latter course, as was done in Blunt v. Little [Id. 1,578]. But we are not satisfied that the case upon the evidence was a clear one for any damages. To say the least of the matter, we greatly doubt, and should have been better satisfied with a verdict for the defendant.

A new trial is therefore ordered; but the plaintiff must pay as a consideration of the new trial all the costs of the suit up to the present time. A new trial ordered.

The action was afterwards settled by the parties, and no new trial was had.

Case No. 17,625.

WIGGIN v. DORR.

[3 Sumn. 410.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1838.

PLEDGE OF INSURANCE POLICY—RIGHTS AS AGAINST COMPANY—SET-OFF—MARSHALLING OF SECURITIES.

1. Wiggin advanced money to Barrett & Brown, taking as collateral security the assignment of a policy of insurance for $10,000, underwritten by the American Insurance Company, on merchandise, being the proceeds of the money advanced. The ship containing the merchandise was lost at sea. Barrett & Brown also obtained from the American Insurance Company a loan of $7,000 on a bottomry bond on the ship Tim, wherein Dorr was surety. This ship performed her voyage safely; but Barrett & Brown had in the mean time failed. The American Insurance Company took possession of the ship, sold her, and applied the proceeds, so far as they went, to the payment of the debt of $7,000. They did not proceed against the surety Dorr, for the balance; but, on his promise to indemnify them, retained from the loss on the policy above mentioned a sum sufficient to cover the balance (about $2,826.12). *Held*, that Wiggin was entitled to the whole sum of $10,000 insured by the American Insurance Company, as the fund out of which his advances were to be paid, without deducting any claims of the company against Barrett & Brown; that his money was lent upon this specific security; that he has a prior and superior equity over the surety, Dorr; and that he has a right to be substituted in equity to the claim of the company on the bottomry bond against Dorr, to the extent of the sum detained by them.

2. The election of a creditor to retain or recover a debt from one of two parties, or out of one of two funds, no matter how positive may be his right to this election, cannot vary in a court of equity their rights inter sese.

3. Whoever has bona fide acquired a specific right to a thing belonging to a debtor is entitled to hold it against all persons who cannot show a higher equity.

4. A surety is entitled to the protection of a court of equity; also sub modo to the benefit of all the securities which the creditor has.

[Cited in Lyon v. Bolling, 9 Ala. 463.]

Bill in equity [by Timothy Wiggin against John Dorr]. The facts of the case were as follows: On the 5th of September, 1833, Robert Hooper, Jr., of Boston, as agent of the plaintiff, who is a resident banker in London, entered into an agreement with Messrs. Barrett & Brown, of Boston, whereby Stephen Jarvis, of the brig Tim, was authorized to value and draw bills at the Brazils upon the plaintiff, not exceeding £3,000 sterling, at sixty days' sight, for account of Messrs. Barrett & Brown, for the costs of shipments to be made for them, and put on board the said brig for the United States, upon condition that the invoices and bills of lading of the shipments should be forwarded to Hooper at Boston, and consigned to his order. The brig proceeded on her voyage; the bills were drawn on the plaintiff, and duly paid; and the shipments (coffee) were put on board, and were consigned to Hooper, and safely arrived at Boston, in February, 1834, the invoice value thereof being about $17,185. A negotiation was then entered into between Barrett and Brown, and Hooper, for the plaintiff, and Samuel Putnam, of the house of Barrow, Putnam and Company, of Antwerp, by which it was agreed that the merchandise should be shipped to Antwerp, consigned to Barrow, Putnam and Company, for sale, and the proceeds of the sale were to be remitted to the plaintiff, at London. It was further agreed that Barrett and Brown should procure insurance on the merchandise for the voyage, payable, in case of loss, to the plaintiff, as collateral security for the advance, so as above stated, made by the plaintiff. The merchandise was accordingly shipped in the same month, on board of the brig called the Soule, for Antwerp, consigned to Barrow, Putnam and Company. The Soule sailed on the voyage on the 14th of the same month; but was never afterwards heard of, and is supposed to have foundered at sea. On the 8th of the same month Barrett and Brown procured a policy of insurance to be underwritten by the American Insurance Company on the said merchandise for the voyage, for the sum of $10,000, in the common form of the Boston policies; but did not, as had been agreed, cause the same policy on its face to be made payable in case of loss to the plaintiff. Hooper first discovered the omission about the 28th of June, 1834, and remonstrated with Barrett and Brown; and one of the firm then, by an endorsement on the policy, ordered the amount to be paid to the plaintiff, in case of loss. The American Insurance Company gave their assent in writing on the policy to this assignment, reserving to themselves all their rights expressed in the policy. The policy contained the following clause, common in the Boston policies. "In

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

case of loss the assured to abate one per centum, and such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium rate if unpaid, and all sums due to the company from the assured when such loss becomes due being first deducted, and all sums coming due being first paid, or secured, to the satisfaction of the said president and directors, they discounting interest for anticipating payment." Another clause of the policy was in these words: "It is also agreed that this policy shall be void, in case of its being assigned, transferred, or pledged, without the previous consent, in writing, of the assurers." There was another policy of insurance underwritten by the Suffolk Insurance Company, on the same goods, for the same voyage, for $10,000, on which similar indorsements were made. On the 17th of September, 1833, Barrett & Brown obtained from the American Insurance Company a loan on bottomry of $7,000, on a bottomry bond, executed by Barrett & Brown, as principals, and by the defendant, John Dorr, as surety, for the term of twelve calendar months, upon the bottom and freight of the brig Tim. The particular terms of the bond need not be stated. The risk safely ended, and the money became due to the company in November, 1834. Some time before the 27th of April, 1835, but how long before does not appear, Barrett & Company having failed, the insurance company, through their president, represented to Dorr that they should look to him for payment of the bottomry bond. The defendant, Dorr, protested against the claim, and insisted that the company ought to take possession of the brig Tim, and sell her, and apply the proceeds to discharge the debt, and if the proceeds were not sufficient to retain from the loss which should become due on the foregoing policy as much as would cover the balance due to the company on the bond. Dorr afterwards took the advice of counsel on the subject, and gave notice to the president of the company that he should insist upon such retainer, and resist payment. The company afterwards sold the brig Tim. And it was agreed between the company and Dorr, that they should retain from the loss on the policy sufficient to cover the balance (about $2,826.12), he, Dorr, undertaking to defend the company against any claim of the plaintiff therefor. The company accordingly deducted the balance, and paid the residue, after some other deductions to the plaintiff. The present bill was brought by the plaintiff against Dorr, to recover from him the sum of $2,826.12, so retained, upon the ground of a superior equity in the plaintiff.

C. P. & B. R. Curtis, for plaintiff.
W. J. Hubbard, for defendant.

STORY, Circuit Justice. Under the circumstances of this case, for there is no real controversy as to matters of fact, the question arises, whether the plaintiff is entitled to the relief, which he seeks. And this must, in my judgment, mainly depend upon the question, whether he has a superior or equal equity with the defendant. If he has a superior equity, then, inasmuch as the only real controversy is between the parties before the court, the insurance company having a clear right of retainer, there ought to be a decree in his favor for the full amount retained by the company, as a sum primarily to be paid by the defendant, in exoneration of the plaintiff. If there is an equal equity, then the question will arise, whether there ought not to be an apportionment equally between the plaintiff and the defendant, of the sum so retained, as a common charge or burthen upon both of them. See cases cited in 1 Story, Eq. Jur. §§ 476, 484, 497–502, 634; Aldrich v. Cooper, 8 Ves. 382.

I have said that the main question is, as to the equities between these parties before the court. For I cannot for a moment entertain the notion, that, in a court of equity, however positive may be the right of a creditor to retain or recover a debt from one of two parties, or out of one of two funds, his election to retain or recover from the one or the other can change their rights inter sese. That would be to say that a creditor might by his own caprice of choice, or exercise of discretion or private friendship, disturb the rights of third persons, or injuriously affect or extinguish their remedies. We all know, that in the common case, where a creditor may resort to two funds to discharge his debt, a court of equity will compel him to take satisfaction out of one, when the rights and interests of third persons are concerned in the other fund; and that, if he has taken satisfaction out of the latter, such third persons will often be substituted to his rights in the fund which he has left untouched. That constitutes the old head in equity of marshalling securities, in respect to which one need not do more than to refer to Lord Eldon's judgment in Aldrich v. Cooper, 8 Ves. 382, 391–394, and to the common elementary treatises on the subject. See 1 Story, Eq. Jur. c. 12, §§ 633–645, and the reporter's note to Averall v. Wade, Lloyd & G. 264–269; Clifton v. Burt, 1 P. Wms. 679, Cox's note, 1; Lanoy v. Duchess of Athol, 2 Atk. 446; Aldrich v. Cooper, 8 Ves. 382. Indeed, the principle goes further; and a mortgagee, who has two funds, as against other specialty creditors, who have but one fund, will, in case of bankruptcy or insolvency of the debtor, be compelled first to resort to the mortgage security; and will be allowed to claim against the common fund only what the mortgaged estate is deficient to pay. Greenwood v. Taylor, 1 Russ. & M. 185, 187. I must treat this case exactly as if the insurance company were parties to this bill, and before the court; and the question was, which, as between the plaintiff and the defendant, ought to be decreed to pay them the debt. Then, how stands the present case

as to the equities between the plaintiff and the defendant? In the first place, it is plain, that the plaintiff advanced his money on the bills of exchange, drawn for the benefit of Barrett & Brown, on the double security of the original consignment of the merchandise to Hooper at Boston, and the policy underwritten on the voyage from the Brazils to Boston. When the new arrangement was made between the parties at Boston, by which the merchandise so subjected to the plaintiff's lien under the original consignment was to have a new destination to Antwerp, it is equally plain, that there was no intention to yield up this lien for the advances; but solely to further the interests of Barrett & Brown by a sale of the merchandise in Europe, the proceeds to be remitted to the plaintiff in London against these advances. I consider it manifest, that Barrow, Putnam & Co., to whom the consignment for sale at Antwerp was made, were parties to this arrangement, and bound thereby; and if they had received the consignment, and sold it, they would have been responsible to the plaintiff for the remittance of the proceeds; and if they had diverted them to any other purpose, they would have been liable for a gross departure from duty. The policies, procured from the American and Suffolk Insurance Companies, were a part of the same arrangement, to secure the plaintiff a full fund of indemnity, in case of the non-arrival of the consignment and a loss thereof by the perils insured against. He stipulated, therefore, in lieu of his lien on the original consignment, for a lien on the proceeds of the property, and also for a lien on the policies for the voyage from Boston to Antwerp. That stipulation, so far as respects the policies, was not punctiliously performed by Barrett & Brown; but the omission has since been cured by their assignment upon the policies, so far as it was capable of being redressed.

Now, what was the intention of Barrett & Brown, and Hooper, the agent of the plaintiff, in regard to these policies. Was it, that the plaintiff should have the full security of the whole value of the property consigned to Antwerp by means of these policies? Or so much only, as might remain after the deduction by the offices of all sums, which were due, or might become due to them, according to the clause in the policies already cited? If the latter, then it is plain that these policies might, in reality, be no security at all to the plaintiff, or a very limited security, because the outstanding claims of the offices might absorb the whole, or a large part of the insurance, in case of a total loss. It is difficult, even for a moment, to contemplate the arrangement to have been made with any such intention, or upon any such contingency. The object of the parties evidently was to substitute another arrangement for the present fixed rights of the plaintiff over the property, by giving him an equivalent security, in each of the alternatives involved in the new voyage, viz., by an appropriation of the proceeds of the property on the sales, in case of a safe arrival at Antwerp, or of the proceeds of the policies in case of a loss and non-arrival. Nor is it by any means an unimportant circumstance that Hooper, at the time of this arrangement, was wholly ignorant and unsuspicious of any subsisting claims of the insurance companies, and especially of the claim of the American Insurance Company, on the bottomry bond. The common clause in the policies, entitling the companies to deduct from any loss the amount of their claims, would not instruct him as to the actual existence of such claims; and the agreement, that the policies in case of loss should be payable to the plaintiff, would disarm him of any suspicion of that nature. To me it appears perfectly clear that the whole arrangement proceeded upon the basis, that in case of loss, the whole sum of ten thousand dollars, insured by each of the policies, was to belong to the plaintiff, as a fund out of which his advances were to be satisfied. The assignment contemplated by the parties was not an assignment of such part of these policies, as might remain, after deducting all the claims of the companies; but an effective assignment of the whole amount insured, as the only full and substantial security of the plaintiff. The rights of the companies against Barrett & Brown, in regard to other claims, not arising out of those policies, were one thing. The rights of the plaintiff, as between him and Barrett & Brown, were quite another thing. Barrett and Brown were understood, and meant to be understood by Hooper, as assigning to the plaintiff the whole amount insured, and nothing less. If the assignment was not effectual, for the full amount, it was not, that it was not so intended; but that Barrett & Brown had not so large an interest to assign.

Taking the case in this view, it seems to me clear, that the plaintiff has the superior equity. He is to be treated, not as a creditor of Barrett & Brown, trusting to their personal responsibility; but as a creditor, lending his money upon specific securities, the consignment of the original cargo shipped at the Brazils, and the policies thereon, and then a substitution of the security of the cargo and its proceeds on the voyage to Antwerp, and the attendant policies therefor. The plaintiff, then, may properly be considered, not as a mere surety, or a mere creditor in personam, but as a creditor, having a lien in rem, and stipulating for such a lien, as the foundation of his original advances, and of his subsequent extension of the original credit, and parting with his original rights and securities for the advances. At the moment when he assented to the new voyage of the cargo to Antwerp, he stood as a purchaser pro tanto of the proceeds of the sales, and of the policies in case of a loss. He advanced a valuable considera-

tion therefor. He stipulated for, and was entitled to a specific lien in rem. As between himself and Barrett & Brown, from the moment that these policies were underwritten, they belonged to him as his own securities, specifically pledged for the advances. If Barrett & Brown had died insolvent, their general creditors could not have touched the funds; but they must have stood bound by the plaintiff's claims. Here, then, we have the case of a creditor having a specific lien on the thing, coming in conflict with a surety, who has no such lien, and has not even stipulated for it. It is true that as a surety he is entitled to the favor of a court of equity. But against whom and against what property? Certainly not against third persons, who have advanced their moneys upon specific pledges, nor against the funds so pledged by a prior appropriation. The defendant stands as a surety trusting to the personal security of his principal, taking no pledge, and preferring to have no lien on the fund. He insists that the company ought to retain the fund from the person to whom it was previously pledged, not upon the ground, that he originally trusted to it, or that he has been misled by it; but simply upon the ground, that the company, having the fund in their hands, ought to apply it to his relief, rather than to the relief of the plaintiff to whom it was previously pledged by a specific agreement. There is no doubt, that the claim is, bonâ fide, so made; and as against the principals themselves, there is no doubt that the relief ought to be granted; and that if there were any surplus in the fund, beyond the advances of the plaintiff, it ought to be applied to his relief. But the difficulty lies in seeing how his claim is to prevail against the plaintiff, who is equally a bonâ fide creditor, and has acquired against all the world but the company, a specific pledge of it for his indemnity for his advances. In truth, the defendant has not even a general lien in this case. His whole equity is to be wrought out, if at all, through the equity of Barrett & Brown, who in respect to the plaintiff, have no equity; but stand as persons in delicto. In respect to liens, courts of equity constantly make a difference between those which are specific and those which are general. The former will prevail over the latter, whenever the claim can be satisfied elsewhere. Thus, if a party indebted by judgment, settles one of his real estates, on which the judgment is a lien, with a covenant against incumbrances, a court of equity will relieve the settled estate from that lien, and throw it upon the unsettled estates. And subsequent judgment creditors have no right to displace the rights of parties claiming under such a settlement, even though it may be defective in some of its provisions; and cannot call upon such parties to contribute towards the extinguishment of the prior judgment; and à fortiori cannot insist upon the prior judgment being satisfied out of the settled estates. That was the very case of Averall v. Wade, Lloyd & G. 252, where Lord Chancellor Sugden elaborately discussed the subject; and took the distinction between cases, where the rights of third persons were concerned, in marshalling securities, and where they were not. In delivering his judgment on that occasion, the learned judge said: "A judgment creditor has not any specific lien on the land. He has only a general lien over all the estate of his debtor. A general creditor does not stand in the same right as a specific incumbrancer; and therefore in ninety cases out of one hundred, he cannot have any relief against a mortgagee, having a specific lien." Now, the defendant in this case does not stand so high as a judgment creditor, for he has not even a general lien. On the other hand, the defendant here is a specific incumbrancer; he has a specific lien on the fund for an express valuable consideration. Even if the defendant had paid the bottomry bond, his claim against the principals would have been that of a simple contract creditor, and not of a specialty creditor. That is clear from Copis v. Middleton, 1 Turn. & R. 224; Jones v. Davids, 4 Russ. 277; Hodgson v. Shaw, 3 Mylne & K. 189; Dowbiggen v. Bourne, 2 Younge & C. Exch. 471; and Reed v. Norris, 2 Mylne & C. 361.

But, then, it is said, that it is a general rule in equity, that a surety is entitled to the benefit of all the securities, which the creditor has. That is true, as Copis v. Middleton, 1 Turn. & R. 229; Mayhew v. Crickett, 2 Swanst. 185, 191; Wade v. Coope, 2 Sim. 155; and Hays v. Ward, 4 Johns. Ch. 123, 129,—fully establish. But then it is to be understood with all the qualifications belonging to the doctrine. Against whom is he entitled to these securities? Certainly not against persons who have a prior or higher equity; but solely, as these very cases show, against the principal and those who claim those securities by a posterior and dependent equity. The doctrine has other qualifications. It does not apply except to securities taken for the very debt, and the whole debt, and not to cases where the security is taken by the creditor for other debts, or for a distinct part of the same debt. Wade v. Coope, 2 Sim. 155, is direct to this point. See, also, Coope v. Twynam, 1 Turn. & R. 426, 429. Lord Eldon in Copis v. Middleton, 1 Turn. & R. 229, said: "It is a general rule, that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal. But," he adds, "the nature of these securities must be considered." Now, if one were disposed to refine upon the subject (which, however, I am not disposed to do), it might be truly said that this policy was never underwritten by the insurance company, with a view to any security at all upon the bottomry bond. The fact, that, in the event of the loss, it gave them the collateral right of retainer for that debt, was accidental, and not foreseen or designed. The policy was in no just sense taken as a security. It was rather a collateral right of set-off, arising from that transaction of all claims in general

against the assured. But it is not worth while to dwell on this peculiar circumstance. The real question, between the parties before the court, stripped of all unimportant circumstances, is, which has the best right to the fund secured by this policy, the assignee of it for a valuable consideration, without notice, or a personal creditor of the assured, to whom it has never been assigned, or promised to be assigned. It is certainly not easy to frame a doubt in equity, when the case is thus put; that he, who has a jus ad rem, and a jus in re, ought to be preferred to a creditor or surety, who has neither a jus ad rem, nor a jus in re. The principle in equity, I take to be, that he, who has, bonâ fide, acquired a specific right to a thing belonging to a debtor, is entitled to hold it against all persons, who cannot show a higher equity. The right of the plaintiff, so far as Barrett & Brown are concerned, attached to this policy from the first moment of its existence, although not consummated by an actual assignment, until long afterwards; and then the maxim applies, as to all persons claiming an equity through Barrett & Brown (which is all, that the defendant, as a surety, can claim), "Qui prior est in tempore, potior est in jure." I agree, that in this case, both parties are, in a general sense, equally innocent, and equally deserving. But one has a title to the property itself; the other has only a general claim to equity, not disturbing the superior rights of others.

Upon the whole, my judgment is, that the plaintiff has clearly the prior and superior equity to the whole of this fund; and in this view of the matter, it is wholly unnecessary to consider the question of contribution, which would arise, only if the equities were equal. I treat the case, as it has been treated at the bar, exactly as if the insurance company were now a party to the bill; and the question was, whether the company ought first to claim their debt of the defendant on the bottomry bond, or to retain it out of the loss on the policy. I think the equity of the plaintiff clear, to have the debt remain, where it primarily was, a debt on the bottomry bond, to be paid by the defendant, and not a debt to be deducted out of the policy. The company have two funds to resort to, and they are bound in equity to seek satisfaction first from the original parties to the bottomry bond. As the company have retained the amount out of the funds assigned to the plaintiff, he has a right to be substituted in equity to their claim on the bottomry bond. The case very much resembles that put by Lord Eldon in Aldrich v. Cooper, 8 Ves. 388, where, in bankruptcy, the crown by extent lays hold of all the property of the bankrupt, even against creditors, in which the crown will be confined by the court to such property, as will leave the securities of incumbrancers effectual. And Lord Eldon on that occasion, added: "This has been carried to a great extent in bankruptcy; for a mortgagee, whose interest in the estate was affected by an extent of the crown, has found his way even in a question with the general creditors to this relief; that he was held entitled to stand in the place of the crown as to those securities, which he could not affect, per directum, because the crown affected those in pledge to him." Substitute the name of the insurance company for that of the crown, and the present case is, in substance, that put by Lord Eldon, the right of retainer performing the same functions as those of the extent.

My judgment accordingly is, that the plaintiff, having a superior equity, has a good title to the relief he seeks; and that a decree ought to pass, that the defendant do pay over to him the sum of $2,826.12; which has been retained by the insurance company, in discharge of their claim under the bottomry bond.

WIGGIN (RUSSELL v.). See Case No. 12,165.

WIGGIN (SIMPSON v.). See Case No. 12,887.

Case No. 17,626.

WIGGINS et al. v. EUROPEAN & N. A. RY. CO. et al.

[1 Hask. 122.] [1]

Circuit Court, D. Maine. Jan., 1868.

JURISDICTION OF FEDERAL COURTS—DIVERSE CITIZENSHIP—CORPORATE STOCK HELD IN TRUST—INJUNCTION.

1. The circuit court has jurisdiction in equity in the district of Maine over a respondent, a citizen of New Hampshire, found in this district and here served with process, when all the orators are citizens of other states, and all the other respondents are citizens of Maine.

2. Contractors for the building of a railroad, having stock of the railroad company as security for their contract, hold such stock for the common benefit of themselves and others whom they have admitted to share in their contract, and must deal with such stock accordingly.

3. The person holding such stock for the common interest of himself and associates, will be restrained in equity from voting it in violation of the orders of an executive committee, appointed by the joint owners of the stock under a contract by which it is held for the common good.

4. An injunction should only be granted in clear cases, and with extreme caution.

In equity. Bill, brought by Wiggins, a citizen of Massachusetts, Case, Thompson and Bradley, citizens of Pennsylvania, Dennison and Smith, citizens of Ohio, and Brink, a citizen of New Jersey, against the European and North American Railway Company, John A. Poor, Allen Haines, and Charles J. Gilman, citizens of Maine, and Geo. H. Pierce, a citizen of New Hampshire, found and served with process in Maine, praying for an injunction. The bill charges that one of the orators, Wiggins, is the owner of nine shares of the capital stock of the corporation, and that all of them have a joint interest with Pierce, one of the respondents,

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

in 574 shares of the stock of the corporation, standing on the company's books in the name of Pierce and one Blaisdell, who with Pierce's assent had assigned all his interest in the same to the orator Case, and that the orators' interest in that stock was eight-tenths, and Pierce's interest in it two-tenths.

Mr. Wiggins, pro se, and Josiah H. Drummond, for orators.

William L. Putnam and Phineas Barnes, for respondents.

FOX, District Judge. The bill avers, that in August, 1865, Pierce and Blaisdell contracted with the corporation to build the railroad from Bangor to St. John; that in March, 1866, a supplementary contract was entered into between said parties, by which it was agreed that the contractors should furnish the funds for building the road to Winn, and that as security therefor, the bonds of said company then in its possession and a major part of all the capital stock then issued should be put into the hands of contractors, and that 574 shares were so placed in their hands; that on the 8th of March, 1866, Pierce and Blaisdell, not being able to carry out their contract for building the road, transferred so much of the contract and of their interest therein, as would give and secure to Wiggins, Brink, Thompson, Bradley and Smith, each one-tenth, and to such other parties as might come in and join in the agreement two-tenths, and that under this agreement Case and Dennison did become parties and were also each entitled to one-tenth interest; that one Thos. W. Pierce was also to become interested to the extent of one-tenth of said contract, but that he parted with all his interest before any division of the profits of the contract could be made; that it was stipulated that one-tenth of the whole net profits should be first paid to Pierce and Blaisdell; that it was further stipulated, that this transfer should include and carry with it any assignment or agreement which Pierce and Blaisdell may have made to obtain control of the railway company and any other railroad connected with the enterprise of building and opening the same, and that these parties shall constitute a board of control, and manage all the affairs of said company, and may act by committee, agent or proxy, and may compose or select the board of directors; that said G. H. Pierce, Smith and George K. Jewett were appointed the executive committee of said parties and expended more than $300,000 on said road, and that Case was added to the executive committee.

It is further averred that John A. Poor, one of the respondents, and one of the directors of said corporation, on the 23d day of Dec. last, presented to said directors a petition signed by himself, Gilman, Haines and others, requesting the directors to call a meeting of the stockholders of said company at the office of the company on the 13th day of January, 1868, to act on certain matters specified in said petition, and that under a by-law of said corporation authorizing the directors to fix the time and place of all meetings of the stockholders except the annual meeting, the directors did call a meeting of said stockholders in all respects in accordance with said request of Poor and others, excepting that the time of the meeting was fixed for the second Tuesday of March, 1868, instead of Jan. 13th.

The bill then charges that Poor, Gilman, Pierce and Haines, conspiring and confederating together for the purpose of injuring and defrauding your orators and embarrassing the business of constructing said railway by holding a meeting of the stockholders of said company, and by means of said stock controlling said meeting, and so, by changing the officers or appointees of the company, and by the passage of votes and resolves hostile to the interests of your orators, hinder, obstruct, and delay the construction of said railway and the work now being performed by your orators, did, on the 24th of Dec., 1867, present a petition to one Wm. H. McCullis, a justice of the peace in Penobscot county, requesting him to call a meeting of said stockholders to be holden at the Bangor House on the 13th day of January, A. D. 1868, for the purposes stated in the former petition, and that thereupon said justice did issue his warrant directed to said Gilman, authorizing him to notify a meeting of said stockholders to be holden at the time and place and for the purposes set forth in said application, and that said Gilman has notified said meeting accordingly.

The bill denies the authority of said McCullis as a justice to call said meeting, avers that there is no occasion or necessity for the stockholders to take action on any of the matters set forth in said warrant, and alleges, that if said meeting is so held, the rights and interests of Wiggins as a stockholder of the nine shares, and of all the complainants as associate contractors for the construction of said road, will be endangered, greatly injured, or totally destroyed; that Pierce had no right to sign said petition as holder of said 574 shares, and has no right solely and alone to control said stock, or to vote on the same at any meeting of the stockholders of said company, because the complainants are interested, to the extent of 87 per cent. of said stock, and that the same cannot be controlled by Pierce or any other person, except the executive committee. The bill prays that the defendants may be enjoined from holding said meeting on the 13th of January, or attending the same, or acting therein, or attempting to act upon any of the matters named in the petition for the said call, and that Pierce may be ordered and declared to hold said stock in trust for the complainants and himself in the proportions they are

interested in said contract, and subject to the order and control of the executive committee, and may be restrained from voting on said stock at the meeting called for Jan. 13th, or any other meeting, excepting under the direction and order of the executive committee.

All the respondents, with the exception of Pierce, are citizens of Maine, and upon service being made upon him in this state, he appears specially by counsel and objects to the jurisdiction of this court over him in this proceeding. His objection is, that as the complainants are not citizens of this state, each and all of the respondents who hold a material interest in the matter must be joined to give the court jurisdiction, and that the fact, that he was here found and served with process, does not change the case and give jurisdiction he being a citizen of New Hampshire.

The 11th section of the judiciary act of 1789 [1 Stat. 78] gives this court jurisdiction, "when the suit is between a citizen of the state where the suit is brought and a citizen of another state." In Moffat v. Soley [Case No. 9,688] Mr. Justice Thompson says, "It was decided very early, 1806, by the supreme court of the United States in the case of Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267, that when the plaintiffs or defendants are numerous, or consisting of more than one person, each one must be capable of suing or being sued in the circuit court, in order to give the court jurisdiction, and this has been the uniform doctrine of the court ever since." The same doctrine is found in Craig v. Cummins [Case No. 3,331]; Taylor v. Cook [Id. 13,789]; Vattier v. Hinde, 7 Pet. [32 U. S.] 252.

With this construction of the act of 1789, as made by the supreme court and many of the circuit courts, the act of Feb. 28, 1839 [5 Stat. 321], was passed, which provides that, "when in any suit at law or equity commenced in any court of the United States, there shall be several defendants, any one of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, but the judgment or decree therein shall not prejudice parties not served with process, or not voluntarily appearing to answer."

What is the effect of this act upon the standing of Pierce before the court; has it changed the former law, and repealed the provision before cited from the act of 1789 so as to give the court jurisdiction over a party when service is made upon him, found in the district where the suit is pending? or was it intended to sustain the jurisdiction of the court over those who were properly before the court, and over whom it would have had jurisdiction, but for the non-joinder of other parties over whom the court had not jurisdiction.

In the case of Taylor v. Cook before cited, Judge McLean, speaking of this act, says: "The decisions under the act of 1789, caused great embarrassment to the proceedings in the circuit court. Unless they could act on the interest of the defendants properly before the court, without prejudice to those who were interested, and who did not reside within the district, they could exercise no jurisdiction in the case. To remedy this inconvenience, the act of Feb. 28, 1839, was passed. Unless required by the act of congress, it would not be necessary that either party should be a citizen of the state where the suit is brought. This provision of the act of 1789 is not repealed by the other act, but is modified. It enables a party who is sued with others, but who does not reside in the district, voluntarily to become a party to the suit, and when this is done, the court can exercise jurisdiction over him the same as if he were a citizen of the district, and process had been served on him."

In Commercial & R. R. Bank of Vicksburg v. Slocomb, 14 Pet. [39 U. S.] 64, this precise point is fully examined by Mr. Justice Barbour, and he says: "In the case of Strawbridge v. Curtiss [supra], the supreme court decided that where there are two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants, in the courts of the United States in order to support the jurisdiction. It was further contended, that all objection to the state of the parties in this case was obviated by the act of congress passed Feb. 28, 1839. We consider the true construction of this act to be this. The 11th section of the judiciary act, after having prescribed the jurisdiction of the circuit courts as it regards the character of the parties by way of personal exemption, declares, 'that no civil suit shall be brought before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.' Under the operation of this clause many difficulties occurred in practice, in cases both in law and equity, in which, by the principles governing courts both of law and equity, it was necessary to join several defendants, some of whom were, and others were not, inhabitants of the district in which the suit is brought. The act of 1839 was intended to remove these difficulties, by providing that the persons not being inhabitants, or not found within the district, may either not be joined at all with those who were, or if joined, and they do not waive their personal exemption by a voluntary appearance, the court may go on to judgment or decree against the parties properly before it, as if the others had not been joined. But it did not contemplate a change in the jurisdiction of the courts as it regards the character of the parties as prescribed by the ju-

diciary act, and as expounded by this court; that is, that each of the plaintiffs must be capable of suing, and each of the defendants capable of being sued, which is not the case in this suit."

Such was the opinion of the supreme court of the United States in 1840. In 1844 the case of Louisville, C. & C. R. Co. v. Letson, 2 How. [43 U. S.] 497, was decided by the same court, in which an entirely different doctrine was declared. Mr. Justice Wayne, in the opinion of the court on p. 555, says: "After mature deliberation, we feel free to say that the Cases of Strawbridge and Curtiss and that of the Bank and Deveaux were carried too far, and that consequences and inferences have been argumentatively drawn from the reasoning employed in the latter, which ought not to be followed. The case of the Commercial & R. R. Bank of Vicksburg v. Slocomb [supra] was most reluctantly decided upon the mere authority of those cases. We do not think either of them maintainable upon the true principles of interpretation of the constitution and the laws of the United States. We remark too, that the Cases of Strawbridge and Curtiss and the Bank and Deveaux have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late chief justice who gave them. We think we may safely assert that a majority of the members of the court have at all times partaken of the same regret. * * * * We do not hesitate to say, that" the act of Feb. 28, 1839, "was passed exclusively with an intent to rid the courts of the decision in the case of Strawbridge v. Curtiss. We say that the act of 28th of February, 1839, enlarges the jurisdiction of the courts. We think, as was said in the case of Commercial & R. R. Bank of Vicksburg v. Slocomb, that this act was intended to remove the difficulties which occurred in practice, in cases both in law and equity, under that clause in the 11th section of the judiciary act, which declares 'that no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ; but a re-examination of the entire section will not permit us to re-affirm what was said in that case, that the act did not contemplate a change in the jurisdiction of the courts as it regards the character of the parties.'"

The case of Strawbridge v. Curtiss being no longer recognized as correct, all the other decisions founded upon it fall with it, and I am compelled to hold that the court has jurisdiction over Pierce in this process.

What then are the rights of these complainants as against Pierce in and to the control of the 574 shares of stock. These shares were placed in the hands of Pierce and Blaisdell under the agreement of March 21, 1866, between them and the company, that they would build the road to Winn, furnishing the necessary funds, "provided the bonds of said company now in its possession, and a major part of the stock of the company, are put into the hands of said contractors and their associates, as security for the payment of the money which they shall advance for doing said work."

On the 8th day of May, 1866, Pierce and Blaisdell entered into an agreement with all of these complainants, except Dennison and Case, who afterwards by its terms were permitted to become parties, and the rights of the complainants and G. H. Pierce must depend on this contract and agreement. There is no evidence of any fraud having been practiced in relation to it, but all parties have recognized it and acted under it, and Blaisdell has since assigned all his interest in the contract for building the road to Case. By this agreement, and the subsequent transfer of Blaisdell, I hold that the complainants have become jointly interested with Pierce in the contract for building the road, and in their rights to this stock, whatever they may be, to the extent of 87 per cent. in common with Pierce. The language is quite emphatic, "The said Pierce and Blaisdell do by these presents * * sell, assign and transfer, so much of said contract and their interest therein to the said parties of the second part, as will give and secure to them the following interest and proportions to wit; to John H. Wiggins one-tenth, &c. * * It is understood and agreed that the foregoing assignment of said contract shall include and carry with it any arrangement or agreement which said Pierce and Blaisdell may have made to obtain control of said railway, and also any other railroad connected with the enterprise of building and operating the same if the parties hereto desire. * * * * The said parties shall together constitute a board of control, and shall manage all the affairs of said company, and may act by committee, agents or proxy, and may compose or select the board of directors." This last paragraph is quite important, as in the call for this meeting of the stockholders, one article is in relation to election of directors.

A board of control, called the executive committee, has been selected, of which Pierce is a member, and this assignment has been assented to by the railroad company, and they have been recognized by the company as the contractors by a formal vote of the directors on their written application. Pierce and the complainants are therefore joint contractors for building this road, and he is bound by the terms of this agreement to hold and manage this stock for the common profit and benefit, to be governed and

controlled by the executive committee in relation to it, and to obey their directions as to the votes to be cast at the election of directors, and in all other respects to represent their wishes and instructions concerning this property, at all meetings of the stockholders. "Courts of equity will interfere, by way of injunction, to prevent a parner, during the continuance of the partnership, from doing any acts injurious thereto, or from violating the rights of the other parties, or his duty to them." 1 Story, Eq. Jur. § 669.

An injunction is asked against the corporation and certain other stockholders to restrain them from holding the meeting of the stockholders on the 13th instant, on the ground that the meeting is not legally called, and that the complainants fear some action may take place at the meeting hostile to their interests. In their relation of contractors for building the road, I do not think they have the least pretence to ask for an injunction; and I understand, that at the hearing, this ground was abandoned, although the bill as drawn certainly presents this as one reason for the request.

The other stockholders have no interest in the nine shares of the capital stock held by Wiggin, and I do not think that they can invoke the aid of the ownership of that stock, and of Wiggin's rights as a stockholder to obtain the injunction; there should be a common joint relation on which all can stand to obtain a common benefit. It is therefore on account of their equitable rights in the stock standing in the name of Pierce and Blaisdell, upon which alone they can ask for the action of the court. They are not known on the records of the company as stockholders, and there may be grave doubts whether a corporation or its members are bound to know or acknowledge the rights of any other parties as stockholders at their meetings, than those who are so disclosed by the books and records of the corporation.

I am not quite certain that the meeting of Jan. 13th is not legally called, and that the magistrate was not authorized to issue his warrant. This depends upon the construction of the by-law of the corporation touching this matter, which is somewhat doubtful and uncertain, and which I do not think I should be justified in passing upon conclusively in this proceeding.

In speaking of the power of a court of equity in issuing injunctions, Mr. Justice Story says, "The exercise of it is attended with no small danger, both from its summary nature and its liability to abuse. It ought, therefore, to be guarded with extreme caution, and applied only in very clear cases." 2 Story, Eq. Jur. (10th Ed.) § 959b.

Mr. Justice Baldwin in Bonaparte v. Camden & A. R. Co. [Case No. 1,617], says, "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate, or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction; but that will not be awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of the court, not of the party who prays for it. It will be refused till the courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act."

The case as presented does not satisfy me that it would be a proper exercise of my discretion to grant the injunction as prayed for against the other respondents, and it is therefore denied; but I think the complainants are entitled to an order restraining Pierce, his agents and proxies, from voting upon, or representing the 574 shares of stock standing in the name of Pierce and Blaisdell, excepting under the direction and order, or with the assent of a majority of the executive committee of the complainants. It is so ordered.

Case No. 17,627.

WIGGINS v. WIGGINS.

[1 Cranch, C. C. 299.] [1]

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

DEPOSITIONS—TIME OF TAKING.

A deposition, taken more than six months after replication, in a chancery suit, cannot be read at the hearing, unless taken by consent, or by order of the court, or out of the district.

Bill, answer, replication, and dedimus awarded in October, 1804. The cause was set for hearing in October, 1805. A deposition was taken in July, 1805.

Mr. Taylor objected, that the deposition being taken more than six months after the replication, could not be read as evidence on the hearing. See Act Assem. Va. Nov. 29, 1792, p. 67, § 46.

Mr. Swann, contra, contended, that the act of assembly means six months after the cause is set for hearing.

Mr. C. Lee and Mr. Simms stated the practice to be as stated by Mr. Swann.

But THE COURT said, that the words of the act of assembly, were too clear and positive to admit of a doubt, and this court cannot say, that a practice, not sanctioned

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

by any judicial decision, and in opposition to the express words of the act, is a correct practice.

WIGGLESWORTH (UNITED STATES v.). See Case No. 16,690.

Case No. 17,628.

WIGHT et al. v. CURTIS.

[11 Hunt, Mer. Mag. 553.]

Circuit Court, S. D New York. 1845.

CUSTOMS DUTIES—DAMAGED GOODS—APPRAISEMENT AND SURVEY—AUTHORITY OF COLLECTOR — REFUSAL OF APPRAISEMENT.

1. No act of congress having designated any form or mode of proof to be made, of damage to goods on the voyage of importation, to lay the foundation for an appraisement, the collector is bound to order it on reasonable evidence of such damage. If he does not object to the form of proof when presented, he cannot raise such objection at the time when sued for not calling such appraisement. A request to the collector to have an appraisement by merchants, appointed pursuant to the act of 1799 [1 Stat. 627], is to be regarded an application to have it made according to the existing law.

2. The 52d section of the act of March 2, 1799, does not require a survey of goods, damaged on the voyage of importation, to be made previous to an appraisement of damages for the purpose of an abatement of duties. If such survey is necessary, the master and wardens of the port are not "the proper officers," within the meaning of the act to make it.

3. After a collector has ordered goods to a public store, because of damage on the voyage of importation, he has no authority to require a survey of such goods, in order to their appraisement.

4. When an appraisement is refused, the deterioration of the goods may be proved by witnesses; and the collector is liable, in an action for damages, to pay the difference between the duties exacted by him, and those the goods ought to have been charged with.

[This was an action by Edward Wight, William Sturgis, and William Shaw against Edward Curtis, to recover back 60 per cent. of certain duties paid under protest.]

BETTS, District Judge. In the decision of this case, I shall forbear the review of several topics, discussed with great fulness and learning. Under the construction I give the 52d section of the act of 1799, it does not become necessary to consider the origin of the powers of the port-wardens of this port, or the just extent of those powers under the statutes of the state, or the conveniency or fitness of the usage prevailing with the custom-house here, to call for their official certificates in cases of goods damaged on the voyage of importation, for which a deduction of duties shall be claimed; nor to investigate and determine the right of marine surveyors, under private appointment, to perform that service.

The facts presenting the question in contestation between the parties, are, that the ship Shefficld, when coming into this port in November, 1843, and in charge of a pilot, grounded in a heavy wind, and filled and sunk. She was subsequently raised, and towed to the city, and her cargo unladen; and, by consent, and at the instance of the parties interested, it was ordered by the collector to be deposited in a public store-house. The dutiable goods of the libellants, on board the ship, were damaged by sea-water on the occasion, to the amount of 60 per cent. on their value. The libellants produced certificates of the port-wardens of surveys of all their packages, except one; and asked, and had allowed them by the collector, an appraisement of the damages so incurred by those packages. In respect to the package in question, the libellants offered to the collector the sworn survey and appraisement of Alexander Cartwright (representing himself to be a person "selected by the parties interested, to survey, appraise, arbitrate, and judge of vessels and goods arriving damaged, or becoming damaged in the port of New York"), certifying that he had taken a strict and careful survey of the goods in question, and found them to have been damaged on the voyage of importation. Also, the deposition of the master of the ship, proving the wreck, and injury to the cargo in consequence. An exception was taken, on the argument, to the admissibility of this deposition, because the attestation was taken before a state magistrate, not authorized to administer oaths to be used in the United States tribunals. I think this objection cannot prevail; for the attestation on oath, to such a document, is not required by any act of congress; and if it had been, the collector should have refused to receive the affidavit, because of defect of authority in the officer taking the oath, so that the irregularity might have been rectified at the time; and he cannot be permitted to start the objection on the final argument. This acceptance of the deposition will be deemed a waiver of any informality in the jurat, particularly as the paper was addressed to him, and was to have no other operation than to guide the decision on the claim of the importer to have his goods appraised.

The collector, by his letter of November 23, 1843, to the plaintiffs, stated that, according to the instructions which he had received from the secretary of the treasury, the certificate of damage must be given by a port-warden; and added "that, if within ten days after the landing of the goods, such certificate shall be presented, orders will be given for an appraisement." The particular certificate not being furnished, the appraisement was refused, and the libellants paid the full duties charged ($103.14) on this package, making their protest at the time, and then brought this action in a state court, to recover back 60 per cent. thereof (being $67.05), with interest from November 25, 1843. The action was removed to this court pursuant to the act of congress of March 3, 1833,—8 Laws [Bior. & D.] 792, § 3 [4 Stat. 633]. A letter of the secretary of the treasury, dated July 13, 1843,

to the collector, ratified his decision in a previous case, rejecting the certificate of damage given by the marine surveyors appointed by the chamber of commerce and board of underwriters of the port of New York, and approved the practice of requiring the certificate of damage to be given by the port-wardens, as not only in accordance with the fifty-second section of the act of 1799, but as that which most nearly conforms with its provisions. Some criticism was addressed on the argument, to forms of the proofs of damage; and their sufficiency to establish the fact was questioned; but, as the objection on the trial referred essentially to their admissibility, and the fact and extent of damage was not made a prominent point, I shall regard the testimony, if competent, sufficient to have justified the jury in finding for the plaintiffs; and the court, on a case made, will draw the same inferences from the evidence that a jury would be warranted in drawing. 14 Johns. 215; 15 Johns. 409; 6 Cow. 632. It was also suggested that the collector rightfully refused the request of the plaintiffs, because they asked the appointment of merchant appraisers, conformably to the act of 1799, when the act of 1823 had abolished that mode of appraisement, and designated official appraisers, who alone possessed authority to make this appraisement. This was clearly a mere misapprehension in the form of application—a mistake which the collector did not regard; for he avowed his readiness to act under the application, on being furnished the particular certificate he required; and, accordingly, the error of the plaintiffs, in the designation of the appraising officers, can stand in no way against their rights in the matter. The court will regard it as the collector did—a request to have the appraisement made conformably with the law.

The essential question to be disposed of is, then, whether the plaintiffs, on the facts and circumstances of this case, were bound to produce a certificate of the port-wardens before an appraisement and a deduction of duties, because of such damages, could be claimed by them. This inquiry turns upon the construction to be given the 52d section of the act of March 2, 1799. It enacts that "all goods, wares, or merchandise, of which entry shall be made incomplete, or without the specification of particulars, either for want of the original invoice or invoices, or for any other cause, or which shall have received damage during the voyage, to be ascertained by the proper officers of the port or district in which the said goods, wares, or merchandise shall arrive, shall be conveyed to some warehouse or storehouse, to be designated by the collector, in the parcels or packages containing the same; there to remain, with due and reasonable care, at the expense and risk of the owner or consignee, under the care of some proper officer, until the particulars, cost, or value, as the case may require, shall have been ascertained, either by the exhibition of the original invoice or invoices thereof, or by appraisement, at the option of the owner, importer, or consignee, in manner hereafter provided; and until the duties thereon shall have been paid, or secured to be paid, and a permit granted by the collector for the delivery thereof. And for the appraisement of goods, wares, and merchandise, not accompanied with the original invoice of their cost, or to ascertain the damage thereon received during the voyage, it shall be lawful for the collector, and, upon request of the party, he is required, to appoint one merchant, and the owner, importer, or consignee, to appoint another, who shall appraise or value the said goods, wares, or merchandise, accordingly; which appraisement shall be subscribed by the parties making the same, and be verified on oath or affirmation, before said collector—which oath or affirmation shall be in the form following, to wit," &c., &c. The usage at the customhouse, under this section, has always been, to exact a certificate preliminarily to ordering an appraisement on damaged goods; and the wardens of the port have been held "the proper officers" to give such certificates. On the part of the plaintiffs, it is contended that the act supplies no authority for either of these requirements. The section recited directs goods, wares, and merchandise, to be conveyed to some warehouse or storehouse, on arriving in port, in either of two conditions:—First, when the entry of them shall be made incomplete, for any cause; and, second, when they "shall have received damage during the voyage, to be ascertained by the proper officers," &c. In the first instance, it is plain, the collector acts on his own view of the state of the entry, and without any extraneous evidence; but as, in the second instance, the cause for ordering the goods to a public store would not be apparent on the entry, or one which the collector would be supposed prepared to decide on his own inspection, there would seem to be the occasion for designating by law the circumstances which would require or authorize the order. This designation is supposed to be supplied by the statute. The terms employed in the act may probably admit this construction; and if the first clause is read by itself, such might be its more natural interpretation, because the inquiry which is to lead to the action of the collector is, whether the goods have received damage during the voyage; and the expression, "to be ascertained by the proper officers," might well be regarded as having reference to the general proposition or idea of damage during the voyage, and not to damage simply in respect to its amount or extent. But the same expression is again taken up in the subsequent clause of the section; and congress, by the application of it there, would seem to regard the language as calling for a valuation of damages, and not merely the finding of the fact that damage had been received. This understanding of its import is again distinctly indicated in the form of the oath; for the appraisers are required to swear that "the

packages have received damage, as we believe, during the voyage of importation; and that the allowance by us made for such damage is, to the best of our skill and judgment, just." It is not to be supposed that congress would, in this clause and the oath, impose on appraisers the duty of ascertaining the fact of damage during the voyage, if, by the previous clause, other officers were appointed to perform that very service; and it seems to me that the entire section, taken with the form of oath, denotes that it was intended to provide for no more than one ascertainment of damage in this behalf; and that, in this respect, the first clause in the section is to be considered subordinate to, or more completely fulfilled by the subsequent one. Although the language may be susceptible, and most naturally, of the interpretation given it by the collector, and the secretary of the treasury, yet plainly no violence is done it, by understanding it in the other sense; and the latter would most effectually harmonize all the provisions of the section. In aid of this exposition, it is to be observed that the language is prospective, having relation to an act afterwards to be done, and that not necessarily before the action of the collector, in ordering the goods to a public store. "Damage to be ascertained," and "to ascertain the damage," are correlative expressions, and indicate one and the same procedure: and that they are so used by congress, is plainly imported by the terms of the oath, "to ascertain and appraise the damage." This latter act must necessarily follow the deposit of the goods in a public store; and the language of the first section may very well be satisfied, even on the interpretation of the defendant, by having the survey posterior to the deposit in store. If, then, this ascertainment of damages by proper officers must not indispensably be had, previous to the deposit of the goods, and as the statute having provided for only one proceeding therein, subsequent to such deposit, the entire section would most appropriately be read as having reference to the one act of ascertaining and appraising, designated and directed in the latter clause.

I think, therefore, that, upon the true construction of the fifty-second section, the damage received during the voyage, to be ascertained by the proper officers of the port or district, mentioned in the first clause, is the same matter directed to be inquired into and determined in the after branch of this section; and that, accordingly, there is no authority in the act for requiring any other survey or appraisement. A more minute analysis of the terms of the section will conduce to the support of this construction. If the provisions of the first clause call for a survey of the goods, by proper officers, as it is understood at the custom-house, it stands in singular contrast with the after provision in that respect, in not naming the officers who are to perform the duty; in not exacting the sanction of an oath from them; and in not rendering it obligatory on the collector to take the proceedings. The importer is supplied with no authority to compel the action of the collector; and if the first branch of the section is read as complete within itself, it would seem that the merchant is placed entirely at the discretion of the collector, or can have no relief because of his refusal to call a survey, and the consequent deterioration of his property, unless through the tedious and precarious prosecution of the collector, for malfeasance in his office. Congress deemed the matter worthy of precise legislation, when they came to consider the equitable consequence of such injury to goods, on the rights of the importer and the interests of the revenue; and provided specifically for enforcing and preserving their respective interests, by clear and precise enactments in the after branch of the same section. Such incongruity would be reluctantly implied in the provisions of the same section; and the construction, therefore, which regards the whole subject-matter one and the same, and as provided for in a common regulation, seems best adapted to uphold the rights of all parties, and fulfil the purposes of congress. This same course is pursued in the 60th section, in relation to vessels coming into port in distress. The regulation is minute and specific, in the description of the officers who may make surveys, and as to the time and manner in which kindred services are to be obtained and rendered; and, whether state officers or merchant appraisers are employed, the act points out definitely when and how they are to act. This latter section supplies also a forcible argument against the application of the term "proper officers," used in the fifty-second section, to port-wardens; because it names them, or calls for other state officers, "usually charged with, and accustomed to ascertain the condition of ships or vessels arriving in distress." It is not to be supposed, if congress adopted in the previous section "port-wardens," under the general appellation of "proper officers," as well known to possess and exercise within the states the functions there called for, that in legislating further, on like subject-matters, they would, in the 60th section, name them specifically, or describe the qualifications of the other officers who might be used. But it is to be remarked that the term "proper officers" is twice used in the same paragraph of the 52d section; and, in the latter case, must necessarily refer to some custom-house officer, or one appointed under the authority of the revenue laws, because he is officially to take care of the goods ordered by the collector to be taken in store.

It is not unworthy of observation, that the phrase, "proper officers of the port or district in which the goods, &c., shall arrive," does not apply to any public officers known to the laws of this state at the time the act of congress was passed; nor is it probable that

such officers were created in any of the other states. The powers of port-wardens do not, under the colonial or state statutes, extend beyond the port of New York (Act March 7, 1759; 2 Smith & Livingston, 160; Act 14th April, 1784, 1 Greenl. 86), whereas the district of New York was, by the fifth section of the act of congress of March 2, 1799, as it had been by the act of July 31, 1789 [1 Stat. 29], made to embrace nearly all the coasts, rivers, bays, and harbors of the southern part of the state, including those on the North river. The city of New York is, in the act of 1789, and all subsequent ones, made the port of entry; but it is manifest that there must be officers created under the acts whose powers extend over the entire district. It may be as important to have proper officers of the revenue in other harbors on the coast within the district, to take care of goods deposited there by the collector, as in that of New York; and it may become of equal importance to have appraisements made at such places, because the whole regulation has reference to wreck or disasters at sea, and will necessarily be ample enough to meet the exigencies that are likely to rise in this behalf, in every part of the district.

Again: the argument in favor of construing the 52d section, so as to have the expressions "proper officers of the port or district" apply to port-wardens, rests upon the assumption that that class of officers notoriously possessed and exercised, under the state laws of the different states, the power of making surveys of goods alleged to be damaged on the voyage of importation, and determining the fact whether such damage has been received. There may be ground to doubt the entire correctness of this assumption. By the colonial act of March 7, 1759, § 9, the master and wardens of the port of New York, for the time being, are appointed surveyors, for surveying of all damaged goods brought into the said port in any ship or vessel; and in like manner, with the assistance of one or more able carpenters, to survey all vessels deemed unfit to proceed to sea, &c. 2 Livings. & Smith, 163.

An act was passed September 11, 1761, with a preamble that "whereas goods imported here, and insured in Great Britain, and elsewhere abroad, are sometimes sold in this city for the account of the insurers, and some persons, taking the advantage of their absence, have frequently made fraudulent sales, to the great prejudice of the insurers, the undue gain of the assured, and detriment of the commerce of this colony; for a remedy therefor, it is enacted, that hereafter, all damaged goods to be sold for account of the insurers shall be surveyed by the master, or one or more of the wardens of the port of New York for the time being, and such sale shall be made in his or their presence," &c., &c. Van Schaick's Laws N. Y. 394. This act was continued in force to January 1, 1775. Id. 498. If this act is to be regarded as suspending or superseding that of 1759, during its continuance, on its expiration, the latter probably revived; and, under the 35th article of the state constitution of April 20, 1777, continued in force until the passage of the act of April 14, 1784, by the state legislature. The 8th section of the latter act is a re-enactment of the 9th section of the act of 1759, above recited. Jones & Vorick, Laws N. Y. 122; 1 Greenl. 89. The latter law, in substance, was continued under the various revisions of the statutes, till a revision and consolidation of the laws on this subject, by the act of February 19, 1819. 5 Laws N. Y. 11. By the 5th section of the act, it is enacted that the master and wardens of the port of New York, or any two of them, with the assistance of one or more skilful carpenters, shall be surveyors of any vessel deemed unfit to proceed to sea, &c., &c.; and in all cases of vessels and goods arriving damaged, and by the owner or consignee required to be sold at public auction, on account of such damage, and for the benefit of underwriters out of the city of New York, such sale shall be made under the inspection of the master and wardens, or some or one of them; which master and wardens shall, when required by the owner or consignee aforesaid, certify the cause of such damage, &c.; and an after clause gives them $1.50 fees "for each and every survey on board of any ship or vessel, or at any store, or along the docks of the city of New York, on damaged goods," &c. This is, in substance, a re-enactment of the provisions of the colonial law of 1761, above recited; and the language of the section clearly indicates that it was based upon like reasons—and, as the existing law of 1784 must necessarily have been in view of the legislature, the implication is strong, if not conclusive, that the latter act was intended to limit the authority of port-wardens, in making surveys of damaged goods, to the single case therein designated. I am aware the vice-chancellor in this circuit has put a different construction upon the act of 1819, and has held, from the grant of fees for surveys on damaged goods, that the intention of the legislature to make the powers of port-wardens as they had been under the act of 1784, is to be implied. This decision, it is understood, is in course of review before the chancellor, and it is not, therefore, to be regarded as authoritative on the point; and, with great respect for the learning of the distinguished judge who pronounced the opinion referred to, I think it must be at least matter of doubt whether so important an interpolation to the act of 1819 can be authorized, upon the presumption afforded by the mere grant of fees, and when also that provision may be reasonably satisfied by applying it to the particular surveys designated by the section. It is enough, however, in the case before me, to say that it is not made clear, upon the laws of this state, that the port-ward-

ens are now possessed of authority to make surveys on all damaged goods brought into this port in any vessels, and certify the cause of such damage; and that, accordingly, if congress intended to refer this service to state officers, the defendant fails to show that the port-wardens are "the proper officers of the port or district," competent to perform such services. But it is to be furthermore observed that, on the construction of the 52d section, contended for by the defendant, a preliminary survey and certificate by port-wardens can only be necessary for the purpose of guiding his discretion in ordering the goods to be deposited in a warehouse or storehouse. It is not urged that the port-wardens have any authority to ascertain and appraise the damage; and there is nothing in the section importing that after the collector, for either cause indicated therein, has commanded the deposit of goods, that he can do less or more, respecting them, than pursue the precise directions of the act. The act is express and explicit in declaring that, when the condition exists requiring the goods to be conveyed to a warehouse or storehouse, they shall remain there until the particulars, &c., shall have been ascertained, in the manner afterwards provided in the same section.

It seems to me clear, therefore, that if the collector might, under the act, exact the certificate of a proper officer on survey of the goods, before he would order their deposit in public store, because of damage incurred on the voyage of importation; yet that, if he acts upon the assumption of such damage, and orders the deposit for that cause, he is then bound to proceed, and have the damage ascertained and appraised by the public appraisers; who, by the act of 1823, supercede in this behalf the authority of merchant appraisers, referred to in the 52d section. I am, accordingly, of opinion that the plaintiffs are entitled to judgment on this verdict.

Case No. 17,629.

WIGHT v. MUXLOW et al.

[8 Ben. 52.] [1]

District Court, S. D. New York. March, 1875.

BANKRUPTCY—INTENT TO GIVE PREFERENCE—SUFFERING JUDGMENT TO BE ENTERED—AFFIRMATIVE ACT—ATTORNEY AND CLIENT.

1. The intent of an insolvent to give preference to a creditor is to be inferred only from some positive or affirmative act. The mere fact that the insolvent has remained passive during legal proceedings, affording no facilities and interposing no hindrance to the creditor's obtaining a lien by judgment and execution, and at the same time neither hindering nor facilitating other creditors, is not sufficient to authorize an inference of an intent to give a preference.

2. Where a debtor does a positive act, the consequences of which he knows beforehand, he must be held to intend those consequences. Where a debtor is sued for a just debt, and interposes a groundless defence, in such manner that another creditor, who brings suit later, is enabled to obtain a prior judgment and the appointment of a receiver, an intent to give a preference to the creditor in the latter suit must be inferred.

3. An attorney defended for the debtor a suit on a just debt, knowing that the debtor was insolvent, and he also obtained, as attorney for another creditor a judgment by default against such debtor in a suit brought later, before judgment could be obtained in the prior suit: *Held*, that the attorney had reasonable cause to believe that the debtor intended to give a preference to the creditor in the later suit, and his knowledge was to be imputed to his client.

On May 20th, 1873, Muxlow, one of the defendants in this suit, recovered a judgment in the supreme court of the state of New York against William W. Hulst for $1,025.63. The suit was commenced by the service on Hulst, on April 28th, 1873, of a summons, without a complaint, by George W. Niles, one of the firm of Niles & Sherman, who were plaintiff's attorneys in the suit. The suit was brought on a promissory note for $1,000 made by Hulst on April 25th, 1873, and payable to the bearer on demand. No answer, demurrer or notice of appearance was served in the suit, and on proof of that fact the judgment was entered as above stated. Within an hour after the entry of the judgment an execution was issued to the sheriff of the city and county of New York, which on the 23rd of May was returned, with the return endorsed: "No personal or real property." Thereupon Hulst was examined in proceedings supplementary to execution, and on the 26th of May the defendant Daniel Adee was appointed receiver of the property of Hulst and he immediately took possession thereof. On May 27th, 1873, a petition in involuntary bankruptcy was filed in this court against Hulst. In those proceedings the plaintiff in this suit [Charles H. Wight] was elected assignee. He filed this bill, setting forth the above proceedings, alleging among other things that Adee as receiver had collected debts due to Hulst and had taken possession of his books and accounts and of a stock of merchandise, part of which the marshal had seized and turned over to the plaintiff herein, but that Adee withheld from him the moneys collected by him and refused to deliver over the merchandise in his possession or to account to him for it; that when Muxlow recovered the said judgment, and issued the said execution, and when it was returned unsatisfied, and when Herbert H. Muxlow procured Adee to be appointed receiver, and when Adee collected moneys from debtors of Hulst, and when Adee took possession of the books and accounts and merchandise of Hulst, Hulst was insolvent, and in contemplation thereof; that, being so, Hulst, in manner aforesaid, subsequent to the period of four months prior to the filing of the creditors' petition against him, and with the

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

view and intent, on his part, to give a preference over his other creditors to Muxlow, as a creditor, procured and suffered said judgment against himself in favor of Muxlow to be entered and the appointment of Adee as receiver of the property of Hulst, and the collection by Adee, as receiver, of said moneys then due to Hulst to be made, and suffered and procured, with the intent aforesaid, Adee, as receiver, to take possession of the books and accounts of Hulst and of a portion of his stock of merchandise, and thereby made a transfer of said moneys and property to Muxlow, with the view and intent aforesaid, contrary to the bankruptcy act [of 1867 (14 Stat. 517)]; that at all the times aforesaid, Muxlow and Adee had, each of them, reasonable cause to believe and knew and had notice and knowledge that Hulst was insolvent and in contemplation thereof, and that said transfer of the property of Hulst was made in fraud of the provisions of said act; that said judgment and execution, and all proceedings thereon, including the appointment of Adee as receiver, were fraudulent and void; that said collection of moneys and taking of property by Adee, and said transfer, were not made in the usual and ordinary course of business of Hulst; and that Muxlow and Adee had, each of them, reasonable cause to believe that the same was made with the view, on the part of Hulst, to prevent his property from being distributed under said act, and to defeat its object, and to impair, hinder, impede and delay its operation and effect, and to evade its provisions. The bill prayed that the said judgment and all proceedings thereon, including the appointment of Adee as receiver, be adjudged void; and that a decree be made that the defendants pay to the plaintiff all moneys so collected on the debts and accounts of Hulst, and deliver to the plaintiff all the merchandise of Hulst which so came into their possession, or, in default thereof, pay to the plaintiff the value of such merchandise, and deliver to the plaintiff the said books and accounts of Hulst, and decreeing that Adee, as such receiver, had no title or interest in said property, books or accounts. The evidence showed that Hulst was insolvent when Muxlow recovered his judgment. There were judgments outstanding against him. There was also a suit pending against him and another party, in which suit Hulst alone appeared by Niles & Sherman as his attorneys and put in an answer on March 27th, 1873, which was referred to a referee on May 17th, 1873, and in which judgment was recovered on June 28th, 1873. The claim in that suit was a bona fide debt. The note on which the bankruptcy proceedings were founded fell due April 4th, 1873, and about the 1st of May, 1873, a suit on it was brought against Hulst. He appeared in the suit and put in an answer. The note on which Muxlow obtained his judgment was given by Hulst to Niles for professional services rendered, and it was alleged to have been sold by Niles to Muxlow for a horse valued at $750 and $150 in money. Muxlow knew nothing of Hulst's responsibility and made no inquiries about it of any one but Niles, and Niles did not endorse the note; and within three days Muxlow brought the suit on the note. Other suits were also pending against Muxlow, in which judgments were afterwards recovered against him.

[See Cases Nos. 6,863 and 6,864.]

C. C. & S. F. Prentiss, for plaintiff.

F. D. Smaw, Jr., for Muxlow.

John Maginn, for Adee.

BLATCHFORD, District Judge. The evidence shows that on the 26th of May, 1873, when Daniel Adee was appointed receiver, and took for the benefit of Muxlow the property of Hulst, Hulst, to the knowledge of Niles, who was the attorney for Muxlow in the proceedings, owed, besides the Muxlow judgment for $1,025.63, the following judgments: The Jackson & Chace judgment of January 16th, 1853, for $262.56, owned by Daniel M. Adee, the two Jackson & Chace judgments of April 22d, 1873, for $118.27 and $243.02 respectively, and the Stacey judgment of May 20th, 1873, for $2,014.88. Niles also then knew of the debts sued for in the suit brought by Holden, Hopkins & Stokes for $734.83 and in the suit brought by Flynn for $1,000, both of which suits Niles was defending as attorney for Hulst. Hulst also then owed the judgment recovered by Daniel M. Adee May 21st, 1873, for $605.13. Hulst was, therefore, at the time Daniel Adee was appointed receiver and took the property in question, insolvent, within the meaning of the bankruptcy act. He had failed to pay judgments obtained by default against him. He had no defence and made none to the suits in which such judgments were recovered. Niles knew of this insolvency of Hulst. His knowledge must be imputed to Muxlow. Muxlow is affected by what Niles knew.

The remaining questions are whether Hulst, in suffering Muxlow to obtain his judgment and to have the receiver appointed, and in suffering the receiver to take the property in question for Muxlow's benefit, substantially procured all this to be done, and did so with an intent to prefer Muxlow over other creditors, and whether Muxlow had reasonable cause to believe that Hulst had such intent, and that a fraud on the bankruptcy act was being committed by what was being done.

The defendants cite and rely upon the decision in Wilson v. City Bank, 17 Wall. [84 U. S.] 473, as controlling in the present case. They contend that there was no collusion between Hulst and Muxlow, in reference to the obtaining of the judgment by Muxlow and the appointment of the receiver, and the taking of the property by him; that Hulst was entirely passive; that he could make no defence to the proceedings of Muxlow, which were founded on a just

debt, and made no defence to them; and that there is nothing shown in evidence to displace the lien acquired by Muxlow.

The main point upon which the case of Wilson v. City Bank [supra], was decided was, that the facts of that case did not show any positive or affirmative act of the debtors from which an intent to give a preference to their creditor could be inferred; that the facts merely showed legal proceedings against them, through the whole of which they remained perfectly passive; that they afforded their creditor no facilities to obtain a lien on their property by judgment and execution, and interposed no hindrance; that no positive evidence existed of a wish or a desire on their part to give their creditor a preference; and that, having other creditors with debts due and suable, they neither hindered nor facilitated any one of all their creditors. But the court, in that case, did not hold, nor has it been held in any case, that where there was evidence of affirmative acts done by the debtor which not only directly tended to secure the preference to the particular creditor, but actually resulted in securing it, the intent on the part of the debtor to secure such preference could not be inferred. On the contrary, the language of the court, in that case, is to the effect that where a debtor does a positive act, the consequences of which he knows beforehand, he must be held to intend those consequences; and that when a debtor contributes, by acts of a positive and affirmative character, to the success of the acts of his creditor, it may be inferred that he has an active desire or wish to prefer such creditor to other creditors, when the acts of his creditor are such as to secure such preference.

Applying these principles to the facts of this case, we find that in March, 1873, Hulst was sued by Holden, Hopkins & Stokes, for a just debt, for $734.83 for merchandise sold, to which there was no just defence; and that this suit was defended in such a manner that Muxlow, who brought his suit late in April, 1873, was enabled thereby to obtain a judgment more than a month before Holden, Hopkins & Stokes could obtain their judgment. The act of Hulst in putting in a defence in the suit of Holden, Hopkins & Stokes was an affirmative act. It had the effect, when the defence was continued after Muxlow's suit was brought, and until time enough had elapsed to enable Muxlow to perfect his judgment and his proceedings for a receiver, to secure to Muxlow a preference over Holden, Hopkins & Stokes. Such preference is now asserted in favor of Muxlow, as against the plaintiff, who represents Holden, Hopkins & Stokes as well as other creditors. The intent of Hulst to prefer Muxlow over Holden, Hopkins & Stokes, from and after the time Muxlow brought his suit, must be inferred from the act of Hulst in continuing after that time to defend the suit brought by Holden, Hopkins & Stokes, when it is shown, by the fact that the latter subsequently recovered a judgment, that such defence was groundless. The propriety of this inference is not qualified by any evidence which goes to show that such defence was consistent with any other intent. Hulst interposed a hindrance to Holden, Hopkins & Stokes, by defending their suit; and by continuing to do so after Muxlow brought his suit and until after the receiver was appointed, he facilitated, by an affirmative and positive act, the proceedings of Muxlow. He must be held to have known that his continuance of the defence of the one suit would enable the plaintiff in the other to secure a preference by proceedings which it was lawful to take. He substantially procured to be done by Muxlow what Muxlow did, because his continuing to defend the other suit enabled Muxlow to secure over the plaintiffs in the other suit the preference which otherwise could not have been secured. It would have been equally open to Holden, Hopkins & Stokes to take the same steps which Muxlow did.

That Muxlow had reasonable cause to believe that Hulst had the intent to prefer him, and that a fraud on the bankruptcy act was being committed, is entirely clear. Muxlow is chargeable with all the knowledge which his attorneys had. They were the same persons who as attorneys for Hulst were defending the suit brought by Holden, Hopkins & Stokes. They were acting for Hulst, after they brought Muxlow's suit, in defending the suit brought by Holden, Hopkins & Stokes, and in thus enabling Muxlow to first obtain his judgment and institute the subsequent proceedings, and they were at the same time acting for Muxlow in using the facilities which, on behalf of Hulst, they were thus placing at their own disposal for the benefit of Muxlow. Mayer v. Hermann [Case No. 9,344].

I have considered this case solely as one of a preference void under the bankruptcy act. That is the only subject matter of the bill. There is a large body of evidence, which, it is urged in argument, makes out a case of actual fraud on the part of Hulst, fraud in fact, fraud as against his creditors, an intent to cheat them, and conspiracy with various persons to that end. I express no opinion as to these questions. It is sufficient to say that the allegations of the bill are not directed to anything of the kind.

There must be a decree for the plaintiff according to the prayer of the bill, with a reference to a master to take the necessary account.

Case No. 17,630.

WIGHTMAN v. PROVIDENCE.

[1 Cliff. 524.] [1]

Circuit Court, D. Rhode Island. June Term, 1860.

EXCESSIVE DAMAGES—PERSONAL INJURIES—PROVINCE OF JURY—ELEMENTS OF COMPUTATION—IMPROPER ARGUMENTS.

1. Courts are reluctant to interfere with the verdict of a jury on the ground of excessive damages, in cases, such as an action against a town for damages received in consequence of a defective highway,—because the law affords no definite rule by which the precise compensation for the injury can be ascertained.

[Cited in Hunt v. Pooke, Case No. 6,895.]

2. The rule goes no further than to point out the grounds of complaint which may be taken into the account as elements of the computation, and the evidence that may be introduced to support the claim, and then the estimation of the amount of the damages is necessarily left to the jury.

3. The court will not interfere, except when the verdict is so large as to show that it was perverse, or the result of gross error, or that the jury had acted under undue motives or misconception.

4. Where a personal injury is of a character to impair the ability of the person to labor, and especially when it is of a permanent character, it often becomes necessary to inquire into the condition in life and the pursuits of the injured person, in order properly to enable the jury to estimate the damages.

5. Where counsel for the plaintiff, in the closing argument, adverted to facts not in proof, but the remarks were checked by the court, and the jury were instructed to confine their attention to the evidence in the case, the course of the counsel was held not to be sufficient ground for a new trial.

[Cited in Waldron v. Waldron, 156 U. S. 361, 15 Sup. Ct. 388.]

[Cited in Porter v. Choen, 60 Ind. 348.]

This was an action of trespass on the case to recover damages for personal injuries received in consequence of a defect or want of repair of a certain highway in the city of Providence, called "College Street." In the month of February, 1856, as the plaintiff [Daniel Wightman] was walking upon the sidewalk of the street, he fell upon the ice which had there accumulated, injuring his arm and hand, and otherwise causing him severe pain and suffering. The nature and extent of the injury, the character of the street, and the consequences to the plaintiff, are detailed sufficiently in the opinion of the court. The action, according to the Rhode Island statute, was brought against the city treasurer. The jury returned a verdict for plaintiff in the sum of four thousand dollars. Defendants moved for a new trial upon the following grounds: First, because the damages assessed by the jury were excessive and unreasonable; second, because the verdict was against the evidence, and the weight of the evidence submitted to the jury; third, because the counsel for plaintiff, in his closing argument, stated facts to the jury not proved by any testimony, and argued upon the basis of those statements. It was admitted that the street in question was a public highway.

J. M. Blake and C. H. Parkhurst, for plaintiff.

The rule of law is clear that the court will not set aside a verdict on the ground of excessive damages in a case of tort, unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated. Chambers v. Caulfield, 6 East, 244; Leeman v. Allen, 2 Wils. 160; Huckle v. Money, Id. 205; Creed v. Fisher, 26 Eng. Law & Eq. 384; Whipple v. Cumberland Manuf'g Co. [Case No. 17,516]; Morse v. Auburn & S. R. Co., 10 Barb. 621; Sedg. Dam. (3d Ed.) 642-645, and cases cited. The second ground for the motion is that the verdict is against the evidence and the weight thereof. The court will not set aside a verdict as against evidence or as against the weight of evidence, where the evidence on the side of the verdict, taken by itself, is sufficient to justify the verdict, and there is conflicting evidence. Hepburn v. Dubois, 12 Pet. [37 U. S.] 345; Wilkinson v. Greeley [Case No. 17,671]; Baker v. Briggs, 8 Pick. 122; Derwort v. Loomer, 21 Conn. 245; Wendell v. Safford, 12 N. H. 171, and cases cited; Gould v. White, 26 N. H. 178; Cunningham v. McGoun, 18 Pick. 13; Johnson v. Blanchard, 5 R. I. 24; Glidden v. Dunlap, 28 Me. 379. The third ground for the motion is that the counsel for the plaintiff, in his closing argument for the plaintiff, made statements of fact which were not proved by any testimony submitted in the said case, and argued to the jury upon the basis of such statements. To this statement we have only to say that, if any such statements were made, they were corrected at the time by the counsel for the defendant, and the jury were distinctly charged by the court that they were to confine themselves exclusively to the testimony submitted in the cause, without reference to what was stated by the counsel of either party.

J. M. Clarke, for defendant and appellant.

CLIFFORD, Circuit Justice. Towns are required by law in this state to keep their highways safe and convenient for travellers, and, in case of neglect to fulfil that requirement, they were declared liable "to all persons who may in any wise suffer injury to their persons or property by such neglect." St. R. I. 1844, p. 321. Those provisions extend to cities as well as towns, and include the sidewalks in the city of Providence, as well as that part of the street more particularly designed for carriages and teams, in all cases where the sidewalks have been duly laid out and constructed according to the established regulations upon the subject. St. R. I. 1821, p. 181;

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

City Ordinances, p. 58. Whether the obstruction was by snow, ice, or any other material, it was held by the supreme court, in the case of Providence v. Clapp, 17 How. [58 U. S.] 161, to the effect that it was incumbent on those charged with the duty of repairing highways to remove or abate the obstructions, so as to render the highway, street, or sidewalk at all times safe and convenient for travellers, regard being had to the locality of the way and its use by the public for the purposes for which it was laid out and constructed. That rule is applicable to this case, as the same statute was in force at the time of the alleged injury to the plaintiff. At the time the accident occurred the ice was several inches thick on the sidewalk. According to the testimony of the plaintiff, the street at the place where he was injured had no curbstones, and the ice extended over all the sidewalk and across the street. That there was ice upon the sidewalk was not controverted by the defendants, but they attempted to prove that it had been rendered safe and convenient for travel by sprinkling ashes or sand upon the surface of the ice; and they proved that persons had been designated by the proper authority, whose duty it was to remedy the difficulty by such means, as often as it occurred. But the testimony introduced by the plaintiff tended to show that the duty had been neglected, or that the work had been so imperfectly done as not to accomplish the object. Snow had fallen that morning to the depth of an inch or two, and the testimony introduced by the plaintiff was full and satisfactory that the sidewalk where he fell was very slippery. He passed down for some distance on the southerly side of the street, in that part of the same which is designed for carriages and teams. While so passing he met a stranger, who spoke to him and made inquiry for a third person; after answering that inquiry, he stepped on the sidewalk, still pursuing his course down the street. It is a steep street leading into South Main street, and, when within a short distance of the latter street, he slipped and fell, which occasioned the injury described in the declaration. The account of the accident was, that he slipped, and as he fell he caught his hand under him and crushed it very badly; another witness, who was present at the time of the accident, says he slipped, and as he fell he threw out his hand to save himself, and, when the witness lifted him up, he complained of his wrist and of being badly sprained in his body. Injury was done to the wrist, but the bones of the wrist were not broken. As described by the medical witnesses, the bones of the hand were driven past the bones of the wrist or forearm, and two of the bones of the hand were broken. For a week or more he was confined to his room, and it was five or six months before he could feed or dress himself. He was a deputy sheriff, and with a business, as he testified, worth nearly a thousand dollars a year; and it was twelve months before he was able to do much writing; and he also testified that he had not done business since the accident occurred. On re-examination he testified that he experienced severe pain for six or eight months, and that by spells the injury continues to cause pain to the present time. He also introduced evidence showing that the fracture was a bad one, and tending to show that it might occasion a permanent injury. On the other hand, the defendants introduced several witnesses to show that the sidewalk was safe and convenient for travel, and that the earnings of the plaintiff were much less than a thousand dollars a year. During his closing argument, reference was made by the counsel for the plaintiff to certain matters not proved in the case, and in regard to which no testimony had been offered or introduced. Objection was made to that course of remark by the counsel on the other side, and it was immediately checked by the court, and the jury were instructed to confine their attention exclusively to the evidence in the case. Excessive damages is the next ground of complaint, and the one on which reliance is chiefly placed in support of the motion. Courts of justice are always reluctant to interfere with the verdict of a jury on that ground in cases of this description, for the reason that the law affords no definite rule by which the precise compensation for the injury can be ascertained. Where a party sustains a loss by reason of a breach of contract, he is entitled to a recompense, compensation, or satisfaction equal to the injury actually received by him from the defendant; or, in other words, he will be placed in the same situation with respect to damages, so far as money can do it, as he would have been if the contract had been performed. Injuries to property, also, may oftentimes be estimated with equal exactness; and when unattended by any circumstances recognized by law as matters of aggravation, the rule of damages is compensation, recompense, or satisfaction for the injury received. Certain other actions of tort are necessarily governed by far more indefinite principles. Where the person or character is injured, it is difficult, says Mr. Mayne, if not impossible, to fix any limit; and the verdict, therefore, is generally a resultant of the opposing forces of the counsel on either side, tempered by such moderating remarks as the judge may think the occasion requires. Such cases, however, as the same author well remarks, are not beyond rule, and consequently the finding of the jury is not beyond the control of the court; for if it were not so, then there could be no such thing as a new trial for excessive damages. Mayne, Dam. p. 34. New trials may, and often are, granted for that cause, but the difference between the one and the other class of cases arises chiefly out of the fact that in cases of this description no rule can be applied to the facts so accurately as to make the amount a mere matter of calculation. Hence the rule goes no further than to point out the grounds of complaint which

may be taken into the account as elements of computation, and the evidence that may be introduced to support the claim; and when that is done, the estimation of the amount of the damages is necessarily left to the jury. They are to weigh the evidence and estimate the loss to the plaintiff; and inasmuch as there are no definite means of calculation by which the amount can be precisely ascertained, courts of justice will not grant a new trial except when the verdict is so large as to satisfy the court that it was perverse, or the result of gross error, or that the jury have acted under the influence of undue motives or misconception. Gough v. Farr, 1 Younge & J. 477. Bodily pain and suffering, in cases of this description, are part and parcel of the actual injury, for which the plaintiff is as much entitled to compensation as for loss of time or the actual outlay of money for nursing and medical attendance. Damages for bodily pain and suffering arising from physical injury, and connected with loss of time or diminished ability to labor as the direct consequence of the injury, are not exemplary or punitory in their character in any proper sense of those terms, but are the legitimate ground of damage in all cases of this description; and yet it is difficult, if not impossible, to prescribe any very definite rule by which the jury are to be governed in estimating the amount to be allowed for that cause. Successive actions may sometimes be brought for a continued wrong, as in the case of a continued trespass on land, and in all such cases the damages are limited to those sustained by the plaintiff at the commencement of the action on trial. But where, as in this case, the suit is for an injury to the person from a single act, one action only can be brought, and consequently there can be but one assessment of damages. For that reason the jury are allowed, and it is their duty in case there is satisfactory proof that the injury is a permanent one, to take into consideration the future consequences to the plaintiff so far as respects loss of time, bodily pain and suffering, and inability to labor, or to pursue his usual avocations. Unless it were so, it might, and often would, happen that the plaintiff would be deprived of the larger portion of the compensation to which he was justly entitled, and the damages as found by the jury would be greatly inadequate to compensate him for the injury sustained. Caldwell v. Murphy, 1 Kern [11 N. Y.] 416; Id., 1 Duer, 233.

When a personal injury is of a character to impair the ability of the injured party to labor, and especially when it is of a permanent character, it often becomes necessary to inquire into the condition in life of the injured party, and also into the nature and character of his pursuits, in order that the jury may determine what the damage is from loss of time which he has received. Like injuries are supposed to occasion like bodily pain and suffering, irrespective of the condition of the injured party, but when the injury extends to loss of time or inability to labor, the law properly recognizes the well-known fact that the services of one will command and deserve higher compensation than those of another, and consequently allows the estimation of loss to be made according to the fact as proved by the evidence in the case. All, or nearly all, of those grounds of damage require the exercise of judgment and sound discretion on the part of the jury, and some of them are not of a character to admit of any very definite rule in making the estimate; and it is for that reason that courts of justice are reluctant to interfere with the finding of the jury. A verdict therefore may be larger than the court would have found, and yet it may furnish no satisfactory reason for a new trial; more than that must be shown by the defendant before the court will disturb the verdict. Gilbert v. Burtenshaw, Cowp. 230, 1 Gran. & W. New Tr. 415.

Mere excess of damages beyond what the court would have found is not sufficient to support the motion, unless it be so great, after making all due allowance for difference of judgment, as to satisfy the court that the jury were actuated by passion or some undue motive, or that the verdict was the result of some gross error or misconception. Applying these principles to the present case, it is obvious what the result must be. It may well be admitted that the verdict is for a larger sum than I would have found upon the evidence; but the excess is not so great as to justify me in disturbing the verdict.

In the second place, it is insisted that the verdict is against the evidence introduced to the jury. Such motions are frequently made and seldom sustained, and it is quite certain, in the present case, that the motion is without merit. Some discrepancy existed in the testimony as to the state of the street, but the weight of the evidence clearly showed that it was in an unsafe condition for travel, and had been so for some considerable time.

One or two observations respecting the third ground of complaint will be sufficient. Certain facts were adverted to by the counsel for the plaintiff which were not in proof. But the counsel was immediately checked by the court, and the jury were expressly instructed to confine their attention to the evidence in the case. In view of the whole case, I am of the opinion that the motion for a new trial must be overruled, and there must be judgment on the verdict.

Case No. 17,631.

WIGLE et al. v. KIRBY.

[3 Cranch, C. C. 597.] [1]

Circuit Court, District of Columbia. May Term, 1829.

SLAVERY—MANUMISSION.

Slaves cannot be manumitted in Washington county, D. C., by last will, if over forty-five

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

years old at the time the manumission is to take effect.

Petition for freedom. The petitioners [Negro Harry Wigle and others] claimed freedom under the will of John Baptist Kirby, by which they were to be free at his death. Some of them were over forty-five years of age at the death of the testator.

Mr. Ashton, for the defendant, prayed the court to instruct the jury that if any of the petitioners were over the age of forty-five at the testator's death, the manumission was void as to them; and cited Burrough v. Negro Anna, 4 Har. & J. 262, and Hamilton v. Cragg, 6 Har. & J. 16.

Mr. Coxe, contrà. There were formerly, in Maryland, different opinions in regard to this question, but the court of appeals of Maryland have decided it since the formation of this district. While the law was unsettled in Maryland, this court decided that the manumission was valid if provision was made by the testator against the slaves being a burden upon the public.

Previous to the act of 1752 (chapter 1), manumission by will was lawful; otherwise that act would have been unnecessary, (see its preamble,) and the second section does not make void the manumission, but only subjects the party to a penalty, and obliges him to support the negro during his life, "whereby he may not become a burden to others, or perish through want, to the great scandal of Christian society." The object of the thirteenth section of the act of 1796 (chapter 67) is the same as that of the second section of the act of 1752, which is repealed by the twelfth section of the act of 1796. The interpretation should be in favor of liberty. "And," in the thirteenth section, should be construed to be "or," so as to read thus, "unless the said slave or slaves shall be under the age of forty-five years," or able to work and gain a sufficient maintenance and livlihood. This testator has made sufficient provisions for the maintenance of the old and infirm, as well as of the young.

Mr. Ashton, in reply. The legislature of 1796 intended to fix the rule of age as the qualification for manumission, in order to avoid disputes as to the ability of the slave to maintain himself, if over that age. It is a clear and definite line drawn; and although under forty-five, the negro must still be able to maintain himself.

THE COURT stopped Mr. Ashton, and said that the law of 1796 was positive and clear, and that the decisions of the court of appeals of Maryland upon their own law are to be respected by this court.

THE COURT (nem. con.) gave the instruction as prayed by Mr. Ashton.

Verdict and judgment accordingly.

WIGTON v. JERSEY CITY WINDOW-GLASS CO. See Case No. 7,292.

Case No. 17,632.

WILBER v. INGERSOLL.

[2 McLean, 322.] [1]

Circuit Court, D. Ohio. Dec. Term, 1840.

STATUTES ABOLISHING IMPRISONMENT FOR DEBT.

The act of Ohio abolishing imprisonment for debt, except in certain cases, having been adopted by congress, can only affect proceedings in a case, subsequently to its adoption.

[This was an action by A. Wilber against T. Ingersoll.]

Mr. Goddard, for plaintiff.

Mr. Gilbert, for defendant.

McLEAN, Circuit Justice. In this case a judgment was entered at July term, 1838, and a capias ad satisfaciendum was issued on the judgment, returnable to the ensuing term of December. On this process the defendant was arrested, and he gave security for the prison limits. And the counsel for the defendant now moves the court for a rule nisi, that plaintiff, within thirty days, file with the clerk an affidavit of himself, his agent or attorney, setting forth some one or more of the causes which, by the laws of Ohio, would entitle him to a ca. sa., and, in default thereof, that the defendant be discharged. This motion is opposed by the plaintiff's counsel.

By the act of Ohio, of the 19th March, 1838, imprisonment for debt, except in certain cases, is abolished, unless an affidavit be made agreeably to the statute, &c., before the suit is commenced, and, also, after the rendition of the judgment, and before final process shall be issued. By the act of congress, of the 28th February, 1839 [5 Stat. 321], the state laws, respecting imprisonment for debt, were adopted. Until the adoption of the state statute on this subject, it could not operate on causes brought in the federal court. And. the question is now made, whether this state law, adopted in 1839, can have the effect to release from imprisonment a defendant held on a capias ad satisfaciendum, dated in 1838, and issued on a judgment rendered the same year. The law took effect from the time of its adoption, and all causes, then pending, were governed by it. But no retrospective operation can be given to the law. In the case of Gray v. Monroe [Case No. 5,724], this court gave effect to the law, by discharging the appearance bail on motion. In that case the action had been commenced, and the appearance bail taken, before the adoption of the statute by congress; but the court held that, as under the law, special bail, in that case, could not be required, the appearance bail must be discharged.

In the case under consideration, the proceedings had been consummated before the law took effect. The defendant was held, if not in satisfaction of the judgment, at least as a means of enforcing the payment of it. And we know of no rule of construction which shall

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

apply the provisions, of the adopted act of 1839, to a proceeding in any case prior to that time. If any further step were necessary by the plaintiff, to coerce the payment of his judgment, such step must be taken under the existing law. The motion is overruled.

Case No. 17,633.

In re WILBUR.

[1 Ben. 527;[1] 3 N. B. R. 276 (Quarto, 71).]

District Court, E. D. New York. Nov., 1867.

BANKRUPTCY—RIGHTS OF CREDITORS—PRIOR LEVIES—INJUNCTION.

1. Where judgments were obtained in good faith against a bankrupt, and levies, on executions issued under them, were made prior to the filing of his petition in bankruptcy, after which injunctions were granted by the bankruptcy court, which, after the lapse of several months, the creditors moved to dissolve, the assignee in bankruptcy having taken no steps in the matter; *Held*, that as it did not appear that the property levied upon was worth more than the amount of the judgments, nor that a sale by the assignee would realize any more than a sale by the sheriff, and as there was no proof that any advantage would result to any creditor by continuing the injunction, it must be dissolved.

2. The rights acquired by the judgment creditors by their levy must be preserved to them.

3. Whether the bankruptcy court has power to assume possession and control of property levied on by a sheriff prior to the proceedings in bankruptcy—quere.

This was a motion made in behalf of certain judgment creditors of the bankrupt [Jeremiah G. Wilbur] for the dissolution of an injunction previously issued by this court restraining them from proceeding to collect upon execution the amount of certain judgments which they had obtained in a state court, and upon which execution had been issued and a levy made upon certain personal property prior to the filing of the bankrupt's petition.

BENEDICT, District Judge. It is clear, upon principle, and also, as I think, from the general scope of the provisions of the bankrupt act [of 1867 (14 Stat. 517)], that any rights which these judgment creditors have acquired in the personal property in question, by reason of their levy made prior to the filing of the bankrupt's petition, are to be preserved to them, and cannot be destroyed by the subsequent proceedings in bankruptcy. Whether, in any case, this court has the power, by virtue of any provision in the act, to assume the possession and control of the property levied upon by a sheriff prior to the proceedings in bankruptcy, and compel the judgment creditors to receive their debt at the hands of this court out of the proceeds realized from a sale of such property to the assignee in bankruptcy, is a question not free from difficulty. But, if such a power exists, it is to be exercised with caution, and not to be resorted to unless it appear necessary to protect some substantial right or prevent injustice. As this case appears from the papers, no advantage will be derived from the interfering with the proceedings upon the execution in the hands of the sheriff. It is not claimed by the assignee that the property levied upon exceeds in value the amount of the judgments, nor that a sale of it by the assignee will realize any greater sum than a sale by the sheriff. Although the injunction was granted in July, and the assignee appointed September 3d, it does not appear that the assignee has made any demand upon the sheriff for the property, or taken any steps towards securing possession of it; nor has any application been made by him for leave to discharge the levy by payment of the amount due upon the judgments, while it is conceded that the judgments were obtained in good faith, without fraud or collusion. Upon such a state of facts, and in the absence of evidence of any advantage to result to any creditor from the interference of this court by a continuance of the injunction, I have no hesitation in directing it to be dissolved.

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

WILBUR (ADAMS v.). See Case No. 70.

WILBUR (ALMY v.). See Case No. 256.

Case No. 17,634.

WILBUR v. BEECHER.

[2 Blatchf. 132; Merw. Pat. Inv. 203; 1 Fish. Pat. Rep. 401.][1]

Circuit Court, N. D. New York. Oct. 20, 1850.

PATENTS—UTILITY AND INVENTION—CONSTRUCTION OF SPECIFICATIONS—INFRINGEMENT—MEASURE OF DAMAGES—BARK GRINDING MILLS.

1. The invention covered by Montgomery and Harris' patent of the 12th of August, 1840, for an "improvement in the mill for breaking and grinding bark," is a multiplication of the grinding chambers and apparatus in a mill of a given size, and which may still be driven by the same power as a mill of a single chamber.

2. It appearing that a mill constructed according to the specification of the patent, with three grinding chambers, would grind, when not in very rapid operation, say at a speed of 50 or 60 revolutions in a minute, a cord of bark an hour through the day, being double the quantity ground by the old single-chambered mill: *Held*, that that was evidence enough of the utility of the invention.

3. On the point of the utility of an invention, the question is not, whether the machine invented is the best one known to the community, nor whether it does its work better or faster than any other machine in the same department of labor, but whether it is, to a certain degree, useful.

[Cited in Hoffheins v. Brandt, Case No. 6,575; Stimpson v. Woodman, 10 Wall. (77 U. S.) 125; Gibbs v. Hoefner, 19 Fed. 324.]

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission. Merw. Pat. Inv. 203, contains only a partial report.]

4. In this case, the thing discovered and described was the formation of grinding-chambers, by the combination of movable conical rings with stationary cylinders, these two parts being severally brought together and fastened by cross-bars; the particular description in the specification showed a mill with three grinding-chambers; but the claim was to the combination of stationary cylinders with one or more movable conical rings, thus allowing both cylinders and rings to be multiplied to any extent, or the mill to be limited to two cylinders and one ring: *Held*, that any further particular description in the specification was unnecessary, in order to enable a mechanic of ordinary skill to make a mill with more chambers than three.

5. A bark-mill that multiplies the grinding-chambers by a combination of movable conical rings with stationary cylinders is an infringement of Montgomery and Harris' patent.

6. The shape of the grinding-chambers and the form of the teeth in the mill are no part of the patented combination, and, therefore, although the defendant's mill, by a change in those points, grinds better and faster than the patented mill, yet, if it contains the combination of the movable conical nuts with the stationary cylinders, it is still an infringement.

7. The case of Parkhurst v. Kinsman [Case No. 10,757], cited and applied.

8. The plaintiff, in a patent suit for making and selling, is entitled to the actual damages he has sustained by the infringement, or, in other words, to the profits the defendant has made thereby; for the law presumes, that if the defendant had not put his machines into the market, the demand would have been for the plaintiffs, and he would have received the profits.

9. The difference between the actual cost of making a machine and its sale price is not all nominal profit; but the jury must take into account the interest on capital, the risk of bad debts and the expenses of selling, in arriving at the defendant's profits.

This was an action on the case [by Erastus Wilbur against Mather Beecher], tried before NELSON, Circuit Justice, for the infringement of letters patent granted to Richard Montgomery and Lewis W. Harris, of Sangerfield, Oneida county, New York, on the 12th of August, 1840, for an "improvement in the mill for breaking and grinding bark." The plaintiff was the assignee of the patent for the state of New York.

At the trial, the plaintiff gave in evidence the patent, with the specifications and drawings thereto annexed, from which it appeared that the bark-mill described and claimed in the specification was composed of alternate stationary and movable rings, placed concentrically, the opposing surfaces of the rings being provided with teeth; that the movable rings were connected together, and to a central shaft with which they revolved, by transverse arms or cross-bars; and that the stationary rings were also connected to each other by transverse arms. The rings, as connected and combined, formed a community of grinding chambers, consisting of two or any greater number, an increase in the number of chambers to any extent being effected by multiplying the number of rings, and connecting and combining them in the manner described in the specification.

[2] [The specification and claims of the patent were as follows:

["To all whom it may concern: Be it known that we, Richard Montgomery and Lewis W. Harris, of Sangerfield, in the county of Oneida and state of New York, having invented a new mode of breaking and grinding bark and other substances of a similar character, and we do hereby declare that the following is a full and exact description thereof:

["The nature of our invention consists in providing a mode of breaking and grinding bark and other substances of a like character, by means of hollow stationary cylinders, and one or more revolving conical nuts, placed concentrically in connection with teeth and pickers, the whole constructed, arranged, and combined, as hereinafter particularly described, the machine operating with the like facility and with the same effect, whether its revolutions are performed forward, or in a counter direction.

["To enable others skilled in the art to which our invention appertains, or with which it is most nearly connected to make and use such invention, we will proceed to describe its construction and operation. The material parts of our machine are as follows, viz.: (1) A cylinder D, Fig. 1, which is hollow, the sides, within and without, are perpendicular to the base, the interior surface being provided with teeth. This cylinder is stationary. (2) Another cylinder M, Fig. 1, which is also hollow. Its sides, like those in the cylinder D, Fig. 1, are also perpendicular to the base, within and without, and are provided with teeth. This cylinder is also stationary. (3) A conical nut b, Fig. 2, which is hollow. The sides within and without, incline upward, each toward the other, at a corresponding angle. The sides within and without, are provided with teeth. (4) Another conical nut T, Fig. 2, which is solid, and through the center and axis of which a shaft passes. The exterior surface of this nut inclines equally on all sides upward toward the shaft a, Fig. 2, and is provided with teeth. The nuts b and T, revolve with the shaft a, to which they are attached. (5) Fluted teeth h, h, h, Figs. 1, and 2, upon the internal surface of the stationary cylinder D, Fig. 1, and upon the internal and external surfaces of the stationary cylinder M, Fig. 1, and upon the external and internal surface of the revolving nut b, Fig. 2, and upon the external surface of the revolving nut T, Fig. 2. (6) Larger teeth c, c, c, c, Fig. 2, upon the external and internal surface of the revolving nut b, Fig. 2, and upon the external surface of the revolving nut T, Fig. 2. (7) Square teeth c, c, c, c, Fig. 2, with a flat top, called pickers, standing upon the upper end of the large teeth on the revolving nut b, Fig. 2. (8) Stationary tranverse arms n, n, n, Fig. 1, to which the cylinders D and M, Fig. 1, are attached, and which hold these cylinders in their proper position. (9) Transverse arms

[2] [From Fish. Pat. Rep. 401.]

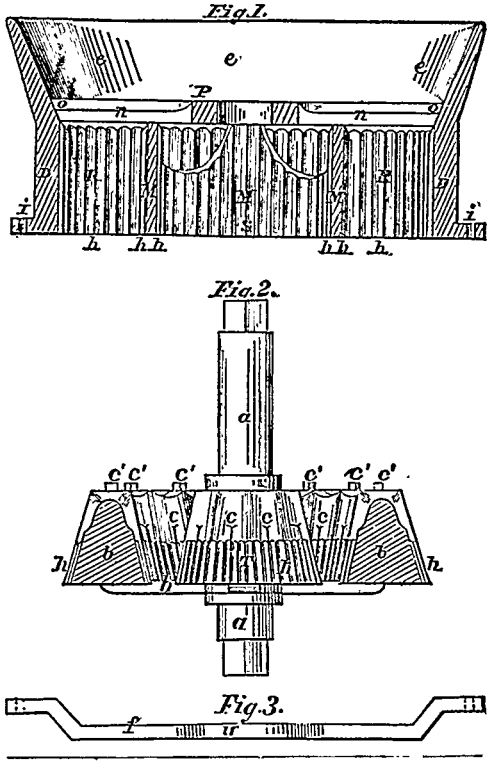
to which the revolving nuts b and T, Fig. 2, are attached, and which secure to these nuts a corresponding motion. (10) The shaft a, Fig. 2, which passes through the center and axis of the revolving nut T, Fig. 2, and to which it is secured. (11) A hopper e, Fig. 1, for holding the substance to be ground, and which is attached to the outside cylinder D, Fig. 1. (12) A cross-bar f, Fig. 3, with a socket n, in its center, in which the end of the shaft a, Fig. 2, turns. (13) Ears i, i, i, i, Fig. 1, upon the cylinder D, Fig. 1, through which bolts or screws are passed, to secure the machine in a fixed and permanent position.

["The drawings which accompany this specification represent different parts of our machine, and the proper position in the machine of the several parts represented will appear from the description and references. The stationary cylinders D and M, Fig. 1, are provided with low fluted teeth of equal length, depth, and sizes, extending longitudinally along and entirely across the inner surface of the cylinder D, and the outer and inner surfaces of the cylinder m, and disposed at equal distances entirely around them. They are arranged in perpendicular lines, parallel to each other, and to the upright shaft a, Fig. 2, and are formed and separated by a narrow concave groove extending the entire length of each tooth, and on both sides of it. The revolving nut T, Fig. 2, which is attached to the shaft a, Fig. 2, is in the form of a truncated cone, its sides retreating upward toward the shaft a. The form of the revolving nut b, Fig. 2, is that of a hollow truncated cone retreating without on all sides alike upward toward the shaft a. The interior surface of this nut and the teeth thereon, converge on all sides from the top downward toward the lower end of the shaft a, at an angle corresponding with that of the slope externally. The revolving-nuts T and b, Fig. 2, are provided with low fluted teeth, of an equal depth and size, and differing from each other only in length. They are like the small teeth in the cylinders D and M, Fig. 1, and are situated upon the external side of the revolving-nut T, Fig. 2, and upon the external and internal sides of the revolving-nut b, Fig. 2. They begin at the lower termination of the sides, and extend longitudinally along, but not entirely across them, and are formed and separated from each other by a concave groove in like manner with those in the cylinders D and M, Fig. 1, above described, and are disposed, at equal distances from each other, entirely around these sides. They are grooved out of the lower circular portion of the nuts longitudinally, and, as far as they extend, slope with them. Those upon the external side of the revolving-nut T, Fig. 2, incline toward the upper portion of the shaft a, Fig. 2, and those upon the internal side of the nut b, Fig. 2, incline toward the lower end of this shaft. The revolving-nuts T and b, Fig. 2, are also each of them provided, in addition to the small teeth above described, with a row of larger teeth, arranged upon the external sides of the revolving-nut T, Fig. 2, and upon the external and internal sides of the revolving-nut b, Fig. 2. Each tooth extends from the lower termination of these sides upward longitudinally entirely across to the upper termination thereof, and is a mere continuation of some of the small teeth above described extended and gradually increased in depth and size from the point of extension toward the top of the nuts respectively. The large teeth upon the nut T, Fig. 2, and upon the external sides of nut b, Fig. 2, incline with the surfaces upon which they are situated to-

[2] [Richard Montgomery and Lewis W. Harris.

[Bark Mill.

[Patented August 12, 1840.]



ward the shaft a, Fig. 2, like the small teeth thereon, and at a corresponding angle, whilst the large teeth upon the interior surface of the revolving-nut b, Fig. 2, incline, like the small teeth, upon this surface toward the lower portion of the shaft (a), and at the same angle with the small teeth last mentioned. The back of each of the large teeth, on the exterior surface of the revolving-nut b, Fig. 2, joins at the top of this nut with a large tooth of the same dimension, the interior surface of this nut, the backs coinciding, and the edges facing in opposite directions. Upon the top of each of the large teeth thus united is a square tooth or picker, standing parallel to the shaft (a, Fig.

[2] [From 1 Fish. Pat. Rep. 401.]

2), which aid in breaking the bark or other substance to be ground against the stationary arms n, n, n, Fig. 1, as the nuts revolve. The stationary arms (n, Fig. 1) are attached to the cylinder m at n, and to the cylinder D at O. In the center of the arm n, at P, is a socket, in which the shaft a, Fig. 2, turns. The lower circumference of the hopper e, Fig. 1, corresponds in size with the cylinder D, Fig. 1, over which it is placed, and to which it is permanently secured. Fig. 1 represents the stationary cylinders D and M', and the hopper e, and the stationary arms n', in an inverted position. R, Fig. 1, is the space filled by the revolving-nut b, Fig. 2, and S, Fig. 1, that filled by the revolving-nut T, Fig. 2. When placed in their proper positions in the machine, g, g, Fig. 1, are ears upon the stationary cylinders D, to which the cross-bar f, Fig. 3, is secured. The nuts b and T, Fig. 2, are firmly secured at the base to transverse arms which revolve with them. These revolving-arms are like the stationary arms n, n, n, Fig. 1, and connect the nuts b, and T with each other in the same manner, that the stationary arms n, Fig. 1, connect the cylinders D, and M, Fig. 1. The lower end of the shaft a, Fig. 2, is firmly secured to the center of the revolving-arms where these arms intersect each other. A revolution of the shaft therefore, carries the revolving-arms and the nuts b and T around with it. c, c, c, c, Fig. 2, are rows of pickers and large teeth upon the nuts b and T, extending entirely around them. As the nuts revolve under the stationary arms n, Fig. 1, the bark, or other substance to be ground, is broken by them against the stationary arms and the surrounding teeth, and sides of the cylinders D and M, into pieces of a proper size, to be acted on by the small teeth in the cylinders and nuts. h, h, h, Figs. 1 and 2, are fine teeth upon the inner surface of the cylinder D, and upon the external and internal surface of the cylinder M, and upon the external and internal surfaces of the nut b, and upon the surface of the nut T. The nut b performs its revolutions between the cylinders D and M. The nut T is surrounded by the cylinder M, within which it revolves. The small teeth in the cylinders are of a corresponding size with the small teeth, in the nut opposed to them, and in connection with which they are designed to act. The teeth in the cylinders are perpendicular to the base of the cylinders, and surround the shaft a, in lines parallel to the shaft and to each other. Those in the revolving-nuts surround the shaft a, in lines inclining toward it as hereinbefore mentioned, but which are in the same plane with the axis of the shaft a. The machine, therefore, grinds with the like facility, whether the nuts revolve forward, or in a contrary direction. The bark or other substance to be gound is placed in the hopper e; the moving-power is applied to the shaft a, which, in revolving takes with it the nuts b and T, together with the arms, which secure and connect them to each other. The substance is broken by the large teeth and pickers c, c, c, c, Fig. 2, against the stationary arms n, n, n, Fig. 1, and the surrounding teeth and sides of the stationary cylinders, and, falling down between the small teeth in the cylinders, and those in the nut opposite, is there ground, and is then discharged through the small teeth, from the base of the machine. The revolving-nuts being of a conical shape as above described, and the teeth thereon inclining with the cone upon which they are situated, as above mentioned, may be brought nearer to those in the cylinders by raising the shaft a, to which they are attached, or may be removed farther from them by lowering the shaft, and, in this manner, the machine may be made to grind coarse or fine as occasion may require.

["What we claim as our invention, and desire to secure by letters patent, is: The combination of the conical nuts, one or more, with the cylinders placed concentrically, as herein mentioned and described, and constructed, arranged, and connected in the manner herein described, and provided with teeth and pickers, arranged as is also herein mentioned and set forth. Richard Montgomery.

["Lewis W. Harris."] [2]

The plaintiff also gave evidence tending to show the novelty and utility of the invention, the sufficiency of the specification, and the manufacture and sale by the defendant, in the state of New-York, of a large number of bark-mills alleged to be an infringement. The bark-mills made and sold by the defendant were constructed, some with four, but most of them with six grinding chambers, formed by alternate stationary and movable rings, arranged and combined in the manner described in the said specification; but the teeth in the defendant's mills varied in some particulars from the teeth described in the specification, and the chambers and stationary rings in the defendant's mills differed somewhat in shape from those in the patented mill.

The defendant introduced evidence designed to show that the specification did not sufficiently describe the manner of constructing a bark-mill with any other number of grinding chambers than three. So much of the specification as is material, and the principal points made and evidence given, are stated in the charge to the jury.

Samuel Stevens, Samuel Blatchford, and Levi D. Carpenter, for plaintiff.

Joshua A. Spencer and William Baker, for defendant.

In charging the jury, NELSON, Circuit Justice, remarked as follows:

The improvement which has been patented to Montgomery and Harris has been described in the specification which accompanies the patent, and it is necessary for us to look into that, in the first instance, with a view to as-

[2] [From 1 Fish. Pat. Rep. 401.]

certain, as nearly as possible, the thing which has been discovered, and the property in which is secured to the patentees. The law requires that the applicant for a patent shall set forth in his specification a description of his invention, sufficiently full and particular to enable any intelligent mechanic to make a machine from such description.

The patentees in this case begin by stating in their specification, in very general terms, the nature of the improvement which they have discovered. They say: "The nature of our invention consists in providing a mode of breaking and grinding bark and other substances of a like character, by means of hollow, stationary cylinders, and one or more revolving conical nuts, placed concentrically, in connection with teeth and pickers, the whole constructed, arranged and combined as hereinafter particularly described." They then go on in their specification and describe the material parts of the machinery of the mill. First, the outer cylinder or shell of the mill; next, another cylinder, which is also stationary, and is the second in the models which have been shown, there being teeth on the inside of the outer cylinder, and on the inside and outside of the inner cylinder; next, a movable conical nut or ring, with teeth on the outside and inside; and then another conical nut, which is solid, and has teeth on its outside, and through the centre of which a shaft passes, which is connected with the driving power. The patentees then give a description of the teeth which are used on these stationary cylinders, and on the movable conical rings. They also describe the cross-bars or pieces that hold firmly together the stationary cylinders, and the cross-bars that hold together firmly the movable conical grinders. All this, taken together, perfects the mill, and produces the combination which the patentees allege they have discovered, and which they design to describe in their specification.

They next set out their claim, which is the most material part of the specification, especially when taken in connection with the particular description previously given. The claim, in the language of the patentees themselves, is as follows: "What we claim as our invention, and desire to secure by letters patent, is the combination of the conical nuts, one or more, with the cylinders, placed concentrically as herein mentioned and described, and constructed, arranged and connected in the manner herein described, and provided with teeth and pickers arranged as is also herein mentioned and set forth." The claim in substance is this—the combination of the conical nuts, one or more, with the cylinders, placed concentrically as described in the specification, and furnished with teeth and pickers on their surfaces.

Now, the first question is—what is the thing that has been invented by the patentees? Because, unless we ascertain intelligibly what the machine is which it is claimed has been discovered, we shall be altogether disqualified for determining whether or not it has been infringed or violated by the operation of the defendant's mill. The claim is exceedingly plain, and is very distinctly and clearly expressed. It is simply the combining together of the stationary cylinders and the movable conical rings, there being teeth on the sides of both, and that combination being sustained by the cross-bars to which the movable parts and the stationary parts are severally attached, so that, on applying the driving power to the shaft, the grinding is effected in the grinding chambers formed by the surfaces of the nuts and cylinders.

It is proper to inquire what the purpose is of this combination, and what useful object was intended to be obtained by it. Obviously, it seems to me, to increase the grinding apparatus in a machine of a given size, and which may still be driven by the same power as before. This is the new and valuable idea which has occurred to the patentees, which they have reduced to practice, and which is, in their description, embodied in a working machine. This is manifest on looking at the old mill, and comparing it with the new mill of the patentees. There was but one grinding chamber in the old mill, while one of the simplest forms of the mill discovered and reduced to practical operation by the patentees, contains two grinding-chambers, which are formed by inserting a movable conical nut between an outer and an inner stationary cylinder. It was the multiplication of these chambers and of the grinding apparatus or machinery, that was discovered by the patentees, and which it is agreed was never before known or put in practice.

As to the utility of the invention, I do not understand that it is called seriously in question. An invention must not only be one that can be reduced to practice, but it must be one of some utility. It appears, from the testimony in this case, that the mill of the patentees, formed by the multiplication of the grinding-chambers, particularly the mill with the three chambers, described in the specification and shown in the drawings, will grind, when not in very rapid operation, say at a speed of fifty or sixty revolutions in a minute, a cord of bark an hour through the day; and the witness did not doubt, that with an increased velocity, it would grind more. It grinds, moreover, double the quantity ground by the old mill. This is evidence enough of the utility of the invention. The question is not, whether the machine invented is the best one known to the community, nor whether it does its work better or faster than any other machine in the same department of labor. But, if it be to a certain degree useful, and be original with the patentee, it belongs to him alone, whether it does less or more work.

It has been insisted, on the part of the defendant, and that view was taken by some of the experts whom he called, that the specification in question here is not sufficiently full

and particular to enable a mechanic of ordinary skill to make a mill with grinding-chambers multiplied beyond the number particularly enumerated in the specification, which is limited to three. But several of the experts who have been examined on the part of the plaintiff say, that there is no difficulty in constructing a mill with any number of grinding-chambers, from the description in the specification. Some of the witnesses for the defendant, who were examined particularly in respect to this point of the case, obviously labored under a misapprehension as to the extent of the questions that were put to them. They failed to comprehend the principle on which these questions are put to experts, and they, therefore, failed to respond intelligibly. Mr. Pond, a witness for the defendant, of great intelligence, and of long practical experience in this branch of business, would not say that, after reading the specification, he could not make a mill with the grinding chambers multiplied to any given number. But he undertook to give a legal construction to the specification for himself, and, assuming his construction to be sound, and predicating upon it the answer he gave, he said he could not make such a mill if he were to follow, throughout its structure, the particular and identical description in the specification; and this was the view taken by another witness. The point is thus made one of some importance.

What is the thing discovered and described? It is the formation of grinding chambers, by the combination of movable conical rings with stationary cylinders, these two parts being severally brought together and fastened by cross-bars. The description in the specification shows a mill with three grinding chambers. How will you add another chamber? The patentees evidently had in their minds the idea of multiplying the chambers, because they suggest the use of stationary cylinders and one or more movable conical rings, thus allowing both cylinders and rings to be multiplied to any extent, or the mill to be limited to two cylinders and one ring. Where was the necessity of their adding the description of another stationary cylinder just like the one described in the specification, and of another conical ring just like the one they have described, and directing the ring and cylinder to be put into the mill concentrically, so as to obtain two more grinding chambers? There would be nothing new in such a description. The specification already directs how to make the cylinder and the ring, and how to combine them in order to produce grinding chambers. A ring between two cylinders produces two chambers, and two more are made by the addition of another ring and another cylinder. This is a mere duplication of parts, and there is nothing new in the multiplication of the parts. By taking the description of what has already been put together to form grinding-chambers, and by putting the same together again, and adding it to the mill by the same connection of cross-bars, you have a multiplication of the grinding-chambers.

If I have been fortunate enough to communicate to you my ideas in respect to the thing really invented and put into practical operation by the patentees, you will be prepared to take up the next subject of inquiry, and that is, whether the defendant has been guilty of an infringement; or, in other words, whether he has appropriated to his own use and for his own benefit, this new machine constructed and put in operation by the patentees. As I have already stated, the object and effect of the invention are, an increase of the grinding apparatus by a multiplication of the grinding-chambers. Has the defendant appropriated to himself this idea? Has he increased the grinding apparatus in his mill, by using the combination of the movable conical rings with the stationary cylinders? Both parties must start with the old machine, the Gale mill, which was the only mill in operation at the time of the invention by the patentees. Montgomery and Harris being the first in point of time, made the improvement which I have been explaining; that is, they increased and multiplied the number of the grinding-chambers by a combination of rings and cylinders. They thus made an advance on the old machine. Instead of only one grinding-chamber in the mill, you have two, three, four or five, or any number you see fit to make, by a multiplication of the parts. Has the defendant appropriated this combination, in the mill which he has constructed? Has he formed grinding-chambers by combining movable conical rings with stationary cylinders? If he has, he has appropriated and adopted the combination invented, described, claimed and patented by Montgomery and Harris. The defendant has a mill of six grinding-chambers and twelve grinding surfaces. Has he obtained that by a multiplication of the chambers, according to the combination of the patentees? If he has, then he has been guilty of an infringement.

It is urged, on the part of the defendant, that the shape of the grinding chambers in the defendant's mill is different from the shape of the chambers in the plaintiff's mill, and that, consequently, the combination in the defendant's mill of the running parts and the stationary parts which form the chambers, is different from the combination of those parts in the plaintiff's mill. It will be quite obvious, however, to any person of ordinary understanding, who will look at these various mills, and at the principle on which they are constructed, that this grinding chamber, though made of various shapes, will still produce a useful result. A particular shape may and probably will enable one machine to operate more advantageously than another. A mill with grinding surfaces of one particular shape may grind faster and better than a mill with surfaces of another shape. But a mill that does not grind so fast or so well as another, because it has chambers of a different shape,

will not, therefore, cease to be useful. This is demonstrated by the evidence in this case. The chamber in the plaintiff's mill has one receding side formed by the movable conical nut, and one upright side formed by the stationary cylinder. The evidence shows that the mill thus constructed is a useful and valuable mill. In the defendant's mill, both the surfaces of the chamber are receding, as well that of the cylinder as that of the ring. Thus, a larger opening is made to let in the bark, and it is very likely that this is an improvement, and that its effect is to aid in feeding the mill and in increasing its grinding capacity. In every new invention, the particular machine, when first reduced to practice, is measurably in an imperfect state. But the idea of the inventor is complete. There is, however, in the execution and mechanical construction, which go to embody the original idea in a machine for practical use, a degree of imperfection which, from a want of experience, always attends the first construction. In the two machines in question here, the shape of the grinding-chamber is different in this respect only that in the plaintiff's one of its sides is upright and one recedes, while in the defendant's both of its sides recede. A person using the combination discovered and put into use by the patentees, may, by experience in its practical operation, see where it can be altered, and may call in a mechanic and have the alteration made, which may improve the machine. This is a necessary consequence of the practical use of the machine by a man of ordinary skill and judgment. But there is no novelty or invention in such alteration.

An illustration of this is to be found in a case recently tried before me in the city of New York, involving the title to a most useful machine called a burring machine, for the purpose of cleaning wool or cotton, and separating the dirt and foul stuff from the fibre. This had before been done by hand, at great expense. But a machine was invented whereby the whole operation was performed by covering a cylinder with a common card of leather, furnished with teeth formed with a hook on the outside and a slot below. As the cylinder revolved, the wool or cotton being brought close to it, was caught by the hooked teeth and drawn into the slot, in such manner that the fibre went to the bottom of the slot, while the dirt remained on the top of the tooth. There was then a beater, which rubbed along the surface of the cylinder and brought off the dirt, and the operation was complete. There was such demand for the machines that the business of constructing them became extensively profitable. In the suit of which I have spoken, the defendant had originally been in partnership with the inventor in constructing the machines, and, after the partnership expired, continued to construct them without any right or license. When prosecuted by the inventor, he set up, among other things, by way of defence, that he had changed the form of the hooked teeth, and had altered the shape of the slots between the teeth. This, he insisted, was a great improvement. He had taken the whole of the patentee's machine, and, slightly altering it, claimed the right to use it, and thus to absorb the whole of the invention. The case referred to is that of Parkhurst v. Kinsman [Case No. 10,757]. But, if any such doctrine were to be incorporated into the patent law, and to be administered by courts and juries, as that such an alteration would be a defence to a charge of infringement, no patent of any machine, however useful, would be worth the parchment on which it is written. But this is not the law. A difference merely in shape is a difference in degree only, and not in the thing itself. In this case, the grinding chamber—the space through which the bark enters—is more open in one mill than in the other. But there is nothing new in this particular shape, because the shape of the grinding chamber is no part of the combination patented.

The same observations are equally applicable to the shape of the teeth. Their shape, whether they be straight or slanting, is no part of the patented combination. Either form will work very well, though the one may be better and more perfect than the other. But the form of the teeth, whether straight or slanting, is not new. Teeth of both shapes are found in many grinding mills, and neither party can claim either form as new.

The novelty of the patentee's machine consists, then, in the combination of the movable conical nuts with the stationary cylinders, by which means the patentees are enabled to multiply the grinding chambers in a mill to any given number. The teeth were old. The mere form of the grinding surfaces was not new. But this multiplication of the grinding chambers, in the manner described, appears to have been never before known. That is the novelty and all the novelty there is in the matter. As to the subsidiary parts, such as the peculiar shape of the chambers and the peculiar form of the teeth, they are incidental. But no one has a right, without the authority of the patentees, to use the combination of the two parts that go to form the grinding chambers. If you shall think that that combination is incorporated in the machine of the defendant, the plaintiff will be entitled to your verdict. But if you shall think otherwise, your verdict will be for the defendant.

If the defendant has been guilty of violating the plaintiff's rights, the rule on the question of damages is, that the plaintiff is entitled to all the actual profits which the defendant has made by the use of the principle of the plaintiff's combination. In other words, the plaintiff is entitled to all the damages which he has sustained by reason of the use which the defendant has made of the plaintiff's property. This is, in effect, the same thing, because the law presumes that if the defendant had not put his machines into the market, the demand would have been for the plaintiff's, and that

he would have received the profits on the machines which have been made and sold by the defendant. Vindictive or exemplary damages are not allowed. The jury are confined to the actual damages, and the law has provided that the court may increase those damages in proper cases.

There are some data in this case which you can take as guides to the amount of damages. It is stated by one witness, that from the year 1843 to this time, a period of some seven years, the defendant has cast six hundred and thirty-two mills; that the average cost of those mills to the defendant was $20 apiece; and that they sold at retail for $45 each, and at wholesale for $37 and $40 each. But the difference between $20 and $45 on each mill is not all of it nominal profit. The interest on capital, the risk of bad debts and the expenses of selling the mills, are all to be taken into account in arriving at the profits which the defendant has made. The right of the plaintiff accrued in August, 1845, and the suit was commenced in June, 1849. The jury should confine their inquiry on the subject of damages to that period, about four years, and to the profits which the defendant derived from sales of his mills within that period.

The jury found a verdict for the plaintiff for $7,200, which was reduced by the court, by consent of the plaintiff to $6,000.

The defendant afterwards moved, on a case, for a new trial, on the ground of errors in the charge of the court, and of the excessiveness of the damages. But the motion was denied.

Case No. 17,635.

WILBUR et al. v. LAWRENCE.

[2 Blatchf. 314.] [1]

Circuit Court, S. D. New York. Oct., 1851.

CUSTOMS DUTIES—DUTIABLE CHARGES—LIGHTERAGE AT PORT OF SHIPMENT.

1. Where wool, the growth and production of Buenos Ayres, was purchased there for exportation to New-York, but, on account of the blockade of Buenos Ayres was transported in lighters to Montevideo and shipped thence to New-York, *held* that, under section 16 of the act of August 30th, 1842 (5 Stat. 563), the costs and charges of such transportation from Buenos Ayres to Montevideo could not be added as a part of the dutiable value of the wool.

[Cited in Hutton v. Schell, Case No. 6,961.]

2. The case of Grinnell v. Lawrence [Case No. 5,831] cited, approved and applied.

This was an action to recover back duties paid to the defendant [Cornelius W. Lawrence] as collector of the port of New-York. The facts were these: The plaintiffs [Jeremiah Wilbur and others] entered at the custom-house, on the 17th of May, 1848, a quantity of unwashed wool, imported by them from Buenos Ayres to New-York. The wool was the growth and production of Buenos Ayres, and was purchased there for exportation to New-York, but, on account of the blockade of Buenos Ayres, was transported in lighters to Montevideo and shipped from that place to New-York. The value of the wool at Buenos Ayres, together with the costs and charges appraised and ascertained at the custom-house, with the addition of the usual commissions, was $4.787. Upon this a duty of 30 per cent., amounting to $1,436.10, was paid by the plaintiffs on the entry of the wool. The charges for the transportation of the wool from Buenos Ayres to Montevideo, together with 2½ per cent. commission, amounted to $1,281.25. Upon this, also, the defendant exacted a duty of 30 per cent., amounting to $384.30, which sum the plaintiffs paid under protest. They then brought this action to recover it back. A verdict was taken for the plaintiffs, subject to the opinion of the court, and also subject to adjustment at the custom-house in comformity to the decision of the court.

George C. Goddard, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. It is contended for the defendant, that the costs and charges attending the transportation of the wool from Buenos Ayres to Montevideo, are the expenses of shipment incurred subsequent to its purchase, and are to be added to the purchase-price, to make up its market value in the country from which it was imported.

The meaning and effect of the 16th section of the act of August 30th, 1842 (5 Stat. 563), as applicable to a similar state of facts, was considered and decided by this court in the case of Grinnell v. Lawrence [Case No. 5,831]. In that case, the goods were the production of China, and were there purchased and shipped to London, and then re-shipped to the United States. In appraising the value of the goods, the appraisers added the costs of transportation from Canton to London. The court decided that, upon the true construction of the 16th section of the act and of the proviso to that section, the market value of the goods, at the time of their exportation to the United States, in the principal markets of the place of production, with costs and charges to the time of shipment, was the dutiable value, and that the freight and expenses of their transportation from Canton to London could not be added. In that case, the goods were procured in the London market for shipment to the United States, and were not, as in this instance, on a continuous course of transmission from the place of production, nor were they purchased and invoiced at the latter place for this market. In these features there was more colorable ground for computing the expenses of transportation to London as part of the dutiable value, than there is in this case, where the purchase of the wool was

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

made at Buenos Ayres by the plaintiffs, and its transmission direct to the United States was commenced at that port. The employment of a vessel at Montevideo to carry the cargo, because of the inability to send one from Buenos Ayres, or for any other cause, did not interrupt the continuity of the voyage. This very point has been before the court in former cases, in which it was ruled, at nisi prius, that the charges of such transportation of the cargo could not be estimated in appraising the market value of the goods, and that the amount of costs and charges was limited to what had accrued at the time the goods left Buenos Ayres. The decision of the court that those cases were embraced within the principle of Grinnell v. Lawrence [supra] was not excepted to, and the judgments rendered in those cases, on that construction of the law, were acquiesced in and satisfied by the government.

Judgment must be rendered in this case for the plaintiffs, with a reference to the collector to adjust the true amount of duties payable by the plaintiffs upon the principles of this decision.

WILBUR (LOOMIS v.). See Case No. 8,498.

Case No. 17,636.

WILBUR v. STOCKHOLDERS.

[18 N. B. R. 178; 13 Phila. 479; 35 Leg. Int. 346; 26 Pittsb. Leg. J. 15.] [1]

District Court, E. D. Pennsylvania. 1878.

CORPORATIONS — STOCK ASSESSMENTS — EQUITY POWERS — CONSTRUCTION OF CHARTER — BANKRUPTCY — ASSESSMENT BY ASSIGNEE — COUNTERCLAIMS — ULTRA VIRES — LIABILITY OF TRANSFEREES OF STOCK.

1. In the ordinary case of a solvent private corporation, there is no liability of the stockholders to pay the capital until an assessment, but in the case of insolvency, payment is compellable at the suit of the creditors, though no assessment may have been made.

2. Under proceedings in equity for this purpose, the court may, if a sufficient corporate organization continues to subsist, order an assessment by the corporate authorities upon the stockholders in any stage of the proceedings for any purpose for which it may be thought convenient. In such case it is only a proceeding in aid of the judicial recourse of the creditors; it may promote the enforcement, but is not essential to the existence of the obligation of the stockholders.

[Cited in Lane's Appeal, 105 Pa. St. 60.]

3. The bankrupt was a manufacturing company organized under a special act with a capital of fifty thousand dollars, divided into one thousand shares of fifty dollars each, with power to increase the number of shares to three thousand. The act prescribed no form or method of subscription to the stock, but authorized the payment of subscriptions in real or personal estate appropriate to the corporate business at a bona fide cash valuation, to be agreed upon by a majority in interest of the subscribers and stockholders. It gave no authority to the directors or to any officer to accept payment for the stock except in money or money's worth. By the articles of association it was provided that the capital stock should be one hundred and forty thousand dollars, divided into two thousand eight hundred shares of fifty dollars each, and that the subscribers should give their notes, without interest, for the amounts subscribed by them respectively, which notes should not be liable, at any time, to an assessment for more than fifty per cent. of their face, nor to an assessment of more than twenty per cent. within eighteen months from the organization of the company. *Held*, that the true, legal, and only rational meaning of the provision was that, with ultimate relation to creditors, the capital was of the full residuary amount of one hundred and forty thousand dollars, but such calls for payments on the stock as might from time to time be made by the corporate authorities, in the course of the active business of the company, as a solvent concern, should not exceed one-half of that amount. There was nothing, therefore, in the articles of association to exempt or absolve stockholders from liability to creditors for so much of the whole capital of one hundred and forty thousand dollars as might be required for the payment of the debts.

4. Notes were given by most of the stockholders in payment for the stock subscribed for by them. Each of these notes conformed to the provisions of the articles of association, but contained a provision that all dividends should be credited proportionately upon it until its full amount, by reason of credits by assessments and dividends, should be paid, when the same should be returned and in lieu thereof a paid-up certificate of stock be issued. *Held*, that the operation of the articles of association as to creditors was not and could not be altered by the insertion of this provision in the notes.

5. The company having become bankrupt, and the deficiency of other assets exceeding the whole unpaid amount of the capital of one hundred and forty thousand dollars, *held*, that the stockholders were liable to the assignee in bankruptcy for their respective proportions of such unpaid amount.

6. Stockholders of an insolvent corporation who are also creditors, cannot be allowed to deduct the amount due to them from their respective proportions or the unpaid capital; but if they prove their debts under the bankruptcy, deductions equal to their estimated respective dividends may perhaps be made from the amounts of the assignee's demands against them as stockholders.

7. Where an investment in stock by a corporation was ultra vires the corporation will not be held liable as a stockholder.

8. A transferee of stock in a bankrupt company is liable to the assignee in bankruptcy in respect to such stock; but where the transfer was not accepted by the transferee, the transferer alone is liable.

W. D. Luckenbach and H. Green, for creditors.

P. K. Erdman, C. M. Runk, and R. E. Wright & Son, for stockholders.

CADWALADER, District Judge. The supreme court has described the capital of a private incorporated company as a fund publicly pledged to all who deal with the association. [Ogilvie v. Knox Ins. Co.] 22 How. [63 U. S.] 387. The application of the remark was to relations of the stockholders of such a company to its creditors. The stockholders individually are not liable

[1] [Reprinted from 18 N. B. R. 178, by permission. 26 Pittsb. Leg. J. 15, contains only a partial report.]

for its debts in any sum greater than their proportional amounts of the capital; and this limitation fortifies the reason that the creditors should be assured of an available recourse for so much of the capital as may be required for payment of the debts. Therefore a deceptive existence of a nominal or illusory capital, as distinguished from an actual and available one, cannot be sanctioned. The capital is a fund clothed with a trust for the security of the debts. Story, Eq. Jur. § 1252, cited [Curran v. State of Arkansas] 15 How. [56 U. S.] 307. So much of the capital as the stockholders have paid in is administered by the corporation; and if misapplied, or not rightly applied, the stockholders, unless willful participants in the wrong, are not responsible for it, or for any losses of creditors which it may cause. But even this immunity of the stockholders does not extend to capital paid in which has afterwards been paid back to them. They can, as against creditors, retain only the accrued profits, which, as contradistinguished from capital, have been actually earned and fairly distributed before insolvency. Capital paid back may, in the case of corporate insolvency, be followed by the creditors in the hands of the stockholders. Wood v. Dummer [Case No. 17,944]; [Curran v. State of Arkansas] 15 How. [56 U. S.] 307, 308.

The questions in the present case concern capital never paid in. The obligations, express or implied, of the stockholders to pay such capital are held by the corporation in trust for the ultimate security of its debts. [Upton v. Tribilcock] 91 U. S. 45; [Sanger v. Upton] Id. 56; [Webster v. Upton] Id. 66, 70, 71. Where the corporation is solvent, the unpaid capital is not due and payable by the stockholders until payment in part or in whole is called for by the corporate authorities, unless a postponement of the payment would be inconsistent with some provision of the act of incorporation, or with a conventional engagement with the stockholders. Ordinarily, there is no such inconsistency of either kind, and thus, in the case of a solvent corporation, a call or levy by the corporate authorities, assessing the amount or amounts payable, must ordinarily precede any ascertained obligation of the respective stockholders to pay. But in the contrary case of an insolvent corporation, the recourse of its creditors does not depend upon any such condition precedent, and cannot be thus postponed. Every stockholder is, with relation to creditors, under an obligation to pay so much of the amount represented by his share, or shares, of the capital, as may be required for payment of the corporate debts. Where he has made no express engagement, this obligation to pay is implied. Where an express engagement has been made upon such a condition as would impair the recourse of creditors, they may proceed as if no such conditional engagement had been made. Upon the insolvency of the corporation, the obligations of the stockholders thus at once become assets for the payment of its debts to such extent as other assets are deficient. To this extent the obligation of every stockholder, in its just proportion, then becomes in equity a debt payable for the benefit of the creditors. No act of the corporation, before or after its insolvency, can derogate, in this respect, from the rights of creditors. Neither can any omission of the corporation, or of the corporate authorities, exempt or absolve stockholders from this obligation. For example, there may not have been any call, or assessment of the contributory amounts of unpaid capital; or, where an assessment has been formally made, the corporation may not have taken measures, by suit, or otherwise, to compel defaulting stockholders to pay. Such omissions do not affect the equitable right of the creditors to payment. But there is no direct privity between them and the stockholders. The creditors therefore cannot, in their own names, sue the stockholders in a court of law, and may be unable, in such a court by mandamus or otherwise, to compel a private corporation either to make an assessment, or to institute suits to enforce one if made. See 1 Q. B. 288. But however such omissions may thus, for technical reasons, impede redress at law, they do not prevent or impede the available and complete recourse of the creditors in equity.

In a suit in equity by the creditors against the stockholders of an insolvent corporation to compel them to contribute a sufficient amount of unpaid capital to make good the deficiency of other assets, the corporation must of course be a party defendant. Such a suit is maintainable under several heads of equitable jurisdiction. The jurisdiction is exercisable in aid of the equitable rights of the creditors, who would otherwise have no adequate redress at law. It is also exercisable in order to enforce the due execution of the franchise of the corporation under the trust with which the capital is clothed for payment of the debts. The proceeding has been described by the supreme court as in the nature of an attachment in which the stockholders are called in to answer as garnishees. [Ogilvie v. Knox Ins. Co.] 22 How. [63 U. S.] 387. But in order to avoid circuity, the proceeding is also, on equitable principles, considered as a suit directly against the stockholders. They are thus, by the same court, assimilated in such a case to the special partners of a limited partnership. Id. This analogy implies that the stockholders become debtors through the mere insolvency of the corporation. In such a suit a receiver is ordinarily appointed. The amount of the deficiency, and amounts of the contributory quotas, may be ascertained by proofs, or through a reference and master's report, according to the course of procedure in equity; and there may thus be a final decree, affording adequate relief to the creditors, without any assessment by the corporate authorities. [Ogilvie v. Knox Ins.

Co.] 22 How. [63 U. S.] 380; 3 Comst. [3 N. Y.] 415, 423; 13 Wis. 57.

If a sufficient corporate organization continues to subsist, an assessment by the corporate authorities upon the stockholders may be ordered by the court of equity in any stage of the proceedings for any purpose for which it may be thought convenient. But in such cases the assessment, so called, is different in its nature from the assessments by a solvent corporation. The consideration of this difference in the applications of the word "assessment" will become very important hereafter. In the meantime it may be observed that in the case of an insolvent corporation, the assessment, if judicially ordered, is only a proceeding in aid of the judicial recourse of the creditors. It may promote the enforcement, but is not essential to the existence, of the obligation of the stockholders. Thus Judge Treat was of opinion that where "a company is insolvent, the original mode of making calls upon the stockholders is not to be pursued in the enforcement of" the equitable right. He said: "The debt is then due on demand." Myers v. Seeley [Case No. 9,994]. In a previous case in Ohio the language used was that where a company "becoming insolvent abandon all action under their charter, the original mode of making calls upon their stockholders cannot be pursued. The debt, therefore, from that time must be treated as due without further demand." 17 Ohio, 191. This case was cited by the supreme court of the United States in [Sanger v. Upton] 91 U. S. 60, 61. In these three cases, the comments on the subject were very much alike, to the effect that "no stockholder could shelter himself behind an agreement that he might pay otherwise than in money or money value," and that if, as between the corporation and the stockholders, there might be an agreement to pay in some other medium, "neither directors, nor stockholders, nor both," could so act towards creditors as to debar them from insisting upon actual payment in money.

More than two centuries ago, a decision of the house of lords, on an appeal from the court of chancery, established the competency of equitable jurisdiction under a creditor's bill against an insolvent trading corporation and the stockholders; and established the existence of an incidental judicial power to direct the levying of an assessment by the corporate authorities upon the stockholders. But, in the same case, the ultimate decision indicated that there was no necessity for such an assessment where the bill was taken as confessed, or the debt and contributory amounts were otherwise ascertained. The suit was in equity only. There was neither a previous, nor a subsequent action at law. The court of chancery, on a demurrer by the stockholders, decreed that the bill be dismissed. The court of appeal reversed this decree, overruled the demurrer, and remitted the cause to the court of chancery with a provisional order for an assessment. But, as the defendants did not appear and answer, the bill was taken pro confesso; and the assessment does not appear to have been thought necessary. It probably never was made. The ultimate decree was a direct one that the defendants pay what was due. Salmon v. Hamborough Co., 1 Cas. Ch. 204, 208, abridged in 6 Vin. Abr. 310, 311, and cited by the supreme court in [Sanger v. Upton] 91 U. S. 61.

In many cases of corporations adjudged bankrupt under the recent bankrupt law of the United States [14 Stat. 517], the court of bankruptcy has made such an assessment. It is, to the extent of the unpaid capital, binding upon the stockholders, who may afterwards be severally sued at law by the assignee for the respective contributory quotas. This course of proceeding by the assignee, though circuitous, and sometimes requiring a multiplicity of suits, has been thought more convenient, in most cases, than a bill in equity, or a summary suit of that nature in bankruptcy against the stockholders, because, in such a proceeding, they must all be defendants. But where they can all be conveniently served with process, whether it be a subpœna in equity, or a citation in bankruptcy, this objection does not apply; and the supreme court has said that "the assignee might have filed a bill against all the delinquent shareholders." [Sanger v. Upton] 91 U. S. 62. Where the capital is of a certain amount, to which it was either originally limited, or has been increased by an unconditional exercise of competent authority, the propositions above stated as to rights and remedies of creditors apply without exception or qualification. Therefore, if an optional increase of unpaid capital has been effected unconditionally, the corporation or corporate authorities cannot afterwards, with relation to creditors, by any act or omission, exonerate the stockholders from their obligation to pay the increased amount, or, in any wise qualify the obligation. This was, in effect, decided in Chubb v. Upton, 95 U. S. 665.

A question which may here be suggested is, whether, at the time of an authorized increase of unpaid capital, a condition which could not afterwards be imposed may not, under possible circumstances, be reasonably annexed to such increase by the same competent authority which creates it. Effectual arrangements of this kind may be conventionally made between the stockholders and the corporation, or by the stockholders mutually with one another. But arrangements thus valid and binding in those relations might be invalid with relation to creditors. The point is whether such a condition can be valid in any case with relation to creditors. This question cannot arise except as to some part of the capital of which the creation is wholly optional with the corporation. Nor can the proposition be affirmed unless with a limited application regulated so as to preclude any possibility that creditors may be misled by a fictitious or illusory increase of the capital. Under this restriction, and perhaps others, the proposition may, in the abstract, be affirmed. The respondents contend that it is applicable in the present case to a certain part of the capital of the bankrupt corporation. They are

the stockholders, and the petitioner is the assignee of this corporation. It was a manufacturing company created by an act of the legislature of Pennsylvania of the 16th of March, 1865 (Pamph. Laws, p. 387), with a capital stock divided into shares of fifty dollars each, to consist of one thousand shares with power to increase the number of shares to three thousand. The minimum of legislatively authorized capital was thus fifty thousand dollars, and the maximum one hundred and fifty thousand dollars. Any addition to the minimum was optional, but was to be in shares of fifty dollars each. No form or method of subscription of the minimum, or of any increased amount, was prescribed. This legislative omission distinguishes the case from some of those which have been cited in the argument. The act of incorporation authorized the payment of subscriptions of stock in real or personal estate appropriate to the corporate business, at a bona fide cash valuation to be agreed upon by a majority in interest of the subscribers and stockholders. This impliedly prohibited payment of the capital otherwise than in money, or money's worth. But though the act had contained nothing on the subject of the medium of payment, contributions to the payment of capital otherwise than in money or money's worth could not have been rightfully accepted by the corporation. The act provided that the affairs of the company should be managed by a board of directors, one of whom should be the president, who should be chosen by the stockholders. But no power was expressly given to the directors, or to any officer, to accept payment of the capital, or of any part of it, otherwise than in money. What might, in this respect, have been the implied administrative power of the directors, if no authority over the subject had been expressly conferred upon the stockholders duly assembled, is a question which it will not become necessary to consider. It may, however, become important hereafter to recollect that the act, as above quoted, expressly required a vote of the stockholders to sanction the acceptance of a payment even in real or personal estate, appropriate to the corporate business; that no power, absolute or qualified, was vested in the directors or officers to accept such a payment; and that they could acquire no such power, unless it were delegated by a vote of the stockholders. Whether it could be thus delegated is a question which will not arise. The act did not, otherwise than as has been mentioned, prescribe any method of corporate organization, but provided that the first election of the directors and president should be held within sixty days after the act should take effect, and gave the "privilege to commence operations" when five thousand dollars of the capital should be subscribed and paid in. Large powers of borrowing and issuing securities for money borrowed were also conferred. But more than five years elapsed before anything was done, formally, with a view to a commencement of the corporate business. Whether the organization was too late, or was otherwise irregular, are immaterial questions. Objections of this kind cannot be suggested in a proceeding between the present parties. See Chubb v. Upton, 95 U. S. 665; also [Minor v. Mechanics' Bank of Alexandria] 1 Pet. [26 U. S.] 46, 63, 65.

On the 23d of July, 1870, there was a meeting of the shareholders, who subscribed articles of association, and elected officers and directors. The articles of association were subscribed by all of the shareholders on that day, or, at the latest before the end of July, 1870. These articles have been called a "subscription list." But this name applies very imperfectly. They constituted, so far as the amount of capital, and the rights of creditors with relation to it, might be concerned, a fundamental conventional organization of the company, which was irrevocable. The leading provision of these articles of association was, that the capital should be one hundred and forty thousand dollars, divided into two thousand eight hundred shares of fifty dollars each, and that the subscribers should give their notes, without interest, for the amounts subscribed by them, respectively, which notes should not be liable, at any time, to an assessment for more than fifty per cent. of their face, nor to an assessment of more than twenty per cent., within eighteen months after the organization of the company. According to this provision of these articles, the company was to have a certain capital, of which one-half was never to be liable to assessment. How ought the phrase "liable to assessment," as here used, to be understood and applied? Did it mean that this half of the capital should not, in any possible event, become payable? If so, the provision was self-contradictory, and absurd, if not fraudulent. It would then import that the capital should be one hundred and forty thousand dollars in two thousand eight hundred shares of fifty dollars each, but that seventy thousand dollars of the amount, or twenty-five dollars of each share, should not become payable even in the event of the company's insolvency, and a failure of other assets. This seventy thousand dollars would not, in that case, be a part of the capital for any purpose whatever, and one thousand four hundred shares would not be shares of fifty dollars each. But no such absurd meaning is attributable. The true legal and only rational meaning of the provision was that, with ultimate relation to creditors, the capital was of the full residuary amount of one hundred and forty thousand dollars, but such calls for payments on the stock as might from time to time be made by the corporate authorities, in the course of the active business of the company as a solvent concern, should not exceed one-half of that amount.

The intended application of the provision clearly was to capital requiring an assess-

ment in order to make it payable. The difference, in this respect, between a solvent and an insolvent corporation has been explained. We have seen that, as a corporation is solvent or insolvent, the nature, purposes, and effect of what is called an "assessment" differ widely, and that, in the ordinary case of a solvent private corporation, there is no liability of the stockholders to pay the capital until an assessment, but that in the case of insolvency, payment by them is compellable, at the suit of the creditors, though there may not have been any assessment. The provision in question was applicable only to assessment in the primary sense of the word. The limitation of liability to assessment therefore applied only between the corporation and the stockholders, or to the stockholders among themselves, and did not, in any wise, affect rights of creditors. That no other intent is rationally imputable appears, also, when we consider that not more than twenty-eight thousand dollars (that is to say, twenty per cent. of the whole conventionally increased capital of one hundred and forty thousand dollars) was, according to this provision of the articles, to be liable to assessment for the period of eighteen months. But the minimum amount of legislatively authorized capital was fifty thousand dollars. Therefore, twenty-two thousand dollars of minimum was to be exempt from liability to assessment for this period. Such a conventional postponement of payment might be fair and honest, as between the corporation and the stockholders, or as to the stockholders among themselves. But it could not, even according to the respondent's own theory of the present case, be pretended that this twenty-two thousand dollars, or any other part of the minimum amount of the statutory capital, could be put by them beyond the reach of creditors for eighteen months. Yet this would be the effect of the articles, if the phrase "liable to assessment," as used in them, were understood as intended to affect creditors in any event.

For these reasons there was nothing in the articles of association of July, 1870, to exempt or absolve stockholders from liability to creditors for so much of the whole capital of one hundred and forty thousand dollars as might be required for payment of the debts. The stockholders would have been liable for no less an amount if they had severally given their notes in the form stipulated in the same articles, and would, under those articles, have been liable for no less, though no such notes were given.

The question remaining for consideration arises from the fact that notes of stockholders were afterwards given and received which differed materially from such as were stipulated for. Subjoined to the articles were two parallel columns, opposite to the respective signatures. In one of these columns the number of shares of each stockholder was set down. This column appears to have been filled up in July, 1870, when the articles were subscribed. The other column, headed "Amount of Stock Note Given," seems not to have been filled up until afterwards, at the several times when the respective notes were given. But these times are not entered in the column. No note appears to have been given by any stockholder in July, 1870, when the articles of association were definitely agreed upon and subscribed. At different times, in and after August, 1870, notes, called "stock notes" or "subscription notes," all dated on the first of that month, were signed by forty-two of the shareholders. There were five other shareholders, none of whom gave any note. Every note given was for the full amount of fifty dollars for each share taken by the subscriber, payable one day after date, without interest, and subject to such assessments, from time to time, as the board of directors might deem necessary, provided that such assessments should not exceed fifty per cent. of the face of the note, nor exceed twenty per cent. thereof within eighteen months from its date, and that all assessments made and paid should be credited thereon. Thus far the notes were substantially conformable to the stipulation for them in the articles. But every note contained the additional provision that in the event of the company declaring any dividend, or dividends, out of profits made, the same should be credited on the note, in the proportion to which the number of shares of the capital stock standing in the subscriber's name might entitle him, until the full amount of the note, by reason of credits by assessments and dividends, should be paid, when the same should be returned to him, and in lieu thereof a paid-up certificate of stock be issued. As to that half of the capital stock of one hundred and forty thousand dollars which was payable in actual money whenever called for, these notes thus repeated the provisions of the articles of association. The provision of those articles, that the other half should not be liable to assessment, was also repeated in words, but with a different context. The superadded provision changed their meaning. The import, thus altered, was, according to the notes, that the latter half of the capital should not be payable otherwise than out of a contingent fund composed of the profits, if there should be any, of the company's future business; and this contingent fund was appropriated for the payment of any capital otherwise deficient. Therefore, no dividends of profits were to be distributable until after such payment, but all profits which might be earned were to be reserved as applicable to such payment, until the whole nominal capital should be accumulated and paid. If the superadded provision had been contained in the articles of association, or had been stipulated for in them, as an intended provision of the notes which were to be given, the question of the effect of the arrangement,

as a whole, with relation to creditors, would have been a very interesting one, however it might be decided. It was contended for the assignee that any appropriation of contingent profits otherwise than for payment of the debts would be fraudulent with relation to creditors. But the answer to this argument is that actual profits might, in the absence of any appropriation of them, be distributed as dividends among the stockholders, and therefore an appropriation preventing such a withdrawal of profits could not be fraudulent. If, in the result, seventy thousand dollars, actually earned as profits, had been conventionally obtained as capital, it would be difficult to distinguish this from any other mode of payment in money, or money's worth. The common stock of an unincorporated partnership may certainly be increased by a conventional conversion of accrued profits into capital which cannot be drawn out for individual use. In such a supposable case, whether of a corporate or an unincorporated association, when the profits are already accrued and in hand, the means of payment are no longer contingent. In the present case, however, no profit was ever made or declared as a dividend or otherwise; nor was a certificate of stock, in any form, ever issued. The question concerns a contingent or conditional increase of capital.

The act of incorporation did not absolutely require a capital of more than fifty thousand dollars. Any excess of capital above that amount being optional, might never have been created. The argument for the respondents, therefore, is, that the excess, if created, might have been created either absolutely or upon any reasonable condition or contingency. The seventy thousand dollars, payable in actual money, though one-half only of the conventionally increased capital, was more than the fifty thousand dollars absolutely required by the act. The other half of the conventional capital, it is contended, might reasonably, therefore, be made payable on the contingency that there should be a sufficient amount of actual profits of the company's business.

It will not be necessary to decide the point, because the operation of the articles of association as to creditors was not and could not be altered by the insertion of the superadded provision in the notes. There was nothing in the articles, or in any proceedings of the stockholders, when the articles were subscribed, to indicate that the notes might contain any such additional matter. Even as between the corporation and a stockholder, the insertion of the provision in his note would, without his concurrence, have been an unauthorized interpolation. This will appear when we consider the subject with reference to any one of the five stockholders who never gave notes. If he refused to give such a note as the articles of association had stipulated for, he would have been liable to an action at the suit of the corporation for not giving it. See 4 East, 147; 3 Bos. & P. 582. But if he had offered to subscribe a note conformable to the stipulation in those articles, and the company had refused it, and required a note containing the superadded provision, the action would not have been maintainable. For payment of one-half of the capital, the purport of the provision was to authorize a withholding and retention of the profits. Assuming that this might originally have been authorized, it would have required the sanction of a vote of the stockholders, duly convened at a corporate meeting. Independently of special provisions of the act of incorporation, such a sanction would have been required on general principles of the law of corporations. Now, the stockholders were never assembled after they had originally subscribed the articles of association in July, 1870; and even if they had been so assembled, they could not, as to creditors, have annulled or varied anything in those articles. The creditors of a corporation must, indeed, take cognizance of its organization. But the organization was here effected by the articles which ascertained irrevocably the rights of creditors with relation to the capital. The subsequent taking of the notes was a matter of administration, which, if the notes had been conformable to the articles, would have been in aid of the organization, but even then would not have been a part of it. As the giving of notes was, however, stipulated for in the articles, the stockholders invoke the rule of interpretation that a recital or mention of one writing in another is constructive notice of the contents of the one recited or mentioned. But this rule cannot here apply so as to affect the creditors. In any stipulation for notes in the articles, the intended contents of the notes ought to have been set forth fully. The stipulation here purported to do so. There was therefore nothing in the articles to induce a creditor to desire to see the notes, or even to induce him to inquire whether they were given.

Another ordinary rule of interpretation is that where several writings have been executed between the same parties, or those respectively in privity with them, on the same subject or business, the writings are considered as if they together constituted one and the same instrument. It is therefore urged for the respondents that the articles of association and the notes are to be read together, as if the superadded provision of the notes had been contained in the articles. There is no doubt that the notes should be interpreted with reference to the articles. Thus far the rule applies. But the question is whether it applies conversely, so that the interpretation of the prior articles depended upon the contents of the subsequent notes where they differ. It is not always essential to the application of the rule that the writings bear the same date, or have been executed at the same instant of time. The rule may apply to any series of acts fairly executed with a common intent. And so far as they are dependent upon one another, a subsequent act may sometimes indicate the meaning of a prior one. But where the prior act was absolutely

or relatively independent of the subsequent one, the rule cannot apply to the former so far as it was independent. Nor can the rule apply so as to sanction a usurpation of authority by the latter act. Here the notes were dependent upon the articles. But we have seen that there was no converse dependence of the articles upon the notes, and that no existing authority enabled any parties, after the execution of the articles, to affect rights of creditors by such a provision as was interpolated in the notes.

A consideration of less weight, but perhaps not wholly unimportant, is that there does not appear to have been any permanent memorial of the provision in question. The stock ledger stated the amounts, but did not indicate the form or contents of the notes. The only evidence of an arrangement postponing the payment of one-half of the capital until after a sufficient accumulation of profits was in the notes themselves. This was fugitive evidence, not only for general reasons, but also because it was expressly provided in each note that the note should be surrendered so soon as paid through the limited assessments and the accumulated profits. A paid-up certificate of stock was then to be substituted. After such hoped for extinction and surrender of the notes, no evidence of the former arrangement would, so far as appears, have been extant among the papers or in the books of the company. This might be unimportant if the taking of the notes had been only a matter of administration between the corporate authorities and the stockholders. But if the provision so concerned the corporate organization as might affect the source and amount of the capital with relation to creditors, more enduring evidence of the arrangement in its original form would probably have existed.

Much of the above reasoning might have been out of place if the conventional corporate organization had not been originally effected through the articles of association subscribed by the same parties who afterwards gave the notes. Had there been no such previous articles, the organization itself might have depended more or less, if not altogether, upon the notes. The reasoning might also have been more or less qualified, if the stipulation for notes in the articles had not described the intended notes with sufficient fulness and particularity, but had, in this respect, been ambiguous or obscure. There is no such difficulty of either kind; and it follows that the rights of the creditors are definable with a sole reference to the act of incorporation and the articles of association, according to which the capital was one hundred and forty thousand dollars, without any diminution with relation to creditors. On the 28th of July, 1870, after the adoption of the articles of association, and before the date of the notes, the directors met and assessed two instalments of ten per cent. each on the capital stock. One of them was payable on the 1st of September, and the other on the 1st of November, 1870. Both instalments were paid, except that one holder of fifteen shares paid only the first instalment, leaving the second seventy-five dollars unpaid. The amounts paid by all the stockholders were thus, together, twenty-seven thousand nine hundred and twenty-five dollars, as on assessments of twenty-eight thousand dollars, and as twenty per cent. of a capital of one hundred and forty thousand dollars. Beyond these two instalments, together twenty per cent., no part of the capital was ever paid. On the 3d of September, 1874, the directors imposed an additional assessment of thirty per cent., payable by certain instalments. But the resolution imposing it was rescinded on the 1st of December, 1874. At about this time, the business of the company was closed by reason of insolvency, and in the spring of 1875 the company was adjudged bankrupt, owing one hundred and seventy-six thousand four hundred and thirty-four dollars, with available assets to the amount of only four hundred and twenty-nine dollars. The deficiency, one hundred and seventy-six thousand dollars, was thus much greater than the whole unpaid capital, at whatever amount computable. If the whole capital was one hundred and forty thousand dollars, the amount unpaid was one hundred and twelve thousand and seventy-five dollars. This unpaid amount is demanded by the assignee in bankruptcy, as payable proportionally by the respective stockholders, respondents. They admit that they are liable for their respective proportions of forty-two thousand and seventy-five dollars, which is all that remains unpaid of the minimum amount of legislatively authorized capital. But they dispute their liability for the seventy thousand dollars, which is the excess above that minimum. In the course of this opinion, the objections to their liability have been considered and overruled.

The proceeding is a petition of the nature of a bill in equity, under the summary jurisdiction of the court of bankruptcy. All the stockholders are defendants, and all of them have appeared and answered. The case was referred to a register, to take examinations and proofs, and report specially on certain points. His report is, in effect, an assessment of the whole of the unpaid part of the capital of one hundred and forty thousand dollars upon the stockholders, by name, with a statement of the respective contributory quotas. This report is confirmed. Its confirmation is an assessment by the court, so far as it may be necessary. But as the insolvency is admitted to be total and absolute, the decree will be directly against the several stockholders for the respective amounts of their contributory quotas, which are sufficiently ascertained in the register's report. The several amounts admitted to be due will be payable in two months, and

the excess in four months. For one-half of the latter amount, there may be a further extension of two months to any respondent who may give sufficient security. Every party will pay his own costs, those of the assignee to be reimbursed out of the estate in bankruptcy.

Certain cases of individual stockholders require special consideration.

The first is the case of J. W. Wilson, the late president of the bankrupt company. In the articles of association, the stockholders agreed to purchase, for corporate use, the real and personal estate of a former corporation, at a price equal to that former company's debts. This was, I think, a legally authorized purchase. It was effected, and notes of the bankrupt company, for the price, were given to the creditors of the former corporation. At a meeting of the directors of the bankrupt company, on the 5th of September, 1870, it was resolved that Mr. Wilson, the president of this company, endorse extension notes, to be given to those creditors, and that the company would hold him harmless against loss, by reason of those endorsements, and to that end pledged thirty per cent. of the subscription notes to their capital stock. To the amount of eight thousand six hundred and ninety-five dollars and fifty-five cents, the extension notes have never been paid by this company. Whether Mr. Wilson has paid them does not appear. But he has never been indemnified against his endorsement of them, or secured otherwise than by the resolution of the 5th of September, 1870. He is entitled to the benefit of the security, according to its substantial intent. An interlocutory order to this effect was made in an early stage of the proceedings, with liberty to either party to move for further directions. It now appears that he is a stockholder of the bankrupt company, on a subscription for five thousand dollars, upon which his unpaid contributory quota is four thousand dollars. His case, unless amicably settled, may be referred to the register, with directions to adjust and state his account as to these matters, and other dependencies with him, if there be any.

As to the Wyoming Coal and Transportation Company, one of the alleged stockholders, the petition of the assignee is dismissed, but without costs. The investment by or on behalf of that company was beyond its corporate powers. The argument for the assignee upon the distinction between executory and executed contracts does not apply to the case, except so far as it may perhaps preclude this Wyoming Company from getting back the amounts of assessments paid, or from proving for them. Under the peculiar circumstances of the case, I do not consider the officer of the same company who made the subscription responsible personally. It was seasonably ratified by that company so far as its powers extended. The petition is also therefore dismissed as to him, but without costs.

The set-offs claimed by certain stockholders who allege that they are creditors of the bankrupt corporation cannot be allowed as deductions from the respective amounts of unpaid capital. To allow such deductions would, in effect, give to creditors who are also stockholders a preference over the other creditors in bankruptcy. But if the creditors who are also stockholders prove their debts under the bankruptcy, deductions equal to their estimated respective dividends may, perhaps, be made from the amounts of the assignee's demands against them respectively as stockholders. The register is authorized to make and report, as occasion may arise, the approximate estimates for such deductions on equitable principles. Such estimates and reports may be made after the general decree for the full respective amounts of unpaid capital.

The attachment executions which were prior to the commencement of the proceedings in bankruptcy cannot prevent the entering of the decree, or prevent its enforcement. But the decree will be made without prejudice to the rights, if any, of the respective attaching creditors; and each one may, if so advised, intervene for his own interests.

The Lehigh Valley Iron Company was not an original stockholder, but holds fifty shares, under a transfer made by an original stockholder. The transfer was made and accepted for a purpose incidental to the business of this company, and the acceptance cannot be considered beyond its corporate powers. On the question whether a transferee of stock in the bankrupt company is liable to the present demand of the assignee, all the decisions in several states of the Union cannot be reconciled. If the preponderance of authority were doubtful, it would be determined on the affirmative side of the question by the opinions of the supreme court of the United States, in [Sanger v. Upton] 91 U. S. 65, and the English court of king's bench, in 7 Term R. 36, 46. In Pennsylvania, if the point has never been decided affirmatively in the case of a corporation chartered by her own legislature, the preponderance of authority is on the same side. The cases of Trevor v. Perkins, 5 Whart. 244, and Merrimac Min. Co. v. Levy, 4 P. F. Smith [54 Pa. St.] 227, show this; and there is nothing decided to the contrary in West Philadelphia Canal Co. v. Innes, 3 Whart. 198. If the cases of Canal Co. v. Sansom, 1 Bin. 70, and Palmer v. Ridge Min. Co., 10 Casey [34 Pa. St.] 288, are not overruled on this point, their authority upon it is now limited, so that they apply only where a corporation is authorized, by its charter, to forfeit the stock of a delinquent shareholder for non-payment of dues. The present is not such a case, and any doubt from these two decisions, which might otherwise have

arisen, is removed by the remarks upon them in 4 P. F. Smith [54 Pa. St.] 229, 230, and [Webster v. Upton] 91 U. S. 70. The decree must, therefore, be against the Lehigh Valley Iron Company, on the same footing as against the original subscribers.

A like effect is attributable to the transfer of Dewees J. Martin's stock to Dr. E. G. Martin. If this transfer had been a recent one, and had been either simply to secure a debt, or upon trust for the general benefit of creditors, Dr. Martin would perhaps have been entitled in equity to elect whether to accept or to reject the stock; and if he had, after the death of D. J. Martin, acquired it as administrator, he might have held it in the representative capacity only. But the evidence does not sufficiently establish his allegations; and his delays and omissions have been such that the decree must be against him, as if he had, in 1872, been the acceptor of an absolute transfer.

Levi Line transferred his one hundred and thirty-five shares to C. H. Nimson. But Nimson did not accept the transfer. Line, therefore, and not Nimson, is liable in respect of these shares. But Nimson, as to fifty other shares, is liable as an original subscriber.

Willoughby Fogel subscribed the articles of association, but died before giving any subscription note. The subscription note was given by his widow, Maria Fogel. The register appears to have considered her the proper party against whom payment should be decreed. It may be proper that counsel be heard again as to this case, if it is of practical importance to determine whether the liability is that of her deceased husband's estate.

[See Case No. 17,637.]

Case No. 17,637.

WILBUR v. WILSON et al.

[2 Wkly. Notes Cas. 496.]

Circuit Court, E. D. Pennsylvania. April 27, 1876.

BANKRUPT ACT, § 14—MESNE AND FINAL PROCESS—ATTACHMENT EXECUTION.

Attachment execution in Pennsylvania is final process, and, as such, is not dissolved by § 14 of the bankrupt act [of 1867 (14 Stat. 522)].

[This was a bill in equity by one Wilbur, assignee in bankruptcy of the Glen Iron Works, against Wilson and others, to enjoin further proceedings in an attachment suit in the state court of common pleas.]

Sur demurrer to bill. The bill filed by the assignee in bankruptcy of the Glen Iron Works set forth that in March, 1875, the corporation known as the Glen Iron Works was adjudged a bankrupt. In 1870 a judgment note had been executed by the Glen Iron Works to the defendants for $25,000, upon which judgment was entered up in the court of common pleas of Lehigh county in 1871. In January, 1875, the defendants procured a writ of attachment execution to be issued upon this judgment, whereby all the mines, goods, debts, etc., of the Glen Iron Works, in the hands of certain persons named in the writ, were attached. The bill further averred that this property was attached in violation of the 14th section of the bankrupt act, which provided that the assignment of the bankrupt to the assignee in bankruptcy "shall relate back to the commencement of said proceedings in bankruptcy, and thereupon by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings." The bill prayed for an injunction against proceeding further with the attachment suit, and that the latter be dissolved. The defendants demurred to the bill.

P. K. Erdman, R. E. Wright, Jr., and C. M. Runk, for the demurrer, were not called on.

W. D. Luckenbach and H. Green, contra.

Mesne process issues pending the suit upon some collateral interlocutory matter. It is any process before the end of a suit. 3 Bl. Comm. 299; 2 Bouv. Law Dict. 387. An attachment execution under the state law is an attachment upon mesne process under the bankrupt act. Bank v. Bank, 23 Pick. 488; Ex parte Foster [Case No. 4,960]. The attachment under our act only differs from the Massachusetts law in not giving the goods of the garnishee into the possession of the sheriff, and the latter was recognized by the supreme court of the United States as an attachment upon mesne process. Peck v. Jenness, 7 How. [48 U. S.] 622. Nor have attachments in other states been held to be other than mesne process. Miller v. Bowles, 58 N. Y. 253; Marshall v. Knox, 16 Wall. [83 U. S.] 552. Our attachment execution is in the nature of commencing an original suit against a third person. It is served as a summons, and under it the sheriff has no authority to take the goods in execution. It is simply a conditional and provisional lien, and differs radically in its effects and nature from the writ of fieri facias. Purd. Dig. 639, § 42; Ogilsby v. Lee, 7 Watts & S. 445; Bancord v. Parker, 15 Smith [65 Pa. St.] 337; Campbell, Bredin & Co.'s Appeal, 8 Casey [32 Pa. St.] 92; Landis v. Lyon, 21 Smith [71 Pa. St.] 475; Patten v. Wilson, 10 Casey [34 Pa. St.] 299; Myers v. Baltzell, 1 Wright [37 Pa. St.] 491; Kase v. Kase, 10 Casey [34 Pa. St.] 130.

THE COURT (McKENNAN, Circuit Judge, and CADWALADER, District Judge,) sustained the demurrer with leave to the complainant to withdraw or amend his bill without prejudice, saying, that attachment exe-

cution in Pennsylvania was a means given to the creditor of obtaining satisfaction of his debt at a final stage of the suit, and that in its nature it was an execution intended to accomplish the same result as a writ of fieri facias, and was not therefore dissolved under section 14 of the bankrupt act.

[See Case No. 17,636.]

WILCOCKS (BAINBRIDGE v.). See Case No. 755.

Case No. 17,638.

WILCOCKS v. PALMER.

[3 Wash. C. C. 248.] [1]

Circuit Court, D. Pennsylvania. April Term, 1814.

SEAMEN'S WAGES—PROOF OF SERVICE.

Libel for mariner's wages. Palmer stated in his libel, that he had shipped, and signed articles for a certain voyage; and was forcibly expelled from the vessel during the voyage, without cause. The answer denied the allegations in the libel, and charged the mariner with mutiny, &c. To entitle the appellee to wages, he must not only produce the shipping articles, but must prove he performed the voyage, or show a legal cause for not having done so.

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

This was a libel filed by the appellee in the district court, setting forth that he shipped on board of a vessel owned by the appellant, as a mariner, on a voyage from Canton to Philadelphia, and signed the shipping articles;—that the ship sailed on her voyage, and stopped at a port in the island of Java, where the libellant was forcibly turned on shore by the master, and without any cause kept out of the ship, and was prevented from performing his contract;—that the vessel arrived in safety at Philadelphia, where the libellant some time afterwards followed her. The respondent, by his answer, states, that whilst the ship was lying at Soura Baya, near the straits of Bally, the libellant was guilty of mutiny, and deserted from the ship. He denies that the libellant was turned on shore by the captain, and was kept out of the ship, and prevented from performing his contract. The district court decreed in favour of the libellant for the amount of his wages [case unreported], from which an appeal was taken to this court.

WASHINGTON, Circuit Justice. There is no evidence produced in this court, nor does it appear, that there was any in the district court, but the shipping articles; and the only question is, whether the libellant is entitled to a decree, without proving the charges in his libel? Upon this point, we entertain no doubt. To entitle the libellant to recover his wages, he must not only state, that he contracted by the shipping articles to serve on board the vessel for a certain voyage, but he must also state, that he performed his contract; or if not, that he was prevented from doing so by some circumstance which amounts to a legal excuse. If the respondent denies the truth of the alleged excuse, then, the libellant must prove it; or else it appears, by his own statement, that he did not perform the contract, in which event, only, he is entitled to his compensation; and he shows no excuse for his not having done so. In this case, the respondent denies the truth of the excuse alleged by the libellant, for his not performing his contract; and then proceeds to state other reasons, why the libellant is not entitled to his wages. If the libellant had proved the allegations of the libel, then it would have been incumbent on the respondent to support his answer.

Decree reversed, with costs, and libel dismissed.

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

Case No. 17,639.

WILCOCKS v. PHILLIPS.

[1 Wall. Jr. 47.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 21, 1843.

PAROL PROOF OF CHINESE LAWS — WITNESSES — COMPETENCY OF PAID LEGATEE — SHIPPING — RIGHTS OF MASTER AND OWNERS — MASTER'S COMPENSATION—USAGE.

1. While in the case of an isolated and peculiar nation, like China, there may be admitted parol evidence of its laws, and this from persons not juris consults, yet such evidence will be received only where it is so direct and positive as to be quite free from ambiguity.

2. A paid legatee is a competent witness where payment has been made by the executor, voluntarily, with knowledge of the claim sued upon, and without a refunding bond, and a long time has elapsed since the death of the testator. The length of time is regulated by analogy to the statute of limitations.

3. The relative rights of ship-owner and captain stated; and the captain and ship having been employed in an Eastern country in a service not strictly within their ordinary offices, and not originally, in any way contemplated, the captain was regarded as not being a mere agent of the ship-owner; and was accordingly allowed to receive compensation on his account, from the parties with whom he dealt; the compensation, though large, appearing to be somewhat in the nature of a present.

4. The doctrine of usage and agency stated; and considerable efficacy given to usage in a particular trade. Similar effect given to a settlement of accounts made by a party's general agent abroad and acquiesced in by the principal here for four years; and particularly where a party was dead.

[Cited in brief in Barnard v. Kellogg, 10 Wall. (77 U. S.) 386.]

Mr. Wilcocks, the plaintiff, was the sole owner of the ship Scattergood, of which Phil-

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

lips, the defendants' testator, in his lifetime, was captain. In the early part of 1829, the ship was sent out by the plaintiff from Philadelphia to Canton, under a charter-party. Phillips was to receive the regular wages of a master, and to have the privilege of certain tonnage.[2] One Latimer was at this time the plaintiff's general agent in China, clothed with very extensive and discretionary power, and the ship and captain were put under his orders, and directed to be governed entirely by him. The ship Levant, belonging to Perkins of Boston, and lying at Lintin (near Canton) as an opium store-ship, became disabled soon after the Scattergood arrived there; and by an arrangement between Mr. Latimer and the agent of Perkins, the Scattergood took the place of the Levant; and continued to be employed for twenty-two months as an opium store-ship. The business of this sort of ship, otherwise called a receiving ship or go-down, is to receive opium from the regular transporting ships, keep it in store, and deliver it out when sold to the Chinese. There is paid for the storage of opium in such ships, a regular charge of two dollars a month, per box, and, besides this, upon the delivery of the opium to a purchaser or smuggler, is paid a kumshaw of five dollars for each box. The number of boxes of opium stored in this ship was about five thousand. The kumshaws were received, in part, by Captain Phillips, aboard, and, in part, by Mr. Latimer, ashore, and paid over by him to Captain Phillips; but no express agreement was made respecting the right to them. To recover these kumshaws (which the plaintiff claimed as part of the ship's earnings) was the object of the present action of assumpsit.

First point of evidence: In the course of the trial, the deposition of an individual who was captain of a large ship trading to China, was read by the plaintiff. In his cross-examination by the defendant's counsel, in answer to a question as to what was the cause of the kumshaw's being greater on opium than that on salt-petre, this person said, that he supposed it was because of the greater value of opium; "for," said he, "salt-petre is prohibited by law, so far as I know, as well as opium." As it was possible that the illegality of the opium trade would become an important point for the defendant, the plaintiff's counsel objected to the reading of this answer, because it tended to no purpose but to shew the illegality of the trade in opium; and, as shewing this, that it was incompetent.

The point was argued, on both sides, at some length. For the plaintiff, it was said: 1st. This is matter of law. The witness, himself, says: "prohibited by law." From the nature of the case, the presumption is, that it was a written law. In Robinson v. Clifford [Case No. 11,948], where the deposition of a captain, stating that, according to the law of St. Christopher's, no other vessel could have been permitted to bring away the cargo, was offered, Judge Washington said, that "the statute or written law of foreign countries, should be proved by the law itself, as written. The common, customary, or unwritten law, may be proved by witnesses acquainted with the law. In this case it does not appear whether the law alluded to by the witness was written or unwritten. From the very nature of it, I presume it to be the former." In Seton v. Delaware Ins. Co. [Id. 12,675], where a witness was offered to prove that the exportation of specie from Cuba was prohibited, the court rejected the evidence, and said, that as this was a subject of purely municipal arrangement, "the law must be presumed to be written, and therefore it should be produced; or evidence given to prove that it was not in the party's power to obtain a certified copy of it; in which case inferiour evidence might be received." These cases are in point; and the presumption must be that the law was written. The defendant has not shewn that evidence of this law could not have been obtained. In fact, the law could have been procured. From what has taken place in the last three or four years, we know that there are laws in China respecting the trade in opium: they have been published; and it is as possible to ascertain the custom-house laws of China as those of Cuba. But, 2nd: The statement of the witness is not direct and positive, nor in answer to a direct question. Being asked why the kumshaw on opium was greater than that on saltpetre, he answers that question, and adds, that so far as he knew, both trades were equally illegal. So vague a statement, from the captain of a ship, upon a point of law demanding nice discrimination and the utmost certainty, is good for nothing.

For the defendant, it was said: The principle settled in the cases is, that if the law of a foreign country is shewn to be in writing, or cannot but be so presumed, the written law must be produced. But all the cases that have hitherto occurred, and have been referred to, were of civilized nations known to have laws, and laws which may be procured. But here is a country unlike every other on the face of the earth. If it may be called civilized, its civilization is entirely its own. Secrecy marks every thing relating to its concerns, and, especially, every thing relating to its court. You cannot know of what nature is the law; whether it is common law, statute, or something differing from both. The rules and presumptions of evidence must have regard to the state and institutions of the particular country, and the actual state of knowledge respecting it; of which the court will take notice. In the Cherokee Case, 5 Pet. [30 U. S.] 1, the supreme court of the United States took notice of the peculiar, sui generis character of the Indian tribes; and, in like manner, the court, in this case, will

[2] By this is meant, a right to carry a certain amount free of freight, or to receive a certain part of the freight.

regard the isolation and other peculiarities of China. In respect to the laws of such a nation the court cannot know judicially what is the medium of proof; or, if it will take judicial notice of what it is, will also take notice, as an inseparable part of the same subject, of the impossibility of obtaining that proof. In Cowqua v. Lauderbrun [Case No. 3,299], Judge Washington admitted parol evidence of the customary interest, in China, of 12 per cent. But besides the peculiarity of the nation concerned in the present case, it is no universal principle that the commercial law of foreign countries is presumed to be written. In Livingston v. Maryland Ins. Co., 6 Cranch [10 U. S.] 274, parol evidence of the laws of Spain in relation to the trade of Peru, having been rejected by the judge below, the supreme court held the rejection to be errour. "It is the opinion of the court," said Chief Justice Marshall, "that as the laws and regulations by which this trade was regulated, are not proved to have been in writing, as publick edicts, but may have depended on instructions to the governour, they may be proved by parol." Page 280. This case was acted upon by the supreme court of Pennsylvania in Dougherty v. Snyder, 15 Serg. & R. 84; and the court there said that as foreign laws were usually difficult of proof, and proof by authenticated copies would be very expensive, it shall "reasonably fall on the party objecting to the parol proof, to shew that the law was a written edict of the country. Reason and publick convenience, the just administration of the law, require this. . . . There can be no difference whether it be a law regulating trade or a law on any other subject: the rule, from its nature, is universal." Page 87. If, then, parol evidence be admissible we have enough. The witness was captain of an East Indiaman; a person to whom vast interests are intrusted. Such an officer must be presumed to be a person of intelligence. He must, himself, be acquainted with the laws of the port to which he trades. He has a high interest to know them; and when he states, as a matter of fact, that no trade could be had in opium, the presumption must be that it is so. We can, in regard to China, have no evidence from jurisconsults. The witness, under any exposition of his testimony, speaks to the whole extent of his knowledge: it is unlawful so far as he knows; and being a person who must know, the expression is tantamount to an affirmation of illegality. But the answer shews that the expression, "so far as I know," refers to the trade in salt-petre, to which the inquiry was directed. "The trade in salt-petre is unlawful so far as I know,—as well as that in opium." The trade in opium, he assumes to be so; and knows to be so: the trade in salt-petre is equally unlawful, so far as he knows. Perfect knowledge in regard to opium is clearly avowed by the answer, whatever may be the character of his knowledge with regard to the salt-petre.

BALDWIN, Circuit Justice. If the witness had stated, positively, what the law was, the court would have been inclined to admit the evidence; for it is true that, to a certain extent, the rules upon this subject must subserve the practical necessities of mankind. China is a country with which, as yet, we have had no treaties nor any diplomatick intercourse; and nearly all that we know of its government, laws and institutions, is derived from the relations of merchants, missionaries, and other persons who have been there. It would be too much, in the late or even in the present condition of that country,[3] to require a party to produce certified copies of its statutes. The nation, it is well known, is isolated and peculiar; and we know of no way in which access could be had to its records. These are facts which, in a case so notorious, the court will judicially notice. Had the statement of the witness, therefore, been direct, responsive and full, we should have received his testimony, as an exception to a rule of law whose obligation, in most cases, is admitted. But it would be as an exception; and coming in on that ground, the testimony should be marked by nothing unprecise or imperfect. The witness in this case, however, does not state, either directly or by clear inference, that to his knowledge the trade in opium is illegal. His answer is ambiguous, and an adjection

[3]Allusion is here made to well known events of the day. In March 1839, the celestial court issued an edict by which, after reciting that notwithstanding the prohibitions formerly enacted against the importation of opium, the drug was still smuggled by thousands of boxes into the various ports of China, it declares that the wrath of the great emperour had become "fearfully aroused," and would not rest until the evil was "utterly extirpated." Extreme penalties were then declared against every man who attempted to get it into the empire: And the final result was, that the Chinese government seized and destroyed all the opium on which it could lay hand, and put the British residents and officers of trade into prison. War having been declared against China by Great Britain, the Chinese were entirely conquered; and a treaty of peace was concluded in August, 1842, between the Chinese and Great Britain, by which the former agreed to open five of their principal ports to British commerce; to allow consuls to reside in them; to conduct all correspondence between the two nations on terms of perfect equality, and to cede the island of Hong-Kong in perpetuity to the British nation. These events were generally regarded as likely to work a revolution in the intercourse of other nations with China; and the subject having been recommended to the attention of congress, "An act providing the means of future intercourse between the United States and the government of China," was passed, March 3rd, 1843 [5 Stat. 624], by which, means were placed at the disposal of the president of the United States, to enable him to establish the future commercial relations between this country and the Chinese empire, on terms of national equal reciprocity. In pursuance of the power given by this act, President Tyler, shortly after its passage, appointed Mr. Caleb Cushing minister to China: and that gentleman departed on his new embassy in August of the same year: but when this case was tried, intelligence had not been received of his arrival in China.

to an answer rather than any answer itself; and withal, is but vague. Such evidence will not do; and on this ground alone, we order the answer to be stricken from the deposition.

Second point of evidence: In the further progress of the trial, a person who was the legatee of a watch under Captain Phillips' will, was called by the defendants as a witness. The legacy had been paid in August, 1836; and this suit was brought to October, 1835. It appeared by the accounts of the executors, that Phillips' estate was insufficient to pay the claim in this suit, should it be recovered; and the plaintiff therefore objected to the competency of the witness, on the ground of interest.

Against the admission it was said:—The witness is interested to defeat this action; for in the event of a recovery, he may at once be compelled to refund the legacy. First: The executors may compel him to refund by bill in equity. In Nelthrop v. Hill, 1 Cas. Ch. 135, it is said, that "if the executors pay out the assets in legacies, and, afterwards, debts appear * * * of which they had no notice before the legacies paid, that the executors, by a bill here, might force the legatees to refund." Page 136. On this point the counsel cited, likewise, Burnley v. Lambert, 1 Wash. [Va.] 308; Bower v. Glendening, 4 Munf. 219, 221; Gallego v. Attorney General, 3 Leigh, 450. And as the executors have no right to recover till this or some other claim large enough to exhaust the whole estate is judicially proved to exist, the statute of limitation has not yet begun to run. An executor is not bound to notice every idle claim. He must be satisfied, in his own mind, or by a judgment, or decree, of the existence of the debt. Second: The creditors likewise, after establishing the debt at law, may, by bill in equity, compel the legatee to refund. Burnley v. Lambert, already cited; Milligan v. Milledge, 3 Cranch [7 U. S.] 220, 228; Dunn v. Amey, 1 Leigh, 465, 472; Anon., 1 Vern. 162; Newman v. Barton, 2 Vern. 205; Gillespie v. Alexander, 3 Russ. 130, 136. In Clarke v. Gannon, Ryan & M. 31, a paid legatee was admitted only because, under the circumstances, it could not be inferred that the estate was insufficient.

It was said contra:—This was a voluntary payment, with notice of an outstanding claim; for the bringing of a suit is notice. The case of Nelthrop v. Hill, cited from the "Cases in Chancery," and on which all the subsequent decisions and dicta are grounded, is therefore, rather an authority for us than otherwise. Notice having been given, that case, by its very terms, excludes the case now before the court. In addition, from the absence of a court of chancery, there is no method, in Pennsylvania, by which the creditor could pursue the legatee. But if either creditors or executors could have ever had a right to bring back the legacy, the right has been barred by lapse of time. By analogy to the acts of limitation the time elapsed here is more than sufficient to bar an action, at common law, by the executor, and more than sufficient to discharge lands from liability to creditors. If the claim upon the legatee is barred by lapse of time, then, on the authority of Ludlow v. Union Ins. Co., 2 Serg. & R. 119, 132, he is competent.

BALDWIN, Circuit Justice. The present suit was pending when the legacy was paid: the claim was therefore fully known; and as there was no refunding bond taken, nor promise required, nor condition made, it is a voluntary payment, and the executor cannot recover it back. We question whether, under the law of Pennsylvania, a recovery could be had by a creditor against the legatee: the claim would be against the executor. But if there were a legal method of recovery, it must be considered that the lapse of time, (now seven years,) has created a bar. Lands of a decedent, which, in Pennsylvania, are chattels for the payment of debts, would be discharged from the lien in favour of creditors; and chattels, after so long a time cannot be considered as liable even in equity. This case we can hardly regard as within the principle of those cases of fraud, where the limitation begins only from the time that the fraud is discovered. The institution of a suit was clear notice not to pay. Let the witness be admitted.

The questions of evidence having been settled, the defence to the main question rested, chiefly, on two points. First: That by the usage of the opium-trade the kumshaws belonged to the captain. Second: That an account had been settled with Captain Phillips by the plaintiff's agent, Mr. Latimer, in 1831, in which the kumshaws were treated as belonging to Phillips, and that this account had not been objected to by the plaintiff until shortly before the bringing of this suit, which was brought in 1835.

In respect to the usage, many witnesses were examined. It appeared that in the East a present is always made on concluding any considerable business, and that on the general Canton trade, the kumshaw is a present made by the hong merchant or broker to the captain or supercargo, upon the completing of a sale. It is voluntary on the part of the hong. It consists, not of money, but of shawls, fine teas, &c. and is always regarded as the perquisite and private profit of the person to whom it is made. But the kumshaw in the opium-trade differs in some respects from that in the ordinary Chinese trade. It is a money-fee, fixed in amount, and obligatory upon the purchaser. In this trade, no hong merchant is employed; but the dealing is direct between the captain and the smuggler. It appeared, likewise, that there was a liability to arrest and punishment by the Chinese government of persons engaged in smuggling opium; though, practically, the danger, at the time of these

transactions, was not very considerable. With regard to the different opium ships at Canton, it seemed that as between the owner and the captains, the right to the kumshaws was usually, though not always, matter of special agreement; and that in the British ships it was generally divided. In the Levant, which was the only American ship which had been engaged in the opium store-trade, the captain received the whole kumshaw. The kumshaw is paid only when the opium is delivered to a purchaser or smuggler, and not when it is trans-shipped.

As to the plaintiff's relinquishment of his right, and Mr. Latimer's having given the kumshaws to Captain Phillips, it appeared that Mr. Latimer (who, as has been already stated, was the plaintiff's general agent, and clothed with large discretionary powers) settled an account with Phillips in 1831, in which the kumshaws were carried to the credit of Phillips; and no objection nor dissent was expressed by the plaintiff until shortly before this suit was brought. There was also some other (not very clear) evidence to shew a rather more direct recognition by the plaintiff of this settlement. On the other hand, Mr. Latimer stated that he did not consider the kumshaws as falling within his province.

Mr. Gilpin and Mr. C. Ingersoll, for plaintiff.

Mr. Meredith and Mr. Cadwalader for defendant.

BALDWIN, Circuit Justice (charging jury). The relations between the parties, originally, were these: Phillips, as captain, was, by law, the plaintiff's agent in navigating the ship and delivering the cargo. The captain's compensation consisted of his wages and a privilege or right of tonnage, which had been allowed to him, and he was not entitled to any of the earnings of the ship or profits of the voyage. Subsequently, however, the relations of the parties were changed. By the arrangements of Mr. Latimer, the ship and captain were employed in a new and different way. As a store-ship, she became a store-house. Phillips became a store-keeper, intrusted with the keeping of opium in store, and the delivery of it upon the owner's orders; and responsible for losses of it by larceny or other ordinary causes. With duties differing from those of the captain of a carrying vessel, his profit was lessened; for his tonnage, of course, ceased during this time. The storage went to the owner of the vessel. As the employment of the captain was a different one from that in which he was originally engaged, and the duties new, it is clear that he was entitled to some compensation; and in the absence of all contract between the parties, we must inquire what rule results in law from the nature and circumstances of the case.

This transaction having taken place in China, the local law, if there was any specifically applicable to the case, must, in the first instance, be looked to. If there was none, we must consider how the general principles of commercial law bear upon the facts of the occurrence. If there was a usage established and generally known among persons engaged in this trade, that becomes the rule to which the contract must be referred. And finally, the course of dealing between the parties, and the acts and admissions of themselves and their agents must have much weight in determining their respective rights. Let us look at these in their order.

No local statute having been brought to the notice of the court, we are referred to general principles of law and evidence, for the discovery of the intention of the parties, and the rights arising from them. What then is this kumshaw, this five dollars, paid on the delivery of a chest of opium to a purchaser or smuggler? and to whom does it belong? The owner of the ship is entitled to all the earnings of the ship. That which is claimed by and paid to the ship, in this trade, is the storage: this is paid for the use of the ship, and for the risk and expense of keeping the opium. But the kumshaw is for something else. The owner of the opium is entitled to all that enters into the price of the opium; but there seems to be no pretence that the kumshaw is a part of this price. The consignee of the ship or of her outward cargo has nothing to do with the kumshaw: he is entitled to nothing but commissions upon what he receives for storage and sales. It is plain, too, that this kumshaw is not a charge made for the mere delivery of the opium, and due therefore to the hands on board the ship; for nothing is paid when the opium is transferred to another ship, though the trouble is as great as must attend its delivery to a smuggler.

For whose benefit, then, is the kumshaw paid? When the captain of a ship becomes a warehouse-man, he acts as consignee and not as captain. As consignee he is entitled to some compensation. Was this kumshaw considered as his compensation? While the ship is engaged in its ordinary employment, the owner has a right to the time and services of the captain to the extent of the duties of that officer's station. But if duties are undertaken not within the ordinary scope of the captain's profession, but in a new, peculiar and unanticipated office, then the employer must pay a compensation; according to the value of the service, if usage has not fixed the rate of recompense; or according to established usage, if there be any. Where the compensation of any agent is settled by contract, or, without contract, is fixed by usage, the jury, in the first instance, are not to inquire what the service was worth on a computation of the value of the time and labour, but they are to inquire into the fact of the existence of the contract or usage; and if they find neither, then they are to al-

low what is reasonable. On this point, (of the reasonable compensation,) you will judge. In the general trade it is admitted that the whole kumshaw goes to the captain. In the opium trade the arrangement, in British ships, appears to have been to divide the kumshaw; while in the only case where a ship of the same nation as the one in question has been engaged in the opium trade, the captain received the whole. The Scattergood took the place of that ship. You will judge, from the whole evidence, whether it is reasonable that she should succeed to the same rule of disposition of the kumshaws.

A contract may be inferred from usage. The usage of merchants constitutes the law of merchants: it is a rule of their own making and binds when no other law is applicable. The influence of usage is universal. It attaches to nations and to individuals. It creates obligations. It interprets laws. In all governments, and in every community there are laws of usage and custom. Where a publick officer has compensation fixed by statute, though usage cannot alter the law, yet it is evidence of the construction given to the law, and is binding on past transactions. Publick officers may, by usage, be entitled to compensation for services beyond the line of their regular duty, and usage will regulate the amount of their compensation. General custom is a general law, and forms the law of contracts, and this, sometimes, though it be at variance with their terms. It controls even the principles of law. Thus the right to the way-going crop, days of grace and times of protest, are regulated by the usage of the place or bank, and affect even those who have no notice of the custom. The ancient, established, uniform and known custom of persons engaged in any trade makes a law for that trade, though it is not applicable to other trades. It is their way of doing business. It is the rule to which all who enter that trade, are understood to consent. It makes, supplies, and construes their contracts. We may here add, that known and settled usages ought to be respected by courts and juries, unless such usages are against the laws or policy of the country: otherwise our dealings with foreigners in foreign lands will fall into disorder and confusion. And I may observe, that less evidence would be required to establish an usage in trading among distant, Eastern nations, where persons live far removed from the laws and customs of their own and other Christian countries, and yet can scarcely be expected to be governed by those of the people, penitus orbe divisos, among whom they are.

What then will make an usage illegal? Not the amount which may be regulated by it; for that depends on accident. You will then decide whether, at the time the Scattergood was employed as an opium ship, there was a known, settled usage as to who was entitled to the opium kumshaw. A legal usage is a thing which it is not easy to establish. The single case of the Levant is not, by any means, enough to make an usage; (nor, if there had been an usage, would casual instances of a different agreement on the British ships destroy it:) but if you think that there was, essentially, no difference between the opium-kumshaw and the kumshaw in the general trade, then, as there appears to have been an ancient, uninterrupted and general custom to give these to the captain, such evidence of usage will be sufficient.

If no usage is found, or if it is found that the rights of the parties in this case were not left dependant upon usage, we must refer to the course of dealing between the parties; for their accounts, acts, letters and declarations are competent evidence of the nature and terms of the tacit, understood, implied contract, under which they acted, and upon which they settled their mutual claims. The letter of attorney under which Mr. Latimer acted, gave him a discretion without reserving to the plaintiff a power to review or reverse acts done within that discretionary authority. The rule of all agencies, publick and private, is, that if authority is given to the agent to do specifick acts, and he exercise that power according to the right conferred; or, if a general authority is given to him to act in the premises according to his discretion, and he do so act; the principal is bound as to the person with whom the agent deals, unless fraud is shewn. If a power be conferred upon an agent, and yet be attended by private instructions as to the exercise of it, or restrictions not known to those with whom the agent deals, the principal is bound to the extent of the power which appears to be conferred. If a power has been assumed without warrant, by one professing to act as agent, the principal may ratify or annul acts done under such power, when informed of them. But he must adopt or reject the whole act: He has no right, without the consent of the other party, to adopt part of an act and reject part. If the acts of an agent are partly within the authority given to him, and partly beyond it, they may be adopted by the principal so far as they are within the power, and disavowed as to the residue. But where a principal has a right to disavow an act done in his name, or on his account, he must do so within a reasonable time after he is made acquainted with it, and must give notice to the party to be affected: otherwise the law will presume an acquiescence; or the jury may infer it, according to circumstances. If the facts are ascertained, the law makes the presumption. If contested or doubtful, the subject is referred to a jury, under the court's direction.

These principles respecting agency apply to the present case. And if the account settled by Mr. Latimer was within the powers given to him, or has been acquiesced in by

the plaintiff, the principles already stated come into action.

A settled account is, in general, binding: and to be otherwise, there should be shewn either fraud or palpable mistake. And, let me say, that this principle acquires new force when death has interposed to close a party's lips, and to deprive those who survive him of knowledge and means of defence. It is justly said, that there is a time for all things; which being suffered to pass, there should be an end of question.

The jury found for the defendants.

Case No. 17,640.

WILCOX v. COHN.

[5 Blatchf. 346.] [1]

Circuit Court, S. D. New York. July 23, 1866.

PLEADING—DECLARATION IN COVENANT.

1. Rules of pleading, applicable to a declaration for the breach of a covenant, stated.

2. Only so much of the covenant as is essential to the cause of action should be set forth.

3. Distinct breaches of separate covenants may be assigned in the same count.

4. It is sufficient to assign a breach of the covenant according to its legal effect, or in words which contain its sense and substance.

5. The performance of a condition precedent must be averred, but matters of defence need not be anticipated and negatived.

This was an action of covenant [by Jedediah Wilcox against Moritz Cohn]. The defendant put in a special demurrer to the declaration, assigning, for cause of demurrer, that there was no breach properly stated, and specifying several particulars in which the declaration was supposed to be defective in that respect.

John B. Staples, for plaintiff.
Charles Wehle, for defendant.

SHIPMAN, District Judge. The rules of pleading, by which the issue raised by this demurrer is to be determined, are very plain and elementary. In order to avoid prolixity, so much of the covenant as is essential to the cause of action should be set forth and no more. Distinct breaches of separate covenants in the deed may be assigned in the same count. It is sufficient if the breach be assigned in words which contain the sense and substance of the covenant. The breach may be assigned according to the legal effect, or in the words of the deed. When the right of action depends upon a condition precedent, its performance must be averred; but it is never necessary to anticipate and negative matters of defence, such as payment, waiver, discharge, &c.

The covenant, for a breach of which this action is brought, is set forth in the declaration as follows: "Nothing in this license contained shall be construed to authorize or permit the said licensee to use the said clasping machine for any other purpose than his own business of manufacturing hoop skirts, to hire the said machine to others, or to suffer any other person to use the said machine gratuitously or for a consideration; and nothing in this license contained shall be construed to authorize, permit, or license the said licensee to construct or vend a machine embodying said inventions of the said Maine and said Deforest and said Baird, or either of them, or to have one or more of said machines constructed for him." The next succeeding clause of the deed states the damages agreed upon by the parties for a violation of the foregoing covenant, and it is therein stipulated, that the defendant shall pay $500, as liquidated damages, "for each and every machine which the said licensee shall use, or permit another to use, and the same sum for each and every machine which the said licensee shall construct or vend, or procure to be constructed." The machines here referred to are plainly machines other than the machines furnished to the defendant by the plaintiff. These two clauses of the deed are to be construed together, and the latter is somewhat explanatory of the former. Thus construing these clauses, it follows that the defendant would violate the covenant contained in them, if he should construct or vend a machine, or cause one or more to be constructed for him, or should use, or permit another to use, a machine constructed by him, or which he had caused to be constructed for himself.

The breach alleged is, that the defendant "had and procured three machines, embracing the inventions set forth in said letters patent, to be made and constructed, and did use said three machines, and permit the same to be used." The pleader here states, with certainty to a common intent, which is sufficient in a declaration, and by a fair intendment, that the defendant caused three of these machines to be constructed for himself, and that he used the same. It is explicitly stated, that the defendant used the machines, and this alone would constitute a breach of a covenant in the deed. A breach is assigned in words which contain the sense and substance of the covenant, and according to its legal effect.

It was unnecessary for the pleader to allege that the machines were not procured from the plaintiff by the defendant, or that the defendant had not paid the stipulated damages. These are matters of defence to the action.

The demurrer is, therefore, overruled.

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

Case No. 17,641.

WILCOX v. KOMP.

[7 Blatchf. 126.] [1]

Circuit Court, S. D. New York. Jan. 18, 1870.

PATENTS—VALIDITY—INFRINGEMENT—HOOP SKIRT TAPE MACHINERY.

1. The first three claims of the patent reissued to Jedediah Wilcox, as assignee, August 4th, 1863, on the surrender of the original patent granted to Bela A. Mann, as inventor, December 24th, 1861, for improvements in machinery for fastening clasps or spangles to the hoops and tapes of hoop-skirts, are valid.

2. The first claim of the patent granted to Joseph Baird, December 9th, 1862, for improvements in machinery for fastening clasps or spangles to the hoops and tapes of hoop-skirts, is valid.

3. The first claim of the Baird patent is not infringed by machinery constructed in accordance with the patent granted to Albert Komp, May 7th, 1867.

4. The third claim of the Baird patent is valid and is infringed by such machinery.

[This was a bill in equity by Jedediah Wilcox against Albert Komp for the infringement of letters patent Nos. 34,026 and 37,124, granted, respectively, to B. A. Mann, December 24, 1861 (reissued August 4, 1863, No. 1,518), and to J. H. Baird, December 9, 1862.] Final hearing, on pleadings and proofs.

John B. Staples, for plaintiff.

J. Van Santvoord, for defendant.

BLATCHFORD, District Judge. This is a suit brought for the infringement of letters patent. Four letters patent are set out and relied on in the bill, all of them being patents for improvements in machinery for fastening clasps or spangles to the hoops and tapes of hoop skirts. One is a patent granted to Thomas B. De Forest, November 4th, 1862, and owned by the plaintiff. One is a patent granted to Joseph Baird, December 9th, 1862, and owned by the plaintiff. One is a patent reissued to the plaintiff, as assignee, August 4th, 1863, on the surrender of a patent granted to Bela A. Mann, as inventor, December 24th, 1861. One is a patent granted to Chauncey L. Olmstead, October 31st, 1865, and owned by the plaintiff. The plaintiff brings the case to hearing only on the Mann and Baird patents, and withdraws his claim to recover in this suit on either of the other two patents.

The inventions set forth in the Baird patent are specific improvements upon those described in the Mann patent. The Mann patent will, therefore, be first considered. The specification of the reissued Mann patent, which is signed by Mann, says: "Previous to my invention, the hoops of ladies' hoop skirts have been secured to the tapes by means of clasps, whose tongues are inserted through the tapes and clinched over the hoops. The operation of applying the clasps and clinching has been performed by hand, and, in some cases, pliers operated by hand have been used to effect the clinching by pressure. The object of my invention is to enable the skirt clasp to be applied to the skirts and clinched with greater rapidity than has heretofore been practicable, and to dispense with the handling of the clasps, the application of the clasps in proper positions for clinching, and their subsequent clinching, being effected by machinery. To this end, the first part of my invention consists in a skirt clasp-feeding device, consisting substantially of an inclined plate, and one or more guide bars, or their equivalent, operating in such manner that skirt clasps which are supplied to the feeding device with their tongues in various positions relatively to the place of supply, are delivered by the device with their tongues in the same positions relatively to the place of delivery. The second part of my invention consists in the construction of a feeding device, operating substantially as above set forth, with an opening to permit the escape of misarranged skirt clasps. The third part of my invention consists in the combination of a hopper with a clasp-feeding device, and with a clasp-supplying device, or their joint or several equivalents, the combination of these devices, as a whole, being such, that skirt clasps placed promiscuously in the hopper are secured in the clasp-supplying device with their tongues in the same positions relatively thereto, and are held therein in a row ready for the performance of a subsequent operation. The fourth part of my invention consists in the combination of a clasp-clinching device with a clasp-supplying device, the combination being such that skirt clasps supplied in a row are operated upon in succession by the clinching device. The fifth part of my invention consists in the combination, in one machine, of a hopper, a clasp-feeding device, a clasp-supplying device, and a clasp-clinching device, or their joint or several equivalents, the combination, as a whole, operating in such manner, that skirt clasps placed promiscuously in the hopper may be clinched in succession upon articles submitted to the machine. The sixth part of my invention consists in the combination of a clasp-clinching device with a liberating device, which permits the disengagement of the clasp from the clasping machine. The seventh part of my invention consists in the combination of a clinching device for clinching clasps, and of a device for supplying it with clasps, with a treadle to control the same by the foot, so that, in the operation of clinching clasps to skirts, the hands of the operator are left at liberty to manipulate the skirt."

The essential parts of the Mann machine will now be described: There is a shallow sheet-metal box or pan, forming a hopper, to which a greater or less inclination can be given, which is open at its front end, and has a short vertical plate or ledge fitted obliquely at its front part and right hand side.

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

To the open front end of the hopper is attached the back end of a feeding plate, which has a greater inclination than the hopper has. The feeding plate is a plane with two bars attached at about right angles with each other. The bars are not in contact, there being a space between them. Each bar has a groove in the lower part of its face. The feeding plate and the bars, which latter act as guide bars, constitute the feeding device. The feeding plate has an oblong slot or opening made through it at its front part. This slot or opening, which is quite near to one of the two bars, permits the escape of misarranged clasps into a box placed beneath it. Next in order to the feeding device is the clasp-supplying device, in which the clasps from the feeding device are received and held in a row, to be supplied in succession, one by one, by means of a liberating device, to a clasp-clinching device. The clasp-supplying device is formed by two vertical plates and a groove. The plates are secured to the front side of a head or bar, with a small or narrow space between them, to receive and guide the tongues of the clasps. The plates overlap the edges of the groove which is made in the face of the head. The lower ends of the plates are curved, so as to project beneath the under part of the head. The liberating device is situated at the lower end of the clasp-supplying device. It consists of two plates or jaws held together by a spring, which permits them to be opened when a clasp is to be liberated. The clasps in the clasp-supplier are supplied to the clinching device. The clasp is compressed in such manner that the tongues are bent between the under side of the head before-mentioned and a clinching block of steel, which has a circular groove extending longitudinally in its upper surface. Guides are provided to receive the hoop to which the clasp is to be applied. The clasp has two tongues projecting from a plate. The clasps are placed promiscuously in the hopper, and gradually pass down upon the feeding plate, the jar or vibration of the machine, when in operation, constituting a sufficient shake motion. The clasps pass down the feeding plate against one of the bars, in an inverted position, and are conducted by it to the other bar. As the clasps pass down the bars, they arrange themselves with their tongues in the same positions with reference to the bars, the plates of the clasps fitting into the grooves of the bars, so that, when the clasps reach, in succession, the place of delivery, their tongues are in the same position relative thereto. In case any clasp has not arranged itself with its tongues in the proper position, it cannot pass by the slot in the feeding plate, which is so close to the lower bar, that the misarranged clasp tips over through the slot and falls into the box beneath. This lower bar conducts the clasps to the passage way of the clasp-supplying device, formed by the plates and the groove before-mentioned. This passage way may be filled with clasps, which are held in a row, with their prongs projecting through the space between the plates. The lowest clasp of the row has an upright position, with its tongues pointing down as the lower curved ends of the plates of the clasp-supplying device conduct it between the plates or jaws of the liberating device, which retain it in that position under the head and directly over the clinching block. The hoop is placed in position, with the loop of the tape in the clinching block. Then, by the action of the foot of the operator on the treadle, the clinching block, with the hoop, is elevated, and the prongs of the clasp are forced through the edges or sides of the loop and through the tape, and, coming in contact with the concave surface of the clinching block, are bent in and clinched at the under side of the tape. After each clasp is clinched, the hoop is moved along and is secured to every tape of the skirt in the same manner, the clasps feeding themselves down in the passage way behind the plates of the clasp-supplying device by their own gravity. As each clasp is clinched, the plates or jaws of the liberating device are forced upwards and apart by the action of the clinching block, so as to liberate the clinched clasp, the plates or jaws instantly closing by the action of the spring. The clinching has been effected by the elevation of the clinching block, which then descends, to re-ascend again. There are seven claims in the patent: (1) "A clasp-feeding device, consisting substantially of an inclined plate, and one or more guide-bars, the whole operating substantially as herein set forth." (2) "The said feeding device, constructed with an opening to permit the escape of misarranged clasps, substantially as herein set forth." (3) "The combination of a hopper with a clasp-feeding device, and with a clasp-supplying device, the combination, as a whole, operating substantially as herein set forth." (4) "The combination of a clasp-clinching device with a clasp-supplying device, the whole operating substantially as herein set forth." (5) "The combination of a hopper, a clasp-feeding device, a clasp-supplying device, and a clasp-clinching device, the combination, as a whole, operating substantially as herein set forth." (6) "The combination of a clasp-clinching device with a liberating device, operating substantially as herein set forth." (7) "The combination of a clasp-clinching device and of a clasp-supplying device with a treadle operating substantially as herein set forth."

The value of the inventions embodied in the Mann patent is unquestionable. The tapes must be secured to the hoops, so as to prevent any sliding, in use, of the tapes on the hoops, and any falling away of the hoops from their proper positions, and the advantage of doing the work by machinery instead of by hand is obvious and is shown by the evidence. Before the invention of Mann this work was always done by hand.

It is claimed by the plaintiff that the ma-

chine of the defendant infringes the first three claims of the Mann patent, in having substantially the same clasp-feeding device, with its inclined plate and guide-bars, and the opening to permit the escape of misarranged clasps, and substantially the same combination of hopper, clasp-feeding device and clasp-supplying device, that are found in the Mann patent, and all operating in substantially the same manner that is set forth in that patent. There can be no doubt that the defendant has bodily appropriated every thing that is embraced in the first three claims of the Mann patent. He has, in his machine, a clasp-feeding device, consisting substantially of an inclined plate and guide-bar operating in such manner that skirt-clasps which are supplied to the feeding device with their tongues in various positions relatively to the place of supply, are delivered with their tongues in the same positions relatively to the place of delivery. Such feeding device is constructed with an opening to permit the escape of misarranged clasps, and is so combined with a hopper and with a clasp-supplying device, that clasps placed promiscuously in the hopper are secured in the clasp-supplying device with their tongues in the same positions relatively thereto, and are held therein in a row ready for the performance of a subsequent operation. In fact, the construction of the defendant's machine, in respect to the hopper, the feeding device, the opening for escape and the clasp-supplying device, is scarcely varied in form from the construction shown in the Mann patent. The infringement of the first three claims of that patent is, therefore, clear.

The defence as to the Mann patent is placed mainly on two grounds: (1) That Mann did not invent what is claimed in his patent, but that it was, in fact, invented by one Samuel R. Wilmot, and communicated to and wrongfully patented by Mann. (2) That the first three claims of the Mann patent are anticipated by what is found in letters patent of the United States granted to William H. Van Gieson, November 30th, 1858, for an "improved machine for plating nail-heads." And the first two claims of the Mann patent are anticipated by what is found in letters patent of the United States granted to M. M. Rhodes and J. C. Rhodes, May 8th, 1855, for a "machine for leathering tacks."

The evidence clearly shows that Mann was an original and independent inventor of what is claimed in the Mann patent; and the defendant wholly fails to show that anything that Wilmot did in the way of inventing or constructing a machine like Mann's was in any way made known to Mann before Mann made his invention. Besides, it is not shown that what Wilmot did, if it was prior in time to Mann's invention, amounted to anything more than a mere experiment, which was abandoned.

It is a mistake to suppose, as is contended by the counsel for the defendant, that the first claim of the Mann patent covers every clasp-feeding device which consists substantially of an inclined plate and one or more guide-bars, whether the whole operates or not substantially as set forth in the Mann patent. In order to be within such claim, the inclined plate and the guide-bars must operate in substantially the same manner, as a whole, as the inclined plate and the guide-bars of Mann, in feeding clasps of substantially the same character as the clasps shown in the Mann patent. So, also, to be within the second claim of the Mann patent, such inclined plate and such guide-bars must operate in substantially the same manner, in connection with the opening for the escape of such clasps as are misarranged, to permit such escape, as in the patent of Mann. And, to be within the third claim of that patent, the combination must be substantially one of such a hopper, and such a feeding device, and such a supplying device, as are shown in the Mann patent, and must, as a whole, operate in substantially the same manner as the combination named in such third claim does, in feeding and supplying such clasps as are shown in such patent. The erroneous view taken, on the part of the defendant, as to the scope of the claims of the Mann patent, is the foundation of the position assumed on the part of the defendant, that Van Gieson's patent anticipates the first claim of the Mann patent, because the former describes a machine for feeding the shells or clasps which go around the heads of nails used on trunks, which machine has a feeding device consisting of an inclined plate and one or more guide-bars, and because such feeding device is, therefore, a clasp-feeding device consisting of those instrumentalities. The same thing is true in regard to the claims made by the defendant, that Van Gieson's patent anticipates the second claim of the Mann patent, because the former describes an opening for escape in the feeding device, and that Van Gieson's patent anticipates the third claim of the Mann patent, because the former describes a hopper, a feeding device, and a supplying device. The same remarks are true in respect to the views urged on the part of the defendant in regard to the Rhodes patent for the machine for leathering tacks.

In the clasp-feeding device of Mann, which forms the subject of the first claim of the Mann patent, the upright face of the guide-bar is separated from the surface of the inclined plate by a space into which the head of the descending clasp enters as far as the tongues on the clasp will allow, so that the tongues rest and slide against the upright face of the guide-bar, and the entire clasp, consisting of head and tongues, is thus guided to the lower end of the inclined plate with the tongues in the position required to enable them to enter properly the clasp-supplying device. In Van Gieson's shell or clasp-feeding device, the upright face of his V-shaped funnel is not separated from the surface of the inclined plate by any space. There is, therefore, in Van

Gieson's device no provision for allowing the tongues of a clasp to arrange themselves against the upright face of the funnel, and no provision for guiding the clasp to the lower end of the inclined plate, with their tongues in the position required for entering properly a clasp-supplying device. In Van Gieson's machine, there are two inclined plates, with a space between them for feeding nails, which slide down the plates suspended by their heads, with their points hanging down between the plates. In the Mann machine, the inclined plate supports the clasps with their heads downwards, and their points upwards. The mode of operation of each of the two feeding devices of Van Gieson is different from the mode of operation of the feeding device of Mann, and neither one of Van Gieson's feeding devices can be used to feed the clasps which the feeding device of Mann feeds. The feeding device in the Rhodes patent operates on the same principle as the nail-feeding device in the Van Gieson patent, and in a substantially different manner from the feeding device in the Mann patent.

Although the Van Gieson machine and the Rhodes machine have each of them an opening to permit the escape of misarranged articles, yet, inasmuch as neither of those machines has the feeding device of Mann, they do not present the same arrangement or combination that is found in the second claim of the Mann patent.

So, in regard to the third claim in the Mann patent, there is not found in the Van Gieson machine any combination of hopper, clasp-feeding device, and clasp-supplying device, which operates, as a whole, substantially like the combination, in the Mann machine, of those three instrumentalities, as there found. There is not in the Van Gieson machine any such clasp-feeding device, or any such clasp-supplying device as is found in the Mann patent.

It follows, therefore, that neither one of the first three claims of the Mann patent is invalidated by anything that is found in the Van Gieson patent or in the Rhodes patent.

We come now to the consideration of the Baird patent. The specification of that patent says: "A machine for applying clasps to the hoops of hoop skirts was invented by Bela A. Mann, by which machine the clasps, thrown promiscuously into the hopper, are fed to a clasp-supplying device, from which they are applied in succession to, and clasped upon, the hoops of the skirt that are presented to the machine. In this machine, the parts are so arranged that, in the operation of clasping, the whole skirt which is being operated upon is raised at the application of each clasp. This arrangement is objectionable, and the object of my invention is, to permit the skirt to remain in one place during the operation of applying all the clasps, by which means the operation of clasping is greatly facilitated. My invention consists, first, in the combination of a rest for the hoops of the skirt, with clasp-feeding and clasp-supplying devices, by means of a moving clasp-carrying device, which receives the clasps in succession, and carries them to the skirt-hoop presented to the machine. The second part of my invention consists in constructing the clasp-carrier in such manner, and in so combining it with the clasp-supplier, that it not only carries the clasp, but also forms a gate which prevents the escape of clasps from the clasp-supplier. The third part of my invention consists in constructing the clasp-carrier in such manner, and in so combining it with the hoop-rest, that it not only carries the clasp, but also forms one of the members by which the clasp is applied to the hoop. The general appearance of the machine in which I have embodied my improvements is similar to that of Bela A. Mann, as it contains a hopper, a clasp-feeding device, a clasp-supplying device, and a clasp-clinching device." The specification then describes the hopper, the feeding device, the opening for escape, and the supplying device. They are those of the Mann patent. The clasp-carrier consists of a slide moving vertically in guides, and fitted, at its lower end, with a pair of jaws, which jaws are at a sufficient distance from the end of the slide to form a receptacle to hold the plate of a single clasp with its tongues projecting down between the lips of the jaws. Means are provided for opening the jaws to permit the clasps to escape. The jaws are drawn towards each other by a spring, to hold the clasp until they are opened. Below the slide is the skirt-rest, which is a grooved block of steel immediately beneath the lower end of the slide, so that, when the slide is depressed, carrying the clasp in its jaws, the tongues of the clasp are clinched by being driven against the grooved block. The grooved block forms a hoop-rest and supports the hoop, and is furnished with a guide to ensure the application of the clasps at the proper places. The upper surface of the hoop-rest is convex, and the lower surfaces of the jaws of the slide are bevelled, so that the striking of the two against each other opens the jaws and permits the clasp held by them to pass between them. They are then withdrawn by the rise of the slide. The slide is worked by a foot-treadle, and is returned to its highest position by a spring. When it is at that position, the receptacle within its jaws is opposite to the mouth of the clasp-supplying device, so that it then receives a clasp, which is pushed edgewise into it from the lower end of the clasp-supplier, by the pressure of the column of clasps above, the lower end of the clasp-supplier being bent for the purpose. The face of the slide moves in close proximity to the mouth of the clasp-supplier, so that it forms a gate which closes the mouth of the clasp-supplier, and prevents the escape of clasps improperly. The specification says: "The movement of the clasp-carrier need not necessarily be in a straight line, because it is obvious that it might be made to move in the arc of a circle, provided the hoop-rest be

properly located to present the hoop to receive the clasp. All that is necessary is, that the clasp-carrier should be moved in such manner, that it will receive clasps from the clasp-supplier, and carry them onward in the machine, to be subsequently clinched upon the hoop." The claims of the patent are these: (1) "The combination of a hoop-rest, a clasp-feeder, a clasp-supplier, and a moving clasp-carrier, the combination, as a whole, operating substantially as set forth." (2) "The combination of a clasp-carrier with the clasp-supplier, in such manner that the clasp-carrier forms a gate or stop to prevent the escape of clasps, the combination, as a whole, operating substantially as set forth." (3) "The combination of a clasp-carrier with the hoop-rest, in such manner that the clasp-carrier forms one of the members by which the clasp is clinched upon the hoop." It is not alleged that the defendant's machine infringes the second claim of the Baird patent, but it is asserted that it infringes the first and third claims.

The machine of the defendant, in the particulars in which it is alleged to infringe such first and third claims, is constructed substantially in accordance with letters patent granted to the defendant May 7th, 1867. The mouth of the groove in the clasp-supplier is closed by a spring-latch, which prevents the clasps from leaving the clasp-supplier spontaneously. From the clasp-supplier, one clasp after another is transferred to a clasp-carrier which swings up and down on a pivot through an arc of ninety degrees or nearly so. The face of the clasp-carrier is provided with a groove, which is just wide enough to pass over the spring-latch before-mentioned, and, when the clasp-carrier is swung upwards, it strikes the spring-latch and opens it, and a single clasp is transferred from the clasp-supplier to the clasp-carrier. The motion of the clasp-carrier is then reversed, and, as it goes down, the clasp is reversed or brought into the proper position to allow its points to penetrate the tape placed on an anvil at the end of its range of motion. The anvil has a semi-circular groove, so that the points of the clasps can penetrate the tape, and they are clinched by the action of a hammer, which is worked by appropriate machinery, and which, by striking the clasp-carrier, causes it to clinch the tongues of the clasp against the anvil beneath. In the Baird machine, as in the Mann machine, the lower ends of the plates of the clasp-supplier are curved, so that the lowest clasp in the row of clasps in the clasp-supplier has its tongues pointing downward as it enters between the plates or jaws of the liberating device, and in that position it descends vertically and enters the tape. The plate or head of the clasp is, therefore, in the Mann and Baird machines, changed, in the clasp-supplier, from a vertical to a horizontal position. In the defendant's machine, the plate of the clasp is in a vertical position when it leaves the clasp-supplier and enters the clasp-carrier, and it is changed to be in a horizontal position, with the tongues of the clasp projecting downwards, by the motion of the clasp-carrier through the arc of a circle.

The first claim of the Baird patent claims "the combination of a hoop-rest, a clasp-feeder, a clasp-supplier and a moving clasp-carrier, the combination, as a whole, operating substantially as set forth." The machine of the defendant has substantially the same hoop-rest, the same clasp-feeder, and the same clasp-supplier, that the Baird machine has, and it has a moving clasp-carrier. But its moving clasp-carrier does not operate substantially in the manner that the Baird moving clasp-carrier operates, as described in the Baird patent. That patent describes the clasp-carrier as consisting of a slide moving in guides, and, although, in its description and drawings, it represents such slide as moving vertically, it states that its movement need not necessarily be in a straight line, but that it may be made to move in the arc of a circle. The slide and guides may be curved, so that the slide will move in the arc of a circle, but still the clasp-carrier must be substantially a slide moving in guides. Although the defendant's clasp-carrier moves in the arc of a circle, yet it is not substantially a slide moving in guides, and does not operate in substantially the same manner as the Baird moving clasp-carrier. Therefore, the combination, in the defendant's machine, of his hoop-rest, clasp-feeder, clasp-supplier and clasp-carrier, does not, as a whole, operate substantially in the same manner as the combination, in the Baird patent, of the hoop-rest, clasp-feeder, clasp-supplier and clasp-carrier described therein. It follows, that the first claim of the Baird patent is not infringed.

In the defendant's machine, the clasp-carrier is combined with the hoop-rest in such a manner that the clasp-carrier forms one of the members by which the clasp is clinched upon the hoop. It is, in the defendant's machine, the blow of the hammer upon the top of the clasp-carrier which clinches the points of the clasps against the hoop-rest or anvil. The third claim of the Baird patent is, therefore, infringed by the defendant.

There is nothing in the Van Gieson patent or the Rhodes patent that anticipates what is covered by the third claim of the Baird patent, nor is it anticipated by any thing found in the De Forest patent or the Mann patent.

It results, that there must be a decree in favor of the plaintiff for a perpetual injunction and an account of profits, as respects the first three claims of the Mann patent and the third claim of the Baird patent, and for the costs of this suit.

WILCOX (LINKMAN v.). See Case No. 8,374.

WILCOX (MUTUAL LIFE INS. CO. v.). See Cases Nos. 9,979 and 9,980.

WILCOX (UNITED STATES v.). See Cases Nos. 16,691–16,693.

Case No. 17,642.

WILCOX & GIBBS SEWING MACH. CO. v. FOLLETT.

[See Case No. 17,643.]

Case No. 17,643.

WILCOX & GIBBS SEWING MACH. CO. v. FOLLETT et al.

[2 Flip. 263;[1] 10 Chi. Leg. News, 99; 2 Cin. Law Bul. 301; 3 Cin. Law Bul. 49.]

Circuit Court, N. D. Ohio. Oct., 1878.

REMOVAL OF CAUSES—PROCEEDINGS FOR REMOVAL.

1. Parties seeking to remove causes to the United States courts must comply strictly with the provisions and conditions presented by the statute, and any material omission will be fatal to such removal.

2. The petition for removal must be filed at the term at which the case can be first tried and before trial thereof, and not after such term.

[This was a motion to dismiss and remand the cause to the state court of common pleas, in an action by the Wilcox & Gibbs Sewing Machine Company against E. Follett and L. B. Kinney.]

John Coon, for plaintiff.

Stone & Hessenmueller and Mr. Estep, for defendant.

WELKER, District Judge. In this case petition was filed by the plaintiff in the court of common pleas of Cuyahoga county, against the defendants, on the 24th of January, 1877, and summons served same day on Kinney. On the 24th of February, 1877, being at the first term of that court, when the case could be first tried, the defendant, Kinney, filed his petition for removal, on the ground that the plaintiff was not a citizen of the state of Ohio. A bond was filed the same day, conditioned "to enter or cause it to be entered in the circuit court, on the first day of its stated term next ensuing after the order of said court of common pleas, for the removal of said suit into said court a copy of the record in said suit," etc., and the cause was continued to the March term, 1877. Answer of plaintiff to petition for removal filed March 31, 1877, and cause continued to May term, 1877. On the first day of May, 1877, said court gave defendant leave to amend his bond. Amended bond filed by Kinney, May 26, 1877, conditioned that "he shall enter in said circuit court on the first day of its next session, copies of the process against him in said suit," etc. At the May term, 1877, and after amended bond filed, the court made an order for the removal of the said suit to this court.

This court commenced its session on the 3d day of April, 1877. The defendant filed the copy of the record in this court on the 20th of July, 1877, and during the April term.

The plaintiff files his motion to dismiss the case and remand to the common pleas, because—First. A copy of the record of the case was not entered in this court within the time prescribed by the statute after the filing of the petition and bond for removal. Second. Because the removal of the case to this court is contrary to law, and this court has no jurisdiction.

The statute (18 Stat. 471, § 3) provides that "whenever either party * * * entitled to remove any suit, * * * shall desire to remove such suit, * * * he, or they, may make and file a petition in such suit in such state court, before or at the term at which the cause could be first tried, and before the trial thereof for the removal, * * * and shall make and file therewith a bond * * * for his or their entering in such circuit court on the first day of its then next session a copy of the record; * * * and the said copy being entered as aforesaid, * * * the cause shall then proceed," etc.

The first term of the common pleas after the filing of the original petition at which the cause could be first tried, was the March term, 1877. The petition for removal and original bond were in fact filed before the March term, to-wit: the 24th day of February, 1877.

The record shows that, after the filing of such petition and bond, the suit was continued to the March term, and at the March term, to-wit: on the 31st of March, 1877, the plaintiff having filed an answer to the petition for removal, the cause was continued to the May term. The first day of the then next session of this court, after the petition for removal was filed, being the third day of April, 1877, was allowed to pass without the filing of the record in this court.

Parties seeking to remove causes to the United States courts are bound to comply strictly with the provisions and conditions prescribed by the statute giving the privilege, and any material omission will be fatal to the removal. It is clear that if the petition and bond were filed before or at the March term, then the record must have been filed in this court on the 3d day of April, 1877, if twenty days intervened, and could not be filed afterward.

But it is claimed by the defendant that, the bond first filed being defective, and leave having been given to amend the bond on the first day of May, the petition and bond are to be regarded as filed then, and the proper time to file the record would be at the October session of this court, and, if that be so, then the filing in this court on the 20th of July would comply with the statute.

The difficulty arising from this claim is that the March term, being the term at which the case could be first tried, was the latest time at which the petition and bond

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

could be filed. The defendants had no right to do so afterward. The policy of the statute seems to be that parties desiring to remove causes must do so at the earliest period at which the cause could be tried, or they cannot avail themselves of the provisions for removal. In this case the petition and bond having been filed on the 24th of February, the defendant thus early availing himself of the privilege, the limit of the time to file the record in this court commenced to run at that date, and the defendant cannot postpone the filing in this court beyond the time fixed by the statute. Parties seeking removal must be careful to have the petition and bond in legal form, and in compliance with the statute, when first filed, but if not, they must perfect them within the time prescribed by the statute for such filing. The subsequent amendment of the bond and the order of the court for removal at the May term do not change the time at which the petition and bond are required to be filed, so as to allow the limitation to commence to run at that time in reference to the time of filing the record in this court.

The motion is sustained and the case dismissed.

WILCUTT (WALCOTT v.). See Case No. 17,053.

Case No. 17,644.

Ex parte WILD.

[The case reported under above title in 12 Blatchf. 42, is the same as Case No. 4,173.]

Case No. 17,645.

In re WILD.

[11 Blatchf. 243;[1] 1 Thomp. Nat. Bank Cas. 246; 8 Alb. Law J. 235; 10 N. B. R. 568.]

Circuit Court, S. D. New York. Aug. 12, 1873.

USURY BY NATIONAL BANK—STATE LAWS.

A national bank, located in the city of New York, made a loan there to a corporation, which, if it had been made to an individual, would have been usurious, under the law of New York, as a loan at a rate exceeding the rate of 7 per centum per annum, so that the securities taken for the loan would have been void. A statute of New York forbids a corporation to interpose the defence of usury. The effect of such statute, as construed by the highest court of the state, is, that the rate of interest which a corporation may pay is not fixed or limited. The 30th section of the national banking act of June 3, 1864 (13 Stat. 108), provides, that, when no rate of interest is fixed by the laws of a state, a national bank may charge a rate not exceeding 7 per centum, and that if it charges more, the entire interest shall be forfeited. *Held*, that the interest on the loan in question was forfeited.

[Cited in brief in Moniteau Nat. Bank v. Miller, 73 Mo. 189; National Bank of Auburn v. Lewis, 75 N. Y. 523; Peterborough Nat. Bank v. Childs, 133 Mass. 250.]

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

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

[The receiver of the Ocean National Bank claimed to be admitted as a creditor of the bankrupt, upon indorsements by him upon promissory notes of the Portage Lake & Lake Superior Ship Canal Company, a Michigan corporation. The assignee of the bankrupt resisted the claim, on the ground that the notes were usuriously discounted by the bank for the canal company. The claimant objected that this defense was not open to the bankrupt, under chapter 172 of the session laws of New York for 1850 (page 334), as expounded in Rosa v. Butterfield, 33 N. Y. 665, and Belmont Branch Bank v. Hoge, 35 N. Y. 65. The district court decreed in favor of the claimant, and admitted him as a creditor. (Case unreported.) The assignee of the bankrupt and also the bankrupt appealed to this court.] [2]

Everett P. Wheeler and Francis S. Silvester, for assignee.

Francis N. Bangs, for receiver.

WOODRUFF, Circuit Judge. On the 13th of February, 1871, the bankrupt, Alfred Wild, without consideration, and as mere surety, became the endorser of two promissory notes made by the Portage Lake and Lake Superior Canal Company, one for $73,902.51, and the other for $35,111.49, which, on that day, were delivered to the Ocean National Bank, and were made payable with interest. These notes were given in renewal of a number of other notes then unpaid, which had been also given in renewal of prior notes held by the bank, and which were taken from the canal company for a loan of two sums of $75,000 each, made on and after the 7th of January, 1867, by the said bank. One of the sums was agreed, on the 5th of January aforesaid, to be loaned in form to the said canal company, and the other was at the same time agreed to be loaned to P. J. Avery, but is proved by the testimony, and was found by the referee in the district court, to have been in fact for the benefit of the canal company, who, in the accounts kept of the transaction, was treated as the actual debtor for both amounts. The reason assigned for giving to the transaction the form of two loans, one to the canal company and the other to P. J. Avery, was, that the national banking law prohibits an indebtedness by any one party, as borrower, to associations formed thereunder, to an amount greater than one-tenth of the capital of the association making the loan.

There is inconsistency, in permitting the bank, or its receiver, to make such a transaction, and avoid the charge of violating the banking act, by making it a loan in part to Avery, and in part only to the canal company, and, on the other hand, to avoid the-

[2] [From 10 N. B. R. 568.]

statutes against usury, of the state of New York, by declaring the whole to be a loan to the canal company, a corporation. It would be no injustice to the bank to hold the form given to the transaction in order to save the bank from a violation, or from an apparent violation, of the banking act, conclusive; and circumstances might, I think, be suggested, in which the bank would be estopped by it to aver that the transaction was other than it appeared on its face, and in the written instruments by which it was agreed that the loan should be made, and in the form of the notes actually given to the bank by Avery therefor. For the purposes of the case before me, I have concluded to treat the transaction in the aspect most favorable to the bank, and in accordance with the claim made in its behalf, as a loan to the canal company, a corporation of the state of Michigan.

The above-mentioned note for $73,902.51, was, on the 18th of September, 1871, renewed for the amount of $70,000, and a new note for the last-named sum, payable with interest thereon, was given, by the same corporation, under a new name, "Lake Superior Ship Canal Railroad and Iron Company," endorsed by the bankrupt, Wild, and others. The two notes, one dated September 18th, 1871, for $70,000 and interest, the other, dated February 13th, 1871, for $35,111.49 and interest, constitute the claim made by the receiver of the bank against the estate of the bankrupt, Wild, who endorsed them; and it is the allowance of that claim by the district court which is appealed from by the assignee to this court.

The loan originally made by the bank was further secured by the delivery to the bank of coupon bonds of the canal company, secured by mortgage, to the amount of two hundred thousand dollars, and it was made a condition of the loan, that the canal company should purchase and receive from the bank certain bonds, amounting on their face to $237,000, of a Georgia railroad corporation, whose road had been stripped of its rails and furniture, whose track had grown up with trees and bushes, which had not been used for many years, on whose bonds no interest had been for a long time paid, and whose bonds had no market value; and their want of intrinsic value was more fully shown by a foreclosure soon after effected, on which the road, the mortgage security for the entire issue of bonds, $924,600, of which these were a part, was sold at public auction, to the highest bidder, for $1,500. It is true, that the purchaser of the road, who seems to have acted for the canal company, states, that, after obtaining an act of the legislature of Georgia, incorporating a new company, and an act authorizing the state to guarantee another large issue of bonds, to enable the new company to reconstruct the railroad, he received a like amount of stock in the new company, $237,000, and succeeded in selling that for $47,000, which sum he paid to the canal company, as and for the proceeds of the purchase which they made from the bank, and of his exertions to obtain a new charter and the pledge of state aid, without which the stock would seem to be of little, if any, value.

Recurring to the transaction between the Ocean National Bank and the canal company, it was made a condition of the loan of the $150,000 by the bank to the canal company, that, besides paying interest at seven per cent. per annum, and securing the same by $200,000 of their mortgage bonds, with power to the bank, at any time, to sell such bonds at any price not less than 90 cents on the dollar, towards the repayment of the loan, (which might, therefore, not continue for more than a very brief term,) the canal company should, also, purchase from the bank the before-mentioned nearly worthless bonds of the Georgia Railroad Company. and should pay therefor the sum of $100,000, securing such payment by a like amount of their mortgage coupon bonds. There was, also, a further requirement, to wit, that the trustee to whom the mortgage securing the canal company's coupon bonds was executed, should be removed or should resign his trust, that the president of the bank should be substituted in his place, and that the moneys loaned by the bank should only be drawn by the canal company from the bank by checks countersigned by the president of the bank, as such trustee. Their president was active in the negotiations with the company, and in settling the terms of the loan; and he required of the canal company, professedly for his own benefit, $50,000 of their mortgage coupon bonds, as compensation for acting as trustee. I shall place no special stress upon that payment to the president, as affecting the question of the liability of the bankrupt in this case. It, however, belongs to the history of the transaction.

The canal company having received the proceeds of the discounts of the various notes given for the loan, subsequently paid considerable sums, by paying the interest coupons attached to the bonds, held by the bank as collateral security, and other considerable sums derived otherwise; and it seems conceded, that the two notes endorsed by the bankrupt, Wild, and the subject of controversy here, constitute the residue of the claim of the bank arising out of the said loan, assuming its entire validity and their title to the same, with interest.

The assignee of Wild (the appellant here) insists, that the loan was usurious, and that there is, on that ground, no valid claim against Wild, as endorser; that, under the national banking act, the loan being made by the bank reserving a compensation exceeding seven per cent. interest per annum, all interest on the loan was forfeited, and the payments made by the canal company amount to satisfaction of the principal debt;

and that the notes, therefore, which are here presented bearing the endorsement of the bankrupt, are without consideration, and constitute no valid claim against his estate.

In the court below, the transaction was assumed to be such, that, had the loan been made to an individual instead of a corporation, it was a violation of the statutes of New York regulating the subject of interest, and the securities or notes given therefor would have been void for usury. In that view of the subject I most fully concur, and must find, as a fact, upon the evidence, that the conditions of the loan reserved to the bank, in money, more than seven per cent. per annum. No one unaffected by interest, bias or prejudice can, I think, read the testimony without being satisfied that the bank, in prescribing the terms of the loan, made it an occasion for extorting from the canal company most onerous conditions, greatly exceeding lawful interest, and that the form of a sale of Georgia railroad bonds, for a price far above their either real or market value, (if, indeed, they had any value, which is very doubtful,) was only a cover and means of securing in money the excessive and illegal compensation the bank reserved and secured for making this loan.

It was, however, held below, that, under the laws of the state of New York, which forbid a corporation to interpose the defence of usury, the transaction must be deemed, between the bank and the canal company, a legal transaction, the notes given by the canal company to the bank legal and binding notes, and, therefore, the endorsement thereof by the bankrupt, as surety for the canal company, a legal and binding endorsement; and, further, that the provisions of the national banking law relating to the interest which national banks may receive, and imposing penalties for charging more, do not affect the transaction, because they only apply to states which have no laws fixing the rate of interest.

It was not the intention of congress, when enacting the national banking law, to authorize national banks, in respect to exacting interest, to violate the laws of the states within which they might be organized, nor, as I think, to relieve them from the consequences of such violation, prescribed by the state laws, if they were guilty thereof. This is the result of the decision of the court of appeals of the state of New York, in First Nat. Bank of Whitehall v. Lamb, 50 N. Y. 95. Without adopting the reasoning of the opinion in that case, I deem the conclusion as above stated correct.

On the other hand, it was entirely competent for congress, when providing for the organization of national banks, to place them under such restrictions, in respect to the rate of interest which they might charge or receive, as congress might see fit. As creatures of their own creation, they could be subjected to such inhibitions as were deemed expedient, even though the privileges were far short of those enjoyed by state banks, or by individuals within the several states. This would involve no conflict with state laws, nor be an attempt to regulate private and domestic affairs within the states, beyond the powers of the federal government. It would be merely defining the powers and regulating the conduct of the organizations which existed only by force of federal enactment, possessed the powers congress chose to confer upon them, and exercised them subject to the restrictions and conditions of the law giving them existence. Indeed, the acceptance of the organization under the law, and the enjoyment of its privileges, are necessarily subordinate to the conditions upon which the powers and privileges are conferred. Hence, had congress seen fit to say that no national bank should contract for, reserve, or receive more than at the rate of five per cent. per annum for a loan of money, or for or upon the discounting of a note, bill, or other security, it would have been a perfectly valid limitation of their powers. It would be in no conflict with any law of a state which permitted the making of loans in general at a higher rate of interest; and, if congress could do this, congress could also declare the forfeiture or penalty incurred by the national bank for violating the prohibition. Such bank would still be left subject to the operation of the state law imposing, it might be, a different penalty for the violation of its own state laws, as was held by the New York court of appeals in the case above referred to. It follows, that transactions may not be condemned by the state laws, applied to individuals or to corporations in general, and may, under such state laws, be legal and valid, which, nevertheless, national banks may not make, and for which, if made, they may be liable to penalties or forfeitures prescribed by the law of their being. It may be, that, in reference to the conduct of merely private or domestic affairs within the states, having no connection with, or relation to, their functions as agents of the government, congress cannot authorize national banks to do what is forbidden by state laws, nor relieve them from the forfeitures or penalties prescribed by state laws for doing what is so forbidden. But this concession would be far short of admitting, that, within the range of what the state laws do permit, congress may not restrict national banks as is seen fit, or may not impose such penalties and forfeitures for a violation of those restrictions as congress thinks lawful. These latter propositions are unquestionable.

How, then, do the laws of the state of New York and the national banking law bear upon the case under consideration? The 30th section of the national banking act of June 3, 1864 (13 Stat. 108), provides, that "every association may take, receive, reserve, and charge, on any loan or discount made, or upon any note, bill of exchange, or other evi-

dence of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that, where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act. And, when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest, which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same: provided, that such action is commenced within two years from the time the usurious transaction occurred."

The state of New York has statutes which prohibit the taking, receiving, or reserving of interest for the loan or forbearance of money, &c., at a greater rate than seven per cent. per annum, and making any note, or bill, or other contract whereon or whereby any greater rate is reserved, void. But the state has a further statute (Laws 1850, c. 172, p. 334), which enacts that no corporation shall interpose the defence of usury in any action. Such was the state of the law in New York when the national banking act was passed. The force and effect of this last-named statute has been declared by the courts of the state of New York in numerous cases. Those cases are collected, carried to what is deemed their legitimate conclusion, by the court of appeals, and distinctly affirmed, in Rosa v. Butterfield, 33 N. Y. 665. The doctrine of that case is, that the dealings of a corporation, as a borrower, and its contracts or obligations for loans, are unaffected by any laws of the state of New York regulating interest; that, as to them, such laws, theretofore existing, are repealed; that, therefore, the rate of interest which corporations may agree to pay is not fixed or limited, but they may agree to pay any rate they see fit, and their contract will be valid; and, also, that one who becomes surety, guarantor, or indorser of such a contract is legally bound to its performance—in short, that, as to contracts made by corporations, whether foreign or domestic, whether made in the state of New York or elsewhere, they stand, in the state of New York, as if no usury laws existed. See, also, Belmont Branch Bank v. Hoge, 35 N. Y. 65. In respect to contracts made within the state of New York, or entered into under or with reference to the laws of the state, I may accept the exposition thus given of the state of the law of New York; and it follows, that there is no law in New York fixing the rate of interest which any one may take upon the loan of money to a corporation, or, in other words, any rate of interest is allowed to which the parties may agree. As to dealings with corporations, national banks in the state of New York are, therefore, within the case described in the national banking law above cited, to wit, "when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum," &c. This is a necessary and logical result. If the rate were fixed by the laws of New York, then her usury laws would apply. If the limitations in her statutes relating to interest do not apply, then no rate is fixed by her laws. Hereupon the restriction, contained in the section of the national banking law, comes into effect, without any interference or conflict with state laws, that is to say, a national bank "may take, receive, or charge a rate not exceeding seven per centum, and such interest may be taken in advance," &c., "and the knowingly taking, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon; and, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same: provided that such action is commenced within two years from the time the usurious transaction occurred." It is not necessary that I should express an opinion upon the question whether this forfeiture and right to recover back can, in any circumstances, be applicable to the case mentioned in the previous clause of the section, to wit, where the national bank reserves or receives a greater rate of interest than is allowed by the laws of a state in which a rate is fixed and limited by the state laws. It is sufficient for the purposes of the present case that it does apply to a case in which no rate is thus fixed and limited. By the laws of the state of New York, as expounded by her highest court, no rate of interest upon loans to a corporation is fixed or limited.

It follows, that the transaction in question was within the prohibition of the national banking law, and that the bank, eo instanti it made the loan, upon the terms exacted, incurred the forfeiture of the entire interest which the notes received, carried with them, or which was agreed to be paid thereon. Discounting the notes did not render it less true, that the notes themselves carried with them the principal loaned, and the interest

agreed to be paid, which, with the bonds also given, necessarily included all the pecuniary benefit agreed to be paid as compensation for the loan, whatever form the transaction was made colorably to assume.

The bankrupt, as mere accommodation endorser or surety, is, upon familiar principles of equity, entitled to all the protection which his principal (the canal company) would have if the notes in question were sought to be enforced against it. I do not say that he can recover back money paid by the canal company, but he has a right to enquire whether, in view of the forfeiture of the entire interest by the bank, there is anything due to the bank upon the notes which he endorsed, and thereby to ascertain whether, and to what extent, the two notes now in question are without consideration.

It is claimed, by the assignee of the bankrupt, that, treating the entire interest as forfeited, the bank have already been paid the whole of the principal of the loan. I am not fully satisfied that a small sum, part of such principal, is not still due. Upon the proofs taken, the account would seem to stand thus:

	Dr.		
Loan		$150,000 00	
Less the interest or discount included in the notes given therefor from time to time		27,117 26	$122,882 74
	Cr.		
Cash payment by Canal Co		$88,750 00	
Coupons paid " "		58,476 67	
Note paid		12,798 90	
Cash paid on giving the note for $73,902 51, which, according to the testimony, made up the whole amount, $76,532 19		2,629 68	
Cash paid on renewal of the note for $73 902 51, when the $70,000 note, now in question, was given		3,902 51	
		$166,557 76	
From which are to be deducted sundry charges to which these payments appear to have been in part applied, viz.:			
Another note for $25,000, and interest	$25,452 80		
Another note for $12,500, and interest	12,726 40		
Interest on these notes after maturity	678 00		
Coupons paid by the bank for the company.	8,068 12		
Interest thereon	113 25	$47 038 57	$119,519 19
Leaving a balance of principal due when the notes in question were endorsed by the bankrupt			$3,363 55

To this extent, of $3,363 55, without interest, it would seem the claim of the receiver should be allowed, but the estate of the bankrupt is entitled to have the collateral security held by the receiver of the bank, or the proceeds thereof, applied to this balance, in exoneration of the estate of the bankrupt, on a sale of a portion of which, by order of the district court, it appears, by the order appealed from, $23,663 30 has been already realized.

I by no means make this statement of the account as a final and conclusive statement. The proofs on the part of the bank do not appear to have been put in with a view to the statement of an account upon the principles affirmed in this opinion. The value of the collateral security held by the receiver, or the proceeds of that portion thereof which appears to have been deposited in the trust company, under the order of the district court, ($23,663 30,) may be, and probably are, so clearly greater than any balance which a more accurate statement of the account would show to be due, upon the principles of this opinion, that any further expense of taking proofs and stating the account would be improvident and wasteful. But, if insisted upon, a reference may be had to state such account.

The order appealed from must be modified to conform to the foregoing opinion.

Case No. 17,646.

WILD v. BANK OF PASSAMAQUODDY.

[3 Mason, 505.] [1]

Circuit Court, D. Maine. May Term, 1825.

BANKS—AUTHORITY OF CASHIER—INDORSEMENT OF PAPER—BILLS OF EXCHANGE—NON-ACCEPTANCE—NOTICE TO DRAWER.

1. A cashier of a bank has prima facie authority to indorse, on behalf of the bank, the negotiable securities held by it. If there be any restriction of his authority, it must be proved by the bank.

[Cited in Merchants' Bank v. State, 10 Wall. (77 U. S.) 650; Case v. Citizens' Bank, 100 U. S. 454; First Nat. Bank v. Stewart, 114 U. S. 229, 5 Sup. Ct. 848.]

[Cited in brief in Bank of the State v. Wheeler, 21 Ind. 95. Cited in Cochecho Nat. Bank v. Haskell, 51 N. H. 121. Distinguished in Corser v. Paul, 41 N. H. 28; Elliot v. Abbot, 12 N. H. 556. Cited in Kimball v. Cleveland, 4 Mich. 608. Cited in brief in Nichols v. Frothingham, 45 Me. 224. Cited in Potter v. Merchants' Bank, 28 N. Y. 649; Smith v. Lawson, 18 W. Va. 227; State v. Commercial Bank of Manchester, 6 Smedes & M. 218.]

2. If an indorser is once fixed by due notice of the non-acceptance of a bill, no delay of the holder to return the bill and demand payment takes away his right of recovery, notwithstanding the drawer may, in the intermediate time, have failed.

Assumpsit on a bill of exchange by the plaintiff [William Wild], as indorsee, against the defendants, as indorsers. The bill was drawn by one James Franklin on E. F. Green, London, for £200 sterling, payable to one Patterson, or order, in ninety days after sight. The bill was indorsed by Patterson in blank, and by a course of negotiation became the property of the Bank of Passamaquoddy, and was indorsed by the cashier thereof in behalf of the bank, and came to the possession of the plaintiff by a subsequent indorsement. It was duly presented to the drawee and protested for non-acceptance, and due notice thereof given to the bank.

At the trial upon the general issue, Mr. Greenleaf, for defendants, took several ob-

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

jections to the plaintiff's right of recovery: (1) That it was not shown by the plaintiff, that the cashier was specially authorized to indorse the bill in behalf of the bank. (2) That the plaintiff had not returned the bill to the defendants, and demanded payment until more than a year after the time, when notice had been given of the non-acceptance, and in the mean time the drawers had failed.

Mr. Emery, for plaintiff, e contrâ, contended: (1) That no special authority in the cashier need be shewn by the plaintiff. (2) That the delay in the return of the bill was no objection to the recovery, the defendants having been fixed with responsibility by due notice of the non-acceptance.

STORY, Circuit Justice. My opinion is, that neither of the objections is well founded in law. The cashier of a bank is, virtute officii, generally entrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management, and disposal of them. Primâ facie, therefore, he must be deemed to have authority to transfer and indorse negotiable securities, held by the bank, for its use and in its behalf. No special authority for this purpose is necessary to be proved. If any bank chooses to depart from this general course of business, it is certainly at liberty so to do; but in such case it is incumbent on the bank to show, that it has interposed a restriction, and that such restriction is known to those with whom it is in the habit of doing business. In the present case, the cashier has, as cashier, indorsed the bill in behalf of the bank, and this is primâ facie evidence of authority, it being within the ordinary duties performed by such an officer. If he was restricted in his authority, it is for the defendants to shew it. The proof is in their possession, and the plaintiff, who is a stranger to their regulations, cannot be presumed to be conusant of it.

As to the other point, the defendants were, in point of law, fixed by due notice of the non-acceptance of the bill. The rights of the plaintiff were then complete. He was not bound to present the bill to them for payment within any particular time, nor is he bound to prove how, or when, and by what circuitous routes the bill was in fact returned to him. If the defendants had any interest in a speedy return, it was their duty to make inquiries, and take up the bill as soon as possible. But as to the plaintiff, I do not know, that an omission to demand payment and produce the bill for any period short of that of the statute of limitations, would operate as a bar to a recovery. If the bill were suppressed from fraud (of which there is no pretence in this case), it might give rise to another sort of inquiry, the effect of which it is unnecessary to consider. There is no principle within my knowledge, that requires the holder of a bill to demand payment of a prior indorser within any particular period, after the latter has been once fixed by due notice of the non-acceptance.

Verdict for plaintiff.

Case No. 17,647.

WILDER v. ADAMS et al.

[2 Woodb. & M. 329.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1846.

ACTION OF COVENANT—DEFENCES.

1. Where an action is brought on a covenant for the payment of certain sums agreed to be paid at a certain rate per weight of salamander safes, which the defendants had been licensed to make and sell by the plaintiff; it cannot be proved as a defence, that the patent for them was invalid.

2. Where the patent right is sold and no benefits are received from it, and an action is brought for the consideration on a parol promise, it may be a good defence that the patent was invalid; but not so when the action is on a sealed instrument, or when another covenant implied from the plaintiff to the defendants was probably the real consideration, and on which a remedy exists, if the defendants have suffered any damages on account of the patent being invalid, and when the defendants, in the sales they are called on to account for on their covenant, have received the proceeds, and sustained no loss of any by reason of the patent being invalid.

[Cited in Birdsall v. Perego, Case No. 1,435; White v. Lee, 14 Fed. 791. Distinguished in Mudgett v. Thomas, 55 Fed. 647.]

[Cited in Davis v. Gray, 17 Ohio St. 352; Jones v. Burnham, 67 Me. 99.]

3. If fraud, however, existed in the matter, or any contravention of public policy, it might be set up as a defence to this action.

This was an action of covenant, on an agreement alleged to have been made between the plaintiff [Benjamin G. Wilder] and the defendants [William Adams and others] on the 23d day of September, 1843, under their respective seals, and in which the defendants are stated to have made the following covenants: (1) In consequence of the grant to them by Wilder of a right or license to make and vend in New England Fitzgerald's salamander safe, they agreed to keep a true account of the number made and sold with their weight. (2) To report the same monthly to the plaintiff or his agent, and pay one cent per lb. on the weight of those sold. (3) To manufacture them in the way and of the good quality pointed out. (4) To pay one thousand dollars penalty, if neglecting to fulfil the covenants.

The declaration then alleged a breach of all these covenants, and for which this suit was instituted April 23d, 1846.

At the trial here May term, 1846, held by adjournment in September, the counsel agreed, that the first and principal defence was the supposed invalidity of the patent before de-

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

scribed, and that the covenant declared on should be put into the case; and if the court should entertain an opinion in point of law, that such a defence could not be made to this action, the damages should be agreed by the parties or assessed by the court or an auditor; but, on the contrary, if such a defence was here competent, the case should stand for trial at the next term. The deed of covenant being put into the case, appeared to be between these parties and made on the day named in the declaration, and containing such stipulations as is there alleged. Among other details, not necessary to be repeated, it was covenanted, that the parties should equally bear the expense of any suit, instituted by either for a violation of said patent, and not allow, without notice to the other, any judgment to be rendered against its validity. And if judgment shall be rendered against its validity in any part of New England, it was stipulated—"said Adams & Hammond shall, from and after the rendering of said judgment, be exonerated and discharged from this agreement as to any subsequent sales of said safes, but that they are not thereby to be exonerated or discharged from any payments, that may have become due under this agreement previously to the rendering of such judgment."

W. Philips, for plaintiff.
B. R. Curtis, for defendants.

WOODBURY, Circuit Justice. This defence goes in substance to the consideration of the covenant, on which the plaintiff declares. And the argument seems to be, that the invalidity of the patent, if shown, would constitute a failure of the consideration, on which the covenant to account and pay rested, and hence would be a good bar to any recovery. But I doubt the soundness of this reasoning in the present form of action, and as applied to a covenant like that, upon which it is founded. Were this suit assumpsit on a parol promise to pay a certain sum for the assignment of a valid patent for a certain machine, and the plaintiff counted, as he must, on an assignment of such a patent as the consideration of the promise, probably he might be obliged to prove the patent was a valid one, and its validity might be impeached in defence to the claim of the plaintiff. Holden v. Curtis, 2 N. H. 64, 65. But here the plaintiff sues in covenant on a sealed instrument, and a good consideration is implied from the solemn form of the promise in writing and under seal. Independent of this, the covenant had for its actual consideration another covenant by the plaintiff, implied from his assignment or grant of a license to use Fitzgerald's safes in New England during the rest of its term; and if that patent was invalid, the defendants probably have a remedy on the covenant, implied in that assignment or grant, for any damages they may thus have sustained. But they cannot, as a general principle and in ordinary cases, resort to such a defence as a want of consideration, or the failure of consideration, when an action of covenant is brought on a sealed instrument, executed in consequence of and founded on another covenant made by the other party to the defendants. The defences, which are sometimes permitted to such suits on such instruments, on the ground of their being opposed to express statutes, or void for fraud or opposition to public policy (2 Johns. 177), rest on different principles, and are not applicable here. In Bliss v. Negus, 8 Mass. 46, the patent was shown to have been fraudulently obtained, and this was properly allowed to be a defence to a note for it. In the case of Hayne v. Maltby, 3 Durn. & E. [3 Term R.] 438, two of the judges expressly go on the ground that the consideration was fraudulent. The case was also one where the covenant was against public policy, being in restraint of using new improvements, and where the defendants had no other covenant to resort to for redress.

Again, if these conclusions are unsound, and an inquiry could properly be made into the consideration of the present covenant, it is by no means certain, that there has been a failure of it, so as to bar a recovery here for the stipulated rate agreed to be paid on the safes actually sold. That rate is not a compensation for any expected or prospective sales of the safes, nor for the full value of the patent right for them in New England. But it was rather for a license to make and sell them within that territory, and the contract was virtually the payment of a certain rate for all which they might actually sell and receive compensation for. If it should turn out, that the patent itself was invalid, but had not been proved to be so in defence to the payment for any of the machines sold, and defeated the action, or had not been made the ground for recovering damages of these defendants by any of their vendees, it is difficult to see how the consideration, which the defendants expected to receive as the foundation of this part of their covenant, has failed; or how they have, in respect to this accounting, suffered any thing or met with any obstacle, which renders it inequitable. Receiving all the profits and benefits from these sales, already made, which they expected or stipulated for, it constitutes a much stronger and more valuable consideration to pay pro rata for them, than many that have been sustained in several adjudged cases. Vickery v. Welch, 19 Pick. 523; 1 Sim. & S. 74; 8 Ves. 215. They have had the license to make and sell which they agreed for; they have received proceeds from it, and they are only asked to pay over the proportion of those proceeds, which they agreed to; they have lost nothing in all this, if the patent was invalid; and why, then, should it be said that the consideration for this contract has failed? Again, there is, in selling by license under another, a recognition or admission of title in that other, not to be contravened lightly between the parties. If a lessee be not actually evicted by

some better or higher title in a third person, he is bound to pay rent as long as he continues to enjoy quietly the premises leased to him, though by one whose title may be invalid. 3 Durn. & E. [3 Term R.] 438. Nor is any case found, where a patent has been possessed and enjoyed, and a recovery back of the consideration paid for it, has succeeded. Phil. Pat. p. 347, c. 16. On the contrary, it has been held, that if benefits have been obtained by the patent, the recovery back will not be sustained. Taylor v. Hare, 1 Bos. & P. (N. R.) 260; 2 N. H. 65. It is on a principle somewhat analogous, that a borrower of an article, having admitted the title of the lender, must restore it to him, under his contract to do it, and under his recognition of the title of the lender by hiring it of him. Poth. Usage, 35; Story, Bailm. § 266; 8 Durn. & E. [8 Term R.] 199; 2 Taunt. 268. He is not excused, except by a suit and recovery against him by a third person claiming title. Story, Bailm. §§ 120, 230; Edson v. Weston, 7 Cow. 278; Wilson v. Anderton, 1 Barn. & Adol. 450; Shelbury v. Scotsford, Yelv. 23. By the Roman law, a thief could regain the articles of a borrower from him (Dom. Civil Law, pt. 13, tit. 6); that is, I suppose, if the true owner did not interpose. So a lessee cannot dispute the title of his landlord. White v. Foljambe, 11 Ves. 337; 2 Ves. 304, 305, note, 394; Hunter v. Marlboro [Case No. 6,908.]

If the defendants do not feel secure in making and selling more machines, or feel justified in doing it, under a belief that the patent is invalid, and thus are stopped and injured in their business, that is a different affair, and their remedy for damages is not by this defence; but is on the covenant or assignment by the plaintiff, selling to them the patent or license for New England, when it was in law not valid, and thus disabling them from proceeding under it. That, too, is the only appropriate remedy, as it will enable them to procure or recover all the actual damages; while, if the defence now proposed is allowed as a substitute, it may enable the defendants to retain, according to the amount now in their hands claimed by the plaintiff, more, or not so much, as the actual damage. Shutting out this defence, all the plaintiff would now be allowed to recover of them will be only what they have received and covenanted to pay him, on account of his agreeing that they should use his patent within New England, and which they have used to the time claimed for; while they will be allowed to recover of the plaintiff, on his covenant and sale to them, all which they have suffered from any invalidity in that patent. This result seems equitable no less than legal towards both. Cowley v. Dunlop, 7 Durn. & E. [7 Term R.] 568; Holden v. Curtis, 2 N. H. 65. Finally, it seems to accord with their own views, not only as implied from those provisions in their covenants already referred to, but as expressed in the closing stipulation. That exonerates the defendants, totidem verbis, from payments on any sales made after the patent shall be adjudged invalid by any court; but provides, further, "that they are not thereby to be exonerated or discharged from any payments that may have become due under this agreement, previously to the rendering of such judgment."

It is difficult to believe, that the parties would stipulate not to discharge the defendants from liability for previous sales, even when the patent was adjudged void by the grave sentence of a court; and would mean to have the defendants discharged, if, in any less conclusive mode, it could be shown that the patent was invalid. There are other aspects of the case which strengthen this conclusion. In one view of the covenants, as formed in detail between these parties, they became quasi partners as to the sale of these safes in New England, the defendants retaining a portion, and paying over a portion to the plaintiff. As such partners, a defence by one against accounting to the other for actual sales and receipts, because the patent may not have been valid, which was the subject of them, would be novel, and difficult to sustain. In another view, the defendants were agents to make and vend for the plaintiff in New England, coupled with an interest in the agents to the whole amount, except a certain rate reserved on the weight of all that was sold. But a defence like this, by an agent, against paying over a portion of the actual receipts and proceeds of his agency, could hardly be tenable.

Considerable discussion, also, has been had in argument for the defendants to show there is no estoppel here to make such a defence. T. Raym. 27; 3 Durn. & E. [3 Term R.] 438; 1 Lev. 45; 3 Lev. 193; 3 Leon. 159, cited. But the illustrations I have put are not grounded on the idea, that there is here any technical estoppel. They rest rather on the idea, that such a defence is not consistent with the position and relation of the defendants to the plaintiff; and, in this case itself, this defence not only contravenes the attitude in which the parties stand towards each other by the terms of the covenant, but, as before shown, is not calculated to enforce justice towards either party. If, however, the defendants can show that the plaintiffs have acted fraudulently in taking out this patent, I should think the defence admissible under the cases before cited from Durnford & East, and the Massachusetts Reports. But the defence now proposed, I do not think competent under the other facts, circumstances and covenants which exist.

WILDER (BALDWIN v.). See Case No. 806.

WILDER, The (COHEN v.). See Case No. 2,965.

WILDER (COX v.). See Cases Nos. 3,308 and 3,309.

Case No. 17,648.

WILDER v. GAYLER et al.

[1 Blatchf. 511; [1] 1 Fish. Pat. Rep. 317.]

Circuit Court, S. D. New York. Oct. Term, 1849.

PATENTS — INFRINGEMENT SUITS — MONTHLY ACCOUNTS OF SALES.

1. An order in a patent suit in equity, requiring the defendant to file a monthly account, on oath, of all "iron safes hereafter manufactured or sold by him," will be sufficiently complied with, by giving the inside dimensions of the safes, without stating the prices at which they were sold, or the names of the purchasers.

2. A knowledge of the names, in such a case, is not essential to an ascertainment of the amount of business done in the article, or of the profits.

3. It is sufficient to describe the articles in the account, so that persons in the trade can determine their value in the market, with a view to the amount of profits.

In this case, a bill was filed [by Benjamin G. Wilder against Charles J. Gayler and Leonard Brown] for an account and an injunction, for an infringement of a patent granted to Daniel Fitzgerald, June 1st, 1843, for an "improvement in fire-proof chests and safes." On an application by the plaintiff for a provisional injunction, the court made an order, that the defendant Gayler "render and file in the office of the clerk of this court, monthly from the date of this order, a just, full and true account in writing of all iron safes made with plaster of Paris in whole or in part, hereafter manufactured or sold by him or his agents, the said account in writing to be verified by the oath of said Gayler, and that, in default thereof, an injunction issue pursuant to the prayer of the bill." The plaintiff now applied again for an injunction, on various grounds, and, among others, that the defendant Gayler had failed to comply with the order.

J. B. Staples, for plaintiff.

George Sullivan, for defendants.

NELSON, Circuit Justice. I am inclined to think that the accounts rendered monthly of the safes manufactured and sold by the defendant Gayler, afford a reasonable compliance with the terms of the order, although they give no description of the safes except their inside dimensions, and do not state the prices at which they were sold or the names of the purchasers. The only doubt is, whether the names of the purchasers of the safes should not be given. But the order does not, in terms, require it, and perhaps should not, as a knowledge of the names is not essential to an ascertainment of the amount of business done in the manufacture and sale of the article, or of the profits arising therefrom. It seems, also, that, according to the course of the trade, the description of the safes by their inside dimensions, as given in the accounts, is sufficient to enable persons in the trade to determine the value or price of them in the market, with a view to the amount of profits. Motion denied.

[For other cases involving this patent, see note to Rich v. Lippincott, Case No. 11,758. See, also, 10 How. (51 U. S.) 477.]

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

Case No. 17,649.

WILDER v. GAYLER et al.

[1 Blatchf. 597: [1] 1 Fish. Pat. Rep. 387.]

Circuit Court, S. D New York. Oct. Term, 1850.

PLEADING IN PATENT SCITS — NOTICE OF SPECIAL DEFENCES—SPECIAL PLEAS.

1. Where the defendant in a patent suit pleaded the general issue, and special pleas, and also gave a notice of special matter under section 15 of the patent act of July 4th, 1836 (5 Stat. 123), and the matters set forth in the special pleas were those of which notice might have been given under said section 15, the court, on the plaintiff's motion, struck out the special pleas, with costs.

[Cited in Latta v. Shawk, Case No. 8,116. Questioned in Day v. New England Car-Spring Co., Id. 3,687. Cited in Wilkinson v. Pomeroy, Id. 17,674; Hubbell v. De Land, 14 Fed. 473.]

2. Notice must be given of the several matters specified in section 15, if they are relied on in defence. They cannot be pleaded specially.

[Cited in Hubbell v. De Land, 14 Fed. 473; Cottier v. Stimson, 18 Fed. 691.]

3. There may, however, be grounds of defence not specified in section 15, which might be set up in bar of the action, by special plea.

In this case, which was an action for the infringement of a patent, the defendants [Charles J. Gayler and Augustus R. Moen] pleaded the general issue, and a large number of special pleas, and also gave a notice of special matter under § 15 of the patent act of July 4, 1836 (5 Stat. 123). The matters set forth in the special pleas were those of which notice might have been given under the said 15th section. The plaintiff now moved to strike out the special pleas.

Seth P. Staples, for plaintiff.

George Sullivan, for defendants.

NELSON, Circuit Justice. The matters set forth in the special pleas are not the subject of a defence in that form of pleading; but stand upon the general issue with the notice prescribed in section fifteen of the patent act of 1836. Most of the matters required by that section to be set forth in a notice could be given in evidence under the general issue without notice, were it not for the section; or, to speak more accurately, are involved in the general issue. They are affirmative facts, which the plaintiff is bound to maintain as essential to the validity of his patent. But, to guard against surprise on the part of the plaintiff, the section re-

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quires that notice shall be given of the several grounds therein specified, if they are intended to be relied on in defence. This however does not enable the defendant to plead them specially as matters of defence. They must be presented in the manner prescribed by the act. There may, however, be grounds of defence not specified in the fifteenth section, which might be set up in bar of the action, by special plea.

The defendants may retain the plea of the general issue, and the notice which accompanies it, and may add new matter to the notice by way of defence, but the special pleas must be stricken out with costs.

[For other cases involving this patent, see note to Rich v. Lippincott, Case No. 11,758.]

Case No. 17,650.

WILDER v. McCORMICK.

[2 Blatchf. 31;[1] 1 Fish. Pat. Rep. 128.]

Circuit Court, S. D. New York. Nov. 19, 1846.

PLEADING—VARIANCE BETWEEN DECLARATION AND WRIT—WAIVER—DEMURRER—DECLARATION ON PATENT—PRESUMPTIONS FROM PATENT—PROFERT—DAMAGES.

1. Where it is assigned, as cause of demurrer to a declaration, that it is not properly entitled, but the defect is not pointed out until the argument, and is then alleged to consist in a variance between the declaration and the writ, the court cannot act upon it on such a suggestion.

2. But, even if such an objection were properly raised, an amendment of the error would be allowed.

3. Variances between the declaration and the writ cannot be taken advantage of on general demurrer.

4. In a declaration on letters patent for an invention, it is not necessary to aver at what specific time the invention patented was made; it need only be before the application for the patent.

5. The grant of letters patent is itself sufficient evidence that all the preliminary steps required by law were properly taken by the patentee; and it is not necessary, in a declaration on a patent, to plead the taking of any of those steps.

[Cited in Spaeth v. Barney, 22 Fed. 829. Cited in brief in Fassett v. Ewart Manuf'g Co., 58 Fed. 364.]

6. A declaration on a patent must tender an issue on the novelty and utility of the discovery patented, but it need not show the regularity of the proceedings in the patent office preliminary to the grant.

7. The authority of the commissioner of patents in granting a patent is not of the nature of jurisdiction, in its common law acceptation, and the doctrine appertaining to the judgments of tribunals of inferior jurisdiction, when pleaded, is not applicable to his acts.

8. A declaration on a patent, which avers the patent and specification to be "in language of the import and to the effect following," and then sets them forth in haec verba, is sufficient, and is not open to the objection that the patent is not set forth according to its legal tenor and effect.

9. An averment that the patent and specification are "ready in court to be produced," is equivalent to a profert in its most formal terms.

[Cited in Bogart v. Hinds, 25 Fed. 484.]

10. A reiteration of infringements of a patent may be sued for in one action.

11. A declaration for the infringement of a patent, commencing in case, and concluding by demanding actual damages in gross in compensation of the wrong, is good.

12. Where a declaration on a patent, though not formal, embodies all that is essential to enable the plaintiff to give evidence of his right and of its violation, and affords to the defendant the opportunity to interpose every defence allowed him by law, the court will not encourage merely critical objections, and will seek, even on special demurrer, to sustain the declaration.

This was an action on the case for the infringement of letters patent. The defendant [Michael McCormick] demurred to the declaration, assigning fifteen special causes of demurrer. The plaintiff [Benjamin G. Wilder] joined.

John B. Staples, for plaintiff.

Eugene Casserly, for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. Most of the causes of demurrer in this case are of an extremely technical character, touching very slightly the merits of the action. They can be best disposed of by considering them numerically in their order.

The first cause is, that the declaration is not properly entitled, but the defect or imperfection is not pointed out. It was alleged on the argument that the writ was returnable on the 19th of February, whereas the placita was of the 20th. If this objection was intrinsically of ever so great importance, the court most manifestly would not act upon it on a suggestion so made. But, if the objection had come up on oyer of the writ, or by setting out the writ in haec verba in the demurrer book, the court would, under the statute, allow an amendment of an error so trivial. Act Sept. 24, 1789, § 32 (1 Stat. 91). Variances between the declaration and the writ cannot, however, be taken advantage of on general demurrer. Duvall v. Craig, 2 Wheat. [15 U. S.] 45. This cause of demurrer is overruled.

The second cause assigned is, that the declaration does not aver at what time the invention patented was made. Time is not, in this case, a traversable particular, in the sense of special pleading. The patent law nowhere requires the patentee to allege or prove the specific time of his invention. It need only be before his application for a patent; and it is wholly immaterial to the validity of the patent, and to the character of the pleading to be interposed by the defendant, whether the invention was long antecedent to the application or directly preceded it. The act of July 4th, 1836 (5 Stat. 119, § 6), entitles the person who invents or discovers a new man-

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ufacture, &c., not known or used by others before his discovery, to take out a patent. Should evidence be offered by the defendant, tending to defeat the patent, because it was taken out before the discovery was made, it would be clearly sufficient for the patentee, in its support, to prove that he made the discovery at any period, however short, previous to his application for the patent. Mellus v. Silsbee [Case No. 9,404]; 2 Greenl. Ev. § 492. The averment demanded by this cause of demurrer is not inserted in approved precedents of declarations for infringements of patents. 2 Greenl. Ev. § 487, note 1; Phil. Pat. 520; 2 Chit. Pl. 320. The second cause must, therefore, be disallowed.

The third and fourth causes cannot be sustained. The third is, that it does not appear that the application for the patent was in writing, nor to whom it was made. The fourth is, that it does not appear that the commissioner of patents had any rightful authority to grant the patent. These causes are founded upon supposed requisites of the statute, not averred in the declaration to have been complied with, and are also supposed to be supported by general principles governing proceedings in tribunals of inferior jurisdiction. If the matters which it is alleged should be set forth in the declaration would call for the application of those principles in case they were pleaded by way of justification and in defence of acts done, or as a protection to the party pleading them, which would at least be a doubtful proposition (Martin v. Mott, 12 Wheat. [25 U. S.] 19), it would not necessarily follow that the same method of pleading must be pursued in declaring upon a private title or a grant emanating from functionaries acting under statutory authority (Day v. Chism, 10 Wheat. [23 U. S.] 449; Bank of U. S. v. Smith, 11 Wheat. [24 U. S.] 171; Carroll v. Peake, 1 Pet. [26 U. S.] 18, 23). The third cause of demurrer rests upon the assumption that the plaintiff must, in his pleading, specify all the acts done by him to obtain a patent, in order that it may appear upon the face of the declaration that the mode of proceeding pointed out by the statute has been pursued. But the case of Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448, disposes of this and all the other objections that fall within the same class. The grant of the patent is itself sufficient evidence that all the preliminary steps required by law were properly taken. And, as the plaintiff may make his patent the direct and efficient proof, in the first instance, of his right to the grant, so, a fortiori, it would seem to be unnecessary for him to plead any of the particulars which conduced to the grant. It is sufficient to set forth the grant in substance. Tryon v. White [Case No. 14,208]. The fourth cause of demurrer is founded upon a misapplication of a doctrine appertaining to the acts of legal tribunals, where a court of inferior jurisdiction takes cognizance of a case and renders judgment, and he who sets up such judgment in support of his own interests must aver and prove that the tribunal had jurisdiction in the matter. The authority of the commissioner of patents, or of the commissioner of the land office, or of the president, (whose former functions in this behalf are now exercised by those officers,) to issue grants, is not of the nature of jurisdiction, in its common law and technical acceptation. As in regard to patents for land, so in regard to patents for inventions, the proper officer issues the grant when he has evidence satisfactory to his own mind that the claimant is entitled to receive it. But that adjudges nothing as to the real right. That question is unaffected, and remains to be examined and decided between parties contesting it, without prejudice or advantage from the letters patent. We are not aware of any method of pleading by which the courts can be called upon to settle the regularity of the preliminary proceedings in the patent office. Nor does there seem to be any utility in putting in issue the authority of the commissioner, upon the facts before him, to grant a patent, because, if the decision should negative his authority, it could not revoke or supersede the patent. The declaration must tender an issue upon the novelty and utility of the discovery patented, these being essential to the enforcement of any exclusive privilege under the patent. But the question of the regularity of the proceedings in petitioning for and obtaining the patent, and that of the correctness of the judgment of the officer in awarding it, are not material, and cannot be inquired into.

The fifth and sixth causes of demurrer are founded upon an inaccurate apprehension of the form of the declaration. The fifth cause is, that the declaration sets forth the letters patent according to their words and figures, and not according to their legal tenor and effect. The declaration avers the patent and specification to be "in language of the import and to the effect following;" and it cannot be a valid exception that "import" is used instead of "tenor," even if the words are not identical in signification, because the language is that of recital and not of grant. The sixth cause is, that the declaration does not make sufficient profert of the letters patent. The declaration says: "as by the said letters patent and specification, all in due form of law, ready in court to be produced, will fully appear." This is equivalent to profert in the most formal and ample terms. It tenders the entire grant to the inspection of the court and party.

The seventh cause is, that the declaration is bad for duplicity, in setting forth three distinct causes of action in the same count, viz.: three distinct infringements of the said letters patent. The patent is for an "improvement in fire-proof chests and safes." The declaration avers, in the same count, that the defendant "made and manufactured and sold five hundred iron safes or chests, in the man-

ner and of the materials described in the said letters patent, and in imitation thereof, in infringement and violation of the said letters patent, and against the exclusive right so secured by the said letters patent;" and also, that he "made and manufactured and sold, and caused to be made and manufactured and sold" five hundred like iron safes or chests; and also, that he "put on sale and offered for sale and sold" five hundred like iron safes or chests. These various averments, which are supposed to constitute three separate causes of action, and thus to render the declaration liable to the objection of duplicity, are no more than a specification of the manner in which the plaintiff's right has been violated. A reiteration of infringements of a patent, like a repetition of torts of any other kind which are of the same nature, may be sued for and recompensed in one action. There is no known doctrine of the law that requires a plaintiff to split up into separate actions grievances of that character. They are properly united in this case, and the demurrer cannot be sustained for that cause.

The eighth cause is, that the declaration has no proper or formal commencement and conclusion, inasmuch as it commences in the form of an action of trespass on the case, and concludes in the form of an action of debt. The conclusion is, that the plaintiff has been injured and deprived of profits which he might otherwise have derived from the improvement, and has sustained actual damages to the amount of five thousand dollars; and that, by force of the statute, an action hath accrued to him to recover of the defendant the said actual damages, and such additional damages, not exceeding, in the whole, three times the amount of said actual damages, as the court may see fit to order and adjudge; and that the defendant, though often requested, has never paid the same nor any part part thereof to the plaintiff. If there be any foundation for this cause of demurrer it is of the most technical description, and the defect would be removable by amendment as of course. But we do not perceive that there is any material incongruity between the commencement and the close of the declaration. The gravamen of the suit is the tortious infringement of the plaintiff's patent, and the conclusion of the declaration is a demand of damages in gross. They are averred to be "actual damages," but that allegation does not change the nature of the averment. It is still merely a demand of damages in compensation of the wrong.

The declaration is not formal in its frame. But it embodies all that is essential to enable the plaintiff to give evidence of his right and of its violation by the defendant, and affords to the defendant the opportunity to interpose every defence allowed him by law. In such a condition of the pleadings in a cause, the court will not encourage objections merely critical and over-nice, and will seek, even on special demurrer, to sustain pleadings substantially sufficient, and thus avoid useless delays and expenses.

The demurrer is overruled on all points, but without costs to either party.

[For other cases involving this patent, see note to Rich v. Lippincott, Case No. 11,758.]

Case No. 17,651.

WILDER v. UNION NAT. BANK et al.

[9 Biss. 178; 9 Reporter, 3; 12 Chi. Leg. News, 75; 9 Nat. Bank Cas. (Browne) 124; 9 N. Y. Wkly. Dig. 220.] [1]

Circuit Court, N. D. Illinois. Nov., 1879.

REMOVAL OF CAUSES—NATIONAL BANKS—FEDERAL QUESTION—RECORD.

1. The fact that one of the parties to a suit is a national bank is no ground for removal from a state to the federal court.

[Disapproved in Cruikshank v. Fourth Nat. Bank, 16 Fed. 890.]

2. To authorize a removal on the ground that the suit involves a question arising under the constitution and laws of the United States, it must clearly appear from the record that a federal question is presented and must be passed upon in the disposition of the case, and the laws referred to and the facts relied upon as affected by these laws must be fully and clearly set out.

At law.

M. W. Fuller, for plaintiff.

G. W. Stanford, for defendants.

BLODGETT, District Judge. A motion is made to remand this case to the circuit court of Cook county, from whence it was removed into this court by the defendant. It appears from the record that this is an action in ejectment, which was brought originally by the plaintiff, Jacob Wilder, against the defendants, Libby, McNeil & Libby. Soon after the commencement of the suit, and before pleas were filed, the Union National Bank of this city appeared by petition in the case, and represented to the court that it was the owner in fee of the property in controversy, and that the defendants in the case were tenants of the bank, and prayed that the bank might be made defendant, and allowed to make defense in the case. An order was made to that effect, whereupon said bank filed its plea of the general issue, and at the same time its petition for the removal of the case to this court, which petition was granted, and an order of court entered directing such removal. The plaintiff now moves to remand the case to the circuit court of Cook county.

It appears from an inspection of the record, that the removal was claimed in the petition filed by the bank upon two grounds. First, that the defendant bank is a corporation, organized and doing business in this district, under the act of congress, "for the

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 9 Reporter, 3, contains only a partial report.]

organization and government of national banks," and that as the corporation derives its existence from a law of the United States, it is claimed that this is a controversy arising under a law of the United States within the meaning of the second section of the act of March 3, 1875 [18 Stat. 470], fixing the jurisdiction of the federal courts, and the right of removal from the state to the federal courts. Secondly, that said suit is one arising under the constitution of the United States in this: "That the question is involved in said suit of whether the obligation of the contract of purchase of the premises, of which those in question form a part, by your petitioner's predecessor in the title of Benjamin Wilder, the plaintiff's ancestor, under whom he claims, is not impaired, under section 10 of article 1, of the constitution of the United States, by certain acts of the general assembly of the state of Illinois, to-wit: an act entitled 'An act authorizing cities to change, alter and vacate streets, or parts of streets,' approved February 15, 1851 (Laws Ill. 1849–1851, p. 112), and an act entitled 'An act in relation to the vacation of streets, squares, lanes, alleys and highways,' approved February 16, 1865 (Pub. Laws Ill. 1865, p. 130), and an act entitled 'An act to revise the law in relation to the vacation of streets and alleys,' approved March 24, 1874 (Rev. St. Ill. 1874, c. 145)."

The motion to remand is made upon the ground that sufficient evidence does not appear upon the face of the record to show that this case is removable from the state to the federal court.

The first cause for removal assigned, which is, that being a national bank, the defendant has the right of removal, is not, I think, well taken. By the second section of the act of July 27, 1868 ([15 Stat. 227]; Rev. St. 1878, § 640), it is provided that "any suit commenced in any court other than a circuit or district court of the United States against any corporation other than a banking corporation organized under the law of the United States, or against any member thereof, as such member, for any alleged liability of such corporation, or of such member as a member thereof, may be removed," etc. It is now, I think, the well settled law by decisions by justices of the supreme court, and circuit judges at their circuits, although there is no decision to that effect, to my knowledge, by the supreme court, that this statute remains in force except so far as it is repugnant to, and thereby constructively repealed by, the act of March 3, 1875; and if so, corporations like this defendant are expressly excepted from the right of removal.

As to the second cause upon which the right of removal is claimed, that this is a suit arising under the constitution and laws of the United States; that is, that the subject matter of the controversy is a question necessarily arising under the constitution and laws of the United States, it will be noticed that not until the act of March 3, 1875, did congress ever authorize the removal of a case from the state to the federal court, because it was a case arising under the constitution and laws of the United States; and I am not aware that the direct question has ever been made in any of the federal courts as to what must be shown in the record in order to authorize the federal courts to take jurisdiction of a case removed to them from the state court for this cause. It would seem, however, to be a safe and sound rule to adopt, that it must clearly appear from the record, when all inspected together, that a federal question is presented, and must necessarily be passed upon in the disposition of the case. Tested by this rule, an inspection of the pleadings in this record fails to disclose any federal question; we have a simple declaration in the usual form in ejectment, in which the plaintiff charges the defendants with having entered the premises in question, and withholding possession thereof from the plaintiff, and the plaintiff's averment that he claims the premises in fee, and the defendants' denial by the plea of general issue, of the allegations in the plaintiff's declaration. From the nature of the pleadings in this form of action, very little is disclosed in regard to the nature of the controversy, or the peculiar questions which will arise on the trial of the case.

The defendant, in making a case for removal by its petition, has attempted to set out how a federal question does arise, under the constitution of the United States, in the case. I have no doubt but what it was the right of the defendant to inform the state court in this manner of the federal question which it intended to insist upon in the case. The only question is, is it sufficiently set out, so that the court can clearly see that such a question does, and must necessarily arise on the trial of this suit. It seems to me that the statement is far too meagre to give the requisite information.

The defendant states that certain laws of the state of Illinois impinge upon, or violate the tenth section of article 1 of the constitution of the United States, but fails to state in what respect, or how the rights, either of the plaintiff or defendant in the suit, are affected by the operation of those laws. There is perhaps, enough in the statement of the case, by reference to the statutes of the state of Illinois there referred to, to lead the court to infer that the controversy is in regard to the vacation of a street or alley by some city or town authority, but it seems to me this is not sufficient. The party should state, with sufficient particularity, the facts through and from which the question arises, that the statutes of Illinois, when applied to such facts, violate the constitutional right referred to; and there being no such statement, it seems to me that the record does not sufficiently show that this is a case coming with-

in the jurisdiction of this court, or the right of removal from the state court to this court.

It was also objected by plaintiff, on the motion to remand, that part of the defendants are citizens of the same state with plaintiff, and therefore the right to remove did not exist. Two answers to this objection occur to me: First—If the record presents a federal question which is a right of action or defense under the constitution and laws of the United States, then the citizenship of the parties has nothing to do with the right of removal. Second—The bank, as owner of the fee to the property in controversy, has assumed the conduct of the litigation, and its tenants, Libby, McNeil & Libby, are only nominal parties; in fact were in default for want of plea, although no default had been formally entered against them at the time this petition for removal was filed.

The cause is remanded to the state court.

NOTE. The federal courts have jurisdiction over suits by or against a national bank, commenced in the circuit court in the district in which the bank is located, irrespective of citizenship or subject matter. Foss v. National Bank [8 Fed. 728]; First Nat. Bank v. Douglas Co. [Case No. 4,809]; Commercial Bank v. Simmons [Id. 3,062]; Kennedy v. Gibson, 8 Wall. [75 U. S.] 498; County of Wilson v. National Bank, 103 U. S. 770. But the bank cannot bring suit out of the district, when the amount in controversy does not exceed $500. St. Louis Nat. Bank v. Brinkham [1 Fed. 45]. Nor be sued in a federal court outside of the district. Main v. Second Nat. Bank [Case No. 8,976].

WILDER (UNITED STATES v.). See Case No. 16,694.

WILDER, The J. W. See Case No. 7,592.

Case No. 17,652.

WILDES et al. v. PARKER et al.

[3 Sumn. 593;[1] 2 Law Rep. 239.]

Circuit Court, D. Massachusetts. May Term, 1839.

JURISDICTION OF FEDERAL COURTS—CITIZENSHIP—AMERICAN DOMICILED ABROAD.

1. The national character of persons, for the purposes of trade and commerce, depends, not upon the country of their nativity, but upon the place of their actual domicil, both in peace and in war.

2. Quære, whether a native-born American citizen, domiciled in a foreign country, and carrying on business in a house of trade established there, but never naturalized there, is to be deemed an alien merchant, and, as such, is entitled to maintain a suit, at law, or equity, in the circuit courts of the United States, touching the business or trade of the said house, against a citizen of the state of his birth, and of the state where the suit is brought.

This was a bill in equity, brought by the plaintiffs, who are domiciled merchants in the city of London and kingdom of Great Britain, and who were described in the bill as aliens, and partners in trade there, under the firm of George Wildes & Co. The firm is composed of George Wildes, John Pickersgill, and William C. Pickersgill, all of whom, for the purposes of this suit, are admitted by the defendants to be subjects of Great Britain, and aliens to the United States,—and of Thomas Searle, who is a native of Massachusetts, and was a citizen of that state until the time of his removal to England, in the year 1834, when he entered the firm aforesaid as a partner, and became, and ever since has remained, domiciled in London. Mr. Searle has never been naturalized in Great Britain, nor in any way given up his citizenship in Massachusetts, otherwise than by his removal to, and domicile in London, where he is subject, like other domiciled merchants, to its laws. The defendants are inhabitants and citizens of Massachusetts.

The bill set forth certain commercial dealings between the plaintiffs and the defendant, Parker, occurring while all the plaintiffs were resident and domiciled in London; upon which a judgment, asserted by the bill to be erroneous and inequitable, has been obtained in a suit at law in this circuit court, brought by the defendant, Parker, against the present plaintiffs, in which suit they were described by the said Parker as aliens to each and every of these United States. The other defendant in equity, William Dehon, who is the assignee of the said Parker, he having, since the said suit at law, but previous to the judgment therein, became insolvent, was not a party to the said suit; but an action was brought in his name, on the judgment obtained as aforesaid, against one of the defendants, in the state of New York, where, at the time of the suit, he resided, and the amount of the same was recovered therein, and is now held by him, for the benefit of the several creditors of the said Parker, who have become parties to his assignment. The bill sought to recover back the amount so received by the said Dehon.

The case came on before the court at the present term, upon a plea interposed by Dehon, averring, that Searle is a citizen of Massachusetts, and not an alien, and not entitled to maintain the present suit against the defendants, or either of them, in this court.

Issue having been taken on the plea, the foregoing facts appeared in evidence. And thereupon, at the hearing, the following questions occurred, upon which the judges of this court were opposed in opinion: (1) Whether a native-born American citizen, resident and domiciled in a foreign country, and carrying on business as a merchant and partner in a house of trade established there,—but never naturalized in such foreign country,—is to be deemed an alien merchant, and, as such, is entitled to maintain a suit at law or in equity in the circuit courts of the United States, touching the business and

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

trade of the said house, against a citizen of the state of his birth, and of the state where the suit is brought, according to the constitution and laws of the United States. (2) Whether under the special circumstances and facts in this case, as above stated, the present bill is maintainable in point of jurisdiction, in this court. And, thereupon, upon motion of the plaintiff, the foregoing questions were stated and ordered to be certified under the direction of the said judges to the supreme court of the United States for a final decision.

Mr. Dehon, for plaintiffs.
Ivers J. Austin, for defendants.

STORY, Circuit Justice, in referring to the division of the court, upon the questions stated in this case, said: When this cause was first argued before me at chambers, I intimated an opinion, that, if any serious doubts occurred to my mind upon the points made at the argument, I should, with the assent of the counsel, propose, that they should be carried, upon a pro formâ division of opinion of the judges of this court, when it was next in session, for a final adjudication in the supreme court. That suggestion was acceded to; and the statement of facts and points of division have been accordingly drawn up, to be certified to the supreme court. At the argument, I confess, that the inclination of my own opinion was, that this court had no jurisdiction of the cause, as it was not a suit between aliens on one side as plaintiffs, and citizens of this state on the other side as defendants. It appeared to me, then, that Mr. Searle, being a native citizen of Massachusetts, and never having been naturalized in England, ought to be deemed still to remain a citizen of this state. In this view of the matter, the case would fall directly within the authority of Strawbridge v. Curtiss, 3 Cranch [7 U. S.] 267. Upon further reflection, I entertain very serious doubts whether this opinion is correct; and as the point is one of frequent occurrence, and materially affects, or may affect, the interests and rights of many of our citizens, who are domiciled in foreign countries, it appeared to me desirable to have the opinion of the supreme court upon the point.

We all know, that the national character of parties, for the purposes of trade and commerce, depends, not upon the country of their nativity, but upon the place of their actual domicile, both in peace and in war. Thus, for example, if this country were now at war with Great Britain, Mr. Searle would be deemed an alien enemy, and his property, captured on the high seas, or elsewhere, would be liable to condemnation in our courts, as the property of an alien enemy, jure belli. In England, he would be deemed, in virtue of his commercial domicile, to be a subject, owing temporary allegiance to the crown as such, and entitled to the protection and support of the government as a British merchant and subject. The same doctrine is applicable to a state of peace. Thus, for example, if Mr. Searle were now the owner of a ship, trading with the United States, the ship would be treated as a foreign ship, liable to pay foreign duties. And if, in the importation of goods into the United States, any discrimination in duties were allowed between importations by citizens and by foreigners, Mr. Searle would, from his foreign domicile, be obliged to pay foreign duties, as a foreign or British merchant. In virtue of his domicile, Mr. Searle now enjoys in England all the privileges of a British subject and British merchant, for commercial purposes. In short, by the general principles of law, Mr. Searle is, from his domicile, now treated, for all commercial purposes, as an alien merchant of Great Britain. There is nothing new in this doctrine. The very question arose and was decided in Wilson v. Marryat, 8 Term R. 31. By the laws of Great Britain and the charter of the East India Company, British subjects were not at that time allowed to carry on trade with the East Indies. By the American treaty with Great Britain, in 1794, art. 13, "vessels belonging to citizens of the United States of America," (such are the very descriptive words of the treaty,) were allowed to carry on that trade. The suit was on a policy of insurance, on a ship owned in part by one Collet, who was a native subject of Great Britain, on a voyage to the East, and back to America. The case found, that Collet was domiciled in America, and there became and was received as a naturalized citizen of the United States. It was held by the court, that he was to be deemed, for the purposes of commerce, a citizen and merchant of the United States; and so within the protection of the treaty. Now, we know it to be a settled doctrine of the laws of England, that allegiance is perpetual, and that no native subject can throw off his allegiance, (whether naturalized abroad or not,) so as to cease to be a British subject; so that he is completely bound by the British laws. Yet here, notwithstanding this well-established rule, Collet was held to be an American merchant, entitled to the benefits of the treaty. Lord Kenyon, on that occasion, said: "Collet is a citizen of this country by birth, so that he cannot throw off his allegiance to this country. He is also a citizen of America for the purposes of commerce, it being found by the special verdict, that he had been adopted as a citizen of that country." This case was afterwards affirmed in the exchequer chamber (1 Bos. & P. 430). In McConnell v. Hector, 3 Bos. & P. 113, a question arose, whether persons, who were British-born subjects, but were domiciled (not naturalized) as merchants in an enemy's country, could sue as British subjects in the British courts. It

was held, that they could not. On that occasion Lord Alvanley said: "The question is, whether a man, who resides under the allegiance and protection of a hostile state for all commercial purposes, is not to be considered for all civil purposes as much an alien enemy as if he were born there. If we were to hold that he was not, we must contradict all the modern authorities upon this subject. While an Englishman resides in a hostile country, he is a subject of that country; and it has been held that he is entitled to all the privileges of a neutral country, while resident in a neutral country."

These are decisions of the courts of common law. But the doctrine is still more forcibly and conclusively established in the court of admiralty, where questions of this sort are of daily occurrence. It is there held, and the doctrine has been fully recognized in the supreme court of the United States, that, for the purposes of trade and commerce, the party acquires the national character of the country of his domicile, whether it is, in war, that of an enemy, or of a neutral; or in peace, that of any alien friend. The whole subject was very much considered by Mr. Justice Washington, in delivering the opinion of the court in the case of The Venus, 8 Cranch [12 U. S.] 253, 278–286. The constitution of the United States declares, among other things, that the judicial power shall extend to controversies "between a state or the citizens thereof, and foreign states, citizens, or subjects." The judiciary act of 1789, c. 20, § 11 [1 Stat. 78], declares, that the circuit courts shall have jurisdiction of suits of a civil nature, where "an alien is a party." The main question, therefore, in this case, is, whether by "alien," in the act of 1789, and by "foreign citizens or subjects," in the constitution, is meant such persons as are, either by nativity or by naturalization, aliens, or foreign citizens or subjects, or whether it applies to those who are temporarily and at the time aliens, or foreign subjects for commercial purposes. It would be strange, if, in respect to all commercial transactions, an American citizen, domiciled in a foreign country, is to be treated as a foreign merchant and foreign subject, and yet if he sues on a commercial transaction, arising during his domicile abroad, he is to be deemed an American citizen. That would be to say, that he was a foreigner, as to all purposes, except of suits in the courts of the United States. Now, this is the point, on which my doubts hinge; and I am, therefore, desirous of having the opinion of the supreme court thereon. I am aware of the case of Breedlove v. Nicolet, 7 Pet. [32 U. S.] 413; but it does not seem to me, under all the circumstances, decisive of the present.

NOTE: This case was certified on division to the supreme court of the United States, who were also divided in opinion upon it. [Unreported.] It was afterwards proceeded with in the circuit court.

Case No. 17,653.

WILDES et al. v. SAVAGE.

[1 Story, 22;[1] 3 Law Rep. 1.]

Circuit Court, D. Massachusetts. Oct. Term, 1839.

BILLS OF EXCHANGE—PROMISE TO ACCEPT—GUARANTY OF FUTURE ADVANCES—NOTICE OF ACCEPTANCE—DISCHARGE OF GUARANTOR.

1. By the English law a promise to accept a non-existing bill of exchange, even though it be taken by the holder upon the faith of that promise, does not amount to an acceptance of the bill, when drawn in favor of the holder.

[Cited in Russell v. Wiggin, Case No. 12,165.]

2. But it has been otherwise held by the supreme court of the United States. Yet if the bill be payable after sight, and not after date, such a promise has never been held in either country to be an acceptance of a non-existing bill.

[Cited in Payson v. Coolidge, Case No. 10,860; Russell v. Wiggin, Id. 12,165.]

[Cited in Brown v. Ambler, 66 Md. 397, 7 Atl. 904; Exchange Bank v. Rice, 98 Mass. 292; Franklin Bank v. Lynch, 52 Md. 276; Savannah Nat. Bank v. Haskins, 101 Mass. 372.]

3. It is not necessary, that the various parties to a negotiable instrument should be different persons in order to render it a bill of exchange.

[Cited in Brown v. Noyes, Case No. 2,023; Towne v. Smith, Id. 14,115.]

4. Upon a guaranty for future advances it is the duty of the parties making the advances to give notice to the guarantor of his acceptance thereof, and his consent to act under the guaranty, and to make the advances. But this doctrine does not apply, where the agreement to accept is cotemporaneous with the guaranty.

[Cited in Davis v. Wells, 104 U. S. 165.]

[Cited in Menard v. Scudder, 7 La. Ann. 385; Milroy v. Quinn, 69 Ind. 412; Thompson v. Glover, 78 Ky. 195; Walker v. Forbes, 25 Ala. 139.]

5. It is not necessary, that a further distinct notice should be given to the guarantor, of the amount of the advances actually made, or the terms upon which they were made, after the transactions are complete. There are, however, certain exceptions, as when the advances are contingent, or there is a continuing guaranty.

[Cited in Bank of Newbury v. Sinclair, 60 N. H. 106. Distinguished in Kellogg v. Stockton, 29 Pa. St. 464. Cited in Lehigh Coal & Iron Co. v. Scallen (Minn.) 63 N. W. 246; Lowe v. Beckwith, 14 B. Mon. 184; Menard v. Scudder, 7 La. Ann. 385; Milroy v. Quinn, 69 Ind. 412; Paige v. Parker, 8 Gray, 214; Powers v. Bumcrotz, 12 Ohio St. 280.]

6. If after the credit has expired and the amount become due under a guaranty, a demand be made upon the debtor, and there be a default of payment, notice thereof must be given to the guarantor within reasonable time. But a demand is not necessary, if the debtor be insolvent at the time when the debt becomes due, and the credit has expired.

[Cited in Louisville Manuf'g Co. v. Welch, 10 How. (51 U. S.) 475.]

[Cited in Bray v. Marsh, 75 Me. 455; McKecknie v. Ward, 58 N. Y. 553; Vinal v. Richardson, 13 Allen, 533.]

7. In order to discharge the guarantor there must not only be a want of such notice, but

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

there must also be some loss or damage sustained by him in consequence, and then there will be a pro tanto allowance.

[Cited in Louisville Manuf'g Co. v. Welch, 10 How. (51 U. S.) 474.]

[Cited in Barhydt v. Ellis, 45 N. Y. 110; Bashford v. Shaw, 4 Ohio St. 268; Farmers' & Merchants' Bank v. Kercheval, 2 Mich. 513.]

8. Under the circumstances of this case, it was *held*, that due and sufficient notice was given, and that the guarantor was liable on his guaranty.

[9. Cited in Montgomery v. Kellogg, 43 Miss. 490, to the point that it is difficult to attempt to lay down any general rule as to what is reasonable notice, leaving each case to stand on its own distinguishing and special features.]

Assumpsit on a guaranty. The case came on to be heard upon a statement of facts, agreed by the parties, in substance as follows: The plaintiffs are bankers, doing business in London and in Boston. Samuel Austin, Jr. is their agent and attorney. In June, 1836, James S. Bruce, a merchant of Boston, applied to Mr. Austin for a credit upon the plaintiffs for two thousand pounds sterling, which said Austin agreed to issue, in behalf of the plaintiffs, upon condition, that the goods, purchased with the proceeds, should be consigned to the plaintiffs, and that, in addition thereto, as a further security, said Bruce should furnish a personal guaranty to the amount of five hundred pounds sterling. The defendant agreed to become such guarantor, and thereupon said Austin gave to said Bruce a letter of credit for the sum aforesaid, on behalf of the plaintiffs, dated June 7th, 1836, to be drawn for on account of said Bruce by Joseph Tuckerman, Jr., then about to proceed to the East Indies, or in his absence by the house of Russell & Co. of Canton. Upon the letter of credit, Bruce, by an indorsement in writing, promised to place the plaintiffs in funds to cover the drafts with a banker's commission, interest, charges, &c. or settle the same in Boston. And the defendant, by another indorsement in writing, guarantied to the plaintiffs a punctual fulfilment of Bruce's agreement, to the extent of five hundred pounds sterling, promising, in case of his default, to pay that amount on demand to the order of the plaintiffs. Joseph Tuckerman proceeded to the East Indies soon after the date of the letter of credit. On the 28th of November, 1836, Bruce became insolvent and executed a general assignment pursuant to the statute of Massachusetts of 1836. The defendant became a party to the assignment on the day of its date, and received dividends, on the 1st of July, twenty per cent.; in October, 1837, fifteen per cent., and on September 3d, 1838, ten per cent.; but he has never made any claim on account of the said guaranty. On the 25th of April, 1837, Russell & Co., in the absence of Tuckerman, drew on the faith of said letter of credit and for account of said Bruce, a bill on the plaintiffs for two thousand pounds sterling, payable to the order of the plaintiffs at six months' sight. The said bill was in part payment of a shipment of teas made by said Russell & Co. to Boston, for account of said Bruce, and consigned to the plaintiffs. Russell & Co. remitted the bill directly to the plaintiffs, and being then indebted to them, the said bill was received by the plaintiffs, on or about October 6, 1837, and passed to the credit of Russell & Co., in account current. On the 25th day of June, 1837, the plaintiffs suspended payment, and after that day declined accepting all bills drawn under letters of credit, heretofore granted by said Austin. Their failure and refusal to accept bills were publicly known in Boston about the 15th of July, 1837, and the defendant, who is conversant with such matters, had knowledge thereof on or soon after that day. On the 2d of May, 1836, Austin, as agent aforesaid, gave to Bruce another letter of credit, upon which the defendant entered into a guaranty of the same date. A bill was drawn under this last mentioned letter, and on presentment thereof to the plaintiffs in London, they refused acceptance thereof, and wrote to Bruce a letter under date of June 29th, 1837. This letter was received by Bruce on or about the 9th of August, 1837, and its contents were made known by Bruce to the defendant in the course of a few days after its receipt. The teas purchased with this bill were received in Boston by Mr. Austin, as the attorney of the plaintiffs, about August 28th, 1837. On October 6th, 1837, the plaintiffs notified to Mr. Bruce by letter, that Russell & Co. had drawn on them for £2000, under said letter of credit and that said bill would fall due on the 8th of April, then next, and requested him to provide for its payment with their partner in New York or their agent in Boston. On the 5th of September, 1837, Bruce executed to Russell & Co. an assignment of all his interest in the teas then in the hands of Austin, which assignment was procured in Boston by Mr. Forbes to secure Russell & Co. in case the plaintiff should not accept and pay the said draft of £2000. On the 5th of May, 1838, Mr. Austin made a formal demand on Mr. Bruce for the fulfilment of his engagement, stating that he had received intelligence, that the bill had been received and passed to the credit of Russell & Co. by the plaintiffs. To this letter Mr. Bruce made no answer. On the 13th of October, 1838, Mr. Austin repeated that request by letter to Mr. Bruce, to which Mr. Bruce made no answer; in which last letter Mr. Austin notified to Mr. Bruce, that he should, after the Monday following, sell the teas, holding him and the defendant accountable for the deficiency, if any. The teas were afterwards sold from time to time by Mr. Austin, who remitted the proceeds to the plaintiffs in London; and on making up the account it appeared, that they fell short of the amount due the plaintiffs by the sum of £728. The

last parcel of the teas was sold in January, 1839; and Mr. Austin, on the 4th of March, notified to Mr. Bruce, that he had received the account from the plaintiffs showing that deficiency. In the autumn of 1838, Mr. Austin verbally notified to Mr. Savage, that the teas were on sale, and would probably leave a deficiency of more than £500, for which the plaintiffs would look to him upon his guaranty, to which Mr. Savage replied, in terms neither admitting nor denying his liability. On the 11th of March, 1839, Mr. Austin received from the defendant a letter, dated March 9th, stating that the plaintiff's account had been shown to him by Mr. Bruce at Mr. Austin's request, but denying any right of claim against him, the defendant. To which Mr. Austin replied on the 11th of March, making a formal demand on the defendant for the deficiency. To this demand Mr. Savage replied on the 12th of March, reiterating his denial of the claim. Russell & Co. received full payment of the bill from the plaintiffs in account current. Mr. Bruce was insolvent at the maturity of the bill, and continued to be so until the present time, as to all debts contracted before his assignment; and this suit is brought to recover the £500 and interest upon the guaranty of the defendant. If the law of England, in respect to a promise to accept a non-existing bill, shall come in question, either party may read the deposition of Sir Frederick Pollock and Mr. Hill as evidence of the foreign law, if the court shall consider the depositions of English lawyers competent evidence in this court of the common law of England. The whole case is submitted to the court upon the law and facts, with authority to draw such inferences as a jury would be justifiable in drawing from the facts as stated.

F. Dexter, for plaintiffs.

Charles P. Curtis and B. R. Curtis, for defendant.

STORY, Circuit Justice. Several points have been suggested at the argument, upon some of which I do not entertain any doubt; and, therefore, they may be disposed of in a few words. It is said, that by the law of England, where the bill of exchange, drawn in this case, was to be accepted, and to be payable, a promise to accept a non-existing bill, even though the bill is taken by the holder upon the faith of that promise, does not amount to an acceptance of the bill, when drawn, in favor of the holder. The opinions of Sir Frederick Pollock and Mr. Hill, who are admitted, on all sides, to be very eminent counsel, taken under commission, are direct and full to the point, and leave no doubt as to the present state of the law in England, although certainly it was formerly a matter of no inconsiderable controversy. The language of Lord Mansfield, in Pillans v. Van Mierop, 3 Burrows, 1663, and Pierson v. Dunlop, Cowp. 571, and Mason v. Hunt, Doug. 296, certainly went very far to establish the contrary doctrine in its full latitude, although it was somewhat shaken but not directly overturned in the subsequent case of Johnson v. Collings, 1 East, 98. It was in this state of the authorities, that the question was first presented to the supreme court of the United States, in the case of Coolidge v. Payson, 2 Wheat. [15 U. S.] 66; and upon the footing of the cases before Lord Mansfield, it was then held, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person, who afterwards takes the bill upon the credit of the letter, a virtual acceptance, binding the person, who makes the promise. To this doctrine, thus limited, the supreme court have ever since steadily adhered, whenever the question has (as it has on several occasions) since come before it. But on the other hand, the court has shown a strong disinclination in any respect to enlarge the doctrine of a virtual acceptance of non-existing bills. Schimmelpinnich v. Bayard, 1 Pet. [26 U. S.] 264; Boyce v. Edwards, 4 Pet. [29 U. S.] 121. It is, perhaps, to be lamented, that the doctrine of such virtual acceptances ever was established; and if the question had been entirely new, I am well satisfied, that it would not have been recognised, as fit to be promulgated, by that court, it being at once unsound in policy, and full of inconvenience. But the supreme court yielded, as did the judge, who decided that case in the circuit court, to what seemed, at that time, the true result of the English authorities upon an important practical commercial question. I am not sorry to find, that professional opinion has now settled down in England against the doctrine; although there is no pretence to say, that, up to this very hour, there has been any formal decision in Westminster Hall against it. But it does not appear to me, that the doctrine ever was applicable, or could be applied, to any bills of exchange, except such as were payable on demand, or at a fixed time after date. Where bills are drawn payable at so many days after sight, it is impracticable to apply the doctrine; for there remains a future act to be done, the presentment and sight of the bill, before the period, for which it is to run, and at which it is to become payable, can commence, whether it be accepted or be dishonored. How can the time be calculated upon such a bill before it is presented? If a letter is written, promising to accept a non-existing bill, to be thereafter drawn at six months sight, when is the acceptance to be deemed made? At the date of the bill? Certainly not; for that would be at war with the obvious intent of the parties, which plainly is, that the acceptance shall be on a future sight of the bill. If it is said, that the acceptance is to be treated as made, when the bill is actually presented for acceptance, and it is dishonored by the draw-

ee, it is as plain, that we set up a prior intent or promise against the fact. Upon what ground can a court say, when a party promises to do an act in futuro, such, for example, as to accept a bill, when it shall be drawn, and presented to him at a future time, that his promise overcomes his act at that time? That his refusal to perform his promise amounts to a performance of it? It is quite another question, whether the holder, who has taken such a bill upon the faith of such promise may not have some other remedy, either at law or in equity, for the breach of it, against the promisor. My judgment is, that the doctrine of a virtual acceptance of a non-existing bill, by a prior promise to accept it, when drawn, has no application to a bill drawn payable at some fixed period after sight; for it then amounts to no more than a promise to do a future act. I have looked into the authorities; and I do not find in any one of them, that the bill drawn, and to which the doctrine was applied, was a bill drawn payable at or after sight.

Upon another point I have still less doubt; and that is, that the bill of exchange, drawn in this case, was a draft within the scope of the letter of credit, and in conformity to the authority therein given. The argument is, that the bill is not a regular bill of exchange, because it is drawn by Russell & Co. payable to Wildes & Co., who are the drawees of the bill. In point of fact it was so drawn by Russell & Co. for the purpose of being passed to their credit by the drawees, to whom Russell & Co. were then indebted in a larger amount. It appears to me, that this does not change its character as a bill of exchange. An instrument is not less a bill of exchange, because all the parties to it in the character of drawers, payees, and drawees are not different persons. A bill drawn by a person, payable to his own order, has always been deemed to be a bill of exchange in the commercial sense of the phrase. And it would not cease to be such a bill, if it should be indorsed by the drawer payable to the drawee. Now, such a bill so indorsed differs in nothing substantially from the present bill. In truth, where the bill is negotiable, and contains a drawer, a payee, and a drawee, it is, in a commercial sense, a bill of exchange, although one or more of the parties should fill a double character. It is of no consequence, in such a case, what particular individuals represent the dramatic personages. Bills of exchange, so called, have sometimes been drawn by the drawer upon himself, payable to himself or order; and they have been held valid after indorsement by him to another person. But, at all events, the present is a "draft" in the sense of the letter of credit; for the word draft is nomen generalissimum, and includes all orders for the payment of money drawn by one person on another.

The remaining point is that alone, upon which any difficulty can be entertained. It is, whether the plaintiffs (Wildes & Co.) have lost their recourse over against the defendant upon his guaranty, by their omission to give him notice at an earlier period, of the neglect of Bruce to pay the money due according to his engagement upon the bill for £2000. And here, it is important to advert to the dates of some of the material transactions. The letter of credit was given on the 7th of June, 1836. Bruce became insolvent and made a general assignment of his property on the 28th of November, 1836, and the defendant became a party to that assignment on the day of its date. The bill of exchange was drawn by Russell & Co., at Canton, on the 20th of April, 1837, at six months sight. The plaintiffs (Wildes & Co.) suspended payment on the 2d and 5th of June, 1837.. The bill was remitted to them by Russell & Co., and was received by the plaintiffs and passed to the credit of Russell & Co. about the 6th of October, 1837, the latter being then indebted to the plaintiffs in a larger amount. On the same 6th of October, 1837, the plaintiffs duly notified to Bruce the receipt of the bill, and that it would fall due on the 8th of April, 1838, and requested him to provide for the payment thereof accordingly. No provision was made by Bruce for the payment of the bill at its maturity. On the 5th of May, 1838, Austin, as agent of the plaintiffs, made a formal demand on Bruce for the fulfilment of his engagement, and stated to him, that the bill had been received, and passed to the account of Russell & Co. by the plaintiffs. Bruce made no reply. Afterwards in December, 1838, Austin gave notice to Bruce of his intention to sell the teas, which were held by him as security for the payment; and the teas were accordingly sold and the sales completed in January, 1839. In the autumn of 1838, probably in October, Austin notified to the defendant, that the teas were on sale, and would probably leave a deficiency beyond the £500, for which the plaintiffs would look to him upon his guaranty. The defendant replied in terms neither admitting nor denying his liability. A formal demand was afterwards made in March, 1839, upon the defendant, for the amount of his guaranty, which he declined paying; and the present suit has been since commenced therefor.

It is upon this posture of the substantial facts (for I omit any reference to others, which have not, in my judgment, any bearing upon the merits of the present case) that the question arises, whether the plaintiffs are entitled to recover, no notice of the default of Bruce having been given to the defendant, until the autumn of 1838. It was said at the argument, that in cases of guaranty of future advances, to be made to another person, notice must be given to the guarantor by the party making the advance, that he accepts the guaranty, and consents to make the advances; and also notice, that he has made the advances and acted upon

the guaranty; and, lastly, notice, that he has made a due demand upon the debtor, and his refusal to pay the amount, when due. The two former, it is added, are conditions precedent to the legal operation of the guaranty; and if not duly given, the guarantor is not bound by his guaranty, whether he suffers any damage or not. The notice of the non-payment, it is admitted, is not a condition precedent; but it must be given in a reasonable time, and if the guarantor suffers any damage from the default of the creditor, he will, at least, to the extent of that damage, be exonerated. I admit, that upon every guaranty for future advances, it is the duty of the party making the advances, to give notice to the guarantor of his acceptance thereof and of his consent to act under the guaranty, and to make the advances. This is conclusively established by the decisions of the supreme court in Russell v. Clark, 7 Cranch [11 U. S.] 69; Edmondston v. Drake, 5 Pet. [30 U. S.] 624; Douglas v. Reynolds, 7 Pet. [32 U. S.] 113; Lee v. Dick, 10 Pet. [35 U. S.] 482; Adams v. Jones, 12 Pet. [37 U. S.] 207; and Reynolds v. Douglas, Id. 497. This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty, and indeed constituted the consideration and basis thereof. And at all events, here there was due notice of an agreement to give the credit, and to make the advances contemplated by the guaranty.

Upon the other point, I have more difficulty in yielding to the argument. Where a guaranty is accepted, and notice has been duly given to the guarantor, that the party will act upon it, and give credit and make advances accordingly, I am not aware, that it has ever been held, that it was indispensable in all cases to give another and a further distinct notice to the guarantor of the amount of the advances actually made, and the terms, upon which they have been made, when the transaction is completed. All that I have supposed to be generally required of the person, making the advances or giving the credit, after having given due notice of his acceptance and intention to act upon the guaranty, is, to make a demand upon the debtor, when the credit has expired, or the amount has become due, and upon his default to give notice thereof within a reasonable time afterwards to the guarantor. There is no case to my knowledge, which goes the length, that there should be three substantive or distinct notices in all cases, as contended for at the argument; and, as an original question, I should not be disposed to entertain it; since it would throw such arduous duties on the guarantee (as I desire to call the party accepting the guaranty) as would materially tend to impair the utility and convenience of that instrument. I do not mean to say, that there are not, or may not be particular cases of guaranty, in which such notice may be required. Thus, for example, in such a case as Cremer v. Higginson [Case No. 3,383], where advances were contemplated upon certain future contingencies, which might or might not arise, it might be proper to hold, that some notice should be given to the guarantor within a reasonable time (notwithstanding he had already signified in general terms a willingness to make the advances, if they should be required) that the contingencies had arisen, and the advances had been made, and the guaranty was relied on; for otherwise the guarantor might not definitely know, whether, under such circumstances, the guaranty was acted upon or not. So in the case of Douglas v. Reynolds, 7 Pet. [32 U. S.] 113, 127, where there was a continuing guaranty for advances, acceptances, and indorsements to be made by the party in futuro, it would seem but reasonable, that when the whole transactions are closed, notice of the whole amount, for which the guarantor is held responsible, should be communicated to him within a reasonable time afterwards. The same rule might well apply to a single transaction, such as a single advance, or acceptance, or indorsement, where, from the nature and objects of the guaranty, the guarantor could not otherwise have any means of knowing the extent of his guaranty as to time, amount, or other particulars, essential to guide his future conduct, and to ascertain and fix his responsibility. All such cases must stand upon their own circumstances; and do not seem to furnish just grounds for a general rule. But, without saying, what is or ought to be the general rule, it seems to me, that the doctrine can never properly apply to a case circumstanced as the present, where all the persons are originally privy to the whole transaction; where the case rests upon a letter of credit for a limited amount, to be drawn within a fixed time, and, subject to these restrictions, where the sums for which the drafts are to be drawn, and the times when drawn, are to depend upon the action of the debtor, and the guarantor is a party to the whole of the original contract. In such a case the guarantor has as good means of knowledge and inquiry, as the guarantee, and it is quite as much his duty to make such inquiries, as it is of the guarantee to give him notice of the subsequent facts. If he omits to make any inquiries, he may properly attribute any loss, which he may sustain thereby, to his own laches, or want of vigilance, or to his own confidence in the debtor, and not to any disregard of duty on the other side. In the present case, it is impossible to avoid seeing, that the letter of credit was for a limited time (eighteen months), after which no advances made would bind the guarantor; that the amount was not to exceed £2000; that all the bills were to be drawn in China at six months' sight on London; that the sole object of the letter of credit and advances was to assist the operations of Bruce in a projected en-

terprise or voyage from Boston to the East Indies and back; that it was contemplated, that the bills would not become payable until a very long period after the time, when the guaranty was given; that the return cargo was relied on, as the immediate fund, by which the advances were to be primarily secured; and that the guarantee was to be merely an auxiliary security. It seems to me, that, under such circumstances, no further notice of the actual advances made was necessary to be given to the defendant, until the same became due from Bruce, and there had been some default on his part. The defendant if he wished any information as to the progress or consummation of the voyage, could readily institute the proper inquiries. I am not prepared, therefore, to admit, that under the circumstances of the present case, there was any duty on the part of the plaintiffs to give notice to the defendant of the fact of the bill of £2000 being drawn upon them and received by them and passed to the account of Russell & Co., before the maturity of the bill and the default of Bruce in not paying the same. If it had been the duty of the plaintiffs to give such notice, under such circumstances, I should still say, that it would not discharge the guaranty, unless the defendant could show, that he had suffered some damage from the want of such notice. Indeed, the rights and duties of parties to guaranties must, from the variety of circumstances, under which they have been entered into, be materially governed by the particular circumstances of each case. Lord Tenterden held this doctrine in Van Wart v. Woolley, 3 Barn. & C. 439, 447, to which I shall presently have occasion to refer for another purpose.

It appears to me, then, that the whole question in this case turns upon the point, whether the defendant has received notice of the default of Bruce and the non-payment of the bill, within a reasonable time; and, if he has not, whether he is discharged from his guaranty, unless he has sustained some damage from the want of such notice. I take the doctrine to be clearly settled, that upon a guaranty, to discharge the guarantor, there must not only be a want of notice within a reasonable time, but there must also be some loss or damage sustained by the guarantor; and that if there be a loss or damage, that the guaranty is not totally discharged, but only pro tanto to the amount of the loss or damage. The case is constantly distinguished in the authorities from that of an indorser to negotiable paper. The latter is entitled to strict notice; the guarantor is entitled only to notice, when he is or may be prejudiced by the want of it. If the debtor is solvent when the money becomes due, and no notice is given to the guarantor, and the debtor afterwards and before notice becomes insolvent, the guaranty is discharged. But where the notice would be of no avail, and the guarantor has suffered and can suffer no damage by the want of notice, he is not discharged by the omission to give it. Ordinarily, therefore, if the debtor is insolvent when the debt became due, and has ever since remained so, no notice to the guarantor is deemed necessary; nay, not even a demand upon the debtor, when the debt became due.

This doctrine seems to me fully sustained by the leading authorities, beginning with the case of Warrington v. Furbor, 8 East, 242. That case was fully recognised in Philips v. Astling, 2 Taunt. 206; and the like doctrine was applied in Holbrow v. Wilkins, 1 Barn. & C. 10, and Van Wart v. Woolley, 3 Barn. & C. 439, 447. In this last case Lord Tenterden said, that in cases of guaranty the nature of the transaction and the circumstances of the particular case were to be considered and regarded; and that, where the debtor had become bankrupt, a demand upon him was unnecessary to charge the guarantor. And in Holbrow v. Wilkins, and Van Wart v. Woolley, the court held, that, as it did not appear, that the guarantor had sustained any damage from the want of a due presentment to the debtor for payment, or of due notice to the guarantor of the default, the guaranty was not discharged. The same doctrine was maintained in Gibbs v. Cannon, 9 Serg. & R. 202, and pointedly asserted in Oxford Bank v. Haynes, 8 Pick. 423. It was also recognised in the fullest extent in Reynolds v. Douglas, 12 Pet. [37 U. S.] 497. And the court in effect there said, that the guarantor is bound, without notice, where the debtor is insolvent at the time, when the debt becomes due; and that his liability continues, unless he can show, that he has sustained some prejudice by the want of notice of a demand on the debtor, and his non-payment; and, if he has sustained any damage, that he will be discharged only to the amount of that damage.

Now, upon these principles, it seems to me difficult to maintain the position, that the present defendant is not liable on his guaranty. Bruce (the debtor) became insolvent before the bill was drawn, and, for aught that appears, he has remained ever since insolvent. The earliest period, in which it would have been practicable to give notice to the defendant of the arrival of the draft and the acceptance by the plaintiffs, must have been after the 6th of October, 1837; and the earliest period at which notice could have been given of the default of payment, must have been after the 8th of April, 1838, when the draft was at maturity. It is not shown, nor as far as I know, even pretended in argument, that notice as soon as practicable after either of these periods, would have been of any advantage to the defendant, or that he has sustained any damage by the omission of such notice. The debtor then was, and as far we know, has ever since been insolvent, and without the means to discharge the debt. If this be so, then, upon the general principles already stated, the defendant is not discharged

from his guaranty. But, it appears to me, that there are circumstances in the present case, which show, that the notice was within a reasonable time; and indeed, as early, if not earlier, than the case required. It is plain to me (as I have already intimated) that the understanding was, that the teas should be the primary fund or security for the payment of the debt; and until that fund was exhausted by a sale, and the actual deficiency was ascertained, I do not well see how the defendant could be called upon to pay the sum due upon his guaranty. It would be an unliquidated deficiency. In a court of equity, at all events, the defendant would have been entitled to require, that the teas should first be sold and applied to the payment of the debt pro tanto, before he was called upon to pay the amount secured by his guaranty. Now, in point of fact, in or about October, 1838, and before the sale of the teas, he had due notice of the advances and of the probable deficiency. He made no objection to the sale; he did not positively insist upon his being then discharged from the guaranty. The sales were not concluded until the succeeding January, and he had due notice thereof in a short period after the entire deficiency was ascertained. Now, if I am right in this view of the facts, that the guaranty was not to be insisted on, until the other fund was exhausted, and the proceeds of the sales were first to be applied in discharge of the defendant, the demand was made upon the defendant within a reasonable time. It was made as soon as it properly could be. And it is not shown, that an earlier sale, if practicable, would have been desirable, or of any higher benefit to the parties.

Upon the whole, upon the best consideration, which I am able to give this case, the plaintiff is entitled to judgment for the amount of the guaranty, as well upon the special principles of law, as the general circumstances of the case.

WILD HUNTER, The (ELLSWORTH v.). See Case No. 4,411.

Case No. 17,653a.

Ex parte WILDMAN.[1]

District Court, D. Kansas. July 17, 1876.

JURISDICTION OF COURTS-MARTIAL — DISCHARGED SOLDIERS IN MILITARY PRISONS—CONSTITUTIONAL LAW.

[Act Cong. March 3, 1873 (Rev. St. § 1361), providing that prisoners under confinement in military prisons undergoing sentences of courts-martial shall be liable to trial and punishment by courts-martial for offenses committed during said confinement, is not in conflict with Const. Amend. 5, providing that no person not in the land and naval forces or in the militia shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury.]

[Cited in Re Craig, 70 Fed. 971.]

[At chambers. In the matter of the application of Ira Wildman for a writ of habeas corpus.]

FOSTER, District Judge. The facts in this case are admitted to be as follows: The petitioner, Ira Wildman, was a private soldier in the military service of the United States. In 1874 he was tried by a general court-martial, and sentenced to be dishonorably discharged from the service, and to be imprisoned for eighteen months in the military prison, which time expired on the 20th of June, 1876. In March, 1875, in pursuance of that sentence, he was actually discharged from the service. In August, 1875, while serving his term of imprisonment (after his discharge), he was charged with having conspired with other prisoners, and incited a mutiny, and overpowered the guard, and made his escape. For this offense he was tried by a general court-martial, and found guilty, and sentenced to one year imprisonment after the expiration of his original term. He applies for a discharge from imprisonment on this last sentence on the ground that the court-martial had no jurisdiction to try him, as he was not a soldier, and was not in any manner connected with the land or naval forces of the United States.

The law under which the action of the court is justified is section 1361 of the Revised Statutes, but it is claimed by the petitioner that, in so far as that law is made applicable to a prisoner not connected with the land or naval forces, it is unconstitutional and void. It seems to have been the intention of congress to make the law applicable to all prisoners confined in the military prison, and so the validity of the law comes in question. The courts will not declare a law unconstitutional on a mere doubt, but it must be clearly obnoxious to the powers conferred by the constitution. On the other hand, where there are serious doubts as to the legality of the imprisonment, such doubts should be resolved in favor of the personal liberty of the citizen, and herein I find it a grave and difficult question to solve. The constitution (article 3, § 2) provides: "The trial of all crimes, except in cases of impeachment, shall be by jury." Article 5 of the amendments requires the presentment of a grand jury for capital or otherwise infamous crimes, except in cases arising in the land or naval forces, etc. Article 6 guaranties to the accused the right to a speedy and public trial by an impartial jury. These provisions are clearly applicable to all persons not in any manner connected with the military or naval service of the government.

The question remains: Is the petitioner so connected with the service that he is not entitled to these guaranties, and subject to trial by court-martial? Among the enumerated powers of congress is the power "to

[1] [Not previously reported.]

make rules for the government and regulation of the land and naval forces." In pursuance of this power, congress has, in some instances, applied the jurisdiction of military courts to persons not actually in the government service; for instance, to all retainers to the camp, etc., though not enlisted soldiers (article 63); to persons found lurking or acting as spies in or about the fortifications, encampments, etc., in time of war (section 1343). Any person guilty of certain enumerated offenses while in the service of the United States shall still be liable to arrest and trial by court-martial, not withstanding he has received his discharge, or been dismissed from the service. Last clause, art. 60. It would seem from these several provisions that congress, in making rules for the government and regulation of land forces, in certain cases reaches persons not enlisted in the service, but in order to secure discipline and good order, and to protect the public service, have deemed it necessary to bring within the jurisdiction of the military courts several classes of persons holding certain relations to the army, although not really in the military service. Courts-martial are tribunals established and recognized by the law. These courts have power to dismiss the soldier from the government service and impose imprisonment, and the law, in effect, says (section 1361), notwithstanding such dismissal from the service, while the person is held as a military prisoner under such sentence, he shall still be subject to the articles of war and trial by court-martial for offences committed during such confinement. This law was in force when the sentence of dismissal was made, and is not the judgment of the court dismissing the soldier so qualified by the law as to still continue his relations to the service so far as to hold the prisoner subject to military law until his term of imprisonment is fully completed? In other words, the law says, if the soldier is guilty of certain offenses, he shall be tried by a court-martial. That court may dishonorably dismiss him from the service, and may at the same time impose imprisonment, and hold him for punishment; and, further, while he is so held for punishment, his discharge, so granted, shall not relieve him from punishment by court-martial for doing that which is prohibited by the articles of war.

I am not prepared to declare that congress, in making such provisions, exceeded its constitutional powers to make rules for the government and regulation of the forces. The question is one of great importance, involving the validity of the act of congress and the personal liberty of the individual, as also the discipline and management of the military prisons, and I hope this decision may be brought before some higher tribunal for further consideration. The application for a discharge of the prisoner must be denied.

WILDMAN, In re. See Case No. 2,959b.

Case No. 17,654.

WILDMAN v. TAYLOR et al.

[4 Ben. 42.] [1]

District Court, D. Connecticut. Feb., 1870.

BANKRUPTCY—CONSTRUCTION OF INSTRUMENTS EXECUTED AT THE SAME TIME—WORDS OF LIMITATION AND CONDITION—FORFEITURE OF ESTATE—DEMAND OF RENT.

1. Where two instruments are executed at the same time, between the same parties, relative to the same subject matter, to effectuate one object, they are to be taken in connection, as parts of the same instrument.

2. H. S. and E S. were brothers, and formed a partnership on August 12, 1855, for the purpose of manufacturing hats. H. S. was the owner of a factory and a lot of land on which it was situated, and E. S. was to buy of H. S. one-half the factory and machinery for $6,000. They continued in business together till October 21, 1856, when H. S. died. A few hours before his death, he executed and delivered to E. S. a quitclaim deed of one-half of the land in question, with the factory, etc., and also "all the machinery situated in said factory which was possessed and owned by me before the 12th of August, 1855." He also executed to E. S. a lease for fifteen years, of all his "right, title and interest in and to certain property," described in the above deed for one-half of said property, "it being the remaining one-half of a certain tract of land, &c., with a hat manufactory and other buildings thereon standing, with all the water and mill privileges connected therewith; also all the machinery situate and now being in said manufactory." The rent was $700 a year, and the lease provided that, "in default of payment for any year during said term, said lease is to be void, and said property is at once to revest in me, or my heirs or assigns, without notice to the lessee, in the same manner as if this lease had not been given." After the death of H. S., E. S. continued in possession of the whole property till December 9, 1864, when he conveyed the whole unexpired term of the lease to S. & B., and on September 14, 1865, he quitclaimed to them all his right, title and interest in the property. S. & B. mortgaged the property, and were thereafter declared bankrupts, and an assignee was appointed. H. S., by will, left the bulk of his property to his daughter T. for her life, and on her death, to her children. There was a failure to pay part of the rent due on October 21, 1867, and a failure to pay the rent due on the 21st of October, 1868, and the agent of the devisees made a demand on that day, generally, for the rent due.

3. The assignee in bankruptcy, claiming the right to the possession of the property, filed a bill in equity against all parties. *Held*, that the deed and lease must be construed together, and that their effect was to convey to E. S. one-half of the whole property absolutely, and the other half for fifteen years, subject to the rent specified.

4. The assignee, therefore, would be entitled to all the estate, both under the deed and lease, (subject to intermediate incumbrances,) which the bankrupts received from E. S.

5. The words in the lease as to the non-payment of rent were not words of limitation, but a condition by which the lease might become void at the option of the lessor.

6. The devisees, having succeeded to the rights of the lessor, were entitled to avoid the

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

lease, on the non-payment of rent, on October 21, 1868.

7. To work a forfeiture for non-payment of rent, there must be a demand of the precise sum due.

8. No such demand was made here, and the lease was therefore not avoided.

9. The assignee was therefore entitled to the immediate and exclusive possession of the property, both real and personal.

In equity.

Nelson L. White and D. B. Booth, for plaintiff.

W. F. Taylor and Origen S. Seymour, for defendants Taylor and wife and children.

Averill & Brewster, for defendants James S. Benedict and Ezra S. Benedict.

SHIPMAN, District Judge. This was a bill in equity, brought by the assignee [Frederick S. Wildman] to have settled and determined conflicting claims to various portions of the property pertaining to the bankrupt estate. All the parties to the bill are residents of this state, except James Benedict and Ezra G. Benedict, who reside at Albany, in the state of New York, and Charles H. Benedict, who resides in the city of New York; but all the respondents residing out of this state have come in and submitted their claims to the judgment of this court.

As the facts bearing upon portions of the controversy are somewhat complicated, some of them dating back several years, a chronological statement of them will aid us in presenting the questions involved.

The main portion of the property in dispute consists of an establishment for the manufacture of hats, situated in Danbury, in this state. On the 21st of October, 1856, Hiram L. Sturdevant was the owner of this property. On that day, he executed and delivered to his brother, Elijah Sturdevant, a quitclaim deed, containing the following descriptive clause: "All right, title, interest, claim and demand whatever, which I, the said releasor, have or ought to have in or to the one-half of a certain tract of land situate in said Danbury, containing two acres, more or less, with a hat factory and other buildings standing thereon, and all the mill privileges connected therewith; bounded north on land of the heirs of Caleb Benedict, deceased; east and south on land of the heirs of Talman Wildman, deceased; and west on my own land. Also all the machinery situated in said factory which was possessed and owned by me before the 12th day of August, 1855."

On the same day, Hiram L. Sturdevant also executed and delivered to his brother Elijah a lease, the material clauses of which are as follows: "I, Hiram L. Sturdevant, of Danbury, etc., for the consideration of one dollar, received of Elijah Sturdevant, etc., have demised, leased, and to farm let, and do by these presents demise, lease and to farm let all the following described property, to wit: all the right, title and interest that I have in and to certain property situate in said Danbury, and particularly described in a deed from me to said Elijah, this day executed, for one-half of said property, it being the remaining one-half of a certain tract of land, situate in said Danbury, containing about two acres, with a hat manufactory and other buildings thereon standing, with all the water and mill privileges connected therewith; also, all the machinery situate and now being in said manufactory. Also, a certain dwelling house, situate near said factory, now occupied as a boarding house, bounded, etc. To have and to hold unto the said Elijah, his heirs and assigns, for the full term of fifteen years from this date, and till the same shall be complete and ended; the said Elijah paying to me, or my heirs or assigns, executors or administrators, the yearly rent of $700 during the continuance of said lease; and in default of said payment for any year during said term, said lease is to be void, and said property is at once to revest in me, or my heirs or assigns, without notice to the said Elijah, in the same manner as if this lease had not been given."

It is proper here to state the circumstances under which these papers were executed. Hiram L. and Elijah Sturdevant were brothers. The former, prior to 1855, and down to the execution of the deed above named, was the sole owner of the property described in the deed, and of the real estate and most of the machinery referred to in the lease. In 1855, his brother Elijah came from Brookfield to Danbury, and on the 12th of August, of that year, they formed a copartnership for the purpose of manufacturing hats at the factory in question. The arrangement between them was that they were to be equal partners, and that Elijah should purchase of Hiram L. one half the factory and machinery, at the price of $6,000. They immediately went into business with this understanding, but the deed was not made till the 21st of October, 1856. Whether the consideration was all paid prior to that time does not appear, but that is not important. This deed was the formal consummation of the bargain and sale. At the time the deed, as well as the lease, was executed, Hiram L. the grantor was in extremis, and died a few hours thereafter.

Upon the death of his brother, Elijah Sturdevant was in possession of the whole property described in the deed and lease, and continued in possession until December 9, 1864, when he conveyed the unexpired term of the lease to Sturdevant and Benedict, the present bankrupts, and surrendered possession to them. On the 14th of September, 1865, Elijah Sturdevant conveyed, by quitclaim deed, all, his interest in the real estate and machinery to Sturdevant and Benedict. The latter continued in possession till the time, or about the time when the proceedings in bankruptcy were commenced.

On the 1st day of June, 1868, Sturdevant and Benedict mortgaged the factory premises and machinery to James Benedict and Ezra

G. Benedict of Albany, as security for a loan of $20,000. On the 2d of June, 1868, they also attempted to mortgage the same property to Charles H. Benedict of New York, as security for moneys advanced or to be advanced, but to this deed there was but one witness, and it is therefore invalid under the statute, of this state, and may be laid out of the case.

As already stated, Hiram L. Sturdevant, the original owner of the hat manufactory, died on the 21st of October, 1856, just after having executed the deed and lease to his brother Elijah, already referred to. By his will he left the bulk of his estate, including that portion of the factory and machinery which was not embraced in his deed to Elijah, to his daughter Sarah L. Taylor during her life, and at her death to her children.

The will was proved October 24, 1856. The executors named in the will having declined to act, the court of probate appointed Elijah Sturdevant and James S. Taylor administrators with the will annexed. What steps were taken by the administrators in the settlement of the estate does not appear, and need not be determined in the present case.

The first question in order is that which relates to the true construction of the deed and lease of Hiram L. Sturdevant to Elijah Sturdevant. Literally read, these instruments are inconsistent each with the other. In the deed, after the description of the real estate, these words follow: "Also all the machinery situated in said factory, which was possessed and owned by me before the 12th day of August, 1855." In the lease, following the description of the real estate, are the words, "also all the machinery situate and now being in said manufactory." Of course these words cannot have a literal operation in both instruments. It is conceded that the machinery in the factory before the 12th of August, 1855, was all owned and possessed by Hiram L. Sturdevant, the grantor in the deed. He could, undoubtedly, have conveyed it all in the same instrument in which he conveyed one-half of the real estate, though, in the absence of any explanation, it would have been a singular and unusual transaction. But the words in the lease are even more comprehensive than those in the deed, "Also all the machinery situate and now being in said manufactory." These words literally cover, not only all the machinery in the factory on the 12th of August, 1855, but all that had been added by the partnership subsequently. It is contended by the assignee that the language of the lease must be restricted, and held to convey the use only of so much of the machinery as the lessor at that moment had an interest in. But how are we to determine what interest the lessor then had? That can be done in no other way than by reference to the deed. The assignee insists that the court should look at the deed, give its words a literal interpretation, and thus restrict the similar clause of the lease to the interest of the lessor in the machinery which the partnership added after the 12th of August, 1855. This statement of the point shows that the two instruments should be compared and construed with reference to each other, unless some stubborn rule of law prevents. The true doctrine on this subject is well stated by Hosmer, C. J., in Isham v. Morgan, 9 Conn. 374, 378, where he says: "The established rule is this: Where two instruments are executed at the same time, between the same parties, relative to the same subject matter, to effectuate one object, they are to be taken in connection as parts of the same agreement." This proposition is amply sustained by the authorities cited in its support in the opinion from which it is taken. To those may be added King v. King, 7 Mass. 496; Clap v. Draper, 4 Mass. 266; Jackson v. McKenny, 3 Wend. 233. The present case comes within all the conditions of the rule. The instruments were executed at the same time, between the same parties, relate to the same subject matter, and were to effectuate the same general purposes which both had in view. The deed was clearly intended to convey one-half of the real estate and machinery, as the latter stood on the 12th of August, 1855, in pursuance of the contract of partnership entered into at that date between the grantor and grantee. The object was to consummate, by formal conveyance, that precise contract, which embraced half of the real estate, and half of the machinery, and only half. The object of the lease was to confer the right of possession and use of the other half of both the real estate and machinery, including the lessor's portion of the latter, which had been added after the 12th of August, 1855. The reason is obvious. The partnership had been of short duration, and the establishment which was to be the principal instrument of carrying it on, had been recently completed. Hiram L. Sturdevant saw that he was near his end. His death would dissolve the partnership, and if no provision were made, by which the control of the property would pass to his brother and surviving partner for some fixed period of time, the whole establishment might have to be broken up and sold. The lease, therefore, of the other half was made. When the two instruments are compared with each other, and read in the light of the relation of the parties and the circumstances in which they were placed, there can be no doubt that the object in executing the deed and lease was to convey absolutely one-half of the whole property, the exclusive title of which was in the grantor and lessor, to his brother Elijah, and the other half to him for fifteen years, subject to the rent specified. This construction does complete and exact justice between the parties, and is consonant with the principles of equity as well as the rules of law. But on the construction contended for by the assignee, by which the whole of the machinery in the factory on the 12th of August, 1855 (and this embraced nearly all there was at the time the deed was executed), is to be deemed as passing to Elijah Sturdevant, the latter would obtain half of such machinery without any consideration whatever. He was to pay $6,000, and receive a conveyance of one-

half of the establishment as it stood when the bargain was made and the partnership commenced, not one-half of the real estate and the whole of the machinery. Had there been no other instrument of conveyance but the deed, and the construction of the assignee were the correct one, equity would have relieved the other half of the machinery on the ground of mistake, on the undisputed facts as they now appear. But, in my view, the whole difficulty is dissipated by comparing the deed and the lease in the light of surrounding circumstances. The latter instrument refers in terms to the former, and, although that and the deed are very imperfectly and inartificially drawn (being done in haste for execution by a dying man), I think it is apparent on the face of the documents themselves, that one-half the property was intended to be conveyed, absolutely, and the other half leased for the term of fifteen years. The two instruments thus embraced the whole property, except the half of the machinery added after the 12th of August, 1855, which belonged to the grantee and lessee, and upon which neither deed nor lease was designed to, or could, operate. In this view, were there nothing else in the case, of course the assignee would be deemed to have taken all the estate, both under the deed and lease, subject to intermediate incumbrances, which the bankrupts received from Elijah Sturdevant, which was an absolute title to one-half, under the deed, and the right of possession and use of the other half under the lease to the 21st of October, 1871, when the fifteen years will expire. But at this point the respondents, Taylor, his wife, and minor children, interpose the claim that the lease has become forfeit for the non-payment of stipulated rent. This is the next question in order.

The language of the lease upon which this question is raised is as follows: "To have and to hold unto the said Elijah, his heirs and assigns, for the full term of fifteen years from this date, and till the same shall be complete and ended, the said Elijah paying to me or to my heirs or assigns, executors or administrators, the yearly rent of $700, during the continuance of said lease, and in default of said payment, for any year during said term, said lease is to be void, and said property is at once to revest in me or my heirs or assigns, without notice to the said Elijah, in the same manner as if this lease had not been given." It is contended by the devisees of the original lessor, that this clause of the lease amounts to a limitation, by the terms of which the estate was absolutely to cease and determine in the event of a failure to pay the rent stipulated, on or before the 21st day of October in any given year, and that no act on the part of the lessor, or his heirs or assigns, was necessary to entitle him or them to immediate possession. The assignee, on the other hand, insists that it is simply a condition, expressing a contingency, the happening of which should render the estate voidable at the option of the lessor. The latter view I think the correct one. "Words of limitation mark the period which is to determine the estate, but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period described by the limitation. The one specifies the utmost time of continuance, and the other marks some event, which, if it takes place in the course of that time, will defeat the estate. The material distinction between a condition and a limitation consists in this, that a condition does not defeat the estate, although it be broken, until entry by the grantor or his heirs." 4 Kent, Comm. 126, 127, and cases there cited. This is the doctrine of the common law, which now prevails in this state, and must govern this case. Bowman v. Foot, 29 Conn. 331. The only absolute limitation in this lease is in the term of fifteen years. To this there is a condition annexed, that by failure to pay the rent any given year, the term should be cut short, and the lease become void. But it is well understood doctrine, that such stipulations are now always construed to mean that the lease shall become void at the option of the lessor. Bowman v. Foot, supra; Clark v. Jones, 1 Denio, 516; Jones v. Carter, 15 Mees. & W. 718.

In this case there was a failure to pay the rent due on the 21st of October, 1868. The devisees having succeeded to the rights of the lessor were, therefore, entitled to avoid the lease. The provision for a forfeiture was, in the eye of the law, and of common sense, inserted exclusively for the benefit of the lessor and those who might hold the fee under him. Now what steps were necessary on the part of these devisees in order to avoid this lease and secure themselves the right of immediate possession? Storrs, C. J., in Bowman v. Foot, already cited, remarks: "If the tenant's right is thus voidable only, the option to avoid must be exercised under the contract, and according to legal usage." This legal usage is to be derived from the doctrines of the common law. In Connor v. Bradley, 1 How. [42 U. S.] 211, 217, the court say: "It is a settled rule at the common law, that where a right of re-entry is claimed on the ground of forfeiture for non-payment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset, on the day when the rent is due, upon the land, in the most notorious place of it, even though there be no person on the land to pay." The same doctrine is laid down in Tayl. Landl. & Ten. (3d Ed.) p. 346, § 493, and in Van Rensselaer v. Jewett, 2 Comst. [2 N. Y.] 147; McCormick v. Connell, 6 Serg. & R. 151, 153. In the present case, there was an attempt to make a demand on the part of the devisees, by an agent sent to the premises for that purpose on the afternoon of October 21, 1868. The particulars of that

attempt were detailed by the witnesses on the hearing, and although it is difficult, in view of this evidence, to repress the suspicion that there was collusion between the agent of the devisees and Elijah Sturdevant, one of the administrators of the original lessor, and Edgar Sturdevant, one of the bankrupts, yet, I do not determine the point on that ground. The demand did not conform to the settled rules of law. It was not for the precise sum falling due on that day. The agent could not make such a demand, for he testified that he did not know what amount was due. He simply made demand generally for the rent due. This, in point of fact, included not only the amount falling due that day, but also an unpaid balance on a previous year. In no aspect was this requirement of the law complied with. The lease was, therefore, not avoided, and the unexpired term, with all the rights which belong to it, passed to the assignee, and is to be disposed of for the benefit of the bankrupt estate.

It follows, of course, from this view, that the assignee is entitled to the immediate and exclusive possession of this property, both real and personal. The lease also covers a small piece of land, with the boarding-house standing thereon, of which he is entitled to the possession. This land seems no way in controversy here, as I understand it is conceded by all parties in interest that it was originally purchased as the joint property of Hiram L. Sturdevant and his brother Elijah, and that the fee of the latter's half passed, through the bankrupts, to the assignee. The other half is embraced in the lease, and consequently the assignee is entitled to the use and possession of the whole during the unexpired term.

WILES (HALL v.). See Case No. 5,954.

Case No. 17,655.

In re WILEY.

[4 Biss. 171.] [1]

District Court, D. Indiana. May, 1868.

PLEDGE — DELIVERY, WHEN NECESSARY — WHAT CONSTITUTES — JURISDICTION — RELIEF TO PLEDGEE.

1. To render a pledge valid, the thing pledged must, in general, be delivered to the pledgee. But to this rule there are exceptions.

2. A pledge may be valid without delivery, when an actual delivery is impossible.

3. The pledge of a note, at the time in the lawful possession of a third person, may be valid without actual delivery to the pledgee. In such a case, the third person may be regarded as the agent of the pledgee, and as holding the note for him.

4. A pledge or mortgage made to secure a debt, previously incurred but still subsisting, or to indemnify against a present liability arising out of a past contract, is made on a sufficient consideration.

5. Where the assignee has received or collected securities pledged, the court may, on petition by the pledgee, direct the assignee to apply the proceeds for the benefit of the pledgee.

[In the matter of William H. Wiley, a bankrupt.]

McDONALD, District Judge. In this case, James Davis has filed a petition alleging that one John Higgins, on the 12th of April, 1867, executed a note to Wiley the bankrupt, for five hundred dollars; that to secure one Fielding Denny on a loan of one hundred and fifty dollars, about that time made by him to Wiley, Wiley pledged to Denny that note; and that it remained in Denny's hands till Wiley was adjudged a bankrupt, and till one John M. Burns was appointed his assignee, who paid off said one hundred and fifty dollars, received from Denny the five-hundred-dollar note, collected it, and now has its proceeds in his hands.

The petition further states, that on the 25th of December, 1866, Davis the petitioner became surety for the bankrupt on a note of three hundred and thirty-five dollars, executed by them to one Abraham Utter, which is now due and unpaid; that on the 15th of April, 1867, the bankrupt pledged to the petitioner the residue of said five-hundred-dollar note (then in the hands of said Denny) over and above said one hundred and fifty dollars for which it had been previously pledged, to secure and indemnify the petitioner as such surety as aforesaid; and that the petitioner is liable, as such surety, to pay the said note of three hundred and thirty-five dollars to said Utter. The petition avers that all said transactions were bona fide; and that none of them were effected in view of the insolvency or bankruptcy of Wiley, or to violate the bankrupt law [of 1867 (14 Stat. 517)]. The petition prays that the assignee Burns be ordered to pay the said Utter, out of the proceeds of the said five-hundred-dollar note, so as to save the petitioner from liability on his suretyship. Burns, the assignee, appears to the petition, and admits the facts stated in it. And these facts are otherwise sufficiently proved.

It is very clear, from the facts established in this case, that the transaction between Wiley and Davis was a pledge, and not a mortgage, of the five-hundred-dollar note. But was it a valid pledge, and such a one as can be enforced in this form of proceeding?

1. To render a pledge valid, it is a general rule, that the thing pledged must be delivered. 2 Kent, Comm. 577, 578; Story, Bailm. § 297. This rule, however, is subject to exception. It is not necessary that the possession of the pledgee should be actual. Stocks, and, it would seem, equitable interests, though incapable of actual delivery, may be pledged. Wilson v. Little, 2 Comst. [2 N. Y.] 443; Dykers v. Allen, 7 Hill, 497.

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

And perhaps it may be safely asserted that, in general, when from the circumstances of the case an actual delivery is impossible, the pledge may be good without a delivery. In this case, Wiley could not deliver the five-hundred-dollar note to Davis, because it was then in the possession of Denny, a prior pledgee. I am inclined to think therefore, that an actual delivery of the note to Davis was not indispensable to the validity of this pledge. Besides, I think that, under all the circumstances, the possession of the note by Denny should be deemed equivalent to the possession of it by Davis to the full extent of his liability on the note to Utter. On the whole, therefore, I conclude that, so far as the delivery of the thing pledged is concerned, the pledge is valid.

2. Was there a sufficient consideration for this pledge? A pledge is a species of contract; and for every contract there must be a sufficient consideration. Now, it is a general rule that a mere past consideration is not sufficient to support a contract. In the present case, the petitioner had, on the 25th of December, 1866, become surety for the bankrupt. Long afterwards, in April, 1867, in consideration of that suretyship, the pledge in question was given. It was then plainly given on a past consideration.

The only question, then, is, does the rule that a mere past consideration is insufficient, reach the cases of mortgages and pledges?—for as to these there can be no difference. I am of the opinion that they constitute a remarkable exception to the rule. I suppose that a mortgage or a pledge made upon a past consideration, if there still remains a subsisting liability, is made on a sufficient consideration. We know that it is every day's practice to enforce mortgages made to secure prior subsisting debts and liabilities; and, in this respect, surely there can be no difference between a mortgage and a pledge. Indeed, there is high authority for holding that, both in the case of a mortgage and a pledge, a past consideration is sufficient. In Jewett v. Warren, 12 Mass. 300, it appeared that Warren had become surety for Jewett by indorsing for him in blank. Afterwards, Jewett pledged or mortgaged divers saw-logs to Warren to indemnify him as such surety; and the court held that "with respect to the consideration, whatever objection might lie considering this as an absolute sale, * * * these objections vanish when the transfer is viewed as a pledge. For a liability to pay on a contract is a sufficient consideration for a mortgage or a pledge." I regard this decision in point; and, following it, I hold that the consideration, on which the pledge in question was made, is sufficient.

3. It remains to us to inquire whether the remedy prayed in this case can be granted. The petitioner asks that the money received by the assignee, and now in his hands, arising from the five-hundred-dollar note be applied to the extinguishment of the note of three hundred and thirty-five dollars, upon which he is liable as surety.

The bankrupt act does not expressly provide, for such a case as this, such a remedy as the petitioner prays. By the letter of that act it is indeed provided that a surety may pay off his liability, and then prove the payment as a debt against the bankrupt's estate. Here, however, he would only take his dividend with the other creditors; and his lien would be gone. But the petitioner occupies the place of a pledgee rather than that of a surety. And in cases of this kind, the general provision of the act is that when one has a pledge of property of the bankrupt, if as in this case, the value of the property exceeds the amount of liability for which it is pledged, the assignee may release the property to the pledgee on receiving from him such excess; or he may sell the property subject to such lien, leaving the pledgee to assert his lien as against the purchaser from the assignee.

But these provisions of the act do not reach the present case. Here the thing pledged is gone. The first pledgee has handed it over to the assignee, who has turned it into money, and has delivered over the pledged note to the maker. Under such circumstances, the proceeds of the note can only be followed into the hands of the assignee; and his right to hold these proceeds must depend, not on any regulations of the bankrupt act, but on general principles of equity. Now it is a general principle of equity that a party interested in property may follow his interest into any new form into which it may have been changed without his fault or consent. Coffin v. Anderson, 4 Blackf. 395. In my opinion, this rule applies to the present case. The note of five hundred dollars was an indemnifying pledge in favor of the petitioner. He has a right to insist on that indemnity. If the proceeds of it go into the general fund, that indemnity will be lost. The petitioner may well claim that those proceeds shall first go to discharge his liability to Utter as surety for Wiley.

It is therefore ordered that with said proceeds the assignee discharge and take up the note executed by Wiley and Davis to Utter; and that he hold the same to be exhibited as a voucher indicating the discharge of a lien on property of the bankrupt.

Case No. 17,656.

In re WILEY.

[4 Biss. 214.] [1]

District Court, D. Indiana. May, 1868.

PARTNERSHIP—INDIVIDUAL DEBTS—DISTRIBUTION—PROPERTY TRANSFERRED TO PARTNER.

1. As a general rule, partnership property must first go to satisfy partnership debts, in preference to separate debts due by a partner.

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

2. When property once belonging to a partnership, has, by a bona fide contract, ceased to be partnership property, and become the separate property of one of the partners, who afterward becomes a bankrupt, the partnership creditors are not entitled to any preference over the bankrupt's individual creditors, in relation to such property.

3. Quære, whether in such a case, the individual creditors of the bankrupt are not entitled to the preference?

[In the matter of William H. Wiley, a bankrupt.]

McDONALD, District Judge. In this case, Samuel H. Burns has filed a petition, the object of which is to have certain property applied to the payment of partnership debts of the bankrupt. The petition is sworn to; and the case made by it is as follows: In 1866, and up to the 25th of October of that year, Burns and the bankrupt were in partnership in the saw-mill business; and, as such partners, they contracted debts to the amount of one thousand two hundred and twenty-eight dollars and sixty-two cents, which have never been paid. On that day they dissolved their partnership. The terms of their dissolution appear in a written agreement, a copy of which is filed with the petition. By that agreement Burns sold to Wiley all the partnership property for seven hundred and fifty dollars; and in consideration thereof, Wiley engaged to pay all the partnership debts. On the 9th of August, 1867, Wiley was adjudged a bankrupt by this court. In his schedule, he included the said partnership debts and said partnership property, consisting of a saw-mill and its appurtenances. These have been sold for one thousand two hundred dollars, by his assignee, in whose hands the money now is for distribution. The debts proved in the bankruptcy proceeding include divers individual debts owing by Wiley, as well as said one thousand two hundred and twenty-eight dollars and sixty-two cents of partnership debts.

The petition claims that, under these circumstances, Burns has a legal and equitable right to have the proceeds of said partnership property applied to the payment of said partnership debts; and he prays for an order of the court to that effect. In this case, if Burns has any such rights as he insists on, I think it clear that he could only have them enforced by a bill in chancery. But waiving this objection to the form of proceeding, has Burns any such right as he claims?

It appears to me plain enough that the saw-mill and its appurtenances have not been partnership property at any time since the 25th of October, 1866. And, in that view it should seem strange that the proceeds of their sale made since August 9th, 1867, ought to take the course in the distribution which by law partnership assets must take.

It is well settled that where a partner is liable for partnership debts, and at the same time owes individual debts, the partnership debts must first be paid out of the partnership property, and the individual debts out of the individual property of the debtor. McCulloh v. Dashiell's Adm'r, 1 Har. & G. 96; s. c. 1 Am. Lead. Cas. 457, 469, etc. But how can this rule apply to the point in question, so as to favor Burns, unless the saw-mill with its appurtenances was, at the time of the adjudication of bankruptcy, partnership property?

Counsel for the petitioner have referred, in support of their case, to the cases of Deveau v. Fowler, 2 Paige, 400; Topliff v. Vail, Har. (Mich.) 340; and Wildes v. Chapman, 4 Edw. Ch. 669. These cases all seem to proceed on the authority of a decision of Chancellor Jones, made in June, 1827—a decision, I believe, not in print. The only authority for its authenticity is a reporter's note; and what the decision was, is therefore, not very certain. The reasoning of the cases above named does not seem to me conclusive; and I should be loth to adopt it. If even, however, it is right, the cases are not precisely like the present. In all three of them a fraud is directly charged on the partner purchasing out his co-partner; and in one of them he had expressly promised to apply the partnership property purchased by him to the payment of the partnership debts. But in the case at bar there is no charge of fraud against any one; and there was no promise by Wiley to pay the partnership liabilities with the partnership property. In no view of these cases, therefore, do I feel bound to apply the principle decided by them to the case under consideration.

There are several English cases that seem strongly opposed to the claim of the petitioner. Ex parte Ruffin, 6 Ves. 119, is, so far as I can see, a case exactly like the present. One partner had purchased all the effects of the firm from his co-partner, and had promised the latter to pay all partnership debts. Afterwards he became bankrupt; and thereupon it was urged that the partnership effects ought first to go to pay the partnership debts. The chanceller decided that, as the transaction between the partners was bona fide, the property in question ceased to be partnership property at the moment of its sale to the purchasing partner; that thenceforth it became and was his individual property, and primarily liable for the payment of his individual debts; and that his promise to pay the partnership debts created a merely personal liability to the promisee, and could not operate as any kind of lien on said property. Ex parte Fell, 10 Ves. 347, and Ex parte Williams, 11 Ves. 3, are decisions to the same effect. They appear to be well considered, and I am disposed to follow them. It is said, indeed, by Chancellor Walworth, in the case of Deveau v. Fowler, supra, that "several questions of this kind have recently arisen in England. But as the decisions appear to have turned on the construction of a particular provision in the bankrupt law giving the property to the creditors of such person as should be the visible owner,

I do not consider it necessary to notice them particularly." The English cases cited above did not "turn on the construction of a particular provision of" the English bankrupt law. The provision alluded to is found in the act of Jac. I. c. 19, § 11, which reciting "that it often falls out, that many persons before they become bankrupt, convey their goods to other men upon good consideration, yet still keep the same, and are reputed the owners thereof, and dispose of the same as their own," enacts: "That if any person, at such time he shall become a bankrupt, shall, by the consent and permission of the true owner and proprietary, have in his possession, order, and disposition, any goods or chattels, whereof he shall be reputed owner, and take upon him the sale, alteration, or disposition, as owner, the commissioner shall have power to dispose and sell the same for the benefit of the creditors seeking relief under the commission, as fully as any other part of the estate of the bankrupt." The sole object of this statute evidently was to render sales by an insolvent debtor of goods and chattels, not accompanied by the delivery of possession, conclusive evidence of fraud as to his creditors—in other words to hold property found in his possession when he becomes a bankrupt absolutely liable to go into the assets, for the benefit of creditors. The statute of 27 Jac. I. therefore, only applies to fraudulent sales by the bankrupt, and makes the retention of possession of the goods sold conclusive evidence of fraud. But the cases above cited from Vesey's Reports were not cases of sales by the bankrupts, but sales to them. Nor was there any question of fraud touching them. It is not, then, correct to say that they "turned" on the construction of the English statute. The truth is, they turned on exactly the same considerations on which the present case must turn—namely, that a sale by a partner of his interest in the partnership property to his co-partner, divests such property of its partnership character and equities, and makes it to all intents and purposes individual property, liable to the payment of the debts of the bankrupt owner. That this should be the result may be argued (as it was in those English cases by the lord chancellor) from the fact that, in cases like the present, the purchasing partner becomes the ostensible owner of all the property formerly belonging to the firm. As such sole owner, he carries on the business previously carried on by the firm. Men deal with him as sole owner. His ostensible ownership gives him credit. And if, when upon this credit, he becomes indebted and turns bankrupt, it should be urged by his old partner that the property once belonging to the partnership ought first to go to pay old partnership debts, it may well be answered that such a course would be a fraud on the creditors of the bankrupt, who obtained his credit on this very property. On such reasoning as this were the cases in Vesey decided; and deeming it sound, I decide the present case as those were decided—against the prayer of the petitioner. Indeed the petitioner may well deem himself fortunate, if the individual creditors of the bankrupt do not apply for an order directing that the money arising from the sale of the saw-mill and its appurtenances shall be first applied to the payment of the bankrupt's individual debts before and in preference to the partnership debts. In view of the 36th section of our bankrupt law [of 1867 (14 Stat. 534)], it might be troublesome to resist such an application.

The petition is dismissed at the costs of the petitioner.

Consult In re Bradley [Case No. 1,772]; In re Knight [Id. 7,880], and notes.—Reporter.

Case No. 17,656a.

WILEY v. ROBINSON.

[Hempst. 41.] [1]

Superior Court, Territory of Arkansas. Oct., 1826.

APPEAL—ADMISSIBILITY OF TESTIMONY—BILL OF EXCEPTIONS.

Where objection is made to the admissibility of testimony, the bill of exceptions must set it out, so that the court may judge of its admissibility, and, if this is not done, the judgment will be presumed to be correct.

Appeal from Conway circuit court.

Before JOHNSON, SCOTT, and TRIMBLE, JJ.

OPINION OF THE COURT. On the nineteenth of August, 1824, the plaintiff filed his account against Israel Robinson before Richard Manifee, justice, on which a summons issued against the defendant Robinson, and on the first Saturday in November, 1824, Abraham Wiley obtained a judgment, from which judgment Robinson appealed. The cause was brought before the circuit court of Conway county, and at the July term, 1826, the plaintiff obtained a judgment against the defendant for sixty-two dollars and costs. The bill of exceptions filed on the trial states that this case was an action of assumpsit for the value of certain sows and pigs; that the plaintiff offered evidence of a former judgment before a justice of the peace, and of money had and received by Robinson from Wiley, by virtue of that former judgment, to which evidence the defendant objected; that the court suffered it to go to the jury, and for this the defendant claims a reversal of the judgment. The bill of exceptions does not show what that evidence was, nor for what purpose it was offered. If it was record or parol testimony, it should have been shown, so that this court might have an opportunity of judging whether the evidence was admissible or not. At all events, it is not shown

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

that the evidence was inadmissible. It might have been admitted to prove some collateral fact, or to prove what matter had been in controversy between the parties on the former trial, or as rebutting testimony; in all of which cases, and a variety of others, it would have been admissible. The bill of exceptions does not, therefore, contain a sufficient statement of facts to show that the judgment of the circuit court was erroneous. And in this we are supported by the decision of this court in the case of Blakely v. Ruddel [Fed. Cas. Append.]. Affirmed.

Case No. 17,657.

The WILEY SMITH.

[6 Ben. 195.] [1]

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

BILL OF LADING—SALE OF CARGO—GENERAL AVERAGE.

1. The master of a vessel, which had been driven ashore by a peril of the sea, and got off, being unable to raise money to pay the salvage claims, sold a portion of the cargo for that purpose. *Held*, that the vessel was not liable for non-delivery of such cargo, under the bill of lading.

2. As the owners of the vessel offered to pay the amount of their contribution in general average, the holders of the bill of lading might recover such amount in this action, on the bill of lading.

This was an action by the consignees of a quantity of satin wood and mahogany, to recover for the failure of the brig to deliver part of it, in accordance with the bill of lading which she had given therefor. The owners of the brig set up, that, after the cargo was received on board, the brig was driven ashore by a peril of the sea, and was got off again, but, in doing so, part of the cargo in question was lost, and the vessel and cargo became liable for salvage, which the master was unable to pay, and, being unable to raise it on bottomry, he was compelled to sell the rest of the cargo in question, and that the vessel was, therefore, not liable for the non-delivery of the cargo; and they offered to pay to the libellants their contribution in general average.

T. Scudder, for libelants.

W. W. Goodrich, for claimants.

BLATCHFORD, District Judge. The evidence satisfactorily shows, that the vessel was driven ashore by a peril of the sea, within the exception in the bill of lading, and that, in taking the measures he did to save vessel and cargo, including the throwing overboard of such cargo as was lost thereby, and in selling what was saved from the cargo, the master acted in good faith, and under a sufficient necessity, for the best interests of all concerned, and with reasonable discretion. The libellants must, therefore, fail in their claim on the bill of lading, but they are entitled to avail themselves of the offer in the answer, made by the claimants, to pay their contribution in general average.

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

WILGEES (LAW v.). See Case No. 8,132.

WILGUS (MILTON v.). See Case No. 9,622.

Case No. 17,658.

The WILHELMINA.

[3 Ben. 110.] [1]

District Court, E. D. New York. Dec., 1868.

CHARTER AND BILL OF LADING—DAMAGE TO CARGO—BLOWING—BURDEN OF PROOF.

1. Where a vessel was chartered, in Buenos Ayres, to bring a cargo of hides to New York, the charter containing this clause: "The charterer furnishing the lining hides and bones for dunnage only," and, after the vessel was loaded, ordinary bills of lading were made out, consigning the cargo to the libellant, and, on delivery of cargo, part of it was found to be damaged, *held*, that, on the facts, the injury was caused by blowing, and that the dunnage was insufficient.

2. Where it appears that damage has been caused by an ordinary occurrence on a sea voyage, the burden of proof is on the ship, to show that proper precautions were taken to guard against the danger.

3. The clause above set forth had no effect to relieve the ship from the duty to properly protect the cargo, and the consignees, not being parties to the charter, but claiming under clean bills of lading, would not be bound by that clause.

4. The ship was liable for the damage.

In admiralty.

BENEDICT, District Judge. This action is brought to recover the amount of damage caused to a cargo of hides, while being transported in the bark "Wilhelmina," from Buenos Ayres to this port. The vessel was chartered in Buenos Ayres, by H. J. Ropes, by a charter party, which provides that the vessel should receive from the charterer, "say 2,000 salted hides, and the balance of cargo of dry hides, the charterer furnishing the lining hides and bones for dunnage only." The salted and dry hides were to pay freight; the lining hides and bones were to be freight free.

This cargo having been laden, bills of lading were issued for it, in the ordinary form, according to which it was to be delivered in New York, to the libellants, R. W. Ropes & Co., in like good order, dangers of the seas excepted; they paying freight for the salted and dry hides only. Separate bills of lading were issued for 160 lining hides, and for the shin bones, declaring them to be freight free. The bones were stowed in the bottom of the ship, from forward to aft; upon these were placed the salted hides, also running from forward to aft, and, upon

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

these were stowed the dry hides, filling the vessel, all being in good order when received. Upon the discharge of the vessel, in New York, a few wet hides came out, at the early part of the discharge, which were taken from the top of the cargo, aft, and which had beans sticking upon them; and, again, at the latter part of the discharge, damaged hides were reached. These, to the number of some 2,500, lay in the wings, on both sides, midships, and were wet with sea water, and seriously injured.

The real controversy, in the case, relates to these last-mentioned hides, inasmuch as it is quite manifest that the injury to the few which came out first, from near the after-hatch, was caused by the starting of the hatch in heavy weather, during the voyage, which permitted some water to pass on the hides below, carrying with it some beans, which had been placed near the hatch over the cargo. As to the injury to the other portions of the cargo, I think it clear upon the proofs, that it did not arise from leaks in the decks, or top sides. There was some starting of these seams, but no amount of water appears to have passed through upon the cargo directly, for the top portions of the cargo, midships, were not wet. The damage was below, at the bottom of the dry hides, and above the salted hides. Nor does it appear that the bark accumulated any considerable quantity of water in her bilges. The only entry in the log, upon the subject, is on one day, where it is noted that "Ship made more water than usual—kept the pumps a-going;" and no witness pretends that the pumps did not keep the water down, or that there was any considerable amount of water in her at any time. She was a new vessel. The damage was not caused by water from the decks, but by blowing. This is evident, from the position of the damaged hides, which were next the ceiling, and about the bilges. Now, blowing is one of the ordinary occurrences on a sea voyage, and injury from it can be provided against, by proper dunnage. Bearse v. Ropes [Case No. 1,192]. The burden of proof, therefore, rests upon the claimant to show that proper precautions were taken to guard against this danger. This has not been shown. On the contrary, it clearly appears that the dry hides were stowed with lining hides nailed between them and the sides of the ship, but with no or at most but very little wood dunnage between the hides and the ceiling. This appears from the testimony of persons who saw the vessel discharged; of a stevedore, who loaded the cargo in part, and refused to continue, because he was not furnished with dunnage; by the testimony of the master, who, although often on board while the vessel was loading, is unwilling to say that any wood dunnage was used for the dry hides. The evidence, upon this point, produced by the libellant, clearly outweighs the evidence introduced by the claimant, to show the presence of wood dunnage. Indeed, the attempt, on the part of the claimant, to prove that the cook, during the discharge, used up the wood, as fast as it was thrown out, to heat his galley, shows that there was an insufficient quantity for such a cargo, in such a vessel.

The use of wood dunnage, inside of the lining hides, to protect hides from damage by blowing, is proved to be a common precaution, and the absence of such a precaution is negligence, which renders the ship liable for any damage resulting therefrom. But, it is said that in this case, the charter party provided that the charterers were to furnish lining hides, and bones for dunnage, and the ship, having used all that were furnished for that purpose, is not responsible for the deficiency in quantity. To this argument, there are two sufficient answers: First, that the consignees are not shown to be parties to the charter party. They claim under clean bills of lading, which make no allusion to dunnage, or to a charter party. And, second, that the clause referred to, in the charter party, has no effect to relieve the ship from the duty to properly protect the cargo. I think the clause, fairly construed, is only a provision that the ship shall take, free of freight, and be permitted to use for dunnage such lining hides and bones or horns as may be furnished and can be so used, and that it in no way relieved the ship from the obligation to properly stow the cargo with proper dunnage.

My conclusion, therefore, is, that the ship must be held liable for the injury caused to the dry hides on board, excluding those which were discharged from about the after hatch.

Let there be a reference to ascertain the number of those hides, and the amount of damage thereto.

Case No. 17,659.

WILKENS v. SPAFFORD.

[3 Ban. & A. 274; [1] 13 O. G. 675.]

Circuit Court, D. Massachusetts. April, 1878.

PATENTS—INVENTIONS BY EMPLOYE—EMPLOYER'S RIGHTS—LICENSES.

1. S. made a contract with W. that, for a stipulated salary paid to S., he, W., was to have the exclusive benefit of the services of S. in making machinery and improvements in W.'s premises, and he was also to have the exclusive benefit of the inventive faculties of S., and of such inventions as he should make during the term of service. The term was one year, but at the expiration of that time, S. continued in the service of W. for some time longer without making any new agreement. During these times S. invented and constructed several machines, which were patented. *Held*, that W. was entitled to an exclusive use of these ma-

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

chines during the existence of the patents and any extensions, renewals or reissues thereof.

[Cited in Hapgood v. Hewitt, 119 U. S. 234, 7 Sup. Ct. 197.]

[Cited in Fuller & Johnson Manuf'g Co. v. Bartlett, 68 Wis. 80, 81, 87, 31 N. W. 750, 753.]

2. Before S. entered the service of W. he had invented and patented a machine which was not then practically useful, but which during the period of said service S. perfected at W.'s expense. *Held*, that W. was entitled to a license for the use of such machine.

[Cited in Jencks v. Langdon Mills, 27 Fed. 624.]

This was a suit in equity [by William Wilkens against Nathan H. Spafford], brought to enforce the equitable rights of the complainant, under certain contracts, in machines and inventions for the treatment of bristles, made by a workman of complainant.

J. H. B. Latrobe and Causten Browne, for complainant.

Chauncey Smith and George E. Betton, for defendant.

SHEPLEY, Circuit Judge. It is clear from the evidence in this record that no contract was made until the conference took place between the parties in New York. Although no written contract was there made between the parties, it is not difficult, from the attending circumstances and the previous correspondence between the parties, and their subsequent conduct and dealings with each other, to determine with substantial accuracy what that contract was. Spafford had written, May 5, 1864, to Wilkens, proposing to go to Baltimore, "and go to work for you for a year, if you desire it, making improvements in your machinery." Wilkens' answer, May 19th, 1864, contains the following passage: "Supposing you write me on what terms, or how much compensation you would ask me to go to work and make inventions and improvements on my place in machinery, such as is used in my business, for my only benefit, and not to be used by any one without my permission, say for one year," etc. On the 24th of May, Spafford replies—among other things: "And to this end, am ready to engage my services to you for one year, as you have named in your letter, and to give you the exclusive benefit of the same in machinery and improvements about your premises. * * * You wished me to name my price. I think, your having the exclusive benefit of my invention, that it would not be unreasonable to name twenty-five hundred dollars for a year. This sum may seem large to you, but, in case I could improve your machinery so as to save double that amount annually in your business, then it would seem small. * * *" May 30th, Wilkens replies to this letter, inviting Spafford to meet him in New York at his (Wilkens') expense, to "talk everything over," and saying: "I don't want anything except what is fair and right, and think we may agree, as I see nothing unreasonable in your proposition." The parties met in New York, and it appears clearly that the interview ended in an acceptance of Spafford's written propositions. The result follows that the contract was that Wilkens agreed to pay Spafford twenty-five hundred dollars a year; that Wilkens was to have the exclusive benefit of Spafford's services in making machinery and improvements in Wilkens' premises; that he was to have the exclusive benefit of his inventive faculties, and of such inventions as he should make during the term of service. And it also appears clearly that the engagement of Spafford was made with reference to the fact that Spafford had been engaged in inventing and experimenting upon machinery for working bristles—Wilkens being very extensively engaged in the business of manipulating bristles and manufacturing brushes from bristles. It clearly was in the contemplation of both parties that Wilkens should have the use of such machines as Spafford during the term should construct, with the skill acquired in his previous experiments, and also the exclusive use of such inventions as Spafford should make after the commencement and during the term of his employment, so as to give Wilkens "the exclusive benefit of the same" (Spafford's services), "in machinery and improvements," and "the exclusive benefit of my" (Spafford's) "invention"—that is, his inventive faculties during the year. Immediately upon the acceptance by Wilkens of Spafford's propositions, Spafford proceeds to purchase, on Wilkens' account and at his expense, the necessary tools and fittings for a shop for the experimenting upon and making machinery for manipulating bristles and spinning hair. Among other things, Spafford prepared drawings for a combing-machine. He charged Wilkens for the cost of the drawing-paper on which these drawings were made, and for his time and expenses during the eighteen days in which he was engaged in making the drawings and in the purchase of tools, and in visiting "places they spin hemp and manilla" to fit him to "make a machine for spinning the hair that will be an improvement on your" (Wilkens') "present ones." That Spafford perfectly understood that he was employed to experiment on making inventions for Wilkens' benefit is fully proved by his own letter of June 21st to Wilkens, at the close of which he writes: "I have some patterns and small pieces of machinery, such as gears, springs, &c., which will be useful in experimenting, and are not of much value to me, which I will bring on or send on by express, if you think best."

On the 1st of July Spafford reached Baltimore, and his salary and services commenced under the contract for a year's time. At the expiration of the year Wilkens was in Europe, and Spafford continued his services under the original contract, and at the same salary, until December 8th, 1865, when Spafford wrote from Baltimore to Mr. Wilkens, in Germany, suggesting "that after one year

from the time I" (Spafford) "came here we had no agreement, the old one having expired, and that it would be well for us to come to an understanding in regard to my patents and inventions." In this letter he "described the three new machines—dragger, comber, and separator—and gave their results," and told him he thought he could make three new labor-saving machines—rifling-machine, mixing-machine, and tampico and horse-hair machines—also spinning-machine for curled hair. Wilkens replied to this letter that he expected to start soon for home, and that, therefore, it would be useless for him to say anything in his letter in relation to Spafford's proposition, suggesting to him to go on slowly with as little expense as possible, until he (Wilkens) arrived, when they could talk everything over what to do next, adding: "I don't want you to stop until I come." Spafford remained without any modification of the contract at the same salary until after Wilkens' return, and the parties not agreeing upon a new contract, he left Wilkens' employment in May, 1867. During this time he invented and constructed the combing-machine, patented April 17th, 1866 [No. 54,033], the separator, patented February 20th, 1866 [No. 52,763], the bundler, patented April 17th, 1866 [No. 54,034], the leveller, or small dragger, patented October 30th, 1866 [No. 59,286], and the rifler, the model of which appears to have been completed September 15th, 1866 [patented Jan. 22, 1867, No. 61,480]. These inventions were made and patented while Spafford was "experimenting" under a salary paid him to experiment upon, invent and construct such machines, and under his own agreement to give Wilkens "the exclusive benefit of the same" (services) "in machinery and improvements," and "the exclusive benefit of my" (Spafford's) "invention." They were made in shops and with machinery and tools furnished by Wilkens and at his expense, for the purpose of such experiments, inventions and constructions, at a cost variously estimated at from twenty-one to thirty thousand dollars, and estimated by Spafford at over twenty thousand dollars.

It appears very clearly that Wilkens is entitled to an exclusive license for the use of these machines during the existence of the patents, and any extensions, renewals or reissues of the same. McClurg v. Kingsland, 1 How. [42 U. S.] 202; Whiting v. Graves [Case No. 17,577].

Before Spafford entered into the service of Wilkens he had invented and patented a dragging-machine for dragging bristles. This machine he afterwards perfected during his service with Wilkens. The original machine exhibited to Wilkens at Providence, regarding it in the light in which Spafford and Wilkens regarded it, and looking at its subsequent history, was evidently not a practically useful machine. On the other hand, its deficiencies apparently were rather structural than functional. It needed more mechanical perfection as a whole and in some of its operative parts, and such a substitution of better equivalents for some of the devices as a skilled mechanic could easily make, to render it practically useful. It needed the work of the skilled artisan more than the thought of the inventor. It needed only the crucial test of experience, of a trial test, to see how to make the mechanical devices perform their intended functions in the machine, rather than experiment as a step in invention. One or more of these machines were constructed by Spafford during his employment by Wilkens, for him and at his expense. That he should construct such machines for Wilkens was contemplated by both parties at the time of his employment. Wilkens is entitled to a license for the use of such machines so constructed, or whose construction was commenced by Spafford during the term of service.

A decree for the complainant, in accordance with these views, may be drawn up and submitted to the court.

Case No. 17,660.

WILKES v. ELLIOT.

[5 Cranch, C. C. 611.] [1]

Circuit Court, District of Columbia. Nov. Term, 1839.

EJECTMENT—AMENDMENT OF DECLARATION—ADVERSE POSSESSION—PAROL DECLARATIONS—LIMITATION—COLOR OF TITLE—TAX TITLE—EVIDENCE—ACCOUNT BOOK.

1. With the leave of the court, the plaintiff in ejectment may amend his declaration by a count upon a new demise, which count will be considered as the commencement of the suit as to the title claimed under that new demise.

[Cited in Wood v. Wood, 59 Ark. 44, 27 S. W. 642.]

2. A plaintiff in ejectment may recover without showing a possession, or a right of possession, or an entry, or a right of entry in his lessor within twenty years; no adversary possession being shown.

3. A parol declaration by the lessor of the plaintiff, that he had not authorized the suit, is not competent to show the title to be out of the lessor of the plaintiff.

4. The defendant's possession for twenty years, is no bar in ejectment, unless the defendant or the person under whom he claims, entered originally under color or claim of title; or unless, being in possession, he set up a color or claim of title hostile to that of the lessor of the plaintiff, more than twenty years before the commencement of the suit, and continued in possession ever since.

5. But if the defendant, or the person under whom he claims, entered upon and inclosed the premises, more than twenty years before the commencement of the suit, without any recognition of the title of the lessor of the plaintiff, but claiming them as his own; and continued to occupy them until suit brought, the jury may infer that the possession was adverse; and if so the plaintiff cannot recover.

6. A person who holds a bare possession of a lot in Washington, without evidence of any bona fide title, in fee, in law or in equity, (such possession being either adverse or tortious as

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

to the legal title and estate of the lessor of the plaintiff, or subordinate to such title and estate,) cannot protect his possession, after paying previous taxes, by clothing it with the legal title, obtained by refusing to pay subsequent taxes, with intent to purchase the lot at the tax-sale.

7. If the party, who calls for an account-book in the possession of the other party, examines it, he makes it evidence for such other party.

8. A purchase at a tax-sale, and inclosed possession under it, give color of title.

Ejectment for lot No. 17, in the square No. 634, in the city of Washington. The original declaration was upon the demise of Charles Wilkes only; was filed on the 7th, and was served on the 30th of September, 1836. Three other counts were, by leave of the court, filed on the 9th of April, 1839. One of them was on the demise of John G. Ladd; another on the demise of Joseph B. Ladd and Sarah Ladd, residuary legatees of John G. Ladd; and the fourth on the demise of Joseph B. Ladd. The plaintiff claimed under John G. Ladd, who purchased the lot at a sale made under a decree of this court, upon the foreclosure of a mortgage made to him by one Amariah Frost, who had a good title from the commissioners of the city of Washington. The defendant relied upon twenty years' adverse possession, under a contract of sale by one Charles Glover, who purchased at the tax-sale on the 21st of December, 1812, and obtained a deed from the corporation in 1815. This cause was submitted to the jury at April term, 1839, after several days' argument, but they could not agree, and were discharged by consent of the parties; and the cause was continued to the present term.

On the trial, Mr. Coxe, for defendant, contended that the plaintiff must show Mr. Ladd to have been in possession within twenty years before the commencement of the suit; and that the title of the lessor of the plaintiff must be a subsisting title at the time of trial. 5 Wheeler, Abr. 19, 24; Doe v. Fillis, 2 Chit. 170; Den v. Morris, 2 Hals. [7 N. J. Law] 6; 1 Munf. 454; Bull. N. P. 106.

Mr. Coxe prayed the court to instruct the jury, that the plaintiff cannot recover on the evidence stated; not having shown a possession, nor a right of possession, nor an entry, nor a right of entry, within twenty years.

But THE COURT (THRUSTON, Circuit Judge, absent) refused to give the instruction, no adverse title or possession having been shown.

The defendant then offered evidence of a conversation, in which Mr. Joseph B. Ladd, the lessor of the plaintiff, said he had not authorized his name to be used; but he did not know but that the Bank of the United States, to whom he had made a deed, would be authorized to use his name; and said further, that he then, (at the time of the conversation,) had no claim upon or interest in, the premises.

Whereupon, R. J. Brent, for defendant, prayed the court to instruct the jury, that the plaintiff cannot recover upon the demise of the said Joseph B. Ladd, if the title is shown to be out of him at the time of the demise.

But THE COURT refused to give that instruction, being of opinion that the said oral declarations of the lessor of the plaintiff, were not competent evidence to show the title to be out of him; and if it were competent for the defendant to show the title to be out of the lessor of the plaintiff by parol declarations, those made by the plaintiff's lessor, as stated, were too vague to have that effect.

The defendant having given evidence tending to prove twenty years' adverse possession by himself and his father, under whom he claims;

Mr. Bradley, for plaintiff, prayed the court to instruct the jury, that unless they should find from the evidence that Mr. Elliot, the defendant's father, originally entered into the possession of the said lot, claiming to hold the same under color and claim of title, either in his own right, or under the said Charles Glover (who had purchased the lot at a tax-sale, and contracted to sell it to the said W. Elliot), and exclusive of any other right; or, that being in possession thereof, without the assent of John G. Ladd, the ancestor of the lessor of the plaintiff, he the said W. Elliot in his lifetime, more than twenty years before the 9th of April, 1839 (the day on which the count upon the new demise under Joseph G. Ladd was filed), set up a color and claim of title either in himself, or under the said Charles Glover, and exclusive of any other right, and that the said possession continued in himself and the defendant ever after; unless the jury shall find the said facts, the possession of the said W. Elliot in his lifetime, and the possession of the defendant, are to be deemed and taken to be consistent with, and in subordination to the title of the lessor of the plaintiff, and do not constitute a defence to the present action.

Which instruction THE COURT gave; and also, at the prayer of Mr. Coxe, the defendant's counsel, instructed the jury that they might infer from the circumstances so in evidence before them, that the title claimed by Charles Glover and, after October, 1818, by W. Elliot and the defendant, was adverse to the title of the said Ladd, in its inception, and during its continuance, and exclusive of the title of any other party.

Mr. Coxe, for defendant, then prayed the court to instruct the jury, in effect, that if the defendant and his father, under whom he claims title, have held possession of the lot adversely to the title of the lessor of the plaintiff, more than twenty years before the 9th of April, 1839, when the new count was filed upon the demise of Joseph G. Ladd, the plaintiff is not entitled to recover upon that count.

Which instruction THE COURT gave; MORSELL, Circuit Judge, doubting, and THRUSTON, Circuit Judge, absent.

The defendant, having given evidence that the lot was assessed in his name, that he paid the taxes on the lot for the years 1820 and 1821, but that the taxes being in arrear and unpaid for the years 1822 and 1823, it was sold for those taxes, and purchased by his agent, John Lessford, who received a deed from the mayor

of Washington, and then made a deed of the lot to the said W. Elliot,

Mr. Coxe, for defendant, prayed the court to instruct the jury that if they should believe that evidence in relation to the sale for taxes, the plaintiff was not entitled to recover.

But THE COURT refused to give the instruction.

Mr. Coxe, for defendant, then prayed the court, in effect, to instruct the jury, that if W. Elliot was in possession of the lot, claiming to hold the same in his own right, and adversely to any other person; and, with a view to fortify and secure his possession and title, he omitted to pay the taxes for 1822 and 1823; and that the premises were accordingly sold in 1825 for the said taxes, after due notice and advertisement, and purchased at such tax-sale for his benefit, such purchase was lawful, and the defendant, claiming under the said W. Elliot, is fully protected thereby; and the plaintiff is not entitled to recover.

Which instruction THE COURT refused to give.

Mr. Jones, for plaintiff, then prayed the court to instruct the jury, that if, when the taxes were assessed and in arrear as aforesaid, and when the lot was advertised and sold for taxes, as aforesaid, the said W. Elliot held the bare possession of the said lot, without evidence of any bonâ fide title in fee, at law or in equity, to the same, and that such possession was either adverse or tortious, as to the legal title and estate of the said John G. Ladd, or his devisee, the lessor of the plaintiff; or was subordinate to such title and estate, and that the said Elliot, after having paid the said taxes so assessed for the years 1821 and 1822, purposely and designedly suffered the said taxes to fall in arrear as aforesaid, to the end of having the said lot so sold for such taxes, and of procuring the same to be bought in for him, with the intent, purpose, and design of clothing such his adverse and tortious, or subordinate possession with the legal estate, and of defeating and divesting the legal title and estate of the said John G. Ladd, or of his said devisee, then such sale for taxes, and such conveyances in execution of such sale were inoperative so as to clothe such bare possession of the said Elliot with the legal estate, and thereby to divest and defeat the legal title and estate of the said J. G. Ladd, or his said devisee.

Which instruction THE COURT gave.

THE COURT decided, that if the plaintiff examines the account-book called for by him, in the possession of the defendant, he makes the book evidence for the defendant.

Mr. Coxe, for defendant, further prayed the court to instruct the jury, in effect, that if the said Glover purchased the lot at a tax-sale in 1812, and W. Elliot entered into and inclosed the same in 1815, or in the spring of 1816, claiming the same under a contract, verbal or written, with the said Glover; and the said W. Elliot, and the defendant claiming by conveyance from him, has ever since held the same under inclosure, claiming it as his own, then the plaintiff is not entitled to recover.

Verdict and judgment for the defendant.

Case No. 17,661.

The WILKESBARRE COAL & IRON CO., 129.

[5 Ben. 482.] [1]

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

DEMURRAGE.

Cargo was shipped on a barge at Philadelphia to be brought to New York and there delivered to the ship L. The barge delayed on the voyage to New York, and failed to deliver the cargo to the L. as soon as the shipper had contracted to deliver it to her, and he filed a libel against the barge to recover, as damages for the delay, demurrage for which it was alleged he had become liable to the L. *Held*, that, as it did not appear that any legal claim for demurrage existed against the libellant in respect of any delay in putting on board the L. the cargo in question, or that any such demurrage had been paid, the libel must be dismissed.

The libel in this case alleged that the libellant was under a contract with the ship Levanter to deliver to her, on or before April 21st, 1869, certain machinery, the ship being in the port of New York, bound for Callao; that, on April 17th, he shipped the machinery at Philadelphia, on the barge, to be carried to New York and delivered to the Levanter; that she wrongfully delayed, so that she did not deliver the machinery to the Levanter till April 28th; and that he thereby became liable to the owners of the Levanter for seven days' demurrage, at $115 a day, for which sum, as damages, he sought to hold the barge.

T. Scudder, for libelant.

C. M. Da Costa and O. E. Bright, for claimants.

BLATCHFORD, District Judge. In this case a decree must be entered dismissing the libel, with costs, on the ground that it is not shown affirmatively by the libellant, that he paid anything for demurrage caused by the delay of the barge in transporting the machinery in question to New York. Although it is shown that he paid some demurrage to the charterers of the Levanter, yet it is not shown that any legal claim for demurrage in fact existed against the libellant, in respect of any delay in putting on board of the Levanter the machinery in question.

WILKESON (STANTON v.). See Case No. 13,299.

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

Case No. 17,662.

WILKIE et al. v. TWO HUNDRED AND FIVE BOXES OF SUGAR.

[Bee, 82.] [1]

District Court, D. South Carolina. July, 1796.

DERELICT—PROPERTY FOUND AT SEA—ABANDONMENT.

No length of time shall divest the original owner of property found derelict at sea. It will be restored upon payment of salvage according to circumstances; unless there be proof of an intention to abandon wholly.

[Cited in The John Wurts, Case No. 7,434.]

[Cited in Eads v. Brazelton, 22 Ark. 499.]

BEE, District Judge. The libel is filed against sundry articles claimed as derelict. The vessel out of which they were taken, was found on the high seas, without any living creature on board; and is supposed to be Spanish. A claim is exhibited by the Spanish consul on behalf of the owners or insurers of a Spanish vessel called the St. Petre, belonging to subjects of the king of Spain. It is stated that the said brig, having encountered a violent storm at sea, was so much damaged as to compel the master and crew to abandon her. That they accordingly quitted her, and were received on board of an American vessel belonging to Philadelphia, where they arrived in safety. The claim further states that the said brig afterwards drifted near the shore of North Carolina, and was carried into some port of that state; where the rest of the cargo was safely landed.

In arguing the cause, it was strongly contended for the actors that this vessel had been so completely abandoned at sea as to become the property of the first subsequent finder. It was said that the owner of property might so cast it away as to relinquish his right; and that such was the case here. But, to constitute such a relinquishment, it must be shewn to be voluntary, and not caused by circumstances which the first owner could not control. If a case of this sort ever happened, the present is not like it. There is not a shadow of reason for supposing that this vessel was abandoned voluntarily. When the articles now libelled for were taken out, the vessel was a mere wreck: she had evidently been exposed to some dreadful tempest. If it were proved that she had been long in this condition, it would give no better right than would have accrued on the day subsequent to the abandonment of her. Cases were cited to shew the difference in regulating wreck and derelict, from the times of the Rhodians to the present. The laws of Rhodes did, indeed, give all wrecked property, cast on shore, to the lord of the soil, even though the owners were saved. But the Roman law was directly opposed to this; and the laws of Oleron make a distinction between wrecks where all on board had perished, and those where some living creature had reached land; probably because, in the latter case, the original owner might be discovered. But if this was thought necessary formerly, it can hardly apply to modern times, when the marks of property are so much more numerous and clear. Molloy says that there is as it were a contract between those who are wrecked and those on land where the goods are cast, that the same shall be restored. And Lord Mansfield in the case quoted from 5 Burrows, 2738, asserts that there never was a determination in the courts so contrary to the principles of law, justice, and humanity as the one now contended for. The same may be said of all the old cases from Molloy, Bracton, Briton, Postlethwaite, Domat, and others, respecting derelicts at sea. Why should the owners of property suffer more on one element than on the other? Formerly, indeed, the probability of its being saved at sea was comparatively small, because fewer vessels then navigated the ocean. But at this day, when it is covered with the ships of different nations, the chances of being met with are a thousandfold greater, and the doctrine no longer should be maintained. Vattel calls it "the unhappy fruit of barbarism, which almost every where disappeared with it." Vatt. Law Nat. 1, 23, 293. The case cited from Beaw. Lex Merc. 147, is in point. The vessel there was abandoned at sea by the master and crew; yet the court of admiralty of Dunkirk gave salvage, and restored the rest. In that case, as in the present, the abandonment was, perhaps, premature. That vessel did not go to pieces; and this brig drifted to the coast of North Carolina: for I have no doubt that she is the same that the Spanish consul describes. This is clear to me from a comparison of the protest of Captain Basset, who carried the crew to Philadelphia, with that of Captain Wilkie, who met with the brig after she was abandoned. The former says that she was a brig, called the San Piero; that she was abandoned on the 4th August; that she appeared to him to be in a most dismal situation, her masts gone, and her rudder almost gone; that it was so broken as to be unfit for use, and incapable of repair; that the vessel leaked much, and that, in his opinion, the crew would have risqued their lives by remaining longer on board. Wilkie says that he met wth the vessel on the 19th of August; that she appeared to be either a ship or a brig; that she seemed to have lost her masts, though, when he boarded her, he found her mainmast and bowsprit standing. The head of the rudder down to the water's edge was broken off, and she had four feet water in her hold. In passing her stern he saw some letters, under the cabin windows, nearly effaced; but he supposed them to mean St. Peter. These different names of the same saint might, in so obliterated a state, appear a little differ-

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

ent to these two captains. Some of the exhibits state that the brig San Pedro drifted on the shore of North Carolina some time in the same month of August. She had been derelict fifteen days when Wilkie found her. He towed her till the 22d, and then the hawser broke, and she parted in the night, at such a distance from the spot to which she drifted as might well be passed in the nine remaining days of August.

From a view of all these circumstances, I am satisfied that this is the same vessel, and upon a comparison of this case with that of The Priscilla, decided by me three years ago, I see no reason to vary from the principle established on that occasion. If I am wrong, an appeal to a higher tribunal will put at rest all difference of opinion upon a point of so much importance to the interests of commerce.

I adjudge and decree that the proceeds of the sale of the articles mentioned in the libel, after deducting the usual charges, be divided equally between the actors and the former owners, if they shall duly authenticate their property within twelve months from this day. If not, let one moiety remain deposited in the branch bank of this city to await the further order of the court. As there is a possibility that this may be finally adjudged to persons not subjects of the king of Spain, I dismiss the claim of the Spanish consul; but without costs.

Case No. 17,663.

WILKINGS v. MURPHEY.

[Brun. Col. Cas. 21;[1] 2 Hayw. (N. C.) 282.]

Circuit Court, D. North Carolina. 1803.

LIMITATION—NEW PROMISE BY ADMINISTRATOR—ASSUMPSIT—JOINDER OF COUNTS.

1. Whether an admission of a debt of the intestate by an administrator, where the intestate has been dead more than three years, will take the case out of the statute of limitations, quære?

2. A count upon the intestate's promise, and upon that of the administrator to pay the debt of the intestate, may be joined.

Plea, the act of limitations; replication, that the intestate assumed, and the evidence offered was that the administrator promised within three years. It was objected that such evidence was not that which the replication offered, and therefore should not be received. To this it was answered that an admission of the debt by the administrator takes the case out of the act; and there is no other way of giving the evidence to the jury but under a replication such as this. If the replication should state a promise of the admintstrator, that would be a departure from the declaration, which states a promise of the intestate. And you cannot in the declaration join a count founded on the promise of the administrator with that against the intestate. Such counts cannot be joined, the judgments upon them being different; the plaintiff's counsel cited 4 Term R. 347; H. Bl. 108, 110; e contra, was cited H. Bl. 104.

MARSHALL, Circuit Justice. I doubt whether an admission of the debt by the administrator will take the case out of the act of limitations; for the admission presupposes a promise made within three years, and how can this be when the intestate has been dead ten years? If it were true that an admission of the debt did take the case out of the act, and it could not be given in evidence at all unless allowed of upon such a replication, I should think that a strong argument for admitting the evidence. But the premises are not correct; it is not true that a count upon the intestate's promise, and upon that of the administrator to pay the debt of the intestate may not be joined; the contrary is directly proved by the case cited from H. Bl. 104, where the administrator upon an insimul computasset and promise thereon was held liable de bonis testatoris. The other cases cited, which state that he is bound de bonis propriis, are where neither the consideration nor the promise arose after the death of the intestate, and in the time of the administrator; here the promise was on a consideration arising in the time of the intestate. The cases are reconcilable.

The verdict founded on the admission of the evidence was set aside, and leave given to the plaintiff's counsel to add a count, the plaintiff paying costs up to this time.

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission.]

WILKINS (BALFOUR v.). See Case No. 807.

WILKINS (BINGHAM v.). See Case No. 1,416.

Case No. 17,664.

WILKINS v. DAVIS.

[2 Lowell, 511;[1] 15 N. B. R. 60.]

District Court, D. Massachusetts. Nov. 13, 1876.

BANKRUPTCY — DISCHARGE OF PARTNER — JOINT AND SEPARATE DEBTS — PROOF OF DEBTS — LIABILITY OF SOLVENT PARTNER — LIMITED PARTNERSHIPS.

1. If a member of a firm obtains his discharge in bankruptcy, he is released from liability for his joint as well as his separate debts.

2. The partners of the bankrupt are bound by the discharge as well as the joint creditors.

3. A joint creditor may prove against the separate estate of the bankrupt, and may vote for assignee, examine the debtor, and object to his discharge. He cannot compete with the separate creditors in the distribution of separate assets, but will receive dividends from any joint assets

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

which the assignee may obtain, and from any surplus of the separate assets after the separate debts are paid.

[Cited in Re Webb, Case No. 17,317; Re Brick, 4 Fed. 806.]

4. The bankruptcy of one partner, ipso facto, dissolves the partnership, and the assignee is tenant in common with the solvent partner in the joint stock.

[Cited but not followed in Crompton v. Conkling, Case No. 3,407.]

[Cited in Curtis v. Woodward, 58 Wis. 502, 17 N. W. 331.]

5. A court of equity may give either the solvent partners or the assignee the settlement of the joint affairs.

6. The assignee may recover at law or in equity, as the nature of the case requires, from a solvent partner what is due from him by the articles of copartnership.

7. A statute of Massachusetts provides that limited partnerships may be conducted in the name of the general partner, and that the special partner shall be responsible for the capital contributed by him; and if, at the termination of the partnership, the assets are not sufficient to pay the partnership debts, he shall be responsible for all sums drawn out by him, with interest. A general partner in such a firm became bankrupt, with assets insufficient to pay the joint debts. *Held*, that his assignee could recover from the solvent special partner the sums withdrawn by him during the continuance of the firm.

8. Nutting v. Ashcroft, 101 Mass. 300, considered.

Action of contract by [C. W. Wilkins] the assignee in bankruptcy of the estate of C. W. Eaton to recover $3,545.49, alleged to be due from the defendant [G. P. Davis]. The parties waived a trial by jury, and submitted the case on the facts, agreed to be thus: The bankrupt and the defendant were associated in a limited copartnership in the clothing business, which was to have terminated Oct. 11, 1875; the bankrupt was the general partner, and carried on the business in his own name; the defendant was the special partner, and contributed the whole capital in cash; during the continuance of the firm he drew out, as interest on his capital, the sums sued for in this action; the general partner became bankrupt in July, 1875, the unpaid joint debts exceeding the value of the joint assets by more than $3,500. Eaton, in his petition, described himself as a member of the firm, but asked for no decree against the defendant or the firm; and none was made. No notice of the petition was given to the defendant; and the assignment to the plaintiff did not mention joint property, but was in the usual form (No. 18), and included "all property of whatever kind, of which he (the bankrupt) was possessed, or in which he was interested, or was entitled to have," on the day the petition was filed. The General Statutes of Massachusetts (chapter 56, § 8) provide that during the continuance of a limited partnership no part of the capital stock thereof shall be withdrawn, nor any division of interest or profits be made, so as to reduce the capital stock below the sum stated in the certificate which the law requires to be made and recorded; and that if, during the continuance or at the termination of the partnership, the property or assets are not sufficient to pay the partnership debts, the special partners shall severally be held responsible for all sums by them in any way received, withdrawn, or divided, with interest. The fourth article of the agreement between the parties provided that they should divide profits and losses in the proportion of seventy-five per cent. to and by the special partner, and twenty-five per cent. to and by the bankrupt, except that in no event should the defendant lose more than the capital contributed by him and interest thereon, and the sums he may have withdrawn from the firm. The joint assets were included in the bankrupt's inventory, and had come to the possession of the assignee. The joint creditors had proved their claims.

J. R. Bullard, for plaintiff.

B. L. M. Tower, for defendant.

LOWELL, District Judge. I understand the defendant to admit that by the law of Massachusetts, as applied to the facts of this case, he is liable for the sums mentioned in the declaration, but to deny that the assignee has any interest in them. It has been announced of late, chiefly in dicta, that all the members of a firm must become bankrupt, in order that the assignees should be able to deal with the joint stock, or that a discharge should be obtained from joint debts. In re Little [Case No. 8,390]; In re Winkens [Id. 17,875]; Hudgins v. Lane [Id. 6,827]. Such, however, is not the law, as I understand it.

1. It has been settled for more than a century and a half, that, if one member of a firm becomes bankrupt and obtains his discharge, he is released from all his debts, joint and separate. Ex parte Yale, 3 P. Wms. 24, note a. This leading case is the law of England to-day. Ex parte Hammond, 21 Wkly. Rep. 865. It has not been necessary to reaffirm it often; but the doctrine has been acted on and applied in various ways. Where the bankrupt was a member of a company which was for some purposes a partnership, the court extended the rule to him: Thomson v. Harding, 3 C. B. (N. S.) 254. So the proceedings and pleadings in such cases have repeatedly recognized the law that one partner is discharged by his separate certificate; such as Bovill v. Wood, 2 Maule & S. 23; Noke v. Ingham, 1 Wils. 89; Booth v. Middlecoat, 6 Bing. 445. In this last case, it does not distinctly appear whether the bankrupt was a partner or a joint contractor; but the very absence of information upon the point shows it to be immaterial. See Lindl. Partn. 1027; Id. (2d Ed.) 1197; Colly. Partn. (5th Am. Ed.) § 858; Mont. & A. Bankr. (2d Ed.) 748; 1 Deac. Bankr. 797; Robs. Bankr. (2d Ed.) 554; Id. (3d Ed.) 596. If a creditor who had proved his debt against a bankrupt partner brought an action at law against the solvent members of the firm, and joined the bankrupt as a defendant, which at law he was bound

to do, for reasons not now necessary to be stated, yet the lord chancellor would require him to give security to the bankrupt against all damages and costs. Ex parte Read, 1 Rose, 461; Ex parte Stanton, 1 Mont. D. & D. 273; Ex parte Mills, 6 Ch. App. 594. Not only will the joint creditors be barred, but the bankrupt's copartners equally; because they may pay the joint debts, and prove against the bankrupt's estate the equitable debt arising from any deficiency in his account. Wood v. Dodgson, 2 Maule & S. 195; Affalo v. Fourdrinier, 6 Bing. 309; Butcher v. Forman, 6 Hill, 583. I have had such cases. That a joint creditor can prove under a separate bankruptcy, and will, therefore, be bound by the discharge, is fully admitted in the United States. The early case of Tucker v. Oxley, 5 Cranch [9 U. S.] 34, went beyond this, and has been modified; but the general proposition laid down by the court, that such a debt is provable, has never been impugned. It is recognized in our statute (section 5118): "No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, or otherwise." Of similar language in the act of 1800 [2 Stat. 19], Marshall, C. J., said that it removed all doubt on the subject ([Tucker v. Oxley] 5 Cranch [9 U. S.] 40); and the authorities are as decisive as the argument. The fact that joint creditors cannot prove against the separate estate might mislead a careless reader of some of the cases into an impression that they could not prove at all; but the true rule is that they may prove, and may vote for assignee, and be heard on the discharge, and examine the debtor, and share any joint assets or any surplus of the separate assets. Heath v. Hall, 4 Taunt. 328; Ex parte Crisp, 1 Atk. 133; Crispe v. Perrit, Willes, 467; Ex parte Farlow, 1 Rose, 421; Ex parte Elton, 3 Ves. 238; Willson v. Gomparts, 11 Johns. 193; Barclay v. Phelps, 4 Metc. (Mass.) 397.

2. It is equally well settled, and is a necessary part of the theory, that the bankruptcy of one partner dissolves the partnership, excepting for the purpose of closing the joint affairs, and that the assignee is tenant in common with the solvent partner of the joint stock. It usually happens that the latter will be in possession of the stock, and this will not be disturbed, excepting for good reasons; and, on the other hand, if, as in this case, the assignee is in possession, that will not be disturbed without good cause. A court of equity has undoubted power to intrust either the solvent partner or the assignee with the exclusive control of the settlement; but if no order is made, the assignee having possession will go on and collect the joint assets, and pay the joint debts, by way of dividend, to those creditors who come in and prove. See West v. Skip, 1 Ves. Sr. 239; Dutton v. Morrison, 17 Ves. 193; Murray v. Murray, 5 Johns. Ch. 60; Parker v. Muggridge [Case No. 10,743]; Ayer v. Brastow [Id. 682]; Amsinck v. Bean, 22 Wall. [89 U. S.] 395.

It is argued that the assignee of one partner cannot interfere with the affairs of the firm, unless the decree of the court expressly confers upon him such a right. But no such point was taken in any of the cases above mentioned. On the contrary, the facts in all of them simply show that one partner was bankrupt. This, of necessity, disposes of all his property; and one part of that is his interest in any firm, or any number of firms, of which he was a member. It seems to be thought that one may be bankrupt and not bankrupt at the same time; bankrupt as an individual, and not so as member of a firm. This is impossible. A man may be bankrupt when the other members of his firm are solvent, and when the joint assets are in excess of the joint debts, because he may owe separate debts beyond the amount of his separate property added to his share in a solvent joint business. I have had such a case; and the assignee very properly made a settlement with the solvent partner, by which the joint debts were paid by the latter, and the value of the bankrupt's interest in the firm was paid over to the assignee for distribution among his separate creditors. If the balance had been against the bankrupt, the solvent partner, upon paying the joint debts, could have proved for it, and have received a dividend from the separate estate, as I have already shown. But the partner would be no less bankrupt in either case, and his assignee would have no other or different title, so far as his estate was concerned, than if all the members of the firm were bankrupt; though, of course, the settlement would be much easier with an entirely solvent partner than with one who was embarrassed, though not bankrupt; and the assignee might be obliged in the latter case to take upon himself a large part of the settlement of the joint affairs, or the whole of it, under the direction of a court of equity.

It is said that some of the remarks of the learned judge who delivered the opinion of the court in Nutting v. Ashcroft, 101 Mass. 300, assert that the assignee of the general partner acquires no interest in the joint stock, unless the firm is adjudged bankrupt after notice to the special partner. Those observations were not necessary to the decision, which was that the assignee of one partner could not sue the other partner in trover for joint stock. I can see no propriety in notifying a solvent partner of the petition of his copartner, nor any standing he would have to oppose or assent to the decree. Nor is it proper or lawful to adjudge a firm bankrupt which consists of a bankrupt general partner and a solvent special partner, nor is it material whether the firm, as such, is able to pay all its debts or not. The decree against the general partner necessarily includes his interest in the joint stock, for the simple reason that it is his. If it were not so, he might obtain his discharge, and then pocket

his share of the surplus of his solvent joint business, if it happened to be solvent, leaving his separate creditors discharged, but not paid, an injustice which the law does not permit. Nutting v. Ashcroft, ubi supra, appears to have been argued for the plaintiff on the assumption that the assignee of a general partner succeeds to his sole right to manage the joint affairs; which cannot be admitted. The bankruptcy dissolves the partnership, and I suppose the solvent special partner has the same right to wind up the affairs which a general partner would have, which is, to deal with such joint stock as he happens to have in his possession, with a like right in the assignee of the special partner, subject, as to both, to the decree of a court of equity, if applied for and necessary. This being so, the decision in Nutting v. Ashcroft was clearly right, because the action was trover, and neither tenant in common can maintain that action against the other; but the reason given, that the bankrupt had not assigned his interest in the joint stock, I cannot assent to; it contravenes all the cases above cited, is inadmissible in principle, and contrary to the very words of the assignment which conveys all his estate.

A rule of this court, as of several other district courts, requires the bankrupt to include his joint creditors in his schedules, in order that they may be notified and may prove their debts, and share in the joint assets and in any surplus of the separate assets, and exercise the right of examination, &c., as they may be advised. All this has been done here; and, besides, the inventory includes all the joint assets, because they were all in the hands of the general partner. If they had not been, he would merely have said, "My interest in such a firm, the joint property being in the possession of my partner B." His assignee's title would be the same in either case, though his right of possession would not.

3. The remaining question is, whether an action at law in the nature of assumpsit will lie to recover the sums which the special partner had drawn out while the firm was going on. The statute says that he shall be responsible for them, but does not say to whom. The articles of copartnership follow the statute to the extent of three-quarters of the losses. I suppose it to be clear that if the general partner had remained solvent, but the joint business had been unsuccessful, so that these sums were needed to make good the defendant's share of the loss, the general partner, if he had paid all the joint debts, and there were no question of accounts, could, by the law of Massachusetts, have maintained an action at law for this amount. If partnership accounts were to be settled, the general partner must go into equity; and if he refused to bring such a suit, and had not paid the joint debts, the creditors might bring one. So far, I apprehend, there is no dispute. If, the general partner remaining solvent, only a part of these sums were necessary to make up the defendant's share of loss, whether the creditors could compel him to pay them, without first resorting to the solvent partner, I do not know; but as they must join both partners in a suit in equity, the court could regulate that matter. The assignee, who succeeds to the rights of the general partner, might, undoubtedly, in some form of suit, oblige the defendant to make good whatever the partnership articles call for, which is three-quarters of the losses; and, upon the whole, I am of opinion that he can, upon some terms, represent the creditors likewise, and sue for the other quarter part. If the whole sum is clearly and admittedly requisite to make up the capital, according to the statute, the assignee may maintain an action at law for its recovery; if there are disputed accounts, he must proceed in equity.

If a corporation is bankrupt, and the shareholders are liable to definite assessments, which the corporation had the power to lay, the assignee may lay them, under the direction of the court, and may recover the amounts of the shareholders. If, on the other hand, the right of recourse against shareholders is given to the creditors independently of and adversely to the corporation, and especially if the creditors must work out their rights by a bill in equity, and different creditors have different rights depending upon the date of their debts, or upon estoppels applying only to a part of them, it might be impossible that all these equities could be worked out through the assignee. The authorities upon this point are not very clear; but I take the law to be that the assignee has all the rights and powers which are given to the whole body of creditors, or to the whole of any one class of creditors, whether at law or in equity, and may maintain any suit for which, for instance, a general creditor's bill would lie, and this exclusively of the creditors themselves.

In this case, the assignee has all the assets. No application has been made to this court in equity to restrain his proceeding; no objection is taken to it: he can and will distribute all the apparent assets; and I see no objection, and can think of none, to his recovering those he now sues for. In an ordinary case, the assignee must join the solvent partner as a plaintiff in a suit for assets; but here the defendant is the solvent partner; and either the assignee may maintain a suit, or it must be left to a creditor's bill, to which the assignee must be a party on the one side or the other, in order that he may show whether these sums are necessary to make up the deficiency, and that he may protect the interests of the separate creditors. It will be observed that the court of bankruptcy has full power to impose upon the assignee any terms, such as giving bond, that may be necessary to secure the rights of all parties.

If no order of this kind is asked for, the entry will be "judgment for the plaintiff."

Case No. 17,665.

WILKINS v. JORDAN.

[3 Wash. C. C. 226.] [1]

Circuit Court, D. Pennsylvania. April Term, 1813.

PRACTICE IN EQUITY — NOMINAL DEFENDANT — ANSWER UNDER COMMISSION — DISSOLUTION OF INJUNCTION — NOTICE.

1. Under special circumstances, as if the defendant in a bill for an injunction be merely nominal, the court will, on the application of the party really interested, though not a party on the record, direct the answer of the nominal party to be taken under a commission; and notice of such an application to the court, is not necessary.

2. Notice of a motion to dissolve an injunction must be given, unless the cause has been set down for dissolution, in a reasonable time before the motion is made.

The complainant filed a bill in this court, praying an injunction against a judgment obtained here—which was granted. The defendant forwarded his answer, and afterwards an amended answer, in which he states that he had, long before the institution of the action at law in his name against the complainant, assigned over to one West all his right and title, claim and demand, against the complainant; and that the suits at law were instituted by said West, and carried on at his expense;—that he made also a general assignment of the residue of his property, for the benefit of all his creditors, to whom he delivered over his books, and of course cannot give a distinct answer to many of the allegations in the bill. Upon an affidavit of West, that these answers are not full and satisfactory, and a suggestion that they had not been fairly taken, a motion was made for a commission to take the defendant's answer.

WASHINGTON, Circuit Justice. This motion is not objectionable on account of its novelty, as we know that in England, answers taken in the country are always under a dedimus potestatem to commissioners. The practice in this country, so far as we are acquainted with it, is otherwise; nor should we like to adopt, generally, that which prevails in England. But when the defendant is merely nominal, and has not the means, and probably might not have the inclination, to give as full an answer as the case admits of, and the interest of the party really interested demands, we should think it entirely proper to issue a commission, upon the application of the real party in the cause; particularly when it is considered, that if the answer be insufficient, the complainant alone has the power to except—which he will never do, if the answer suits his purpose. As the plaintiff, if he means nothing but what is fair, (and in this case we see no reason for suspecting the contrary,) cannot possibly be injured by the defendant's answer being taken under a commission, no notice of such a motion is necessary. But the motion to dissolve the injunction in part, cannot be listened to without a previous reasonable notice, either in writing, or by setting it down for that purpose, a sufficient length of time before the motion is made, to allow the complainant to take affidavits to support his bill.

In this case, we shall direct a commission to issue for the reasons before mentioned, and not on account of any alleged impropriety of conduct in the plaintiff or his agents. Were this the only ground for such a motion, we should require notice to the adverse party, that he might be prepared with counter-affidavits, if he thought proper.

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

WILKINS (JORDAN v.). See Cases Nos. 7,526 and 7,527.

Case No. 17,666.

WILKINS v. WRIGHT et al.

[6 McLean, 340.] [1]

Circuit Court, D. Ohio. April Term, 1855.

DEEDS OF TRUST AND MORTGAGES — FORECLOSURE.

1. The distinction between a deed of trust and a mortgage, is somewhat technical.

[Cited in Bingham v. Frost, Case No. 1,413.]

[Cited in Palmer v. Mason, 42 Mich. 152, 3 N. W. 948.]

2. Before a default in payment, the property mortgaged may be sold on execution as the property of the mortgagor.

3. This cannot be done under a deed of trust.

4. To perfect a title under a mortgage, a judicial sale must be had.

5. Under a deed of trust, a sale is not required.

6. So nearly are these instruments assimilated, that different minds may come to different conclusions in regard to the character of the same instrument.

In equity.

Messrs. Andrews, for plaintiff.

Mr. Parker, for defendant.

McLEAN, Circuit Justice. The lessee of plaintiff are heirs at law of Diana Rapelye, deceased, and claim under a deed to their ancestor from Joseph Evans, dated 19th June, 1817. Defendant's title is under a later deed from Evans. The case turns on the character of the deed to Rapelye. On its face this deed is absolute. But the following indorsement is made upon it: "It is perfectly understood between Diana Rapelye and Joseph Evans, that the said Diana is to hold the within mentioned tracts of land, as a deed of trust, for the said Joseph Evans, and as security for her, until he pays the five hundred and the one thousand dollars with interest, which he has given his notes for,"

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

&c. If the notes were not paid at the time specified, "the said Diana will have full power to sell or to act as she thinks proper; but the said Evans is to have the privilege of selling the lands, at any time within the period specified in the notes, but the notes to be taken up before the deed is returned; the interest on the notes are included, but if taken up before due, then the interest to be deducted from the date." Notes were drawn payable in two and four months. If the notes should be paid, then "the deed for the land to be again made to Evans, free from all incumbrances whatsoever."

The question arises whether the above deed, with the indorsement, is a deed of trust or a mortgage. If it be a mortgage, before forfeiture it may be sold on execution against the mortgagor, subject to the mortgage. But if it be a deed of trust, nothing remains in the grantor which can be reached by execution. If it be a mortgage, on the payment of the money the title reverts to the mortgagor. But if it be a deed of trust, a reconveyance of the land is necessary. In either case, the land is a security for the money. But under the mortgage a sale would be necessary to perfect the title in the mortgagee or in any other person. But if the instrument be a deed of trust, the fee stands vested in the grantee, and no sale is necessary.

The distinction between a deed of trust and a mortgage, is somewhat technical, and in many cases different minds might incline to the one character or the other of the same instrument. The parties in this case call the instrument a deed of trust, and provide that on the payment of the money, the title should be reconveyed to the grantor, free from all incumbrances. This is not the language of a mortgage, which provides that, on the payment of the money the conveyance should be of none effect. From expressed language of the parties, they would seem to have considered the instrument as a deed of trust. And as this kind of instrument best secures the right of the grantee, we may presume the form was adopted with that view.

Upon the whole, we think the instrument may be considered as a deed of trust, but we decide nothing more. Any equitable rights which the defendants may have, are neither shown nor considered in the case.

Case No. 17,667.

In re WILKINSON.

[3 N. B. R. 286 (Quarto, 74);[1] 2 West. Jur. 350; 16 Pittsb. Leg. J. 237.]

District Court, E. D. Missouri. Nov., 1869.

BANKRUPTCY—DISCHARGE.

It is the duty of the court to refuse a discharge to the bankrupt where, upon an inspection of the record, it appears that he has done those acts which prevent his receiving a discharge, although no objections are interposed by creditors.

[Cited in Re Antisdel, Case No. 490.]

[In the matter of Joseph L. Wilkinson, a bankrupt.]

PER CURIAM. The bankrupt applied to be finally discharged, no objection being interposed by creditors. The court, upon inspecting the record of the bankrupt's examination by the assignee, discovered that since the passage of the act the bankrupt had lost a large sum of money at gambling. The discharge was refused, the court holding that it was its duty to examine the record before granting a discharge, and if it appeared that the bankrupt was not entitled thereto, to refuse it, although creditors interposed no objection.

[1] [Reprinted from 3 N. B. R. 286 (Quarto, 74) by permission.]

Case No. 17,668.

WILKINSON v. BABBITT.

[4 Dill. 207.][1]

Circuit Court, W. D. Missouri. 1877.

UNITED STATES AS A PREFERRED CREDITOR—SUBROGATION.

The complainant, as collector of internal revenue, *held* not entitled, by way of subrogation, to the rights of the United States as a preferred creditor.

[Cited in Dorian v. City of Shreveport, 28 Fed. 295; German Bank v. U. S., 148 U. S. 581, 13 Sup. Ct. 705.]

[Cited in Goble v. O'Connor (Neb.) 61 N. W. 135.]

This was an appeal from a decree of the district court [of the United States for the Western district of Missouri] sustaining a demurrer to the bill of complaint and dismissing the bill. [Case unreported.] The bill charged that the defendant [James C. Babbitt] is the assignee in bankruptcy of the Union German Savings Bank; that the bank had been adjudged a bankrupt April 3d, 1873; that at the time of the bankruptcy there was on deposit in the bank $1,062.62, moneys belonging to the United States, which had been placed there by one Voede, who, at the time of such deposit, was a deputy collector under the complainant [C. B. Wilkinson], who was collector of internal revenue; that the moneys so deposited were moneys arising from collections of internal revenue. The complainant, as required by law, paid the aforesaid sum into the treasury. The complainant, in his bill, claimed that by the deposit of the money in the bank he became the surety of Voede, and of the bank to the United States; and that the United States, until the 3d of April, 1873, had a cause of action against the bank and Voede; and that, by virtue of the payment of the said sum of $1,062.62 to the United States by complainant, he became entitled to the preference of

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

the United States as against the bank, and asked to be so subrogated as a preferred creditor. The defendant demurred.

James S. Botsford, for appellant.

Henry Flanagan and H. N. Ess, for respondents.

DILLON, Circuit Judge. The deposit of the money by Voede in the Union German Savings Bank was the act of complainant; the deputy, who is his appointee, authorized by law, derives the breath of life from the collector—is appointed by, and receives his pay from, and is removable at the pleasure of, the collector. The deposit of money in the bank did not create the bank the principal debtor, and the complainant the surety. The various sections of the internal revenue act of 1862 [12 Stat. 432] show that the collector is the only person known to the law as the custodian of the revenue collected, until it is paid into the proper depository. While the doctrine of subrogation, which entitles the surety to all of the liens and securities of the creditor, on paying the latter the debt of the principal, is fully recognized in equity, and in certain cases at law, this is not a case for its application, and complainant is not entitled to be subrogated to the rights of the United States as a preferred creditor against the bank; and, moreover, under the acts of congress, the deposit of the money in the bank, by Voede or Wilkinson, was positively forbidden, and the deposit there was unlawful. The complainant, therefore, is not in a position to ask the aid of a court of equity to give him the fruits of an unlawful act, and to do so would encourage other officers in the violation of the law. Affirmed.

Case No. 17,669.

WILKINSON et al. v. BARNARD et al.

[9 Ben. 249.] [1]

District Court, S. D. New York. Nov., 1877.

BANKRUPTCY—ENJOINING PROCEEDINGS IN STATE COURTS.

B. & Co. had possession of a sealed package which, and its contents, the wife of a bankrupt claimed to own. The trustees in bankruptcy claimed the package and its contents, as assets of the bankrupt, and notified B. & Co. of their claim. The wife brought a suit in a state court, against B. & Co., after demand and refusal, to recover damages for the conversion of the property. The trustees, having been refused permission, by the state court, to be substituted for B. & Co., as defendants, brought a suit in equity, in this court, against B. & Co. and the bankrupt and his wife, to obtain a determination as to the ownership of the package and its contents, and applied for an injunction to restrain the wife from prosecuting said suit in the state court, during the pendency of the suit in this court: *Held*, that the injunction should be granted.

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

In equity.

Davies, Work, McNamee & Hilton, for plaintiffs.

Man & Parsons, for defendants.

BENEDICT, District Judge. This action is brought by [Alfred Wilkinson and George C. Peters] trustees in bankruptcy against Samuel W. Barnard, one of the bankrupts, Cordelia C. Barnard, the wife of that bankrupt, and the members of the firm of Bound & Co., for the purpose of obtaining, at the hands of this court, a determination in respect to the ownership of the contents of a certain sealed package in the hands of the defendants Bound & Co., which package, the trustees in bankruptcy claim, contains property belonging to the bankrupt, Barnard, and forming part of the assets of the bankrupt's estate, but which the wife of the bankrupt claims belongs to her. Prior to the commencement of this action the trustees in bankruptcy notified Bound & Co., the depository of the package, that the same was claimed by them as trustees of Barnard, and forbade the delivery of the box to any other person. Mrs. Barnard also laid claim to certain securities and moneys alleged by her to be in the package and, her demand therefor on Bound & Co. having been refused, she brought a suit against Bound & Co., in the superior court of the city of New York, to recover damages for conversion of the property. Thereupon, the trustees in bankruptcy applied to the state court to be substituted as defendants in the action of Mrs. Barnard, and to be allowed to defend the same, which application was denied. This action was then instituted, and, all the parties thereto having duly appeared, it now comes before the court, upon an application for an injunction to restrain the defendant Cordelia C. Barnard from prosecuting her said action against Bound & Co., in the superior court, during the pendency of this action.

The propriety of granting such an injunction is strenuously disputed, as is also the power to grant it. The statement of the case, however, seems to me to be sufficient to show the propriety of enjoining the suit in the state court, provided this court has the power to do so. The defendants Bound & Co. make no claim to the ownership of the package, and are placed in the position of being required to defend two actions, simply because the trustees in bankruptcy claim to be entitled to the property as part of the assets of a bankrupt. This claim is one properly to be determined in this court, and it is, at least, doubtful whether any other court has jurisdiction to determine it. The present action is, therefore, properly brought, and, if so, equity would seem to require that the defendants here should not be compelled to litigate the same question in the tribunals of the state. Full authority, not only for the action, but also for the interposition of the

court to restrain the prosecution of the suit in the state court, is found in the case of Kellogg v. Russell [Case No. 7,666]. In that case there was an application for an injunction to restrain the prosecution of an action in a state court, brought by a third party, claiming to be the owner of certain property by transfer from the bankrupt, to recover damages of the marshal for the taking by the marshal of the property in dispute and delivering it to the assignee in bankruptcy. The application was made in an action brought by the assignee and the marshal against the bankrupt and his transferee, the plaintiff in the state court, to determine the validity of the claim of the transferee to be the owner of the property in dispute; and it was there held by Judge Woodruff, that such an action was properly instituted by the assignee in bankruptcy, and that the power to entertain it involved the power to employ an injunction to preserve the rights, interests and equities of all parties, and it was declared proper to restrain, by injunction, the suit in the state court, not with the direct object of protecting the marshal as an officer of the court, but because the prosecution of the suit in the state court, although in form a simple action for damages, proceeded upon a claim of property, which claim it was the right and duty of the assignee in bankruptcy to contest.

The distinction sought to be drawn between that case and the present, that there the property itself was involved, while here the action in the state court does not seek to disturb the possession of the property, is not seen to exist. In that case, as here, the action in the state court was to recover damages for the conversion of property. There, as here, the action sought to be restrained was brought by a third party, making claim to be the owner of property alleged to belong to the bankrupt. There, as here, the assignee brought an action in equity, to determine the title to the property, and there the action at law was restrained. The only difference between that case and this is, that here the property, instead of being seized by the marshal, has, by the notice of the trustees, been detained in the hands of a mere depository, and, consequently, the suit in the state court is against the depository instead of against the marshal. This circumstance creates no distinction. In principle, the cases are identical, and the decision of Judge Woodruff is an authority in support of the application under consideration.

If this action were instituted for the sole purpose of preventing a multiplicity of suits, the case would be different, and section 720 of the Revised Statutes would apply, but from that provision, as amended by the Revised Statutes, injunctions authorized by the bankrupt laws are expressly excluded. The injunction here sought is authorized by the law relating to proceedings in bankruptcy. The question involved relates to property claimed to be part of a bankrupt's estate; and the result of the proceeding instituted in the state court depends upon the same question. There can, therefore, be no doubt as to the power of the court to interfere by way of injunction. The case cited is decisive as to the propriety of exercising the power in this instance. I am, therefore, of the opinion that the plaintiffs are entitled to an injunction.

There is a slight irregularity in the practice, for the terms of the order to show cause are hardly broad enough to support an order for an injunction, but, as the argument on both sides has been principally addressed to the question of an injunction, that question has been considered. If, for any reason, it is desired by any of the parties to have this irregularity corrected, the correction can be made, and the entry of an order for the injunction will be delayed until a new order to show cause is obtained or a notice of motion is given.

Case No. 17,670.

WILKINSON et al. v. DOBBIE et al.

[12 Blatchf. 298.] [1]

[Circuit Court, N. D. New York. Sept. 1, 1874.

APPOINTMENT OF RECEIVERS — PRELIMINARY INJUNCTION—PLEADING—MULTIFARIOUSNESS.

1. W., trustee of a bankrupt, filed a bill in equity, setting forth that P., the bankrupt, had owned a vessel, and had made a preferential transfer of an undivided half of it to S., who had transferred it to G., and he to T., each transferee having knowledge of the fraudulent character of the original transfer. The bill set forth, that, if T. had any interest in the vessel, there was an irreconcilable difference between the plaintiff and T. in regard to the management, disposition and navigation of the vessel, and that T. had forcibly seized the vessel from the possession of the plaintiff. The prayer of the bill was, that the transfers be adjudged void, and for a temporary injunction and a receiver, and, if T. should be adjudged a part owner, for an accounting, and a sale of the vessel, and a distribution of the proceeds. The plaintiff moved for an injunction and a receiver. P., S., G. and T. were defendants in the bill, and denied all fraud: *Held*, that the motion must be denied.

2. An injunction will not be granted, or a receiver appointed, where it is not apparent that the ultimate determination of the suit in favor of the plaintiff is reasonably probable.

3. The bill should aver joint ownership in the plaintiff and T., to warrant preliminary relief.

4. If it did aver such joint ownership, it would be multifarious, as asking, also, to set aside the transfers as fraudulent.

In equity. This was a motion for a preliminary injunction and the appointment of a receiver. The bill set forth the appointment of the plaintiffs [Alfred Wilkinson and others] as trustees of the estate and effects of White, Barnard & Page, who were adjudicated bankrupts on the petition of creditors, filed on the 24th of July, 1873, and that an assignment by the bankrupts, pursuant to

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

law, of all their estate, real and personal, was made to the plaintiffs. It then stated: "That, for some time prior to the 22d of April, 1873, the defendant Alanson S. Page, one of the bankrupts, was the registered owner of the vessel called the Alanson Sumner," but that, in fact, the said vessel was the property of all of the bankrupts, and had been purchased with their money. It then alleged, that, on or before the 21st of January, 1873, Page made a fraudulent and preferential transfer of an undivided one-half of said vessel to the defendant Sallie F. Dobbie, and she subsequently made a transfer of the same to the defendant Gilchrist, and he to the defendant Thomas Dobbie, and that each of these transfers was made with full knowledge of the fraudulent and preferential character of the original transfer. After stating fully the facts showing the fraudulent character of these transfers, the bill proceeded as follows: "And your orators further show, that, in case it should be held and decided by this honorable court that the said Thomas Dobbie has any interest whatever in the said vessel, your orators allege that there is an irreconcilable difference between your orators and the said Thomas Dobbie, in regard to the management, disposition and navigation of said vessel," particularizing this allegation by setting out in detail, that, while the plaintiffs were in the peaceable and exclusive possession of said vessel, said Thomas Dobbie forcibly and riotously dispossessed the plaintiffs and took exclusive possession of the same. The prayer for relief asked that said transfers be adjudged fraudulent and void, and for a decree that the plaintiffs are the sole owners of said vessel, and for a temporary injunction and a receiver, and in the event that the court should adjudge that the said Thomas Dobbie was a part owner of said vessel, "that an accounting may be had between the parties who may be found to own said vessel, the vessel sold, and the proceeds distributed according to the interests of the parties." Upon this bill, and affidavits, and upon affidavits and exhibits on the part of the defendants fully denying all the averments of fraud, and averring that they had a valid title to an undivided half of the vessel, the motion was presented.

Henry E. Davies, William C. Ruger, and Charles T. Richardson, for plaintiffs.

Albertus Perry and William A. Poucher, for defendants.

WALLACE, District Judge. So far as this motion is predicated upon the alleged fraudulent or preferential transfer of the vessel, the complainants should not prevail upon the facts as they appear upon the hearing. An injunction will not be granted, or a receiver appointed, where, upon the hearing of the motion, it is not apparent that the ultimate determination of the suit in favor of the complainants is reasonably probable. The defendants fully meet and deny all the allegations of the bill as to this branch of the case, and support their denial by affidavits and exhibits which strongly corroborate it.

Upon the argument, reliance was mainly placed upon the ground that the complainants and Thomas Dobbie are joint owners of the vessel, between whom irreconcilable differences exist, of such character as to justify equitable interference and appropriate preliminary relief. The affidavits upon the part of the defendants show, that Thomas Dobbie and the complainants are joint owners of the vessel; but, objections fatal to any relief to the complainants upon this ground arise upon their bill. The bill does not aver that the complainants and Thomas Dobbie are such joint owners, or that the complainants have any interest except such as exists because the transfer by Page was fraudulent. It does aver, that, at and prior to the 22d of April, 1873, the bankrupts were the owners of the vessel, and that, at a subsequent time specified, a half interest was transferred, which Thomas Dobbie now claims to own, thereby raising the inference that the other half was not transferred and became the property of the complainants. As a question of evidence, the conclusion would be legitimate, upon the rule that a state of facts once shown to exist is presumed to continue until the contrary is shown. But this rule does not obtain in construing pleadings. Facts must be specifically stated, and conclusions upon inference or argument are not tolerated. The hypothetical averment of irreconcilable differences between the parties, which exist "in case it should be held and decided by the court that Thomas Dobbie has an interest in said vessel," does not aid the pleading. The court will not find, or seek to find, any interest which is not claimed to exist by the bill. No relief can be decreed finally except such as conforms to the case made by the bill as well as by the proofs—secundum allegata et probata—and, as none can be granted finally, none should be granted preliminarily, upon this ground. On the other hand, if the bill sufficiently averred facts showing that Thomas Dobbie and the complainants are joint owners, and that such differences exist as to require a receiver to be appointed and a sale to be ordered, then such averments would render the bill multifarious and demurrable, and for this reason the motion should be denied.

It is not permissible for a complainant to unite in his bill two inconsistent causes for equitable relief. An action to set aside a transfer as fraudulent, in which the court is asked to adjudge the defendant's title to the vessel void, and one where the transfer is alleged to be valid and the complainant claims relief on the theory of a subsisting joint interest with the defendant by reason of the transfer, proceed on entirely different grounds, and are utterly repugnant to each

other. Both theories cannot be true on any hypothesis of fact, or by any fiction of law. Analogous cases are those in which it was attempted to unite a cause of action for a forfeiture of a lease, and an injunction, on the theory that the lease was still subsisting; a cause of action to set aside a contract for fraud, or, if valid, to enforce its specific performance; a claim to recover purchase money in arrear upon a contract, and for a forfeiture of the contract, in all of which the causes of action were held to be inconsistent. Even a defendant cannot avail himself, by answer, of two defences which are so inconsistent with each other that, if the matters constituting one defence are truly stated, the matters upon which the other defence is attempted to be based must necessarily be untrue in point of fact. Hopper v. Hopper, 11 Paige, 46; 1 Barb. Ch. Prac. (2d Ed.) 41, note.

In this case, upon the theory of a fraudulent transfer, the bankrupts, Sallie Dobbie and Thomas Dobbie are necessary parties, while, upon the other theory, none of the defendants would be proper parties but Thomas Dobbie. A bill may be framed with a double aspect, and alternative relief be demanded, but no relief can be demanded which is not consistent with a state of facts conceded in the bill. Where the complainant is ignorant of the facts, he may allege his ignorance, call for a discovery, and frame his prayer so as to obtain such relief as it may appear he is entitled to; or where, upon the facts stated, he is uncertain as to the relief to which he is entitled, he may ask for alternative relief. These are the limitations which apply to a bill with a double aspect. Lloyd v. Brewster, 4 Paige, 537. It can hardly be contended that the bill in this case is within them. The complainants having so framed their bill as in effect to deny the existence of any state of facts inconsistent with a fraudulent transfer of the vessel and a title void in law, they must stand or fall upon the issue they thus have tendered. The motion is, therefore, denied, with costs.

Case No. 17,671.

WILKINSON et al. v. GREELY.

[1 Curt. 63.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1857.

NEW TRIAL—SUFFICIENCY OF EVIDENCE—REVENUE CASES.

1. A new trial will not be granted because the verdict is against the evidence, unless the court can clearly see that the jury must have unconsciously fallen into some mistake, or been actuated by some improper motive.

[Cited in Hunt v. Pooke, Case No. 6,895; Cady v. Phœnix Fire Ins. Co., Id. 2,284; Shaw v. Scottish Commercial Ins. Co., Id. 12,723; Fuller v. Fletcher, 6 Fed. 130.]

2. In revenue causes, it is particularly important that the verdict should be the result of a full and careful investigation of the questions of fact.

[Cited in Johnson v. Root, Case No. 7,409.]

This was an action of assumpsit, brought by the plaintiffs [Arthur Wilkinson and others], who are merchants in the city of Boston, against the defendant [Philip Greely, Jr.], the collector of that port, to recover back a sum of money paid to him, under protest, for duties on certain merchandise imported by the plaintiffs. It appeared, at the trial, that in August, 1849, there arrived in Boston, by two ships, two parcels of merchandise, consigned to the plaintiffs, and invoiced as being blankets; that the defendant refused to allow them to be entered and passed as blankets, paying a duty of 20 per cent., but exacted a duty of 30 per cent. ad valorem, as being, not blankets, but articles not enumerated, of which wool was the component material of chief value. The trial was before Mr. Justice Woodbury, at the last May term of the court, who instructed the jury that the burden of proof was on the collector, to show that the article was not truly described in the invoice, and that the question was, whether these articles were such as, at the time of the passage of the act of 1846 [9 Stat. 42] were known in commerce as blankets. The jury found a verdict for the defendant. The plaintiff moved for a new trial, because the verdict was against the evidence, and also for newly discovered evidence.

The questions were argued before Mr. Justice WOODBURY, at the last term, but had not been decided by him at the time of his decease, and at the present term were again argued, before Mr Justice CURTIS.

The District Attorney and Mr. Sanger, for the United States.

Mr. Woodbury and A. W. Griswold, for plaintiffs.

CURTIS, Circuit Justice. I hold it to be my duty not to interfere with the verdict of a jury, as being against the evidence, unless I can clearly see that the jury must have unconsciously fallen into some mistake, or been actuated by some improper motive in rendering the verdict. Alsop v. Commercial Ins. Co. [Case No. 262]; Fearing v. De Wolf [Id. 4,711]; Hepburn v. Dubois, 12 Pet. [37 U. S.] 376. On examining the evidence introduced by the defendant, on whom was the burden of proof, to show that these articles were not known in commerce as blankets, at the time of the passage of the tariff act of 1846, I find he called seven witnesses. The first was C. J. F. Allen, an appraiser in the custom-house, who testified that he, and Mr. Bradley, another appraiser, examined these articles, and concluded they were not blankets in the meaning and intent of the law; that he has always considered the stripe essential to a blanket, but he should call the plaintiffs'

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

green sample a horse-blanket, though it has no stripe. It must be noted that this is rather evidence of the witness's own views of nomenclature, and of the interpretation of the law, than direct testimony that the articles were not generally known in commerce as blankets. The testimony of Charles Bradley, the other appraiser, is, that they were not known, prior to 1846, as blankets. Lincoln, another appraiser, testifies in the same way, but he admits that, as an appraiser, he had passed as blankets an invoice of these articles, of somewhat higher cost, and same general style and fabric, and which were imported by the plaintiffs under the same order, arriving a little earlier, by another vessel. Chase, another witness, who had been, until the last three years, an importer, and since a manufacturer, testified they were not known as blankets, but admitted that he had had difficulty with the plaintiffs, and two bills were produced, made out by one of his clerks, who, he said, was a competent man of business, showing sales of similar articles by his firm, under the name of blankets. Simpson, a manufacturer, testified they were known as coatings, and not as blankets, though if they had a stripe they might be called blankets. Thomas Tarbell, who was forty-five years an importer in Boston, but had retired from business, testified that these articles were generally known as blankets, in commerce, in and long before 1846, and that the stripe was not material. Lewis Mills, who had been a merchant, and was connected indirectly with manufacturing business, testified he should not have supposed the plaintiffs' samples were blankets; he would call them blanket coating, but that the absence of the stripe made no difference.

Bearing in mind the nature of the fact to be proved, namely, that these articles were not generally known in commerce as blankets, and consequently the number of witnesses who must have knowledge of this fact, if it be true, this strikes me as a very weak case. Out of these seven witnesses, one, Mr. Tarbell, is directly and pointedly against the defendant; two, Lincoln and Chase, have practically treated such articles, or had them treated, by an agent, as blankets, and two, Allen and Simpson, rest their evidence on the absence of the stripe, which Tarbell, and Mills, and eleven witnesses for the plaintiffs, swear is immaterial. On the other side, the plaintiffs produce six witnesses, resident here, and five, by depositions, from New York, importers, and dealers in, and manufacturers of clothing, who swear that prior to 1846, and ever since, articles, in all respects like these, have been generally known in commerce as blankets, and they state the reasons why the stripe, which was formerly borne on blankets, has been generally left off; and one of them testifies that in 1846 he paid about $1,000, under protest, for duties on articles like the plaintiffs', and in 1848 it was returned to him by the government.

Now, although it is true that the defendant introduced some evidence fit to be weighed by the jury, it is to my mind clear that the whole evidence, viewed together, not only preponderated in favor of the plaintiffs, but so decidedly and strongly preponderated that it seems to me scarcely possible that men of average intelligence, who understood what the question was, could have hesitated to come to the conclusion that the defendant had not sustained the burden of proof which rested on him.

Whether there is not another question in the case, not submitted to the jury specifically, namely, whether the absence of the stripe is not sufficient to render these goods coatings, if by leaving off the stripe they are made such in substance, cannot now be determined. I am sensible of the difficulty under which I labor in this case, from not having been present at the trial, for I know very well that evidence which is heard from a witness who is seen, may properly produce an effect on the mind quite different from a report of the same evidence. But the law has made it my duty to decide this motion upon such a report, and one party to this case is as likely to gain or lose by it as the other. It was fairly suggested, at the bar, that the witnesses are to be weighed, and not numbered, and that several of the plaintiffs' witnesses are importers, and one of them a foreigner; but it is a fair answer, that though importers have one interest, manufacturers have another, and that every witness called by the defendant, who did not testify against him, was either a custom-house officer, or connected with manufactures in the United States. It was also argued that great weight should be allowed to the fact that the jury had the samples of the plaintiffs' merchandise, and also of other cloths and blankets, before them, and so had means of forming an opinion not known to the court. But the question, as submitted to them, was of such a character that the exhibition of these samples could conduct the jury but a short distance towards the result. It was not for the jury to find what they would deem a fit name for these articles, but what name they generally bore in commerce; and whatever may have been the appearance of the samples, this could be known to the jury only by the testimony of commercial men. Indeed, I am inclined to think that this exhibition of samples was one cause why the jury was misled; for, unless they were carefully cautioned, they would be very likely to compare the samples with their own ideas of what a blanket should be, and thus go aside from the true question.

My judgment has also been somewhat affected by the conviction, that newly-discovered evidence, of considerable importance, may be laid before the jury on another trial. I do not think this alone would be sufficient cause to set aside the verdict, because the evidence is cumulative, and because I

am not satisfied that due diligence was used to discover and produce this evidence at the trial; but when the court sees reason to believe that the jury have fallen into a mistake, it may well affect the exercise of its discretion, and cause it to act with less hesitation, if it also sees that, on another trial, the subject will be investigated under fuller and better light, and so justice will be more certainly done. Norris v. Freeman, 3 Wils. 38; Jackson v. Sternbergh, 1 Caines, 163.

I consider that the nature of this case is justly entitled to some consideration, on this motion for a new trial. Judicial decisions of such questions, under the revenue laws, afford guides both to the government and the importer in very numerous cases; and it is of great public importance that they should rest on secure foundations, which are felt to be such as ought to be generally satisfactory; otherwise they will not be acquiesced in, and litigation will be multiplied, with the chance, at least, that different results may be arrived at in different parts of the country, and thus a system of duties on imports, designed to be uniform throughout the United States, will be in danger of becoming unequal, and consequently unjust.

In trials of this kind, the jury really do what is ordinarily done by the court; for they put an interpretation on the language of a statute. This is inevitably necessary; but it makes the meaning of the law dependent on the verdicts of juries, which can have no legal operation, except in the cases in which they are rendered, instead of being settled by the judicial decision of the highest court, which would be binding in other future cases. This is an evil, and it is highly important that it should not be magnified by suffering verdicts in such cases to stand, when the court sees sufficient reason to believe that the investigation was incomplete, and that the jury must have been under some mistake respecting the true question on which they were required to pass.

The result is that the verdict is to be set aside, and a new trial granted.

[For instructions to the jury on a subsequent trial, see Case No. 17,672.]

Case No. 17,672.

WILKINSON et al. v. GREELY.

[1 Curt. 439.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1853.

CUSTOMS DUTIES — ACTION TO RECOVER DUTIES PAID—BURDEN OF PROOF—COMMERCIAL DESIGNATION.

1. A collector who has compelled an importer to pay a higher rate of duty than that imposed by law on such articles as are named in the invoice, has the burden of proof to show the authority under which such higher duty was exacted.

[Criticised in Arthur v. Unkart, 96 U. S. 123.]

2. When the question is, whether samples bore a particular name in commercial transactions, it is necessary they should have been so known generally, and not in particular places, to the exclusion of others, or to particular persons only.

3. On this question, negative evidence, from those engaged in the trade, has much weight.

4. If articles identical with the samples were not generally known, the question whether the diversities were material arises; and this may be a question of law when the facts are ascertained. A change, which renders an article substantially different as an article of commerce, and adapts it to all the uses of another article, on which a higher rate of duty is levied, destroys its legal identity, and is a material change under the revenue law.

This was an action for money had and received, to recover an alleged excess of duties exacted by the defendant [Philip Greely, Jr.], while collector of the customs for the port of Boston. A new trial was granted in this case, which is reported. [Case No. 17,671.] On this trial it appeared, that before the tariff act of 1846, various kinds of blankets were imported into the United States, among which was Mackinaw blankets, under which name the merchandise in question was invoiced, and entered by the plaintiffs [Arthur Wilkinson and others] at the custom-house in Boston, in August, 1849. The collector refused to allow them to pass under the designation of blankets, and assessed upon them an ad valorem duty of thirty per centum as manufactures of wool. Some testimony was introduced, tending to show that articles in all respects like these had been imported into New York, and known there as blankets before the date of the tariff act of 1846. There was also other evidence tending to prove that Mackinaw blankets, before that time, bore a stripe at the ends, and that after 1846 it was left off, as was the case with these goods, in order that they might be used for making garments with less waste of cloth. And there was evidence, that, so far as respected the fabric, and the processes of manufacture, these goods were substantially like certain species of coatings imported in pieces of twenty yards and upwards, under the names of Duffels, Petershams, and Pilots, known in commerce by those names, and entered at the custom-house as manufactures of wool. And there was evidence to the contrary on each of these points. Witnesses, skilled in the trade, were called on both sides, some of whom testified that goods like these, with some differences, were, and some that they were not, known in commerce as blankets, before the tariff act of 1846 [9 Stat. 42].

Choate & Griswold, for plaintiffs.
Mr. Hallett, Dist. Atty., for defendant.

CURTIS, Circuit Justice (charging jury). The tariff act of 1846 imposes a duty of thirty per centum, ad valorem, upon manufactures of wool, or of which wool is the component material of chief value, not otherwise pro-

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

vided for. These cloths are unquestionably manufactures of wool. They are, therefore, liable to pay thirty per centum, unless they are otherwise provided for. They are not otherwise provided for, unless they come under that clause of the act which levies a duty of twenty per centum upon blankets of all kinds. The question for you to try is, whether the articles, samples of which are before you, come under that last-mentioned clause of the act. In considering this question, you must bear in mind that the burden of proof is upon the defendant. Acting in behalf of the government, he has levied upon these commodities a duty of thirty per centum. He has compelled the plaintiffs to pay it. When any officer of the government compels a citizen to pay a tax, he may be required to show that it was exacted by authority of law. The defendant must prove this here; and he can do so, only by satisfying you that these articles were not blankets, within the meaning of the tariff act of 1846.

Usually, it is for the court alone, to ascertain and declare the meaning and effect of an act of congress. But laws levying duties upon particular articles are, to some extent, an exception from this rule. The reason is, that congress is understood to have designated the various commodities subjected to duty, by the names by which they are generally known in commerce; and when a question arises, whether a particular article is embraced under some particular name in such a law, the first inquiry is, whether such articles were generally known in commerce by that name, when the law was passed. This inquiry can be made only by the jury, and therefore it is that your aid is necessary to determine whether these articles, now in question, are, or are not, included in this act of 1846, under the words, "blankets of all kinds." In approaching the inquiry you are to make, there are several matters which, though preliminary to the main question, are nevertheless important.

It is generally agreed by the witnesses, that the term blankets is a generic term, which includes a considerable number of different kinds of blankets. That in commercial dealings, there is no such thing bought or sold or known as blankets merely. But always some particular kind of blankets, as Mackinaw, or Rose, or Whitney, or Duffel blankets. And you observe that the act of congress does not speak of blankets, or blanketing, but of "blankets of all kinds." Now, the plaintiffs have imported and entered these fabrics under the name of Mackinaw blankets. You will consider then, whether the inquiry is not narrowed down to the question whether these were Mackinaw blankets. This may be quite material. For, if that be the true inquiry, you need not trouble yourselves about the characteristics of other species of blankets. You will readily perceive, that if it were competent for the foreign manufacturer to select from each kind of blankets such characteristics as he might wish, the fine wool from one, the close beating from another, the shearing from a third, the milling from a fourth, and the absence of the stripes from a fifth, he might produce a fabric which had no one quality not common to some kind of blankets, yet, as a whole, totally unlike any of them. And, therefore, it is important to bear in mind, that you are to ascertain whether such articles as these were known as any kind of blankets in 1846; especially, whether they were known as Mackinaw blankets. And it is not enough that they were so known in some one place, to the exclusion of others, or to some particular importers. They must have been so known generally to those engaged in the trade. The necessity for this is apparent. For if these cases were to be decided according to the designation of articles in particular places, or among some particular persons, the decisions must vary, and the application of the law, instead of being uniform throughout the whole country, would be irregular, unequal, and unjust. It is particularly important, therefore, that you should bear in mind, that when it is said that the question is whether these articles were known in commerce as some kind of blankets, it is meant, were they generally so known throughout the United States to persons engaged in the trade. At the same time, if they appear to have been generally so known in New York and Boston, from which ports alone the evidence in this case comes, it is fair to infer, in the absence of all evidence to the contrary, that they were generally so known throughout the country. In this connection, there is another observation which I deem important. The plaintiff's counsel has suggested that the witnesses for the defendant speak negatively only. That they can say no more than that such articles as the plaintiff's were not known to them under the name of blankets of any kind, before 1846; and that positive evidence is to be believed rather than negative. This is generally true. But this case is peculiar. Where the inquiry is, whether a certain act was done, or a certain event happened, positive evidence from a credible witness that he saw or did it, is, generally, to be preferred to negative evidence, from a witness equally credible, that he did not see it, though present; because both may intend to speak the truth. The act or event, though it occurred, may not have been observed or remembered by him who speaks negatively. But here the question is, whether a certain thing was generally known to those engaged in a particular trade; and when witnesses so engaged testify it was not known to them, this negative testimony tends directly to disprove the fact asserted, and if the witnesses are quite numerous, and their business extensive, their testimony would, if believed, be sufficient to prove, though the plaintiff's witnesses are believed when they testify they knew the fact, yet that the fact was not generally known, for if generally known, it would have been known to the defendant's witnesses as well as to the plaintiff's.

Passing from these preliminary observations, I think there are three inquiries to be made by you: (1) Whether articles, in all particulars like these samples of the plaintiffs, were generally known as Mackinaw blankets, before July, 1846? If not, then (2) were articles, more or less similar to these, known as such blankets, and what are the diversities between these samples, and the articles so known as blankets? And (3) are those diversities material, so as to render the designation of blankets inapplicable to these samples?

There is some evidence from New York, tending to show that articles in all particulars identical with these samples, were known as Mackinaw blankets before July, 1846. (Here the judge detailed this evidence.) If this satisfies you that articles identical with the samples, were generally known as Mackinaw blankets, before July, 1846, you need inquire no further. The plaintiff, in that event, is entitled to your verdict. But if you think otherwise, you will then compare the samples with what were generally known as Mackinaw blankets before July, 1846, and ascertain the diversities between them. (Here the judge recapitulated the evidence on this subject.)

Having ascertained, to your own satisfaction, what these diversities, if any, are, you are next to inquire whether they are material. In other words, if articles in all particulars like these samples were not generally known in commerce before 1846, are the differences between these samples and what was known as Mackinaw blankets, so material, that these samples, as articles of commerce, differ substantially from what were known as Mackinaw blankets? You have had, from many of the witnesses, opinions upon this question. Some witnesses consider the supposed differences material, and others immaterial. It commonly happens, that when witnesses are allowed to give opinions, they disagree. And though this kind of evidence is admissible in some cases, and should, in proper cases, be considered by the jury, yet whenever the jury have the facts before them, and the matter is one concerning which they feel able to form their own opinions, it is safer and more satisfactory to do so, than to trust to the opinions of witnesses, which are often formed without an exact knowledge of the precise question on which their opinion is required, and often differ, because they understand differently the very terms they themselves employ.

It is asserted by the defendant, that these samples are substantially like some species of coatings, imported before 1846, and known in commerce as Flushings, Pilots, and Petershams. And it is urged, that though they came in pieces of twenty yards and upwards, and these are in lengths of four yards only, this difference is not sufficient to exempt these from paying a duty of thirty per centum. And it is further urged, that the stripe, said to have been borne on Mackinaw blankets, before 1846, has been omitted from these samples to adapt them more perfectly to be used as coatings. On the other side those positions are denied, and it is said the stripe was merely an ornament, and that the taste of customers having changed, it has been left off, but that such a change does not affect the essential character of the thing.

I am not prepared to say, that because you may be of opinion that the fabric of these samples is substantially like coatings, therefore they are necessarily not to be deemed blankets; for the case is not to be determined simply by an examination of the fabric. For aught I know, the fabric of some kinds of coatings may have been like the fabric of Mackinaw blankets. Yet, undoubtedly, any difference between the fabric of these samples, and of things known as Mackinaw blankets before July, 1846, are important for your consideration; and if those differences assimilate these articles to coatings, they become still more important. Neither can I say, that the omission of the stripe, though designed for an ornament, is immaterial. That is for you to determine.

It is urged also, that the use of these fabrics for garments, does not change their character or designation. This is true. But in considering whether any differences between these samples is material, the practical effects of these differences is not to be overlooked. Though a blanket be used to make a garment, it is, nevertheless, till cut up, a blanket. But it does not follow, that a fabric somewhat like a blanket, but made different from one, in order to adapt it better to be made into a garment, is also a blanket. The objects of the change, as well as its nature, should be considered.

And upon this part of the case, my instruction to you is, that if you find articles identical with these samples were not known in commerce before July, 1846, but articles similar to these, with the exception that they bore a stripe or heading, had been generally known as blankets, had been used for making coats, and, to the extent they were so used, took the place of manufactures of wool, on which was paid a higher duty than on blankets, and if you further find that the omission of the stripe, taken in connection with any other differences which you may find, does make a substantial change in the article, as an article of commerce, by adapting it more perfectly to be used for making garments, thus adapting it more perfectly to the uses of those fabrics, which, under this law, are denominated manufactures of wool; and if you further find, that before the tariff act of 1846, fabrics, substantially like these samples, without a stripe, had been imported into the United States in pieces of about twenty yards and upwards, and entered at the custom-house, and known in commerce, not as blankets, but as manufactures of wool, then the absence of the stripe makes

a material change in the article, and it is not one kind of blanket, and is not provided for otherwise than as a manufacture of wool, in the tariff act of 1846. (The judge then recapitulated and explained this instruction.)

The jury returned a verdict for the defendant.

After verdict, the plaintiffs moved for a new trial, assigning as the cause, that the last paragraph of the above instructions, beginning with the words, "and upon this part of the case," was erroneous.

CURTIS, Circuit Justice. To judge of the correctness of that part of the instructions to the jury, of which the plaintiffs complain, it is necessary to observe to what particular point it related, and what facts it assumed to have been found by the jury, before it would be applicable to the case. The jury had previously been instructed that, if articles, identical with the plaintiffs' samples, had been generally known in commerce, under the designation of blankets, before the passage of the tariff act of 1846, they need inquire no further, but should return a verdict for the plaintiffs. But if they should not so find, they must then inquire what were the diversities between the plaintiffs' samples and articles, so known as blankets; and whether those diversities were material. And the instruction, which forms the ground of this motion, related solely to this question of the materiality of these differences.

It appears, not only from its connection, and by what had previously been said, but in express terms, that the jury have found that articles identical with the plaintiffs' samples were not generally known in commerce, as blankets, before 1846; that one diversity was the absence of the stripe or heading; that the fabric of the samples was substantially like cloths imported in pieces of twenty yards and upwards, and generally known in commerce, before 1846, not as blankets, but as manufactures of wool; and that the omission of the stripe, taken in connection with any other differences the jury might find, did make a substantial change in the article, as an article of commerce. And the instruction is, that if the jury should find these facts, then, although witnesses had given their opinion that the omission of the stripe was immaterial, yet it was in point of law material; and these samples were not to be deemed blankets within the meaning of the tariff act of 1846.

I do not think the plaintiffs can complain of this instruction. To see precisely what its effect was, it is necessary to observe that the question was, whether these samples, if imported before the tariff act of 1846, would have been generally known in commerce as blankets. Now, suppose this question had been presented on a statement of those facts which the jury are taken to have found. The first difficulty to be encountered by the plaintiffs would have been, that these samples, if imported before 1846, would not have been generally known at all, by any name. They would have been a novelty. But still, it would be urged, they are so like blankets, that they may come under that designation. But if they are substantially like coatings in their fabric, and if they are substantially different from blankets, as articles of commerce, how can they be denominated blankets? Why should they not be deemed to be included by the law under that description of fabrics which they substantially resemble; and why should they be included in the name of blankets, from which they substantially differ?

I think some obscurity has been thrown over the case by the assumption that the jury were instructed that, if the omission of the stripe facilitated the making into garments, then it was material. But this is not the effect, any more than the terms of the instruction; which was, that it was material, under the condition stated, if it worked a substantial change in the thing as an article of commerce. It is true the attention of the jury was drawn to the effect of this change, by which, as the evidence strongly tended to prove, the thing was better adapted to the uses of coatings; but this was done in such a manner as to restrict, rather than enlarge, the field of inquiry, when the jury were considering whether the omission of the stripe made a substantial change in the article, as an article of commerce; and so was favorable to the plaintiffs.

The instruction was: "If they should find that the omission of the stripe, taken in connection with any other differences which they might find, made a substantial change in the article, as an article of commerce, by adapting it more perfectly to be used for the making of garments, and to the uses of those fabrics which, under this law, are denominated manufactures of wool," &c. Now, it would, in my opinion, have been correct, to leave them to find whether the change was substantial, for any cause; but as the evidence pointed strongly to this cause, and to no other, I thought the instruction should draw their attention to it, to the exclusion of all others; and this was the reason why it was thus mentioned.

It is urged by the plaintiffs' counsel, that in all other cases in the books, the question has been left broadly to the jury, whether the articles bore a certain commercial designation. This is generally true; but so this case was left to the jury. It was only in the event that they should come to the conclusion there were diversities between these samples and what were known as blankets, and it should thus be necessary for the jury to decide whether these diversities were material, that the instruction was to be applied. It is further urged, that this question of the materiality of these diversities should have been decided by the jury, upon the opinions of experts. I think otherwise. I believe the ex-

perience of all concerned in the administration of justice tends to the conclusion that this species of evidence is less satisfactory than any other; and it is a common remark, that where there is any room for a difference of opinion, experts, in about equal numbers, will generally be found testifying on each side. To make revenue cases necessarily and always depend on such evidence, would greatly increase the uncertainty of their results, and strongly tend to render the application of the revenue laws variable, unequal, and consequently unjust. It may not be practicable always to avoid dependence on such evidence, in this class of cases; but it is not easy to see how it had any proper place in this case. Experts are usually called in revenue cases, to say that they have or have not known articles, samples of which are shown, under a particular denomiation. This is a mere matter of fact. True, it involves a mental comparison between the samples and the articles previously known. But so does every question of identity. The same comparison is made when a witness swears to a prisoner, or an article stolen from him. But when it is ascertained that there are diversities between the samples and all things previously known, why should a witness be allowed to give an opinion that the diversities are not material. He has had no experience, and can have no particular skill upon this question; for the diversities are admitted to be novel, and he cannot have positive knowledge what effect may be attributed to them.

Besides, the real question is, what effect is attributed to them by the revenue law? Suppose any number of witnesses should swear that the difference between a coat embroidered with gold lace, and one not thus embroidered, was not material, or that plaster of Paris, ground, was not materially different from the same article unground,—such testimony could have no effect, because the law makes these differences material. And the true question, under this motion for a new trial, is, whether a diversity between these samples and blankets, which differs them, substantially, as articles of commerce, from blankets, and adapts them to the uses of coatings, which are subject to a higher rate of duty than blankets, and leaves no substantial difference between the samples and coatings, except that the former come in pieces of four yards, and the latter in pieces of twenty yards, is or is not a material diversity between the samples and blankets, under the revenue laws. And my opinion is, that it is, in point of law, a material diversity.

To hold otherwise, would leave the revenue law open to evasions, which I do not think should be permitted. If the mode of manufacturing an article, which is named in the revenue law and subjected to a duty of twenty per cent., is so changed as to make it substantially a different thing, viewed as a commodity of commerce, and the purpose and effect of that change are to adapt the article to take the place and serve all the uses of another article, on which a higher rate of duty is imposed by law, I am prepared to say, that, in point of law, the article, thus changed, is not entitled to be admitted under the name appropriated in the law to articles not thus changed. In my opinion, its legal identity is destroyed.

I have not overlooked the argument, that if it was intended to be asserted that these samples were substantially coatings, that question should have been left to the jury; and that, under the instruction, the jury cannot be taken to have found they were known as coatings, but only that, so far as respects their fabric, they were substantially like what were known as coatings. It is true this is all the jury have found on this point. But I do not consider the true question was whether these samples were known as coatings, but whether they were known as blankets. They may differ, substantially, from both; and then, being a manufacture of wool, and not otherwise provided for as blankets, they were liable to a duty of thirty per centum.

The motion for a new trial must be overruled, and judgment rendered on the verdict.

WILKINSON (HALE v.). See Case No. 5,917.

WILKINSON (HAYTON v.). See Case No. 6,272.

WILKINSON (MANN v.). See Case No. 9,036.

Case No. 17,673.

WILKINSON et al. v. NICKLIN et al.

[2 Dall. 396.]

Circuit Court, D. Pennsylvania. 1798.

BILLS OF EXCHANGE—INDORSEMENT IN BLANK.

[The blank indorsement of a bill of exchange passes all the interest therein to every indorsee in succession, and, even in the hands of one who takes it after it is noted on its face for nonacceptance, it is discharged from any obligation which might exist between the original parties, but which does not appear upon the face of the instrument itself.]

This was an action brought by the indorsees of a bill of exchange, drawn by McClenachan and Moore, upon George Barclay, of London, in favor of the defendants, and by them indorsed in blank, to Arthur Crammond & Co., who, likewise, indorsed and discounted them with their bankers, the present plaintiffs, under the following circumstances: The defendants, having opened a commercial correspondence with Arthur Crammond & Co., of London, remitted the bill of exchange in question, to be passed to their credit, in their general account with those gentlemen. The bill was noted on the face of it for nonacceptance. It was afterwards, on the 4th of August, 1796, paid in short, on account of Arthur Crammond & Co., with their blank indorsement, to the banking house of the plaintiffs; but, on the 19th of the

same month, the amount was carried out to the credit of Arthur Crammond & Co. as if it had been then discounted by the plaintiffs; and it was said by a witness examined under a commission, that, after this discount, the money had been duly paid upon the drafts of Arthur Crammond & Co.

The counsel for defendants stated that they proposed to show by evidence that the bill of exchange was remitted on account of the defendants, and that Arthur Crammond & Co. were in very great pecuniary embarrassments, at the time of the alleged discount of the bill of exchange, and had soon afterwards become bankrupt. From these premises, from the nature of the previous deposit, and, above all, from the dishonored state of the bill, when it was deposited and discounted (which was enough to have prompted an enquiry into the real circumstances of the case), it was intended to argue that the plaintiffs knew that the bill was, in fact, the property of the defendants, and that the eventual discount was colorable and collusive, for the mere purpose of recovering the damages, or of securing a pre-existing balance due to the plaintiffs from Arthur Crammond & Co., who were on the eve of a public failure. 3 Term R. 80. If the plaintiffs did not know the facts they cannot be entitled to any more benefits from the possession of the bills than Arthur Crammond & Co. themselves.

The counsel for plaintiffs (who had, indeed, anticipated the defence in their opening) insisted that the general, unrestricted nature of the indorsement had empowered Arthur Crammond & Co. to pass the bill to whomsoever they pleased, and that, whatever might be the imputation on them for a breach of trust, it could not affect the plaintiffs, who had paid a valuable consideration for the bill, and who ought not to be charged with collusion and fraud upon strained inferences and slight presumptions. Their knowledge of the transactions between the defendants and Arthur Crammond & Co. has not been proved; and it would be a violation of the most important commercial principles, of the most authoritative adjudications, to permit such a defense to be made against the claim of an indorsee. The distinction between restricted indorsements, and indorsements which leave the bill to a free negotiation, has been fully established (2 Burrows, 1216, 1226, 1227); and an indorsee in the latter case cannot be effected even by letters accompanying the bill (Cas. t. Hardw. 74). Nor does the reason of the case in 3 Term R. 80, where the note was negotiated after the term of payment had elapsed, apply to a protest for non-acceptance. Bills are often so protested, and yet are eventually paid. The strongest presumption arising upon a protest for non-acceptance is that the drawee has not effects of the drawer in his hands, at the time of presenting the bill; but, when a note has been protested for nonpayment, the fair presumption is that the drawer is either unable to pay it, or has a legal excuse for not paying it; and the purchaser of the note, under such circumstances has a reasonable warning, and must take it at his peril.

Ingersoll & Lewis, for plaintiffs.
E. Tilghman and Mr. Dallas, for defendants.

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

CHASE, Circuit Justice. The defense cannot be admitted. There is no rule more perfectly established, there is none which ought to be held more sacred in commercial transactions, than that the blank indorsement of a bill of exchange passes all the interest in the bill, to every indorsee, in succession, discharged from any obligation which might subsist between the original parties, but which does not appear upon the fact of the instrument itself.

PETERS, District Judge. Though I can easily suppose cases of hardship may arise, and though I am disposed, indeed, to think that strong equitable circumstances now exist in favor of the defendants, yet the rule of law is so well established, and, upon general principles, is so beneficial, that I cannot persuade myself, in any degree, to dispense with its operation. I am therefore of opinion that the evidence in support of the defense proposed ought not to be admitted.

Verdict for the plaintiffs.

Case No. 17,674.

WILKINSON v. POMEROY.

[9 Blatchf. 513.] [1]

Circuit Court, S. D. New York. April 4, 1872.

PLEADING AT LAW—BREACH OF PROMISE—SPECIAL PLEAS—GENERAL ISSUE—EVIDENCE—MITIGATION OF DAMAGES—SCANDALOUS MATTER.

1. A plea, without a conclusion, is no plea.

2. A plea of the general issue, in an action for breach of promise of marriage, may be treated as a nullity, under rule 26 of this court, if not accompanied by the affidavit and the certificate required by that rule.

3. A special plea, in such an action, may be treated as a nullity, under rule 27 of this court, if not accompanied by the certificate required by that rule.

4. Matter pleadable in bar, in such an action, if intended to show that the plaintiff had no subsisting cause of action when the suit was commenced, can be given in evidence under the general issue.

5. In such an action, evidence of acts of misfeasance, immediately connected with the cause of action, or evidence showing an equitable defence arising out of the cause of action, if admissible at all, can be given in evidence, in mitigation of damages, under a plea of the general issue.

6. In such an action, matter, in a plea, which attributes to the plaintiff habits, disposition, temper, and acts, in such wise as would warrant an action for libel against whoever should publicly make such charges by printing or writing, is irrelevant, impertinent, and scandalous, and will be stricken out, on motion.

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

[This was an action by Sadie E. Wilkinson against Mark M. Pomeroy to recover damages for breach of promise to marry. Heard on motion to strike out a paper filed by defendant as a pleading.]

Benjamin F. Butler and Sidney DeKay, for plaintiff.

James D. Reymert, for defendant.

BLATCHFORD, District Judge. This is an action for breach of promise of marriage. The declaration contains two counts. The first count is in the usual form. It alleges the plaintiff to have been, and to be, unmarried, and that the defendant married another person. The second count alleges, that the defendant, being a married man, and having a lawful wife alive, promised to marry the plaintiff, she being unmarried, and believing the defendant to be unmarried.

The defendant has put in, in answer to the declaration, a paper which denominates itself as being "pleas," and which contains four parts.

The first part professes to be an answer to only the first count of the declaration. It is, in substance, a plea of the general issue to such first count, denying any promise to marry by the defendant, and all else in it being surplusage. But it has no conclusion. It does not conclude to the country, nor does it conclude with a verification. It is, in fact, no plea at all. If regarded as a plea of the general issue, the plaintiff would have a right to treat it as a nullity, under rule 26, because, being put in in an action on contract, it has not annexed to it, and filed with it, an affidavit of the defendant, that he has a good and substantial defence on the merits, as he is advised by his counsel, and verily believes, together with a certificate of counsel, that he so advised the defendant.

The second part of the paper purports to be, if anything, a special plea to the first count of the declaration. But it purports, on its face, to be equivalent to the general issue, for it concludes to the country. Yet, it calls itself a "further plea." Regarded as a plea of the general issue, the plaintiff would have the right to treat it as a nullity, for the reason above given in respect to the first part. Regarded as a special plea, he would have a right to treat it as a nullity, under rule 27, as not being accompanied by the certificate of a counsellor of this court, that, in his opinion, it is well founded. It contains some matter, which, if pleadable at all in bar, is intended to show that the plaintiff had no subsisting cause of action when the suit was commenced. Such matter can be given in evidence under the general issue. The rest of the matter in it is matter not in bar, but matter which, if it could be taken into consideration at all, would be matter only in mitigation of damages. As such, it could, in an action of assumpsit, such as this is, be given in evidence, if admissible at all, under a plea of the general issue, as being evidence of acts of misfeasance, immediately connected with the cause of action, or evidence showing an equitable defence arising out of the cause of action. Withers v. Green, 9 How. [50 U. S.] 213; Van Buren v. Digges, 11 How. [52 U. S.] 461; Winder v. Caldwell, 14 How. [55 U. S.] 434; Miller v. Smith [Case No. 9,590].

The matter last referred to has, therefore, no proper place in these pleadings. It is open to the further objection, that, being irrelevant and impertinent, it is also scandalous. It attributes to the plaintiff habits, disposition, temper, and acts, in such wise as would warrant an action for libel against whoever should publicly make such charges by printing or writing.

The third part of the paper purports to be, if anything, a plea of the general issue to the second count of the declaration; but it has no conclusion, either to the country or with a verification. If regarded as a plea of the general issue, it could have been treated as a nullity, for the reasons before stated in regard to the first part of the paper. It denies any undertaking to marry the plaintiff, and all the rest of it is surplusage.

The fourth part of the paper purports to be, if anything, a special plea to the second count of the declaration, but it concludes to the country, thus claiming to be equivalent to the general issue. It calls itself a "further plea." Regarded either as a plea of the general issue, or as a special plea, it could have been treated as a nullity, for the reasons before stated in regard to the preceding parts of the paper. It is made up of matter of two classes, falling under the descriptions above given of the matter in the second part of the paper, and contains like scandalous allegations in respect to the plaintiff.

There is nothing in the paper which confesses either of the causes of action in the declaration, and then avoids them.

The plaintiff moves that this paper be stricken out as impertinent and scandalous, and that judgment, with costs, for the plaintiff, be given on the pleadings, and for such other rule or order as to the court may seem meet. The motion is granted, so far as to strike out the paper as a pleading. Wilder v. Gayler [Case No. 17,649]; Varnum v. Campbell [Id. 16,887]. But the defendant will be allowed, within ten days, to plead the general issue, if he desires, by a plea properly verified and certified under rule 26, provided he will also accept notice of trial for the present term of the court, the cause to be put on the calendar for trial thereat.

[For hearing on a demurrer to the first plea of defendant, see Case No. 17,675.]

Case No. 17,675.

WILKINSON v. POMEROY.

[10 Blatchf. 524.] [1]

Circuit Court, S. D. New York. March 14, 1873.

BREACH OF PROMISE TO MARRY — PLEAS—DECLARATION AND WRIT—VARIANCE—DEMURRER —JOINDER OF COUNTS.

1. The proper plea to a count on a breach of promise of marriage, is non assumpsit, and not not guilty; and a plea of not guilty will be stricken out, on special demurrer, as bad.

2. A writ which requires the defendant to answer to the plaintiff in a plea of trespass, and, also, to a certain bill of the plaintiff against the defendant, for damages, in a sum named, for deceit and breach of promise of marriage, sets forth, in the action for deceit, an action in trespass on the case, and the rest of the ac etiam clause may be regarded as explanatory of the subject-matter to which the deceit was applied, or may be rejected as surplusage; and, therefore, the writ is not incongruous.

3. A variance between the writ and the declaration cannot be taken advantage of by a demurrer.

4. A count in assumpsit, for a breach of promise of marriage, and a count in tort, to recover damages for deceit, cannot be joined, and the defect can be reached by demurrer.

5. An objection, that a declaration shows that the cause of action is barred by the statute of limitations, cannot be taken by demurrer.

[This was an action by Sadie E. Wilkinson against Mark M. Pomeroy to recover damages for breach of promise to marry. A motion to strike out a certain pleading filed by defendant was heretofore granted. Case No. 17,674. The cause is now heard on a special demurrer to the first plea of defendant.]

Sidney DeKay, for plaintiff.
James D. Reymert, for defendant.

SHIPMAN, District Judge. The questions presented for consideration in the present stage of this case, and now to be disposed of, arise on the special demurrer interposed by the plaintiff to the first plea of the defendant. The demurrer is, in substance, that the plea should have been "non assumpsit," instead of "not guilty." It appears, from the record, that the defendant had been ordered by the court to file the general issue, and that, under such order, he filed the plea of "not guilty," to the first count in the declaration.

1. The plaintiff claims, that the first count in the declaration is a count in assumpsit, and that the general issue proper to be pleaded to such a count is non assumpsit. This claim is, undoubtedly, correct. The first count sets forth a promise of marriage, made by the defendant, to the plaintiff, May 30th, 1866, the breach of such promise by the defendant, his subsequent marriage to another woman, and a claim for damages, of twenty-five thousand dollars. This count is based upon a breach of contract, and is, properly, a count in assumpsit. The general issue appropriate to such a count is non assumpsit. The plea of not guilty, to this count, is, therefore, bad, and must be stricken out. 3 Chit. Pl. p. 908, note.

2. The defendant, on the other hand, claims, that the demurrer reaches back through the whole record, and attaches to the first substantial defect, and that there are defects of this character, both in the writ and in the declaration; that one count in the declaration is in tort, and the other is in contract, while the writ is an action in trespass, and for deceit and breach of promise of marriage; and that the whole is incongruous. These objections, certainly, deserve consideration.

The first question is, whether any incongruity in the writ, or any variance between the writ and the declaration, is reached by a demurrer. The writ requires the defendant to answer unto the plaintiff, "in a plea of trespass, and, also, to a certain bill of the said plaintiff against the said defendant, for damages, in the sum of twenty-five thousand dollars, for deceit and breach of promise of marriage." Does this language describe a valid cause of action; and, if so, is that cause of action variant from the first count in the declaration? It is to be observed, that the writ, in this case, was served upon the defendant as a separate process from the declaration, which was filed afterwards. This practice has come to us from English parentage. We should, therefore, look, for light upon these questions, at the common law practice, as it existed when our American colonies became separated from the mother country.

Under the old English practice, the whole original writ was repeated in the declaration, and, if a material variance appeared between the writ and the declaration, the defendant might take advantage of it, either by motion in arrest of judgment, writ of error, plea in abatement, or demurrer. But, this was altered by rule of court, in 1654, ordering that declarations in actions upon the case and general statutes, other than debt, should not repeat the original writ, but only the nature of the action. After this rule was made, the only way in which the defendant could take advantage of a bad original, or of a variance between the original and the declaration, was by praying oyer of the writ, or, in case of a bad original, by writ of error. But, the practice of praying oyer of the original having been much used for delay, the courts came to a resolution not to grant oyer of the original writ, so that no advantage whatever could be had of a defective original, or of a variance between it and the declaration. 1 Saund. 318, note 3. The effect of this rule was to abolish all pleas in abatement for any variance between the writ and the count, and it extended to all pleas in abatement which could not be proved with-

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

out an examination of the original writ. Gould, Pl. c. 5, § 64, note 9, and Id. §§ 82, 101. By statute of 13 Car. II. St. 2, c. 2, it was provided, that "the certainty and true cause of action" should be "expressed particularly," in writs, bills and process issuing out of the courts of king's bench and common pleas, and in all bailable actions, where the penalty exceeded the sum of forty pounds. If this provision was not complied with, the defendant was to be bailed upon his own bond for appearance. Blackstone says: "This statute (without any such intention in the makers) had like to have ousted the king's bench of all its jurisdiction over civil injuries without force; for, as the bill of Middlesex was framed only for actions of trespass, a defendant could not be arrested and held to bail thereupon for breaches of civil contracts. But, to remedy this inconvenience, the officers of the king's bench devised a method of adding what is called a clause of ac etiam to the usual complaint of trespass, the bill of Middlesex commanding the defendant to be brought to answer the plaintiff of a plea of trespass, and, also, to a bill of debt, the complaint of trespass giving cognizance to the court, and that of debt authorizing the arrest." 3 Bl. Comm. 288. The same practice was afterwards extended to the court of common pleas.

A question very similar to the one now under consideration was decided in 1769, in the case of Callaghan v. Harris, 2 Wil. 392. The sheriff was commanded to attach the defendants to answer the plaintiff "in a plea of trespass, and, also, that the defendants answer the plaintiff, according to the custom of the said court, in a certain plea of trover, and for converting of the goods and chattels of the said plaintiff, &c." The defendants having been arrested upon this writ, and held to special bail, a motion was made for a rule to show cause why a common appearance should not be accepted for the defendants, alleging that the ac etiam in the writ did not particularly express the cause of action, as the statute of 13 Car. II. St. 2, c. 2, directs, for that there is no such cause of action as a plea of trover, but, it ought to have been, in a certain plea of trespass upon the case, for converting the goods and chattels of the plaintiff, &c. But it was resolved by the court, that the cause of action was fully and clearly expressed, and that, although the ac etiam was not exactly clerical, yet nobody who read it could doubt of the cause of action. So, in the case under consideration, although the cause of action expressed in the ac etiam clause is "for deceit and breach of promise of marriage," which is not exactly clerical, yet, actions for deceit belong to a class of actions well known as actions on the case, and the words, "breach of promise of marriage," may be regarded as explanatory of the subject-matter to which the deceit was applied, or they may be rejected as surplusage. Gould, Pl. c. 3, § 170. The writ, then, may be regarded as disclosing a cause of action in trespass on the case.

Upon the question of variance between the writ and the first count, the authorities already cited show that a defect of this character cannot be reached by a demurrer. In Thompson v. Dicas, 2 Dow. 93, the writ was trespass on the case, and the declaration was trespass. On a rule for setting aside the declaration for variance, the court held, that, under the uniformity act, the declaration must be conformable to the writ; and the declaration was set aside, with leave to the plaintiff to declare properly under the writ, if he could do so. But, the court held, by Bayley, B., that the variance could not be taken advantage of on demurrer, because it was a "mere irregularity." Chitty lays down the rule in such cases as follows: "Before the uniformity of process act (4 Wm. IV. c. 39) upon common process, the plaintiff might declare in any cause of action whatever. But, in bailable actions, the declarations must have corresponded with the cause and form of action in the affidavit, and the ac etiam part of the latitat or other process; for, otherwise, the defendant would be discharged on filing common bail, and the court would not allow the declaration to be amended in that respect; but, that was the only consequence, for the court would not, in such case, set aside the proceedings for irregularity." 1 Chit. Pl. p. 253. "If the body of the declaration state a cause of action that is not, nor could be, properly declared for, in the form of action stated in the writ, then the deviation would constitute an irregularity and ground for setting aside the declaration, but not a ground for demurrer." Id. p. 254. In our own courts, it has been decided, that a variance between the writ and declaration must be pleaded in abatement. Wilder v. McCormick [Case No. 17,650]; Duval v. Craig, 2 Wheat. [15 U. S.] 45. But, in this case, the defendant has pleaded to the merits, and, therefore, it is now too late for him to plead in abatement. Prosser v. Chapman, 29 Conn. 515.

3. It remains now to consider the objections raised by the defendant to the declaration. Some of these objections are merely formal, and, not having been pointed out in the special demurrer, are not reached by it. Only defects of substance in the declaration can be taken advantage of under a special demurrer to a plea. Gould, Pl. c. 9, pt. 1, § 20.

It is claimed, that there is a misjoinder of counts in the declaration, one count being in contract, and the other in tort. If such misjoinder exists, it is a radical fault, and is reached by the demurrer. Gould, Pl. c. 4, § 98.

As has already been remarked, the first count is in assumpsit. The second count sets forth the deceit of the defendant, in representing that he was a single man, when, in fact, he was married, and, under that mis-

representation, entering into a promise of marriage with the plaintiff, and thereby preventing her from receiving the attentions of other men and making a suitable marriage, and keeping her a single woman for the last six years, and injuring her good name, and hurting her feelings, &c. This is a count in trespass on the case (1 Chit. Pl. 137), or, as it is generally denominated, an action on the case. It sounds in tort. So that there is a count in assumpsit, and a count in case, joined in the same declaration. These counts cannot be so joined, at common law. Gould, Pl. c. 4, §§ 87, 88, 91. If the writ be regarded as substantially for trespass on the case, and the second count for the same cause of action, then the first count, being in assumpsit, is manifestly out of place. The first count, therefore, should be stricken out. Gould, Pl. c. 4, § 101.

As both parties have been greatly in fault in pleading, and as a portion of the pleadings of both parties is to be stricken out, this may be done by both parties without costs.

A further objection is raised to the declaration, that it shows, upon its face, that the cause of action arose more than six years before suit brought, and is, therefore, barred by the statute of limitations of New York. But, the date mentioned in the declaration is not material, and, as the plaintiff can prove any date within the statutory period, such objection cannot be raised on demurrer.

WILKINSON (READ v.). See Case No. 11,611.

WILKINSON (SALT CO. OF ONONDAGA v.). See Case No. 12,269.

WILKINSON (SHORT v.). See Case No. 12,810.

WILKINSON (TYLER v.). See Case No. 14,312.

Case No. 17,676.

WILKINSON v. UNION MUT. LIFE INS. CO.

[2 Dill. 570.] [1]

Circuit Court, D. Iowa. 1872.

LIFE INSURANCE — WARRANTY — FALSE ANSWERS IN APPLICATION—MISTAKES OF AGENT.

1. Where a life insurance policy contains a condition that if the statements in the application shall be found in any respect untrue, it shall be void, untrue answers to specific questions avoid the policy, although relating to matters not materially affecting the risk, and not made with a view to deceive the company. See Swick v. Home Ins. Co. [Case No. 13,692].

2. The local agent of a foreign company in taking and filling up blank applications entrusted to him is ordinarily to be taken as the agent of the company, and not of the assured, and the company, if true answers to the questions in the application be made by the applicant, will be estopped to take advantage of the mistakes and omissions of the agent in reducing the answers to writing, if the applicant is without fault.

This was an action on a policy of life insurance. The defense was the alleged falsity of certain answers in the application for the insurance. The jury found a special verdict, the general nature of which appears in the opinion. A report of the same case in the supreme court of the United States, more in detail, will be found in 13 Wall. [80 U. S.] 222. The defendant moved for a new trial.

Geo. W. McCrary, John H. Craig, and W. J. Cochrane, for plaintiff.

Gillmore & Anderson, for defendant.

DILLON, Circuit Judge. I think the motion for a new trial ought to be overruled. The special findings of the jury dispose of every defense on its merits against the company, except the one relating to the age of the mother of the assured at the time of her death. The special verdict on that subject is fully warranted by the evidence, and being so, the company is justly estopped to make the defense that the applicant misrepresented or untruly stated the age at which her mother had died.

In propounding the questions to the applicant, and in taking down her answers, the local agent acted for his company, and if the applicant made truthful answers, as found by the jury, and the agent wrote down the answers on that subject, which appear in the application, without the knowledge of the applicant, and without being misled by her, acting upon his own judgment, why should not the mistake of the company's agent be visited on the company, rather than on the plaintiff? I am aware of the conflicting views which different courts have held on this subject, but the one above indicated is well supported by adjudged cases, and is the one towards which, as it seems to me, the judicial sentiment of the country is rapidly tending. Rowley v. Empire Ins. Co., 36 N. Y. 550; Viele v. Germania Ins. Co., 26 Iowa, 9; Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 216; s. c. 7 Am. Rep. 122, and cases cited in note; Geib v. International Ins. Co. [Case No. 5,293]; Wilkinson v. Connecticut Life Ins. Co., 30 Iowa, 119, which was an action by the present plaintiff on another policy. Judgment for plaintiff.

NOTE. In Hiatt v. Mutual Life Ins. Co. of New York [Case No. 6,449a], the defense was suicide, to which the plaintiff replied insanity. The court ruled: 1. That it was good cause of challenge to a juror that he considered the fact of suicide as conclusive evidence of insanity. 2. That the burden of proof to establish insanity was upon the plaintiff. See Swick v. Home Ins. Co. [Case No. 13,692], and cases cited. 3. As to the kind and degree of insanity necessary to be shown to entitle the plaintiff to recover where the assured took his own life, the court followed Terry v. Life Ins. Co. [Case No. 13,839], affirmed, 15 Wall. [82 U. S.] 580. There was a verdict and judgment for the defendant. I. N. Kidder and Gatch & Wright, for plaintiff. Holmes & Reynolds and Polk, Hubbell & Goode, for defendant.

WILKINSON (UNITED STATES v.). See Cases Nos. 16,695 and 16,696.

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

Case No. 17,677.

WILKINSON et al. v. WILKINSON et al.

[2 Curt. 582.] [1]

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

FEDERAL COURT—JURISDICTION—SUIT BY ASSIGNEE — DIVERSE CITIZENSHIP — ASSIGNMENT FOR CREDITORS—PURCHASE BY BENEFICIARY.

1. An assignee of a right to an account of the proceeds of sales of mortgaged property, cannot maintain a suit in the circuit court of the United States, in a case where his assignors were not competent on the ground of citizenship, to sue the defendants.

[Distinguished in McNichol v. Phelps, 16 Fed. 9. Cited in Simons v. Ypsilanti Paper Co., 33 Fed. 194.]

2. If a cestui que trust under an assignment for the benefit of creditors, buys a right of property which the assignees were empowered to sell, in the execution of their trust, he must claim as a purchaser under them, not as a cestui que trust.

Mr. Cozzens, for complainant.

Mr. Potter, contra.

CURTIS, Circuit Justice. This is a suit in equity to which George Wilkinson, a citizen of the state of Connecticut, and Hiram M. Barney, a citizen of the state of Illinois, were originally the parties plaintiff, and the administrators of William Wilkinson, deceased, and Benjamin Fessenden, all citizens of Rhode Island, are the parties defendant.

The bill states, that Abraham and Isaac Wilkinson, mortgaged certain real and personal property to the deceased, William Wilkinson, conditioned to indemnify him against certain liabilities he was under, or might incur for the mortgagors, with a power of sale in case of breach of condition; that subsequently the mortgagors conveyed the equity of redemption of the mortgaged premises, together with other property, to William Wilkinson, Nathaniel Searle, the plaintiff Barney, and the defendant Fessenden, in trust to sell the same, and to apply the proceeds to pay particular creditors of the assignors, of whom the plaintiff, George Wilkinson, was one.

The bill further states, that William Wilkinson, in his lifetime made sales under the powers contained in the deeds of mortgage, fully reimbursed himself for all his payments, and extinguished all his liabilities for the mortgagors, and had in his hands a surplus, for which he ought to have accounted to the assignees of Abraham and Isaac Wilkinson. That Searle, one of the assignees, is dead; and that the surviving assignees, for a valuable consideration, have sold and assigned to the plaintiff, George Wilkinson, all their right and title to what remained in the hands of William Wilkinson, as above stated. The bill prays for an account by the administrators of William Wilkinson, of the moneys received by him under the sales of the mortgaged property, and of the disposition thereof, and that the balance may be decreed to be paid to George Wilkinson, as assignee thereof.

The eleventh section of the judiciary act of 1789 (1 Stat. 78) declares "that no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made."

I am of opinion that an equitable assignee of a claim to an account is within this restrictive clause. In Seré v. Pilot, 6 Cranch [10 U. S.] 335, Mr. Chief Justice Marshall, speaking of a suit in equity by an assignee for an account, says: "Without doubt, assignable paper, being the chose in action most usually transferred, was in the minds of the legislature when the law was framed; and the words of the provision are, therefore, best adapted to that class of assignments. But there is no reason to believe that the legislature were not equally disposed to except from the jurisdiction of the federal courts, those who could sue in virtue of equitable assignments and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant, might, under certain circumstances be permitted to sue in equity, in his own name, and there would be as much reason to exclude him from the federal courts, as to exclude the same person, when the assignee of a particular note. The term, "other chose in action," is broad enough to comprehend either case, and the word "contents," is too ambiguous to restrain that general term. The contents of a note are the sum it shows to be due; and the same may, without much violence to language, be said of an account.

No substantial distinction in this respect, can be made between a right to an account of sales of mortgaged property, and any other right to an account. They are all choses in action within the meaning of this law. They are rights to recover sums of money by means of suits; and whether the right be legal or equitable, whether the assignment thereof passed a legal title so as to enable the assignee to sue in his own name at law, or only an equitable title, to be asserted through the aid of a court of chancery, it was equally the purpose of this restrictive clause to prevent the citizenship of the assignee from enabling him to come into a court of the United States. Such, in general, was the view taken of it by the supreme court, in Sheldon v. Sill, 8 How. [49 U. S.] 441; and which was not modified by Deshler v. Dodge, 16 How. [57 U. S.] 622, which explained its meaning.

The true inquiry here is, therefore, whether the plaintiff's assignors could have sued in the circuit court on the title shown by this bill. And it is manifest they could not, for one of them is a citizen of Rhode Island. It is urged, however, that Barney, one of the surviving assignees of A. and I. Wilkin-

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

son, might have brought his bill against his co-assignee Freeman, and the administrators of William Wilkinson, and alleged, that he joined Freeman as a defendant to compel him to do his duty in collecting the money, and paying it to creditors. That such a bill might be sustained, may be admitted. But it would be a case differing widely from the one shown by this bill; which shows that both assignees, Freeman and Barney, in the execution of their trust, have sold this claim to the plaintiff, George Wilkinson. They have no further duty as assignees to perform, in the collection of this money; and, consequently, one of them, upon the present state of facts, could not allege, that the other should be made a defendant, to compel him to discharge any trust, as to this account.

George Wilkinson is the assignee of both Freeman and Barney. It was necessary that both of them should join to make him any title. Wilbur v. Almy, 12 How. [53 U. S.] 180. Both did join; one is as much his assignor as the other; or, rather being but trustees, both united conveyed one entire title. Unless both could have sued upon this title if no assignment had been made, the assignee cannot sue. And he cannot escape the difficulty by suggesting, that if no assignment had been made, there might have arisen such a state of facts that a court of equity would have allowed one of the trustees to represent and enforce the whole title. I cannot presume that Freeman would have refused to do his duty, and join in a suit for an account, if any thing was due.

It is further urged, that George Wilkinson, being a cestui que trust under the assignment of A. and I. Wilkinson, may sustain this bill in his own right. But the creditors of A. and I. Wilkinson have no longer any equitable interest in the account for which this bill is filed. The right to an account having been sold, and assigned by the trustees, for a valuable consideration in the execution of their trust, the purchase-money is substituted in place of the right; and George Wilkinson as a creditor and cestui que trust, has no right therein. The entire interest belongs to him as a purchaser.

My opinion is that the bill must be dismissed for want of jurisdiction.

Case No. 17,677a.

WILKINSON v. WILLIAMS.

[2 Hayw. & H.] [1]

Circuit Court, District of Columbia. Jan. 10, 1850.

ACTION FOR PRICE OF GOODS—PAYMENT IN WORTHLESS NOTES.

Where a party takes bank notes in payment for goods sold upon the understanding that he should return the notes to the purchaser if they turned out not to be current, *held*, that the seller could not maintain his action for the price of the goods, unless he return the notes before action brought, unless it shall appear from the evidence, to the satisfaction of the jury, that the buyer of the goods knew that said notes were issued to defraud the public, and were worthless at the time the bargain was made, in which case the jury would be authorized to disregard the notes in payment, and return the verdict for the price of the goods, as if no notes had been given.

John Marbury, for plaintiff.

R. G. Coxe and H. May, for defendant.

This action was brought by the plaintiff [Prescilla Wilkinson], as executrix of the estate of George Wilkinson, deceased, for the price of a negro man, the slave of the deceased. The deceased received $600 in notes of the Commercial Bank of Millington, state of Maryland, with the understanding that if the notes turned out not to be good that they could be returned and the defendant [William H. Williams] would make them good. The notes were worthless and good for nothing; that the deceased offered to return the notes, and that the defendant refused to take back the said notes and make them good. That not regarding his promise, and undertaking, but contriving to injure and defraud the said plaintiff, hath not yet accounted with or paid the plaintiff the sum of six hundred dollars or any part thereof. The sale was made September 25, 1840. The Bank of Millington, Md., failed October 10, 1840. $530 of the notes were produced in open court and tendered the defendant.

Mr. Marbury, for the plaintiff, cited the following points and authorities: Starkie, in his work on Evidence (vol. 2, pt. 4, p. 95), says: "If a bill be given in payment of goods, and there be no agreement as to time, and it turns out to be worthless, an action may be commenced immediately." Lord Kenyon says in Stedman v. Gooch, 1 Esp. 5: "If such bill or note is of no value he may consider it as waste paper, and resort to his original demand, and sue the debtor on it." He says in Puckford v. Maxwell, 6 Durn. & E. [6 Term R.] 53: "If the bill which is given in payment do not turn out to be productive, it is not that which it purports to be and which the party receiving it expects it to be, and therefore he may consider it a nullity, and act as if no such bill had been given at all." See Ellis v. Wild, 6 Mass. 321; Wiseman v. Lyman, 7 Mass. 286; People v. Howell, 4 Johns. 296; Johnson v. Weed, 9 Johns. 310. Where the article of sale is warranted it seems that the vendee is entitled to prove the inferiority, and the breach of the warranty. 2 Starkie, Ev. pt. 4, p. 645, and the case cited, viz.: Hunt v. Silk, 5 East, 452; Conner v. Henderson, 15 Mass. 319; Thornton v. Wynn, 12 Wheat. [25 U. S.] 183. See, also, Curtis v. Hannay, 3 Esp. 83, and Grimaldi v. White, 4 Esp. 95; Franklin v. Long, 7 Gill & J. 407, as to the return of the goods as soon as the breach of warranty is discovered. The count for money had and received may also

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

be supported upon a consideration, which failed as where payment has been innocently made in counterfeit notes or coins, if the plaintiff has offered to return them, within a reasonable time. 2 Greenl. Ev. § 124, and cases there cited. A payment received on forged paper, or in any base coin is not good, and if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand. U. S. Bank v. Bank of Georgia, 10 Wheat. [23 U. S.] 333, and cases cited by Justice Story.

Counsel for the defendant made the following points as to averring fraud in the declaration. Fraud consists in intention, as a fact to be averred. Stuart v. Wilkins, 1 Doug. 18; Moss v. Riddle, 5 Cranch [9 U. S.] 351. As to returning an unsound thing, see Fielder v. Starkin, 1 H. Bl. 19. Assumpsit will not lie where there is a fraud, the action must be trover or deceit. Ferguson v. Carrington, 3 Car. & P. 457; s. c. 14 E. C. L. 457; Slater v. West, 14 E. C. L. 330; Ferguson v. Carrington, 9 Barn. & C. 59; Thompson v. Bond, 1 Camp. 4; Read v. Hutchinson, 3 Camp. 352. An executed consideration, whereon the law implies a promise to pay on request, as upon an account stated, is not sufficient to support a promise to pay at a future day. Hopkins v. Logan, 5 Mees. & W. 241; Kaye v. Dutton, 7 Man. & G. 807. Where the defendant knew the bill of exchange given for goods was worthless at the time of purchase, assumpsit was held not to be the remedy. Read v. Hutchinson, 3 Camp. 352; Thompson v. Bond, 1 Camp. 4. Assumpsit on an implied contract. The law does not imply contracts where facts are inconsistent with contracts when implied. Where facts show a fraud, and that is to destroy the contract, then there can be no fact on which a contract can be implied, but quite the contrary; the implication is forbidden. Assumpsit for money had and received can only be for the actual amount of the sale by the defendant. Where there is a special count and a general count for goods sold, plaintiff may abandon his special count, but not when his proofs show the goods were delivered under the special agreement still subsisting. Raymond v. Bearnard, 12 Johns. 274; Jennings v. Camp, 13 Johns. 94; Robertson v. Lynch, 18 Johns. 451; Clark v. Smith, 14 Johns. 326; Perkins v. Hart, 11 Wheat. [24 U. S.] 237. If the contract is affirmed it must be as made, and the party cannot recover on a promise implied different from the one made. The notes were not worthless at the time of the contract, and he only tendered a part of them. The tender of a part affirms the contract made.

The following exceptions were made in the course of the trial:

1st. The plaintiff to support the issues on his part joined offered to read to the jury a commission issued in this cause, together with the depositions taken in pursuance thereof, to the reading of which deposition the defendant objected, because of the execution thereof, but the court permitted the same to be read. Marbury, in reply stated: 1st. The oath is signed by "J. Milburn, J. P." "J. P." means "Justice of the Peace." 2nd. The commissioners certify that they took the oath.

2nd. The plaintiff, to maintain the issue on her part, offered Ebenezer Rodbird, a competent witness, who testified that during the years 1839 and 1840 he was employed by the defendant to purchase negroes for him in the states of Maryland and Virginia; that the mode of business between the said witness was as follows: Williams placed in the hands of witness, from time to time, various sums of money, to be employed by him in the purchase of negroes, for which he allowed witness compensation; that he took the bills of sale and receipted on the purchase of the negroes in the name of the defendant, and delivered the negroes and evidence of purchase to the defendant from time to time; that the business and employment of the defendant was a trader in negroes; that witness paid for the negroes in the identical money placed in his hands by the defendant, and on being asked by the defendant's counsel if his authority as agent of defendant was in writing, said he had no authority written or verbal, except what is contained in the receipts given by him to the defendant, which he produced in form as follows: "Received of Wm. H. Williams ten hundred dollars, to be laid out in negroes, or returned when wanted. June 16th, 1839." Another for two thousand dollars, another for twelve hundred dollars, and another dated August 25th, 1840, for six hundred dollars. And thereupon the said plaintiff offered to read the depositions with the above receipts, to the reading of which the defendant objected.

3rd. Whereupon the defendant prayed the court to instruct the jury as follows: "If the jury shall further believe, from the same evidence, that at the time of alleged sale of the negro man by the said Wilkinson to defendant, that it was agreed between the said parties that in case the Millington bank notes then paid and received should prove worthless or not good, the former should return them to the defendant, who was then to make them good, then the plaintiff is not entitled to recover upon the common counts,"—which the court refused to give except with the qualification as follows: "If upon the whole evidence the jury should believe that the payment in Millington notes formed no part of the contract of sale of the negro man Frisby, but was collateral thereto; and shall further find that the defendant on the 25th of September, 1840, purchased of the said Wilkinson, in his lifetime, the said negro man Frisby, at and for the price and sum of $600, and paid for him in said notes of the Commercial Bank of Millington; and if they shall further find that said notes was issued by

certain individuals using the said name of said bank, and for the purpose of deceiving and defrauding the public; and if they shall further find as aforesaid that the said defendant knew of the existence of said fraud before the said purchase, and in such known case passed said notes to said Wilkinson; and further that the said George Wilkinson, on the discovery of said fraud, returned said notes or tendered them to the said defendant, or shall satisfy the jury that said notes were entirely destitute of value at the time said fraud was discovered, then the passing of said notes, if passed by the agent of the defendant to said George Wilkinson, was no payment for the purchase of said negro, to prevent the plaintiff from recovering in this action." The above was granted by the court. To which refusal to instruct, as prayed by the defendant, as well as to the instruction with the qualification aforesaid granted, the defendant excepts.

4th. In the progress of the trial of this cause, upon notice from the plaintiff to the defendant to that effect, the defendant produced and gave to the plaintiff's counsel the said letter from said Wilkinson to defendant, dated the 18th of Oct. 1840, and postmarked by said Wilkinson himself, who was then postmaster at the place where it was written, dated and mailed October 26th, and after said letter had been given in evidence to the jury, the following instructions were given:

"If the jury shall believe from the whole evidence aforesaid that the plaintiff's testator, George Wilkinson, at the time of selling the said negro man in the declaration mentioned, applied to Mr. Agustus R. Sollers for his opinion, whether or not the notes offered by Rodbird in payment were good, and received from him the reply that there could be no doubt about the money, received it as payment of said negro upon this assurance only, then the plaintiff is not entitled to recover on the special count in the declaration, notwithstanding the jury shall also believe that said Wilkinson afterwards stated to said Rodbird that in a short time he should go to Baltimore, and if he ascertain the notes were not good he should return them, to which said Rodbird assented. And further, that upon said testimony plaintiff cannot recover on the special count, unless the plaintiff shall further prove that said Wilkinson did, within a reasonable time, notify said defendant that the notes which had been paid him were not good, and had returned said notes, or offered to return them." The above was given by the court.

"If the jury shall believe from the said evidence that at the time of negotiating the sale of the said negro, and before the consummation of the same, and before the said Wilkinson would agree to receive payment for the said negro man in the notes of the Commercial Bank of Millington, the said Rodbird promised the said Wilkinson that should said money not be passable in the city of Baltimore, when he, the said Wilkinson sent it there, he, the said Rodbird, bound himself to make it good to said Wilkinson in other funds;" that then it was incumbent on said Wilkinson to send said money to Baltimore in a reasonable time, and if on sending it he found that it was not passable, to give by the earliest practicable public conveyance notice thereof to said Rodbird or said Williams, and to require the amount to be made good in other funds; and in the absence of such proof the plaintiff is not entitled to recover in this action, and further that fraud is not to be presumed, and that the acts and conduct of the said defendant, as proved in said evidence, may be accounted for by and traced to an honest and legitimate source and motive, the jury are not at liberty to infer fraud from such acts and conduct." The above instructions were given by the court at the instance of the defendant, who read to the court part of said letter embraced in instructions; the said defendant prayed the court to instruct the jury: "And further that the allegations contained in said letter of said Wilkinson of the 18th October, 1840, of his having sent said money to his agent in Baltimore, or that he received the letter from said agent as therein stated, are not competent evidence to prove said facts, that he had to send the money to Baltimore, or that he received any letter from his agent, or that said letter contained what is there stated, or that such statements were true as there made,"—which instruction the court refused to give, to which refusal the defendant excepts.

The exceptions were signed and sealed by Judges MORSELL and DUNLOP, under date of November 6, 1849.

Verdict for the plaintiff for $530, with interest from September 25, 1840.

Motion for a new trial on the following grounds: 1st. Because the verdict is against the law and the evidence. 2nd. Because the court erred in instructing and in refusing to instruct the jury. 3rd. Because the verdict was against the instructions of court

Coxe and May, for defendant.

Motion overruled, and judgment on the verdict.

Case No. 17,678.

WILKINSON et al. v. YALE et al.

[6 McLean, 16.] [1]

Circuit Court, D. Michigan. June Term, 1853.

CREDITORS' BILL — JUDGMENT OF STATE COURT — GARNISHMENT PROCEEDING—MICHIGAN STATUTE.

1. The courts of the United States can take jurisdiction, where property has been fraudulently conveyed to defeat creditors, and proceed under a state statute, where a judgment has been obtained, and execution has been returned no property.

[Cited in Claflin v. McDermott, 12 Fed. 376.]

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

2. And this proceeding may be had where the judgment was entered, and execution issued, in the state court.

3. And the same proceeding may be had in the state court, on a judgment obtained in this court.

4. Under the statute, judgment and execution are required. Many authorities require this on general principles.

5. But execution can never be required, on general principles, where at law the property cannot be reached.

6. A proceeding in a state court by attachment, where a garnishee is summoned, cannot be set up in bar or abatement to a creditor's bill.

7. Under a statute of Michigan, the procedure against a garnishee takes place after judgment against the defendant.

8. Until this, the procedure against the garnishee, under the statute of Michigan, is not a suit.

9. Partners cannot distribute among themselves any part of the stock in trade, to the prejudice of creditors. But when a distribution is made with the assent of the creditors, the act is not fraudulent.

[This was a bill in equity by John Wilkinson and others against Charles Yale and others.]

Wells & Cook, for complainant.

Mr. Campbell, for defendant.

McLEAN, Circuit Justice. This is in effect a creditor's bill. A judgment was obtained in the state court of Michigan, for a sum exceeding five hundred dollars. An execution was issued, which was returned, no property real or personal to be found. And the complainants allege that the defendants have conveyed their property so that it cannot be reached by an execution. The bill asks a discovery and relief. The defendants admit the obtainment of the judgment. They have no knowledge of the issuing of the execution or of the alleged proceedings thereon. They admit the judgment remains unsatisfied. Defendant Bronson believes Yale & Atherton have no property, real or personal. He admits that the 27th of November, 1849, they assigned to him all the notes and accounts then due to them as the firm of Chester Yale & Co., and all moneys on hand, and stoves not yet in possession, upon trust to pay creditors, &c. And he denies that the assignment was colorable or fraudulent, but that it was made and received in good faith. Bronson denies that the property is held, as charged, in trust for Yale & Atherton, except the payment of two hundred dollars to Yale. He alleges, that at the time defendant received said assignment, W. A. Cook was present as counsel for complainants, and defendant understood he was acting for them, and he expressed his entire assent to the same. That the debts stated in said list as owing by Yale & Atherton, to Rathburn & Co., and to Jewit & Root, were paid prior to the assignment; and he has since ascertained that the debt to Pratt & Co., is $530.75. Defendant has collected of the demands assigned about $500, and has paid to Yale $100, and to the creditors of Yale & Atherton $129 before injunction, and the balance remains in his hands, out of which he claims to retain a compensation for his services and expenses. That of the sum so paid to creditors, $15 was to complainant, to apply on the debt for which said judgment was rendered. That some weeks before such payment, defendant exhibited to said complainant, William Wilkinson, said assignment and schedules, and fully explained the same, and he expressed his concurrence therein; and the $15 were paid to him at his particular request. That after this, and the previous assent through Cook, it is insisted the complainants have no right to disaffirm the same. That 16th April, 1850, complainants garnisheed defendant Bronson in the suit in which judgment was rendered. That said proceedings are still pending in the county state court, involving the same matters, as in this suit which remain undetermined; defendant therefore insists that complainants have not exhausted their remedy at law, &c.

The first question made is, whether the court can take jurisdiction in the case. In Lanmon v. Clark [Case No. 8,071], it was held, a creditor's bill could be filed in this court. The judgment in that case was rendered in this court; but on the same principle, relief may be given, where the judgment was given in a state court. Under the statute of Michigan, the judgment must be shown, and the return of the execution, of no property, as a basis for proceedings; and it cannot be material whether such judgment and execution be shown in the federal or state court. The facts are sufficiently established by the record of either court. And we suppose a state court could proceed in the same manner on a judgment and execution in the federal court. The basis of the procedure is the fraud alleged, or trust, which can only be reached effectually in a court of chancery. A deposition was offered and objected to, because it does not appear by whom the deposition was written, or by what means it came into the hands of the clerk. When a deposition is taken, under the act of congress, in the absence of the other party, and without notice, great strictness is required. It must appear that the deponent, or the magistrate before whom it was taken, wrote the deposition; but the case before us, was, where the deposition was taken under a rule of court, as in state practice, and not under the act of congress, the same degree of strictness is not, therefore, required. We think, that prima facie, the deposition may be received, subject to any proof showing unfairness or fraud. It is insisted that the proceeding against Bronson, as garnishee, is a bar to this procedure.

By the act of Michigan of the 28th of March, 1849, in the 13 section, it is provided, that in any action before a justice of the peace, &c., if the plaintiff or his agent shall make affidavit that he has good reason to believe, and does believe, that any one has money or effects in his hands, or under his control, or that such person is in debt to such defendant,

the justice shall issue a summons, and require such person to answer under oath, the matters alleged in the affidavit; and from the service of such summons on the garnishee, he shall be liable for the effects of the defendant in his hands. And it is declared that from the service of a summons, the suit against the garnishee shall be deemed as commenced. After the examination of the garnishee, the cause as to him, shall be continued until the final judgment against defendant. After the final judgment, the justice, on request, shall issue a summons against the garnishee, to show cause why a judgment should not be rendered against him. And the plaintiff may declare against him in trover. And the 20th section provides, that no suit shall be maintained or recovery had by such plaintiff against the garnishee for the amount of money sworn to, proved or admitted to be due from such garnishee to defendant, or for the property or value thereof, while the original suit is pending. Although the statute declares the suit shall be considered as pending, from the time the garnishee is summoned, yet, it is clear, that until after the judgment in the original case is obtained, according to the 20th section, no suit can be maintained against him. The first proceeding, therefore, against the garnishee, must be regarded in the light of a witness, except that from the time he is first summoned, he is held liable for the assets in his hands. Until after the judgment, the procedure against the garnishee cannot be considered as a suit pending, which can be set up in abatement of the present bill.

The next inquiry is, whether the assignment was void as against creditors. In the case of Fox v. Willis, 1 Mich. 321, it was held, "that a deed fraudulent as to creditors, is not void but voidable; and can be avoided only by a judgment creditor, or one claiming under him, who has taken out execution, and levied on the property fraudulently conveyed." "Where a debtor conveyed property in trust for creditors, which conveyance was fraudulent as to creditors, and afterwards gave a mortgage on a part of the same property to a creditor, who was aware of the previous conveyance, for the payment of a judgment the creditor had against him, it was held that the mortgagee, though a judgment creditor, inasmuch as he had not taken out execution on his judgment, and levied on the land fraudulently conveyed, could not call in question the validity of the prior conveyance; and that he was not protected against it as a purchaser for a valuable consideration." 2 Johns. Ch. 189; 10 Pick. 413; 2 Kent, Comm. 533; 4 Johns. Ch. 529; [Brooks v. Marbury] 11 Wheat. [24 U. S.] 78; 4 Johns. Ch. 672. The above cases are ruled, or some of them, upon the ground that judgment and execution are essential, before the party can ask relief in a court of chancery. But in the case of Hadden v. Spader, 20 Johns. 569, it was held, that this doctrine is not sustainable. That in case of stocks and other property which cannot be reached by execution, a judgment and execution are not necessary. This is undoubtedly the reasonable doctrine, and it is applicable to all cases of trusts, where a proceeding at law cannot reach the property. In the answer of Bronson, he says, that he fully explained to the Wilkinsons the nature of the assignment, as to the amount reserved for Yale; and the receipt for $15 shows it was received, as a part of the dividend. Received February 15th, 1850, of H. O. Bronson, fifteen dollars to apply on demand against Yale & Co., signed Wilkinson & Co.

Choate, a witness, states, that before the assignment was made, he told Mr. Cook, counsel for the plaintiffs, that Chester Yale, one of the partners, was to be preferred as a creditor of about two hundred dollars, in consequence of his having paid more capital than his partners, Atherton & Co., when he expressed himself gratified with the arrangement.

Samuel Higby, says, that fifty dollars were paid to Mr. Cook, with the understanding that it should be considered a part of the assets, and should be included in any dividends that should be made to said complainants.

Austin Blair, of counsel for defendants, explained to Cook the nature of the assignment agreed upon. Witness waived the injunction as to the payment of the fifty dollars, being attorney in the case, on the declaration of Mr. Cook, that if he would do so, he would receive it, as from the assignee, and would account for it out of the dividend they should be entitled to receive.

It is true, the partnership funds invested cannot be withdrawn and distributed among the partners, so as to equalize the sums advanced by each, to the prejudice of the creditors; but in this case the distribution seems to have been made with the acquiescence of the complainants and their counsel. That the complainants were fully apprised of the claims against the company, and of the claims and property assigned to the defendants, which they assented to, and that they, through their counsel, received certain sums in part of the dividends to be distributed. Under these circumstances, we think the assignment cannot be considered fraudulent. The bill is therefore dismissed at the costs of the complainant.

WILL The (HARTMAN v.). See Case No. 6,163.

WILL (UNITED STATES v.). See Case No. 16,697.

WILLAMET FALLS, C. & L. CO. v. KITTREDGE. See Case No. 17,105.

WILLARD (BARBEE v.). See Case No. 969.

WILLARD (BOGGS v.). See Case No. 1,603.

WILLARD (BRATTLE v.). See Case No. 1,815.

Case No. 17,679.

WILLARD et ux. v. DORR.

[3 Mason, 91.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1822.

ADMIRALTY—SUIT FOR MASTER'S WAGES—STATUTE OF LIMITATIONS—CAPTURE OF VESSEL—EFFECT ON WAGES CLAIM.

1. The master of a ship may maintain a suit in the admiralty in personam against the owner, for his wages, but not in rem against the ship, for he has no lien.

[Cited in The Santa Anna, Case No. 12,325; The Stephen Allen, Id. 13,361; The Merchant, Id. 9,434; Cox v. Murray, Id. 3,304; The Larch, Id. 8,085; Grant v. Poillon, 20 How. (61 U. S.) 168; The M. Vandercook, 24 Fed. 475; The Atlas, 42 Fed. 794.]

2. The statute of limitations of a state is no bar to a suit on the admiralty side of the courts of the United States.

[Cited in The Utility, Case No. 16,806; Joy v. Allen, Id. 7,552; Scull v. Raymond, 18 Fed. 553; Nesbit v. The Amboy, 36 Fed. 926; The Queen of the Pacific, 61 Fed. 215.]

3. The statute of Anne, limiting suits in the admiralty for seamen's wages to six years, is not a bar to such suit in the courts of the United States.

[Cited in The Utility, Case No. 16,806; Southard v. Brady, 36 Fed. 561.]

4. If during the voyage there be a capture and final restitution decreed, the right to wages is not complete until the restitution.

[Cited in Brown v. Lull, Case No. 2,018.]

This was a libel brought by the administratrix of the master of the ship Jenny, owned by the respondent, John Dorr, for wages earned by the master in a voyage originally undertaken from Boston to China, and back again to Boston, and also for wages earned by his apprentice during the same voyage. The voyage commenced in May, 1807, and was carried on until December, 1808, when the ship was captured as prize by a British cruiser, and carried into Calcutta for adjudication. Upon trial there, the ship and cargo were condemned, and an appeal was taken to the lords commissioners in England. Upon the hearing of the appeal, the decree was, after many years' delay, reversed, and the property ordered to be restored. But the respondent did not receive the proceeds, under the decree of restitution, until 1818. To the libel, asserting these facts, the respondent put in a plea excepting to the jurisdiction of the court, upon the ground, that the admiralty had no jurisdiction in a suit by the master for wages; and also interposed a bar of the statute of limitations of Massachusetts; and also of the statute, passed in the reign of Queen Anne, limiting suits in the admiralty for seamen's wages to six years.

The cause was argued upon the question of the sufficiency of these pleas, by Mr. Hubbard, for defendants, who cited Brown v. Jones [Case No. 2,017]; 3 Burrows, 625; St. 4 Ann. c. 16, § 17. And by L. Shaw, for respondent who cited Com. v. Leach, 1 Mass. 61.

STORY, Circuit Justice. So far as the objection to the present suit rests on the ground of the incompetency of the court to retain the jurisdiction, because it is a suit for the master's wages, I am of opinion, that it cannot be sustained. If this were a suit in rem against the ship for payment of the master's wages, the objection would be fatal; for it has been settled at the common law, that the master has no lien upon the ship for his wages; and the jurisdiction of the admiralty in rem can be supported, only where a lien exists, which it may lawfully enforce. Such a lien is admitted to exist for the seamen's wages. But the same difficulty does not occur in respect to a suit in personam. There, the contract being for services purely maritime, and of the same nature as the seamen's, it is a case of admiralty and maritime jurisdiction. As is observed by Lord Chief Justice Abbott, in his treatise on Shipping (page 459), "in this view of the subject, it is difficult to distinguish the case of the master from that of the persons employed under his command; the nature and place of the service, and the place of the hiring, are in both cases usually the same." He goes on to state, that it has however been settled, that the master can only sue the owners personally, in a court of common law. I am inclined to think, that the question has never come under the cognizance of a court of common law, except in cases for prohibitions of suits of the master against the ship. All the cases within my research appear to me to be of that nature, and the reasons given for the decisions apply to suits in rem. The master is said to trust to the personal credit of the owner, and to have no lien on the ship, as the seamen have. See Com. Dig. "Admiralty," E, 15; Ragg v. King, 2 Strange, 858; Clay v. Sudgrave, 1 Salk. 33; s. c. 1 Ld. Raym. 576; 12 Mod. 405; Carth. 518; Read v. Chapman, 2 Strange, 937; The Favourite, 2 C. Rob. Adm. 232; 2 Browne, Civ. & Adm. Law, 87, 89, 95; Wilkins v. Carmichael, 1 Doug. 101; De Lovio v. Boit [Case No. 3,776]. Indeed, in some cases, the judges of the courts of common law seem to have been ignorant, that a seaman could maintain a suit in personam in the admiralty for wages (though that is now familiar), as well against the owner, as master. In ancient times the principal mode of proceeding in the admiralty was by process in personam. See, also, The Hope, 3 C. Rob. Adm. 215, and note; Brevoor v. The Fair American [Case No. 1,847]; Clerke, Praxis, Adm. tit. 1; The Anne [Case No. 412]; [M'Culloch v. Maryland] 4 Wheat. [17 U. S.] 433; [Mauro v. Almeida] 10 Wheat. [23 U. S.] 473.

My opinion is, that the admiralty has jurisdiction in cases of this nature in personam, though not in rem. The contract is maritime, and the service maritime; and I can perceive

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

no principle, upon which the court can entertain a suit in personam for the seamen, which does not apply to the master. This point has in fact been repeatedly ruled in this court. We may then dismiss the question of jurisdiction.

As to the other point, so far as the bar depends upon the statute of limitations of Massachusetts, it has been already disposed of by this court, in the case of Brown v. Jones, 2 Gall. 477. As to the statute of Anne (4 Anne, c. 16, § 17), the words are, "that all suits and actions in the court of admiralty for seamen's wages shall be commenced and sued within six years next after the cause of such suits or actions shall accrue." Now these words plainly apply to suits in the high court of admiralty in England. There is not the slightest allusion to the vice admiralty or colonial courts. The language is, "suits and actions in the court of admiralty," not in any court of admiralty. There is no reason to suppose parliament meant to include any colonial courts. They might well be left to adjudicate on these matters according to the general principles of maritime law; and a rule of limitation, which in England might be convenient and useful, might be wholly inapplicable in some of the colonies, and mischievous in others. I am not aware, that this statute of Anne was ever adopted in practice in any of the colonies, as a rule governing their courts of admiralty. If it was, it is incumbent upon those, who assert the fact, to establish it by some competent evidence. None has been adduced. The principle, stated in Com. v. Leach, 1 Mass. 59, may be true, that, "generally, when an English statute has been made, in amendment of the common law of England, it is here to be considered as a part of our common law." But the doctrine is inapplicable to the present case. That is not a statute in amendment of the law, which merely prescribes a limitation as to suits in one particular court. The colonial courts of common law, might well adopt some English statutes in amendment of the common law, as applicable to the state of the colonies. But the courts of admiralty in the colonies were governed, in their principles and practice, by more general considerations. The omission, on the part of parliament, to restrict them to any period, in relation to entertaining suits, when it did restrict the high court of admiralty, might well be considered as equivalent to a declaration, that their proceedings ought to remain, according to the general course of the admiralty. The colonies did not create or undertake to make laws for the courts of admiralty. They were exclusively under the general regulation of the crown and of parliament. 2 Browne, Civ. & Adm. Law 490; 3 Bl. Comm. 69. In the charter of Massachusetts, of 1692, the king expressly reserved the exclusive authority to create and regulate admiralty courts. The power to create vice admiralty courts, generally, was considered as a prerogative of the lord high admiral, or of the crown, acting in its sovereign capacity, when that office was vacant. If, however, it were shown, that in fact the statute of limitations of Anne had been adopted in practice by the colonial courts, before the Revolution, it would not follow, that it was obligatory upon the admiralty courts, organized under the government of the Union. They derive their powers and authority from the constitution and laws of the United States, and have no connexion or dependence upon the colonial vice admiralty courts. They possess general admiralty and maritime jurisdiction; and, in the exercise of it, must be governed by the general principles of such tribunals, and not by a statute provision, emanating from another government, and which ought only to regulate its own high court of admiralty. The lex fori, positively prescribed as a limitation upon suits, in a foreign tribunal, is not of course to be adopted, as a binding authority upon the courts of another government. As far as I know, no statute of limitation, not absolutely addressed to a court, has ever been admitted to control its general jurisdiction over suits. Undoubtedly, courts of admiralty, like courts of equity, will not entertain stale demands; and will assume, upon general principles, some limitation. It will presume demands extinguished after the lapse of a reasonable time, and feel, that it best dispenses justice by refusing its aid in reviving dormant and antiquated claims. This, however, is the exercise of a far different power from that of entertaining a strict legal bar. It is an exercise of sound discretion, and is to be guarded by a wholesome equity.

There are circumstances, also, in the present case, which make it difficult to apply the bar of the statute of limitations, considering the imperfect manner, in which the plea attempts to meet the matter of the libel. The right to wages, to a certain extent at least, was suspended by the capture, and was revived only by the final restitution under the decree of reversal. The property was not actually received by the owner until 1818; and the exact time of the reversal is not definitely averred, so that it is not even put in, as an allegation, that six years have elapsed since that decree. If any thing decisive turned upon these considerations, I should probably direct the parties to amend the pleadings. But in any event I am not able to say, that the right to wages, thus suspended and thus revived, even if the statute of Anne applied, could be reached by it, unless six years had elapsed after the decree of restitution, or perhaps after the effective receipt of the proceeds of the property. That statute would not begin to run, until the right of action was complete; and as the right to wages was inchoate only before the capture, and perfected only by the final restitution, the "cause of action" did not, in the sense of the statute, "accrue," until that period.

Upon the whole, my opinion is, that the pleas put in by the respondent must be overruled, and he be assigned to answer over per-

emptorily to the merits of the libel. Decree accordingly.

[For a subsequent hearing of this cause, see Case No. 17,680.]

Case No. 17,680.

WILLARD et ux. v. DORR.

[3 Mason, 161.] [1]

Circuit Court, D. Massachusetts. May Term, 1823.

CAPTURE OF NEUTRAL SHIP — WAGES OF MASTER AND SEAMEN — ADMIRALTY PROCEDURE — SET-OFF — LACHES — TERMS OF HIRE — SERVICES AS FACTOR.

1. The master of a neutral ship which is captured, is bound to remain by the ship until condemnation, or a recovery is hopeless; and his wages after the capture and until the condemnation &c. are a charge to be paid by the owners, and ultimately to be borne, as a general average, by all the parties in interest.

[Cited in Copeland v. Phœnix Ins. Co., Case No. 3,210; The M. M. Chase, 37 Fed. 711.]

[Cited in Duncan v. Reed, 39 Me. 418.]

2. If a neutral ship after capture is condemned and sold, and afterwards on appeal the sentence is reversed, and freight for the full voyage is allowed in damages, it seems the seamen are entitled to full wages for the voyage. At all events, they are entitled to wages up to the time of the condemnation, if they remained by the ship so long.

3. If the master is guilty of smuggling in the voyage, if it is gross, it is a forfeiture of his wages for the voyage; and, at all events, any loss to the owner occasioned thereby, is to be compensated out of the wages of the master.

4. Courts of admiralty do not take notice of set-offs, except so far as they grow out of a maritime contract, submitted to its cognizance, and then principally by way of diminishing compensation, and not as an independent right.

[Cited in Bains v. The James & Catherine, Case No. 756; The Hudson, Id. 6,831; Dexter v. Munroe, Id. 3,863; The Two Brothers, 4 Fed. 159; Gillingham v. Charleston Tow-Boat & Transp. Co., 40 Fed. 650; The Journeyman, 60 Fed. 296.]

5. Courts of admiralty will not entertain suits upon stale demands. Twelve years' delay, unexplained, will affect a demand with the imputation of staleness.

[Cited in The Utility, Case No. 16,806; Bains v. The James & Catherine, Id. 756; Joy v. Allen, Id. 7,552.]

6. Shipping articles, being the proper and usual documents of the ship for the voyage, are in the admiralty always admitted as evidence of the terms of hire, even of the master, or his apprentice; but the evidence is not conclusive.

[Cited in Slocum v. Swift, Case No. 12,954; The Elvine, 19 Fed. 528.]

7. No suit for services performed by the master as a factor, or in any other character except that of master, is cognizable in the admiralty.

This cause [Case No. 17,679] came on again to be heard at this term, the respondent having put in a special answer; and upon a special replication thereto, the parties were at issue, and the points both of fact and law were argued at large.

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

Mr. Hubbard, for libellant.

L. Shaw, for respondent.

STORY, Circuit Justice. It may be proper to state the leading facts of the case before I proceed to the consideration of the matters in controversy between the parties. The voyage originally undertaken by the ship Jenny, of which William Dorr was master, was a circuitous voyage from Boston to China, and back to the United States. The ship sailed from Boston on the voyage on the 5th of June, 1807. In the course of the voyage she stopped at Port Jackson, in the colony of New South Wales, and arrived at the Feegee Islands in the Pacific Ocean in May, 1808, and there disposed of the principal part of her cargo, and took on board a cargo of sandal wood; and sailed for China in September of the same year. Having sustained some injuries by tempestuous weather at a previous period, and the change of the monsoon approaching, it was judged proper before entering the Chinese seas, to stop for a supply of spars and other necessaries at the Island of Guam, one of the Ladrone Islands. Whilst lying there to refit, a quantity of beech de mer, beetle nuts, and deer horns were taken on board and added to the cargo. The ship sailed from Guam for China on the 10th of December, 1808, after a delay of about forty-five days, and was captured by a British cruiser on the 27th of the same month, and sent into Calcutta for adjudication. She arrived at Calcutta on the 4th of April, 1809; and after due proceedings had in the vice admiralty court there, she was finally with her cargo condemned on the 9th of June of the same year. Captain Dorr was sent in with the ship, and attended personally to her concerns in court and out, until the condemnation, when the ship and cargo were sold; and his apprentice was retained for the ship's service during the same period. An appeal was taken to the high court of admiralty, and Captain Dorr remained at Calcutta for the purpose of obtaining the necessary papers &c. until the 27th of December of the same year, and finally arrived at Boston on the 22d of March, 1809. Upon the hearing of the appeal, restitution of ship and cargo and freight were decreed by the high court of admiralty on the 16th of May, 1811, and a small part of the proceeds were then received. But in consequence of the delay of bringing the residue of the proceeds into court, and the intervention of the war between Great Britain and the United States, all farther proceedings were suspended until after the peace of 1815. In the spring of that year the proceeds were paid to the respondent's agent in London, and were finally received in America for the benefit of all concerned in November, 1816. Captain Dorr left the United States for Macoa in July, 1810, and never afterwards returned, having died at that place in May, 1813.

These facts are not controverted by the parties. The libel asserts a claim for wages for the master up to the time of the capture, or departure for Guam; and for compensation to the master for services during the pendency of the proceedings, and until his arrival in the United States, as well as the expenses of his passage home. It also asserts a claim for wages for the apprentice up to the departure from Guam; and for his services afterwards on board the ship, until her condemnation. The answer of the respondents sets up a variety of defences, some of which go to the merits of the whole claim, and some only as set-offs to diminish the amount of compensation.

The first and most general in its nature is, that the demand is stale, and ought not (independent of any positive bar under any statute of limitations) to be entertained by the court, the lapse of time creating a presumption that it has been deemed settled by the parties, or that it has no foundation in justice or equity. I agree to the position, that courts of admiralty ought not to entertain suits for stale demands of wages. Although there is no prescribed limits beyond which, in the exercise of admiralty jurisdiction, the courts of the United States may not take cognizance of suits; yet it has been the constant habit of admiralty courts to refuse their aid in favor of old and dormant claims. Like courts of equity, they prescribe a rule to themselves, by analogy to those positively prescribed to courts of common law, beyond which, unless under special circumstances, constituting a just exception, they will not interpose. The repose of the commercial world requires this forbearance; for otherwise demands would perpetually spring up after the evidence to repel them was gone by the death, or dispersion of witnesses, or by the loss of important documents. So that lapse of time and acquiescence of parties constitute material ingredients in every claim, which is sought to be enforced through the instrumentality of tribunals of justice. Where there are no positive bars, presumptions are often indulged, which are equally fatal to a recovery. More than twelve years elapsed between the end of this voyage and the commencement of the present suit; and if the case stood upon ordinary grounds, such a delay unexplained would be decisive against the libellants. It would affect the demand with the imputation of staleness, and authorize the court to dismiss the libel.

But the circumstances of the present case appear to me decisive against the defence of staleness. It is true, that the original voyage was commenced in 1807, and the progress and fulfilment of it were entirely interrupted by the capture in December, 1808. The claim for wages may in a sense be said to have been complete by the maritime law for a period up to the last port of trade and delivery, which I consider to have been the Island of Guam, and during half the time of the ship's delay there. The Two Catherines [Case No. 14,288]. If the conduct of the ship had been confined simply to the repairs and refreshments necessary for the prosecution of the voyage, there might have been some ground to have considered the Feegee Islands the last port of departure for the purposes of trade. But the purchase and taking on board of additional cargo at Guam, afford strong presumptions to my mind, that the stop there was not singly from necessity, but mixed with motives of interest subservient to the great objects of the voyage. But though the right to wages up to the last port of trade may be considered as earned under the maritime law; yet the right to those wages is acquired under a continuing contract for the whole voyage, and is not absolute until its regular termination. They may be forfeited for subsequent offences; and by the stipulations of our common shipping articles, are not payable until the voyage is ended. The contract then being for the whole voyage out and home, no presumption of satisfaction or extinguishment can ordinarily arise until after the termination of it by a return home. In the case before the court, a capture intervened, and produced, not an extinguishment, but a suspension of the contract. The seamen were, as has been repeatedly held by this court, bound to remain by the ship until condemnation took place, or a recovery became hopeless. The Saratoga [Id. 12,355]; Emerson v. Howland [Id. 4,441]. If upon the proceedings at Calcutta the ship had been acquitted, the seamen would have been bound to have gone on and completed the voyage upon the peril of the forfeitures attached by the maritime law to their original contract. She was condemned and sold; and certainly after that time they were at full liberty to depart and seek a new employment. Still, however, the condemnation was not final upon their rights to wages earned subsequent to the departure from the Feegee Islands or from the Island of Guam. By the restitution decreed upon the appeal the seamen were, at all events, entitled to their wages up to the time of the condemnation at Calcutta, if they so long remained by the ship. And if the restitution was decreed with freight for the whole voyage by way of compensation and damages, it seems to me they were entitled to wages for the whole voyage; for in such case, as freight is in effect earned for the whole voyage, there seems no reason why the seamen should not receive their wages for the same period, as such freight includes the expenses of navigation. That point, however is not now pressed upon the court, and may well be reserved for future consideration. The view which I wish to present on the present occasion is, that the contract for wages being for the whole voyage, it is to be considered as a continuing contract, until the termination of the voyage,

and the wages, though due at each port of delivery, as in some sort connected till such termination, and therefore not liable to be split into fragments by the interposition of any positive bar or limitation, or by any presumption of payment. Indeed, as has been already suggested, the clause in our common shipping articles suspends the payment until the close of the voyage.

The case of the master of a neutral ship upon capture is far more strong in point of right and duty than that of a common seaman. He has not only a right, but it is his imperative duty to remain by the ship until a condemnation, or all hope of recovery is gone. He is intrusted with the authority and obligation to interpose a claim for the property before the proper tribunal, and to endeavour by all the means in his power to make a just and successful defence. To abandon the ship to her fate, without asserting any claim, would be a criminal neglect of duty, and would subject him to heavy damages for a wanton sacrifice of the property. As therefore the law compels him to remain by the ship, and attaches him in some sort to her fate, he is entitled to receive compensation for his services, and this compensation is a charge to be borne in the first instance by the owner of the ship, and ultimately as a general average by all the parties in interest. His duties do not indeed cease even with condemnation; but he is to act for the benefit of all concerned; and if he should deem an appeal to be expedient, he is bound to enter it, and may, in his discretion, remain until copies of the papers are obtained, and other means of rendering the appeal effectual are concluded. The compensation for such services, and the incidental expenses, fall under the same predicament as those already adverted to. Upon these principles, I cannot but consider Captain Dorr entitled to wages from his original retainer to go the voyage until the condemnation at Calcutta. He was bound to remain by the ship during that whole period, and his wages must be coextensive in point of time with that obligation. He is also entitled to compensation for his services, as master, in effecting the appeal and procuring the necessary papers, and for the necessary prolongation of his stay at Calcutta for these purposes. For any other services performed by him, as agent or factor, independent of his character as master, he can have no claim here, for such claims are not within the cognizance of a court of admiralty.

As to some of these claims, he might certainly have demanded payment immediately upon his return home; as to others, the right, until the final restitution, might have been, and probably was, deemed doubtful. For instance, his title to wages, at least for a part of the voyage after leaving the Feegee Islands, might have been liable to great controversy, unless the decree of condemnation was reversed. That reversal, at all events, reinstated him in his rights. Looking to the whole circumstances of the case, I cannot say that there has been any unjustifiable delay. The restitution was not made until May, 1811, and the proceeds were not finally obtained until four years afterwards. Captain Dorr was abroad at the time of the restitution, and probably never had notice of it; and he died abroad two years before the decree became effectual. The fair inference deducible from all the facts is, that the parties were willing to leave the claims of Captain Dorr to be adjusted upon the final event of the appeal; and I cannot but think great indulgence is due to parties acting under circumstances of so much embarrassment and intricacy. The claim of the apprentice to wages, supposing it to be in other respects unobjectionable, stands on like principles. He was retained on board for the service of the ship, and as a guard against embezzlement, until the time of her condemnation; and is now entitled to wages at least up to that period, since the decree of restitution has reinstated the owner in his full title to freight.

Another objection to the recovery of wages both of the master and apprentice is, that there is no sufficient proof of the actual shipment of the latter for the voyage, nor of the terms and rate of wages on which either was engaged. It is admitted that the shipping articles contain their signatures and engagements for the voyage, with the monthly hire in the usual manner. But these articles, it is said, are not evidence in any controversy between the master and owner, but only in cases of the other officers and seamen. This distinction is perfectly novel in its character, and cannot, in my opinion, be sustained upon legal principles. The shipping articles constitute a part of the documents of the ship for her voyage, and are prima facie evidence in respect to all persons named therein. They are in no just sense the private papers of the master, but properly the documents of the owner, to which he must be presumed to have free access, and of the contents of which he cannot ordinarily be supposed ignorant. These articles invariably contain the contract of the master in respect to wages and the voyage, as much as of the seamen; and the terms of hire of the master and his apprentice, when found there, must be presumed to be perfectly sanctioned by the owner. If the latter wishes for any farther security than the ordinary integrity and interest of the master for his fidelity, he may and ought to take the precaution to possess a copy of the articles, or a distinct contract with the master. And in the customary orders for the voyage, it is not unusual to state, what the terms of the engagement of the master are in respect to wages and commissions. But prima facie the shipping articles are presumed to import verity, and to be as well known to the owner as master; and it is in-

cumbent on the owner, if he means to contest the fact, to offer some evidence of fraud, mistake, or interpolation. I wish to state this as a general rule applicable to cases of this nature. But so far as the case before the court requires any application of evidence, there really does not seem any reasonable ground for the objection. It is not doubted, that the master and apprentice went on the voyage: the compensation claimed as monthly wages is not attempted to be shown to be extravagant or unusual: and unless the court is to presume, that they volunteered their services without reward, which would be a most extraordinary and rash presumption, there is nothing in the claim, which upon a quantum meruit ought not to be decreed.

Another objection to the recovery is the allegation, that at Sydney Cove or Port Jackson in New South Wales, Captain Dorr was engaged in smuggling spirits, for which illegal proceeding the ship was seized and detained, and though finally released, expenses were incurred to the amount of $1,169.70. This is an independent allegation, and is of course to be established by competent evidence on the part of the defendant. Smuggling on the part of a master is a criminal departure from duty and a rank offence, calling upon the court for its most decided reprobation. Where it is gross in its circumstances, and attended with serious damage or loss to the owner, it is such a violation of the master's contract, as may be justly visited with the penalty of forfeiture of wages. And under the most venial and favorable circumstances, the damages actually sustained by the owner may be charged upon the wages of the master, and deducted by way of diminished compensation therefrom. But such misconduct is not to be presumed on the part of the master, and must be made out by reasonable proofs. It is certainly in proof in the case, that the ship was actually seized at Port Jackson, and that expenses were incurred on that occasion. But the ship was ultimately released, and this circumstance goes strongly to establish that the fact of smuggling, even admitting that this was the cause of seizure, was not maintained. If indeed there was any smuggling, as there was a supercargo, Mr. Francoeur, on board, who had the sole control of the cargo, and the direction of the voyage, it would still remain to be shown, that the master participated or connived at the act, and that it was his fault, and not merely his misfortune. Now there is no direct proof even of the act of smuggling. It is attempted to be made out by probable inferences from circumstances not very cogent; and it is denied both by Mr. Francoeur and the master in their depositions in preparatorio. The seizure is by them attributed to another cause, there being a convict found secreted on board, who came there without their knowledge or connivance. There is this additional circumstance, that this very claim was in 1816 brought by the defendant before the commissioners appointed upon Captain Dorr's estate under a commission of insolvency, and upon full consideration was by them rejected. Whether this rejection of the claim would in all cases be conclusive, need not be here determined. It is sufficient to say, that the decision of the commissioners is entirely in coincidence with the opinion of this court; and fortifies every conclusion, which the evidence before it would now justify it in entertaining.

The remaining questions respect the set-offs asserted by the defendant, as matters of counter claims. Some of these are properly before the court, as partial payments of wages and advances in the voyage; but others are debts and claims of a wholly independent nature. Now in respect to the latter, I am utterly at a loss to know, how they can be properly brought within the cognizance of this court. Most of them are not of a maritime nature; and even if they were, as they do not grow out of the maritime contract, on which the libel is framed, it is difficult to perceive, how they are founded in point of jurisdiction. Courts of admiralty are not invested by statute with any authority to hold plea of set-offs generally. Wherever they do entertain such claims, it is upon general principles of equity, where the claims attach to the particular maritime demand, submitted to their cognizance by the libel, and not upon any notion of a right to enforce such set-offs, as are now recognized and enforced in courts of common law under statuteable provisions. The set-offs allowed in the admiralty are principally those, in which advances have been made upon the credit of the particular debt or demand, for which the plaintiff sues; or which operate by way of diminished compensation for maritime services on account of imperfect performance, misconduct, or negligence; or as a restitution in value for damages sustained in consequence of gross violations of the contract for such services. The duty of the court is clear, therefore, and it ought not to entertain any jurisdiction over such set-offs. As, however, the questions have been fully argued by counsel, and these same claims were presented to and rejected by the commissioners of insolvency, I shall take the liberty of expressing in a few words my own opinion respecting them, which, indeed, coincides with that of the commissioners.

As to the notes of Captain Dorr for $270 and $75, it now appears, that the former was given for the advances made by him at Calcutta, and for which he drew exchange on the respondent in favor of Rammohun Roy. These advances were for the master's expenses at Calcutta, and are certainly a proper charge on the ship owner. They have been allowed by the underwriters as such, and paid to the respondent. This note, therefore, as well as the dependent claim for the money advanced by Rammohun Roy, vanishes as a subsisting charge against Captain Dorr. The same may be said of the other note for $75, which was given by Captain

Dorr for advances made for his passage money and expenses home by the way of New York. These expenses were also payable by the owner. Indeed, these notes confirm the view already taken by the court, that there never was any settlement really had between Captain Dorr and his owner for the proceedings of the voyage, but that it was postponed until the event of the appeal should be ascertained. In any other view of the facts, the court would be obliged to come to the conclusion, which it would be very reluctant to do, that an improper advantage had been taken of Captain Dorr's necessities, or that he acted under the grossest mistake of his legal rights. I do not choose, without a full warrant, to indulge in such a conjecture. The facts admit of a more liberal and just explanation. The other note for $35 is admitted to be due, and no objection is urged against the deduction of the amount from the present demand.

Then comes the claim for fifty-eight kegs of lard, part of the cargo, which it is alleged were lost, and not accounted for by Captain Dorr. In the first place, the whole cargo was consigned to Mr. Francoeur, the supercargo, and he alone is responsible to account for it. The master, as such, had no control over it; and it is not shown, that any part of it was lost or injured by his misconduct. In the next place, the answer of Mr. Francoeur to the standing interrogatories establishes, that in point of fact it was embezzled by the captors. If so, there is no pretence to charge the master with the loss, unless the embezzlement was by his connivance, which has not been in the slightest degree hinted at. The next item is for palanquin hire, and for wine used at Calcutta. The former, I believe, is no unusual or unreasonable expense in East India voyages; and the latter, if not indispensable, was not deemed improper under the circumstances, by Mr. Francoeur, the agent of the owner, who was on the spot, and made the advances for this purpose. In the absence of all proof, that these expenditures were unjustifiable or extravagant, the court must presume them to be correct. The item of $19 for money advanced by Mr. Carrington appears to have been in payment of the expenses of the protests at Calcutta, and if so, was a charge on the owner.

The only remaining item, which requires any particular notice, is that of $160 for clothing, tools, and other articles asserted to have been supplied to Captain Dorr and to his apprentice, during the voyage, out of the property on board belonging to the ship owner, or for which he was responsible. The apprentice, in his deposition, utterly denies having received any such supplies; and there is no proof to contradict his testimony. This claim, therefore, falls to the ground, as unfounded in fact.

Upon the whole, I shall decree that the libellants shall recover wages and compensation for services according to the principles already stated. Of course the advance wages and equitable claims are to be deducted. Decree accordingly.

The minute for the decree was as follows:

Captain Dorr's wages from 22d of May, 1807, to 7th of June, 1809, at $50 per month, 2 years and a half month...		$1,225 00
Compensation in the nature of wages for services as master, from 7th of June (time of condemnation) till departure for home, say 7th November, 1809, 5 months, at $50.....		250 00
James Powell's (the apprentice) wages from 5th of June, 1807, to 7th of June, 1809, 2 years, at $12 per month.....		288 00
		$1,763 00
Deduct Cr.		
Cash paid master as advance wages.....	$100	
Cash paid apprentice as advance wages.....	24	
Note for cash lent.....	35	
	$159 00	
Note of 4th of May, 1810, for general average (if produced and proved)....	164 72	
		323 72
Balance.....		$1,439 28
Interest from 13th of April, 1822 (the commencement of the suit) to 13th of June, 1823, 2 years and two months, on $1,439.28.....		187 09
Whole amount.....		$1,626 37

The sum of $230 was paid by the underwriters to the defendant for the master's services at Calcutta.

WILLARD (NOYES v.). See Case No. 10,374.

WILLARD (PRATT v.). See Case No. 11,378.

WILLARD (UNITED STATES v.). See Case No. 16,698.

WILLARD, The B. J. See Case No. 1,454.

Case No. 17,681.

The WILLARD SAULSBURY.

[1 Lowell, 194.] [1]

District Court, D. Massachusetts. Jan., 1868.

COLLISION — TUG AT ANCHOR — FAILURE TO SHOW LIGHT.

1. A boom was anchored within the limits of the "Narrows" in Boston Harbor, as a protection to the scows and dredges at work in deepening and enlarging the channel. A tug was moored to the boom on the inside, at night, without displaying a light, and keeping no watch, and was run into and much injured by a schooner which was coming up the harbor with a proper lookout. The schooner's men had no actual notice of the boom, nor had any notice of its being placed there been made public. The course of the schooner was rather to the northerly side of the channel, and there was room to go to the middle or southward. *Held*, the tug should have displayed the light required by article seven of the sailing rules of the act of 1864 (13 Stat. 59), because she was anchored in a fair-way.

2. By the general maritime law the tug was bound, if the statute did not apply to her, to keep a watch and show a light.

3. The schooner, not having actual or constructive knowledge of the boom, and keeping a good lookout, had a right to go in any part of what had been, and was supposed still to be, the channel, as she pleased. On the facts concerning her diligence, she was not in fault.

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

4. It seems, that the court has jurisdiction of an action in rem against the schooner by one who was injured on board the tug.

Libel by the owners and another by the master of the tug Ellen for injuries to the vessel and to the master in a collision with the schooner Willard Saulsbury. At about midnight of the 24th–25th September, 1867, the tug was lying moored to a boom which was anchored in the "Narrows," so called, in Boston harbor, to protect the dredging-machines which were at work widening the channel under authority of the United States. The schooner was sailing up the harbor, on the port tack, with the wind nearly abeam, and the tide about half ebb; the mate and one man were on the lookout forward, and the master was at the wheel. The mate discovered the tug directly ahead and gave proper orders; but it was too late, and the tug was damaged and her master sustained very serious injuries. The night was clear starlight; the tug was moored just inside the boom without a watch and without the light required by statute for vessels anchored in a roadstead or fair-way. There were bright lights near Lovell's Island, where the dredging-machines were kept at work by night as well as by day; but whether these lights would tend to show the tug to persons coming up the Narrows, and whether the tug herself had any light at all, were disputed points.

J. C. Dodge, for libellants. The schooner was in fault. The tug being at anchor, this is presumed; and the evidence shows that she might and ought to have been seen. The tug was not in a roadstead or fair-way, because the boom had been laid down by authority, and, of course, the space within it had ceased to be a part of the fair-way.

H. A. Scudder, for claimants. The tug should have had the light required for vessels at anchor in a fair-way.

LOWELL, District Judge. A roadstead is a place where vessels usually anchor; and a fair-way is where they usually pass and repass. That the Narrows are a fair-way which from the depth of water is resorted to by more than half of all the vessels that come to or leave Boston, notwithstanding its narrowness, cannot be disputed. Independently of the boom, the spot where the tug lay is a part of the fair-way. Taking the plan of Mr. Buckke, the engineer and contractor, to be correct, as it doubtless is, the width of the channel here between the low-water lines on either side, is about six hundred feet, and the tug lay about one hundred feet out from that line on the Lovell's Island side. The evidence on both sides shows that at all states of the tide vessels could, and often did, run inside of this spot. Some of the libellants' witnesses do say that the tug was inside of the ordinary track of vessels coming up or down the Narrows; but on full examination it appeared that they mean only that vessels would ordinarily try to keep near mid-channel if they could, and had room enough, and that most of them would probably succeed. Not that many might not go inside, but that most would not in fact do so. This has no tendency to show that this spot was not a part of the fair-way. A like argument would show the gutter to be no part of a street, because most carriages would keep nearer the middle if they conveniently could. It is in vain to say that this schooner, if she had made the straightest and best course from some point where she had been a few minutes before to some other point whither she was going, would not have passed over this spot; if it was a part of the thoroughfare through which vessels pass, it was within the statute.

The next point presents a different consideration. Mr. Buckke put down this boom to protect his dredging-machines, with the consent of the light-house board; and it is argued that thereby the water within the boom became of right and in fact separated from the fair-way, because the work being lawful, all necessary and proper aids and appliances are lawful; and that if this be so, the statute does not apply. This argument has much force in showing the lawfulness of the obstruction; but the consequence does not follow. The boom was moored in the fair-way, and if it had been a ship it should have been furnished with the statute signal; this tug was moored to the boom and so near the fair-way as to be in danger of injury from vessels there navigating in ignorance of her presence, and under these circumstances I consider her to be at anchor in the fair-way within the intent and meaning of the statute. She made, for the time, a part of the boom which was so anchored.

Nor have I any doubt that if the statute does not apply to the case, the tug should have kept a watch or a sufficient light, or both, by the rules of the general maritime law, which rest the obligation upon the actual danger to be anticipated if the caution is neglected, rather than on the construction of any particular word. How are the facts? The works here were conducted by day and night; the tug was waiting for the scows to be loaded. It does not appear that any vessel had been accustomed to lie there, and it was not a place in which a vessel at anchor would be looked for. Within a few minutes of the collision two schooners and perhaps a bark had nearly run over the tug. The dredging operations had been going on but six or seven weeks, and many of the coasters, including this schooner, to say nothing of ships whose voyages are longer, had no notice of the boom. General Foster, commanding the district, and Judge Russell, collector of the port, had very properly published a notice in the newspapers warning mariners not to collide with the dredging-machines under pain of damage; but the boom had not then been established, as I suppose, at all events, no

notice was given of it; but, on the contrary, the public were expressly informed that the machines would lie close to the bank. Under these circumstances, it was incumbent upon the tug to take every proper means to warn vessels of her presence. If a vessel is lying at a place where vessels usually lie, and out of the track where vessels usually pass, as, for instance, close to the bank of a wide river, like the Mississippi, such precautions are not usually required; but if they lie at anchor in the track of vessels they must show a light. The St. Charles, 19 How. [60 U. S.] 108.

The libellants contend that, whether the tug should have shown the statute light or not, she had a light in her pilot-house, and that she might easily have been seen in time to avoid the collision; all duty of avoiding being on the schooner, which was under way, and therefore that latter was in fault.

Upon this head, many of the facts above mentioned under other points, are of importance. The boom was recently laid down, the tug was not usually there, the published notice and the nature of the channel rendered it improbable that a tug would be anchored there; two vessels at about the same time barely avoided her by luffing. The schooner, as is usual in passing through this passage at night, had two lookouts, one of whom was an officer, and this doubling of the lookout was made for the very purpose of working the vessel carefully and promptly for a few minutes only, and may therefore be presumed to have been effective; the evidence shows that the lookouts were vigilant. Now these circumstances tend to show that no fault is to be found with the schooner. The main point of fact in controversy is, whether the tug had a light in her wheelhouse. The three men on board of her say she had, and other persons on the shore say they saw it. Six witnesses from vessels passing within a few minutes besides those of the respondent schooner are called, one of them by the libellants, and not one of them saw any light. It is a sound canon of criticism on such evidence to believe the positive against the negative, and to believe the witnesses of each vessel concerning her state and conduct; but even with these, I can hardly believe that there was a light visible to ships coming up the Narrows. It is not very improbable that, for some reason or other, it was obscured at the time from the view of such vessels; this is the only theory that can reconcile the evidence. The case is not full or clear concerning the amount of light, excepting that it was sufficient to read the clock by, and that it was seen on shore. Upon the whole, I cannot allow this evidence to prevail so far as to show by inference that the schooner must have been in fault, when all the evidence shows that she was not. Whether it might not have been possible to see the tug sooner, I do not think very material; she was in a place where a vessel under way would have been likely to be going up the harbor, or if coming down should have had side lights, and where a vessel at anchor was not to be expected; for vessels do not anchor there excepting in case of necessity; she was a small vessel not easily made out; the numerous lights about her on the shore, more brilliant than her own, if she had one, might probably tend to withdraw attention from her rather than to aid in seeing her, as alleged in the libel, and three vessels with efficient lookouts failed to see her.

Upon the whole, I am satisfied that whether the tug was in fault or not, she has failed to show that the schooner was. The libels must be dismissed with costs.

I have no doubt that this court has jurisdiction of the case of Captain Taylor. It has been exercised in like cases in this district, and not denied anywhere so far as I know. The Maverick [Case No. 9,316].

Decree for the claimants.

An appeal was claimed from this decree, but was afterwards abandoned, the claimants agreeing to take no costs.

WILLBANK (HAWKINS v.). See Case No. 6,247.

WILLETT v. The ORIENT. See Case No. 10,569.

WILLETTS (UNITED STATES v.). See Case No. 16,699.

Case No. 17,682.

WILLENDSON v. FORSOKET.

[1 Pet. Adm. 197.]

District Court, D. Pennsylvania. 1801.

UNITED STATES COURTS—JURISDICTION OF FOREIGN SEAMEN.

[1. The court will not take cognizance of disputes between masters and crews of foreign ships except in special cases.]

[Cited in The Jerusalem, Case No. 7,293; The Bee, Id. 1,219; Davis v. Leslie, Id. 3,639; The Becherdass Ambaidass, Id. 1,203; The Belgenland v. Jensen, 114 U. S. 364, 5 Sup. Ct. 864; The Topsy, 44 Fed. 635.]

[2. A foreign seaman cited the master of the vessel on a claim for wages, alleging a discharge at Philadelphia. The master denied the discharge, and charged a desertion, which forfeited wages. He had refused to admit the seaman into the ship, and the latter had stayed on shore at lodgings. *Held* that, the master offering to return the seaman to his own country, and to give him a certificate of forgiveness of past offences, the suit should be dismissed.]

The claimant, a foreign seaman, and one of the crew of a Danish ship, belonging to Altona, cited the master on a claim for wages. Although bound by the articles to return to Altona, the seaman alleged a discharge at Philadelphia. The captain denied the discharge, and charged the mariner with desertion, for more than twenty-four hours,

which, by the Danish laws, forfeited wages. He had refused to admit the seaman into the ship, and the sailor staid on shore at lodgings for a considerable time: there were faults on both sides; but the master now offered to take him again on board, on his promise of good behaviour in future, and to forgive all past offences.

It was insisted, that this was a case in which the court ought to interfere, the contract being at an end, by the alleged discharge, and the sailor, in a Danish court, would not have the benefit of the proof of which he was here possessed, to repel the charge of desertion, and support his alleged discharge.

BY THE COURT. It has been my general rule not to take cognizance of disputes between the masters and crews of foreign ships. I have commonly referred them to their own courts. In some very peculiar cases, I have afforded the seamen assistance, to protect them against oppression and injustice; and in cases where the voyage was broken up, or ended here, I have compelled the payment of wages. Masters too have always been assisted in recovering deserters, and reducing to obedience perverse and rebellious mariners; these must be restored only to the ship from which they abscond. Under pretext of carrying home deserting seamen, attempts have been made to increase the force, by adding to the numbers, of an armed belligerent ship. Neither assistance or permission should be afforded for this purpose in a neutral territory. In the case now before me, I see no cause to warrant my taking cognizance. It is the duty of the master to return the seaman to his own country. This he offers to do.—It is my duty, from motives of justice, and reciprocal policy, to discourage foreign seamen under engagements to perform their voyage, from breaking their contracts, with any views of obtaining higher wages, or from other unjustifiable motives, quitting the service in which they are engaged. Reciprocal policy, and the justice due from one friendly nation to another, calls for such conduct in the courts of either country. Whatever ill-humours or misconduct may have prevailed between the parties in this suit, the master now places the matter on a reasonable ground. He must give the sailor a certificate of forgiveness of past offences, to avail him in his own country. If he takes the seaman on board, and there shall appear no deception in the present offer, I shall not further interfere, but dismiss the suit. If any difference should hereafter arise, it must be settled by a Danish tribunal.

It was stipulated on the part of the captain, by authority from the Danish consul, that the master should bona fide comply with his engagement, and pay the sailor's debt for boarding, to be deducted out of his wages.

Case No. 17,683.

WILLETT et al. v. PHILLIPS.

[8 Ben. 459.] [1]

District Court, S. D. New York. June, 1876.

CHARTER PARTY AND BILL OF LADING — NONDELIVERY OF CARGO—PERILS OF THE SEA —ENTIRE CONTRACT.

1. A vessel was chartered for a lump sum to bring a cargo from Leghorn to Baltimore. The charter contained no exception as to perils of the seas. She was loaded at Leghorn and sailed; but, meeting heavy weather, she put back leaky to Leghorn, where parts of her cargo, which had been damaged, were taken out "by the authorities" and sold. The rest of it was carried forward by the vessel and delivered according to bills of lading, which the master had signed for it, as stipulated in the charter. The owner of the vessel filed a libel against the charterer to recover the charter money. *Held*, that the libel did not aver a loss of the cargo by perils of the seas; but, on the assumption that the nondelivery of the cargo which was not delivered, was caused by perils of the seas, the libellants were not entitled to recover, for the contract was an entire one, and, as the vessel did not fully perform it, she could not recover any part of the charter money, and the receipt of the cargo under the bills of lading by those to whom it was consigned was not a waiver by the charterer of the stipulation in the charter that the cargo should be wholly delivered before the charter money was payable.

2. The stipulation in the bills of lading as to perils of the seas could not affect the right of the charterer under the charter party.

This was a libel by [Lindley M. M. Willett and Edward J. Murphy] the owners of the bark Idolique to recover the sum of $3,000, being the amount of charter money agreed to be paid in a charter of the bark to the respondent [Jonas Phillips] for a voyage from Leghorn to Baltimore, which was executed by the master of the bark and the respondent, on the 23d of February, 1871. The libel alleged that the vessel was loaded at Leghorn by the respondent's agent with a cargo, for which the master signed bills of lading; that she sailed but met with heavy weather and sprung a leak, and parts of the cargo were wet and the vessel put back to Leghorn for repairs; that, while there, the authorities took from the vessel parts of the damaged cargo, without the consent of the master, and sold it; that the master applied to the respondent's agent for additional cargo, but the agent instructed the master to proceed on his voyage with the cargo that remained on board; and that the vessel performed the voyage to Baltimore and there delivered her cargo. The answer admitted the loading of the vessel but put in issue the other allegations of the libel, and denied that the vessel had performed the charter, and claimed that the libellants were not entitled to recover anything, by reason of the failure of the vessel to perform the charter, but alleged that the respondent had offered to pay such proportion of the charter mon-

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

ey as the cargo delivered bore to the cargo shipped.

Beebe, Wilcox & Hobbs, for libellants.
J. E. Parsons, for respondent.

BLATCHFORD, District Judge. The charter party in this case is very clear in its provisions. It charters the vessel to the respondent for an entire voyage from Leghorn to a port in the United States to be named by the charterer on signing bills of lading. The whole of the vessel is to be at the sole use of the respondent, and the owner agrees to take on board the cargo furnished. The respondent, in consideration of the agreements of the owner, contracts to furnish the vessel with a full cargo, and to pay for the charter or freight of the vessel $3,000 American gold dollars in full, "payable in cash on the correct delivery of the cargo." It is stipulated that the master is "to sign bills of lading as presented, without prejudice to this charter party." There is no exception as to perils of the seas or other misadventure.

The vessel performed the voyage under the charter, but delivered at the port of destination only a part of the cargo which the respondent put on board at Leghorn. The libellants contend that the vessel is entitled to the full freight of $3,000 because she performed the voyage, without reference to whether she did or did not deliver the whole of the cargo which was put on board of her, provided the cargo not delivered failed of delivery because of perils of the sea; and it is claimed that that has been shown.

The libel sets up that parts of the cargo which the vessel took on board at Leghorn were damaged by perils of the sea, after the vessel left Leghorn originally; that the vessel herself was damaged by such perils and put back to Leghorn for repairs; that there part of the damaged cargo was taken from the vessel, without the consent of the master, by "the authorities there," and was sold by them without his consent, and she was thus deprived thereof; that the master then applied to the agent of the respondent for additional cargo, but the agent instructed the master to proceed with what he had remaining; and that the vessel did so and delivered it and it was accepted.

The libel sets up no loss of cargo by perils of the sea. It sets up damage to cargo by perils of the sea and then avers substantially that some persons whom it calls "the authorities" took away part of the damaged cargo, and sold it without the consent of the master. It does not aver that the part so taken away and sold was so damaged that it could not have been carried forward, or that the sale was necessary or in accordance with the local law, or that the perils of the sea, or damage to the cargo by perils of the sea, had any thing to do with the sale. But, even on the assumption that perils of the seas caused the non-delivery of the cargo which was not delivered, the libellants are not entitled to recover. The contract was a unit. Being a contract for the conveyance of merchandise for an agreed price, it was entire and indivisible, and, as the vessel did not completely perform it, she is not entitled to any part of the $3,000. The freight was not wholly earned by a strict performance of the contract, and, therefore, no freight became due. There is nothing in the charter party on which the court can make any division or apportionment of the $3,000, because there is nothing in it from which it can be inferred that the parties intended there should be any such division or apportionment. Nor can the respondent be held to have waived the full performance of that part of the contract which provides that the cargo shall be wholly delivered before the charter money is payable, so as to be liable pro rata for the carriage of the merchandise actually delivered. The respondent did not accept or receive the cargo which was delivered. It was delivered, under the bills of lading, to those who received it, and no stipulation in the bills of lading, as to perils of the sea, could prejudice or affect the rights of the respondent under the charter party.

The allegations in the libel that the master applied to the agent of the respondent for additional cargo, and that the agent instructed the master to proceed with what he had remaining, are not sustained by the evidence. The respondent having once loaded the vessel was under no obligation to furnish her with more cargo.

The libel is dismissed, with costs.

Case No. 17,684.

The WILLIAM.

[13 Hunt, Mer. Mag. 81.]

District Court, D. Massachusetts. 1853.

LIBEL FOR POSSESSION OF VESSEL—BOTTOMRY BOND—EFFECT OF FRAUD.

[1. The owner of less than a half interest in a vessel, having title to the whole in his name, gave a bottomry bond covering the whole value of the vessel, though only one-third of the sum was actually due, and this bond was set up as a defense to a suit by the other part owner of the vessel for a conveyance of his share. *Held*, that the bond was fraudulent.]

[2. Where a bottomry bond covering the whole vessel is void in toto against a part owner of the vessel for fraud, it cannot be good in part against a purchaser from him, with knowledge that part of the debt secured by the bond was originally good.]

This was a libel for possession, by Andrew Carland, who claimed under one Bowler. James Downing and James Carbrey intervened, denying any right in Carland or his grantor, but claiming the sole title in Downing; and Carbrey set up a bottomry bond covering the whole value of the vessel, given him by Downing as sole owner, and which Downing, in his answer, admitted to be due

in full. The libellant contended that this bond was void, as against Bowler and his grantee, for fraud.

SPRAGUE, District Judge, said that the bill of sale was in Downing only, and the first question was, whether Bowler had an equitable interest which he could convey to Carland. THE COURT was satisfied, upon all the evidence, that Downing purchased the vessel to hold jointly for himself and Bowler, Bowler advancing more than half the purchase money; the balance, but little more than one-third, being loaned to Downing by Carbrey. They took possession together, and Bowler was driven from the vessel, as the evidence seems to show, intentionally on the part of Downing. Bowler, then, had an interest capable of assignment, and a proper bill of sale of his interest to Carland was produced. The vessel was sold by order of court upon the agreement of the parties to the suit, and the question is as to the disposal of the proceeds in the registry. Carbrey's bond, if good for its full amount, will take up all these proceeds. But the circumstances in proof satisfy the court that it is void for fraud, as to these parties. It was taken so as to cover the whole vessel, when only about one-third the sum was actually due. Such a bond is capable of being used fraudulently, and the use made of it will explain the original intention of the parties. When Carbrey took it, he not only knew that it was for nearly three times the debt, and that Downing had neither money nor credit, but also knew what money Bowler had advanced. When Bowler was turned from the vessel and utterly destitute, he applied to the counsel, and under advice of counsel, a demand was made on Downing for a conveyance to Bowler for a proper title to his share. This was refused. A suit was then brought for money had and received, and the vessel attached as Downing's property. Carbrey then, with the knowledge of Downing, gave formal notice to the sheriff of his bond for the whole value, and stated it to be all due, and by reason of this, the suit was dropped. Bowler then sold his interest for a small sum to the libellant, who having means and knowledge of the circumstances, brings this suit. Again, Carbrey and Downing resisted all right in Bowler, and jointly set up the bond as due to its full amount, and it was not until a full investigation and interrogatories to Carbrey under oath, that the true debt was ascertained. The use made of the instrument has been grossly fraudulent, and this, added to the circumstances under which it was made, leads to the conclusion that it was made to be used if parties should think proper. It cannot, therefore, be set up in this court.

It is contended that Bowler is an alien, and could not, therefore, hold or convey a title. This defense was not set up in the pleadings, and therefore not before the court. Some evidence has been admitted without objection, but the alienage is not satisfactorily proved. It is then contended that by bringing his suit against Downing for money had and received, Bowler has abandoned what title in the vessel he may have had. But he was compelled to bring that suit by the fraudulent conduct of these parties, and having abandoned it, they shall not stop him by their own act. It appears in evidence that Carland, the libellant, before he bought of Bowler, knew that Carbrey had actually advanced about one-third of the purchase money. Upon this it is contended that though the bond may be void in toto against Bowler, upon whose rights it was a fraud, yet it ought to be good, for its true amount against Carland, who knew of the advance. His honor said that there was an appearance of reason in this, but he was satisfied the principle was otherwise; and upon this ground; if a bond, void in toto against Bowler for fraud, may yet be good in part against a person who purchases of him, knowing that part of the debt was originally good, then Bowler cannot sell to such a purchaser for full value. The rule would limit the ability of the party defrauded to get a full price for his actual interest. It is for the benefit of Bowler and not of his purchaser, that the latter is allowed to resist the bond in toto.

Decree for one-half the proceeds to the libellant, with costs. The remainder to await the further order of the court upon applications from other parties.

WILLIAM, The (FINDLAY v.). See Case No. 4,790.

WILLIAM, The (MARTIN v.). See Case No. 9,171.

WILLIAM, The (UNITED STATES v.). See Case No. 16,700.

Case No. 17,685.

WILLIAM v. VAN ZANDT et al.

[3 Cranch, C. C. 55.] [1]

Circuit Court, District of Columbia. Dec. Term, 1826.

SLAVERY — EVIDENCE—SUIT FOR FREEDOM — CONCLUSIVENESS OF JUDGMENT—SALE OF SLAVE BY IMPORTER—EFFECT.

1. In a suit for freedom, a judgment against the defendant, upon his disclaimer, and default in not rejoining, is not prima facie evidence of the freedom of the petitioner, in a subsequent suit by him against another defendant, although this other defendant should, after such judgment, have filed a paper in that suit, claiming the petitioner as his slave.

2. Possession of, and acts of ownership over, a colored person, are prima facie evidence of slavery and ownership; and a sale of a slave by the importer, within three years after importation, gives the slave his freedom if such im-

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

porter be the sole owner; but if the importer has only a distributive interest, with others, in the slave, such sale does not give freedom.

Petition for freedom. Upon a former petition against Milburne, judgment was rendered in favor of the petitioner, upon the default of Milburne to rejoin. Milburne had, in that case, disclaimed to hold the petitioner as a slave; to which the petitioner replied certain facts, showing that Milburne had purchased the petitioner, and did claim and hold him. To this replication Milburne was ruled to rejoin, and, upon his failing to comply with the rule, judgment by default was rendered against him.

Mr. Key and Mr. J. Dunlop, for the petitioner, offered the record of that judgment as prima facie evidence of his freedom.

THE COURT (MORSELL, Circuit Judge, contra) rejected the evidence.

Mr. Key then offered in evidence a paper filed by the defendant, Van Zandt, in this court, after the judgment in the case against Milburne, praying the court to order the petitioner, William, to be delivered to him, claiming under authority of Mr. Estes, administrator of the estate of Dr. W. W. Southall, which the court then refused to do; and Mr. Key thereupon contended that that act of Mr. Van Zandt made the whole record in that case evidence in this. The court, however, still rejected the record; but said that the acts or declarations of Mr. Van Zandt might be given in evidence.

Mr. Key then offered evidence to prove that a certain Mrs. Straas had possession of, and exercised acts of ownership over, the petitioner, and imported him into this county, and delivered to the clerk a list of slaves imported by her, including the name of the petitioner; and that she afterwards, within three years after such importation, sold him to one Coburn, in this county, contrary to the act of assembly of Maryland, 1796, c. 67, § 3.

Whereupon the court, at the motion of the petitioner's counsel, instructed the jury that the possession and acts of ownership by Mrs. Straas were prima facie evidence of title.

And THE COURT (CRANCH, Chief Judge, contra) refused to instruct the jury that if Dr. Southall died possessed of the slave, and the defendant, Estes, was his administrator, then the sale by Mrs. Straas was not sufficient to entitle the petitioner to his freedom.

But THE COURT (nem. con.) instructed the jury that if Mrs. Straas had only a distributive share in the slave, her sale could not entitle the petitioner to his freedom; but that if, from the whole evidence, they should find that Mrs. Straas was in possession and exercised acts of ownership, and several of the distributees knew it and did not object, and that Estes never claimed the slave until after the sale, they may presume that she had good title. And the court refused to say that the evidence did not justify such an inference. Verdict for petitioner.

Motion for new trial overruled. Judgment for petitioner.

Case No. 17,686.

The WILLIAM A. HARRIS.

[8 Ben. 210.] [1]

District Court, E. D. New York. July, 1875.

LIEN ON VESSEL—LOAN TO OWNER.

1. A libel against a canal boat alleged that she was engaged in transporting goods on the navigable waters of the port of New York, and was in need of advances to enable her to prosecute her business; and that the libellant, at the request of her master and owner, advanced money to pay necessary towage bills, wharfage bills, and bills for materials whereby the boat was enabled to earn freight. The owner of the boat excepted to the libel for insufficiency. *Held*, that the libel did not state facts sufficient to entitle the libellant to a lien on the boat.

2. Mere advances of money to the owner of a vessel do not create a lien on her in favor of the lender, in the absence of any agreement for a lien upon the vessel, though the money be applied to the payment of liens upon the vessel.

Beebe, Wilcox & Hobbs, for libellant.
Owen & Gray, for claimants.

BENEDICT, District Judge. This case comes before the court upon an exception to the libel, upon the ground that the facts stated do not warrant the decree prayed for.

The allegations of the libel, material to be noticed, are simply these: That between the 1st day of July, 1874, and the 18th of November of the same year, the canal boat "William A. Harris" was engaged in transporting merchandise on the navigable waters of the port of New York, and was in need of advances in order to enable her to prosecute her business; and that the libellant, between the dates aforesaid, at the request of the master and owner of the boat, advanced large sums to pay the necessary towing bills, wharfage and material bills whereby the boat was enabled to earn freight.

Upon these facts alone the libellant is not entitled to a decree. To say nothing of the want of definiteness and certainty which the libel displays, it wholly fails to state facts sufficient to entitle the libellant to a lien upon the vessel proceeded against. Assuming that the libellant's money was applied to the discharge of the bills referred to,—and this is not stated,—still facts are not stated from which the court can see that such bills were liens, nor is it averred that they were so. Further, it is not asserted that there was any agreement for a lien, in pursuance whereof the libellant advanced his money. The mere advance to the owner of a vessel, of money, though applied by the owner to discharge liens upon his vessel, without any agreement for a hypothecation of the vessel, does not create a lien in favor of the person who advances.

The exception is allowed and the libel dismissed with costs.

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

Case No. 17,687.

The WILLIAM AND EMMELINE.

[1 Blatchf. & H. 66.] [1]

District Court, S. D. New York. Aug. 5, 1828.

BOTTOMRY BOND—ADVANCES IN FOREIGN PORT—POWERS OF MASTER.

1. It is essential to a bottomry transaction, that the money lent should run the hazard of the voyage.

2. A master can, in a foreign port, hypothecate his vessel for the payment, without maritime interest, of money advanced by a stranger for necessary repairs, and to secure the payment of a bill of exchange drawn by him on the owner of the vessel for those advances, although he is himself owner of cargo more than sufficient to pay for the repairs, and is solely concerned in interest in the voyage.

[Cited in The Hilarity, Case No. 6,480; The Boston, Id. 1,669; Thomas v. Osborn, 19 How. (60 U. S.) 28; The Eureka, Case No. 4,547; The Edward Albro, Id. 4,290; The Cumberland, 30 Fed. 450; The Scotia, 35 Fed. 909; Nippert v. The Williams, 39 Fed. 829; The Wilmington, 48 Fed. 568.]

3. Charleston (South Carolina) is, in respect to hypothecation, a foreign port to New-York.

4. Semble, that the master may bottomry the ship for necessaries in a foreign port, when he cannot procure the necessary means from the funds or credit of the owner, whether he has sufficient funds of his own on board to meet the expenses or not.

[Cited in The Gustavia, Case No. 5,876; Harris v. The Kensington, Id. 6,122; The Clotilda, Id. 2,903.]

5. In an action to recover advances made upon a bottomry bond, it is necessary for the libellant to exhibit an account of particulars and establish the necessity of the advances.

6. Whether the same rule holds in an action founded on a simple hypothecation, without maritime interest, quere.

In admiralty. The brig William and Emmeline, belonging to the port of New-York, put into the port of Charleston, in the state of South Carolina, disabled and needing repairs; and, while she was there, on the 18th of August, 1827, her master, in consideration of $511 48, advanced by the libellants, T. & T. Street & Co., drew upon the claimant, the owner of the brig, a bill of exchange for the amount, payable to the libellants, and, to secure the payment of the bill, executed what the libel alleged to be a bottomry bond upon the body of the vessel. The libel further alleged, that the money was advanced for necessary repairs, and that the bill of exchange had been protested for non-acceptance and non-payment. The answer admitted that the brig was hypothecated "in the manner stated in the libel," but set up for defence, that the master had no authority to hypothecate the ship; that Charleston was not a foreign port; and that the master was solely concerned in interest in the voyage, and had sufficient means of his own on board to procure the sum advanced, namely, lumber invoiced at $690 20. The instrument of hypothecation contained this clause: "and, for the better securing the payment of the said bill of exchange, with interest and expenses, unto the said T. & T. Street & Co., their heirs, executors, administrators and assigns, in any port or place where the said brig may be, and this bond be produced, I do hereby bind myself, and all and every of the owner and owners of the said brig, and particularly the said brig, her tackle, apparel and furniture, and the freight of the cargo on board of her, for the payment of the said bill of exchange, together with the interest, damages and expenses that may accrue thereon unto the said T. & T. Street & Co., their executors, administrators and assigns." The instrument was intended to secure only the sum for which the bill of exchange was given. There was no stipulation for marine interest, and the payment of the bill was not dependent on the hazard of the voyage.

Andrew S. Garr, for libellants.
Gerardus Clark, for claimants.

BETTS, District Judge. It is essential to the validity of a bottomry transaction, that the money lent should run the hazard of the voyage. The Nelson, 1 Hagg. Adm. 169; Abb. Shipp. (Ed. 1830) 117 et seq.; 2 Marsh, Ins. 632; 2 Bl. Comm. 458; Poth. Pret a la Grosse, art. 2, § 3. It is such risk that supports the marine interest which is always a constituent of a bottomry bond. The Augusta, 1 Dod. 283; Abb. Shipp. (Ed. 1830) 117 et seq.; Rucher v. Conyngham [Case No. 12,106]; The Mary [Id. 9,187]. In the instrument of hypothecation in this case, neither marine risk nor marine interest is provided for. The personal liability of the master and owner is secured at all events. All that is stipulated by way of hypothecation is, that the libellants shall have a lien on the vessel, her appurtenances and freight, during the voyage specified, and afterwards, until the satisfaction of the debt, interest and expenses. This instrument, though treated by the counsel in the pleadings and on the argument as a bottomry bond, and though denominated in the bond "an obligation of bottomry," is not so, in the acceptation of that peculiar security in the maritime law, not being subject to the incidents of a bottomry. The power of a master, in case of necessity, to raise money, by hypothecation of his ship, in order to prosecute his voyage, is not in question. The question is, whether the instrument in this case is a valid exercise of his authority. It is immaterial whether it be called a pawn, a hypothecation, a mortgage or a bottomry. The intention of the contract is, to pledge the brig and her freight for the payment of the disbursements of the libellants advanced for her repairs and refitting, and for which a bill of exchange was drawn by the master on his owner. His power to impawn the ship for her necessities, is declared by the earliest writ-

[1] [Reported by Samuel Blatchford, Esq., and Francis Howland, Esq.]

ers. 1 Moll. de J. Mar. bk. 2, c. 2, art. 14. In the case of Sampson v. Bragington, 1 Ves. Sr. 443, in addition to the hypothecation of the vessel, a bill of exchange was drawn by the master, in a foreign port, on his owner, to cover advances made in behalf of the vessel. The ship having been captured on her voyage home, the holder of the bill was allowed to recover the money of the owner; and it was also said that the ship was well hypothecated. This case is cited with approbation in Abb. Shipp. (Ed. 1830) p. 125. It may, perhaps, be questionable whether the English admiralty court would have enforced the hypothecation. The element of marine risk being wanting, the transaction was not a bottomry; and it may be that that court would have declined to take cognizance of a case where the advance made was not solely upon the credit of the ship, and on a bond properly of a bottomry character. The Augusta, 1 Dod. 283; The Rhadamanthe, Id. 201. In this country, however, admiralty will take cognizance of a hypothecation which is not a bottomry in form, when made in a foreign port. Robertson v. United Ins. Co., 2 Johns. Cas. 250. See Jennings v. Insurance Co. of Pennsylvania, 4 Binn. 244. Indeed, as a general principle, every maritime lien on a ship is a tacit hypothecation. Emerig. Contrat a la Grosse, c. 12, § 2. And what is a tacit hypothecation will not lose its effect by being made an express one. By the civil law, every person who repaired or fitted out a vessel, or lent money for those purposes, had a lien upon the vessel therefor, without any express hypothecation. Dig. lib. 42, tit. 5, lex 26; Novel. 97, c. 3; 1 Valin, Comm. 606; Hall, Emeri. 217. In England, on the contrary, such a lien can only be acquired by an express agreement of the owner, or of the master, acting within the scope of his authority. The Zodiac, 1 Hagg. Adm. 320, 325; Abb. Shipp. (Ed. 1830) 108 et seq.; Hussey v. Christie, 13 Ves. 594. In this country, the law has been recently settled by the highest tribunal, that in the case of a domestic ship, the municipal law (which is, in most states, the common law) prevails, and that such advances and credits are no charge upon the ship, unless made so by the law of the state where the debt accrues, but are only a claim upon the owner personally. In the case of foreign ships, however, the state laws do not prescribe the rule; and the maritime law of this country, following the civil law, gives the party, without the aid of any special contract, a lien upon the ship itself, which may be enforced by a suit in rem in the admiralty. The General Smith, 4 Wheat. [17 U. S.] 438; Abb. Shipp. (Ed. 1830) 116, note, 125, note. This doctrine became an element in the maritime usages of the middle ages, and thence was engrafted on the law maritime of modern Europe. 2 Cons. del Mare (Paris Ed. 1808) c. 32; 1 Azuni, Mar. Law, pt. 1, c. 4. It follows that, by the principles of the law maritime, a suit in admiralty to recover advances for the necessary supplies of a ship can, in the case of a foreign ship, be sustained in the American courts in all cases, without any express instrument of hypothecation. As a suit will lie in the admiralty on the lien implied by the law in such cases, there seems to be no reason for holding that the lien is lost because an express hypothecation is made by an informal instrument. Abb. Shipp. ubi supra. Should the bond in this case then be regarded as irregular, or inadequate to pledge the vessel, it would not, in admiralty, be considered an abrogation of the original lien, and the suit might be maintained on that by an appropriate amendment of the libel. The fact that the master is solely concerned in interest in the voyage, makes no difference. Third parties, dealing with him as master, are deemed to act upon the credit of the vessel, and are not chargeable with notice of his secret relations with the owner. Their security will, in this respect, be preserved to them, notwithstanding any special arrangements with the owner, detracting from the ordinary force of the master's acts, as implied from his office and trust. The rule applies as well when the master is charterer or lessee of the vessel, as when he is in command only on behalf of the owners (Rich v. Coe, Cowp. 636), unless the creditor has notice of his relation to the vessel. His possession as master is prima facie an authority from the owner to bind the vessel for necessaries supplied to her abroad. In the better acceptation of the doctrines of the law maritime, the master is ex officio agent or trustee of the owner, carrying, in that relation, a presumptive letter of credit in all places abroad where his vessel goes, to act for the owner in the employment of the ship, and in obtaining for her supplies and necessaries. Abb. Shipp. (Ed. 1830) 132.

It remains to be considered whether Charleston is, for purposes of hypothecation, a foreign port, with reference to New-York. The supreme court of this state has held that Charleston is not a foreign port in a case where a statute which gave to justices' courts, in New-York, jurisdiction over assaults committed in foreign ports, was adjudged not to authorize jurisdiction over an assault committed in Charleston. King v. Parks, 19 Johns. 375. And see Miller v. Hackley, 5 Johns. 375, and Overseers of Chatham v. Overseers of Middlefield, 19 Johns. 56. It has been decided otherwise, however, in respect to bills of exchange. Duncan v. Course, 1 Const. S. C. 100; Bayley, Bills (Bost. Ed.) 14, note. These cases would not, perhaps, be deemed controlling in the local courts on a question of maritime lien. By the civil law, and the laws of France, all ports where the owner does not reside are treated as foreign. 2 Valin, Comm. 10, 11; 2 Emerig. Mar. Law, 424, 436, 437. This is not the rule in England, however. The whole of England proper is considered, in respect to the owner-

ship of vessels, as the home of an Englishman; (Abb. Shipp., Ed. 1830, 123; Jac. Sea Laws, 363); but Ireland is regarded as foreign (The Rhadamanthe, 1 Dod. 202). It is believed, that though the point has not come up for direct adjudication, yet the courts of the United States have, in maritime questions in respect to the employment and refitment of vessels, considered the states foreign in relation to each other. The General Smith, 4 Wheat. [17 U. S.] 438; Murray v. Lazarus [Case No. 9,962]. In the case of La Ysabel, 1 Dod. 273, 274, Lord Stowell held two ports in Spain to be foreign to each other, on the ground that "the law does not look to the mere locality of the transaction. The validity and invalidity of the bond does not rest upon that circumstance only, but upon the extreme difficulty of communication between the master and owners.". Without deciding how far this would be the correct principle upon which in all cases to determine what are foreign ports, I am of opinion that Charleston is to be regarded in this case as a foreign port, and that the master had authority to hypothecate the vessel there.

Another ground of defence relied on by the answer is, that even if the master might ordinarily pledge his vessel in the port of a state out of her domicil, he could not do so in this instance, because he had sufficient means of his own on board to procure the sum required for her necessities. It is well settled, that the master cannot raise money on bottomry when he has funds of the owner in his possession, or can raise the necessary sum upon the personal credit of the owner. The Nelson, 1 Hagg. Adm. 169. But that he is prohibited from raising money even on bottomry because he has sufficient funds of his own at command, is a point by no means made certain by the authorities. The principle has been broadly laid down, that if the master has or can command other funds, he has no authority to bottomry the ship. Walden v. Chamberlain [Case No. 17,055]; Boreal v. The Golden Rose [Id. 1,658]; Forbes v. The Hannah [Id. 4,925]. And, in support of this doctrine, there are impressive opinions both in England and in this country. Cupisino v. Perez, 2 Dall. [2 U. S.] 194; The Packet [Case No. 10,654]; The Zodiac, 1 Hagg. Adm. 320; The Sydney Cove, 2 Dod. 11; The Hero, 2 Dod. 139; Moll. de J. Mar. bk. 2, c. 11, § 11; Abb. Shipp. (Ed. 1830) 125, note. On the other hand, it is distinctly intimated by the supreme court of the United States, that the master may hypothecate the ship, unless he has the funds or credit of the owner to rely upon. The Aurora, 1 Wheat. [14 U. S.] 96. To the same effect is the law of the Hanse Towns. Jus. Mar. Hans. Hamb. (Ed. 1667) p. 51, tit. 6 art. 2, and Kuricke, Comm. (Ed. 1667) 176. See, also, 2 Marsh, Ins. bk. 2, c. 1, and Lex. Mer. Amer. 354. I am inclined to the opinion, that the true spirit of the maritime law is, that the master has a right to pledge the ship when he cannot command means to supply her necessities either from the funds or credit of the owner, as well when the ship is laden with his own goods as when she is laden with those of a general freighter; but whether he can also subject her to marine interest, I do not undertake now to decide. It may be well asked, on what principle of justice can the master be compelled to appropriate his own property to the benefit of the shipowner. It is from no privity of contract, nor from any consideration peculiar to the master, arising out of the shipment. The owner derives the same advantage from the goods shipped by the master as if they were put on board by a third party. They are alike charged with freight, and subjected to average for the benefit of the ship, and the master, as freighter, has no community of interest with the owner of the vessel which is not shared by other freighters. If, in case of urgent necessity, the goods of a shipper are sold by a master for the repair or refitment of a vessel, the loss sustained is, by the maritime law, a lien on the vessel. Emerig. c. 4, § 9; Id., c. 12, § 4. If the master is bound to use his own goods for that purpose, it must be because he is, equally with the owner, bound to make repairs, and then he could have no claim to indemnity from the residue of the cargo, unless his loss was one of a general average character. Benecke, Ins. 252. Nor is it by any means certain he could have a lien on the freight and vessel for the amount of such expenditures. See Hussey v. Christie, 9 East, 426, and Smith v. Plummer, 1 Barn. & Ald. 575. Though, should the freight chance to come to his hands, he might undoubtedly retain it as security. The case of Ingersoll v. Van Bokkelin, 7 Cow. 670, imports that a master has a lien on the freight for his disbursements and liabilities, and for his wages also. This case can hardly be reconciled with the scope and spirit of the law maritime, unless it is to be understood as making the possession of the cargo retained by the master to secure those demands, tantamount to a receipt of the freight chargeable upon the cargo, so that what is termed a lien becomes his right to retain security out of the freight paid him. It is believed no other case has recognised a lien in favor of a master for wages, upon the vessel or cargo in his hands; though, by special enactments, the master is sometimes placed upon the same footing with seamen in respect to wages. Code de Commerce, art. 191. This right to retain is a partial security, so far as it goes; but it would clearly be insufficient to indemnify a master for the privation of his property, since it covers no more than his actual disbursements, and he may be subject to losses from the forced sale of his shipment at a port for which it was not designed, and be obliged to forego the advantages anticipated by a sale at the port of destination. These would seem to be adequate reasons for allowing the master, in a proper case of necessity, to raise money on a hypothecation of the vessel, though he has or can command sufficient funds of his own. The maritime law guards, with vigilant

circumspection, the exercise of the power of hypothecation by bottomry, and it can rarely happen, that if the enjoined requisites are observed, an owner's interest can be essentially compromised by a master, even in raising money upon such pledge of the vessel.

The decision of this case does not, however, rest necessarily upon these principles, inasmuch as the bond in this case was not a bottomry. The transaction, as proved to the court, was a credit to the owner and to the vessel herself, procured by the intervention of her master in a foreign port, and of such a nature as to create a lien upon the vessel, without express stipulation. When an advance is made upon bottomry, the libellant must establish the necessity of the advances, and exhibit an account of the particulars, that the court may pass upon that fact. Walden v. Chamberlain [supra]; Crawford v. The William Penn [Case No. 3,373]; The Mary [Id. 9,187]; The Aurora, 1 Wheat. [14 U. S.] 96, 103, 106. By the French law, when the bond of hypothecation alleges that the loan was on the body and keel of the vessel, it is received as full evidence that the money was employed in the use of the ship and for the necessities of the voyage. 2 Valin, Comm. 9; Poth. Pret a la Grosse, Avent. art. 4, § 2. But by our law, as appears from the cases cited, the court must examine the proceedings, and determine the propriety and necessity of the bottomry pledge. Whether the principles of maritime law render it incumbent on the libellant, when there is a simple hypothecation without maritime interest, to exhibit satisfactory evidence that his demand arose for necessaries furnished the ship, it is not necessary in this case to decide. The authority of the master to bind the owner is limited to the supply of necessaries for the ship. Abb. Shipp. (Ed. 1830) 116, note. The master is declared by all the authorities to be the agent of the owner pro hac vice. Abb. Shipp. (Ed. 1830) 108, 109. If, as is contended in this case, the libellants must prove the necessity of the advances in order to sustain their lien on the vessel or an action against the owner, it would seem that the general law governing the rights of third persons arising out of transactions with agents must, in respect to this class of contracts, have a restricted application. The familiar rule of law is, that the acts and declarations of the agent within the scope of his authority are evidence against his principal. 2 Starkie, Ev. pt. 4, pp. 41, 43. The well-known distinction between general and special agents would not account for any change of the principle in regard to maritime agencies. For, though a special agent (which a ship-master is) must be strictly held within the limits of his authority (2 Kent, Comm. 620 et seq.; Paley, Ag. c. 3), yet, where the authority is established, the like doctrine as to his proceedings governs in both cases. The plaintiff need show no more than the dealing of the agent, and that his acts or declarations were in conformity with his authority. At common law, an authorization to a broker or mechanic to provide necessaries for repairing a ship or house, would refer to the judgment of the agent the determination of the necessity of the particulars furnished, and the principal would be bound by his decision (2 Kent, Comm. 617, 621, 629); and that doctrine ought to have the same effect in respect to the doings of a ship-master as agent of the owner.

If it is necessary to establish in this case that the articles furnished were necessary for the use of the vessel, the libellants rely upon the general allegations of the libel, which are not denied by the answer, and upon letters of the claimant, which I am inclined to regard as substantially admitting the fact. These letters show that the claimant was duly apprized of the circumstances, and was satisfied at the time that the vessel had been repaired in a state of distress by the funds of the libellants, and that the amount claimed by them had been expended for that purpose. The recognition of these facts by the claimant, whether directly made or whether necessarily to be implied from the circumstances of the case, must be equivalent, in effect, to any other mode of proving them. The manner in which the suit has been contested would naturally have led the libellants to rely upon slight proofs on this point. The answer does not deny the distress of the vessel, nor that the advances were made, nor that they were expended upon necessaries for the voyage, but assumes, as ground of exoneration, that the master had no right to contract the debt on account of the owner, at Charleston, that not being a foreign port, and that the master was solely interested in the voyage, and had means to meet the charge, and was therefore alone liable. It is true that the allegations of the answer are broad enough to permit the claimant to avail himself of the other objections; yet, if they must not be considered as impliedly waived, they are so faintly urged as to render a less amount of evidence adequate to surmount them. The case is in such a posture, that if I were not satisfied by the evidence offered, I should, for the reasons above stated, permit it to stand over for further proof upon these particulars. I do not now deem it necessary to require that further proof from the libellants; but, upon a proper suggestion on the part of the claimant, that there is reason to suppose there are charges in the claim for which he ought not to be liable, I shall be ready to refer the matter to the clerk, to report to me the items of the demand and the evidence upon which they rest. If no such application is made, the amount of the bond, with interest and costs, is decreed to the libellants. Decree accordingly.

WILLIAM & SAMUEL, The (UNITED STATES v.). See Case No. 16,701.

WILLIAM ARTHUR, The (UNITED STATES v.). See Case No. 16,702.

Case No. 17,688.

The WILLIAM CAREY.

[Affirming The William Carey, Case No. 17,689. Nowhere reported; opinion not now accessible.]

Case No. 17,689.

The WILLIAM CAREY.

[3 Ware, 313.] [1]

District Court, D. Maine. Feb., 1865.[2]

SALE OF VESSEL BY MASTER—VALIDITY.

To render a sale valid, made by a master of a vessel under the general authority vested in him, and convey a good title under it, there must be a necessity for such sale, and entire good faith on the part of the master.

Shepley & Dana, for libellant.

Mr. Hale and S. C. Strout, for claimant.

WARE, District Judge. The William Carey, a British barque of about 580 tons burthen, Edward Williams, master, sailed from London in May, 1863, for New Zealand, with a general cargo, and passengers with their freight, and having delivered her cargo there, went to the Chincha islands and took in a cargo of guano, which she delivered at Martinique in the West Indies. She then went to St. Thomas, and was there chartered by her master to go to St. John, New Brunswick, for a cargo of deal, which she was to deliver at Liverpool, England. She took in 300 tons of ballast, and sailed from St. Thomas Oct. 2d, 1864, and on the coast of Maine she first made the island of Mount Desert Nov. 4th, at 6 o'clock in the morning, about fifteen miles distant, with a strong wind, increasing to a gale from the S.S.E., driving directly towards the island. She came to anchor near the Duck islands, in about 19 fathoms water, and she let out 75 fathoms of chain. In about twenty minutes the port barrel of her windlass gave way under the strain of the wind, the cranks crooked, the wood-work broke, and it was entirely useless. After that broke she was made fast to the deck stoppers. She held for fifteen minutes, and then the cable parted at the 15th fathom shackle from the anchor. She then drifted towards Gott's island, and when she was half way from Gott's island to Bass Harbor Light, let go her starboard anchor and 55 fathoms of chain, which held her through the night. The next day, Sunday, the master went ashore for aid, and to get the windlass repaired. He got six or seven men, who succeeded in heaving the cable and fixed the windlass, but it could not be used. The master then left with the mate, to obtain a pilot to bring the vessel into harbor. He succeeded in obtaining a pilot, but such was the state of the wind and weather that he could not get on board the vessel till the 10th. He then shipped the cable, and with Moor, the pilot, and Capt. Benson, steered into the harbor and anchored in four fathoms water, with a spare anchor of about 1200 lbs. The wind then blew a gale from the S.W. They let out fifty fathoms of cable, but the vessel drifted directly on shore on a ledge of rocks at full high water. She rested on the rocks at both ends and made water freely, as there was as much, or nearly so, inside as outside. The master got assistance the next tide, and endeavored to get her off in vain. He then went ashore to note his protest with a notary, and saw the wreck-master, Capt. Benson. The notary ordered a survey. Three surveyors were appointed, two masters of vessels, and one ship-carpenter. They reported after a careful examination, that she could not be got off the rocks, and recommended that she be sold the next day, at 4 o'clock p. m., where she lay. She was accordingly sold, and under this sale the claimants claim to hold the vessel. The counsel of his Britannic majesty acting officially for the benefit of the original owners, or whoever may claim title under them, disputes this title, and the captain's right to sell is the question now to be decided.

The legal authority of the master to sell a vessel under his care, as master, is too well settled in both English and American jurisprudence, to be controverted, and it has not been in this case. But to render a sale valid, and convey a good title under it, two circumstances must concur. There must be a necessity for a sale, and there must be entire good faith on the part of the master. In this case the necessity arises from the vessel being driven on the rocks in that harbor. It was a rocky shore where she struck, and to a considerable distance each way, and if she drove at the mercy of the winds she could not by any possibility avoid them. It is proved, also, that other vessels had been wrecked on, or near where this went on the rocks, and that none had been saved. The master, after making an unsuccessful attempt to get her afloat from the rocks the next tide, went ashore to note his protest, and get aid and advice. The notary advised a survey, and appointed three persons to make it, as competent and judicious as could be found in that place, two of which had been masters of vessels, and one a ship-carpenter. They went on board, and after a careful examination, reported that she was much damaged, bilged badly, hogged, strained, nearly full of water, and could not be removed from her present position. The surveyors lived in the neighborhood, were men well acquainted with the character of the shore where she lay, knew all the facilities, as well as difficulties of saving vessels in that place, as well as the hazards of the weather at that season of the year, and were men of as much experience, knowledge, and character, as any in the place. They examined the condition of the vessel, and gave their opinion under a feeling of responsibility, and to their conclusion much deference would naturally be shown. And their judgment agreed

[1] [Reported by George F. Emery, Esq.]

[2] [Affirmed by circuit court; case unreported.]

with that of the master. Under all the circumstances, they recommended the sale of the vessel where she lay, the next day, Saturday, at four o'clock p. m., and the master's opinion concurred with them. After the survey on Saturday morning, the United States steamer Mahoning went into Bass Harbor, and the captain, with the chief engineer, Mr. Douglass, made a short visit to her. It is the duty of this vessel to aid others in distress. She is prepared for it, and it is the opinion of the chief engineer, that if the weather favored her, she could, with proper appliances, have been saved. But this was after the survey, the order of sale, and the advertisement, when the business was in the hands of the law, and the master chose to be influenced by that decision, by the opinions of discreet men before expressed concurring with his own, than in any uncertain opinion subsequently volunteered by others, and she was sold accordingly for $1,000 in gold, or the equivalent, $2,500 in currency. If any arguments may be drawn from subsequent facts, it may be observed that no attempt was made to get her off the rocks, but she was stripped where she lay at the time.

The necessity of a sale is, I think, made out by the evidence. But this is not alone sufficient. There must be entire good faith in the sale on the part of the master. He is appointed to navigate the vessel, and for that purpose he is the agent of the owners, and has all the powers that such an agency requires; but the agency to sell, the law rather casts on him in extreme cases, and it is his duty to obtain as much for her, and for the benefit of his owners, as he can. The judgment or good faith of the master is questioned in this,—that sufficient time was not allowed to circulate the information more widely. The survey was made Friday, and the sale was ordered on Saturday, on the recommendation of the surveyors. Immediate notice was given of the sale by posting up advertisements in the three principal settlements of that town. But it is said that sufficient time was not given to spread the notices, and the population of Tremont was small. Still there were enough men of property in the place to create some competition, though perhaps not so great as would arise from a more extensive notoriety. At the same time the situation of the vessel was full of peril. She lay on the rocks, where she was driven from her mooring by the violence of the wind, and a heavy storm which was then threatening might make her completely a wreck. In these circumstances the master followed the opinions of the surveyors, and ordered a sale at that time.

Another circumstance is relied on in impeaching the master's good faith, that he did not order her to be sold in lots, but in the lump. On this point there is a difference of opinion among the witnesses, some thinking that she could sell better one way and some in the other. The master chose to sell her in the lump. There is room for this difference of opinion, and it would be a hard measure to attribute the determination of a doubtful matter to the want of integrity in the master.

But the heaviest charge against the good faith of the master is in the concealment of the time of sale from the officers of the Mahoning. They visited the vessel on the morning of the sale, after the time was fixed, and it was the duty of the master to give all the publicity to it that was possible. Yet he not only did not mention it, but took pains to conceal it, by pretending that the time was not determined, and assuring them that they should be informed. This fact, of which there could be no doubt, is left entirely unexplained by the testimony. I cannot explain it to my satisfaction. But on this fact alone, it would be a harsh judgment to blast the master's reputation perpetually.

A good deal has been said at the argument, of a general conspiracy at the sale to injure the owners or under-writers. Such rumors would naturally be set afloat, but as they are not supported by any evidence in the case, they may justly be dismissed, more especially as the case is subject to appeal, in which new evidence and any error may be corrected.

Libel dismissed with costs.

[On appeal to the circuit court, the above decree was affirmed. Case unreported.]

Case No. 17,690.

The WM. CUMMINGS.

[27 Leg. Int. 116;[1] 7 Phila. 598.]

District Court, E. D. Pennsylvania. 1870.

WAGES OF SEAMEN—PARTIAL FORFEITURE—INSUBORDINATION AND MUTINY — DISCHARGE BY CONSUL—LOSS OF VOYAGE.

1. Seamen, having received two months wages in advance, mutinied, with a concerted purpose to intimidate the officers of the vessel, and obtain a discharge without going to sea. The revolt having been quelled by the prompt use of severe measures of repression and punishment, the crew was retained for the outward voyage. As they were sufficiently punished for this misconduct, their wages for the outward voyage were not forfeited.

2. The measures of repression and punishment, whether unduly severe or not, were not considered as part of the general treatment of the crew, on the question whether they had been used so cruelly on the outward voyage as to entitle them to a discharge at the first port of arrival.

3. This was a port where another crew could not be obtained, and the master had neither funds nor credit, and the climate was unhealthy. The crew having refused to perform any duty, and having, through concerted misrepresentation, procured their discharge by the consul at this port, were, after a long delay, re-shipped in the same vessel. The intended voyage having been abandoned, they came back in her to her home port. They were not allowed wages for

[1] [Reprinted from 27 Leg. Int. 116, by permission.]

the time of her detention at the foreign port while they were out of her service.

4. But as the master did not appear to have made proper efforts to get to her next port of destination, where funds would have been at command, and a new crew easily obtainable, wages for the homeward, as well as the outward voyage, were decreed, without set-off or abatement by reason of the detention abroad.

Libel of mariners for wages, for a voyage, which was, according to the articles, to have been from the United States to St. Paul de Loando, in Africa, (a Portuguese colonial settlement,) and thence to Bahia, and further, to return in twelve months. The vessel made the voyage to Loando in eighty-two days. Through difficulties, which will be mentioned below, the crew left her at Loando, with the sanction of the consul. She was detained there six months; and the intended voyage having been abandoned, and the crew reshipped in her, she returned to the United States, the homeward voyage occupying fifty-one days. The libellants were thus on board, in all, about four and a half months. They demanded wages for this time, and for the longer period of the detention at Loando, which, they alleged, was wrongful. The owners of the vessel denied that the libellants were entitled to any amount whatever.

Mr. Cochran, for libellants.
Mr. Coulston, for respondents.

CADWALADER, District Judge (orally). We have, in this case, an example of the ill effects of the culpable inattention to the selecting and shipment of a crew, which, though now almost habitual in the United States, cannot be the less inexcusable in owners and masters of vessels. This vessel was thus unseaworthy for a time at least, through the incompetency and insubordination of the libellants and others on board. This negligence, in the shipment of a crew, does not excuse the misconduct of the crew shipped. The difficulties which occurred may probably have been increased by the fact that the first mate was the master's brother. He was probably more independent than he should have been of the master's authority. I have little doubt, from the evidence, that the second mate was, from the time of the shipment of the crew, engaged in organizing a conspiracy to subvert the discipline of the vessel, or at least in promoting a mutinous feeling, which, in part through his incitement, broke out in the Delaware before getting to sea, and was again manifested in Loando. But whether my impressions, in these respects, of the causes of what occurred, are correct or not, is of little importance to the decision of the case upon what actually occurred.

The whole crew having, at the time of shipment, received an advance of two months' wages, the libellants and others made a concerted effort, in the Delaware, so to disturb the police of the vessel as to intimidate the master and obtain their discharge from her. Their conspiracy and mutiny, for this purpose, which are clearly proved, would have been successful, if energetic measures of suppression had not been adopted. By the prompt use of such measures, the revolt was quelled, and the vessel enabled to get to sea with this crew. Whether the severity may not have been greater than was absolutely necessary, and whether the methods of coercion used were in all respects proper, are questions which need not be decided. The men appear to have been sufficiently punished for their misconduct at the outset of this unfortunate voyage. Whether the measures then used for the repression of the mutiny were blamable or not, they should not be considered as part of any treatment which can be complained of as cruelty during the voyage. The two questions of alleged severity in quelling a mutiny, and alleged cruel treatment at other times, are, in a great measure, if not altogether, distinct.

Though these men composed a bad crew, during the rest of the outward voyage, and though some of them were of inferior capacity, I do not see that such acts of subsequent positive misconduct on their part occurred before arrival at Loando as to forfeit their wages for the outward voyage. That they formed a combination during this voyage to obtain their discharge at Loando, and that the statements by which they succeeded in obtaining it were preconcerted, and were, in a great measure untrue, I have little if any doubt. But I do not see that there was any purpose on their part of obtaining a discharge otherwise than through consular sanction; and if they had afterwards told the truth to the consul at Loando, such a previous concert of action would not have been objectionable. I think that the machinations of the second mate were secretly continued, more or less, throughout the voyage, and that the resentment and ill humor of the crew were probably kept up through occasional acts of undue severity on the part of the first mate. These acts, though doubtless greatly exaggerated, and somewhat distorted, in the testimony, were, I think, arbitrary, hasty, and harsh, to say the least; and if the captain did not occasionally err in like manner, he does not appear to have exercised proper supervision over this mate. There is, however, I am sorry to believe, a great deal of falsehood in the testimony of the crew; and, from what I may have occasion to say hereafter, it is possible that my present view of this part of the case may be more unfavorable to the master than it should be.

At Loando the sickly season was begun or approaching; there were no facilities for getting another crew; the captain was without funds, and had neither means nor credit to obtain them there in cash. If it had been a place where a new crew could have been shipped, the incompatibility of a proper fu-

ture state of discipline on board, with very probable future consequences of past and existing relations between the officers and crew, may have been such as to have required, or justified, the discharge of the crew. This might have been so, independently of what might otherwise have been deemed the merits of their controversy with the master. But as the difficulties of obtaining a new crew at Loando were insuperable, necessity, which has its own law, required that the vessel should in some way be enabled to reach Bahia. At Bahia a crew could have been obtained without difficulty; and there the master, whether he had a letter of credit or not, could have obtained ample funds upon the rich freight which he deposes could have been engaged.

At Loando the crew absolutely refused to do any duty until the case should be investigated by the consul; and it was accordingly investigated by him upon their complaint. He seems to have disregarded in a great measure, while they took the fullest advantage of, the local difficulties which have been mentioned. I do not doubt that he acted with a conscientious desire to perform his duty, according to his conception of it. But the proceeding before him seems to have been rather an ex-parte inquisition than a hearing of a case referred by parties to his arbitrament. The witnesses do not appear to have been confronted with the master, and no sufficient opportunity for putting questions to them appears to have been given to him. I do not think that he properly insisted upon having such an opportunity. But I think that the consul should, for the sake of justice, have seen that it was afforded.

Upon a comparison of the depositions of the crew before him, with their subsequent examination here, the contradictions are so numerous, and so material, that it is now difficult, if not impossible, to credit their testimony on any precise points. But it appears to have been implicitly believed by the consul without the slightest qualification. It is true that he received afterwards in like manner the ex-parte statements of the master and of the first mate. I do not impute partiality to the consul, but the manner in which he made this investigation was such as might prejudice unjustly his mind. In these litigations, the difficulty of ascertaining the truth of what has occurred on ship-board, is almost always very great. Sometimes it is to be surmounted only through extended cross-examination, especially where the testimony of examinants has been preconcerted, as, unfortunately, is too often the case.

The consul, as I have already intimated, appears not to have been aware of any such difficulty. His decision sustains the crew in every respect, so far as the opinion of a consular officer abroad can ever be decisive. If this had been a consular award under an ordinary arbitrament in a controversy between a master and his crew, I would have been very unwilling to question the decision, though, of course, it would not have been absolutely conclusive. On October 7th, 1867, the consul announced his decision. It was that the crew, twelve in number, should be discharged for what he thought barbarous treatment on the outward voyage, especially in the river Delaware, and that they should receive full wages, and additional wages for three months, according to his view of the act of congress. He gave notice to the captain-general not to let the vessel leave without previous payment by the master of the wages, &c., and the consular charges. The captain-general gave orders accordingly to detain the vessel. There is no evidence that the master made any application to the captain-general, or to any of the local authorities, for a revision, reconsideration, or qualification of this order. I cannot adopt the consul's opinion of the rights of the crew to any thing like the extent to which he went, nor can I approve of his disregard of the embarrassments in which the vessel was placed. On the other hand, I do not agree with the respondents' counsel that the master of the vessel, by adopting proper measures, would, after the consul's award, have had any insuperable difficulty in getting the vessel to Bahia.

The consul on the 18th of November wrote to the master in these words: "When you have complied with my demands, I could undoubtedly procure from the Portuguese corvette men enough to take your ship to Bahia." This offer the master did not accept for the reason as alleged, that he had no funds at Loando to enable him to meet the consul's demand. I have already expressed my belief, that no such funds were obtainable there. But I repeat that I also believe there would have been no difficulty whatever in getting them at Bahia. The master offered to the consul a draft on the owners at Philadelphia, which offer was not accepted; nor should it have been, if the money was rightly demandable, because the more proper place of payment was Bahia. Subsequently the consul proposed to defer the payment, certainly of a part of the amount, until the return of the vessel to the United States, and until a decision here upon the merits of the controversy. I am not quite certain that this is not too narrow a view of the import or tendency of his offer. At all events, I have little doubt that if the master of the vessel had responded to the overture in any spirit of concession, an arrangement could have been made for thus deferring payment of the whole amount, if he had proposed it. However this may have been, the proper course, in order to get his vessel away, was to arrange matters (under protest of course) for payment at Bahia. This he does not appear to have suggested or even thought of. The consequence of all these unfortunate acts and omissions,

and of others, was the loss of the intended voyage, through a delay at Loando till 25th of March, when the crew, having been reinforced by a detachment from the United States ship of war Swatara, were again shipped in the Cummings, which vessel returned to her home port. The outward voyage occupied eighty-two days, the homeward fifty-one days. The men were thus in the actual service of the vessel for about four and a half months. They earned wages to be credited or paid to them for this period, less the advance of two months wages. For the three months wages under the act of congress, awarded by the consul, no demand is, or could be, made.

The controversy is twofold; first, as to wages for the time of detention at Loando; secondly, as to the liability of the crew for a set-off in damages for an alleged loss of freight on the intended voyage which was broken up. On the first question I consider the crew to have been out of the service of the vessel from the time, in September, when they refused to perform duty at Loando, and when laborers from the shore were employed to unlade her, to the time of reshipment in March. This reshipment of the crew, I consider, in view of the peculiar circumstances of this extraordinary case, to have been made, in effect, under a new contract. I think that the false statements of these men to the consul were the principal cause of the difficulties which occurred. In adopting an opinion different from his, I do not think them entitled to any wages which they did not earn on board. Secondly; I disallow the demand against them for the loss of the freight which would have been obtainable at Bahia for the ulterior voyage, originally intended, and for the loss from detention of the vessel at Loando. I have already said that however they may have been in fault, their misconduct did not render it in fact impossible for the vessel to reach Bahia; and though their misconduct may have caused some unavoidable delay of the vessel, mariners are not treated on questions of demurrage as parties to a contract of affreightment.

My decision against the mariners on other points makes their case perhaps one of some hardship. I will not increase it in the manner suggested. How far the decision of the consul, though it might be subject to revision here, furnished in fact, if not of right, the provisional or temporary rule of conduct for all parties at Loando, it is not necessary to decide. I think the case one for full costs, however small the amounts awarded in proportion to those demanded. A balance of $62.50 with interest, is due to each of the libellants, except those with whom a settlement has been made since the commencement of the proceedings. Decree accordingly, with costs.

WILLIAM D., The (BICKNER v.). See Case No. 1,390.

Case No. 17,691.

The WILLIAM D. RICE.

[3 Ware, 134;[1] 10 Law Rep. 501.]

District Court, D. Massachusetts. Nov., 1857.

ADMIRALTY JURISDICTION — EQUITABLE TITLE TO VESSELS.

A court of admiralty has no jurisdiction to try questions of equitable title to vessels, or to enforce the equities between mortgagor and mortgagee of vessels; it can only pass upon the legal title.

[Cited in Morgan v. Tapscott, Case No. 9,808; The C. C. Trowbridge, 14 Fed. 876; Wenberg v. Cargo of Mineral Phosphate, 15 Fed. 288; The Ella J. Slaymaker, 28 Fed. 768.]

In admiralty.

S. J. Gordon, for libellant.

B. R. Curtis and C. E. Pike, for claimants.

WARE, District Judge. This is a libel for the possession of the brig William D. Rice. The libellant alleges that he is the true owner, and formerly had, and ought still to have, the possession. But the brig is now in the possession of Simeon M. Mitchell and Nathaniel Heath, claiming title under a pretended sale by one Edwin H. Rice, in fraud of the libellant. The libellant deduces his title from Edwin H. Rice. It is alleged that while the brig was on the stocks, Rice, the builder and owner, on the 15th of August, 1856, mortgaged the vessel to the said Simeon M. Mitchell, George S. Chaloner and Frost Warren, in trust to secure the payment of a note to Nicholas Mason, of $2125; that Mason, in October following, assigned all his right and interest in said note and mortgage to the libellant; that afterwards two of the trustees, Chaloner and Warren, on the 6th of April, 1857, assigned the note and mortgage to the libellant, but that Mitchell fraudulently concealed the note and refused to join in executing the assignment of the mortgage; that on the 1st of November, the libellant appointed Mason his attorney, with power of substitution, to collect the note and foreclose the mortgage; that Mason, March 7th, substituted Wm. A. Richardson, who, with the knowledge and consent of the libellant, took possession of the vessel then on the stocks, and foreclosed the mortgage. In July, after the foreclosure, Rice, with Mitchell and others, it is alleged, launched the vessel against the will of the libellant, and Heath fraudulently procured for the brig a register under her present name (after she had been registered under the name of David Ransom, in another port), under pretended claim of ownership on the part of Heath. The libel concluded with a prayer that the brig may be delivered to the libellant, and for such further relief as to law and justice appertain. To this libel exceptions are filed by the claimants in substance: 1st. That the libel does not show a title in Ransom, nor that he is entitled to the possession. 2d. That this court has not juris-

[1] [Reported by George F. Emery, Esq.]

diction to try the question whether the mortgage has been foreclosed. 3d. That the court has not jurisdiction to try the question whether Ransom has an equitable title, and to enforce the same. No right of possession is claimed by the libel independent of the right of property. The court is therefore called upon to determine whether the title is in the libellant as preliminary to the delivery of possession.

That courts of admiralty in this country have authority to pronounce on the title of vessels is, I suppose, too well established to be questioned. But when this is said, it is the legal title only that is meant. Mason's assignment to Ransom of all his right and interest in the note to him and the mortgage to trustees for his security, did not give him a legal title to the vessel. It gave him only a right to have that interest which Mason had transferred by the trustees, and that interest was not an absolute title, but only a title in mortgage. But the assignment of the mortgage by two of the trustees only was wholly inoperative. It transferred nothing. Wilber v. Almy, 12 How. [53 U. S.] 120; 2 Story, Eq. §§ 1230, 1231. It is alleged that the third trustee fraudulently refused to join in the assignment; but if so, I take it to be quite clear, that the court has no authority to compel him to join. The power to compel a specific performance of a contract in the execution of a trust is within the peculiar and exclusive jurisdiction of courts of equity. A court of admiralty has no such power. This article does not show any such interest in the vessel as will enable a court of admiralty to take jurisdiction of the case.

The libel then sets out another title, that the libellant has the proprietary interest in the brig under a foreclosed mortgage. In the case of Bogart v. The John Jay, 17 How. [58 U. S.] 399, it was decided that a court of admiralty had not jurisdiction to order the sale of a mortgaged vessel to pay the mortgage debt, nor to foreclose the mortgage by a decree, and transfer the property and possession to the mortgagee. In that case the vesesl was mortgaged by the purchaser to secure the payment of the purchase-money. The libel contained two prayers for relief. The first was for a decree for the payment of the unpaid purchase-money, and that the vessel, with her equipments, might be condemned to pay the same. This would have been the proper prayer if the mortgage had been a maritime hypothecation. The second was that the steamer might be decreed to be the property of the libellants, and the possession be delivered to them, which would have been a strict foreclosure. The court decided that, sitting as a court of admiralty, it had not the authority to grant either prayer. It could neither order a sale, as in the case of maritime hypothecation, nor by a strict foreclosure, make a judicial transfer of the property. The court quoted and adopted the doctrine of Sir John Nichol, in the case of The Neptune, 3 Hagg. Adm. 132, that the admiralty has no jurisdiction to decide on questions arising out of the mortgage of vessels between mortgagor and mortgagee. The mortgage of a vessel to secure the payment of a pre-existing debt, does not rest on a maritime consideration, nor is it made a maritime transaction by reason that the thing mortgaged is a necessary instrument in carrying on maritime commerce, and used exclusively for that purpose. It is as purely a land transaction, as the mortgage of any other chattel. It is not like the implied mortgage, or hypothecation of a maritime lien, when the consideration is purely maritime, as the lien of seamen for their wages; nor is it like the lien of material men, where the ship herself, in the view of the maritime law, is considered as a primary and principal debtor. In all these maritime hypothecations, there is some resemblance to a common mortgage. The creditor is considered as having a jus in re, a proprietary interest, in the things, but it is a qualified right of property. It is simply a right to be paid out of the thing, the res itself being treated as the debtor. The proper relief is that the thing be sold to pay the debt, and when that is paid, the thing is free. But with some points of resemblance, there is a clear and broad distinction. A mortgage is the conditional transfer of the whole property, and not of so much of it as is sufficient to pay the debt, and by a breach of the condition the title in law becomes absolute to the whole. Nothing remains in the mortgagor but an equity of redemption. But a marine hypothecation, whether express or implied, transfers to the creditor no more of the thing than the portion of his debt, and that is to be ascertained by a sale. (There is nothing known in the contract, as I understand it, like a proper foreclosure.) There is no other mode of carrying it into execution but by a sale. Such being the nature of a mortgage, and so broadly discriminated from the analogous security of a maritime hypothecation, and having nothing maritime in its consideration, the courts have held that the rights of parties under such a contract do not fall within the jurisdiction of the admiralty.

But it is argued by the counsel for the libellant, that the court having an unquestioned right to pronounce on the title to vessels, it may decide other questions that arise as incident to the principal questions which, standing by themselves, are not properly of admiralty cognizance; as in this case, it may take notice of the alleged fraud, though the jurisdiction over fraud, in itself and simply considered, belongs to another tribunal. This, with proper limitations is undoubtedly true. But the difficulty in this case is, that the party in his libel admitting the whole to be true, has not shown a legal title, the only one that gives the court jurisdiction, but has shown at most an equitable right to have a legal title. Now, in order to have that title legal, the court must exercise the powers of

a court of equity, by compelling a conveyance. This it cannot do. If this were done, the court would have possession of the cause, and might proceed to consider whether it would take notice of the alleged fraud as incidental to the principal question. But until the court is in possession of the principal cause, it has no incident, and without encroaching on the exclusive jurisdiction of a court of equity, it cannot get possession of the cause. My opinion is, that the libel must be dismissed with costs.

WILLIAM F. BURDEN, The. See Case No. 12,558.

Case No. 17,692.

The WILLIAM FLETCHER.

[8 Ben. 537.] [1]

District Court, S. D. New York. Nov., 1876.

MARITIME LIEN—BREACH OF CHARTER PARTY.

A steamboat was hired, to be at a certain place on a certain day, and to be used for one day for a specific trip, for a price agreed on, part of which was paid in advance. She was not at the place as agreed and the charterer did not have the use of her. He filed a libel against her to recover damages. *Held*, that the breach of the contract created no lien on the vessel enforceable in the admiralty.

[Cited in Marshall v. Pierrez, Case No. 9,130; The Monte A., 12 Fed. 332; The J. F. Warner, 22 Fed. 345; The Guiding Star, 53 Fed. 943.]

S. G. Courtney, for libellant.

Beebe, Wilcox & Hobbs, for claimants.

BLATCHFORD, District Judge. The libel in this case sets forth that the libellant, on the 2nd of September, 1875, chartered the steamboat William Fletcher of the agent of her owners, for use on the 5th day of that month; that such owners failed to furnish said steamboat at the time agreed upon; and that the libellant has sustained damages to the amount of $500. The libel prays for process against the vessel and that she may be condemned and sold to pay such damages. The answer sets up that the facts alleged in the libel created no lien on the vessel, enforceable in admiralty, and alleges that, therefore, this court has no jurisdiction of the subject matter of this action. The evidence shows a hiring of the vessel by the libellant, she to be at a certain place on a certain day, and to be used by the libellant for one day, for a specific trip, for a price agreed upon. She was not at the appointed place, as agreed, and the libellant did not use her. Part of the agreed price had been paid by the libellant in advance.

The libel must be dismissed, with costs, on the ground that the breach of the contract to furnish the vessel for the use of the libellant created no lien on the vessel enforceable in admiralty. This is well settled by several decisions. The Freeman v. Buckingham, 18 How. [59 U. S.] 182; Vanderwater v. Mills, 19 How. [60 U. S.] 82; The Hermitage [Case No. 6,410]; The General Sheridan [Id. 5,319]; The Pauline [Id. 10,848].

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

Case No. 17,693.

The WILLIAM GILLUM.

[2 Lowell, 154.] [1]

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

GENERAL AVERAGE—JETTISON OF DECK CARGO—LIBEL AGAINST VESSEL.

1. A usage in the coasting trade to carry a part of the cargo, if heavy and imperishable, on deck, is reasonable. Such a usage found in this case.

2. If such a deck-load be jettisoned, the ship and freight are liable to contribute for the loss in general average.

[Cited in The John H. Cannon, 51 Fed. 47.]

3. This contribution may be recovered by a libel against the vesel for a total loss.

4. Whether the shippers of goods under deck, who did not actually assent to the shipment, would be liable to contribute, quære?

The libellants proceeded for thirty-three tons of pig-iron short delivered out of two hundred tons, shipped at Philadelphia, for the Bay State Iron Company at Boston, by the schooner William Gillum, under a bill of lading in the usual form. The answer set up that in a gale it had been necessary to throw overboard this part of the cargo, for the safety of the rest. Of the two hundred tons, fifty had been stowed on the deck of the schooner; and of the quantity jettisoned a little less than one-half was under deck, for which the libellants had received contribution in general average, and made no further claim; but they demanded payment in full for that which had been thrown over from the deck. The claimants introduced evidence of a usage in the coasting trade to carry a part of such heavy and imperishable goods on deck, say from one-eighth to one-quarter of a full cargo, and that it made the vessel easier in a sea. The libellants showed that the underwriters had not recognized such a usage, and that masters who carried such goods on deck often inserted a memorandum to that effect in the bill of lading, and that others were in the habit of insuring their deck cargo at the expense of the ship.

T. K. Lothrop and A. Lincoln, for libellants.

The simple and consistent rule of law is, that if a deck-load is carried by the master, without the consent of the shipper, the risk is the ship's. Granting that a general, uniform, and long-established usage might be evidence of consent, yet the proof in this case falls far short of these requisites. We rely on the following

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

cases, and especially the first: The Paragon [Case No. 10,708]; The Rebecca [Id. 11,619]; The Waldo [Id. 17,056]; Vernard v. Hudson [Id. 16,921]; Sutton v. Kettell [Id. 13,647]; 1 Pars. Shipp. & Adm. 185, 186; Fland. Shipp. §§ 191–195.

F. Goodwin, for claimants.

The origin of the law is usage, and that is founded on the reasons that a deck-load is in more danger than goods stowed in the hold, and that it hinders the working of the ship. But we prove here that a reasonable quantity of pig-iron on deck is in no danger of injury, and rather helps than hinders the working of the vessel; and cessante ratione, &c. Besides, the usage is valid, and varies the general rule. Chubb v. Seven Thousand Eight Hundred Bushels of Oats [Case No. 2,709]; The Neptune, 2 Marit. Law Cas. 456; 1 Pars. Shipp. & Adm. 352, 356, and notes; Valin, Comm. bk. 3, tit. 8, art. 12; Gardner v. Smallwood, 2 Hayw. (N. C.) 349.

After the case was submitted to the judge, he sent word to the parties that he should wish to hear argument on the question, whether, if the usage was proved, the ship and freight were liable to a general average contribution. Thereupon written notes were exchanged between the counsel and sent to the judge, in which it was insisted on the part of the libellants, and admitted on the part of the claimants, that there was such a liability; but it was urged, that if a decree were entered for the libellants on that ground it ought to be without costs.

LOWELL, District Judge. The evidence appears to me to establish the usage contended for by the claimants, which is, that in coasting voyages of this character, where there is a full cargo, consisting, in large part, of heavy goods, like pig-iron, a portion of the cargo, not exceeding one-quarter, is carried on deck; and that such a custom is reasonable, applying, as it does, only to merchandise which is not liable to be injured by wet, nor to be readily washed overboard, and as such stowage tends to make the vessel steadier and easier in rough weather. If such a usage is proved, and nothing more, it relieves the master and owners of the ship from liability for bad stowage. 3 Kent, Comm. 240; Abb. Shipp. pt. 4, c. 10, § 3; Chubb v. Seven Thousand Eight Hundred Bushels of Oats [supra]; Toledo Ins. Co. v. Speares, 16 Ind. 52; Dodge v. Bartol, 5 Greenl. 286.

Who is to bear the loss, when there has been a jettison of goods thus lawfully laden on deck, is not so clear. In the case cited from Greenleaf's Reports, the jury found not only a usage to stow on deck, but a usage "having the force of law," that the shipper of the deck-load took the whole risk of jettison, the ship not being liable even for contribution. And this law, thus found by a jury, has remained the law of Maine. Cram v. Aiken, 13 Me. 229; Sproat v. Donnell, 26 Me. 185. A like usage was said to exist in New York. Smith v. Wright, 1 Caines, 43. But I understand the law of that state to be otherwise at present, and that in that jurisdiction goods stowed on deck, in virtue of a general usage, are contributed for. Harris v. Moody, 4 Bosw. 210; s. c. 30 N. Y. 266. In England, on the other hand, a usage was proved in the timber trade, that the ship took the whole risk of the deck-load. Gould v. Oliver, 2 Man. & G. 208; and afterwards, in the same trade, the usage was shown to be that the ship and freight contributed, but not the goods under deck; and still another usage, that the underwriters on the ship did not undertake this risk, unless it were expressed. Between the two usages first mentioned it would seem more reasonable that the ship should bear the whole loss rather than the freighter; because the master, who decides what part of his cargo he will carry on deck, is the agent of the ship in that matter. The question whether the ship and freight ought to contribute to such a loss is open for decision in a libel for the whole value of the goods, because the greater includes the less. Dupont de Nemours v. Vance, 19 How. [60 U. S.] 162. In deciding it, I might perhaps rest upon the admission of the claimants' counsel; but as that may have been intended only for this hearing, and the cause is not unlikely to go farther, I have examined the point, and will express my views upon it.

The weight of modern authority favors such a contribution. It was formerly laid down by writers on this subject, in general terms, as the law of the commercial world, that the deck-load contributes to general average if saved, but is not contributed for if lost; but it is probable that this broad statement was intended only for those cases in which the deck-load was unlawfully carried, or, at most, when it was carried by a private arrangement between the particular shipper and the master. Thus Chancellor Kent, after stating the general rule, without qualification, in the text of his Commentaries, adds, in a note, after citing certain cases: "But if they be laden on deck according to the custom of a particular trade, they are entitled to contribution from the ship-owner for a loss by jettison. Gould v. Oliver, 4 Bing. N. C. 134." 3 Kent, Comm. (5th Ed.) 240, and note (a). The case of Gould v. Oliver, cited in this note, established the point in England, if it were not already put at rest by Da Costa v. Edmunds, 4 Camp. 142; and the same doctrine obtains in the more recent cases in the United States. It is considered by the text-writers to be the sounder opinion. See Hurley v. Milward, Jones & C. (Ir. Exch.), 224; Milward v. Hibbert, 3 Q. B. 120; Johnson v. Chapman, 35 Law J. C. P. 23; Merchants' & Manufacturers' Ins. Co. v. Shillito, 15 Ohio St. 559; Gillett v. Ellis, 11 Ill. 579; Toledo Ins. Co. v. Speares, ubi supra; Meaher v. Lufkin, 21 Tex. 383; besides the case above cited from New York; Phil. Ins. §§ 460, 1282; 1 Pars. Shipp. & Adm. 354, &c.; Marsh. Ins. (5th Ed.) 432; Arn. Ins. (3d Ed.) 776; Abb. Shipp. pt. 4, c. 10, § 3, and Mr. Justice Shee's note to English edition. and Mr. Perkins' note to American edition.

These writers give all the reasoning and learning on the subject. I have seen no better statement than that of the superior court of Connecticut, in 1773: "The court determined that although stock upon deck is more exposed to danger, and in a storm exposes the vessel to greater risk, than goods in the hole, yet as it is the universal custom to ship goods in the hole, with stock upon deck, when the stock upon deck is thrown overboard for the express purpose of saving from destruction the cargo in the hole, it is but reasonable that the cargo saved should bear a proportion of the loss which was the price of its ransom." Brown v. Cornwell, 1 Root, 60. I am aware that some of the late cases are of shipments by steamers which are so built that the main deck is the ordinary and proper place for the bulk of the cargo to be stowed, so that it has been held, as matter of law, that the rule against deck-loads did not apply to them. The Neptune, cited by the claimants, and reported on appeal [Case No. 10,118]. But the cases cited from the courts of Indiana and of Texas are not of that kind; and in most of the others the usage was proved, and was the foundation of the decision, and the character of the vessels was relied on only to show that the usage to carry goods on deck was reasonable, and must have been known to the shippers by such vessels. In Lawrence v. Minturn, 17 How. [58 U. S.] 100, and Slater v. Hayward Rubber Co., 26 Conn. 128, the question of contribution was expressly reserved.

The only recent decision which denies contribution was one in which the deck-load was shipped by special arrangement and not by usage. The Milwaukee Belle [Case No. 9,627]. Judge Miller there relies very much on Lawrence v. Minturn; but he overlooks the fact that in that case Mr. Justice Curtis carefully omitted to decide the point. See 17 How. [58 U. S.] 115. "His right to contribution is not involved in this case." All that I now decide is, that the ship and freight must contribute to the loss. The other interests are not represented here; and the general average adjustment, which was made up and acquiesced in by both the parties to this suit, relieves the other shippers. It was argued by the claimants that it went farther, and estopped the libellants from making any claim against the ship and freight; but the evidence was, that all those rights were expressly retained, and that the settlement of the average was made without prejudice to this suit. A late writer on average, speaking of the practice of underwriters in England, which he does not think entirely satisfactory (because, as I suppose, it does not give sufficient weight to the law as laid down in Gould v. Oliver and Milward v. Hibbert), says: "The loss of goods and freight thrown overboard from deck is apportioned on the value of the ship, the net freight, and the cargo, including what is jettisoned. If there be goods below deck, the property of an innocent shipper, i. e., one who has no goods on deck, and was not consulted about the vessel carrying a deck-load, his value is to be omitted from the contribution, or, by the practice of some, is brought into the apportionment, but the ship pays that shipper's quota." Hopk. Av. 37. The former of these modes appears to be appropriate to the present case; because, as I say, the parties, here, by their settlement, released the other shippers, who, perhaps, would be liable upon proof of such a custom as I find to be proved here. At all events, I see no reason why the ship should bear their share of the loss, nor do I understand that either party contends for this.

It will be easy for the parties, I suppose, to make their settlement on the basis of this opinion. I see no reason why the libellants should not recover their costs. It is true that they demanded more than they will recover; but the supreme court have decided that they may properly recover a general average loss in such a suit; it is, therefore, like any other case in which a recovery is had of part of the sum demanded. To stop costs, the claimants should have tendered the amount due for their share of the loss; especially so in this case, because the course of their defence is such that they can hardly deny, and, as soon as called on to argue the point, they at once admitted a liability for this lesser amount; for they contend the usage is notice to all the world, and puts these goods on the precise footing of under-deck goods.

Interlocutory decree that the libellants recover a general average loss, to be adjusted hereafter if the parties do not agree.

Case No. 17,694.

The WILLIAM GRAY.

[1 Paine, 16.] [1]

Circuit Court, D. New York. Sept. Term, 1810.

EMBARGO ACTS—CONSTRUCTION—VIOLATION THROUGH NECESSITY.

1. A vessel which during the existence of our embargo laws, departed from one port in the United States on a voyage to another, but was obliged from irresistible necessity to put into a foreign port, and sell her cargo, was not guilty of a violation of those laws.

2. From a fair comparison of the different embargo acts with each other, it may be collected that congress meant expressly to make such an instance of necessity an exception to the penal operation of those acts.

3. But if congress have neglected to provide for such an exception, it is the duty of the courts to interpret those laws, as they do all penal statutes, by considering the exception as implied. Consent is essential to guilt; and the legislature is supposed to pass all penal laws with the understanding that courts will not inflict the penalties for such violations as are unintentional.

[Cited in U. S. v. Morris, Case No. 15,816; The Waterloo, Id. 17,257.]

4. This is not, therefore, one of those cases which are referred for mitigation to the secretary of the treasury.

This was an appeal from a sentence of condemnation in the district court of the [United States for the] Southern district of New York.

The vessel was libelled on behalf of the

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

United States for a violation of the "Act laying an embargo on all ships and vessels in the ports and harbours of the United States" (4 Laws [Bior. & D.] 129 [2 Stat. 451]), and of the act supplementary to said act, and of the act in addition to said supplementary act. The libel stated that the William Gray was, on the first of January, 1809, at Alexandria, Virginia, bound for a foreign port, and afterwards, contrary to the provisions of the two first mentioned acts, proceeded from Alexandria to Antigua in the West Indies; and that certain goods, wares, and merchandises were exported in said vessel from the United States to Antigua, contrary to the provisions of the last mentioned act. The appellant, George Crosby, stated in his claim as owner of the vessel, that she was at Alexandria on the 30th of December, but not on the first of January, and denied that she was bound for a foreign port, or that she proceeded from Alexandria to Antigua, but that on the contrary she proceeded to Martha's Vineyard. The claim also denied that any goods were exported as alleged in the libel, except that the William Gray, with goods on board, was, while proceeding on her intended voyage from Alexandria to Boston, Massachusetts, driven by storms, tempests, stress of weather, and necessity, out of her course, and forced to proceed to Antigua, for the preservation of the vessel and cargo, and the lives of those on board. The claim further stated, that on the arrival of the William Gray at Antigua, the cargo was compelled to be sold by order of the government, against the will of the master and those concerned in it. It appeared from the testimony of the master, that the William Gray sailed from Alexandria on the 30th of December, bound on a voyage to Boston, with a cargo of flour consigned to several different persons in Boston. That they encountered a severe storm, from which the vessel suffered very seriously in her spars and rigging, and the master, mate, and two men were frozen and otherwise injured. On the 11th of January they arrived at Martha's Vineyard, where they repaired their shattered sails and rigging, and were in three days ready to proceed on their voyage to Boston, but were obliged to wait until the 20th before they could get a favourable wind. On that day they took a pilot for Boston, and made sail with a westerly wind, in company with several other vessels, and had a pleasant passage over the roads. In the evening they were abreast the table land of Cape Cod, when a violent gale commenced from the northwest, with a heavy sea; the vessel was kept close to the wind, with the intention of beating into Cape Harbour. In this they were unsuccessful, and from the 20th to the 22d they sometimes tried to lie to and sometimes were obliged to run before the wind. During this period the storm was so violent that their anchors were washed overboard, the bowsprit carried away, the foremast sprung, the maintopmast lost, and the spars, sails, and rigging so shattered that the vessel was described as a wreck. The weather was so cold, the sea continually washing over them, that the men were unable to work. On the 22d the wind shifted to the southward, and they attempted to reach the land, but before they had gained half the distance to land the wind again changed to the westward, and blew another severe gale, until the 24th, during which period they lay to, and the vessel was greatly injured, so as to become, in the words of the witness, a perfect wreck. They were also almost out of water and provisions. In this situation it was determined to bear away for the West Indies for the safety of their lives. On the 21st of February they arrived at Antigua, where the master applied to the governor for leave to refit and proceed on his voyage to Boston. This request was refused by the governor, although repeated for several days. The captain then employed an agent to sell the cargo; and the vessel arrived at New-York on her return about the last of April. Charles Ramsdell, a witness on the same side, corroborated the testimony of the master throughout. This witness was a farmer, and never had been at sea before. He chartered the vessel from Kennebeck to Washington to take on a cargo of lumber. The owner, if he chose, was at liberty by their contract to take her after her arrival at Washington. Witness put on board an adventure for himself for Boston, and was on board the vessel until her arrival at New-York. He left Alexandria, as a passenger, for the purpose and with the expectation of returning directly to Boston. The flour was purchased at $4.50 at Alexandria, and sold for $21.50 at Antigua. The vessel took only 1060 barrels, but was able to carry 1700.

J. O. Hoffman and S. Harris, for appellants.
N. Sanford, Dist. Atty.

LIVINGSTON, Circuit Justice. In defence of the libel filed against this vessel for proceeding from the United States to the island of Antigua, contrary to the act laying an embargo, and the first act in addition thereto, the claimant alleges, that while on a voyage from Alexandria to Boston, she was driven by storms, tempests, stress of weather, and necessity, out of her course, and forced to proceed to that island for her own preservation and that of the cargo, and of the lives of the persons on board. Both the fact and the legal consequences deduced from it by the appellant, are denied by the counsel for the United States. In looking at the testimony, it cannot be denied that there is every reason to believe that the real destination of the William Gray was Boston. Two witnesses swear to this fact positively, and she had actually arrived at Martha's Vineyard on that voyage. Why it was not completed is very minutely accounted for. An attempt was made to reach Boston, but the inclemency of the season, the frozen and mutilated condition of several of the hands, and the wrecked state of the brig, are assigned as

reasons for not being able to effect this purpose. In this state of things it appears to have been unanimously thought necessary for the preservation of life, and on the advice of the pilot, to bear away for the West Indies, it being deemed impossible to return to any port on the continent of America. What the pilot advised to be done is a matter of fact, and may be proved as such by any witness. Such advice or conduct on his part cannot be classed, as has been done, with hearsay testimony. To this body of evidence the court is desired to oppose its own opinion as to the practicability of arriving at some one or other port within the United States. It is certain that a story may be so very improbable that although attested to by more than one credible witness, no one would be bound to believe it. But this is not of that description, although it does appear to the court somewhat extraordinary that a vessel so near the continent, and in so high a latitude, should not be able to make some part of it; yet, for aught it can know to the contrary, vessels quite as near, if not nearer, may have been blown off in the winter season, especially if in a shattered order, to the West Indies. It would, therefore, be unpardonable in either a jury or a court, merely because a fact appears somewhat improbable, to disregard the evidence establishing it, and to decide in conformity with its own opinion, unassisted by that of professional men, in the face of all the proofs in the cause.

In the judgment of this court, then, the alleged necessity is sufficiently made out. Whether it takes the case out of the statute is next to be considered. Were this res integra the very able argument on behalf of the United States would be entitled to the most respectful consideration. It is perhaps to be lamented that judges ever permitted themselves to make any exceptions to an act, which the legislature itself had not thought proper to incorporate within the body of it. The latitude which has been assumed in this way has very much added to the uncertainty of the written law of the land, and produced much litigation, which a firm adherence to its letter would have prevented. But it is too late for speculations of this kind. Their only use can be to make courts careful, and they cannot be too much so, never to depart, under the idea of preventing a particular hardship, from the plain and obvious meaning of the legislature. This restriction, which every judge should impose on himself, is not transcended when in the interpretation of penal statutes, any principle is applied, which is found in every code of laws divine or human, and has from time immemorial been ingrafted into the common law of the country from which our jurisprudence is borrowed. Where such rules or principles exist and have invariably and on all occasions governed courts in the administration of criminal justice, they become as much a part of the law, and are as obligatory on a court as the statute which it may be called on to expound. Of this kind is the one of which the appellants now claim the benefit; that the concurrence of the will in what is done, where it has a choice, is the only thing that renders a human action culpable, or in other words, that to make a complete offence, there must be both a will and an act. This axiom, as it may be termed, is applied as well to offences created by statute as to those which are such at common law. The variety of cases in which this absence of will excuses those who would otherwise be offenders, have been mentioned in the course of the argument, and among them we find that on which this defence proceeds, namely, an act which proceeds from compulsion and inevitable necessity. Whether the legislature might not by apt words punish an act taking place under such circumstances is foreign from the present inquiry: but where this is not done in terms, they are supposed to know that by the rules of the common law, it is always considered as excepted, and therefore do not make the exception themselves. The cases which have been produced by the appellant are as strong and conclusive as perhaps were ever submitted to a court in support of any proposition of law. If the necessity which leaves no alternative but the violation of law to preserve life, be allowed as an excuse for committing what would otherwise be high treason, parricide, murder, or any other of the higher crimes, why should it not render venial an offence which is only malum prohibitum, and the commission of which is attended with no personal injury to another. The court, therefore, cannot but yield to the weight of so many authorities, especially too when every decision accords with reason, common sense, and the feelings of mankind, which are universal and indelible. But is it so very clear that the law itself does not make the exception? The court is inclined to think, that on a fair comparison of the different acts with each other, this will be found to be done. The legislature, by some of the provisions of the enforcing law, as it is called, certainly appear to have been of the same opinion. The court, therefore, thinks that the necessity which is proved to have existed, excused the party from all guilt, and of course from the forfeiture which is sought; and that none having accrued, it is not among those cases which are referred for mitigation to the secretary of the treasury.

The sentence of the district court must accordingly be reversed.

Case No. 17,695.

The WILLIAM HARRIS.

[1 Ware (367), 373; 1 Law Rep. 64; 1 Hunt, Mer. Mag. 62.] [1]

District Court, D. Maine. April 17, 1837.

LIBEL FOR SEAMAN'S WAGES—DEFENSES—SEAMAN'S IMPRISONMENT IN FOREIGN PORTS—POWERS OF CONSUL — SURVEY OF VESSEL — UNSEAWORTHINESS.

1. When the respondent wishes to avail himself of any particular matter of defence, he must present it with proper averments in his answer or by plea.

[Cited in The Rhode Island, Case No. 11,745. Quoted in The Starlight, Id. 13,310.]

2. No evidence is properly admissible but what applies to matters in issue between the parties, and nothing is in issue but what is averred on one side and denied by the other.

3. Whether the master is a competent witness for the owner in a libel against the vessel for wages. Quære.

4. He is incompetent to prove any matter of defence which originates in his own acts for which he is responsible.

5. A consul has no authority to order American seaman to be imprisoned in a foreign port.

6. A master, who procures his men to be imprisoned without good cause, will not be exempted from his liability to them for damages, by showing that the imprisonment was ordered by the consul.

[Cited in Jay v. Almy, Case No. 7,236; Tingle v. Tucker, Id. 14,057; Wilkes v. Dinsman, 7 How. (48 U. S.) 129; Patten v. Darling, Case No. 10,812.]

7. When the crew insist on a survey of the vessel, alleging that she is unseaworthy, if there be reasonable cause for a survey, the owners cannot charge the expense to the seamen.

8. The master is not a competent witness to prove that a medicine chest was on board, for the purpose of throwing the expense of medical advice on a seaman.

[Cited in The Peytona, Case No. 11,058; Patten v. Darling, Id. 10,812; The Ben Flint, Id. 1,299; Brown v. The D. S. Cage, Id. 2,002.]

9. When the sufficiency of the medicine chest is questioned, the proper evidence to be produced is the testimony of some reputatble physician who has examined it.

This was a libel for wages alleged to have been earned on a voyage from Portland to Matanzas, in the island of Cuba, and back to this port. The service was admitted, and the answer sets forth a number of charges which the owners claimed to have deducted from the wages. If all these were allowed, they would amount to more than the whole balance of wages remaining due. The several claims are mentioned in the opinion of the court, and the evidence stated by which they were supported.

Mr. Rand, for libellant.

Mr. Willis, for respondent.

WARE, District Judge. Several preliminary questions have been raised and discussed at the argument which must be disposed of before we can approach the libel on its merits. In the first place it is objected that the action is brought too soon, ten days not having elapsed after the discharge of the vessel, before the suit was commenced. The sixth section of the act of July 20, 1790, c. 56 [1 Story's Laws, 105; 1 Stat. 133, c. 29], provides that the seamen shall be entitled to their wages, "as soon as the voyage is ended and the cargo and ballast fully discharged at the last port of delivery." But admiralty process shall not be immediately issued against the vessel. But if the seamen "shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen, touching said wages, then the judge, or in case his residence is more than three miles from the place, any judge or justice of the peace may summon before him the master, to show cause why process should not issue against the vessel;" and if no sufficient cause is shown, then process to issue according to the direction of the act. But there is a proviso at the conclusion of the section that nothing in the act "shall prevent any seaman from having and maintaining an action at common law for the recovery of his wages or from immediate process out of any court having jurisdiction wherever any ship shall be found, in case she shall have left her port of delivery where her voyage ended before payment of wages, or in case she shall be about to proceed to sea before the end of ten days next after the delivery of her cargo or ballast." Now there is a distinct allegation in the libel that the vessel is about to proceed to sea before the expiration of ten days from the discharge of her cargo; and this allegation is not denied in the answer. The objection itself does not go to the merits, but is merely a dilatory exception, and if the respondent had intended to rely upon it, he should have put the question of fact in issue by a dilatory plea in the nature of a plea in abatement, or by a distinct denial of the averment in the libel by a counter allegation in his answer. As he has done neither one nor the other, the fact must be taken as admitted. No evidence can properly be received to contradict it, because the proof must be confined to the matters in issue. The court cannot travel out of the record to decide questions which the parties have not submitted to it, and nothing is submitted to its determination but what is distinctly alleged on one side and contradicted on the other. It is true that courts of admiralty are not restrained by the strict technical rules of pleading which prevail at common law, but it is not less true in all courts, that the matters in controversy must be distinctly propounded, and each party must set forth by plain and precise allegations the grounds on which he asks for the judgment of the court in his favor, as well to disclose to the adverse party the points to which he must direct his proof, as to enable the court to see what is in controversy between them. Though the objection is one merely dilatory in its nature, I

[1] [Reported by Hon. Ashur Ware, District Judge. 1 Hunt, Mer. Mag. 62, contains only a partial report.]

do not say that it is not in the power of the court after the parties have come prepared for a trial on the merits, to admit an amendment of the answer in order to put the fact in issue. It will be in time to decide this question when a case is presented which requires it; but in the present, all the evidence which I have heard goes fully to sustain the allegation in the libel.

The same remarks will apply to another ground of defence assumed at the argument, that is, that the misconduct of the libellant with the rest of the crew amounted to a mutiny and worked a forfeiture of wages. No defence of this kind is set forth in the answer. But as this objection goes to the merits, resting upon a charge of a very aggravated character, I should feel it to be my duty, if it were sustained by the evidence, to allow an amendment in order to bring the matter fairly before the court. Mariners, it is well known, are favored persons in this court; they are familiarly said to be the wards of the admiralty. But a court of admiralty never countenances insubordination, much less mutiny, in those who are under its protection. But in point of fact the objection is wholly unsustained by the evidence.

We are brought, then, to the real matters of defence which are set forth in the answer; these are various charges which the respondent claims to be deducted from the wages, and which, if deducted, will amount to more than the whole balance of wages remaining due. In support of these, the master [Churchill] was offered as a witness. He was objected to by the libellant's counsel as incompetent, but his testimony was taken de bene esse subject to the opinion of the court on his competency. In a libel against a vessel for wages, although a monition usually goes to the master and the owners as it did in this case, yet the master does not become technically a party in the cause, but by appearing, answering, and taking upon himself the defence. It is sometimes said in a loose sense that all the world are parties to a libel in rem, but by this general language, nothing more is meant than that all who have an interest in the thing may make themselves parties by filing their claims, and therefore they are bound by the decree so far as they have an interest in the thing. None, however, are parties in the proper sense of the word but those who make themselves such. The master, therefore, although monition to him was asked for in the libel and was issued, as he has chosen not to appear and defend, is not incompetent, as a party. If incompetent at all, it is on the ground that he has an interest in the cause. Whether he has such an interest as upon strict legal principles excludes him from testifying, is a question of some difficulty, upon which the authorities are not agreed. It was uniformly held by Judge Peters during the long period that he presided in the admiralty court of Pennsylvania, that the master was incompetent on the ground of interest; and though this opinion was often objected to by counsel, it is not understood that it was ever overruled by the appellate court. Malone v. Bell [Case No. 8,994]; Jones v. The Phœnix [Id. 7,489]. The same principle has been adopted by the district court of Massachusetts. Dunl. Adm. Prac. 245. On the contrary, Sir William Scott held that he had no interest which went to his competency, though his relation to the cause might go materially to his credit. "The master," he says, "has no immediate interest in the suit, and therefore is not an incompetent witness by any rule of law with which I am acquainted, though it may certainly be necessary to watch his testimony with jealousy, as his conduct may constitute a material part of the adverse case." The Lady Ann, Edw. Adm. 235.

But waiving the question as to the competency of the master generally, it is clear on principle and authority that he is an incompetent witness to support any matters of defence set up, which originate in his own acts, because for those acts he may be held personally responsible. This was decided by Sir William Scott himself, in the case of The Exeter. In that case the mate of the vessel had been discharged by the master for alleged misconduct. On the return of the vessel she was libelled by Robinett, the mate, for his wages, and the deposition of the master was offered and read de bene esse, to prove the misconduct and justify the discharge. Sir William Scott held that he was clearly inadmissible, for if the discharge was not justifiable, he would be liable to the owners for any damage that they might sustain in consequence of it. "I have no doubt," says he, "from the consideration that I have been able to give to the matter, and also from conversation with eminent persons at the common law, that he is not a competent witness." 2 W. Rob. Adm. 261. Now as far as legal principles are concerned, there is a perfect identity as to several of the claims which are insisted upon as deductions from wages between the present case and that of Robinett against the Exeter. This will be evident as we proceed to examine them.

The libellant, while at Matanzas, was by the procurement of the master, for some alleged misconduct, put in prison and detained several days. The first charge claimed as a deduction is the expenses of this imprisonment, and the second is the expense of hiring another hand to supply his place while in prison. These are expenses which the master pays and charges to the owner among the expenses of the voyage. It is very certain that the master cannot charge the owner with this expense unless he can show by satisfactory proof that the imprisonment was required by the urgency of the case, and called for by the interest of the owners.

If it were unnecessary and unjustifiable, the master would be liable himself for the expenses and all the damages his own wrongful act had occasioned, besides being liable to the seamen for his personal wrong. The master is introduced as a witness to justify this imprisonment and throw these expenses on the seamen, and thus exonerate himself from his own liability. For this purpose the master is clearly an inadmissible witness. But the allegation in the libel is that the libellant was ordered to be imprisoned by the American consul, and it seemed to be assumed in the argument that this would relieve the master from his responsibility. In the first place it is to be remarked that the order of the consul was obtained by the master on his own ex parte representation. And in the second, that a consul has no authority to commit seamen to prison. The laws of the United States invest their consuls and commercial agents with certain powers to be exercised for the benefit and protection of American seamen when in foreign ports; as for the relief of destitute mariners and furnishing them with the means of returning home. But no portion of the judicial power of the United States is conferred on consuls. They cannot take cognizance of the offences of seamen in foreign ports and sentence them to punishment. When the master of a vessel finds it necessary for the purpose of preserving discipline on board his ship and maintaining his authority, to treat any of his crew with severity, as a matter of prudence it may be well for him to consult the consul and take his advice. This is usually done on his own representation of the case, but the interposition of the consul has never been supposed to exempt the master from his own responsibility. Wilson v. The Mary [Case No. 17,823].

The third charge is for the expense of the survey called by the crew. It appears that three or four days after the vessel left this port she was met by a severe gale, that she was strained by the severity of the weather, and her deck load was shifted, and that during the whole residue of the voyage she leaked so much that when the weather was bad one hand was required at the pump nearly the whole time, and when the sea was smooth, that one hand was kept at the pump nearly half the time; that after her arrival in port she continued to leak very badly until a part of the cargo was discharged. The crew did their duty faithfully without any complaint until the vessel was wholly discharged. They then required of the captain, the mate agreeing with them, a survey of the vessel, stating their opinion that she was not seaworthy, and not safe to return in. While the crew were discharging the cargo, the master had employed caulkers who had been engaged in repairing her for two days, and it was after they had left the vessel that the crew demanded a survey. It seems that they were not satisfied with the repairs that were made, and the report of the surveyors justified their apprehensions. In the first report of the surveyors on the 15th, they directed certain repairs to be made, and these having been made, on examining her again on the 21st, they pronounced her unseaworthy. The act of July 20, 1790, provides that when a vessel, bound on a voyage to a foreign port, shall, "after the voyage is begun," be found to be leaky, or otherwise unfit to proceed on the voyage, the majority of the crew with the mate may require the master to put into the nearest port and have a survey called. The master is required in the first instance to pay the expense of the survey; but if it appears that "the complaint of the crew was without foundation," then, and only then, is he authorized to deduct the amount of the expense from their wages. The statute seems from its language to contemplate the case of a vessel sailing from a port in this country to some foreign port, but the reason of the law applies as strongly to that of a vessel departing from a foreign port on her return, as leaving her home port on a foreign voyage. It contemplates also the case of a vessel which has already commenced her voyage. This case does not therefore fall within the precise words of the law. This vessel was not proceeding from a port in this country, and had not commenced her voyage. She had, however, proved herself unfit for navigation after the disaster she met with on her outward voyage, and though she had been partially repaired, it appeared from the survey that the repairs were insufficient. Is it then reasonable, without referring to the statute, that the crew should be charged with the expense of the survey, when the result proved that it was called for by the interest of the owners themselves? The charge of the expense on the crew, when their complaint is without foundation, is in the nature of a statute penalty for interrupting the voyage without reasonable cause. In this case the complaint was not unfounded, and though the facts of the case do not bring it within the words of the statute, I feel no difficulty in saying that it is within its reason. And if there were no statute, I should feel as little difficulty in holding the crew free from blame. It is an engagement implied from the very nature of the contract between the owners and the seamen, that the vessel in which the voyage is to be performed shall be seaworthy, and if in the course of the voyage she receives such damage as to be unsafe, the crew are not bound to continue in her, unless she is rendered seaworthy by sufficient repairs. They are not bound to expose their lives in a vessel which is in an unfit condition to perform the voyage.

Another charge claimed as a deduction is the sum paid for medical advice. By the general maritime law, if a seaman fall sick during the voyage, he shall be cured at the expense of the vessel. There is not a single principle of maritime law more generally rec-

ognized by the usages of all commercial nations, than this, that the expenses of the sickness of any of the crew shall be borne by the vessel. These expenses include medical advice, as well as medicine, diet, lodging, and attendance. The act of congress of 1790 (chapter 29, § 8), has introduced an exception into the law of this country in favor of the owners by providing that all vessels of certain descriptions, bound on a foreign voyage, shall be provided with a medicine chest, accompanied with suitable directions for administering the medicine; and by the construction of the act, it has been holden that if the vessel is thus provided, the expense of medical advice shall be borne by the seamen; but all other expenses of sickness are left where they are placed by the maritime law, a charge on the vessel. To exempt the vessel from the charge, then, it must be shown that there was a medicine chest on board, provided with suitable medicine in sufficient quantities and accompanied with proper directions for administering them. When a statute specially exempts a party, on the performances of a condition, from any particular liability or duty, which, before the statute, was imposed by the general law, before he can claim the exemption, he must show the conditions to have been complied with. The burden, therefore, is on the owner, to show, if the fact be not admitted, that there was a medicine chest suitably provided with medicines, and instructions for their use, if he wishes to exempt himself from a charge for medical advice.

The only evidence offered, to prove that there was a medicine chest on board, was the testimony of the captain. But it is quite clear that he is an incompetent witness to prove this fact. In case there is not one on board the vessel, the statute makes him personally liable for the expenses of medical advice; and if it be admitted that he could charge it in his account against the owners, yet, as he is liable in the first instance, he swears directly to his own discharge. Admitting, however, that there was no legal exception to his competency, it can hardly be pretended that he is a proper witness to prove the sufficiency of the medicine chest, and still less, if possible, to satisfy the court that it was accompanied with suitable directions for administering the medicine. For why is such a book of directions required, except that the requirement is founded on the reasonable presumption that the master has not sufficient knowledge of the properties of particular drugs to administer them without such directions? Whenever the sufficiency of the medicine chest is called in question, the proof which would be required would be the testimony of some reputable physician who had examined it.

With respect to the last two charges claimed to be deducted from the wages, upon the evidence before me, I am quite clear that they cannot be allowed. As to the first two charges, growing out of the imprisonment, it is equally clear that the master is an inadmissible witness to support them. There is, however, other testimony on the subject, that of the seamen who were examined by the libellant, and their testimony corresponds very nearly with the statement of the master. The leaky condition in which the vessel arrived at Matanzas has been already mentioned. Notwithstanding the hard service required of the crew by the bad state of the vessel, one hand being required at the pump the greater part of the time during the whole of the voyage, it appears that the men did their duty faithfully and cheerfully until she got into port, and until the cargo was entirely discharged. After that they came forward to the captain and stated that they objected to working longer until there was a survey; that they considered the vessel unseaworthy and unsafe to return in. They did not in terms absolutely refuse to work. The strongest language, which it is pretended was used, was that they had rather not work until there was a survey. Nor is it pretended that the state of the vessel was seized upon by them as a mere pretext to avoid duty. It is admitted, and it is clear from all the testimony, that the men were afraid to return in the vessel. Thus far, it appears to me the crew were free from blame. They believed, and had reason to believe, that the vessel was not in a condition to make the voyage safely, and that their lives would be endangered by returning in her without further repairs. The survey proved that their fears were well founded.

After the survey, but before any thing was done by the master towards making the repairs, which were decided to be necessary, he again ordered the men to go to their work, and they again in the same respectful, but decided manner refused. Thereupon one of them was immediately sent to prison. This was in the evening, and the next morning the same order was given by the master with the like result, when the libellant and another man were sent to prison, leaving only one green hand and a boy on board. It is not so easy to excuse the crew for persevering in their refusal to work after the survey. It could not be expected that they would proceed to load the vessel until the repairs were made, but no satisfactory reason can be given why they should not prepare the vessel for taking in her return cargo. But though the men were not free from blame, was the master justifiable in the harsh and severe measures he took to punish them? It was evident that they did not refuse to work from a disposition to insubordination; they put their refusal on the single ground that the vessel was unseaworthy, and having discharged the cargo, that they ought not to be required to enter upon the services of a new voyage unless the vessel, by proper repairs, was rendered fit for it.

It may be asked what was the captain to do. The law intrusts him with a large and

somewhat undefined authority over his men. But it is an authority analogous to that of a parent over a child, or a master over an apprentice, rather than to that of a magistrate; and the law expects him to exercise his authority with something of parental moderation and discretion. It will not justify him in resorting to the severest punishment for slight offences. In cases of urgent necessity, when the ship is in danger, and the property which his owners have intrusted to him, to say nothing of the lives of the crew, is in imminent jeopardy, the most prompt obedience is necessary, and the most energetic measures justifiable for enforcing it. But in cases where there is no such pressing urgency, the law very reasonably requires more moderation and forbearence. In the present case it can hardly admit of a doubt, if the captain had calmly explained to the crew their duty, and assured them that they should not be required to return in the vessel until she was made safe by sufficient repairs, that a crew so habitually obedient, would have complied with his orders. At any rate, the master cannot be justified in resorting to so severe a punishment until milder measures had been tried. Wilson v. The Mary [supra]. It has been doubted whether the master is authorized in any case to punish a seaman by imprisonment in a foreign port. It is not only a severe punishment in itself, but as the prison fees and other expenses are usually, in the settlement of the voyage, charged on the earnings of the seamen, it operates in practice as a species of forfeiture of wages. I have held that in extreme cases, where a man proves incorrigibly disobedient and refractory, and where it is necessary, for the purpose of preserving order and discipline on board the vessel, that the master was justified in calling in the aid of the police, and sending a seaman to prison. But it is not a punishment to be resorted to, except in grave cases, and not until other means have been tried to bring a man to his duty. Under the circumstances of the present case, I think it was clearly unjustifiable. I decree the wages to be paid without deduction.

Case No. 17,696.

The WILLIAM H. NORTHROP.

[Blatchf. Pr. Cas. 235.] [1]

District Court, S. D. New York. Oct., 1862.

ENEMY VESSEL — FICTITIOUS SALE TO NEUTRAL — CONDEMNATION OF VESSEL—VIOLATION OF BLOCKADE.

1. The alleged sale of an enemy vessel, in time of war, by an enemy resident in the enemy country, to a neutral, *held* not to be proved.

2. The object of the transaction was to have the neutral put the vessel in trade with an enemy port, in evasion of an existing blockade of that port.

3. A settled course of trade in violating the blockade, and the employment of the vessel before in such trade, and the fact that her claimant had before been engaged in such trade, taken into consideration in deciding this case.

4. Vessel condemned as enemy property.

5. Vessel and cargo condemned for an attempt to violate the blockade.

BETTS, District Judge. This vessel and her cargo were libelled in this suit January 17, 1862. Both were captured as prize December 25, 1861, at sea, within soundings, sixty or seventy miles off Wilmington, North Carolina, by the United States ship-of-war Fernandina, and were sent to this port for adjudication, and here attached by process of law, returnable and returned in court, duly served, February 4, 1862. Mr. Archibald, the British consul, intervened in the cause, and filed a claim to the vessel and cargo, as the property of British subjects, February 18, 1862, and the cause was brought to hearing on that issue at the present term. The documentary proof of ownership of the vessel consists in the certificate of her registry at Nassau, N. P., August 12, 1861, to Joseph Roberts, of that place. That document states that she was built at Wilmington, North Carolina, in the year 1859. The only written evidences of the employment or destination of the vessel subsequently to that registry are shipping articles executed at Wilmington, North Carolina, between Silliman, master of the vessel, and her crew, for a voyage from Wilmington to one or more ports in the West Indies, for a time not exceeding two months, and back to the port of Wilmington, North Carolina, which agreement was signed by the master and four seamen, at Wilmington, September 18 and 19, 1861, and by two other seamen, at the same place, one on the 27th of September, and the other on the 31st of October thereafter; a manifest of the cargo of the vessel, dated August 12, 1861, stating that it was taken on board at the Bahamas and bound for ——, under the description of the cargo, on the face of which manifest, signed by Silliman, it is noted in pencil, "Went to Wilmington"; the manifest of the master, dated at Eleuthera, Bahamas, August 24, 1861, stating that the cargo was shipped by Silliman, the spaces on the face of which manifest, marked "To whom consigned," "Place of consignee's residence," "Ports of destination," left to be filled, all remain in blank, and on the face of it, under the description of the cargo, is entered a note, in broad pencil-mark, "Went to Wilmington"; and a memorandum in writing, not dated or signed, as follows: "Mem. sch. Wm. H. Northrop, of Nassau, N. P. Sailed from Currant Cut on the 26th of August, 1861; arrived on the coast of North Carolina on the 31st; saw one large steamship; was not boarded between the edge of the Gulf Stream and Frying Pan shoal; on the first day of September arrived at New Inlet; saw no armed vessel of any description, therefore went in;

[1] [Reported by Samuel Blatchford, Esq.]

and arrived same day at Wilmington, N. C." There is also connected with these papers a certificate of the British vice-consul, dated at Wilmington, North Carolina, September 19, 1861, authorizing the departure of the vessel from that port on a voyage to the port of Cardenas, Cuba, and asserting that at the date of the arrival of the vessel the port of Wilmington was not blockaded, except by proclamation, by any force of the United States. These are all the papers produced from the ship relating to her voyage after her sale in Nassau, except some accounts current with her and for disbursements for her use in Havana, the last of November, 1861, and a certificate or registry of like date, from the Spanish authorities, of the departure of the vessel, destined, under Captain Silliman, to the port of New York. No log-book was produced from the vessel evidencing her employment and course of trade and navigation subsequent to the alleged sale of her to the British owner, nor any bill of sale of such transfer, or proof of the actual payment of any consideration on such sale. Berkheimer, the American owner of the vessel in 1859, appointed Joseph A. Silliman to be her master before her sale at Wilmington, and he was again appointed her master at Nassau by Roberts, the purchaser on the sale there, and again in August, 1861. The vessel, in September, 1861, went from Nassau to Wilmington with a cargo of salt, coffee, and fruit. She took thence a cargo of rice and lumber to Havana, in November, 1861, and sailed thence with a cargo of coffee, medicines, and acids, for New York, and was captured on that voyage about eighty miles (within soundings) east of Wilmington and off Cape Fear. The cargo was at the time of capture owned jointly by the master and Roberts, the owner of the vessel. The master says that he had heard at Nassau as early as July, from general conversation and the newspapers, of the war and the blockade of North Carolina, but "did not know positively that the coast was blockaded, but presumed it was." The mate testifies that the master told him the vessel was bound from Havana to New York, but he had a strong impression she was bound to some Southern port; that he thought so because she was so near in shore; and that he and his master knew of the war, and that the whole Southern coast was blockaded by the United States government. A seaman who was examined says that all on board knew of the war and of the blockade of North Carolina.

The intervention of the British consul in the cause is official only. He does not supply any proof, by what is called his test affidavit, of the legal ownership of Roberts, the alleged purchaser of the vessel, and none has been furnished by the latter or by any agent of his up to this period. The master, Silliman, gives the only evidence offered on that point. He says that Roberts was owner of the vessel, and that he and the witness were joint owners of the cargo captured; that he (the witness) knew from the registry and from conversation with Roberts that the latter was owner of the vessel, and that he (the witness) saw a bill of sale of the vessel some time in August, 1861, at the counting-house of Messrs. Sawyer & Menendez, of Nassau, acting as agents of Henry Berkheimer, of Wilmington, to Mr. Roberts, of Nassau, and has not seen it since. He says that he was not present when it was made; that he supposes it is now in the custom-house at Nassau; and that he knows of no other engagement concerning the purchase than what appears on the bill of sale. This is a very faint and imperfect support of a paper title to a vessel, made in time of war, by an enemy resident in an enemy country, evidently for the purpose of putting her in trade with an enemy port by a neutral, in evasion of an existing blockade of that port. In the case of The Bernon, 1 C. Rob. Adm. 102, an enemy vessel was sold and conveyed to a neutral in time of war, and Sir William Scott says, that although such purchases have been allowed to be legal, they are obnoxious to much suspicion, and the court will look into them with great jealousy, even in purchases made for neutrals resident in their own country. The caution embodied in that doctrine is significantly evoked by the incidents intermingled with the present case. And, in respect to a formal bill of sale from the vendor of the vessel, and a note for the payment of the consideration price, with a receipt for its payment, the learned judge held that evidence to be of itself inadequate to establish a lawful purchase, without proof that the purchaser had funds to satisfy the credit, or at least without further verification, by the attesting witnesses, than their mere signatures to the bill of sale, that the transaction was actually fair.

The testimony of Silliman, the master, stands before the court subject to great distrust. He represented to Tibley, the acting mate of the vessel, and to Herring, a seaman on board of the vessel, and during her last voyage, that he hailed from Bordeaux, and was a native of France, while he testifies, on his own examination, that he was born in Philadelphia, and has always lived there, and that he is married, and that his wife lives in that city. The protest which he says he made to the British vice-consul, on entering the port of Wilmington to obtain a certificate of clearance, in September, 1861, appears to flatly contradict a written memorandum of the occurrences on that voyage and of the entry into port, found on the vessel. There is, moreover, in these proofs, a very significant admonition that such consular certificates are entitled to slight consideration, when they are grounded upon dubious representations of that character. No manifest, clearance, or bill of lading, executed at Havana, are produced from the vessel. Two or three invoices of goods, dated November 30, at Havana,

without any consignment or direction to any person, are delivered to the court, with a registry from the Spanish officers of the customs, certifying that the goods had been embarked in the schooner W. H. Northrop, under Captain Silliman, destined to New York. This is doubtless intended to be an official authentication of the despatch of the vessel and cargo from the port of Havana, but fails to identify the same with reasonable certainty. Silliman, the master of the prize, testifies that Cabergoss & Co., of Havana, laded the cargo on board the schooner; that no consignees thereof were appointed; that that was left to him, Silliman, to determine on his arrival at New York; that no bills of lading were signed for the cargo; that the only paper relating to it was the invoice of the laders; and that the whole of it belonged to the witness and Roberts. The master says that the last voyage of the vessel began at Nassau, and that she was to touch at Wilmington and Havana, and end the voyage at Nassau. New York is not named by him as contemplated in the programme of the voyage, nor is that port alluded to in the shipping articles signed at Wilmington after the arrival of the vessel at that port from Nassau, in September, 1861. The master specifies the employments of the vessel under his command, backward and forward, between Wilmington and Nassau, previous to April, 1861, and between those ports since that period, up to the present voyage. The regular course of her navigation and business seems to have corresponded with that notoriously followed at Nassau since the blockade of the rebel ports, and which the records of this court show to have been also promoted and participated in by Roberts, in like manner as in the present case, and to have become the steady habit of passing in and out of Wilmington, under circumstances manifesting a full notice of the existing state of war with the United States, and of the condition of blockade of Wilmington and the other ports of the rebellious states. This case is thus brought clearly within the rules declared by Sir William Scott in The Rosalie and Betty, 2 C. Rob. Adm. 343, and since recognized and enforced in this court (The Mersey), which import a purpose in those concerned in that line of trade to violate the rights secured to the United States by the law of nations. It is thus made apparent that the vessel left Wilmington the property of a resident at that port, and in evasion of the blockade, and that this fact was well known to Roberts, in Nassau, at the time of the alleged purchase by him at that port. He gives no legal proof that a bona fide and legal transfer has since been made of her to him, a neutral, and in a neutral port. It is also manifest that the vessel ran into Wilmington from Nassau in September, 1861, knowingly in violation of the blockade of Wilmington, and there fitted out and sailed thence in the same month, destined to ports in the West Indies, and back again to Wilmington, in violation of the blockade. It is also shown, by strong presumption, that the vessel departed in November thereafter from Havana, in the West Indies, in fulfilment of her said shipping articles, and with intent to enter the port of Wilmington, or some other blockaded port of the Southern states, and that when she was captured she was pursuing that intention, and attempting to enter a blockaded port. It must be inferred from the proofs that the scheme of the voyage contemplated a trading enterprise between Nassau and Wilmington, as the commencing and terminating points of the adventure, though other than enemy ports might, in the progress of the voyage, be visited for the purpose of obtaining cargoes or supplies. And it is clear, upon the proofs, that when captured the vessel was in execution of the purpose and attempt to violate the blockade. A decree of condemnation is, accordingly, ordered against both vessel and cargo.

WILLIAM H. RUTAN, The (MONTELL v.). See Case No. 9,724.

Case No. 17,697.

The WILLIAM JARVIS.

[1 Spr. 485.] [1]

District Court, D. Massachusetts. June, 1859.

CONTRACT OF SEAMAN — SUIT FOR WAGES — PROCEEDING AGAINST VESSEL — PORT OF DISCHARGE—PROCESS—ISSUE BY CLERK.

1. The rules of evidence in admiralty cannot be changed by a state statute.

2. A voyage described in the shipping articles was from "Havre to New Orleans, and thence to one or more ports in Europe, and finally back to a port of discharge in the United States, for a period not exceeding twelve calendar months." *Held*, that there were two restrictions, one of time, and the other of ports; and that the seamen were not bound for twelve months, unless the vessel went to the ports in the order described.

3. By their contract, the seamen were bound until the vessel should return "to a final port of discharge in the United States."

4. She returned to New Orleans, the only port to which she was then destined, and her cargo was there wholly discharged. *Held*, that New Orleans was the final port of discharge in the United States.

5. Requiring the seamen to serve from New Orleans to Boston, was a violation of their rights, for which they were entitled to an indemnity.

6. Section 101 of the chapter of the Revised Statutes of Louisiana, entitled "The Black Code," respecting colored seamen, is unconstitutional.

7. The right of a seaman to his wages is perfect, upon the completion of his service.

8. Before St. 1790, c. 29, § 6, if payment was refused, he could have instantly commenced a suit in personam against the owners or master, or in rem against the vessel or freight.

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

9. The statute affects only one of these remedies, viz., that against the vessel. It does not touch suits in personam, or against the freight.

10. By the statute, as a general rule, no proceedings can be had against the vessel, until ten days after the right to wages has accrued.

11. But there are three events in which such proceedings may be had within the ten days, viz.: (1) If a dispute has arisen. (2) If the vessel has departed from the port of her discharge. (3) If she is about to proceed to sea. In the last two cases, the statute is inoperative, and the right to process is the same as if it had never been passed.

[Cited in The Shelbourne, 30 Fed. 512.]

12. The expiration of ten days, and a dispute having arisen, are by the act made equivalent to each other. And upon the happening of either, the proceeding by summons to the master is authorized, but not required.

13. It is optional with the seamen whether to resort to the preliminary measure of summoning the master, or to make direct application for admiralty process. And the judge may order process against the vessel, without previous summons to the master.

[Cited in The M. W. Wright, Case No. 9,983; The Waverly, Id. 17,301; Murray v. Ferry-Boat, 2 Fed. 88; The Frank C. Barker, 19 Fed. 334.]

14. In the absence of the judge, the clerk may issue process according to rules prescribed, or instructions given by the judge.

In admiralty.

W. E. P. Smyth, for libellants.

J. H. Prince, for claimant.

SPRAGUE, District Judge. This is a libel for seamen's wages, on a voyage from New Orleans to Havre, thence to New Orleans, and thence to Boston.

The first question is, what was the contract rate of monthly wages? Some of the libellants claim more than is set down in the shipping articles. Each of the libellants was offered, as a witness in his own behalf, the counsel contending that he was admissible by statute of Massachusetts of 1857, c. 305. It was decided in this court, in U. S. v. Dunham [Case No. 15,006], and afterwards in the circuit court, that the rule of evidence prescribed by that statute must prevail in the courts of the United States, in trials at common law. But it has also been decided, in this court, that it does not prevail in suits in admiralty. And it has been held by the supreme court, in U. S. v. Reid, 12 How. [53 U. S.] 361, that a state statute cannot change the rules of evidence, in criminal trials, in the courts of the United States, they not being deemed trials at common law, within the meaning of the thirty-fourth section of the judiciary act of 1789 (1 Stat. 92). The testimony of each libellant in his own case was, therefore, rejected, and there is no sufficient evidence that a fraud was practised upon any of the libellants, in the insertion of the rate of wages in the articles.

The second ground of claim is, that the voyage from New Orleans to Boston was performed without any contract, either written or verbal, and that the seamen were wrongfully coerced to remain in the service of the ship. Some of the libellants shipped at New Orleans, in September, 1858. The voyage described in their shipping articles was from "New Orleans to Havre, and one, two, three or four other ports, should the master require, and back to a final port of discharge in the United States." The rest of the libellants shipped at Havre. The voyage described in their articles was from "Havre to New Orleans, thence to one or more ports in Europe, and finally back to a port of discharge in the United States, for a period not exceeding twelve calendar months." The ship went from Havre to New Orleans, and thence to Boston. She arrived in New Orleans on the 9th of February, 1859. The crew consisted wholly of colored men, who, by the laws of Louisiana, are not permitted to be at large on shore, and might even be taken from their vessel and imprisoned; and the master was compelled to give bond to carry them out of the state. Some of the crew requested their discharge at New Orleans, and to be transferred to some other vessel. This was refused by the master, and all were required to continue in the service of the ship, and did so continue, until her arrival at Boston, on the 21st day of May, 1859. As to those who shipped at Havre, it is contended that they were bound for twelve months. But they were thus bound only for the voyages described in the articles, which contain two restrictions. First of places, and second of time. Boston was not one of the places embraced in their contract, unless it should be the port of discharge in the United States, after a second voyage to Europe, which was not performed. As to those who shipped originally at New Orleans, it is contended that Boston was the final port of discharge in the United States, within the meaning of their contract. But this construction cannot be maintained. This ship took no cargo at Havre, excepting a small quantity of potatoes, which were all discharged at New Orleans. If she had taken on board goods for different ports, to which she was bound successively for the discharge of cargo, then there would have been reason to contend that the last of such ports, in the United States, was the final port of discharge, within the meaning of the contract. U. S. v. Barker [Case No. 14,516]. But in this case, so far from there being cargo to be discharged at several places, the vessel was not even destined to any port, excepting New Orleans; she went there seeking business, and ready to accept it for any part of the world.

Another ground of defence is, that these libellants being negroes, the master was compelled, under a law of Louisiana, to give bond to carry them out of the state. The provisions of that statute are referred to in The Cynosure [Id. 3,529]. It was there held, that this law of Louisiana was invalid, and to that opinion I still adhere. It is there said to be inconsistent with the constitution and laws of the United States respecting commerce. And it may be added that this view is sustained by the leading case of Gibbons v. Ogden, 9

Wheat. [22 U. S.] 1, and by the established doctrine of the supreme court. In that case it was decided that commerce embraced navigation. All the numerous acts of congress respecting ships and their crews, in defining the rights and duties of merchant seamen, have emanated from the power to regulate commerce. It was further decided, in the same case, that a state could pass no law affecting navigation; in part, on the supposition that such cases were not covered by the legislation of congress. For in this respect commerce was to be deemed a unit, and what congress had not seen fit to restrict, they had permitted, and this tacit permission was to be considered a part of the system of regulation which congress had established, and of the same force as if it had been expressly enacted. It is of no avail, therefore, to say that congress have not, in express terms, said that negroes may be seamen on board of American vessels. It is sufficient that there is no prohibition, and that all persons, of every shade of color, stand upon the same ground of right to constitute a part of the crew. And this unrestricted permission is as perfect as if it had been given by positive enactment. The master could not, therefore, by giving his bond to the state authorities, whether done voluntarily, or by illegal compulsion, acquire any right to control their persons, still less to compel them to serve on board of his ship. No one of the libellants ever agreed to go from New Orleans to Boston. And the master in requiring their services on that voyage, violated their rights, and they are entitled to recover an indemnity therefor.

This ship arrived in Boston on the 21st day of May, and the crew were immediately discharged. On the 23d, they went to the master for their wages, who offered to pay them for the whole time, at the rate prescribed in the articles. This they refused to accept, claiming a greater rate from New Orleans to Boston, and some of them, also, a greater rate between New Orleans and Havre. On the 25th, application was made to this court for admiralty process against the vessel, which, after due examination, was awarded, and she was arrested. It is insisted, that this arrest was premature: (1) Because it was within ten days after the seamen were discharged; and (2) because there was no previous notice to the master, to show cause why admiralty process should not issue. These objections are founded on the sixth section of the statute of 1790, c. 29 [1 Stat. 133]. This section has been very perplexing to the courts. It has often been regarded as a sort of legislative enigma,—an inexplicable enactment for inscrutable reasons. Upon examining this sixth section, it is found that its provisions do not affect the right to wages, but only the remedy. To understand the statute, we must see when the right accrues, and what were the remedies previously existing. The right to wages accrues when the contract has been performed. Formerly, the practice was to hold the seamen to assist in unloading the ship, and his service was not terminated, until the cargo was fully discharged. Now, he is almost invariably discharged at the termination of the voyage. This sometimes has arisen from the express terms of his contract; sometimes from the established usage of the port where the voyage terminates, which tacitly becomes a part of the contract; and sometimes from a discharge by mutual agreement. But, in all these cases, his right to wages is perfect when his contract has been performed, whether that be when the voyage is ended, or not until the cargo is unlivered. If such wages were not paid upon demand, the law immediately gave him several remedies, viz., in personam against the master or owners, either in admiralty or at common law, or in rem, against the ship or freight, in admiralty. The question arises, how far does the statute affect these remedies? I am not aware that it has ever been contended that it curtailed the right to proceed at common law, or that any particular question has arisen, or discussion been had as to process against freight.

But questions and discussions have arisen, as to the time when seamen may proceed against the vessel, or in personam in the admiralty. It is admitted that, as a general rule, process against the vessel is delayed for ten days, although the statute does not say this, in express terms. It recognizes the immediate right to wages, upon the discharge of the cargo; and then says, if they are not paid within ten days, &c., a monition may be had to show cause why process should not issue against the vessel. This has been considered as impliedly prohibiting any proceedings against the vessel, within ten days. But the act itself makes three exceptions to the general rule of delay: (1) Where a dispute has arisen as to the wages. (2) When the vessel shall have left the port where the voyage ended. (3) When she shall be about to proceed to sea within the ten days. It has been maintained by very respectable authority (1) that the ten days' restriction applies to suits in personam in the admiralty, as well as to process against the vessel; (2) that the first exception, viz., the clause respecting a dispute, can have no efficacy, and must be wholly disregarded; (3) that neither after the expiration of the ten days, nor in the excepted cases, can process to arrest be issued, without the previous summons to the master to show cause; in other words, that there must be such previous summons in all cases, before the vessel can be arrested.

The last two of these propositions are now directly before me for adjudication, and I am called upon to consider the arguments which have been adduced in their support. The same reasons apply, in a great measure, to the first. The judges and writers who have maintained these propositions, do not seem to have confined themselves to the language of the legislature, or to have scrutinized it with much care, but to have rested their conclusions upon certain supposed reasons and objects of the legis-

lature. Judge Peters (Edwards v. The Susan [Case No. 4,299]); and after him, Mr. Dunlap, in his Admiralty Practice (page 96); and after him Judge Conkling (Adm. Prac. p. 393), maintain, that the reason and purpose of the legislature in giving the ten days' delay, are to enable the owner of the vessel to ascertain whether there has been any embezzlement by the crew, and to collect freight wherewith to pay the wages, and that this reason applies as well to a suit in personam as in rem. And it may be added, that it applies as well to process against the freight, as against the vessel, and to suits at common law, as well as in the admiralty. But this supposed reason is a mere assumption, to which the statute gives no color, but the contrary. It is assumed, that the statute gives the ten days in order that the owner may have an opportunity to examine the cargo, and see if it is intact, and to collect the freight to pay the wages. Now the statute contemplates that the ten days shall not begin, until the cargo has been fully discharged. It was framed with reference to the practice then existing, by which the seamen continued their service until the cargo had been unlivered. The language is, "As soon as * * * the cargo or ballast be fully discharged * * * every seaman shall be entitled to the wages which shall be then due, according to his contract, and if such wages shall not be paid within ten days after such discharge" of the cargo, &c. Now the complete discharge of the cargo by the owner himself, gives him the fullest opportunity to ascertain its condition, and to see if there has been any embezzlement. It also gives him time to collect the greater portion of the freight, and at least the fractional part, that would suffice to pay the wages of the mariners. Owners of cargo almost invariably take it away as soon as it is placed upon the wharf. They are anxious to obtain possession of their property, and the carrier is not bound to deliver it, until freight be paid. But even if the owner had no opportunity to collect freight, is it credible that the legislature could intend that the seaman, after complete performance of his contract, and after his right to compensation was perfect, should be turned ashore, penniless and friendless, (as he commonly is,) and kept for ten days, without payment of any portion of his wages, and this, too, merely from tenderness to his employer, who could, in general, make instant payment, without the slightest inconvenience? Besides this, the statute expressly preserves the right to proceed by suit at common law. And this is just as incompatible with giving time to examine the cargo, and to collect freight, as would be any suit in the admiralty. And it may be safely said, that no reason can be assigned for permitting a suit at common law, which would not apply with equal force to allowing it in personam in the admiralty, which, indeed, is the more appropriate and favored remedy for seamen, because more promptly meeting their necessities.

Another and quite different reason has been assigned by one learned judge, for depriving a seaman of an immediate remedy, viz., that it is for his benefit, by preventing his involving himself too readily in the evils of litigation. Conk. Adm. Prac. 404. This argument goes in support of all the propositions for delay. It has generally been considered the duty of government to administer justice promptly and without delay, and this injunction has even been incorporated into state constitutions. If the reverse be the true principle, if the right to sue should be withheld, to prevent the evils of litigation, why not extend it to other persons, as well as to seamen? Would it be peculiarly beneficial to the latter? So far from it, that there is no class upon whom delay inflicts such cruel injustice. Laborers, to whom wages are due for services on land, have homes, friends, or at least acquaintances, but a seaman is generally put ashore a destitute, homeless stranger, with nothing but his claim for wages on which to subsist. If they are withheld, he is driven to dispose of his claim, and with what sacrifice this will be done, has been often made manifest in judicial proceedings. Cases have been presented, in which the whole claim for years of service, has been transferred by the seaman, within two days after his discharge, upon his receiving less than a third of what was due to him. Generally, the master or owners recognize the necessities of the seaman, and have been honorably prompt in the payment of his wages. But this is by no means universal. They have sometimes used their supposed right to withhold the wages for ten days, as a means of coercing the seaman into the relinquishment of valuable claims against the owners, or officers, for violations of contract, or for personal violence. That seamen can, of all persons, least bear the evils of delay, is manifest from their character, and their employment. This has been universally recognized. It is for this reason that, in case of seamen's wages, the admiralty is emphatically an instance court, velatis velis. Even the English courts of common law, while obdurately prohibiting nearly all other suits, have permitted seamen to proceed in the admiralty for their wages, as an indulgence to their necessities.

I have discussed these reasons at some length, not only because of the authority by which they have been put forth, but because they have aided in producing a general belief, particularly among ship-owners, that the seamen can commence no suit, and that the owners are under no legal obligation to pay the wages, until after the expiration of ten days. It seems to me that, if we are content to look to the language of the statute, and its fair interpretation, without seeking to enlarge its construction, from an assumed theory of the purposes of the legislature, many of the supposed difficulties will vanish. And surely we ought not to go in search of arguments for giving a strained construction against the seaman, of a statute which does him injustice, by curtailing the remedies which the jurisprudence of all other countries has given him. And we must also bear in mind, that we are dealing with remedies for

the collection of debts, which justice requires should be prompt and efficient, even where our sympathies are excited by the embarrassment of the debtor, and where the creditor has abundant means. But in case of seamen, the creditor generally is in distress, and the debtor of ability. And there is certainly no sufficient reason for peculiar tenderness to such a debtor, at the expense of such a creditor. The reason of the provision for delay, deduced from the statute itself, is simply the apprehension that ship-owners might suffer great inconvenience from having their vessels arrested, and held upon trifling demands of seamen. This reason applies peculiarly to vessels; it does not extend with equal force to suits against the freight, or in personam; and hence, the statute has provided only for delay in arresting the vessel. And even to this delay there are three exceptions; two to prevent the loss of this remedy, and the other to prevent delay, where the right is contested.

I am aware that this view is in opposition to very respectable authority. In Swift v. The Happy Return [Case No. 13,697], it is said, that the wages are "not payable until the expiration of the period allowed for collecting the freight," i. e., until after the ten days. If not payable, no suit could be commenced. And in Dunl. Adm. Prac. p. 100, it is said, that suits in the admiralty, in personam, for wages, cannot be commenced until after the lapse of ten days from the discharge of the cargo. There is no such restriction in the statute, and it has often been held, in admiralty, as well as at common law, that suits in personam may be instituted immediately after the discharge of the seaman, and a refusal of payment of his wages. The enacting clause exhausts itself upon the process against the vessel, and it is only from the proviso that any argument can be drawn, to restrain proceedings in personam. But the office of the proviso is to limit, and not to enlarge the enactment. It may be asked why it is declared that nothing therein shall prevent the seaman from having a suit at common law, if no suit in personam had been affected by the previous clauses? To this I must answer, that I do not see any necessity for such a proviso. It may have been from superabundant caution. But inability to perceive any necessity for the proviso, cannot change the palpable fact of what is previously written; and that there is not a word in it that touches, or even glances at any proceeding in personam. And there are not wanting precedents of provisos, equally inexplicable, but which have not been permitted to enlarge the enactment.

I come now more directly to consider the clause in the statute, respecting disputes. It is admitted that a dispute had arisen in the present case, but it is insisted that the process was premature, because that provision of the statute is wholly inoperative. And Dunl. Adm. Prac. p. 100, and Conk. Adm. Prac. p. 393, are cited as authorities. I cannot, however, accede to the doctrine therein stated. The statute says: "If such wages shall not be paid within ten days after such discharge (of the cargo), or if any dispute shall arise between the master and the seamen," &c., application may be made for process. But it is contended in Dunlap, that if the seaman may institute process, by reason of a dispute, the ten days' restriction will be nugatory, because he can create a dispute at pleasure; and he concludes that the court must either abrogate the clause respecting disputes, or permit the seamen to nullify the ten days' restriction. But no such necessity exists. His theory is that the seaman will make an exaggerated demand, for the mere purpose of causing a dispute. I do not understand that it is apprehended that he will make a claim wholly fictitious, knowing that nothing is due to him, for he has no more temptation to do this before, than after the expiration of the ten days. In either case, the only result would be total failure in his suit, and a loss of all the expenses incurred, and a liability to pay costs to the other party. But the apprehension must be, that having a just claim for a certain sum, which is not denied by the master, the seaman may wilfully exaggerate the amount, for the mere purpose of creating a dispute, in order to obtain process. But against this there are sufficient guards. In the first place, before the judge will order the arrest of the vessel, he must be satisfied that there is a real dispute, and sufficient grounds for process; and to this end will require evidence upon oath. In the next place, the seaman must fail in his suit, so far as there is any matter in controversy, and must therefore pay all the expenses which he has incurred, and may be mulcted in costs to the other party, to be deducted from the amount admitted to be due; or the proctor, if colluding or aiding in the supposed evasion of the law, may be compelled to pay the costs out of his own pocket, or otherwise dealt with, for malpractice. The power of the court over the cause, the costs, and the proctor, is sufficient to prevent, or correct, the apprehended fraud upon the law. Beside this, there is really no inducement for a party thus to make a false claim, and commence litigation thereon. So far from gaining time, he will be delayed, until the termination of the litigation, and then obtain only the amount originally admitted to be due, less the costs to which he may be subjected. The danger of such a procedure is imaginary. I have never known a case of such fictitious dispute, and the fear of it, certainly, will not justify a judicial repeal of this clear and substantive provision of the statute.

It remains to consider the further objection, that the arrest of the vessel was premature, because there was no previous summons to the master, to show cause why admiralty process should not issue. And it is insisted that, neither after the expiration of the ten days, nor in the excepted cases, can admiralty process issue, without the preliminary summons to the master, to show

cause; in other words, that such summons is, in all cases, an indispensable pre-requisite. This presents a question of more difficulty than the preceding. It has been held by a learned author and judge (Conk. Adm. Prac. 395) that such previous notice is necessary, even in case the vessel shall be about to proceed to sea. To this I can by no means accede. Before the statute, the seaman had a right to immediate process. The enacting part of the sixth section authorizes a summons after ten days, or a dispute. It is only by virtue of this enactment, that the previous right to immediate process can be impaired. But the close of the same section says, in terms, that nothing herein contained shall prevent the seaman from having immediate process, out of any court, in case the vessel is about to proceed to sea. How, then, can it be said, that what precedes in the same section shall prevent immediate process in such case? There are four events specified in the sixth section: (1) The expiration of the ten days. (2) A dispute has arisen. (3) The vessel having departed from the port where she was discharged. (4) Being about to proceed to sea. The last two are contained in the proviso which takes them out of the enactment, and leaves them precisely as they were before the statute. It is the first two that require consideration.

Before the statute, the seaman had no right to this summons to show cause. It is a new proceeding, and whoever avails himself of it, can do so only in the manner expressly set forth. And if the process to arrest the vessel owed its existence to this statute, it could be had only in the manner therein mentioned, that is, after the notice to the master. But the right to the process existed previously, and the question is, how far the statute has impaired it. It is agreed that it is postponed for the ten days. Is it further delayed until after the proceedings on summons to the master? The language of the statute is enabling, not prohibitory. It says that a proceeding by summons may be had after ten days, but does not forbid process to arrest. The prior law is not expressly repealed. Is it repealed by implication? To the extent of the ten days it is. Because, if two modes of proceeding are given by law, one to arrest, and the other a summons to show cause why there should not be an arrest, it would be absurd that the milder measure of the summons should not be permitted, until after ten days, and allow the arrest itself to be made, without such delay. But no such absurdity exists in allowing the party, after the expiration of the ten days, to have his election which of the two proceedings he will at once resort to. The new right given to the seaman, to proceed by summons to the master, is not incompatible with his previous right to proceed immediately by process to arrest. It is but giving him an option of remedies. That there is no incompatibility, has been practically demonstrated; for some courts have always allowed this option to the seaman, without difficulty or inconvenience. The former law is not in this respect repealed, either in terms, or by its incompatibility with the new provisions of the statute. If we take more general views, either of policy or justice, we find no grounds for saying that it was the intention of the legislature to take away the right of immediate arrest, after the ten days. The language authorizing the summons is, "It shall be lawful," &c. If this is merely enabling, that is, if it be optional whether to resort to this proceeding, or not, then the provision may be of some benefit to the seaman, and some slight compensation for the injustice of the ten days' delay; but if it is imperative upon the seaman to go through the process of summoning the master, before he can have a warrant of arrest, it will be an additional injustice. The principal benefit to the seaman from this provision for summoning the master is that he sometimes has the pecuniary means of instituting this proceeding, but not to arrest and hold the vessel. And if the master failed to show cause why admiralty process should not issue, it may inspire his proctor or others, with sufficient confidence in his claim, to become responsible for the expense of an arrest. And in some few cases, this procedure may be resorted to, in order to ascertain the objections to the claim. But these are almost always well known, and where they are not, it is generally vain to expect that disclosure on summons, which has been refused in pais. It sometimes happens, too, that the parties are willing to abide by the opinion of the judge, upon an application. But this is voluntary, for he can decide nothing, except whether a suit in rem shall then be commenced; and his refusal does not preclude a renewal of the application, and his allowing it will have no effect upon the trial, which will proceed in the same manner as if there had been no such previous summons.

But this procedure of summoning the master is, in general, wholly useless. It does not begin until after a dispute has arisen, or, at least, payment has been refused, and litigation has become necessary, and then the more directly and speedily the question is brought to an issue, the better. The multiplication of unnecessary processes is an evil; they create delay and expense. The delay is too palpable to be denied; but one learned writer indulges the idea, that there need be little or no expense, because the seaman may, without any assistance, himself carry through this procedure of summoning the master to show cause, attend the hearing before the judge, or magistrate, and obtain the certificate. Conk. Adm. Prac. 398. The idea that a common sailor, who, very often, can neither read nor write, and not unfrequently cannot speak our language, should himself make out a written claim, present

it to the magistrate, obtain a summons, and himself serve it on the master by reading, or leaving an attested copy, attend to the hearing, and perhaps summon and examine witnesses, is a mere illusion. He has the right to do all this, and so has every man a right to institute and prosecute his suits at law, without professional assistance. But how often is this done, even by the most intelligent and educated? Not in one case in a thousand; and still more rarely would the common sailor enter upon legal proceedings. He always employs a proctor, who must be paid, as must also the commissioner or justice, when they are resorted to, and the officer who may serve the summons. It is true, costs may be given to the seaman, where the master is in the wrong, but it is well known, that the highest taxation falls far short of the charges of the proctor alone. It may be added, that if it be not optional with the seaman, whether to resort to this procedure by summons or not, there is a want of reciprocity, for it is entirely optional with the master, whether to take any notice of it or not, and his refusal to do so, only leaves him liable to have a suit commenced against the vessel; that is, in the same situation as if this provision for a summons had never existed. On the whole, I see no reason for extending these provisions impairing the previous rights of seamen, further than is required by a fair construction of the language used by the legislature. And I am of opinion, that it is optional with the seaman, whether to resort to the preliminary measure of summoning the master, or to make direct application for admiralty process.

In conclusion, the right of a seaman to his wages is perfect, upon the completion of his service; and before the statute, if payment was refused, he could have instantly commenced a suit in personam, against the owners or master, or in rem, against the vessel or freight. The statute affects only one of these remedies, viz., against the vessel. It does not touch suits in personam, or against the freight. By the statute, as a general rule, no proceedings can be had against the vessel, until ten days after the right to wages has accrued. But there are three events in which such proceedings may be had within the ten ways, viz., if a dispute has arisen, if the vessel has departed from the port of her discharge, or if she is about to proceed to sea. In the last two cases the statute is inoperative, and the right to process is the same as if it had never been passed. The expiration of ten days, and a dispute having arisen, are by the act made equivalent to each other, and upon the happening of either, the new proceeding by summons to the master, is authorized, but not required. The act is, in this respect, permissive, not imperative. The judge may order process against the vessel, without previous summons to the master In the absence of the judge, the clerk may issue process, according to rules prescribed, or instructions given by the judge. Decree for libellants for $386.82, and costs.

WILLIAM KALLAHAN, The (KELSEY v.). See Case No. 7,680.

Case No. 17,698.

The WILLIAM MARTIN.

[1 Spr. 564.] [1]

District Court, D. Massachusetts. Jan., 1858.

WHALING VOYAGE — LAY OF SEAMAN — END OF VOYAGE—EXPENSE OF SEAMAN'S RETURN.

1. A seaman, during a whaling voyage, being appointed a ship-keeper, is thereafter entitled to the lay of that station.

2. Where a seaman has different lays, during the same whaling voyage, he is to have such proportion of each lay, for the whole voyage, as the time he served under such lay was of the time of the whole voyage.

3. The vessel not returning home, as she ought, the seaman was allowed compensation for his time and expenses in returning; calculating for his time at the rate of his last lay; deducting what he earned, or might, but for his own neglect, have earned, while so returning.

This was a libel by Frank Smith, for a share of the proceeds of a whaling voyage, and also for damages for not being brought home. He originally shipped at Boston, as a seaman, at a lay of one thirty-fifth. During the voyage, he was appointed ship-keeper, and THE COURT, (SPRAGUE, District Judge,) was of opinion, that from that time he had a right to the lay of his predecessor, viz., one twenty-fifth. It appeared, that after the time for which the vessel had been originally fitted out, and after she had filled with oil, the master went into Fayal, and thence shipped his catchings home by another vessel, and there refitted his own vessel, and entered upon a farther whaling voyage. The libellant refused to go the second voyage, left the vessel, and returned to Boston. The court held, that he was justified in such refusal, and entitled to an indemnity for not being brought home, by the return of the vessel, according to the original contract. An assessor was appointed, by order of court, giving him instructions, which show the opinion of the court, in what manner the lay should be calculated, and the indemnity ascertained. The instructions were, to calculate the libellant's lay from the commencement of the voyage to the 6th of May, 1857, at a lay of one thirty-fifth, and from the last date to the time when the libellant arrived at Boston, at a lay of one twenty-fifth, giving him such proportion of one thirty-fifth

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

part of the proceeds of the whole voyage, as the time which he had a thirty-fifth lay was of the time of the whole voyage; and such proportion of one twenty-fifth of the proceeds of the whole voyage, as the time he had a twenty-fifth lay was of the time of the whole voyage. And also, to ascertain and report what were the expenses, if any, which the libellant necessarily incurred in returning to the port of Boston, after he left the vessel; and also the length of time which he necessarily expended in so returning, and the amount to which he would be entitled for that length of time, calculating his compensation therefor at the same rate which he will be entitled to recover under his said lay of one twenty-fifth; and also, whether the libellant earned any, and what wages or compensation, after he left the said vessel, and during the said time allowed him for his return, or had a reasonable opportunity to do so, and might have so earned wages or compensation, but for his own neglect.

W. H. Judson, for libellant.

H. A. Scudder, for claimant.

WILLIAM M. JONES, The (BUCKLEY v.). See Case No. 2,095.

WILLIAM PENN, The (BROOKS v.). See Case No. 1,965.

WILLIAM PENN, The (CRAWFORD v.). See Cases Nos. 3,372 and 3,373.

WILLIAM POPE, The (UNITED STATES v.). See Case No. 16,703.

Case No. 17,699.

Ex parte WILLIAMS.

[4 Cranch, C. C. 343.] [1]

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

CORPORATION OF WASHINGTON — POWERS — CONFINEMENT TO LABOR — FREE BLACKS AND MULATTOES—PLAYING AT CARDS.

1. No person can be detained upon a commitment which does not show sufficient cause upon its face.

[Cited in Erwin v. U. S., 37 Fed. 486.]

2. There is no law in the county of Washington, to justify the commitment of a man to hard labor by a justice of the peace, for playing at cards, even if he be a free black or mulatto, and unable to pay the fine imposed on him by the justice.

3. The 8th section of the by-law of 31st May, 1827, is not, so far as it authorizes a commitment to the work-house for the non-payment of a fine, warranted by the charter, except in the case of the nightly and other disorderly meetings of slaves, free negroes and mulattoes, who are unable to pay the fine.

4. By the 8th section of the charter, the only persons who may be confined to labor for not paying a fine are free negroes, or mulattoes, who are unable to pay such penalty.

5. Confinement to labor is a severe proceeding, and should be strictly confined to the case in which alone it is authorized by the charter.

6. The power was not originally given as a substituted punishment in lieu of the penalty, but as the means of obtaining payment of the penalty.

7. In case of inability to pay, he is to give an equivalent in labor.

8. The corporation had no authority to compel a person to labor, who was able and refused to pay.

9. The by-law which attempts to give authority to a justice to commit the defendant to labor for a refusal to pay, is not warranted by the charter.

10. A commitment under the by-law, must charge that the offence was committed by a free black or mulatto.

Habeas corpus, to Richard Butts, intendant of the Washington Asylum, commanding him to bring up the body of Thomas Williams, with the cause, &c., to do and submit, &c.

Upon the return it appeared that the said Thomas Williams was detained by virtue of the following warrant: "District of Columbia, county of Washington, to wit. To Richard Butt, intendant of the Washington Asylum, greeting. Whereas the mayor, board of aldermen, and board of common council of the city of Washington, recovered judgment for $10 fine, and $1.58⅓ cents costs, against Thomas Williams, for playing at cards, &c., before Robert Clarke, Esq., a justice of the peace for the county aforesaid, on the 26th day of July, 1833, and the said Thomas Williams refuses to pay or satisfy the aforesaid judgment: You are therefore commanded to take into your custody the body of the said Thomas Williams, and him keep at hard labor into the penitentiary department of the Washington Asylum, thirty days, until he shall be otherwise discharged by due course of law. Hereof fail not. Given under my hand and seal, this 22d day of October, 1833. John D. Clarke. (L. S.) To John Waters, a constable, of Washington county."

CRANCH, Chief Judge, delivered the opinion of the court, (THRUSTON, Circuit Judge, contra.)

The by-law under which this prosecution is supposed to have been instituted, was passed on the 31st of May, 1827, (sections 4 and 8) entitled "An act concerning free negroes, mulattoes, and slaves." By the 4th section it is enacted, "That if any free black or mulatto person shall be found playing at cards, dice, or any other game of an immoral tendency, or shall be present as one of the company where such game is playing, on conviction thereof, before a justice of the peace, shall forfeit and pay a fine not exceeding $10." By the 8th section it is enacted, "That any free black or mulatto person, who shall be fined under any of the provisions of this act, on refusing or neglecting to pay, or secure to be paid, such fine, shall be committed to the work-house, until such fine be paid, for any

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

period of time, not exceeding six months." The act of congress of the 15th of May, 1820 (3 Stat. 583), "To incorporate the inhabitants of the city of Washington, and to repeal all acts," &c., among other powers gives the corporation (by the 7th section,) power "to restrain or prohibit" "all kinds of gaming," and "impose and appropriate fines, penalties, and forfeitures, for the breach of their laws or ordinances;" and by the 8th section, "to establish and erect work-houses, houses of correction, penitentiary, and other public buildings;" "to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes, and to punish such slaves by whipping, not exceeding forty stripes, or by imprisonment not exceeding six months for any one offence; and to punish such free negroes and mulattoes, by penalties not exceeding $20 for any one offence; and in case of the inability of any such free negro or mulatto to pay any such penalty and cost thereon, to cause him or her to be confined to labor for any time, not exceeding six calendar months;" "to punish, corporeally, any colored servant or slave for a breach of any of their ordinances, unless the owner or holder of such servant or slave shall pay the fine in such cases provided; and to pass all laws which shall be deemed necessary and proper for carrying into execution the powers vested by this act, in the said corporation or its officers." By the 9th section it is enacted: "That the marshal of the District of Columbia shall receive and safe keep within the jail for the county of Washington, at the expense of the corporation, all persons committed thereto under, or by authority of the provisions of this act. And in all cases where suit shall be brought before a justice of the peace, for the recovery of any fine or penalty arising or incurred for the breach of any law or ordinance of the corporation, execution shall and may be issued as in other cases of small debts." By the law of the 5th of April, 1821 (section 12), it is enacted: "That at the asylum there shall be a separate apartment or apartments for the reception of vagrants and persons committed for offences against the laws of the corporation. And the intendant of the asylum, under the directions of the guardians of the poor, shall have the care of all such vagrants, and persons committed as aforesaid, and shall keep them employed in some useful work." The by-law of the 5th of July, 1821, speaks of the work-house and the penitentiary department of the Washington Asylum as the same place.

A temporary work-house had been provided by the by-law of the 15th of November, 1813, for the reception of such persons as should be committed under the act of the 16th of December, 1812; and the mayor was to appoint some fit person to be styled "superintendent of the work-house," whose duty it should be "to superintend the work-house and persons committed to his charge, and keep such persons at hard labor, for and during the term for which they shall have been committed." In the third section of the same by-law it is called, "said penitentiary." The by-law of the 6th of April, 1815, suspends the use of the temporary work-house, and the duties of the superintendent ceased. A part of the poor-house was ordered to be fitted up for the same purpose and put under the care of the superintendent of the poor-house, who was required to keep the prisoners at hard labor. In the seventh and eighth sections of the same by-law it is called "the said penitentiary or poor-house." In the by-law of the 25th of June, 1818, it is called "the temporary penitentiary or work-house," and it is made a "part of the poor-house establishment." And the by-law of the 14th of April, 1821, calls it, "the work-house."

Upon the whole, it seems probable that "the work-house" mentioned in the eighth section of the by-law of the 31st of May, 1827, was the apartment or apartments in the asylum directed to be prepared, by the twelfth section of the by-law of the 5th of April, 1821, c. 124, and which, in the by-law of July 5th, 1821, is called "the penitentiary department of the Washington Asylum." A commitment, therefore, "to the penitentiary department of the Washington Asylum," was a commitment to the work-house, within the meaning of the eighth section of the by-law of May 31st, 1827. No person can be detained upon a commitment which does not show sufficient cause upon its face. There is no law, in this county, to justify the commitment of a man to hard labor by a justice of the peace for playing at cards, even if he be a free black or mulatto, and unable to pay the fine imposed on him by the justice. The eighth section of the by-law of 31st of May, 1827, is not, so far as it authorizes a commitment to the work-house for non-payment of a fine, or penalty, warranted by the charter, except in the single case of the nightly and other disorderly meetings of slaves, free negroes, and mulattoes, who are "unable" to pay the fine or penalty. By the eighth section of the charter of 1820, the only persons who may be confined to labor, for not paying a fine or penalty, are free negroes or mulattoes who are unable to pay "such penalty." The penalty meant is the penalty incurred by "such free negroes and mulattoes," as shall be guilty of the nightly and other disorderly meetings, which the corporation is, in the same sentence, authorized to restrain and prohibit. By the same section power is given to the corporation "to restrain and prohibit the nightly and other disorderly meetings of free negroes and mulattoes;" "and to punish such free negroes and mulattoes by penalties not exceeding twenty dollars for any one offence;" (that is, the offence of disorderly meeting.) "And in case of the inability of any such free negro or mulatto," (that is, the free negro or mulatto who has incurred the penalty for a disorderly meeting,) "to pay any such penalty," (that is, the penalty for a disorderly meeting,) "and costs thereon," "to cause him or her," (that is, the free negro or

mulatto who had incurred the penalty for the disorderly meeting, and is unable to pay it,) "to be confined to labor for any time, not exceeding six calendar months."

Confinement to labor, in lieu of a pecuniary penalty, is a severe proceeding, and should be strictly confined to the case in which alone it is authorized by the charter. The power was not originally given as a substituted punishment in lieu of the penalty, but as the means of obtaining payment of the penalty, as is apparent from the provision of the act of congress of the 4th of May, 1812 (2 Stat. 721), "further to amend the charter," and which continued in force until the new charter was granted in 1820. The words of that act are, "To restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes;" "and to punish such free negroes and mulattoes for such offences by fixed penalties not exceeding twenty dollars for any one offence; and in case of the inability of any such free negro or mulatto to pay and satisfy any such penalty and costs thereon, to cause such free negro or mulatto to be confined to labor, for such reasonable time, not exceeding six calendar months, for any one offence, as may be deemed equivalent to such penalty, and costs;" that is, that, in case of inability to pay, he was to give an equivalent in labor. The word "inability," in both charters, contains an important restriction of the power to sentence the offender to labor. If the defendant was able to pay the penalty, it might be recovered, (without resorting to this severe remedy,) by fieri facias, or by simple imprisonment upon a ca. sa. to compel a surrender of his property. The corporation had no authority to compel a person to labor who was able and refused to pay; or merely because he refused to pay. The by-law, therefore, which attempts to give authority to the justice to commit the defendant to labor, merely for a refusal to pay, is not warranted by the charter, and is void as to the power to commit to labor for any of the offences described in that by-law. In the case of vagrants, and keepers of public gaming-tables, who may be required to give security for their good behavior, the charter has provided for the case of their refusal, as well as for their inability to give it. Its omission to do so in the case of disorderly meetings of free negroes, &c., is evidence of a different intention as to them.

But not only is the by-law not warranted by the charter, but the commitment does not describe any offence under the by-law. It does not state that the defendant was a free negro or mulatto, to whom alone the by-law is applicable. It states the offence to be "playing at cards," &c., but that is no offence for which the party may be confined to labor, unless committed by a free black, or mulatto; a fact not stated in the description of the offence charged in the warrant.

For these reasons a majority of the judges think the prisoner ought to be discharged.

Case No. 17,700.

In re WILLIAMS et al.

[6 Biss. 233; [1] 11 N. B. R. 145; 7 Chi. Leg. News, 49.]

Circuit Court, W. D. Wisconsin. Nov. 31, 1874.

AMENDMENT OF BANKRUPTCY LAW—JURISDICTION OF COURT—HOW AFFECTED—AMENDMENT OF PETITION.

1. An amendment of a petition in bankruptcy to bring it within the amendment of June 22, 1874 [18 Stat. 178], is retroactive, and gives effect to action of the court taken on the original petition.

[Cited in Roche v. Fox, Case No. 11,974.]

2. The amendment took effect on the beginning of the day it was approved, and operates upon a petition filed during the day.

3. The amendment should be reasonably construed, if possible, so as not to destroy or impair any proceedings already commenced, or commenced in good faith in ignorance of its passage.

4. Irregularities in the bankruptcy proceedings do not deprive the court of its jurisdiction over the bankrupts and their estate, nor justify creditors in proceeding in the state courts.

5. A statement in the declaration filed in the state court, of facts which would, if true, prevent the discharge of the debt in bankruptcy is not binding upon the bankrupt court, nor does it prevent the full jurisdiction of that court over the person and estate of the bankrupt.

[Cited in Re Alsberg, Case No. 261.]

[In review of the decision of the district court of the United States for the Western district of Wisconsin.]

In bankruptcy. On the 22d of June, 1874, Williams & McPheeters were partners in business in the Western district of Wisconsin, and on that day a petition in bankruptcy was filed against them in the district court of the United States for that district. On the 29th of June they were adjudged bankrupts by their own consent. The usual proceedings took place under this petition in bankruptcy. There was a meeting of creditors and an appointment of an assignee, who entered upon the duties of his office, and afterwards, under the direction of the district court, made sale of property belonging to the bankrupt estate, which sale was duly confirmed by the district court. After these proceedings in bankruptcy were commenced, one Ellis brought an action in the circuit court of Dane county, in the Western district of Wisconsin, against the bankrupts, and Williams was arrested upon process issued out of that court. Thereupon he applied to the district court by petition, setting forth the facts and asking that Ellis be restrained from prosecuting the action, and for such other relief as should be just. The district court issued a rule to show cause why Williams should not have the relief he prayed for; and upon the return of the rule, argument was heard, and the court stayed the action in the state court until the

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bankrupt court should determine upon the question of the discharge of the bankrupts, and the court directed that Ellis, upon service of a copy of the order of the court upon him or his attorneys, should discharge Williams, and cancel and surrender a bail bond which he had given.

Lewis & Tenney and Tenneys, Flower & Abercrombie, for Ellis.

A. S. Sanborn and M. Culver, for respondents.

DRUMMOND, Circuit Judge. It is this order, made by the district court, that this court is called upon to review as being erroneous, not only in general, but in detail, for the reason that the recent amendment to the bankrupt law was passed on the same day that the petition in bankruptcy was filed, and it declared that a petition in bankruptcy might be filed against a party by one-fourth in number of his creditors, and one-third in value of the debts provable under the law, and as confessedly their petition was not filed under the provisions of the amendment, and so was not filed by one-fourth in number, or one-third in value, it is claimed that the court had no jurisdiction of the case, and that all proceedings that took place in the bankrupt court were void. It is insisted that the bankrupt law took effect at the beginning of the day it was approved, namely, the 22d of June, and there being no fractions of a day, and that the amendment operated upon the petition which was filed on that day.

If we concede that this principle is correct, namely, that the law took effect at the earliest moment of the 22d of June, 1874, the question is whether all the proceedings connected with the petition in bankruptcy were void, and the court had no jurisdiction of the case.

Clearly, according to numerous decisions which have been made, as the amendment was retrospective as to pending cases where there had been no adjudication of bankruptcy on the 22d of June, the petition could be amended. Now in this case the petition was, in point of fact, subsequently amended with the consent of the court, and one-fourth in number and one-third in value became parties to the petition. And if this were indispensably necessary to give effect to the action of the district court, the question is, whether it was not competent for the court to permit this to be done, and when done whether it did not relate back to the commencement of the proceedings in bankruptcy and give effect to the action of the court. I think it did. But, independent of this, it is to be observed that here the decree in bankruptcy was rendered with the consent of the bankrupts, and there is great force in the view suggested, that there was merely an irregularity which the bankrupts might waive.

But, however this may be, I am not prepared to say that because of this irregularity the court was deprived of all jurisdiction over the bankrupts and their estate, and that therefore any creditors of the bankrupts could proceed against them in the state court and obtain preferences, and harass and arrest the bankrupts after a petition in bankruptcy was thus filed.

It will be recollected that the recent amendment provides that in case one-fourth in number and one-third in value have not petitioned, other creditors may join in the petition on certain terms, thus recognizing the propriety of supplying defects in the petition.

The amendment to the law should be reasonably construed, and, if possible, so as not to destroy or even impair any proceedings which had been already commenced, or which might be commenced, in good faith and in ignorance of the passage of the amendment on the 22d of June.

It follows from what has been said that Ellis should not have commenced an action against the bankrupts in the state court after the proceedings in bankruptcy had been instituted; and that the bankrupt court, according to the terms of the bankrupt law, had control of the action of the state court, and had a right to protect the bankrupt from arrest. Perhaps the proper course would have been for the bankrupt court to issue a writ of habeas corpus, and, upon the hearing, to discharge the bankrupt from arrest. But the order accomplishes, substantially, the same result, so far as it directs a suspension of proceedings in the state court upon the action, and effects the discharge of the bankrupt from arrest.

What was the legal effect of the action of the district court by an order properly made on the application of the party arrested, was a question of law, and it should have been left, I think, to the law to determine.

I should, perhaps, notice an objection taken to the jurisdiction of the district court upon the ground that the claim of Ellis, as set forth in his complaint in the state court, was one that was not affected by the bankrupt law; because it is said that, to secure the indebtedness which existed on the part of the bankrupts, a mortgage of chattels was given by one of the parties, and they wrongfully and fraudulently sold the property, and converted it to their own use.

This objection seems to proceed upon the theory that the complaint and facts stated therein bound the bankrupt court. This is not correct, though it is true that the bankrupt law declares that the proceedings in bankruptcy shall not affect debts of a certain character, and among others, those which have their origin in fraud, and from them the discharge of the bankrupt shall not operate as a release.

It is to be observed, however, that this is a question which the bankrupt court has the right to determine, and that a statement in a declaration or complaint made by a party in a state court does not bind the bankrupt court. Ellis had, therefore, no right to as-

sume that, because of certain allegations contained in the complaint, the court in bankruptcy was deprived of control over the proceedings in the state court.

There seems to have been no determination of the question of fraud by the bankrupt court; and, in fact, the allegations are not so clear, even in the complaint, as to warrant that court in arriving at the conclusion that the debt was of such a character as to be excluded from the operation of the bankrupt law.

The order of the district court will be sustained.

Consult Hamlin v. Pettibone [Case No. 5,995]; also, In re Perkins [Id. 10,983.]

Case No. 17,701.

In re WILLIAMS.

[5 Law Rep. 155; 1 Pa. Law J. 212.]

Circuit Court, D. Massachusetts. June 11, 1842.

BANKRUPTCY — ALLOWANCES TO BANKRUPT — DISCRETION OF ASSIGNEE.

[1. The provision in the third section of the act of 1841, that the articles set aside to the bankrupt by the assignee shall not, in any case, exceed in value $300, does not entitle the bankrupt in every case to an exemption of that amount. On the contrary, it is a limitation merely, and the amount allowed may vary, according to circumstances, from a very small amount up to the full sum, having reference to the family, circumstances, and condition of the bankrupt.]

[Cited in Carr v. Gale, Case No. 2,434.]

[2. The words "other articles and necessaries" are to be construed as permitting the allowance of necessary articles only.]

[3. A clock and silver watch are not such furniture, articles, or necessaries as the assignee may, in his discretion, allow to the bankrupt. Silver spoons and a cow may, or may not, be necessaries, according to circumstances.]

In bankruptcy. This case was certified into the circuit court of this district. The petition was as follows: "Respectfully represents Ziba Williams, of Cambridge, in the county of Middlesex, and district aforesaid, who has been declared a bankrupt: That the assignee of the estate of your petitioner claims to retain, out of the property specified in Schedule B, annexed to his petition, the following articles of property, namely: One clock; one set of silver tea spoons; one silver table spoon; one silver watch; one cow, —all of the estimated value of thirty-three dollars. And also all the goods in the shop in Merrimac street, in Boston, occupied by your petitioner, including the shop furniture, estimated at $146.78. And that the allowance made to your petitioner, except wearing apparel, amounts only to the estimated value of $74.75. And your petitioner excepts to the determination of the said assignee, and prays that your honor will direct him to set apart to your petitioner the said clock, spoons, watch, cow and all of the said property in said shop, inasmuch as the whole estimated value of all the property specified in said Schedule B, deducting therefrom the wearing apparel, and notes and accounts due, amounts to less than the sum of $300."

The district judge ordered the following question to be adjourned into the circuit court, to be there heard and determined, namely: "Whether all, or any, and which of the articles of property, which the assignee has refused to allow the said bankrupt, and to which refusal the said Williams has excepted, as set forth in the return of the assignee, and the petition of the said Williams, are such furniture, articles or necessaries, as the assignee may, in his discretion, allow to the bankrupt." [Case unreported.]

P. W. Chandler, for bankrupt.

No counsel appearing for the assignee.

STORY, Circuit Justice. The third section of the bankrupt act of 1841, c. 9 [5 Stat. 440], vests in the assignee all the property, and rights of property of the bankrupt, except such as is therein excepted; and the exception is contained in the following proviso: "Provided, however, that there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt, as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt; but altogether not to exceed in value, in any case, the sum of three hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the court." In the present case the whole household and kitchen furniture of the bankrupt is estimated at $78.75, and the provisions and fuel at $9; and all the other property of the bankrupt, in his store, at $146.78. The assignee insists upon retaining from the bankrupt all the goods in his store, $146.78; and a clock, a set of silver tea-spoons, one silver table spoon, one silver watch, and one cow, the value of all which is $33. The bankrupt insists, that he ought to have all the furniture and other articles above named, and also all the goods in his store, ($146.78,) inasmuch as the whole will not amount in value to the sum of $300. From the schedule it does not appear, that the bankrupt possesses any other property, except debts and securities of the nominal value of $1,122.61; but in reality of little or no intrinsic value.

No particular facts are alleged in the present petition, to establish, that the allowance actually made by the assignee is not reasonable and suitable, with reference to the family, condition, and circumstances of the bankrupt. And, certainly, the court may well deem it to be reasonable and suitable,

until the contrary is shown by some appropriate facts and proofs. The ground of the petition seems to be, that, in all cases whatsoever, the bankrupt is entitled to have the sum of three hundred dollars allowed him under the proviso, if he has so much property, as assets, in the hands of the assignee. Now, if this is the ground of the present application, I am clearly of opinion, that it is unmaintainable upon the words, as well as the true object and intent, of the proviso. The words import a limitation upon the amount to be allowed to him. It is in no case to exceed the sum of $300; but it may be below that, and vary, according to the circumstances of particular cases, from a very small allowance up to the full sum, having reference in the amount to the family, condition, and circumstances of the bankrupt. Suppose the bankrupt is a single man, without any family, it would surely be unreasonable to allow him as large a sum, as if he had a wife, or a wife and children. If he had five children, all whom were infants, and living with him, it might be reasonable to allow him a large sum, when it would be improper to do so, if they were all full grown, and capable of earning their own livelihood, and engaged in pursuits, which would enable them at once to do so. If the bankrupt were old and decrepid, or his family feeble and sickly, it might be entirely proper to make a liberal allowance, keeping in view his condition, when a far less allowance might suffice, where he and his family might at once engage again in lucrative pursuits.

But this is not all. The language of the act does not justify an allowance, except for necessaries, namely, "for necessary household and kitchen furniture, and other articles and necessaries." Now, I am far from thinking, that a close, or severe, or strict interpretation is to be given to these words. I think, that they should be treated liberally, and to some extent in the same manner, as the common law treats the question of necessaries in relation to infants, as in a great measure to be regulated by their wants, their means, and their condition. But, then, it should be remembered, that in the case of infants we are dealing with contracts and property, in which they have the deepest interest, and that they have the entire benefit thereof. But in cases of bankruptcy the creditors also have rights and interests, equally entitled to protection and aid. It seems scarcely just to them to press the allowance to any great extent, where the assets are small; and especially where it will absorb the whole, or a very large portion thereof. The sum of three hundred dollars is the largest amount, which can be given in the most pressing and distressing cases, even where the assets are very large. It surely could not have been the intention of the statute to strike a dead level, and make the allowance the same in all cases. The very words of the clause forbid it; and the very object of it seems equally inconsistent with such a result.

Besides, the language is, that "necessaries" are to be allowed; and although the words "other articles" precede that word; yet we must, upon the obvious principles of construction, limit the "other articles" to such as are necessaries—ejusdem generis. Now, certainly, a clock, or a silver watch, cannot justly be deemed necessaries in cases of this sort. Silver spoons may, or may not, be necessaries, according to circumstances. But here the assignee has left with the bankrupt, as a part of his allowance, a plated set of spoons; and there is nothing in the petition to show that these are not amply sufficient for the purposes of the family. A cow, also, may or may not fall within the description of necessaries, according to circumstances. If the party has a large family, it may be fit to make such an allowance. If he has none, it may be unfit, especially if he does not reside in the country. But here, again, there is nothing to assist the court in coming to a decision. No facts are stated to show, that in this particular case the allowance would be reasonable.

I shall send a certificate to the district court upon the adjourned question, to the following effect: That a clock and a silver watch are not such furniture, articles, or necessaries, as the assignee may, under the proviso of the third section of the bankrupt act of 1841, in his discretion, allow to the bankrupt; that the silver spoons, and the cow may or may not be necessaries, within the meaning of the same proviso, according to circumstances; that the assignee is not bound, as a matter of right, on the part of the bankrupt, or of duty on his own part, to include them in the allowance to the bankrupt. But he may in his discretion allow them, if, having reference to the family, conditions, and circumstances of the bankrupt, they may reasonably be deemed to be necessaries.

Case No. 17,702.

In re WILLIAMS.

[5 Law Rep. 402.]

Circuit Court, D. New Hampshire. 1842.

BANKRUPTCY—PARTNERSHIP AND INDIVIDUAL CREDITORS.

Where a bankrupt was formerly a member of several firms, against which no decree of bankruptcy had been entered, it was *held*, that the fund in court, which was derived from the separate estate of the bankrupt, was exclusively distributable among the separate creditors of the bankrupt.

This case came before the district court on the report of a commissioner in bankruptcy, which set forth that the balance in court, from which the costs taxed were first to be deducted, was $578.70, the whole of which sum belonged to the separate estate of the

said Williams. The petition for the benefit of the act of congress of 1841 [5 Stat. 440] was presented by Williams, and no decree of bankruptcy had been entered against E. Whiting, E. Whiting & Co., or Turpin & Williams, firms of which said Williams was a member. Debts to the amount of $917.12 had been proved against Williams, and to the amount of $1075.10 against E. Whiting & Co., or rather against Williams as a member of that firm. The commissioner requested the instruction of the court upon the question, whether the creditors of the said Williams, individually, and the creditors of the said E. Whiting & Co., shall share pari passu the funds in court, in proportion to their respective claims, or in what manner the funds shall be distributed. The district court ordered, "that the question contained in the accompanying report of the commissioner be adjourned into the circuit court, to be there heard and determined." [Case unreported.] The case was now submitted without argument.

STORY, Circuit Justice. The question contained in this case is substantially answered by the decision in the matter of William Ingalls, in bankruptcy. [Case No. 7,032.] The whole fund in court belongs to the separate estate of the bankrupt, Williams, and of course, upon general principles of law, as well as the positive enactment of the fourteenth section of the bankrupt act of 1841, c. 9, the whole is, in the first instance, to be applied to the payment of the debts due to and proved by his separate creditors; and as there is no surplus, the joint creditors of the firm, of which Williams is a partner, can take nothing. I shall direct a certificate to be sent to the district court accordingly.

The certificate was as follows: "In the matter of Henry B. Williams. It is ordered by this court, that the following certificate be sent to the district court: 'It is the opinion of this court, that, under the circumstances stated in the commissioner's report, the fund in court is exclusively distributable among the separate creditors of the said bankrupt, Williams, and that there being no surplus, the joint creditors of the firm of E. Whiting & Co. are not entitled to any share in the said fund.'"

Case No. 17,703.

In re WILLIAMS et al.

[1 Lowell, 406; [1] 3 N. B. R. 286 (Quarto, 74).]

District Court, D. Massachusetts. 1869.

BANKRUPTCY—DISSOLVED PARTNERSHIP—INVOLUNTARY PROCEEDINGS — PAYMENT TO PETITIONER—ACTS OF BANKRUPTCY.

1. So long as partnership debts remain due and outstanding a joint petition in bankruptcy may be brought by or against the partners, notwithstanding a dissolution of the partnership.

[Cited in Hunt v. Pooke, Case No. 6,896; Re Sheffer, Id. 12,742.]

[Cited in Monroe v. Upton, 50 N. Y. 597.]

2. If the debtor against whom a petition in bankruptcy is pending is clearly insolvent, he cannot defeat the petition by tendering the petitioning creditor the amount of his debt.

3. Where a conveyance is made with intent to delay one creditor, it is an act of bankruptcy if its necessary effect is to delay all the creditors.

[Cited in Curran v. Munger, Case No. 3,487; Re Redmond, Id. 11,632; Re Marter, Id. 9,143.]

4. Such an act may be declared on either as a fraudulent conveyance or as a concealment.

[5. Cited in Re Redmond, Case No. 11,632, to the point that a conveyance by one partner of individual property, even with intent to defraud firm creditors, or to prefer a firm creditor, will not sustain bankruptcy proceedings against the firm.]

Petition against the defendants as partners under the firm of Granville Williams & Co., alleging that the firm owe more than three hundred dollars, &c., and that the said G. W. & A. W. made a fraudulent conveyance of their property, and did certain other acts within section 39 of the statute [of 1867 (14 Stat. 536)]. The assets of the firm consisted of the machinery, fixtures, and stock of a small paper-mill, and the leasehold estate on which the mill stood, and one credit of about three hundred dollars. On the 29th of March, 1869, the respondents conveyed all this property excepting the credit to their brother, Emory Williams, by a bill of sale, which was executed at about three o'clock, and recorded at five o'clock on that morning. In the course of the same morning they sent for a person to whom they owed a debt of some sixty dollars, and gave him a note for three hundred dollars dated back about a month, with the agreement, which was carried out, that he should sue and attach the only debt due then, which was for about three hundred dollars, as above stated. It appeared that a creditor, one of these petitioners, had threatened to sue them by noon of that day unless they gave him security. It was admitted that the giving the note and causing it to be sued were for the purpose of preventing an attachment by the petitioner, Roberts, but it was said that the real object of thus withdrawing the fund was not to delay the creditors generally, but only Mr. Roberts, and that it was the purpose of the respondents to use the money to pay their workmen.

[This defense, if true, will not avail. The act had a direct and necessary tendency to defeat and delay creditors generally, though aimed at one only. The immediate result was to give the respondents the secret control of this fund, under the guise of an adverse attachment. It is impossible for the court to go beyond that result and determine on doubtful evidence, or any evidence, that the parties intended, when the fund was illegally withdrawn from the ordinary reach of the

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

law, to apply it more beneficially than the law itself would apply it. This is a fundamental principle of the law of fraudulent conveyances.

[It was urged that the conveyance amounted to a dissolution of the partnership, and that the court has no jurisdiction of a petition filed after a dissolution.] [2]

J. Spaulding, for respondents: (1) The petitioners have no standing in court, because the amount due one of them has been paid into court, and the other has less than two hundred and fifty dollars due him. (2) The conveyance to the brother was for a valuable consideration, and disposed of all the property of the firm, and thus dissolved the partnership, after which they cannot be proceeded against in one petition. (3) There is no sufficient allegation that the fraud was joint, and related to the joint estate. (4) There is no sufficient evidence of a fraudulent intent.

I. J. Cutter, for petitioners.

LOWELL, District Judge. 1. The tender after suit brought will not bar the petition unless the debt is the only one outstanding, or unless all other creditors consent, because the respondents are admitted to be insolvent, and the petitioners would have no right, knowing and relying on the insolvency, to accept payment in full without the consent of all. The court cannot be a party to such a preference. If the insolvency were shown only by the dishonor of negotiable paper, and the respondents professing to be able to pay all their debts, should pay the note which had been lying over, the case might be different.

2. I have often decided that so long as partnership debts are outstanding the petition in bankruptcy may be joint. The words of section 36, that where two or more persons who are partners in trade shall be adjudged bankrupt, &c., seem to point to an adjudication only while the partnership is still continuing, but when we examine the scope and purpose of the statute we find that a joint proceeding is equally useful and convenient to the proper winding up of partnership affairs, whether there shall have been a dissolution of the firm before the petition is filed, or only one which is operated by the proceeding itself. If the partners after a dissolution of the firm must always proceed separately, upon as many petitions as there are partners, great confusion will arise in marshalling the assets, and great and wholly needless expense in the administration of the bankruptcy. On general principles the firm continues to exist for all purposes necessary to the final liquidation of their affairs. And by analogy to actions at law or in equity as well as from considerations of expediency, it would seem that where partnership affairs are to be wound up, the partners may join or be joined in one petition. If it were not so the partners would always have it in their power to defeat one of the most important provisions of the law, that the creditors of the firm shall choose the assignee. The decisions, I know, were not entirely uniform under the law of 1841; but the Massachusetts doctrine was that there may be a joint petition so long as joint assets remain to be distributed. McDaniel v. King, 5 Cush. 469. And Judge Blatchford has intimated a concurrence in this view which accords with the practice under our present law and with the reason of the case. In re Crockett [Case No. 3,402]. In my opinion a like result must follow if there are joint debts outstanding. It is for the benefit of the joint creditors, so long as any remain, that the proceedings should be joint, because they have the choice of the assignee. Whether there are any joint assets or not may often be disputed, and be the very question which an assignee is needed to try, as would be the case here if all the property had been transferred, instead of nearly all; but the fact of joint creditors whose rights are to be protected, is easy of ascertainment, and when ascertained shows a necessity for joint action. It is a mere question of joinder of parties. And I hold now, as I have held before, that so long as joint debts remain outstanding and unsettled, the proceedings, whether voluntary or involuntary, may be joint. In the present case there is no dispute that there were assets, because the credit of $300 was an outstanding partnership credit at the date of the petition.

[2] [The other objection is that the petition does not distinctly allege that the property and credit in question were vested in the firm. But considering the whole petition, I think it does sufficiently appear that the frauds which are set out as done by the two partners, were done in respect to the partnership property. This is the fair and reasonable construction of the allegations.

[The evidence concerning the bill of sale was not quite so clear as that relating to the attachment. On the one side, it appears to have been made to a brother, and one not engaged in the business of a papermaker, and at an unusual hour; and on the other, that some money was paid to each partner, and a note or memorandum given for the balance. As the allegation concerning the attachment is sustained, it will not be necessary to consider this matter fully. I will only say that by our law a conveyance may be an act of bankruptcy in the grantors, although no fraudulent intent is known to or participated in by the grantee. I have before had occasion to point out the important difference between our statute and the English law in this respect. In our system the title of the assignee relates only to the filing of the petition and not to the act of bankruptcy, ex-

[2] [From 3 N. B. R. 286 (Quarto, 74).]

[2] [From 3 N. B. R. 286 (Quarto, 74).]

cepting when that act is the filing of a voluntary petition. It follows that an adjudication of bankruptcy does not, per se, affect the title of the purchaser. And the statute expressly says that if a person is adjudged a bankrupt for any conveyance, etc., the assignee may recover the property, provided the person receiving the payment or conveyance had reasonable cause to believe that a fraud was intended, etc. I do not mean to say that this is, or is not, such a case.

[One other matter arose accidentally. Neither petitioner alone had a debt amounting to two hundred and fifty dollars. In the course of the hearing the respondents paid into court, in pursuance of a tender made on the day before, the amount due to one of the petitioners, and professed a readiness to pay the other. This cannot defeat the petition. The debtors are confessedly insolvent now, and it would not be proper for the petitioners to accept payment in full at the expense of the other creditors. It has been always the law and practice here under the Massachusetts statute, to consider all partial settlements by insolvents as in themselves acts of bankruptcy, and it is well understood that if a single creditor stands out, no arrangement can be made excepting through the bankrupt court. This is so well understood that no case has ever arisen or is likely to arise in this district which will call for an express decision whether such an arrangement, however fairly intended, can be made. In this case the petitioners were well justified in refusing the tender.] [2]

3. I consider that the fair construction of the petition is that the frauds therein set out as having been committed by the two defendants were done by them as partners and in respect to the joint property. This being so, it only remains to inquire whether the case is made out. The bill of sale was made at an unusual hour, and to a brother who was not engaged in paper-making, and it seems altogether probable that it was made on the part of the respondents with intent to withdraw the property from attachment. If so, it was an act of bankruptcy, although the grantee may have bought the property in good faith, and with no knowledge of the fraud, and though his title may be perfectly good as against the assignee in bankruptcy. If the evidence on this point is somewhat contradictory, yet the second specification of fraud is fully made out. It is admitted that the debt due the respondents was assigned over by them to prevent its being attached by the garnishee process. The immediate and necessary result was to delay the respondents' creditors, and it is not possible for a court to look beyond that result and determine on doubtful evidence or any evidence that the parties intended, when the fund was illegally withdrawn from the ordinary reach of the law, to apply it more beneficially than the law itself would apply it. This is a fundamental rule of the law of fraudulent conveyances.

This act comes fairly within the language of the statute, "or shall conceal or remove any of his property to avoid its being attached," because this means not only the physical removal or concealment of a chattel, but the concealment of the actual title and position of property of whatever kind. O'Neil v. Glover, 5 Gray, 144. It is not declared on in the petition under that clause, but as the procuring, by insolvent debtors, of their property to be taken on legal process, with intent to give a preference, and this requires me to decide whether the respondents were insolvent on the twenty-ninth of March. It must be remembered that the well-settled meaning of insolvency under this act, in the case of a trader, is an inability to pay his debts as they mature, and tried by this test the respondents were insolvent then as they are admitted to be now. This being so, the attachment would effect and must have been intended to effect a preference of the creditor with whom the scheme was made, and of the workmen too, if the intent were what it is said to have been. Adjudication ordered.

[2] [From 3 N. B. R. 286 (Quarto, 74).]

Case No. 17,704.

In re WILLIAMS.

[2 N. B. R. 83 (Quarto, 28).] [1]

District Court, D. South Carolina. 1868.

INVOLUNTARY BANKRUPTCY—EXPENSES OF SUIT—CONTRIBUTION BY CREDITORS.

A creditor's petition for an adjudication of bankruptcy against the estate of his debtor, is the same as a creditor's bill against a deceased insolvent. All creditors must contribute pro rata to the expenses of the suit. Whether counsel fee shall be allowed, as well as the measure of such fee, rests with the court, and is a question addressed to its equity.

[Cited in Ex parte Jaffray, Case No. 7,170; Re Mead, Id. 9,364; Re Mitteldorfer, Id. 9,675; Re New York Mail Steamship Co., Id. 10,208; Re Nounnan, 7 N. B. R. 22. Quoted in Re O'Hara, Case No. 10,465. Cited in Re Schwab, Id. 12,498; Trustees v. Greenough, 105 U. S. 534.]

In bankruptcy.

BRYAN, District Judge. The court, in this case, concurs in the conclusion and recommendation of the register, for the reasons stated by him, and others which seem to have weight. The analogous case in which counsel fees are allowed in our state court, in chancery, is that of a creditor's bill against the insolvent estate of deceased persons. Now, in contemplation of law, so far as his property is concerned, the bankrupt is dead. He is no longer entitled to the control over it, or the distribution of it. It is assets in the possession of

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the court, to be administered by the agency of an assignee, for the equal benefit of all creditors—not preferred and protected by liens—and such lien creditors secured in their liens, as in the case of an insolvent decedent's estate.

In every successful prosecution of a suit in involuntary bankruptcy, the result is, that the defendant, declared a bankrupt, is deprived of his property, and it becomes an estate held for the benefit of his creditors. The creditor's petition is inevitably in all such cases substantially a creditor's bill against a deceased insolvent. Such creditor is the champion, certainly, of all creditors, who, either at the time of the suit or after its successful prosecution, choose to avail themselves of its benefit. They are at liberty, at any time, to come in and profit by it. Shall they do so without making the pro rata contribution to the expenses of the suit, (as in our court of chancery,) which has secured them a share in the bankrupt's estate? And shall the creditor, who has (as in this case) rescued the estate and made the fund for the benefit of the general creditors, be alone excluded from the common benefit? Shall he who is thus a common benefactor be made a martyr and a scape-goat? Shall he bear the whole burden and reap scarcely any—if any—benefit? Not, certainly, if the "bankrupt act" is founded in justice, and its policy is to be enforced.

There is a very cogent reason why any single creditor should feel at liberty to prosecute without the fear of having his claim swallowed up by the expenses of the suit—even when successful. The act contemplates fraud, as the ground of prosecution, in a great variety of forms. Instant action by one creditor, in a precise locality, separated from all other creditors, and without opportunity of counseling with them, is necessary for the efficient administration of the law and the protection of the whole body of creditors. To wait for time for consultation would, in numerous instances, be to lose the golden moment, and let the fraudulent debtor go free. There should be no hindrance to any creditor acting promptly under such circumstances.

On the contrary, he should be permitted and invited to play the part of champion of those in common interest with him—to become the guardian of those, who, from ignorance or absence, cannot take care of themselves. How can this be, when the paralyzing thought is ever present to his mind, that when he has maintained the justice of the act and secured the beneficient ends contemplated by it, he is to be punished and not rewarded for his zeal, activity and vigilance? That when he has brought conviction to the fraudulent debtor, and rescued property in the act of transition, or the debtor himself in the act of escape, he is to be mulcted for all his pains and expenses, and others, and not himself, reap the benefit of labor and sacrifice sanctioned by the act. And let it be noted that it is only when successful that the petitioning creditor can ask his fellow creditors to contribute anything. He takes all the hazards of defeat. It is only when successful, and the creditors elect to share in the benefits of his success, he asks them in due proportion to share the cost of it—and thus equalize the benefit and burden. And he is paid out of an estate in which the bankrupt, as in the case of an estate of a deceased insolvent, has no interest. For, as has been said before, the bankrupt, so far as his property is concerned, is as a deceased insolvent. His property has ceased to be his, and thenceforth is to be administered as an estate.

Another important consideration, entering into the determination of this question, is that the measure of the counsel fee is not left to counsel and client. Whether a fee should be allowed, and for what amount, is to be determined by the court, and is a question addressed to its equity. The judge, in coming to his conclusion, is aided by the fact, that much of the labor to be compensated is done in his presence. Of this, the highest form of service, he is supposed to be a competent judge. If not fully informed, he takes counsel through the proper officer of the court of the value of the whole services rendered. And he does not allow the fee unless satisfied that full value has been given in the services rendered. The estate of the creditors is thus protected against any possible sinister speculations of client and counsel, or any innocent fanciful valuation that counsel might attach to their services, and clients might be disposed to allow, if permitted without restraint to tax the estates of bankrupts.

Upon very full consideration and after much deliberation, it is ordered that the report of Mr. Register Clawson be confirmed. It is also ordered that he report what, in his judgment, is a proper counsel fee in this cause, and that if there is any doubt upon the amount, that he take evidence upon the question and submit it with his judgment to the court.

Case No. 17,705.

In re WILLIAMS.

[2 N. B. R. 229 (Quarto, 79); 3 Am. Law. Rev. 374; 1 Am. Law T. Rep. Bankr. 107, 113.] [1]

District Court, D. Connecticut. 1868.

BANKRUPTCY—PRIVATE DEBTS—SUBSEQUENT JUDGMENTS.

1. A judgment extinguishes the debt upon which it was founded, and constitutes a new debt. A judgment obtained after an adjudication of bankruptcy is not provable against estate of bankrupt.

[Cited in Re Montgomery, Case No. 9,731; Re Swift, Id. 13,693. Approved in Re Gallison, Id. 5,203; Re Mansfield, Id. 9,049. Disapproved in Re Hennocksburgh, Id. 6,367; Re Brown, Id. 1,975; Re Crawford, Id. 2,363; Re Vickery, Id. 16,930; Re Stansfield, Id. 13,294.]

[Cited in Bradford v. Rice, 102 Mass. 474; Conway v. Seamons, 55 Vt. 11; Moors v. Albro, 129 Mass. 12.]

[1] [Reprinted from 2 N. B. R. 229 (Quarto, 79), by permission. 3 Am. Law Rev. 374, contains only a partial report.]

2. The trustee authorized to pay to the sheriff fifty dollars for the care and protection of the property from the time of obtaining the judgment.

[Cited in Zeiber v. Hill, Case No. 18,206.]

In bankruptcy.

Johnson T. Platt, for trustee.

S. L. Warner, for attaching creditors and sheriff.

SHIPMAN, District Judge. The bankrupt was a merchant in Portland, in this state, and on the 23d day of December, 1867, his goods were attached at the suit of L. N. Barlow & Co., by writ, which was returned to the superior court of Middlesex county, on the first Tuesday of February, 1868. On the 8th of January, 1868, the bankrupt filed his petition in this court for the benefit of the bankrupt act, and on the 13th was adjudicated a bankrupt. Having decided to proceed by way of a committee of creditors, a trustee was chosen on the 24th of February, 1868, and on the 27th the choice was approved by this court, and on the 29th, the estate of the bankrupt was duly transferred to the trustee. On the 6th of February, judgment was rendered in the superior court in the suit of Barlow & Co., against the bankrupt, and on the 7th execution was issued. The amount of the judgment was nine hundred and one dollars and forty-three cents debt, and ninety-one dollars and thirty-one cents costs of suit. On the 7th of March, the trustee applied to this court for an injunction to restrain the officer from selling the goods attached on the execution which he had levied. To this Hyde and Barlow & Co. were made parties, had appeared and filed an answer, claiming among other things, that the officer's fees, and his expenses incurred in the necessary care of the goods, was a lien on the goods in his hands. A hearing was had on this application before this court on the 29th of March, 1868, and it was held: First. That the transfer of the estate of the bankrupt on the 29th of February, 1868, to the trustee, vested the title thereto in him, to the same extent as title vests in assignees under proceedings, when by the act the latter take the estate; and that this title relates back to the commencement of the proceedings in bankruptcy. Second. That on the transfer to the trustee, the attachment referred to was by operation of law dissolved. Third. That the levy of the execution, if not void at the time, became void on the transfer of the bankrupt's estate to the trustee, and therefore confers no right upon the officer to sell the property levied upon, and that he was bound to deliver the same to the trustee on demand of the latter. Fourth. That the fees of the deputy sheriff Hyde for the attachment, levy, and care and custody of the goods can be presented to the trustee and proved, and before distribution of the avails of the assets of the bankrupt's estate, this court will pronounce upon the questions of priority and lien on their being presented in the usual way. Fifth. That the injunction asked for issue. An application is now made for the court to determine these questions, and also the question whether the judgment debt in favor of L. N. Barlow & Co. is provable, and therefore entitled to a dividend out of the estate.

The most important question is whether this judgment debt is provable against the estate of the bankrupt, and the judgment creditor has a right to a dividend thereon. This depends upon the question, whether it was an existing debt at the time of the adjudication in bankruptcy. On this point the authorities are numerous and decisive. A debt upon which a judgment of law is founded is merged in that judgment, and extinguished by it. The judgment constitutes a new debt, which takes its date from the time of the recovery. The debt, therefore, of L. N. Barlow & Co., upon which their suit was brought against the bankrupt, was extinguished by the judgment which they obtained. It no longer existed. It has had no existence since the rendition of that judgment, and can never again be called into life. The judgment itself constitutes a debt, but it had no existence at the time of the adjudication of bankruptcy, and is not, therefore, provable against the bankrupt's estate. Holbrook v. Foss, 27 Me. 441; Pike v. McDonald, 32 Me. 418; Sampson v. Clark, 2 Cush. 173; Kellogg v. Schuyler, 2 Denio, 72. There are other authorities in which the same principle is recognized. Faxon v. Baxter, 11 Cush. 35; Carrington v. Holabird, 17 Conn. 530. It follows that the debt in question is not provable against the estate of the bankrupt, and no dividend can be allowed thereon.

It is not now necessary to decide whether the fees and expenses of the officer up to the time of the rendition of the judgment were a lien on this property which this court would respect and cause to be discharged, had no judgment been rendered in the superior court. These fees and expenses, up to the rendition of that judgment, were also merged and extinguished in that judgment, and became part of the new debt. The goods, however, still remained in the custody of the officer after the attachment was dissolved and after the judgment was rendered. No formal demand was made by the trustee on the deputy sheriff till March 3, 1868, and then it seems that he continued to hold and care for them in virtue of an amicable understanding, until the decision of this court, on the 20th of March last. It is shown that this custody was attended with some expense, which was necessarily incurred, and for which the sheriff is entitled to be reimbursed, not as a debt provable against the estate, but as a part of the necessary expenses incident to its settlement. The trustee is, therefore, authorized to pay the sheriff, Arba Hyde, fifty dollars and no more for the custody, care, and protection of this property after the 6th of February, 1868.

Case No. 17,706.

In re WILLIAMS.

[14 N. B. R. 132.] [1]

District Court, E. D. Michigan. March 27, 1876.

BANKRUPTCY—ATTACHING CREDITORS—PREFERRED CREDITORS—ESTOPPEL.

1. An attaching creditor may intervene to contest an adjudication upon the merits, as well as to claim the court has no jurisdiction of the case.

[Cited in Re Austin, Case No. 662; Re Jonas, Id. 7,442.]

[Cited in Risser v. Hoyt, 53 Mich. 198, 18 N. W. 618.]

2. Creditors who have obtained a preference by a bill of sale from the debtor, are estopped to set up the execution of the same as an act of bankruptcy.

[Cited in Re Kraft, 3 Fed. 893; Judson v. The Courier Co., 8 Fed. 426.]

3. Creditors who have taken possession of the entire property of a debtor, under a general assignment, or bill of sale, intended to prefer them, cannot set up the non-payment of a note as an act of bankruptcy.

4. An attaching creditor, who intervenes to oppose an adjudication, may take advantage of any defense available to the debtor.

[5. Cited in Re Sawyer, Case No. 12,394, to the point that one who has become a party to, or assented to, an act, cannot afterwards, for his own advantage, denounce the act as illegal.]

On petition of William W. Crapo, attaching creditor, for leave to intervene and contest the bankruptcy proceedings.

A petition was filed against Elias G. Williams on the 13th day of December, 1875, by a number of creditors, praying for his adjudication as a bankrupt, and setting forth, as acts of bankruptcy, the transfer of his property, by a bill of sale, to the Citizens' National Bank of Flint, and also the non-payment and suspension of commercial paper. On January 3, William W. Crapo, an attaching creditor, filed his petition, setting forth that on the 16th of October he took out a writ of attachment from the state court, and seized certain property of Williams; that upon the same day a bill of sale was made by Williams to the Citizens' National Bank, and placed on file in the city clerk's office, but not until after the property covered by the bill of sale had been seized upon petitioner's attachment. The bill of sale covers all the property of Williams liable to execution. That two of the petitioning creditors were officers of the bank; that at the time the bill of sale was given, they and two others transferred their claims to the bank, and that the bill of sale was taken by the bank partly to secure the same; that at the time of giving the said bill of sale, and also upon the day the creditors' petition was filed, Williams was indebted in the amount of over forty-eight thousand dollars; that four hundred and thirty-five thousand feet of lumber in Williams' possession was claimed by other parties, who replevied it three days after the petitioner's attachment was taken out; and the day following the replevin, the bank, claiming this same lumber under its bill of sale, itself replevied the lumber back again; that petitioner obtained judgment, on the 21st of December, for two thousand two hundred and forty-nine dollars and thirteen cents, and immediately levied his execution upon the property, by virtue of which he now holds it. Petitioner further alleges that five of the creditors have undertaken to defeat his claim under the attachment, by asserting their lien under the bill of sale, and have combined with Williams to procure an adjudication, and thereby work a dissolution of his attachment, and that the creditors' petition was filed collusively and for that purpose. He further claims, and it is admitted, that, excluding these five petitioners, there are not the requisite number of creditors named therein; that these five, having procured or assented to the taking of the bill of sale, are estopped from setting up the assignment as an act of bankruptcy, and, holding their lien, are not proper petitioning creditors. He further sets up that the bank and one petitioner procured the bill of sale, and the transfer from Williams to the bank, of all his property, money credits, and effects, to secure the payment of the note set out in the creditors' petition, the non-payment of which is alleged as an act of bankruptcy and that, by the taking of the bill of sale by the bank, Williams was deprived of the means of paying the note, and the bank and Hamilton thereby obtained the means of said Williams with which payment of said note could have been made within the forty days. He therefore claims that the petitioning creditors have no right to set up the non-payment of the note as an act of bankruptcy, and that said non-payment is not an act of bankruptcy. He further states that he has acquired a lien, by his attachment upon the property of the bankrupt, which will be destroyed by an adjudication, and prays that he may be let in to contest the proceedings.

Griffin & Dickinson, for petitioning creditors.

M. E. Crofoot and Alfred Russell, for intervening creditors.

BROWN, District Judge. It has already been held by this court, in the case of Bergeron [Case No. 1,342], that the attaching creditor has the right to intervene and contest the jurisdictional allegation of the petitioner, as to the number and amount of creditors. All the cases up to that time are cited in this opinion. Since then, however, the same question has been similarly decided by the district judge of the Eastern district of Wisconsin. In re Hatje [Id. 6,215]. It is claimed, however, by the petitioning creditors in this case that, although he may have the right to intervene to object to the juris-

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diction, he cannot be permitted to contest the case upon its merits; in other words, he cannot intervene for the purpose of showing that no act of bankruptcy has been committed, and it is suggested that all of the cases, where an intervening creditor was permitted to appear, turned upon the alleged want of jurisdictional allegation in the court, and that no authority is found for the position that he may intervene to put in issue the act of bankruptcy. On the contrary, however, in the case of Brewster v. Shelton, 24 Conn. 140, the attaching creditor was permitted to come in and claim that the proceedings were collusive, as to him—precisely what is claimed in this case; and in Re Mendelsohn [Case No. 9,420]. In the Case of Jack [Id. 7,119], the attaching creditor was permitted to contest the question of merits. No distinction in principle is perceived; the attaching creditor has an interest to protect. By the adjudication his attachment is ipso facto dissolved, and he has a right to inquire whether an act of bankruptcy has in fact been committed, as well as whether the court has jurisdiction to entertain the petition. Underlying all the discussion upon this subject is the general principle of law, that no man shall be deprived of his property without the opportunity of being heard. An assumption of this kind is at war with our whole system of jurisprudence.

The question next arises whether the petitioning creditors are not estopped to claim the bill of sale set forth in the petition as a preference, to be an act of bankruptcy. The intervening petition sets forth (and for the purposes of this motion, it must be taken as true), that four of the petitioning creditors were officers of the bank to which the bill of sale was made at the time the same was executed; that they and two others of the petitioners transferred their claims set up in the petition to the bank; that said claims were held by the bank at the time the bill of sale was taken and constituted a part of the claim named in the bill of sale, which it was taken and intended to secure, and that said security was procured with the consent and at the instance of these creditors, and that they were not entitled to be represented in the petition. It further sets forth that five of these creditors, acting for themselves and the bank, have undertaken to defeat petitioner's claim, under his attachment, by asserting their lien under the bill of sale, and have combined with Williams to procure an adjudication and thereby to work a dissolution of his attachment lien. The law is as well settled in bankruptcy as in equity, that the party who has become a party to, assented or taken benefit from a fraudulent conveyance, is estopped thereby to claim the same as a fraud or an act of bankruptcy. A party cannot thus take advantage of his own wrong, as observed by Judge Leavitt in Re Langley [Case No. 11,006]: "The well known doctrine of estoppel is undoubtedly applicable in such a case, if the facts justify its application. It would be clearly in violation of a rule of good morals as well as of law, that one should give his assent and approval to an act, and afterwards, for his own advantage, denounce the act as illegal and immoral." In the Case of Schuyler [Id. 12,494], creditors who had assented to a transfer from a common law assignee for the benefit of creditors to another assignee, were held estopped from questioning the original assignment. See, also, Spicer v. Ward [Id. 13,241]; In re Massachusetts Brick Co. [Id. 9,259]; Bamford v. Baron, 2 Term R. 594, note; Hicks v. Burfitt, 4 Camp. 235, note; Ex parte Kilner, Buck, 104; Ex parte Cawkwell, 19 Ves. 233; Back v. Gooch, 1 Holt, N. P. 13. I think it entirely clear in this case that the creditors whose claims are secured by this bill of sale would be estopped to claim its execution as an act of bankruptcy.

The only other act charged is the suspension and non-payment of a note, dated July 15, 1875, payable sixty days after date to the order of William Hamilton. The intervening petition further sets up that the bank and the petitioner Hamilton procured a transfer from Williams to the bank, of all his property, money, credits and effects to secure the payment of this note, and that by such transfer Williams was deprived of the means of paying the same, and the bank and Hamilton thereby obtained the means with which payment of such note could have been made within the forty days, and therefore that the petitioning creditors have no right to set up the non-payment of the note as an act of bankruptcy; though it was clear that Williams could not, as against creditors not assenting thereto, set up the assignment of his property for the benefit of creditors as an excuse for non-payment of his commercial paper, still I think the creditors who have procured such assignment, and thereby taken the means by which Williams might reasonably be expected to pay the note, are as much estopped to claim the non-payment of the note as an act of bankruptcy as they are to claim the assignment itself to be such. But it is insisted, that, granting that the debtor might claim these estoppels, the same defense cannot be made available in the hands of the intervening petitioner. The general rule is unquestioned, that only parties to a deed and those in privity with them, can be bound by it, or take advantage of the estoppel created by the instrument. Bigelow, Estop. 269. It only remains to inquire whether Crapo is a privy to the estate of the debtor within the meaning of the law. The term "privity" (Greenl. § 189) "denotes mutual or successive relationship to the same acts of property." Such relationship may be cast upon the privy by the voluntary act of the party, or by the act of the privy himself, proceeding in hostility to the party. Privies in estate exist where there is a mutual or successive relationship to the right of property, not occasioned by descent or by act of law. Freem. Judgm. § 162. Privies in estate are simply distinguished from strangers; and the manner in which the party be-

came a privy, so long as the relationship exists, is of no moment. In the case of Parker v. Crittenden, 37 Conn. 148, the plaintiff bought a hack in the possession of a third person as belonging to him. The real owner was present and assented to the sale. Subsequently it was attached as his, in the hands of the plaintiff, who now brought replevin. The court held him entitled to recover. The defendants, it was remarked, by claiming through the owner under attachment, were privies in the estate with him, and bound by the same estoppel. See, also, Bigelow, Estop. p. 493, etc. Similar questions have frequently arisen under the usury laws of the state of New York. In the case of Dix v. Van Wyck, 2 Hill, 522, it was held that, although a deed or contract cannot be avoided for usury by a mere stranger to the transaction, a judgment creditor, by selling the property of his debtor on execution, might place himself in the situation of a privy, and contest the validity of any prior lien affected by usury. The case was replevin against a sheriff for goods taken on execution, the plaintiff claiming under a prior mortgage, executed by the judgment debtor; and it was held that the sheriff might show the mortgage usurious as a defence to the action. The court observes that "the purchaser under a judgment and execution, is an assignee by operation of law, and so stands in legal privity with the judgment debtor. We have not been referred to any case, nor have we met with one which denies that an execution creditor may seize and sell the property of his debtor, and thus try the validity of any prior charge or incumbrance on the ground of usury." Similar views were expressed by the chancellor in the case of Post v. Dart, 8 Paige, 640, where it is observed that "a usurious mortgage is void, not only as to the mortgagor, but as to all other persons who succeed to his rights in the mortgaged premises, either by the operation of law or otherwise. A judgment creditor, therefore, whose mortgage becomes a legal lien upon the whole interest of the mortgagor in such premises, may buy and sell and purchase under his judgment, obtain a perfect title to the land, and may then enjoy the same as fully as the judgment debtor might have done had he continued to be the owner." In Mason v. Lord, 40 N. Y. 476, it was held an assignment of a lease absolute on its face but in fact given as security for a usurious loan might, in the hands of a purchaser of such lease from the usurious assignee, with notice that the original assignment was security for a loan, although without notice of its usurious character, be avoided for usury by a judgment creditor of the original lessee. All those cases were reviewed in Carow v. Kelly, 59 Barb. 239, where it was held a chattel mortgage could be avoided for usury by a judgment or execution creditor of the mortgagor. The general doctrine was there asserted that a person who, like an execution creditor, asserts a lien upon mortgaged property, is not a stranger, within the meaning of the rule; that the defence of usury is a personal one, and cannot be pleaded by one having neither privity of estate nor of blood with the borrower, that is to say, by a mere stranger. As the intervening petitioner claims title to the property in question by an attachment duly levied upon it, I think he stands in the relation of a privy and may take advantage of any defence available to the debtor, and his motion for leave to intervene is therefore granted.

Case No. 17,707.

In re WILLIAMS et al.

[3 Woods, 493.] [1]

Circuit Court, N. D. Georgia. Sept. Term, 1876.

BANKRUPTCY—PARTNERSHIPS.

Where the same partners carry on the same business at different places, under different partnership names, there are not two distinct firms; the assets of both nominal firms are equally applicable to the payment of all the creditors of both.

[Cited in Campbell v. Colorado Coal & Iron Co. (Colo. Sup.) 7 Pac. 292.]

Petition of review filed by the assignee in bankruptcy. The facts shown by the record are as follows: James J. Williams, of Atlanta, Georgia, and R. R. Anderson, of Loudon, Tennessee, composed the firm of J. J. Williams & Co., and carried on business in Atlanta, Georgia. The same persons composed the firm of Anderson & Williams, and carried on the same business in Loudon, Tennessee. The partners, under the firm name of J. J. Williams & Co., filed their petition in bankruptcy in the district court of the United States for the Northern district of Georgia, and included in their petition the firm of Anderson & Williams. There was a fund in the hands of the assignee, and the question was presented by the petition of review, how ought these assets to be distributed? The assignee claimed that there was in fact but one firm, and that the assets should be distributed pro rata between the creditors of J. J. Williams & Co. and Anderson & Williams. On the other hand, it was claimed by the creditors of J. J. Williams & Co., that there were two distinct firms, and that the assets of each should be applied to the payment of the creditors of each.

P. L. Mynatt, for petitioners.
No counsel opposed.

WOODS, Circuit Judge. Where parties agree to transact business jointly under a contract to share in the profits, the name or firm which they use is arbitrary and conventional. They may use the name of both or of one alone, or any distinct designation by which all of them will be bound as if all their names were used. They may trade under different firm names at different places, but it will be all one partner-

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

ship: Baring v. Crafts, 9 Metc. (Mass.) 380; Gage v. Rollins, 10 Metc. (Mass.) 348; Ex parte St. Barbe, 11 Ves. 413. To hold that where the same persons, carrying on the same business under two different firm names, the creditors holding claims nominally against one firm, are entitled to be first paid out of the assets held under that firm name, is in effect to decide that there are two partnerships, and that one of these partnerships may hold a claim against the other. But it has been held otherwise. Where all the partners are the same and they carry on the same business under different partnership names, they are the same firm, and the assets of both nominal firms are equally applicable to the payment of all the creditors. Colly. Partn. §§ 1000, 1003, 1004. See, also, Buckner v. Calcote, 28 Miss. 586, 587; In re Vetterlein, [Case No. 16,927]. On these authorities and principles I must hold that all the assets of J. J. Williams & Co. and Anderson & Williams are to be applied pro rata to the payment of all their creditors.

Case No. 17,708.

WILLIAMS' CASE.[1]

[Whart. St. Tr. 652; 4 Hall, Law J. 461; 2 Cranch, 82, note; Nat. Mag. No. 3, p. 254.] [2]

Circuit Court, D. Connecticut. Sept., 1799.

CITIZENSHIP — EXPATRIATION — CITIZEN ENGAGING IN WAR AGAINST FRIENDLY NATION.

[1. A citizen of the United States cannot expatriate himself without the consent of his government; and no consent is to be implied from the policy of the United States to permit the naturalization of foreigners without inquiring whether their allegiance to their native countries has been dissolved.]

[Cited in Henfield's Case, Case No. 6,360.]

[2. Therefore a native American who has become naturalized under the laws of France still remains subject to indictment in the United States courts, for serving on a French privateer engaged in committing hostilities against a power at peace with the United States.]

The indictment charged, that Isaac Williams, of Norwich, in the county of New London, in said district of Connecticut, a citizen of this United States, did, without the jurisdiction of any particular state, viz: at Guadaloupe, in the West Indies, on or about the twentieth day of February, A. D. 1797, he, the said Isaac Williams, then being a citizen of the United States, accept from the republic of France, a foreign state, and then enemy to the king of Great Britain, and at open war with said king—said king then was, and ever since hath been, in amity with said United States—a commission and instructions to commit acts of hostility and violence against the said king and his subjects, all of which is contrary to the twenty-first article of the treaty of amity, commerce, and navigation then existing between Great Britain and the said United States, &c.

On the trial, it was admitted on the part of Williams that he had committed the acts alleged against him in the indictment, but, in his defence, he offered to prove that, in the year 1792, he received from the consul-general of the French republic, a warrant, appointing him third-lieutenant on board the Jupiter, a French seventy-four gun ship; that, pursuant to this appointment, he went on board the Jupiter, and took the command to which he was appointed; that the Jupiter soon after sailed for France, and arrived at Rochefort, in France, in the autumn of the same year; that at Rochefort he was duly naturalized in the various bureaux in that place, the same autumn, renouncing his allegiance to all other countries, particularly to America, and taking an oath of allegiance to the republic of France, all according to the laws of said republic; that immediately after said naturalization he was duly commissioned by the republic of France appointing him a second-lieutenant on board a French frigate called the Charont; and that before the ratification of the treaty of amity and commerce between the United States and Great Britain, he was duly commissioned by the French republic a second-lieutenant on board a seventy-four gun ship, in the service of said republic; and that he has ever continued under the government of the French republic down to the present time, and the most of said time actually resident in the dominions of the French republic; that during said period he was not resident in the United States more than six months, which was in the year 1796, when he came to this country for the purpose merely of visiting his relations and friends; that, for about three years past, he has been domiciliated in the island of Guadaloupe, within the dominions of the French republic, and has made that place his fixed habitation, without any design of again returning to the United States for permanent residence. The attorney for the district conceded the above mentioned statement to be true; but objected that it ought not to be admitted as evidence to the jury, because it could have no operation in law to justify the prisoner in committing the facts alleged against him in the indictment. This question was argued on both sides by Mr. Pierpont Edwards for the United States, and Mr. David Daggett for the prisoner.

Judge LAW (District Judge) expressed doubts as to the legal operation of the evidence; and gave it as his opinion, that the evidence, and the operation of law thereon, be left to the consideration of the jury.

Judge ELLSWORTH, the Chief Justice of

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[1] The report in the text is substantially taken from the Connecticut Courant of September 30, 1799, the record having been resorted to, in addition, for the purpose of giving greater precision. The charge of the chief justice is the same with that given in 1 Tuck. Bl. pt. 1, append. 436, and in 3 Wheat. [16 U. S.] 82, with the exception that the omissions in the latter reports are supplied in the text.

[2] [2 Cranch, 82, note, contains only a partial report.]

the United States, stated his views nearly in the following language:

The common law of this country remains the same as it was before the Revolution. The present question is to be decided by two great principles; one is, that all the members of civil community are bound to each other by compact. The other is, that one of the parties to this compact cannot dissolve it by his own act. The compact between our community and its members is, that the community will protect its members; and on the part of the members, that they will at all times be obedient to the laws of the community, and faithful in its defence. This compact distinguishes our government from those which are founded in violence or fraud. It necessarily results, that the members cannot dissolve this compact, without the consent or default of the community. There has been here no consent—no default. Default is not pretended. Express consent is not claimed; but it has been argued, that the consent of the community is implied by its policy—its conditions, and its acts. In countries so crowded with inhabitants that the means of subsistence are difficult to be obtained, it is reason and policy to permit emigration. But our policy is different; for our country is but sparsely settled, and we have no inhabitants to spare. Consent has been argued from the condition of the country; because we were in a state of peace. But though we were in peace the war had commenced in Europe. We wished to have nothing to do with the war; but the war would have something to do with us. It has been extremely difficult for us to keep out of this war; the progress of it has threatened to involve us. It has been necessary for our government to be vigilant in restraining our own citizens from those acts which would involve us in hostilities. The most visionary writers on this subject do not contend for the principle in the unlimited extent, that a citizen may at any and at all times, renounce his own, and join himself to a foreign country. Consent has been argued from the acts of our own government, permitting the naturalization of foreigners. When a foreigner presents himself here, and proves himself to be of a good moral character, well affected to the constitution and government of the United States, and a friend to the good order and happiness of civil society; if he has resided here the time prescribed by law, we grant him the privilege of a citizen. We do not inquire what his relation is to his own country; we have not the means of knowing, and the inquiry would be indelicate; we leave him to judge of that. If he embarrasses himself by contracting contradictory obligations the fault and the folly are his own. But this implies no consent of the government, that our own citizens should expatriate themselves. Therefore, it is my opinion that these facts which the prisoner offers to prove in his defence, are totally irrelevant; they can have no operation in law; and the jury ought not to be embarrassed or troubled with them; but by the constitution of the court the evidence must go to the jury.

The cause and the evidence were accordingly committed to the jury. The jury soon agreed on a verdict, and found the prisoner guilty. The court sentenced him to pay a fine of one thousand dollars, and to suffer four months imprisonment.

The defendant was also indicted before the court, for having on the 23d of September, 1797, in a hostile manner, with a privateer commissioned by the French republic, attacked and captured a British ship and crew on the high seas, contrary to the twenty-first article of the treaty between the United States and Great Britain, said Williams being then a citizen of the United States, the French republic being then at war with the king of Great Britain, and said king being in amity with the United States. Williams' defence on the first indictment being of no avail, and having no other defence to this, he pleaded guilty. The court sentenced him to pay a fine of one thousand dollars, and to suffer a further imprisonment of four months.

NOTE. Cobbett, on July 19, 1799, thus noticed the proceedings which led to this trial: "Williams, the American Traitor.—St. Johns, Antigua, May 1. The ship William, Captain Atkinson, from Lancaster and Cork, bound to this island, has been taken and carried into Point à Petre. She sailed from Cork on the 14th ult.; and on the 17th, lat. 7° N., and long. 59° 30' W., in company with the ship Betsy, Captain Fleek, from Glasgow, fell in with a French privateer schooner of 10 guns, full of men, mostly Americans, and commanded by one Williams, an American. The privateer immediately attacked the Betsy, which after some resistance, struck, and was sent off for Guadaloupe; after which an engagement commenced between the William and the privateer, and continued for five hours, when the latter was obliged to sheer off. A gentleman from the West Indies, who lately had the misfortune to be taken by the French, assures us that he is personally acquainted with Williams, whose Christian name is Isaac, a native of Norwich, state of Connecticut; and that he has treated some of his countrymen, that fell into his hands, with the greatest barbarity."

Mr. Chauncey Goodrich, in a letter to Mr. Wolcott, Sept. 28, 1799 (2 Gibbs, Admin. of Wash. & Ad. 266), says: "Isaac Williams, the noted privateersman, has been tried on two indictments, on one of the articles of the British treaty, for accepting a commission and committing hostilities against the British. He offered, in evidence, residence in France since 1792 (except being here on a visit five months), and an act of naturalization; both were objected to as not being relevant, on the ground of his being an American by birth, and his allegiance unchangeable. Judge Law was for admitting it. Judge Ellsworth decided against the admission; so it went to the jury, who found him guilty. So much for naturalization acts. He is sentenced to pay a fine of one thousand dollars on each indictment, and suffer imprisonment, on each, four months. A bill is found against Holt, the Bee man. The Jacobins are impudent and cross. They think they gain ground: they are mistaken."

The question raised in the text, whether a citizen may, in any manner, without the consent of

his government, cast off his allegiance to his native country, is one which has risen in this country to more than theoretical importance. The very liberal policy of our naturalization laws, in the domestication of foreigners, has necessarily a tendency to render complicated and conflicting their duties to their native and their adopted countries. Occasions must necessarily arise when inconsistent claims to the services and the obedience of the same individuals will be put forward. One of the chief causes of the war of 1812, was the disregard paid, by the British government, to the naturalization of British subjects in this country. Within a very short period, the matter has been again agitated in the masterly dispatches of Mr. Buchanan, arising from the detention of Bergen and Ryan, during the late insurrection in Ireland. The claim of the United States for the release of these parties was founded on the assumption that, as naturalized citizens of this country, they were no longer subject to the jurisdiction of England. The tendency of the public mind in this country is unquestionably in favour of the right of expatriation. The extravagant extent to which the doctrine of perpetual allegiance has been at times carried in England; the grievances suffered by us from the practical operation of the English rule during the early part of this century, and the somewhat migratory habits of our people, have rendered the doctrine distasteful; while the apparent inconsistency with our system of naturalization, and the uniform encouragement afforded by the government to emigration, have been thought to preclude its adoption by the courts. It has also, as has been seen, been opposed by very high authority in the cabinet and in congress. But whatever may be the popular feeling on the subject, the question, as far as judicial decision extends, seems settled in accordance with the view expressed by Chief Justice Ellsworth in the text, as well as that hinted by Judge Wilson, in Henfield's Case [Case No. 6,360], viz.: that no citizen of the United States can throw off his allegiance, without the consent of congress.

The common law maxim is, "Nemo potest exuere patriam, nec debitum ligeantiæ ejurare;" that no one may throw off his country or abjure his allegiance. Story's Case, Dyer, 298a; 1 Bl. Comm. 370; 1 Hale, P. C. 68. This rule, founded on the feudal relation of lord and vassal, stamps upon any one born within the British kingdom, so indelibly the character of a British subject, that no act on his part can relieve him from its consequent duties. Entering into a foreign service without leave of the sovereign, or refusing to leave such service when required by proclamation, is a misdemeanour. 1 East, P. C. 81. No matter how solemn a mode of adjuration is adopted, the subject is still liable to punishment for offences against the government. The case of Aeneas Macdonald is an illustration of the severity of the rule. Aeneas Macdonald was a native of Scotland. At a very early period he had been taken to France; had passed there all the earlier portion of his life; and had entered the service of the king of France. He took part in the rebellion of 1745, and served under the Pretender at Culloden. Being taken after that battle, he was indicted for high treason. He claimed the treatment due by the laws of war to an alien enemy. But the judges all held, that notwithstanding his removal to France, he still remained a subject, and the jury found him guilty of high treason. He was afterwards pardoned by George II., on condition of leaving the kingdom, and never again bearing arms against it. Fost. Cr. Law, 59. The publicists, in general, speak rather vaguely on the subject, and perhaps somewhat confound the right of emigration and the right of expatriation, in themselves distinct. Grotius (book 2, c. 5, § 24) speaks of the right to leave the state at pleasure, as a natural right, but subjects it to the provisos, that we ought not to go out in troops or large companies; nor where there is a large public debt, without paying our proportion; nor when the state is engaged in war, or involved in difficulties of any kind. Wicquefort (de l'Ambassadeur, c. 11), in discussing the question whether a prince may employ foreigners in service in their native country, which he answers in the affirmative, asserts, that the citizen has a perfect right to emigrate; and that a complete severance of all ties with his native country will be effected by the taking an oath of allegiance to a foreign country. Burlamaqui is more definite in his remarks: He says (book 2, p. 2, c. 5, § 125): "It is a right inherent in all free people, that every man should have the liberty of removing out of the commonwealth, if he think proper. In a word, when a person becomes a member of a state, he does not thereby renounce the care of himself and his own private affairs. Thus, the subjects of a state cannot be denied the liberty of settling elsewhere, in order to procure those advantages which they do not enjoy in their native country." He then goes on to qualify the exercise of this right in certain instances. Expatriation, he considers, should not take place without the permission of the sovereign, though he, on his part, ought not to refuse it without important reasons; nor at an unseasonable juncture; nor when the state is particularly interested in his remaining at home; nor if there be any provision on the subject in the laws of his country, for he argues, "we have consented to those laws, by becoming members of the state." The most systematic and practical, on this subject, of these writers on political law is Vattel. He asserts an absolute right in the citizen to emigrate, where he is unable to procure subsistence in his native country; if the body of the society, or he who represents it, fails to discharge its obligations towards him; or, if the major part of the nation attempt to enact laws in relation to matters in which the social compact cannot oblige any one to submission, as in matters of religion. He claims for him a qualified right, where it is not advantageous to remain, to quit his country, on making it a compensation for what it has done in his favour: provided it be not at such a juncture that he cannot leave it without visible injury, and that all municipal regulations on the subject be complied with. But the opinions of these jurists, whatever weight they may have from the names attached to them, are obviously, in their naked state, but imperfect rules of guidance. It will not be found that, in their full extent, they have been followed in the codes of any state in modern times. Mr. Whewell, one of the latest and most judicious writers, indeed, (Elem. Mor. v. ii. p. 394,) asserts that no practical legislation has recognized that theoretical view which permits any man, on coming of age, to choose a country for himself. His country, he says, is his mother, in spite of him. Perfect freedom of intercourse, and mutual citizenship, existed among the different states of Greece; but whether any restriction was laid on emigration beyond these limits, is not known. The numerous colonies which proceeded thence, would seem to negative the supposition. The Roman law on this subject is not very clear or definite. Cicero, in his oration for Balbus (c. 13), boasts that the freedom of the Roman citizen was such that neither could he be exiled from, nor compelled to remain in, the republic against his consent. This power of retaining or throwing off at pleasure rights acquired, he calls the firmest foundation of Roman liberty. "Nequis invitus civitate mutetur: neve in civitate maneat invitus. Hæc sunt enim firdamenta firmissima nostræ liberatis, sui quemque juris et retinendi et dimettendi esse dominum." The jus post liminii was denied to those who preferred remaining in the country of their capture; and the Digest illustrates this point by the example of Regulus, lib. 49, tit. 15, l. 3. No one, however, could be the citizen of two states; if he adopted another allegiance, he was obliged to give up that to Rome. Cic. pro Balb. 28; Cic. pro. Cæcina, 36; Heinecc. Ant. Rom. Jur. App. lib. 1, c. 1, § 72. A different rule prevailed at a later period, as regards the Munici-

pia of Italy. Though the liberty of changing his residence was not denied to the Municipes, yet his former obligations still remained, and he by emigration became subject to the burthens of two governments instead of one. The claims of his place of origin could in nowise be thrown aside. "Cum te Byblium origine, incolem apud Beritum esse proponas, merito apud utrasque civitates muneribus fungi compelleris." Code, lib. 4, tit. 38, l. 1. "Origine propria neminem posse voluntate sua eximi manifestum est." Id. l. 4. See also, Dig. lib. 50, tits. 1, 2. See 1 Mich. Hist. France, 49, 54. While the feudal system prevailed, this right could not have existed, as the relationship between lord and vassal could not be dissolved but by mutual consent. One of the earliest practical illustrations of the principle, in modern Europe, was the execution of General Patkul by Charles XII. Patkul was a native of Livonia, a province of Sweden, but had quitted his country when twelve years of age. He had distinguished himself in the service of the king of Saxony. He determined to remain there, and with the consent of his former sovereign, and in time of peace, sold his former possessions in Livonia. Afterwards, he was taken prisoner in an engagement between the Swedes and the Saxons. He was condemned and executed for the crime of treason by the orders of Charles. Vattel blames the conduct of the Swedish monarch as contrary to every principle of justice, contending, with some show of reason, that whatever may be the abstract doctrine on the subject, Charles had, by permitting Patkul to sell his estates, and to remain in the army of the king of Saxony, consented to his expatriation. The Code Napoleon has provided expressly for the case. There are three means by which a native of France may be de-naturalized and deprived of the rights of citizenship: 1st. By naturalization in a foreign country. 2d. By acceptance, without authority of the government, of an office in any other state. 3d. By domiciliation in a foreign country without intention of return. From this last is excepted a domicile for the purposes of commerce. Notwithstanding these provisions, no Frenchman may, under any circumstances, bear arms against his native country, without subjecting himself to the penalties of treason. Pailliet, Man. de Droit Francais, 17. In Spain, in the time of Wicquefort, there was a custom permitting any one to remove from the kingdom at his pleasure, and to throw off, entirely, all allegiance to his sovereign. Wicquefort, supra. In Russia, on the contrary, no one can leave the empire without permission from the emperor, and all subjects in a foreign country are liable to be recalled at any moment.

Having thus, cursorily, glanced at the question as it has been considered in other countries, we will proceed to detail its history in the United States. That the king of England refused to permit the naturalization of aliens in the colonies, was one of the causes of complaint enumerated in the Declaration of Independence. Before the adoption of the constitution, two states, Pennsylvania and Virginia, had provisions in their constitution and laws in favor of the right of emigration. These provisions were considered as destroying the common law rule. Murray v. M'Carty, 2 Munf. 393; Jackson v. Burns, 3 Binn. 83. That rule, therefore, in 1789, was not the law of all the states that adopted the constitution, which seems to negative the idea that the principle was adopted at the formation of our federal government, as part of the common law recognized universally in the states. The diversity prevailing in the colonies and states, prior to 1789, would afford strength to the argument that, in the national government, the common law rule of perpetual allegiance did not prevail. Sandford, V. C., in Lynch v. Clarke, 1 Sandf. Ch. 583–658. In several of the states, since the adoption of the constitution, decisions affirmative of the right of expatriation have been pronounced. In Murray v. M'Carty, ut supra, the court of appeals held this right to be original and indefeasible, and the statute which enunciated it to be merely an affirmance of an immutable principle. In Jackson v. Burns, ut supra, Chief Justice Tilghman considers the English doctrine to be inconsistent with the constitution of Pennsylvania. The court of appeals of Kentucky in Alsberry v. Hawkins, 9 Dana, 178, asserted expatriation to be a fundamental doctrine, and that the citizen, where there is no statute regulation on the subject, may in good faith adjure his allegiance. There are, however, restrictions under which the power is to be exercised. Where a person, who was appointed consul to a foreign port, declared, before he left the country, that he intended to resign his consulate and settle in a foreign country, it was held that this was held not sufficient evidence of expatriation. Woodridge v. Wilkins, 3 How. (Miss.) 360. The mere taking of an oath of allegiance in a foreign country, without a bonâ fide change of domicile, is no abjuration of the country of birth. Fish v. Stoughton, 2 Johns. Cas. 407. It is thus possible to have two allegiances co-extensive in duration. See, also, Lynch v. Clarke, ut supra. On the other hand, in Massachusetts, the common law rule is said by Chief Justice Parsons to exist in its fullest extent. Ainslie v. Martin, 9 Mass. 461. But, it is obvious, that whatever be the legislation or decisions in the states, these cannot affect or furnish a rule for the federal government. The allegiance due to the United States is a paramount one, and cannot be affected by the discharge of that due to a state. Talbot v. Jansen, 3 Dall. [3 U. S.] 133. In the case of State v. Hunt, 2 Hill (S. C.) 1, the question to whom the allegiance of the citizen was due in the first instance was very thoroughly discussed, and a majority of the court of appeals of South Carolina decided that the allegiance due to the United States, was paramount to that due to the state. Allegiance, it is to be remarked, was put in this case on no feudal ground, but entirely in the light of obedience owing to each government to the extent of its constitutional powers. The same principle as that enunciated in the previous case, was affirmed with less hesitation by Sandford, V. C., in Lynch v. Clarke, ut supra, where it is declared, after a review of the authority, that the United States alone can determine upon alienage or citizenship, and can alone bind or loose the tie of allegiance.

The first decision in the United States courts on this subject, was made by Judge Bee of South Carolina of the district court of the United States in that district, in Jansen v. Fraw Christiana Magdalena [Case No. 7,216]. It was there determined, that, although a citizen of the United States may have a right to expatriate himself and become a citizen of another country, he has no right, in his new character, to injure the country of his first allegiance by open violation of her treaties. This decision was affirmed in the circuit court. The case was then taken up to the supreme court of the United States, under the name of Talbot v. Jansen, 3 Dall. [3 U. S.] 133, where the abstract question was avoided by Chief Justice Rutledge, in giving the opinion of the court, as unnecessary to the decision, but was glanced at by Judge Patterson and dwelt upon by Judge Iredell, the inclination of both of whom was to admit the right, though in a guarded and reserved way, Judge Iredell taking the ground that though the right existed, it was not independent and indefeasible, but was the proper subject of legislative restraint, and check; and that even where there has been no legislation, it was to be received with the qualifications of the civilians, by which no man could leave without paying his debts, or when the country is at war. Next came the case in the text, and afterwards Murray v. Charming Betsy, 2 Cranch [6 U. S.] 64; McIlvaine v. Cox, 4 Cranch [8 U. S.] 209; The Bello Corunna, 6 Wheat. [19 U. S.] 152; and The Santissima Trinidad, 7 Wheat. [20 U. S.] 283.

In the first two of these the question was again avoided, and in the last it was alluded to as still open; the position, however, being taken, that if the right is to be recognized at all, it is only to be recognized when manifested by unequivocal acts of the party himself, tending to substantiate his intentions. In U. S. v. Gillies [Case No. 15,206], Judge Washington was still more reserved, hesitating even to admit that allegiance could ever be thrown off without precedent legislative permission. In Inglis v. Trustees of Sailors' Snug Harbour, 3 Pet. [28 U. S.] 99, one step further was taken: it being intimated, in the opinion of the court generally, that allegiance, when undissolved by the parties, still binds (Id. 125); and it being declared by Judge Story, that allegiance by birth is at common law perpetual (Id. 152). At last, in Shanks v. Dupont, Id. 242, the long circuit of doubts and reservations was closed, and the court found itself back again at the position of Williams' Case, that allegiance, without mutual consent, is indissoluble. It is to be regretted, however, that Judge Story, in giving the opinion of the court, should have confined himself to a popular statement of the doctrine thus reached—making no reference whatever to the painfully discordant opinions by which this great question had been previously distressed. However distasteful it may have been in a political point of view, we are bound, therefore, now to hold that allegiance does not shift at will, but is a contract dissoluble only by consent. Nor, is it to be disguised that the repugnance with which this view was visited in the earlier stages of the republic, when the country was composed of nothing else than aliens, naturalized or revolutionized, is now yielding to a more imperial policy. Our flag is not to be trifled with by receiving a mere mercenary or coquettish allegiance, assumed for the purpose of plunder or of amusement, and abandoned when an abandonment suits the whim or interest of the party. It may now be urged that it is our policy to take the same ground with the leading nations of the world, that our sovereignty is to be retained over all who voluntarily submit to it until we consent to their withdrawal. Perhaps in this view the decisions of the supreme court, however at variance with our early interests, may be found most consistent with our permanent dignity. How far a double allegiance may be recognized was discussed in Calvin's Case, and the existence of such an allegiance approved to the country of birth and the country of naturalization. The complicated considerations arising from this position have yet to be settled by the courts.

Independently of the late correspondence in the Case of Bergen, already referred to, where the popular American doctrine is ably, though briefly maintained by Mr. Buchanan, a very clear and elaborate view of the same side of the question is to be found in a pamphlet put forth by Mr. Madison's administration, at the time of the impressment difficulties, and now understood to have been written by the late accomplished Mr. Hay, then district attorney of Virginia. (A Treatise on Expatriation, Washington, 1814.) An argument to the same effect, less full in its common law reasoning, it is true, but peculiarly rich in its citations from the civilians, was about the same time put forth by a writer said to have been Mr. Duponceau. (An Essay on Naturalization and Allegiance, Washington, 1816.) Mr. Nicholas, it is said, contributed a series of essays, under the name of Aristogiton, attacking Judge Ellsworth's doctrine with great bitterness, which are to be found in the Virginia Examiner, and Aurora, of Nov. 2 and Nov. 4, 1799; and Mr. Cooper's fertile mind was exhausted in the same crusade. See Aurora for Nov. 7 and Dec. 7, 1799, and Jan. 21, 1800. I may be permitted, also, to refer to a full and luminous disquisition on the whole subject, not yet published, by Mr. Miller, of the Philadelphia bar, in which this particular point is treated with great sagacity and learning.

Case No. 17,709.

Case of WILLIAMS.

[Crabbe, 243; [1] 2 Law Rep. 104.]

District Court, E. D. Pennsylvania. March 8, 1839.

RECLAMATION OF FUGITIVE SLAVE — EVIDENCE OF IDENTITY—BURDEN OF PROOF.

[Where a person is claimed as a fugitive slave, under the act of Feb. 12, 1793, the question of identity can be proved only by inspection of the person, and, when such proof has been given, it may be disproved or discredited by clear proof of circumstances absolutely incompatible with it. But if such counter proof is doubtful, or, at least, not brought to a reasonable certainty, or may be consistent with the positive evidence of identity, the latter must prevail; subject, however, to the general rule that the burden of proof is on the party claiming the recovery.]

[This was a proceeding under the act of February 12, 1793 (1 Stat. 302), by Ruth Williams, claiming the delivery of "Isaac," or William Stansbury, as a slave.]

Mr. Ingraham, for claimant.

C. Gilpin and D. P. Brown, for respondent.

HOPKINSON, District Judge. The hearing of this case commenced on the 31st day of January last, and has been attended throughout the several sittings with an increasing excitement and interest. There are questions and circumstances involved in it calculated to give it more importance than ordinarily belongs to examinations of this description. On the one side we have a citizen of a sister state, coming here under the protection and authority of that state, claiming to have restored to her certain property, of which she alleges she has been unlawfully deprived; and insisting upon her right to my order to have this property delivered to her by the injunctions of the constitution of the United States, which I am bound to obey. In the other party, who denies and resists this claim, we have an individual who has lived among us for more than twenty-three years; has a wife and family of children depending upon him, and a home, from all which he must be separated, if the claimant has made good her right. These are considerations that make it peculiarly incumbent on the judge, who is to decide the question, and to decide it by the evidence that has been brought before him, to weigh that evidence carefully and scrupulously, without prejudice or influence from any other quarter. He is to yield nothing, on the one side to the power and patriotism of the state of Maryland, which have been strongly invoked for the cause of the claimant; nor, on the other, to any feeling for the consequence of his judgment to the respondent and his family; much less to any opinions of his own on the question of slavery.

Nobody recognises more fully and firmly than myself the complete legal and constitu-

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

tional right of the owner of a slave in and to his person and services; no one is more deeply impressed than I am by the solemn guarantee, which those states of our Union, whose laws permit slavery to exist in them, have received and have a right to exact from every other state; that this right shall be faithfully regarded, and that if a person held to labor or service in one state by the laws thereof shall escape into another, he shall be delivered up to the party to whom such service or labor shall be due. This right it is my duty and desire to respect and secure, not only as a judge, sworn to respect and secure it, but as a citizen of the United States; firmly believing the union of these states to be our first and greatest blessing, and to maintain it, our highest duty; and knowing that it cannot be maintained but by a faithful performance of all its obligations and provisions by all the parties to it. In my view, the happiness of black and white, of the freeman and the slave, is intimately, I may say in our present circumstances, inseparably connected with the maintenance of that government, under which, and by which, we have attained an unexampled prosperity, and have secured to us every right which a rational people can wish for or enjoy. I make these remarks, because the topics to which they allude found no inconsiderable place in the argument of this case. I take the occasion, too, to observe, that the experience of this case, as well as many others, has shown that this mode of trial, directed by the act of congress, is better for both parties, especially for the person claimed as a slave, than a trial by jury could be. This hearing began on the last day of January; the claimant of course came prepared with the ordinary prima facie proof, sufficient, if uncontradicted, to entitle her to the possession of the respondent. He was taken suddenly in the street, without any notice or expectation of any such design or danger. He could not, therefore, be ready with his proofs and witnesses to repel the claim. It might be necessary to seek for them at a distance, and time was necessary for this purpose. After reading the documentary testimony of the claimant, and examining two of her witnesses, by which the respondent was fully apprised of the nature of the claim, the hearing was postponed, on his application, until the 16th of February. It was then resumed, and the claimant examined another witness, and closed her case. The defence was then entered upon and several witnesses were examined to support it. Another postponement was granted to the 23d of February, to enable the respondent to obtain other witnesses; and again to the 2d of March, when the respondent examined additional witnesses, and the claimant also produced another. It is obvious that a jury could not have been kept together for this length of time, and that much important evidence would have been excluded by a more hasty conclusion.

I will now proceed to an examination of the case, as it appears on the evidence that the parties have respectively offered; for it is only by that evidence, and not on any surmises or conjectures, conclusions or belief, not founded upon it, that I must raise my opinion. Judicially I can have no belief or opinion about it, but such as I can justify by the evidence. In the power of attorney, given by Ruth Williams, the claimant, to her grandson, William W. Hall, to prosecute this claim, she states that her negro man Isaac, who calls himself William Stansbury, absconded from her service on or about the 10th day of February, 1816. We have here an important date ascertained, which we must carry with us throughout the inquiry, which turns so much on the accuracy of dates. The whole controversy settles down into the question, whether the person now brought before me and who calls himself William Stansbury, is or is not the man Isaac who was the slave of William Williams, in his lifetime, and afterwards came into the possession of his widow, Ruth Williams, and who escaped from the service of Ruth Williams in the month of February, 1816. In short, it is a question of identity of person. This power of attorney bears date on the 19th day of January last, and was executed in consequence of a letter written to Mrs. Williams from George F. Alberti, dated at Philadelphia, on the 29th December, 1838. In that letter Mr. Alberti informed her, that he understood she had a slave named Isaac, alias William Stansbury, who absconded from her about the year 1815. He gives the name of Issac's mother, and tells her, that his features are just the same as usual, and advises her how to proceed to have him arrested and delivered to her. It is no part of my business to inquire how Mr. Alberti got his information of a transaction which took place nearly twenty-three years before; I mention the letter only as being the commencement of this proceeding. Mr. Hall came to this city with his power of attorney and some witnesses to identify the person of Isaac. He was arrested in the street, and brought before me; I have given every opportunity to both parties to settle this question of identity, by their evidence, and will now, briefly as I can, compare the testimony offered, and endeavor to come to a satisfactory conclusion from the whole. Identity can be proved only by inspection of the person, and, when such proof has been given, it may be disproved or discredited by the proof of circumstances absolutely incompatible with it. But such circumstances must be clearly proved, and they must be absolutely irreconcilable with the direct proof of identity; for, if the counter proof is doubtful, or, at least, not brought to a reasonable certainty, or may be consistent with the evidence of identity, the direct and positive proof must prevail; subject, however, to the general and just rule of law which throws the burden of proof on the party who claims the recovery of that which is in the possession of another. If, therefore, the circumstances themselves and the proof of them be such as to bring the

testimony for the claimant into so much uncertainty and doubt, that the mind cannot be satisfied to rely upon it, the legal consequence is that it must fail. In short, the proof of identity by inspection will be sufficient, unless it be wholly discredited, or so impeached by contradictory evidence that the judgment cannot be satisfied to depend upon it. The proof of ownership, says the act of congress, must be "to the satisfaction of the judge." A conscientious witness will be cautious in his testimony of identity, and take care not to be too absolute and positive in his knowledge of it, for assuredly strange mistakes have been made upon this subject by witnesses, whose honest intentions could not be questioned. By a certificate from the register's office of Prince George county, Maryland, it appears that letters of administration were granted to Ruth Williams and James Beck on the personal estate of William Williams, deceased, on the 7th day of October, 1806, and in the inventory of the estate, we find a "boy named Isaac," about ten years old, appraised at $200. The respondent is claimed to be this boy Isaac; and the question is, whether he is so or not.

The first witness examined on the part of the claimant, was Beale Duval, whose manner of testifying and deportment throughout his examination was such as to impress us with the entire sincerity of his testimony. This witness now resides a few miles from the city of Baltimore, but in 1806 he resided in Prince George county, and did so until about two years past, about two or three miles from the house of William Williams; knows Mrs. Williams; was frequently at her house; there was a considerable family intimacy between them; knew all her servants for many years; he has seen the respondent a vast many times; has seen him at the house of his master and mistress, and at his (the witness's) house; he went by the name of Isaac; and was claimed by Mr. Williams as his slave to his death; after his death, Mrs. Williams always had him in possession; he was born on Mr. Williams's place; witness knew his mother; he had a brother, still in the family when witness left the county; don't recollect precisely when he ran away; he has been gone twenty years and upwards; witness said that he had no doubt that the respondent is the boy Isaac; he recognised him as soon as he saw him; he has a mark on his forehead, occasioned by a burn when young. The cross-examination related to the time when the witness heard of the claim now depending; and from whom he heard of it; at whose instance he came here; of seeing the respondent first in the street; when he knew him directly; that he was told by a young man that respondent was in the street, describing the place; had not seen him, until then, for upwards of twenty years; thinks that when Isaac went away he was between fifteen and seventeen years of age; he repeated, that he never saw a person he could recognise more certainly; he is not much changed; has a beard now; but had not then; yesterday witness asked him if he knew him; he would not acknowledge it; would not commit himself, or own any of the transactions of which he spoke to him.

William Williams was the next witness. He said: "I reside in Prince George county; was born there; at fourteen years old went to Baltimore, for seven years, and then returned to Prince George; knows Mrs. Ruth Williams; knew Mr. Williams in his lifetime; Mr. Williams raised me until I was fourteen years old; am now forty-six; he died in 1805 or 1806; knew the boy Isaac from his infancy; he was nine or ten years old when Mr. Williams died; left him at the house of Mr. Williams when I went to Baltimore, and found him there when I returned; he ran away in 1815 or 1816; his mother and two brothers lived there at the same time; witness gave an account of the brother and mother of Isaac; this boy (Isaac) was always claimed by Mrs. Williams as her slave after the death of Mr. Williams; he had a mark on his forehead, occasioned by a burn; I recognised him as soon as I saw him; I understand he had an uncle named Nashe (Ignatius) Beck, who belonged to Joseph Beck, a brother of Mrs. Williams." On a cross-examination the witness said that Mr. Williams was his uncle and raised him; that he lived about four miles from Mr. Williams; was at his house twice or three times a week; "on my return from Baltimore, I saw Isaac at my store and at his mistress'; I spoke to Isaac yesterday; he said he did not know his master or mistress, mother or brother, or the state or county; that he did not know where he was born, nor where he came from."

John Riddle was sworn. He said he resides in Prince George county, Maryland; is forty-nine years old; has known him (the respondent) ever since he knew himself; lives three-quarters of a mile from Mrs. Williams; intimate in her family; knew her people; knew the boy named "Isaac," a yellow boy; "we were raised together; I was eight or ten years older than he; he was hired out; he was claimed by Mr. Williams in his lifetime as his slave, and by Mrs. Williams after his death; I always understood she took him as her part; I knew the mother of the boy; she was a slave to Mr. Williams; she bought her freedom, and now lives in Washington; the respondent is the same man; is not changed; saw his brother a few weeks ago at Mrs. Hall's, a daughter of Mrs. Williams; there is a strong resemblance between the brothers; I have no doubt that this is the man; he had a scar over one of his eyes; the witness points to the scar." Cross-examined: "I saw him a month or two before he went away; it is twenty odd years ago; about the time the war was ended."

With this evidence and the certificate of the letters of administration, and inventory of the personal estate of Mr. Williams, the counsel for the claimant closed his case,—

but at a subsequent hearing produced Dennis Duval as a witness, whose testimony I shall state here, that the whole of the claimant's evidence may be brought together. He was examined after several of the respondent's witnesses. He said: That he resides in Prince George county, and has done so all his life; is forty-nine years old; lives about one and a half miles from Mrs. Ruth Williams; always intimate in the family, visiting there constantly; knew all her people; knows the boy (the respondent); knew him at Mrs. Williams's house; "I recollect his running away; I think he was something like twenty years old; a stout youth; think he had a little mark on his forehead, occasioned by a burn; scalded; have not seen him since, until to-day; I recognised him immediately; can't recollect exactly the year he went away, but thought it was between 1817 and 1820; the fact was known in the neighborhood; he was advertised; I have no doubt that this is the boy." The cross-examination related to the question of his relationship to Mrs. Williams, and Beale Duval; he was related to neither, and the witness said, he was to have come here as a witness some weeks ago, but was sick; that he came at the request of Mrs. Williams; he had no conversation with her on the subject; she never showed him the letter (Alberti's) received from this quarter about the claim, nor did she speak of any; "she told me that her servant was here in prison, and asked me if I did not think I should know him; thinks the scar on the forehead was on the left side, but that it does not form any part of my recollection of him; his face is familiar to me; he had heard Mr. Williams (the witness) after his return home, say that Isaac had a mark; probably I might have asked Williams if he had a scar; I first saw him where he is now; nobody pointed him out to me as the person on trial;" the witness said he had been with Mr. Alberti and Mr. Hall the evening before, and the conversation was about the boy; he does not recollect what he said nor that he told them what he could prove; the witness said that on coming into the court room, Mr. Hall pointed out the man to him; he now says, "Mr. Hall, Williams, and myself came into the court room this morning, and I said, 'There sits the man;'" and on a question, he added, "Mr. Hall did not point him out to me, or point his hand towards him;" on a question put by the judge, who reminded him. that he had said that Mr. Hall did point out Isaac to him, and showed the manner in which it was done, the witness replied, that he was satisfied that he was mistaken, when he said that Mr. Hall pointed out the man to him when they came into the court this morning.

I cannot but observe here the confusion and errors which this witness fell into in the course of his examination, not with any intention to impute any improper design to him; I do not believe he had any, but to claim some indulgence for other witnesses who have been treated, for similar mistakes, with great severity. In the first place, as to time, this witness thought that Isaac went away between the years 1817 and 1820, when this event happened in February, 1816; yet I do not doubt that Mr. Duval spoke to the best of his recollection. In the second place he stated as a fact that Isaac was advertised, and afterwards admitted he had never seen the advertisement, that he only heard so; that Mrs. Williams was the person who had told him so; now, as a very superior degree of intelligence has been claimed for the witnesses of the claimant, and been the subject of high eulogy, one would suppose that they knew the difference between hearsay, and a fact within their own knowledge, to which only they should testify. But a more remarkable instance of confusion or inadvertence in this witness is, that he said distinctly, that on coming into the court room, Mr. Hall pointed out the respondent to him; he afterwards said he did not, but that he immediately said "There sits the man;" and on my question, he said, he was mistaken when he said Mr. Hall pointed him out. I recollect no mistake so extraordinary as this in any other witness in the whole course of this examination; a fact was distinctly stated to have happened but two or three hours before it was given in evidence, and then it is withdrawn, the witness saying he was mistaken when he stated it. Again, this witness was in conversation, the evening before he gave his evidence, with Mr. Hall and Alberti, and he did not recollect what he said in this conversation; nor that he told them what he could prove. I most truly and seriously acquit this gentleman of any improper motives or intention to state a falsehood, or conceal the truth; he was evidently hurried and confused. But if this may happen to one of his standing and intelligence, it should not be visited too harshly upon those who are his inferiors in both, and whose inferiority has been pressed as a reason why their testimony should not be considered of equal or of any weight.

I have thus taken an ample review of the evidence by which Mrs. Ruth Williams has supported her claim to the labor or service of the person she has arrested and brought before me, under the name of Isaac, or William Stansbury. If that evidence cannot be disproved, or has not been disproved, it cannot be denied that it is sufficient to overflowing, to establish her right. It is clear, positive, and unhesitating, from witnesses of an undoubted character and intelligence, who cannot be suspected of any wilful misrepresentation, or any careless and culpable indifference to the consequences of their testimony, to themselves and to others. They have spoken confidently, what they truly believe; if their testimony and if the fact, that is, the identity of William Stansbury with the boy Isaac, who ran away from Mrs. Williams in February, 1816, be of a character about

which mistake cannot reasonably be presumed or believed, it must be admitted that her claim has been well established, and it would be hardly necessary to give any attention to the testimony produced on the part of the respondent. No one, however, of professional experience in trials at law, who has had opportunities of observing the errors which witnesses, of the best character, innocently fall into in delivering their testimony, not only of long past, but of recent transactions, will be willing to say that any evidence, from whatever witness it may come, may not be founded in some mistake. On the subject of the identity of persons, instances have occurred of the most surprising description. They have occurred in relation to brute animals, as well as to men. Controversies have arisen about the property of a horse, and numerous witnesses, of unexceptionable character, have testified for the one side and the other with equal positiveness. On one occasion, I think it was in Chester county, the horse was brought into the court room; was standing in the presence of the witnesses for their examination, when they gave their evidence, without producing the least change of belief in any one of them. The counsel for the claimant, adverting to the respondent's witnesses reminded us, how often highwaymen have escaped by having their confederates ready to prove an alibi, by an artful narration of circumstances, all true except as to the time. On the other hand, we should also remember the lamentable instances in which innocent persons have been convicted and executed as highwaymen, on proof of identity as positive as that we have in this case; not, I agree, with equal opportunities of knowledge, but with equal good faith in the witnesses.

I well remember a remarkable case, tried in June, 1804, in New York, in which the uncertainty of evidence of identity was wonderfully exemplified. I have since obtained a report of the trial. It was an indictment for bigamy against one Thomas Hoag, alias Joseph Parker. The question was whether the prisoner was the person who, under the name of Thomas Hoag, had married one Catherine Secor, four years before, having another wife then living. He denied that he was the man, or that Thomas Hoag was his name, and insisted that he was in name and fact Joseph Parker, and that he was never married to Catherine Secor. Numerous respectable witnesses, wholly disinterested, testified that the prisoner had lived and worked with them, that they knew him well, and that he was Thomas Hoag. Among the circumstances by which they knew him was a scar on his forehead, which the prisoner had. Benjamin Coe, one of the judges of the county court, testified that Hoag had lived and worked with him, that he had married him to Catherine Secor, and he was as much satisfied that he was Thomas Hoag, as that he (the witness) was Benjamin Coe. Other witnesses swore to his identity with equal positiveness. But, what is more strange, Catherine Secor, the woman who was said to be his second wife, swore that she became acquainted with him in September, 1800; that he married her in December 25th, of the same year, and lived with her till the latter end of March, 1801, when he left her. She said, "I am as well convinced as I can be of anything in the world, that the defendant now here is the person who married me, by the name of Thomas Hoag." On the other side, witnesses equally respectable swore, with equal certainty, that the person was Joseph Parker; and they traced their knowledge of him living in the city of New York from time to time in the years 1799, 1800, 1801, with circumstances that made it impossible that he could have been in the county of Rockland, where the marriage with Catherine Secor was solemnized, at the period of that marriage. So the question stood, and was thus finally decided. Two of the witnesses for the prosecution testified that Thomas Hoag had a scar under his foot, occasioned by his treading on a drawing-knife; that the scar was easy to be seen. His feet were exposed to the court and jury, and no scar was there; and there was an end of the question. The prisoner was really Joseph Parker, and was not Thomas Hoag. But does anybody think of imputing the crime of perjury to the witnesses who swore positively, as well as circumstantially, without reservation, that he was Thomas Hoag? By no means.

It is therefore a mistake in the argument to say that if, upon the whole evidence of this case, the true or most probable conclusion should be that the respondent is really William Stansbury, and not Mrs. Williams' Isaac, any imputation of perjury, or of any other legal or moral offence, will rest upon her witnesses. We may therefore go to the examination of the evidence given on the part of the respondent, without any fear of taking anything, even by suspicion, from the respectable characters of the opposing witnesses.

In order to overthrow or disprove the evidence of the claimant, it is necessary that the respondent's evidence should be more certain, more satisfactory, less liable to mistake, than hers. If they are incompatible, as assuredly they are, if they cannot both be true, then we must take that which can be most safely relied upon. The object is to reach the truth of the case, through and by the evidence, and not to take anything to be truth from any prejudice or preconceived opinions, nor from surmises and suspicions, however strong they may be, and whatever disposition we may have to adopt them. For every fact to which I give my belief, I must be able to say, "Here is the proof of it."

As a preliminary remark to a review of

the respondent's testimony, I will observe that I have no faith in any one's recollection of dates and times, if he has nothing by which he can ascertain them but the mere act of his memory. On the other hand, if memory acts not upon the insulated point of time, but upon certain circumstances of a character to fix themselves on the memory, and the times of those circumstances are either of public and unquestionable notoriety, or can be proved by credible written documents, then it is obvious that the evidence is not to time, but to facts, and the time is ascertained by the facts thus proved. Justice to the respondent requires of me, although at the expense of considerable labor, to give the same careful examination of his testimony that I have given to that of the claimant.

The first witness was William Butler. He says he knew Stansbury about the year 1815; was in his company in New York. This is of little importance, for he mentions nothing by which this date is remembered, unless it can be connected with the testimony of Captain Whippey, so as to be corroborated by it.

George Melburn swears that he knows Stansbury; has known him ever since the war, and knew him during the continuance of the war. This witness here refers to a circumstance of public notoriety to fix the time of his acquaintance with Stansbury. He speaks of the building of the batteries on the west side of the Schuylkill for defence against an expected attack by the British. He says that he and Stansbury went out together with the colored people to assist in that work. He is certain they went together, and he knew him a year before that. Now, it is a fact of general notoriety that the colored people did go out to work at these batteries, and that this took place in the fall of 1814. If then it is true that the witness and the respondent went out together to this work, putting aside his declaration that he knew Stansbury a year before, it is undeniable that he cannot be Mrs. Williams's boy Isaac, who did not leave her service until February, 1816; that is, about sixteen months after the work alluded to. The witness adds that he is satisfied Stansbury is the man; he was intimate with him; that is, that he did not only see him on that occasion, but knew him before and after. He says he thinks that he knew him to be employed in throwing wood out of boats in 1811 or 1812; to this I pay little regard. On a close cross-examination he said nothing that appeared to weaken his testimony, and his manner betrayed no uneasiness of feeling. He gave a simple account of his own history.

Abraham Dutton knew Stansbury twenty-five years ago; he (the witness) was going in a sloop bringing wood to the city, and Stansbury was at the drawbridge, throwing the wood out. He fixes the time to be twenty-five years, because he lived at Mount Holly; it is twenty-seven years since he went there, and he lived there seven years, and saw Stansbury two years after he went there; he knows from his marriage the time he went to Mount Holly; it will be twenty-seven years next December since he was married. This is not very satisfactory as to the time of his first knowledge of Stansbury, although his calculations are pretty accurate; but the defect is in fixing by any circumstances that he did know Stansbury while he lived at Mount Holly. If he is not mistaken in that, all the rest proves that he did know respondent several years before Isaac left the service of Mrs. Williams.

Ignatius Beck. This is a very important witness, and his testimony should be closely examined; for, if he has not uttered the most broad and unsheltered falsehoods, William Stansbury cannot be the claimant's man Isaac. The appearance of Beck, now far advanced in life, with the proof of it on his gray hairs, was without exception becoming; nor did a very severe cross-examination betray him into any impropriety or appearance of feeling. He is the brother of the mother of Isaac who absconded from Mrs. Williams. He has sworn distinctly that he knew Stansbury in 1810, or thereabouts; knew him before the war began; is satisfied of it. He then mentions the circumstances by which he fixes the time of his knowledge. He says he moved out of Seventh street into St. Mary's street, which was in 1810; that Stansbury, whom he had seen before, came and helped him to unload his furniture, and he has known him ever since; that is the man; he had got him to haul wood for him; he was away two or three years after he got acquainted with him, but in 1817 he saw him working along the wharves. Still, we have nothing but his memory to fix the time of his moving into St. Mary's street. He put this beyond a doubt by producing the receipts of his landlord, Robert Mercer, for rent,—the first receipt, in a book, dated December 10th, 1810, for three months' rent; another in June, 1811. No others were turned to. He said he moved there in the fall of 1810, before the receipt was shown; and he could not read. He says that his sister Amy, the mother of Isaac, came to see him (the witness) about ten years ago; stayed with him about nine or ten months; that he is not Stansbury's uncle; he said, from his age, and the respect the colored people had for him, they were in the habit of calling him sometimes "Uncle Beck," and sometimes "Father Beck." He is sixty-five or sixty-six years old. On cross-examination, he gave a particular account of the family of his old master, Joseph Beck; of his own manumission and history. He said he understood Stansbury to say that he came from the northward, somewhere about New Bedford. This may be connected with Captain Whippey's evidence. He stated a fact of much importance; that is, that during the visit of his sister Amy here ten years ago,—a visit which continued for nine or ten months,—he never saw her and Stansbury together. This is incredible, if she was the mother of

Stansbury and Beck his uncle. Unless this old man, so respectable in his appearance and demeanor, and unimpeached by a whisper against his veracity or general character, and contradicted by no one in the particular facts he has narrated; unless the whole of his story is a false and foul fabrication, a series of corrupt perjuries, it is not possible that William Stansbury is the runaway boy Isaac.

Jonathan Judas. He also speaks of the building of the batteries over Schuylkill; he was active in getting the colored people to go out and work; he got the names of those who agreed to go; among them was that of William Stansbury; the witness wrote his name down—this he says is the same person; he has been acquainted with him from that day to this; Stansbury went out with him; witness says he had the honor of being captain that day; they met, 360 in number, in the state house yard; Stansbury then appeared to be from 20 to 22 years old; never talked with him about the place he came from; witness was born in 1784. Is this all a fabrication? By what testimony, either to the facts themselves or the credibility of the witness, is it proved to be so?

Henrietta Reading knows Stansbury, and first knew him in 1812, as she believes, from a circumstance that occurred, which was the wedding of Richard Paxson; which was on 1st April, 1813, and of his sister, which was on the 1st of May following; she became acquainted with Stansbury the fall before these weddings; has known him ever since. I do not lay much stress on this witness, for although it was proved by the records of the meeting that she was accurate as to the time of the wedding, she has mentioned no circumstance which enables her to say that it was the fall before these events that she knew Stansbury; it is mere memory of time unassisted by circumstances, or nearly so.

Amy Curry was brought here on my suggestion; she is the mother of Isaac who absconded from Mrs. Williams. I shall say but little of her testimony, as she stood in a most difficult situation, if this is her son. She however clearly and distinctly asserted that he is not. She said, pointing to the respondent: "This is not Isaac, he is none of mine." She spoke of the mark as being on Isaac's cheek differing from those who said it was on his forehead, as this man's is. It will be remembered that I asked this witness if she belonged to any religious society; she replied she did; to the Methodist. I then made a serious appeal to her conscience and her fears if she said anything untrue; reminding her that it would be no excuse for her that she did it to save her child; she said she knew all this, and persisted in her story. If she has deceived us, she has deceived herself more fatally. On her cross-examination she certainly fell into some contradictions, which may have their effect on her credit; but they were not more striking or strange than those of Mr. Dennis Duval. I would shelter them both by the same mantle of charity; she too was somewhat hurried and confused on her cross-examination. She also says that she did not see this man (Stansbury) during her visit to her brother, I. Beck, ten years ago.

The only remaining witness is Captain Whippey. He is confined in the debtor's apartment (from whence he was brought to testify), where the respondent has also been kept. After respondent had been there a day or more, he asked me (says the witness) if I had any recollection of coming from Nantucket, in 1810; his naming the sloop and the master's name, brought it to my recollection, that I was a passenger in her. He told me he was a boy at the time on board of her; I don't recollect anything of this man; but there was a colored boy on board, who ran away from the vessel on our arrival at New York; I asked him how he came to know me; he said that hearing my name mentioned in the prison, had led him to ask me the question; the boy, as far as I can recollect, was rather of a lightish cast. The witness then mentioned circumstances which were satisfactory to show that this voyage was performed in the winter of 1810. He also said that he had mentioned these circumstances to no one in the prison. Stansbury mentioned to him the year, the season of the year, and the name of the sloop and her master, all correctly. This is very powerful evidence, unless we may account for it by the supposition of the claimant's counsel, that is, that there is a colored man in the prison to whom all this happened, and that he made the communications to Stansbury, to use them for himself. This is an ingenious surmise, but where is the proof of it? If such was the belief of the counsel, it might have been at once verified by sending to the prison, or asking the question of the keeper of the prison, who was here in court with his prisoner. Why did he trust so important a matter to an argument, when it was susceptible of proof.

One circumstance remains to be noticed, which has been vehemently pressed by the counsel for the claimant. It is certainly not without its importance, although it is claiming too much for it to say it is conclusive on the whole case. It is alleged that the respondent has not, either at this hearing or to any of the witnesses, his friends and intimates, ever told who he is or where he came from. This is not strictly correct. Ignatius Beck testifies that he understood from Stansbury that he came from the northward, somewhere about New Bedford; and if he is the boy Captain Whippey spoke of, this is not improbable. It would have been more satisfactory to have had a better account of him; but his habitual silence on this subject and the want of more proof in relation to it, is but a circumstance of suspicion, that he has or may have some reason for saying nothing about it; still it is but a circumstance of suspicion. It cannot prevail against the mass of positive evidence he has brought to prove that whoever or whatever he may be, he is not the slave of Mrs. Williams. I cannot adopt the reasoning,

that because he does not show where he comes from, therefore he ran away from Mrs. Williams; that because he does not show who he is, therefore he is her boy Isaac. Unless we carry this circumstance out to this conclusion, it cannot avail the claimant, whatever suspicion it may throw on the respondent. What reasons he has for this concealment I do not know; but I cannot say that they have any reference to the claim or right of Mrs. Williams. On the contrary, they certainly cannot have any such reference, unless her witnesses have one and all sworn falsely. I will put a familiar case: A man is charged with having stolen property—say a horse—in his possession. On the trial the prosecutor swears postively that the horse is his and was taken from him on a certain day. If the defendant proves by numerous witnesses, to the satisfaction of the court, that he had the horse in his possession one year before the prosecutor lost his horse, and has had him ever since, is it any answer to such testimony to say, "You have not shown where you got this horse"? Is it not enough to show that it cannot be that which belonged to the prosecutor?

To the witnesses of the claimant I can freely say, "You have done no wrong; you have honestly testified to an opinion; for it is only to an opinion, which you truly and conscientiously believe; but you have been mistaken in a matter, on a question, as to which many honest men have been mistaken before you; and if you should now be satisfied that you were mistaken, you will rejoice that it has done no wrong." But if I were to discredit the witnesses of the respondent; if I were to treat their testimony as unworthy of belief, I could address no such consolatory language to them. I must say to them broadly and plainly, "You are branded and blackened with a foul crime before God and man, volunteered by you in the most unnecessary and wanton manner. You were not called upon to speak at all, if you knew nothing of the case; but if you did speak, you were bound to tell the truth and the whole truth, by the most solemn obligations." Dare I pronounce such a condemnation upon these people, unimpeached by any attempt upon their general good character and veracity, or by anything apparent in their conduct here to bring suspicion upon their evidence? In such a case, can I turn them all off as confederates and conspirators with the respondent to defraud the claimant of her property, while I am unable to lay my finger on a particle of evidence or a single circumstance to justify or defend such a course toward them? It may be well for counsel—for I presume it was truly his opinion—to dispose of all the testimony given for the respondent, by charging it in mass, to be falsehood and perjury; to have been fabricated by confederacies and conspiracies. He may be satisfied with his opinion, that the object of the counsel of the respondent is not the truth; but to encourge the poor wretches (as he designates the witnesses of the respondent), who have come here in their perjuries; but as I have no such knowledge or opinion, I cannot found a decree upon them, nor in any manner adopt them. Nor can I agree with the counsel, that it is enough to discredit Beck that he is of the same race and color with the respondent. This would put these people in a strange and perilous condition. It would be enough to have a white witness, however connected with the claimant by the ties of neighborhood, friendship, or blood; however united with her in a common feeling and interest for such claims. By the law of this state, which I am bound to administer, in this respect, the black witnesses stand here as entirely competent as the white, and their credit is to be tried by the same rules and principles. I am no more authorized to say, nor disposed to say, that any witness for the respondent is to be discredited because he is of the same race and color with the respondent, than I would be to discredit for the same reason a witness for the claimant. Neither the law nor my sense of justice will warrant any such discrimination. There is one broad line of discrimination between the witnesses of the claimant and of the respondent. The first speak of the identity of a person they have not seen for twenty-three years, and who was then a youth, and can only deliver an opinion concerning it: they can only testify to recollection; to memory, after a long lapse of time; while the others speak of one they have seen constantly from time to time, for a longer period; who has never been out of their view for any great length of time; and of facts and circumstances, which must be true or false. It would be a strange principle for a court of justice to adopt, in trials of this sort, that no black witness is to be believed; that perjury must be presumed of all of them. The whole examination then is a mere mockery and waste of time.

It may be that these witnesses have imposed falsehoods upon me for truth; for in what case or by what color of witnesses may that not be? But I have no reason to presume it, or to believe it; and I do not. If they have done so, be it on their own consciences. I have done my duty in giving the weight to their testimony to which, in my judgment, it is entitled. I pretend not to look into the hearts of men; to discover the deceit that may be hidden there; nor do I incur any responsibility if I am so deceived. I confess that during the examination and discussion of the case, I have had, occasionally, doubts and misgivings about the truth of it. I am not even now entirely without them. How can it be otherwise under the pressure of such conflicting testimony? But I feel it to be my duty to decide it by the whole evidence, and by such a comparison and estimate of it as the rules of evidence have prescribed for cases of contradictory testimony; and not to yield my judgment to

surmises and suspicions that I cannot defend by just conclusions from the whole testimony.

In this case I must refuse the certificate applied for, and order William Stansbury to be discharged from the arrest.

Case No. 17,710.

The WILLIAMS.

[Brown, Adm. 208; [1] 7 Am. Law Rev. 755.]

Circuit Court, E. D. Michigan. March, 1873.

JURISDICTION—EXECUTORY MARITIME CONTRACT—LIEN—EFFECT OF PART PERFORMANCE.

1. A tug was hired at $200 per day to go to the assistance of a vessel which had been reported aground on the shore of Lake Huron. On arriving at the spot, it was found the vessel had been gotten off, and the tug returned home without rendering her any actual assistance. *Held*, a proceeding in rem would lie to recover the stipulated compensation.

[Cited in Scott v. The Ira Chaffee, 2 Fed. 402.]

2. All maritime contracts made by the master, within the scope of his authority as master under the maritime law, per se hypothecate the ship, and performance, in whole or in part, does not affect the question of jurisdiction generally, or the character of the proceeding, whether in rem or in personam.

[Cited in The Dolphin, Case No. 3,973; The Senator, 21 Fed. 191; The St. Joseph, Case No. 12,230; Roberts v. The Windermere, 2 Fed. 727; Robinson, McLeod & Co. v. Memphis & C. R. Co., 9 Fed. 140; Insurance Co. of Pennsylvania v. Proceeds of The Waubaushene, 24 Fed. 559; The Maiden City, 33 Fed. 717; The Gilbert Knapp, 37 Fed. 213; The Roanoke, 50 Fed. 577.]

3. A libel in rem for salvage services will be sustained, though the contract was for a per diem compensation, not contingent upon success.

[Cited in The New Orleans, 23 Fed. 911.]

4. The nature of maritime liens discussed, and the authorities reviewed.

[Cited in The Illinois, Case No. 7,005.]

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

The libellant, John Demas, owner of the tug U. S. Grant, claimed a lien upon the brig Williams, under the following state of facts: On the 4th day of June, 1871, the brig was aground at Bing Inlet, on the Canadian shore of Lake Huron. On that day the master of the brig employed the tug at Detroit, her home port, to go to the brig's rescue, under a special contract to pay her $200 per day, from the time she should leave Detroit till her return, and $200 additional for use of hawser; which compensation was to be paid at all events, whether the services of the tug should result in, or contribute to getting the brig off or not. The tug left immediately to enter upon the service, but in approaching the place where the vessel had been, and probably was at the time of the agreement, aground, it was found that she was already afloat, and the services of the tug had become unnecessary. Thereupon the tug returned to Detroit. She was absent a little over five days, and the gross amount of her compensation was settled by the master at $1,100, for which a draft was given. The draft having been protested for non-payment, this suit was brought, and the draft tendered to be delivered up.

The following opinion was delivered by the district court (LONGYEAR, District Judge):

That the contract was maritime in its character, and that the claim for compensation under it would constitute a valid cause of action in admiralty, in personam, is not seriously disputed, and I think does not admit of doubt. The question is, has the libellant a lien upon the vessel? If, by operation of law, the contract itself raises a lien, then the present action in rem will lie, and the lien must be enforced, notwithstanding the ultimate object and purpose of the contract became unnecessary, or for any purpose impossible of performance, libellant having performed on his part so far as he could. If, however, no lien was created by the contract, then, as no service to the vessel was actually rendered, it is difficult to see how, or on what principle, a lien has arisen. Was a lien created by the contract? I think not. The service contracted to be rendered—that is, the ultimate object and purpose of the contract—was purely a salvage service. A lien on account of a salvage service arises because, and only because, something is saved by the service, or that service has contributed towards saving something, and then only upon what has been so saved. These constitute the very essence of a lien for salvage. A lien then arises out of, and exists only on account of, the fact of salvage, and not on account of any contract under which the service may be rendered. When the service is rendered under contract, the contract is resorted to for the purpose of fixing the compensation, and not for the purpose of creating a lien. The law settles the question of lien in all cases of salvage where the contract is silent upon the question, and is not of such a character as to preclude a lien which might otherwise exist. Where a salvage service is actually rendered in a case like the present, there is no doubt the lien thereby created extends to the entire time employed, including going and returning. The Independence [Case No. 7,014]. But this is because the time spent in going and returning is incidental to the salvage. If the salvage fails, or is wanting, of course the lien and all its incidents fail. The Narragansett [Id. 10,020].

There is much force in the analogy suggested by counsel between the present case and the case of an executory contract of affreightment. In such cases a lien arises and can exist only with the actual delivery of the freight on board, or what is in law equivalent to such delivery. Now, suppose a vessel is employed at Detroit to go to Cleveland or other port, for some specific cargo which is there and ready for shipment, for a fixed per diem compensation for the entire service, including going and

[1] [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

returning. The vessel actually enters upon the performance of the contract on its part, by going to Cleveland, or other port, where the cargo was when the contract was made and when its performance was so entered upon, and there finds that the cargo has already gone forward, or for some reason its transportation has become unnecessary or impossible, and the vessel returns to Detroit. While there is no doubt an action in personam would lie for the time spent, no one would contend for a moment that a lien on the goods for freight was thereby created. It seems to me the case supposed and the one under consideration are quite analogous.

If necessary, this case might be disposed of adversely to the libellant, on another ground, and that is, the contract being for a fixed price, to be paid at all events and in no manner dependent on success (the contract being for a salvage service), no lien upon the vessel could result in any event. This court, at the November term, 1871, so decided in the case of The Marquette [Id. 9,101]. See, also, the following cases: The Whitaker [Id. 17,524], and the same case [Id. 17,525]; The Independence [supra]; Squire v. One Hundred Tons of Iron [Case No. 13,270]; The Camanche, 8 Wall. [75 U. S.] 477. But inasmuch as under the view already taken, it is unnecessary to a decision, I do not put the case upon that ground. The learned advocate for libellant, seeing the difficulties in the way of maintaining a lien for salvage, asked and obtained leave at the hearing to amend his libel by striking out "salvage" as the cause of action, and inserting in lieu thereof, "contract, civil and maritime." I fail to see, however, that this improves the matter in the least. In fact, as it seems to the court, the concession admits the case against the libellant on the question of lien. The contract was for the performance of a salvage service, and if a lien cannot be maintained on that ground (and we have seen it cannot), it cannot be maintained on any other. In order to do so, the court would have to construe the contract to mean something different from its express terms, and thus make a new contract for the parties, which, of course, will not be done. The libel must be dismissed, with costs to the respondent; but inasmuch as the point upon which the decision is based, was clearly presented on the face of the libel, and therefore might and ought to have been raised by exception, all costs of witnesses and taking testimony must be omitted in the taxation. The decree must be without prejudice to such other action as libellant may see fit to bring for the recovery of his claim.

An appeal was taken by the libellant from this decree.

Mr. H. B. Brown, for libellant and appellant.

Objection is made to a recovery upon the sole ground that although the tug entered upon the performance of her contract, and proceeded to the place where the vessel was lying, she did not actually take her line or pull her off. It is conceded that if she had actually pulled the vessel off, she would be entitled to recover not only for this service but for going and returning for that purpose. It is also conceded that if the tug had taken her line and made an effort in good faith to pull her off, she could have recovered though that effort was entirely futile. There seems to be, therefore, in the opinion of claimant, some magic about the physical connection between the tug and the vessel that gives the lien. It is unnecessary to consider whether a proceeding in admiralty can be maintained for the breach of a purely executory contract. All we claim in this case is that where a vessel has once entered upon the performance of a maritime contract, she is entitled to recover for the services actually rendered, though they were of no benefit to the vessel. The general rule is well settled that wherever in a maritime contract there is a remedy against the owner, there is also a lien upon the vessel. The Druid, 1 W. Rob. Adm. 399; The Bold Buccleugh, 2 Eng. Law & Eq. 536; The Freeman, 18 How. [59 U. S.] 182. All contracts of the master within the scope of his authority, give a lien. 1 Pars. Shipp. 173, note; 2 Pars. Shipp. 178, note 5; The Paragon [Case No. 10,708]. It is held that although a ship has no lien upon the cargo before it is received, the lien attaches the moment it is shipped on board, and she cannot be compelled to give it up until the freight is paid. 1 Pars. Shipp. 175; Bulkley v. Naumkeag Steam Cotton Co., 24 How. [65 U. S.] 386; The Hermitage [Case No. 6,410]; The General Sheridan [Id. 5,319]; The Pacific [Id. 10,643]. There is no difference in principle whether the tug takes the vessel's line or not. She may not render her a particle of service, and may even injure the vessel, and yet it is not denied she would have a lien. The following cases dispose of the question of the necessity of physical connection with the vessel to confer a lien: The Pacific [supra], where an action in rem was sustained for the breach of an executory contract to carry a passenger. Bulkley v. Naumkeag Steam Cotton Co., 24 How. [65 U. S.] 386, in which a vessel was held liable for the loss of a cargo after it was delivered to a lighter, but before it was shipped on the vessel. See remarks as to physical connection, page 393. The rule is well settled that if supplies are bought for a vessel upon the representation they are necessary, the vessel is held, though in fact they are not necessary, and though they were never placed on board at all. The Gustavia [Case No. 5,876]; Bryan v. Pride of the West, 12 Mo. 371; Gibbons v. The Fanny Barker, 40 Mo. 253; Merritt v. Brewer [Case No. 9,483]; The Kearsarge [Id. 7,634]; Brightley, Fed. Dig. p. 799, § 500; Sewall v. Hull of New Ship [Case No. 12,682]; The Walkyrien [Id. 17,091]. In the case of The Canada [Id. 219],

salvage was awarded for consorting an injured vessel, though she was not touched by the consort; and, in The Underwriter [Id. 14,341], it was given to a vessel which "lay to" near a vessel in distress, though no assistance was actually rendered. The question involved in this case is also discussed in The Susan [Id. 13,630], and an opinion expressed in favor of a lien. See 2 Pars. Shipp. p. 287, 144. In the following cases actions were maintained, based upon a simple tender of services: The America [Case No. 289]; Ex parte McNeil, 13 Wall. [80 U. S.] 236. It is unnecessary to determine whether a lien is created by the contract. There are a few cases which indicate that an action in rem will not lie for the breach of a purely executory contract, but on examination they will be found confined to preliminary contracts or to contracts of affreightment in which the lien is in the nature of a common-law lien, and dependent upon possession. Andrews v. Essex Ins. Co. [Case No. 374]; The Tribune [Id. 14,171]; The S. C. Ives [Id. 7,958]; The General Sheridan [supra]. There are dicta to the same effect in the following cases: The Freeman, 18 How. [59 U. S.] 182; Vandewater v. Mills, 19 How. [60 U. S.] 82. In The City of London, 1 W. Rob. Adm. 89, a mariner was discharged after the articles had been signed, but before the commencement of the voyage, held, that as the voyage had been performed he could sue in admiralty for his wages. As nothing remained to be done in this case except payment of the money, the contract was clearly executed. 2 Greenl. Ev. 104.

W. A. Moore, for claimant and appellee.

The contract was a personal one, and created no lien upon the vessel. A maritime lien is a jus in re. The Globe [Case No. 5,483]; The Young Mechanic [Id. 18,180]; The Kimball, 3 Wall. [70 U. S.] 37. To create a lien for supplies, there must be a necessity for supplies and a necessity for credit. Pratt v. Reed, 19 How. [60 U. S.] 359; Tod v. Sultana, Id. 362. A contract to take care of a ship in port and the performance of the service does not create a lien. Levering v. Bank of Columbia [Case No. 8,286]; Phillips v. The Thomas Scattergood [Id. 11,106]; Gurney v. Crockett [Id. 5,874]. There is no lien for a stevedore's services. The Anstel [Id. 339]; The D. C. Salisbury [Id. 3, 694]. The master has no lien for his wages. The Grand Turk [Id. 5,683]; The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175. The language used in The Druid and The Bold Buccleugh is not approved in the case of The Freeman. In the case of The Druid the question was whether the owners were responsible for damage willfully done by the master when not acting within the scope of his authority. In The Bold Buccleugh, the question arose whether the pendency of a common law action, for a collision, could be pleaded in abatement of a suit in admiralty in rem for the same collision. The case of The Pacific [supra] was decided by Judge Nelson in 1850; the case of Vandewater v. Mills [supra], decided in 1856, overruled The Pacific, and Judge Nelson himself recognized this fact in the case of The Hermitage [supra]. And so Judge Blatchford held in the case of The General Sheridan. In The Lady Franklin, 8 Wall. [75 U. S.] 325, the supreme court adheres to the principle that the vessel is not bound except where the cargo is shipped. The cases cited by libellant, where the vessel was held for supplies "furnished" for her, but not delivered to her, were all dependent upon a state statute, except Merritt v. Brewer [supra]. A maritime contract does not necessarily include a maritime lien. The Kiersage [Case No. 7,762]; Vandewater v. Mills, 19 How. [60 U. S.] 82, 89, 90, 91.

EMMONS, Circuit Judge. Having recently, before the argument in this cause, decided in the case of the steamer Robinson, in the Western district of Tennessee, substantially the principle here involved, we should not, but for the history of the cause, have deemed the question one of doubt. Without any very thorough examination at the time, but drawing mainly upon what we had ever assumed to be the law, we ruled that all maritime contracts made within the scope of the master's usual authority did per se hypothecate the ship; and that those of affreightment, insurance, towage, the fitting out and discharge of vessels, and for aiding them in distress, were instances only of the application of the rule. After such examination as the great pressure upon our time will permit, we see no reason to modify this ruling; but hold that the contract in this case did ex vigore, the instant it was consummated, pledge both vessels, that which was to aid and that to be aided, for the security of the agreement. Performance in whole or in part works no consequence in reference to jurisdiction generally, or in the character of the remedy, whether in rem or in personam. It affects only the measure of recovery.

The practical importance of this question to our northwestern commerce; the numerous analogous rights which will fail of protection by even a limited application of the contrary doctrine; the protective power which the jurisdiction we sustain will exert in preventing the disregard of agreements; and the fear that a brief unreasoned judgment may be less influential to extend and support it, is our excuse for pursuing somewhat at length the reasons for our ruling, although forced to do so with much want of form. That contracts for salvage, towage and of affreightment, are in the most unqualified sense maritime, and therefore of admiralty cognizance, will not be questioned; and that New Jersey Co. v. The Merchants' Bank, 6 How. [47 U. S.] 344, Morewood v. Enequist, 23 How. [64 U. S.] 493, Insurance

Co. v. Dunham, 11 Wall. [78 U. S.] 1, and the authors and judgments they refer to, bring within the rule the contract in this case, will be as readily conceded. The denial extends only to the remedy in rem. We infer that one of the reasons for the decree of the district court is that this is at least in the nature of salvage service, and as the libellant did not by his efforts save anything, there is no remedy in rem. The Camanche, 8 Wall. [75 U. S.] 477; 2 Pars. Adm. 283, and cases cited; Ben. Adm. §§ 300-300e; The Henry Ewbank [Case No. 6,376]; Clarke v. The Dodge Healy [Case No. 2,849]; 1 Newb. Adm. 428, 438; 1 Conk. Adm. 352, which say salvage is earned not by an attempt but by actual rescue, assert no doctrine having any tendency to inhibit this proceeding. They and the numerous kindred judgments and authors deny only the extraordinary compensation given for salvage service. There is no intimation that a remedy against the ship, if it is saved, will be denied if the agreement was for payment absolutely. The same remark is equally true of all the cases and authors which say if the agreement is for such absolute payment, irrespective of results, there can be no reward for salvage properly so called. They all relate to compensation only, but not in any case to a denial of the proceeding in rem. Thus, the Case of One Hundred Tons of Iron [supra], is understood by counsel to deny all remedy against the ship. As the sole authority for what it does in this regard decide, The Independence [supra] is cited, in which, after a careful discussion of this question, Judge Curtis takes pains to say he does not decide that in a case like that now before us there is no jurisdiction in rem. On the contrary, with manifest approbation, he refers to the judgment of Judge Conkling in The A. D. Patchin [Case No. 87], affirmed on appeal by Judge Nelson, in which there was a contract precisely like that here set up, to labor for the rescue of the ship for a per diem compensation, and where both judges sustained a proceeding in rem, as consistent with the other wholly distinct rule that there can be no extraordinary compensation in such case. It is said: "For all maritime contracts which the master is authorized to make, there is an implied hypothecation of the ship. There was authority to employ others to aid in preserving the ship, and I imagine that such a contract, subject to the revisory powers of the court, would create a lien on the vessel." The Emulous [Id. 4,480], The Centurion [Id. 2,554], The Pigs of Copper [Id. 1,193], are reviewed, and the principle deduced that suits for salvage may be maintained, although there is an agreement for a fixed and absolute compensation. This judgment is referred to in this connection more particularly to illustrate the position that a denial of salvage is not a rejection of a proceeding in rem, but it quite as fully sustains the broader proposition soon to be considered, that all authorized maritime contracts pledge the vessel for their performance.

It will be noticed the term salvage is used to denote the nature of the service, even where an absolute compensation is agreed on. And so are other cases. In Hennessey v. The Versailles [Case No. 6,365], Judge Curtis remarks that he doubts whether there is any such head, properly speaking, as towage. It should all, he thinks, be termed salvage, whether the ship is in distress or not, whether there is an agreed price or for fixed wages, as in the case before us. It is, however, but a name. He followed only what Judge Story a little less plainly said in The Emulous [supra], where he was seeking to lodge the power under some well-known head and among the old, familiar classes of admiralty jurisdiction, that it might escape the contests in the supreme court. That high tribunal has now settled this and some other questions, fortunately for the commerce of the country, and declared that over all maritime contracts our courts have cognizance, and that our only duty is to determine they are such. We need not now, in order to take jurisdiction, maintain that the towage of a staunch and seaworthy ship through the safe and land-locked straits of Detroit is a salvage service. We believe that the partial adoption of this inapplicable nomenclature is the parent of the objection in this case. It illustrates the impolicy of applying names to things and acts in unusual senses. Towage, however, is generally called towage, and jurisdiction over it taken not because it is salvage or in the nature of salvage, but because it is performed in pursuance of a maritime contract over which the constitution and laws give the district courts jurisdiction. In most such cases the more appropriate, but, in our opinion, unnecessary terms of ordinary and "extraordinary towage" are employed. See The Princess Alice, 3 W. Rob. Adm. 138; The Kilby, 26 Eng. Law & Eq. 596, note 1; The Kingaloch, Id. Dr. Lushington points out at length the difference between salvage and towage, and what he terms extraordinary towage, the latter being such as demands some extra labor. He cannot, he says, where all is fair, break in upon agreements for the latter, and allow salvage properly so called. The Harbinger, 20 Eng. Law & Eq. 641, and The Graces, 2 W. Rob. Adm. 294, were like cases, where similar terms, familiar in England, are used. In the latter, it is said, the going to the ship was a part of the services as much as the labor after arrival. And see The White Star, L. R. 1 Adm. & Ecc. 68; The Banner [Case No. 17,149]. Judge Wilkins, in this district, said, there was a lien for towage; that it might be necessary in cases of stranding. The Susan [supra], and many of the more modern American cases employ the same terms, and treat the jurisdiction, as it should be, as depending upon

a maritime service and contract only. Rightly understood, of course, no influence upon jurisdiction and remedies should be wrought by the accidental use of either class of names. The contracts and acts involved are alone material. It becomes worthy of notice here only in the supposition that analogies have been sought in the doctrines of salvage to deny a jurisdiction in rem for the violation of a familiar maritime contract, because the labor of the libellant in the accidents of its performance was not instrumental in relieving the Williams. The attempt under this contract for absolute payment by the day, irrespective of results, bears no more analogy to salvage, properly so called, than do the services of the fireman and the engineer.

It is, however, broadly contended in argument here that, irrespective of all notions peculiar to salvage, there is no hypothecation of the ship while the contract is executory. That, unless the performance is entered upon in such mode as to bring the subjects of the agreement into actual contact, there can be no remedy in rem. We were referred to no judgment or book countenancing such a doctrine beyond The Freeman, 18 How. [59 U. S.] 182, and The Yankee Blade, or Vandewater v. Mills, 19 How. [60 U. S.] 82, which, in their now expressly overruled dicta, do sustain in some degree such a doctrine in reference to contracts of affreightment. They affirmed extrajudicially that there was no lien in favor of the shipper until the cargo was laden on board. From this error it was argued that, unless the tug in this instance actually laid hold of the Williams, and made at least a single pull, she was not drawn within the jurisdiction in rem. It will be seen that even this farfetched analogy fails not only for want of similitude, but the doctrine from which it is sought to be deduced, never had a resting place in law.

We think it may now be considered as settled that such a delivery to a carrier as imposes upon him the extraordinary liabilities attaching to his character creates a lien upon the ship to secure the performance of the contract of carriage. There is no necessity for actual contact of cargo with ship. Whether there is a remedy in rem where there has been no delivery, has not as yet been decided by the court of last resort, but in the absence of all authority to the contrary and sustained by express judgments in the district and circuit courts, and, as we said upon the argument, by what we deemed unquestionable principles, we should readily sustain a libel for the breach of a contract of affreightment wholly irrespective of delivery to the carrier. Such act may, and in most instances would, be requisite to launch the duty of carriage. But jurisdiction in rem does not depend upon it. That vests, if without it a maritime contract within the usual authority of the master has clearly created a duty to carry, to tow, to aid in distress, or do any other act within the common duties of the department of commerce in which the vessel is engaged. If the agreements are obligatory, and the conditions for performance occur as contemplated, they do, of their own force, hypothecate the ship. The contract, the obligation which it imposes, does so.

In The Edwin [Case No. 4,300], affirmed in 24 How. [65 U. S.] 386, was sustained a proceeding in rem for the loss of cotton upon a lighter on its way to the ship. Judge Sprague reviews the 18th and 19th Howard [59 and 60 U. S.], and anticipates what the supreme court on appeal says of the dicta in those two judgments. He says it is worthy of much consideration whether there is not a hypothecation of the ship by a contract of carriage without any delivery to the carrier, and cites The Flash [Case No. 4,857], decided by the learned Judge Betts, of the Southern district of New York, so holding, but adds that, subsequently, in 1857, according to a newspaper report, he refused to enforce the doctrine in obedience to the dicta in 18th and 19th Howard [59 and 60 U. S.]. They out of the way, The Flash is not extinguished, although the learned judge who decided it felt himself no longer at liberty to follow its light. In The Edwin, or Bulkley v. Cotton Co., 24 How. [65 U. S.], the court say that what is said in 18th and 19th Howard [59 and 60 U. S.] and in Grant v. Norway, 2 Eng. Law & Eq. 337, all refer to circumstances where there had been no such delivery as to impose on the carrier the duty of carriage or to care for the property. It is said "the unloading of the goods at the end of the voyage, on the wharf, does not discharge the lien, and we do not see why the lien may not attach if the cargo is delivered to the master before it reaches the hold of the vessel, as consistently as its continuance after it is unloaded on the wharf or within the warehouse." The scope of what is here meant will be better understood in connection with the at one time much discussed, but now settled doctrine in all courts, English, federal and state, that a delivery at the usual place where a carrier receives goods, whether upon a wharf, in a warehouse of his own or others, fixes his liability as insurer. See Ang. Carr. §§ 129–148; 2 Redf. R. R. 55–59; Ben. Adm. § 287; 1 Conk. Adm. 193; 1 Pars. Adm. p. 183. Nowhere is any distinction made between the absolute liability of the carrier as insurer and the right to enforce it by a proceeding in rem, the abandoned dicta in 18th and 19th Howard, and the few cases dependent upon them excepted. In The Robinson [unreported], we had occasion to go somewhat into the distinction between contracts which did and those which did not bind the ship in rem. We found the line wholly drawn between those which were maritime and the undertakings of the master in reference to the sale

of the cargoes and return of proceeds, and other similar agreements collateral to his ordinary ex officio duties. We held that an agreement to collect and pay over the sum due upon a bill of goods, although contained in what was called a "collect on delivery," or a "C. O. D." bill of lading, did not authorize a proceeding in rem. But it was because it was not maritime, was an impolitic extension of the lien to cases not coming within the reason of the rule. 2 Pars. Adm. 252, cites the judgment in The Edwin to the position "that the liability to proceedings in rem commences by reception of the goods on board or at the wharf; that it continues after they are unladen." See The Tangier [Case No. 12,265]. The General Sheridan [supra] was a libel against a vessel for refusing to proceed to the ports named in a charter party. Judge Blatchford conceded that The Pacific [supra] was full authority to sustain the proceeding. It enforced a right in rem where the ship was not fitted out according to agreement, and a passenger refused to go on board, and in which Judge Nelson, sustaining a proceeding in rem, used as an illustration a refusal to carry out an executory contract to transport goods. But Judge Blatchford felt he could not follow The Pacific, as Judge Nelson had himself, in The Hermitage [supra], in obedience to the dicta in The Freeman and The Yankee Blade, announced a contrary rule. He therefore, manifestly against his own convictions and the logically sustained judgments of Judge Betts in The Flash, Judge Nelson in The Pacific, those of Judge Ware hereafter cited, and the dicta of Judge Sprague in The Edwin, dismissed the libel. But the then and now conditions of opinions in the supreme court render The General Sheridan an authority so far as the opinion of the able judge who decided it is such, for sustaining a libel against a ship for refusing to call for passengers or freight at the places and in the times where those who are authorized to make obligatory contracts agree she shall go. 1 Pars. Adm. 183, repeating the doctrine that delivery on the wharf binds the carrier, and showing in the note that he means binds the ship as well, refers to the MS. decision by Judge Betts, in which he refused to follow The Flash, and says the cases in Howard and Hennessey v. The Versailles, supra, do not compel his departure from his former ruling, and that The Edwin, 24 How. [65 U. S.] 386, sustains his own text. So far, therefore, as the decree below may be supposed to rest upon the assumption that there is no remedy in rem for the breach of a wholly executory maritime contract to carry goods, we think it fails of support.

The rectitude of the jurisdiction now taken, however, may be vindicated more fully than simply to answer the accidental objections made to it. It may be quite true that the analogies from the doctrines in salvage fail because the service is not such, and that the breach of an executory contract of affreightment may be compensated by proceedings in rem, and still the present decree fail of affirmative support. We do not repose upon this negative argument. The wider principle, that every maritime agreement binds the ship as well as the owner, is that upon which we rest our decision. That such is the law of the American admiralty, and substantially so, as now restored, of the English, and that the ship is bound by the contract, and not by force of part performance, will be seen by the following judgment and authors. It would be a mere affectation to go back of the more modern decisions, which, if we might suppose what no one suggests, that they misconceive the older doctrines, are nevertheless in the conditions of this court to be followed. No separation of cases which announce the general rule, and those which apply it, where the services have not been rendered in, or upon, or in contact with the ship will be made. Judgment in the erroneously so-called salvage cases and towage cases, where the agreements are implied from signals and circumstances, are promiscuously referred to, as their applicability will be sufficiently apparent.

In Insurance Co. v. Dunham, 11 Wall. [78 U. S.] 1, although a proceeding in personam upon a policy of insurance, its mode of argument and approval of cases would, without more, oblige our inferior courts to say that for all purely maritime contracts there is a remedy in rem. It extensively reviews the former judgment, and sums up its able argument by the broadest announcement of the jurisdiction generally, and declares that "the only duty is to apply the general principle to the differing cases as they arise." From The Belfast, 7 Wall. [74 U. S.] 624, is quoted "that contracts, claims or services purely maritime are cognizable in the admiralty," and from Morewood v. Enequist, 23 How. [64 U. S.] 493, that part of Judge Grier's opinion which says that "over all maritime contracts there is jurisdiction in the admiralty, both in rem and in personam." New Jersey Co. v. Merchants' Bank, 6 How. [47 U. S.] 344, is referred to, and the following passage from Judge Nelson's opinion approved: "If the cause is maritime the jurisdiction is as complete over the person as over the ship. It must, in its nature be complete; it cannot be confined to one of the remedies on the contract where the contract itself is within its cognizance." In 6 How. 344, the contest was whether the proceeding must not be solely in rem, and the learned argument of counsel as well as its treatment by the court show how free from doubt is such a remedy here. We do not overlook the fact that these broad announcements are not literally and universally applicable. The exceptions, however, are so far from this case that it would be a useless criticism to suggest them. In Four Thousand Eight Hundred and Eighty-Five Bags of Linseed, 1 Black [66 U. S.] 108, Chief Justice Taney says, "As contracts

of affreightment are maritime contracts there is jurisdiction in rem." After the decision in 6 How., this was not doubtful, but it is now referred to for the reason and ground of the proceeding. It is the contract which gives it, not a service or act in a locus within the territorial jurisdiction of the admiralty, as is necessary to give cognizance of a tort. Among the leading and learned judgments upon this subject, are those of Judge Ware. They have been repeatedly approved by the supreme court. In The Paragon [supra] he says: "Every contract of the master, within the scope of his authority, binds the vessel and gives the creditor a lien for security;" and in The Phebe [Case No. 11,066], in an instructive opinion, the lien is asserted and traced to the maritime law, and its original reason thought to be found in that feature which confined the owner's liability to the value of the ship. But another and leading one, undoubtedly, is the fugitive character of the property and agents, and the almost universal absence of the obligated persons and the impracticability and expense of seeking them. The Robert J. Mercer [Id. 11,891], in deciding that a Massachusetts statute created no lien for refusing pilotage where it gave half fees, states, as a reason, "that there was neither any actual service or contract for service made." That had there been a contract, express or implied, a lien would have resulted, is decided in The America [supra]. The law was amended so as to give a lien, and the objection was made that to enforce such a statutory right where there was no actual service to the ship there was no jurisdiction in the admiralty. Judge Lowell, after arguing that from such a law a contract would be raised by implication, says, "a lien is implied from a contract of pilotage, unless the statute expressly, or by implication, forbids it." If there is a contract for service, and it is refused where labor has been expended to tender it, that a proceeding in rem is given, is assumed as undoubted law. Benedict, Conkling, Abbott, and Parsons, citing portions of the foregoing and following decisions, all so lay down the rule. The latter (1 Adm. 173) says: "Every contract by the master within the scope of his authority binds the ship to its fulfillment." In The Bold Buccleugh, 3 W. Rob. Adm. 222, Dr. Lushington quotes and approves what he says in The Druid, 1 W. Rob. Adm. 391. After saying that generally no suit could be maintained against the ship, unless, at the time of the contract or occurrence, owners were also responsible, he adds (page 399): "The liability of the ship and the responsibility of the owner in such cases are convertible terms. The ship is not liable if the owners are not responsible, and no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against." This was said originally in a case for a willful wrong by a master where the owners were not liable and the ship discharged. But it was quoted in The Bold Buccleugh as applicable to that class of contracts for which the master as such may bind his owners. We quote the passage as it stands, and concede it is true so far only as it asserts that where the master has a right by the maritime law to bind the owners, he may by his contracts hypothecate the ship. Here in the case of domestic vessels, as the law just now stands, there is an exception as to supplies. But all concede it to be an anomaly in view of the sources from which our admiralty must draw the larger portion of its powers. It does not affect the general rule upon which we rely. In The Susan, Judge Sprague says, that if a signal is given, and persons go out to render assistance with great pains to the ship, their services cannot be rejected as unnecessary, and that if the ship comes to a place of safety without their aid, a remedy in rem should be given. He concedes that if the agreement is for absolute payment this will displace the salvage compensation, but it is clear he would still afford the remedy in rem. If the implied contract to accept services deduced from a signal will sustain the lien, surely the formal one in this case will. The Undaunted, Lush. 90, is a case where at request of a ship a tug went for two anchors, but before they arrived the ship was gone. A libel in rem was sustained. After pointing out the difference between the cases of pure salvage, where volunteers labor in the expectation of large rewards and run the risk of success, it is said, "But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts, even though the labor may not prove beneficial to the vessel." Here was a contract. Before the instrumentalities for assistance reached the ship she had gone. The case is that before the court. In The Circassian [Case No. 2,722], a libel was sustained for unloading a ship on fire. The cases which deny the jurisdiction in favor of stevedores are justly disapproved, but the case is distinguished from them. It rests upon the principle announced in 11 Wall., that where the contract was decided to be maritime, it was a duty to take jurisdiction, and that all the remedies were open both in personam and in rem. Benedict's Admiralty Practice says, stevedores may sue in rem, and we think he is right. The Ocean, 2 W. Rob. Adm. 92. By request, the libellants took a message for a steamer. They did personally board The Ocean to receive it, but this fact is noticed in judgment only to enhance the compensation, as it was hazardous. It is another case of remedy in rem for services not upon or in contact with the ship, and one which for recompense did not depend upon the salvation of the vessel. The Canada [supra]. It is manifestly assumed in the judgment that simply lying by or consorting with another ship, if by contract, will sustain the libel. The Underwriter [supra]. Judge Nelson allowed The Delaware, in a proceeding in rem, a large extra compensation for lying by, although she could not reach or in any way aid The Underwriter. It was, however, upon request. There was a contract. Such feature, it will be seen, attends all the cases where allowances have been made where no actual benefit has ac-

crued or labor upon the vessel has been done. There are a few instances where, in the encouragement of diligence, the expenses of volunteers have been paid by proceedings in rem, where unexpectedly aid becomes necessary or the attempt abortive. See, fully so deciding, The Ranger, 9 Jur. 119; 2 Pars. Adm. 284; The Albion, 3 Hagg. Adm. 254. Even the old time-honored maxim that "salvage never results from an attempt, but from rescue only," is no longer a universality. If Providence does what the fearless and active salvor attempted, the rule has been modified. It is only where the calamity destroys the object of the effort that all remedy is denied. We look in vain into any department of the rational and protective maritime code for a principle or a precedent which will deny a remedy to the owner, who in good faith and in reliance upon formal contracts incurs expense in order to tender the labor he has agreed to perform.

This jurisdiction is all the more necessary now that so large a portion of our transportation is done by corporations whose ships are frequently covered by bonds and mortgages, and whose personal responsibility is doubtful. To send the proposed shipper in all instances to the often distant home of the owner is a hardship which the rule was established to prevent, and which no evil growing out of its administration demands. No class of contracts requires promptness so much as those connected with commerce. The buyers of produce, the merchant and manufacturer all have adjusted their most continuous and common transactions upon a basis which involves the utmost fidelity and regularity in the carrying trade. The proprietor of a tug, which in virtue of a fair contract is sent hundreds of miles to aid a ship in distress, should not be compelled to go to another state and sue without security for the agreed price, because the accidents of the winds and waves may have rendered its labors unnecessary. Decree for libellant.

Case No. 17,711.

WILLIAMS et al. v. ADAMS et al.

[8 Biss. 452; 7 Reporter, 613; Cox, Manual Trade-Mark Cas. 387; 11 Chi. Leg. News, 249.] [1]

Circuit Court, N. D. Illinois. April 14, 1879.

TRADE-MARK—ABANDONMENT—"YANKEE."

1. Abandonment of a trade mark is not made out by showing numerous infringements in which the owners of such trade-mark have not acquiesced.

2. The term "Yankee" applied as the name or label upon soap, *held*, to be a valid trade mark.

In equity. Bill to restrain the use of a trade mark. The alleged trade mark is the use of the word "Yankee," as a label or mark to designate the complainants' manufacture of a certain kind of shaving soap. The bill set up that the firm of Williams Brothers, in 1846, commenced at Manchester, Connecticut, the manufacture of a superior article of shaving soap, or toilet soap, to which they gave the name "Yankee Soap," or "Yankee Shaving Soap." That shortly afterwards the business place of the firm was removed from Manchester to Glastonbury, Connecticut, and the complainants' firm, as successors of the original manufacturers, have succeeded to all the rights of the original firm of Williams Brothers; and that the defendants [Charles L. Adams and others] were putting upon the market an inferior article of shaving soap, which they labeled "Yankee Williams' Shaving Soap." The complainants [James B. Williams and others] claimed the exclusive right to use the word "Yankee," having adopted it at an early day as a trade mark, designating their manufactured goods.

H. B. Hurd, for complainants.
Banning & Banning, for defendants.

BLODGETT, District Judge. I am satisfied that the complainants' case is fairly made out. The proof shows that they did enter upon the manufacture of this class of soap, as the bill alleges, and adopted this word "Yankee" as the mark or designation of their goods, and have used it from the time of its adoption to the present.

The defendants, on the contrary, claim that the complainants have abandoned the use of this word as their trade mark; that they have allowed other manufacturers to infringe upon it by putting their soaps upon the market under the designation of "Yankee," as, for instance, "Yankee Jim," "Yankee Sam," and under other labels in which the word "Yankee" is the controlling or leading term, whereby complainants' exclusive claim of right to the use of the word "Yankee" has been infringed; and that complainants have so acquiesced in these infringements as to have abandoned their exclusive right to the use of the word "Yankee."

I do not find this position sustained by the testimony. The complainants seem to have been diligent in prosecuting all persons who infringed upon their rights within a reasonable time after they became aware of such infringement. It is true that the proof shows that quite a large number of manufacturers are putting shaving soaps upon the market under the term or description of "Yankee," such as "Yankee Sam Soap," "Yankee Jim Soap," and the "Yankee Soap," which last is precisely like the complainants', and there are various other imitations of the complainants' goods, shown in the proofs. But I do not understand the rule to be, that if a party infringes upon another's trade mark there is any fixed time in which he must bring suit in order to save his rights. Certainly,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 7 Reporter, 613, and Cox, Manual Trade-Mark Cas. 387, contain only partial reports.]

there is no such neglect on the part of the complainants proved here, as would show an intention to abandon their trade mark.

The other point, that the word "Yankee" cannot be adopted by any person as a trade mark, is presented with a good deal of vigor and ingenuity by defendants' counsel, and with a show of authority. A Mr. Browne has written a book on trade marks, which to some extent, I think, is accepted by the profession as an authority, in which he sums up his own conclusion as to the principle decided in a certain trade mark case, and says: "It clearly appears from the foregoing case, that words designating localities, places or persons, such as London Dock Gin, Yankee Soap, etc., cannot be adopted or used as a trade mark." Browne, Trade-Marks, §§ 119–125, 597.

It is sufficient to say in reference to this paragraph, that Mr. Browne is not a court; that he was simply enforcing his own individual views or conclusions from certain adjudged cases. Now, it seems to me by all the analogies, that a manufacturer, especially a manufacturer thirty years ago, would have had the right to adopt the term "Yankee" as applicable to some specific kind of goods, and make it a valid trade mark.

We must remember that the term was not as generally applied then as it is now. At that time, certainly, the term "Yankee" was applied to the inhabitants of but a small portion of the United States—to a small portion of the New England states. For instance, in Western Massachusetts they would speak of the inhabitants of the eastern part of that state, and along the coast from Boston, to Portland, Maine, as "Yankees." The eastern shore people were called "Yankees" in New England. In the Southern, and perhaps some of the Western states, all people in the New England states were spoken of as "Yankees," and since our unfortunate national Rebellion, it has been quite common at the South to speak of all persons who remained loyal to the federal government as "Yankees." The term has been enlarged by use, undoubtedly, very much within the last fifteen or twenty years. In 1846, the time the complainants entered upon this manufacture, the term "Yankee" was restricted, and applied solely as a nickname or epithet to the inhabitants of some parts of the New England states, but it was not a term describing a specific locality or place, or person. It is not a geographical term, nor a proper name, but a designation applied by the dwellers in one locality to the dwellers in another place. It was not the name of any certain locality, and it seems to me complainants had the right to adopt it as their trade mark. If it has since that time, by a more general use and definite application, come to designate any certain locality—which is not conceded—such subsequent events cannot defeat complainants' right. The complainants have made such a case as entitles them to an injunction perpetually restraining defendants from using the word "Yankee" in any label or mark upon their soaps, and the case will be referred to the master to take proof as to the damages which the complainants have sustained.

See, also, Roberts v. Sheldon [Case No. 11,916.]

Case No. 17,712.

WILLIAMS et al. v. The ADOLPHE.

[19 Am. Jur. 219.]

District Court, D. Rhode Island. Aug. Term, 1837.

SALVAGE—DERELICT—INTENT TO ABANDON—COMPENSATION.

1. Property found in a vessel, abandoned in a harbor on an uninhabited coast, comes within the maritime definitions of derelict property, unless it appears that there was an intention to return to the vessel, on the part of the officers and crew.

2. When a part of the cargo of a vessel is thrown overboard to make room for property found abandoned, the owners, of such part of the cargo are not entitled to be first reimbursed out of the proceeds of the substituted property, but as between the salvors, in adjusting their proportions, their claim should be duly considered, and should be taken into the general account of the merits and sacrifices of the salvors.

[This was a libel for salvage by Caleb Williams, Jr., and others against the cargo, tackle, and apparel of the ship Adolphe.]

PITMAN, District Judge. This is a cause of salvage originally instituted by the master and owners of the bark Triton for themselves alone. Afterwards their libel was so amended by consent as to include the crew of the Triton, excepting Ephraim Hansen, Duncan McClellan and Joseph M. Smith. A petition and claim for salvage was at the same time filed by the said Hansen, McClellan and Smith, which was resisted by the master and owners, on grounds stated in their answer; but at the hearing, the answer to this petition was abandoned and the libel agreed to be amended so as to include all the crew of the Triton, as libellants. I have been thus relieved from the consideration of any material question of controversy as between the salvors. A claim has been interposed by the consul-general of France residing at New York, in behalf of the original owners of the ship Adolphe and cargo, being French subjects, praying for restitution after awarding to the libellants competent salvage.

The material facts stated in the libel, and supported by the proof, are: The Triton on a voyage from New York to the Pacific Ocean and the northwest coast of America, on the 18th of February last, and between the 47th and 48th degrees of south latitude, encountered a severe gale of wind and shipped a sea, which caused so much damage that the projected voyage was abandoned, and she put away for the harbor of St. Elena, on the east coast of Patagonia, to repair. On the 22d February she reached the harbor of St. Elena, and found there stranded the French ship

Adolphe, of Nantz. At low water she was high and dry upon the rocks. She appeared to be a French whale ship, with some cargo on board, being part of her outfit, and abandoned by her officers and crew; she had a large hole in her bottom, so that the tide flowed in and out of her; her rudder was carried away, her keel sprung on one side, a considerable proportion of the copper washed off, and she was hogged or broken-backed. She was in a condition which rendered it apparently impossible to get her off from the rocks, and if so, to make her fit for sea. After surveying the wreck, the master, and Hunt, the supercargo and part owner of the Triton, thought it best to attempt saving the cargo of the Adolphe, her tackle and apparel; and, to make room on board the Triton for the same, they deemed it necessary and did throw overboard a part of the Triton's cargo, which they thought less valuable than what they expected to save from the Adolphe. The Triton lay in the harbor of St. Elena from the 22d of said February until the 18th of March last, her crew employed in saving the cargo and apparel of the Adolphe, and in repairing the damages sustained by the Triton. The latter was the work of two or three days by such of the crew as were employed therein, the residue being employed in the salvage service. Having got out all the cargo which they could, the Adolphe was set on fire by the orders of the master of the Triton, to get the copper and copper bolts which could not be procured without. In about two days, after the ship was partly burned, a gale came on, accompanied with a higher tide than they had before experienced, which in the opinion of some of the witnesses, would have washed away the Adolphe and what remained in her, if she had not been set on fire, and which actually washed away what was remaining, and removed many articles of great weight, which had been deposited on the shore, supposed to be in a place of safety.

The libellants claim salvage on property derelict, and the owners of the cargo of the Triton (being the same as the owners of the ship) claim to be remunerated for that portion which was thrown overboard, aside from their other claims as salvors. It is contended in behalf of the owners of the salved property that this is not a case of derelict, that the officers and crew of the Adolphe abandoned her with the intention of returning (as is to be presumed) when they had obtained the means so as to be able to save the cargo, and that the service rendered by the salvors merits not the high reward usually given in cases of derelict. And, whether a case of derelict or not, it is contended that the claim for remuneration for the cargo thrown overboard is wholly unprecedented in relation to the owners of the salved property, however it may be considered in adjusting the proportions of salvage among the respective salvors.

Whether this be a case of derelict or not may not be very material, except as bringing the case within a rule which has been adopted in the admiralty courts in this country, as a guide to judicial discretion. Apart from this rule, the meritorious nature of the services rendered, and the small amount of property saved, might induce the court to decree an amount of salvage as great as if guided by the rule in cases of derelict. If the property is found abandoned by the officers and crew, it comes within the maritime definition of derelict, unless it appears there was an intention to return to the vessel. Was there any evidence of such an intention in this case? Those presumptions which may arise in cases of ships found on shore or stranded in a civilized and inhabited country do not exist in this case. The Adolphe was found on an uninhabited coast, and, as far as she might be visited on the land side, it was by savages. The circumstances in which the Adolphe was found furnished no presumption that the crew intended to return. On board, the hatches were gone, the companion-way open; on shore they found chests and tents, but the provisions and clothes strewed about the tents, and no appearances of any care to preserve the property until they might return to take it, either on board or on shore. I deem it unnecessary to pursue these remarks, as those who set up the intention of returning in cases of abandonment, prima facie, are bound to give some evidence of this intention. A paper found on board the Adolphe signed by Hyppolitus Leopold Saxemoeder, harpooner on board the Adolphe, dated February 8, 1837, is relied on to show the intention of returning. He was the owner of a chest found on board, and this paper appears to have been written for the purpose of preserving his claim for the space of three years. In this paper he says (speaking of the chest), "It is not abandoned. We pray those who shall find it to respect it for the space of three years," &c. A paper signed by a person of so little consequence on board would not be entitled to much consideration, as evidence of the intention of the master to return to the vessel. But it proves too much, if anything,—an intention not to abandon under three years. It will hardly be contended that the Adolphe and cargo were not to be deemed derelict until after that time. If the owner of this chest deemed it necessary in order to preserve his property to leave this paper, why did not the master of the Adolphe leave some writing, which might show what was his intention in leaving her, and giving some directions to those who might take possession of the property? There was a paper found in a bottle at the head of the grave of one of the crew of the Adolphe, drowned during the shipwreck. This paper gave an account of the disaster and the name of the deceased, and was formally signed by officers and crew; but nothing was in it which told of any intention of returning, nor whither the master

and crew had gone. I consider, therefore, the claim of the libellants in this case to be for salvage on property derelict.

The question occurs, what proportion of the property saved ought to be awarded to the salvors? Here it is necessary to consider a preliminary question which has been made by the claimant, as tending to diminish the amount of salvage, or as forfeiting all right to the same. It has been said the firing the Adolphe was a wanton destruction of property; that a portion of her cargo was thus destroyed, and if the master and crew of the Adolphe had returned, they were thereby prevented from saving that part of the cargo which the Triton did not take; and that such an act deserves the severe rebuke of a court of admiralty, whose duty it is to guard against the destruction of property. I have looked into the evidence in this case with much attention to see if there was any foundation for these suggestions,—feeling it my duty to visit a wanton destruction of property, where there was any hope of recovery with such a diminution or forfeiture of salvage, in relation to the guilty, as private rights and public justice might require. I see nothing in the evidence, however, which warrants these imputations upon the salvors or any of them. On the contrary they appear to have acted in a manner which would have been approved by the owners of the Adolphe, had they been present. The sacrifice of the less to the greater was the part of prudence and propriety. The object of the salvors was to obtain all they could from the wreck, and in so doing they acted for the benefit of the owners as well as themselves. It has been suggested that the hogsheads on board the Adolphe, when found, might have contained whale oil. There is nothing in the evidence to lead to such a presumption,—there were no appearances that the Adolphe had taken any whales; if there had been oil on board when the ship was on fire, it would have been manifested in all probability by the raging of the flames, but no one then entertained such a suspicion. The master of the Triton says they found no oil on board, except olive oil in bottles. Beverly, one of the crew of the Triton, says, "We got all out of the Adolphe but the ground tier of hogsheads, which were full of salt water." Hart, another of the crew, says, "We left in the lower tier of hogsheads in the wreck; the water flowed in so that we did not dare to work there, and the wreck was falling to pieces every day we lay there." Hunt, the supercargo, says they saved everything they could save. Smith, the mate, whose testimony was taken and introduced by the claimant, says, "After we got out most of the oil casks the captain and Hunt concluded to burn her." He says, "Two-thirds of the second tier in the lower hold of the Adolphe was broken up." He says, indeed, "We left the oil casks on board, because the captain and Mr. Hunt were afraid of a noise or a mutiny on board the ship, and thinking the copper was worth more than the casks." The testimony of the sailing-master, Hansen, introduced also by the claimant, is, that they "saved all the cargo they could; that they left some oil-casks, some were full of salt water, some empty, and some bilged in the lower hold; that the lower deck beams broke down and rested on some of these casks, so that they could not get them out without staving them; that they had to stave a number of bread casks to get the bread, on this account, and that, in his opinion and that of the crew, the captain and Mr. Hunt, it was best to set the vessel on fire; that there was no appearance of any whales having been taken by the Adolphe from anything on board; and that he considered the wreck, after some of the goods were got out, in a very dangerous situation on account of the heavy blows." No evidence in contradiction of this is in the cause. That more copper was not procured by the burning of the ship was not the fault of the salvors; she was set on fire on the 10th of March, according to the testimony of Captain Williams, and the Triton remained at St. Elena until the 18th of the same month. The master says, "We got a small proportion of the copper by setting the wreck on fire, and should probably have got the major part of it, had it not been for the gale on the 11th and 12th, which swept it into the sea."

I come now to the consideration of the question whether the owners of the Triton and cargo are to be paid specifically for that part of the cargo of the Triton which was thrown overboard to make room for the property saved from the Adolphe. In the case of Small v. Goods Saved from The Messenger [Case No. 12,961], the cargo of the brig which saved the goods was displaced to receive them. There was in this case no claim to salvage by the owners of the cargo thus displaced. They probably held the master and owners of the brig liable to them, but nothing is said by the court, giving to the owners of the brig any further claim on this account, and Judge Peters seemed to be relieved from all difficulty in this respect, as there was no claim on this account by the owners of the cargo. In the case of The Harmony, decided in the New York district court, reported in 1 Pet. [26 U. S.] 34, note, the salving ship threw overboard her cargo, stated in the libel of the value of five thousand dollars, to make room for the cargo salved. The amount of property saved was large, and a moiety of the net amount, after paying all expenses and costs, was decreed to the salvors, one-third part of which was given to the owners of the salving ship, but no allowance was made, eo nomine, for the cargo thrown overboard. In that case, the master and mate of the salving vessel were owners of the vessel, and received also an allowance as salvors, in their capacity of master and mate. I do not find any case, in which the claim by the owners of the cargo thrown overboard, was set up, as in this case. As between the salvors, in adjusting their proportions it ought undoubtedly to be duly considered, and also

to be taken into the general account of the merits and sacrifices of the salvors, but not as constituting by itself a distinct claim, entitled first of all to be paid. In this case, the claim of the owners for a full indemnity for the cargo thrown overboard amounts, as they have stated their account, to the sum of three thousand two hundred and ten dollars and eighty-three cents. The proceeds of the property saved, deducting duties, amounts to five thousand eight hundred and thirty dollars and fifteen cents, and the claim on this account alone is more than is usually allowed salvors in cases of derelict. What then would remain for the owners of the Adolphe, and what for the other salvors? It would seem, indeed, from the statement at the hearing, as if the owners of the Triton could not be remunerated for the loss of the voyage they might have made after repairing damages at St. Elena, if they had carried the salt which was thrown overboard to Monte Video, and brought home from thence a cargo of hides, as was contemplated at one time. Why was not this done? There was undoubtedly a mistake as to the value of the Adolphe's cargo, but the consequences of this mistake are not so to be visited on the owners of the Adolphe, as to leave them nothing of the property salved. The claim of the libellants is for salvage, the services rendered were salvage services, and the owners are to receive their property again, after paying salvage for the services rendered them. What service would it be to them to take their property under circumstances calling for the whole of it by way of indemnity? The mistake of the captain and supercargo, and part owner of the Triton, as to the value of the property on board the Adolphe, should not operate to the injury of the owners thereof; the salvors must bear the consequences of their own mistake, taking such a proportion only of the property salved, as by the law of the admiralty should be awarded them.

It has been urged for the claimant, for the purpose of diminishing the amount of salvage, that the Triton was enabled to make her repairs from the materials and tools found on board the Adolphe, and that without these the Triton could not have so repaired her damages as to have got home. If this were so, about which there is some contrariety of evidence, it was for the benefit of the owners of the Adolphe, that the Triton should have been repaired, otherwise their property could not have been saved by her means, and it does not lessen the merits of the salvage services, for which compensation is now to be decreed, because the salvage could not have been effected, but for the materials and aid furnished the salving ship from the wreck. In the case of The Ewbank [Case No. 6,376], the crew of the Hope, one of the salving vessels, when she fell in with the Ewbank, were suffering for want of provisions, and were greatly relieved by obtaining a supply from the Ewbank. This seems to have been urged in that case as diminishing the claims of those salvors who were on board the Hope. On this point Mr. Justice Story said: "Nor do I think the distressed state of the Hope, at the time when she fell in with the Ewbank, can make any substantial difference in her merit, at least not in respect to her co-salvors. She might have supplied her necessities, and been excused and perhaps justified in so doing, from the abundance of the floating derelict ship, and then have left the latter to her fate. She did not stop there; but, having supplied herself, undertook the not less grateful though perilous task of saving the residue for others."

I now come to the principal question in this cause,—the merits of the salvage services. The time employed by the salvors in loading the cargo of the Adolphe on board the Triton, was a little more than three weeks. They worked for several nights as well as days. During this time the Triton was exposed to several gales, and almost every night to heavy squalls, and much labor was required on board the Triton to save her from sharing the fate of the Adolphe. "Almost every night," says the master, "we were obliged to let go an extra anchor, and from fifty to eighty fathoms of chain cable, on account of heavy tornadoes coming out of the south and west almost every night, suddenly, without any previous notice." The mate, Smith, states, "We had frequently to let go two anchors almost every night, as the wind went around the compass almost every day, and blew so heavy at night, we were afraid of getting a round turn round our anchor." The frequent shifting of the winds rendered it necessary to heave up the extra anchors every day, to prevent the round turn mentioned by the mate. "Although the French ship lay in a very dangerous and rough place, and very much exposed to heavy seas that came into the harbor, it was," says the master, "perfectly safe to land with our boats on the west side of reef point, under the protection or lee of the land, without danger of life, either on the rocks or on the beach." The principal danger incurred during the salvage, was the exposure of the Triton to the same fate as the Adolphe, and it appears, from the fate of one of the crew of the Adolphe, that there was some danger of life in this exposure.

The cargo of the Adolphe was brought a long way hither: this was not necessary for the benefit of the owners of the Adolphe; it might have been saved, and in all probability placed in the hands of the master of the Adolphe in going into Buenos Ayres or Monte Video; and bringing it hither, therefore, though justifiable as the home of the saving ship, and if, as stated by Hunt, the supercargo, they thought this "the only place where they could dispose of the cargo from the wreck to any advantage," founds no extra claim for salvage on account of the length of the voyage hither.

The value of the Triton and her remaining cargo, at risk, whilst she lay in St. Elena, is not particularly proved. It was stated at the bar, that she was insured for six thousand dollars, and her cargo for ten thousand

dollars, on time, so that here there was no deviation, but the premium was probably enhanced from the nature of the insurance. The rule of salvage, in cases of derelict, ranges from a third to one half of the property saved, after deducting costs and expenses. Mr. Justice Story, in the case of Rowe v. The Brig [Case No. 12,093], after reviewing the law on this subject, comes to the conclusion, "that the general sense of the maritime world seems to be, that the rate of salvage, on derelicts, should not, in ordinary cases, range below a third, nor above a moiety of the value of the property, and that a moiety was the favorite proportion" of judicial tribunals. And in the same case he says, "that where a particular proportion has been frequently applied in a class of cases, slight or even considerable distinctions in the circumstances ought not to induce a court of law to depart from that proportion; that it was better to adhere to a rule which may operate somewhat unequally than to leave everything afloat in mere undirected discretion." The rule, however, he considers sufficiently flexible to admit of exceptions "in cases of extraordinary peril and difficulty, and exalted virtue and patriotism, where a moiety of even a very valuable property might be too small a proportion, or in cases of so little difficulty and peril, as to entitle the parties to little more than a quantum meruit for work and labor." The same learned judge had occasion to review this branch of the law in a subsequent case of The Emulous [Id. 4,480], in which he says: "The court may say, and indeed it has said, that generally, in cases of derelict, it will not allow more than one-half the value as salvage. But extraordinary cases of great danger and gallantry may occur in which the court would even desert this rule." And in the same case he adds: "On the other hand, the value of the property saved must always form a very important ingredient, since that proportion would be a very inadequate compensation in cases of small value, which would be truly liberal in others of great value." In a subsequent case, The Ewbank [supra], the same judge said: "The court on all occasions has great reluctance in deviating from a moiety, and expects a very strong case to be made out, in which, upon other principles, there would be a very great disproportion between the services and the compensation; so great indeed as in a moral and legal view to constrain the court to deviate from it." In this case he further said: "I agree that the value of the property saved constitutes a material ingredient in decreeing salvage." In the case of The Cora, decided in the circuit court for the Pennsylvania district [Case No. 1,621], Mr. Justice Washington remarked: "Where the usual proportion of the property saved would afford a very inadequate reward to the owners of the property at risk or to the salvors, this might afford a good reason for increasing the proportion of salvage with a view to such compensation, but without at the same time losing sight of the owners of the property saved." In the case of The Adventure, decided in the supreme court of the United States, 8 Cranch [12 U. S.] 228, Mr. Justice Washington, in delivering the opinion of the court, observed: "It being determined to be a case of salvage, the next question is as to the amount to be allowed. On this subject there is no precise rule, nor is it in its nature reducible to rule. For it must, in every case, depend upon peculiar circumstances, such as peril incurred, labor sustained, value decreed, &c., all of which must be estimated and weighed by the court that awards the salvage. As far as our inquiries extend, when a proportion of the thing saved, a half has been the maximum; below this it is usual to adjudge a compensation in numero. In some cases indeed more than a half may have been awarded; but they will be found to be cases of very extraordinary merit, or on articles of very small amount." In the case of The Jonge Bastiaan, 5 C. Rob. Adm. 323, reported as a case of derelict, Sir William Scott awarded for salvage, two-thirds of the whole property, which had been appraised and delivered on bail at three thousand four hundred pounds sterling. The time employed by the salvors in that case was somewhat more than the time which the salvors were employed in this case, looking only to the services at St. Elena, but not so much, if the voyage from St. Elena home be reckoned a part of the salvage services.

The services rendered in this case in the harbor of St. Elena were laborious, but not particularly perilous, except the dangers which threatened the Triton which have been stated, but which were guarded against by means of the cables and anchors of both vessels, though with much vigilance and labor. The services do not appear to me to be those of extraordinary peril and gallantry, sufficient to extract it from the general rule in cases of derelict, if the property saved had been of that value which would have afforded that liberal compensation, which it is the policy of the admiralty law to allow for salvage. I regret that it is not in my power to give this compensation to the salvors in this case, "without" (in the words of Mr. Justice Washington already quoted) "losing sight of the owners of the property saved." This I have no right to do. The salvors had no right to place the owners of this property in a predicament which would subject them to the loss of all their property in expenses, costs, and salvage. Something should remain to the owners of the property saved, as well as something given to those who volunteered their services in saving it. The expenses attending the unloading, storage, sale, and delivery of the property are heavy, exclusive of the marshal's fees, and, with the duties, consume nearly one-fourth of the gross amount of sales. The gross amount of sales is $6,-

797.84; the duties amount to $737.69; and the expenses above mentioned to $586.58. The rule of a moiety in cases of derelict is a moiety of the net amount, deducting expenses, costs, &c. Considering, however, the small amount of property saved, compared with the labor and services rendered, I have felt constrained to exceed the maximum usually allowed in cases of derelict, so far as to allow three-fifths, after deducting the duties, being a little more than a moiety of the gross amount. The expenses and costs, except those which have accrued by the litigation between the salvors, will be a charge upon the two-fifths remaining.

The general rule of distribution between the salvors, is to allow the owners of the saving ship and cargo one-third of the salvage. This was the rule recognised by Mr. Justice Story in The Ewbank, but which he admits should not be so inflexible as not to yield to extraordinary merits, or perils, or losses on the part of the owners. In The Ewbank, one-third was allowed the owners; in that case the judge observed, "Neither of these has suffered any loss or injury, in tackle, apparel, keel, or cargo," &c. In this case, the owners of the Triton lost that part of her cargo which was thrown overboard, and which, if it had arrived safe at this port, would have been worth as much as one-half of the salvage allowed. To allow them, however, a full indemnity for property lost, expenses incurred, and property at risk, would deprive the officers and crew of salvage, by whose labors it was principally procured. Under these circumstances, I allow the owners of the Triton and cargo a moiety of the salvage. In apportioning the residue between the officers and crew, I am instructed by the case of The Ewbank, that the general rule, under ordinary circumstances, has been to allow the master double the proportion of the mate. I perceive nothing in the circumstances of this case to induce me to depart from this rule. The character of Hansen, who appears as sailing-master in the shipping paper, is somewhat anomalous. In the deposition of the master he is called nominal sailing-master, and from his own deposition it appears that he wished to ship as second mate, but was put down as sailing master to prevent his being under the command of the mate, and that extra wages were allowed him from his expected services as pilot, when they arrived on the northwest coast of America, and especially in Columbia river. In the distribution, I allow Hansen somewhat less than the mate, and a little more than the second mate. To Lord and McClellan, though shipping for high wages, I have allowed but a seaman's share, as their high wages had reference not to their superior services on board ship, but as fishermen and net-makers, in which capacity they were of little or no use in the navigation of the vessel, but whose labors were probably worth those of the other men, in getting out, and loading on board the Triton, the cargo of the Adolphe. The one moiety of the salvage allowed the officers and crew, I divide into fifty-three shares, to be distributed as follows: To Caleb Williams, Jr. master, ten shares; Stephen Hunt, supercargo, who was active in getting out the cargo, and commanded the men on board the Adolphe, nine shares; Joseph M. Smith, mate, five shares; Ephriam Hansen, four shares; David W. Wyman, second mate, three shares; Arthur Rayner, two shares; Nelson Crocker, two shares; George Fulton, two shares; Loyalist Mains, two shares; John B. Lord, two shares; Duncan McClellan, two shares; Dexter Taylor, one and a half shares; William Hart, one and a half shares; William Beverly, one and a half shares; William Jackson, one and three-fourths shares; William Angell, one and one-fourth shares; Daniel Adams, one and one-fourth shares; and to Frank (the servant and apprentice of Captain Williams), for his own use and benefit, one and one-fourth shares. Whatever costs may have accrued from the incipient litigation between the salvors are to be a charge on the portion awarded the salvors. All other costs and expenses, except the duties which have been provided for, are to be paid from the two-fifths remaining for the owners of the Adolphe and cargo; the residue is to remain in the registry of this court subject to the further order thereof, for the use and benefit of such person or persons as may in this court make title thereto as owner or owners of the ship Adolphe and cargo, or such person or persons as may be legally authorized by them to receive the same. I shall refer it to the clerk of this court, to ascertain and report the amount of salvage due to each party as above stated, and the decree will be drawn up accordingly.

WILLIAMS (ARMROYD v.). See Case No. 538.

WILLIAMS (ASH v.). See Case No. 573.

WILLIAMS v. BANK OF LEE. See Cases Nos. 13,990–13,992.

WILLIAMS v. BANK OF LOUISIANA. See Cases Nos. 13,990–13,992.

WILLIAMS (BANK OF UNITED STATES v.). See Case No. 942.

Case No. 17,713.

WILLIAMS v. BARNEY.

[5 Blatchf. 219.] [1]

Circuit Court, S. D. New York. May 30, 1864.

CUSTOMS DUTIES—RICE CLEANED IN ENGLAND.

1. Under the 14th section of the tariff act of July 14, 1862 (12 Stat. 557), rice, the growth of a country beyond the Cape of Good Hope, imported into England in an uncleaned state, and there cleaned, and thence imported into the United States, is liable to a duty of 10 per cent. ad

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

valorem, in addition to the duty imposed, by the 8th section of the same act, on cleaned rice, when imported into the United States directly from the place of its growth.

2. The cleaning of the rice in England does not change its identity as rice, or cause it to cease to be the growth or production of a country beyond the Cape of Good Hope.

This was an action [by John Williams] against [Hiram Barney] the collector of the port of New York, to recover back an alleged excess of duties paid, under protest, on cleaned rice imported from Liverpool, England. Under the 14th section of the act of July 14th, 1862 (12 Stat. 557), the collector imposed an additional duty of 10 per cent. ad valorem on the rice, as being the growth of a country beyond the Cape of Good Hope, but imported from a place this side of it.

Sidney Webster, for plaintiff.

E. Delafield Smith, Dist. Atty., for defendant.

NELSON, Circuit Justice. The additional duty imposed is objected to on the ground that, though the article is of the growth and produce of a country beyond the Cape of Good Hope, to wit, the British East Indies, yet its nature and condition have been so changed in England, since it left the East Indies, as to take it out of the 14th section of the act. The section provides, that goods, the growth of countries beyond the Cape, when imported from places this side of it, shall pay a duty of 10 per cent. ad valorem, in addition to the duties imposed on any such articles when imported directly from the places of their growth or production. The 8th section of the same act imposes duties as follows: "On rice, cleaned, one cent and a half per pound; paddy, three-quarters of one cent per pound; uncleaned rice, one cent per pound."

I agree that an article, the growth or production of a country beyond the Cape of Good Hope, may be so changed by manufacture or labor upon it, that, when imported into the United States from a place or port this side of the Cape, it would not be subject to the additional duty. But, in order to bring it into that state or condition, it must have lost its substantial identity. Many examples might be given, as, for instance, wool imported from beyond the Cape, and manufactured into yarn or cloth on this side, and then in that state imported; or hemp into cordage, &c.

The rice, in the present case, was imported into England in an uncleaned state, and was cleaned after it arrived there, and was thence imported into the United States. The article is, doubtless, by this process, very much improved in its condition, and is made fit for use by expelling the dust and dirt and the small and inferior particles of the rice, but its identity is not changed—it is still rice, and nothing more or less. It might as well be argued that wool imported from beyond the Cape, and cleaned after it arrived in England, had lost its identity, and was not liable to the additional duty when imported thence here.

It has been said, that the article of rice, under that designation, is unknown to the tariff act. This is hardly correct. The duty is imposed on the article specifically, but according to its quality or condition. If it is cleaned and fit for use, the higher rate is fixed. But the article, after it is cleaned, is as much the growth or production of the East Indies as it is when uncleaned, that is, when the hull is removed, or as it is when called paddy, that is, in its condition when removed from the stem. Judgment for defendant.

Case No. 17,714.

WILLIAMS et al. v. BARRETT.

[2 Cranch, C. C. 673.] [1]

Circuit Court, District of Columbia. May 24, 1826.

DOWER—GUARDIAN AND WARD—WASTE.

1. The widow is not entitled to dower in lands of which her husband died possessed, but to which he had no legal title, although he had paid the whole purchase-money.

2. A guardian is liable for waste, and entitled to credit for permanent improvements, and the education of the children.

Bill in equity by the heirs of Walter B. Smallwood against Richard Barrett, who married the widow of Smallwood and the mother and guardian of his heirs, whom he, Barrett, has survived. It states that Smallwood, in his lifetime, contracted to purchase certain land of Murdoch, and held the same, under that contract, at the time of his death, not having received a legal conveyance of the same. That the annual value of Smallwood's real estate was ascertained by the orphans' court in 1816. That Barrett, in settling his guardianship account with the orphans' court, deducted one third of the rents received of the real estate, including that purchased of Murdoch, in right of his wife's dower in the same, amounting to $733.33, which he had no right to do, because she was not entitled to dower in lands of which her husband was never seized in law of an estate of inheritance during the coverture. The bill also charges Barrett with waste. It avers that, upon a bill filed by Murdoch's heirs, the contract for the sale of the land to Smallwood was rescinded, and the purchase-money refunded to J. W. Baker, the administrator de bonis non of Smallwood, and in that suit the waste was considered by the court equivalent to fourteen years' interest of the purchase-money, (which was $1,176,93,) refunded by Murdoch's heirs. The bill calls upon Barrett to account for the rents and the waste; and prays injunction against Baker, to restrain him from paying any part of the purchase-money ($1,176.93) to Barrett, who had brought suit

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

against him for one third of that purchase-money.

The cause having been set for hearing upon the bill, answer, replication, exhibits, depositions and other evidence in the cause, the principal question argued was, whether the widow was entitled to dower in the lands purchased by her husband of Murdoch, and of which her husband was possessed at the time of his death, but to which he had no legal title, although he had paid the purchase-money.

Mr. Redin, for plaintiffs, to show that she was not entitled to dower, cited the following authorities: 1 Madd. 365, 371; D'Arcy v. Blake, 2 Schoales & L. 388, 389; Chaplin v. Chaplin, 3 P. Wms. 229; Attorney General v. Scott, Cas. t. Talb. 138; Godwin v. Winsmore, 2 Atk. 525; Dixon v. Saville, 1 Brown, Ch. 326; Burgess v. Wheate, 1 W. Bl. 123, 138; Claiborne v. Henderson, 3 Hen. & M. 322, 365; Kilty's Report of British Statutes in force in Maryland, 208; Stevens v. Richardson (1824) 6 Har. & J. 156, 162.

R. P. Dunlop, for defendant, cited the following authorities: 1 Madd. 362; Sugd. Vend. 120; 1 Cruise, Real Estate, 490; 2 Tuck. Bl. Comm. 131; Banks v. Sutton, 2 P. Wms. 700, 719; 1 Fonbl. Eq. 22, note; 2 Bl. Comm. 337; Burgess v. Wheate, 1 W. Bl. 160; Shoemaker v. Walker, 2 Serg. & R. 554; Collins v. Torry [7 Johns. 278]; 13 Mass. 227; Dixon v. Saville, 1 Brown, Ch. 326; Fish v. Fish, 1 Conn. 559; Snow v. Stevens, 15 Mass. 278; 6 Johns. 290; Coles v. Coles, 15 Johns. 319; 5 Johns. Ch. 452, 482, 492; 1 Cruise, Dig. 161; Hamilton v. Mohun, 1 P. Wms. 118; 1 Cruise, Dig. tit. 12, c. 3.

In settlement of Barrett's guardianship account, in right of his wife, with the orphans' court, that court allowed him to retain one third of the rents of the land contracted for but not conveyed to her husband. To show that such settlement was not conclusive, the counsel for the plaintiffs cited 6 Har. & J. 156.

This court made the following interlocutory decree, on the 24th of May, 1826, namely: That the auditor take and state an account of all moneys received by the defendant, or for which he is chargeable as guardian, or in right of his late wife Sarah, who was the widow and administratrix of Walter B. Smallwood, deceased, and guardian of his infant children; and state the said guardianship account, giving to the said Barrett, in the said account, all proper credits. But the court was of opinion that his said wife was not entitled to dower in lands to which the said W. B. Smallwood had not, at some time during the coverture, a legal estate; but that he is entitled, in right of his wife, to her distributory share of $1,176.93, being the purchase-money heretofore ordered by this court, in the suit of Smallwood v. Murdoch, to be refunded by the representatives of Murdoch, to the administrator de bonis non of Smallwood, and which this court, by a decree in that cause, ordered to be distributed as personal assets of the said Smallwood. That the auditor, in that account, charge the said Barrett with the value of the waste done by him upon the lands of the heirs of the said Smallwood, and give him credit for all permanent improvements made by him thereon; and for the maintenance and education of the children of the said Smallwood, taking into consideration the kind of maintenance and education which they actually received, and the value of their services.

WILLIAMS (BARTLETT v.). See Case No. 1,081.

Case No. 17,715.

WILLIAMS v. BAXTER.

[3 McLean, 471.] [1]

Circuit Court, D. Michigan. Oct. Term, 1844.

PRINCIPAL AND AGENT—LIABILITY OF AGENT FOR INTEREST.

Where funds are placed in the hands of an agent to make purchases, and a balance remains in his hands, after the purchases are completed, he is not liable to pay interest on such balance before the commencement of the suit, unless a special demand was made.

Mr. Chipman, for plaintiff.

Lathrop & Duffield, for defendant.

McLEAN, Circuit Justice. Defendant acted as the agent of the plaintiff in purchasing wheat. He showed receipts, amounting to the sum of $23,000 for purchases, leaving in his hands $3,000 of advances made by plaintiff. For this balance this action is brought, and the only question is, shall the defendant be held liable for interest, and from what time?

No demand for the payment of this balance is proved to have been made, but the plaintiff insists that he is entitled to interest from a reasonable time after the last credit. The court instructed the jury, that interest should be computed from the commencement of the suit, as no special demand had been made.

WILLIAMS (BERGEN v.). See Case No. 1,340.

WILLIAMS (BERGER v.). See Case No. 1,341.

WILLIAMS (BINNS v.). See Case No. 1,423.

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

Case No. 17,716.

WILLIAMS v. BOSTON & A. R. CO.

[17 Blatchf. 21; 16 O. G. 906; 4 Ban. & A. 441; Merw. Pat. Inv. 468.] [1]

Circuit Court, N. D. New York. Aug. 11, 1879.

PATENTABLE COMBINATIONS—LOCOMOTIVE LAMPS—INFRINGEMENT—ABANDONMENT—PUBLIC USE—LACHES.

1. The decision of this court in Williams v. Rome, W. & O. R. Co. [Case No. 17,735], in regard to the reissued letters patent granted to Irvin A. Williams, December 19th, 1865, for an "improvement in locomotive lamps," cited and applied.

2. Although the subordinate combinations covered by the several claims of the patent will not produce a useful result without the addition of other parts necessary to make a locomotive lamp, they are, nevertheless, sufficient to sustain the patent, because, by their co-operation, they contribute to a new result, and may be used in conjunction with such other parts as are ordinarily employed in locomotive head-lights.

3. All the claims of said patent are valid, except the fifth.

4. The fifth claim is void for want of novelty.

5. The defendant having employed all the parts in combination covered by the claims of the patent, cannot escape liability for infringement, because of the employment of others in addition.

[Cited in Washburn & Moen Manuf'g Co. v. Griesche, 16 Fed. 670.]

6. A defence in a suit in equity, that the patentee has, since he obtained his patent, abandoned or dedicated it to the public use, must be set up in the answer.

7. Mere delay in enforcing equitable rights is not a defence to a suit, except in cases where the statutes of limitation apply, or where the party has slept upon his rights, and acquiesced for such a length of time that his claim has become stale.

[This was a bill in equity by Irvin A. Williams against the Boston & Albany Railroad Company for the infringement of letters patent No. 35,122, granted to I. A. Williams, April 29, 1862, reissued December 19, 1865 (No. 2,133).]

Wetmore & Jenner, for plaintiff.

A. McCallum, for defendant.

WALLACE, District Judge. The case of Williams v. Rome, W. & O. R. Co. [Case No. 17,735], is a controlling authority upon many of the questions now presented. In that case, the validity of the issue of complainant's patent was necessarily determined, as was also the novelty of the several combinations claimed, so far as this was assailed by the patents then introduced as anticipations. Not only did Judge Blatchford sustain as patentable the entire combination which complainant's organized locomotive lamps embraced, but also the sub-combinations covered by the several claims in the patent. In the present case, therefore, it must be held, that, although the subordinate combinations will not produce a useful result without the addition of other parts necessary to make a locomotive lamp, they are, nevertheless, sufficient to sustain the patent, because, by their co-operation, they contribute to a new result, and may be used in conjunction with such other parts as are ordinarily employed in locomotive head-lights. It then becomes necessary to ascertain whether the novelty of any of these combinations is disproved by the patents and devices now relied on as anticipations, which were not introduced in the former case.

To this end, the inquiry is, whether the alleged anticipations contain parts constructed and arranged substantially like those of the complainant, and have the same mode of operation. To illustrate: The first claim is for a combination of the circular, hollow wick-tube, perforated air-screen for the exterior current of air, and cap-deflector, substantially as set forth. This claim does not cover the use of these three devices in combination, irrespective of the manner of construction and arrangement. The correct rule of construction is one which will give the patentee what he has really invented, so far as is consistent with the language of his description and claim, both of which are to be read together; and where, as in this case, all the parts are conceded in the description to be old, and their efficiency is referred to their peculiarity of construction and arrangement, it is this peculiarity which is the essence of the invention.

Applying this rule, it is not contended that the defendant can rely upon any of the alleged anticipations except the English patent of Quincy and Johnson and the lamp of Dyott, because the others plainly fail to present the complainant's combination.

Every claim of the patent except the fifth covers a combination of which the hollow wick-tube and cap-deflector are parts. The fifth claim is for the combination of the hollow wick-tube, lateral oil-reservoir and perforated air-screen for the interior current of air, substantially as set forth. The Quincy and Johnson patent discloses a device called a "blower," interposed between the cap-deflector and hollow wick-tube, which, it would seem, is a necessary feature in their arrangement, as respects each other, and materially affects their mode of operation, and which suffices to distinguish the construction and arrangement of these parts from the complainant's. This patent is, however, in my judgment, an anticipation of the fifth claim of the complainant. The orifices which admit the air for the interior current, together with the interior screen, are equivalents for the complainant's devices, and break up the current of air sufficiently to prevent material flickering of the flame from the pressure of air in the head-light. The differences between the wick-tube and the lateral oil-reservoir of Quincy and Johnson and those of the complainant are not substantial.

The Dyott lamp, assuming it to have been

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. Merw. Pat. Inv. 468, contains only a partial report.]

perfected like the model, does not contain the cap-deflector nor the circular hollow wick-tube of the complainant, nor equivalents therefor, and, therefore, does not anticipate any claim in the patent.

The defendant employs all the parts in combination covered by the claims of the complainant's patent, and cannot escape liability for infringement because it employs others in addition.

The defendant insists that the proofs show, that, since the complainant acquired his patent, he has abandoned or dedicated the same to the public use. This defence is not set up in the answer, and there is nothing in the record to apprise the complainant that such an issue was to be raised in the case. This alone is sufficient to deprive the defendant of the right to rely upon this defence. It is proper to say, however, that, while the evidence shows such laches on the part of the complainant in enforcing his rights, that, upon a motion for a preliminary injunction, it is very doubtful if he would not be defeated, it is not sufficient to establish the defence of abandonment or dedication. Mere delay in enforcing equitable rights is not a defence to an action, except in cases where the statutes of limitation apply, or where the party has slept upon his rights and acquiesced for such a length of time that his claim has become stale. There may be an acquiescence by an owner in the use of his property, under circumstances which amount to an equitable estoppel against the assertion of his right. The case made here is not one for the application of this doctrine. According to the statement of the complainant, he has never permitted it to be doubted that eventually he should enforce his rights under his patent, neither does mere delay or acquiescence establish an abandonment or dedication of the patent. There must be an acquiescence in the appropriation of the right, of such character as reasonably to induce the belief that the owner intended to relinquish it to the public use.

Inasmuch as the complainant's patent has expired since the bill was filed, the decree will be for an accounting only.

[For another case involving this patent, see note to Williams v. Rome, W. & O. R. Co., Case No. 17,735.]

Case No. 17,717.

WILLIAMS v. BOX OF BULLION.

[1 Spr. 57;[1] 1 West. Law J. 355; 6 Law Rep. 363.]

District Court, D. Massachusetts. Oct., 1843.

SALVAGE SERVICES—TRANSFER OF RIGHT—QUANTUM MERUIT—DEVIATION.

1. The American ship Constitution, on a voyage from Havre to Charleston, S. C., having on board a box of bullion, was abandoned at sea. The box was taken on board the Danish brig Urania, bound to Copenhagen; and three days afterwards, while at sea, was transferred to the Constellation, an American ship, bound to the United States. *Held*, that the bullion, while on board the Urania, was not in that peril required by law to make it the subject of salvage, and the taking it on board the Constellation was not a continuation of salvage service.

2. There being no agreement to transfer any right of the Urania to the Constellation, and the captain of the former having declared himself fully compensated, no such transfer is created by implication of law.

3. The Constellation was entitled to a quantum meruit compensation, and might proceed therefor in rem. This right was not lost by delivery of the box of bullion to the master of the Constitution.

[Cited in note to Salvor Wrecking Co. v. Sectional Dock Co., Case No. 12,273.]

4. It is not a deviation for a vessel to go out of her course three miles, to speak another at sea, on seeing a signal for that purpose; nor to delay three hours, to take from a foreign ship, bound to a foreign port, shipwrecked mariners of the United States, for the purpose of bringing them direct to the United States.

The American ship Constitution, on a voyage from Havre to Charleston, S. C., having on board a box of gold coin, of the value of $42,000, and a crew of seventeen men, met with a disaster, and was deserted at sea on the 9th of April, 1843. The crew and box of gold were taken on board the Danish brig Urania, bound to Copenhagen. On the 12th of April, she fell in with the American whaleship Constellation, bound for New London. The Urania made a signal, and the Constellation bore away, and on speaking her, was requested to take the crew of the Constitution on board, which she did, and also took the box of bullion. The owners and crew of the Constellation brought this libel, claiming, first, salvage, and if not entitled to that, compensation.

C. G. & F. C. Loring, for libellant.

B. R. Curtis, for claimants.

SPRAGUE, District Judge. The box of bullion, while on board the Urania, was not in that peril required by law to make it the subject of salvage service. Abb. Ship. 554; 3 Kent, Comm. 245; Waite v. Antelope [Case No. 17,045]. The mere taking it on board the Constellation was not, therefore, a continuation of salvage service.

There was no agreement for the transfer of any right of the Urania to the Constellation. But it is contended, that such transfer is created by implication of law, it being reasonable and equitable, and such as the parties would have made, had they been conusant of their rights. It appears that the master of the Urania received property which he deemed a full compensation, and by which he declared himself amply paid. I think it would be too hazardous to presume him ignorant of his rights, and to transfer from him to the Constellation claims which he had relinquished. The libellants must, therefore, stand upon their own merits and services, and these

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

do not confer upon them the character of salvors.

That they are entitled to a quantum meruit compensation is not denied, but it is insisted that they cannot proceed in rem; that their lien was lost by delivery of the bullion to the master of the Constitution. The question is still between the original parties; no rights of third persons have intervened. The service was strictly maritime, and the right to compensation peculiarly within the jurisdiction of the admiralty. The appropriate remedy would be a process in rem, to which the party would clearly have been entitled, had possession been retained. Does the parting with possession take away this privilege? I have heard no argument, either from principle or authority, why it should. In cases of salvage to which this is analogous, possession need not be retained.[2] Eleanora Charlotta, 1 Hagg. Adm. 156.

[A contract to deliver possession, as in case of a cargo to be delivered before the freight is payable, may take away the right to proceed in rem, but it is on the ground that such was the intention of the parties. An engagement upon adequate consideration, that the party shall have the possession, may well be understood to mean that he shall have beneficial possession, giving him the entire control and disposition of the property. The circumstances of this case do not show any such agreement.] [3]

It is consonant to natural justice, that the property should pay for the service rendered to it, and I see no sufficient grounds for saying that the equitable privilege of proceeding in rem has been lost.

The only question is the amount of compensation to be awarded. One ground urged for enhancing the compensation is, that there was a deviation, which discharged the underwriters. The Urania made a signal to speak, or of distress, and for that cause the Constellation, when at a distance of two or three miles, bore away, and upon approaching the Urania, was informed of the condition of the crew of the Constellation, and requested to take them on board. This request was acceded to, and a delay of some two or three hours was occasioned thereby. Nothing was said of the box of bullion; but while the crew were preparing, and passing in boats from the Urania to the Constellation, this box, under the direction of the captain of the Constitution, was put into one of the boats, and under the care of the mate of the Constitution, was conveyed to the Constellation and there hoisted on board; and afterwards was, by the captain of the Constellation, placed in his state-room as a place of safety.

The bearing away, upon seeing the signal of the Urania, and before its object was known, clearly was not a deviation. See Crocker v. Jackson [Case No. 3,398]. It was no more than a common incident of a voyage, which at its inception all parties must be presumed to contemplate as likely to occur. But it is insisted, that as the crew of the Constitution were not in immediate danger or distress, the delay for the purpose of taking them on board, was a deviation. Their ship, an American vessel, had foundered at sea on a voyage to the United States. They had been rescued by the Urania, a Danish brig, bound to Copenhagen. They fell in with the Constellation, an American ship, coming to the United States, where she arrived in thirteen or fourteen days.

That it is the invariable practice to take men on board under such circumstances, is abundantly proved. Indeed, to have refused to receive their shipwrecked countrymen, and compelled them still to rely on the hospitality of strangers, and be transported to a foreign and distant country, would have been a violation not merely of the courtesy, but of the humanity of the seas. As a general rule, that is not to be deemed a deviation, which is within the usage of the seas, on such a voyage. Delays to save wrecked property are an exception to this rule. Salvage in such case is given only to the owners and those engaged in the service. No part is awarded to the underwriters: and it is reasonable that the insured should not be permitted to become wreckers for their own pecuniary benefit, and at the risk of the insurers.

Urgent cases may be supposed, but in general the question, whether the insured should add to the hazards of the voyage merely for the purpose of saving the property of others, is one of pecuniary interest and not of moral obligation, and the policy of the law addressing this interest, holds out strong inducement to engage in such enterprises, by the very liberal compensation which it awards. The law ought to be equally solicitous to encourage services like the present. But in such case not only is no salvage allowed, but, according to the usage proved, no compensation is asked. The owners of the vessel bear the expense of the delay and of the support of the shipwrecked mariners taken on board, and the captain and crew the inconvenience of such large addition to their numbers in their narrow accommodations; and why, to this should be added the risk of the whole property during the rest of the voyage? The policy of the law certainly would not create this additional discouragement to conduct which it approves and desires. Justice does not require that the performance of a mere usual act of humanity, burdensome at all events to the owners, should be visited by the penalty of transferring the risk of the vessel thereafter from the underwriters to the insured. I am of opinion, that stopping to take on board the crew of the Constitution was not a deviation.

With respect to the box of bullion, nothing

[2] That a delivery, by the salvor to the owner, of the property saved, does not defeat the lien, or the right to process in rem, see The H. D. Bacon [Case No. 4,232]. See, also, Cutler v. Rea, 7 How. [48 U. S.] 731.

[3] [From 6 Law Rep. 363.]

was said to the captain of the Constellation, until it was actually on board his vessel. It does not appear that he had any previous knowledge of its existence. There was not, therefore, any intentional delay on his part, for the purpose of receiving it. It was transferred from the Urania, as incidental merely to the removal of the captain and crew of the Constitution, and while the Constellation was waiting a reasonable time for that purpose only. This did not create a forfeiture of her insurance.

The time, labor, and responsibility of the Constellation did not certainly exceed what they would have been, if the bullion had been taken on freight. But there are considerations which should enhance the compensation beyond the mere ordinary freight: The ship, with her cargo, was of great value. The box of gold was taken on board at sea, when the weather was thick and rainy, and boats, passing and repassing between the vessels, might be in some danger. She was not a freighting ship; and when, in addition to her own crew of whalemen, seventeen other seamen were taken on board the Constellation, her captain, had it been left to his option, might have been reluctant to take on board a box of gold of such great value, and presenting temptations to seamen, of whose character he was ignorant. But he had no choice, and could not make terms.

I think that one and a quarter per cent., or $525, is a suitable compensation; and decree that, with costs.

WILLIAMS (BRAINARD v.). See Case No. 1,804.

WILLIAMS (BUSH v.). See Case No. 2,225.

Case No. 17,718.

WILLIAMS v. BYRNE et al.

[Hempst. 472.] [1]

Circuit Court, D. Arkansas. Aug., 1846.

ORIGINAL AND AUXILIARY BILLS—ENJOINING ACTION AT LAW—JURISDICTION OF FEDERAL COURTS—CITIZENSHIP.

1. A bill to enjoin a judgment in the circuit court is not considered an original bill between the same parties, as at law, but as growing out of, and as auxiliary to, the suit at law.

[Cited in First Nat. Bank of Alexandria v. Turnbull, 16 Wall. (83 U. S.) 195; Christmas v. Russell, 14 Wall. (81 U. S.) 81.]

2. But if other parties are introduced, and different interests involved, it is to that extent an original bill, and the jurisdiction of the court must then depend on the citizenship of the parties; and one of the parties must be a citizen of the state where the suit is brought.

[Cited in Christmas v. Russell, 14 Wall. (81 U. S.) 81.]

3. There is no jurisdiction to entertain a bill to enjoin a judgment at law in the circuit court, brought by a citizen of Tennessee, not a party to the judgment, against a citizen of Mississippi, the plaintiff in the judgment.

Bill in equity for an injunction.

Pleasant Jordan, for complainant.
S. H. Hempstead, for Elias E. Byrne.

OPINION OF THE COURT (JOHNSON, District Judge). The complainant, a citizen of the state of Tennessee, has brought this suit in chancery against Elias E. Byrne, a citizen of the state of Mississippi, and Absalom Fowler, Thomas T. Tunstall; and W. W. Tunstall, citizens of the state of Arkansas, and W. B. Miller, whose residence is unknown and not alleged, and thereupon moves for an injunction.

By the eleventh section of the judiciary act of 1789 (1 Stat. 78), this court can entertain jurisdiction of suits at common law or in equity only "where the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state." The complainant being a citizen of Tennessee, and the defendant (Byrne) a citizen of Mississippi, this court has no jurisdiction, unless there is something in the case itself to take it out of the operation of the rule prescribed by the above act. And to do that, the complainant contends that as this is a suit to enjoin proceedings on a judgment at law rendered in this court, in which Byrne was plaintiff, it is not an original bill, but is auxiliary, growing out of and subsidiary to the suit at law. If this position is correct, the jurisdiction of the court is clear enough.

Now it has been held repeatedly, that the defendant in a judgment at law in the circuit court of the United States may file a bill in chancery in the same court to enjoin the plaintiff from proceeding on the judgment, and that such a bill is not to be regarded as an original suit, but only as auxiliary to and springing from the suit at law. Logan v. Patrick, 5 Cranch [9 U. S.] 288; Dunlap v. Stetson [Case No. 4,164]; Dunn v. Clarke, 8 Pet. [33 U. S.] 3.

Is this such a bill? It is not the case of a defendant against whom a judgment has been obtained, invoking the aid of the chancellor to relieve him from it as unjust and inequitable, but it is the case of one who was neither party nor privy to the judgment, seeking to restrain the plaintiff from enforcing it, and also praying a decree for the amount recovered. This bill sets up an equity between the complainant therein and Byrne, the plaintiff in the suit at law, but not between the parties to the judgment. The defendant in the judgment has no interest in the subject-matter of this suit. The bill cannot be said to be auxiliary to the defendant Tunstall's defence, for it is not filed by him; nor has he any interest in any decree that might be made. Is it not, then, an original proceeding? I cannot doubt that it is. In every case in which the courts of the United States have held the bill to be auxiliary to the suit at law, and consequently not original, the de-

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

fendant at law has become the complainant in chancery.

In Dunn v. Clarke, 8 Pet. [33 U. S.] 3, the supreme court says: "The injunction bill is not considered an original bill between the same parties, as at law; but if other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill, and consequently the jurisdiction of the circuit court must depend upon the citizenship of the parties." Under the judiciary act, one of the parties must be a citizen of the state where the suit is brought.

Now here the bill is not between the same parties as at law, and moreover an entirely different interest is involved. For all practical purposes, it must be considered as an original bill; and as the complainant David Williams is a citizen of Tennessee, and the defendant Byrne a citizen of Mississippi, this court can take no jurisdiction of the case.

Upon the ground, also, that Williams failed to swear to his bill, without showing any sufficient reason for it, I should not hesitate to overrule the motion for an injunction.

WILLIAMS (CALLON v.). See Case No. 2,324.

WILLIAMS (CASSEDY v.). See Case No. 2,501.

WILLIAMS (CLEMENTSON v.). See Case No. 2,885.

Case No. 17,719.

WILLIAMS v. CRAVEN.

[2 Cranch, C. C. 60.] [1]

Circuit Court, District of Columbia. Dec. Term, 1812.

AMERCEMENT OF MARSHAL.

If a defendant arrested upon a capias ad respondendum be discharged under the insolvent act, before the return of the writ, and fail to appear, the marshal cannot be amerced.

The marshal, having returned cepi, discharged under the insolvent law, upon a capias ad respondendum, and no appearance having been entered for the defendant, the plaintiff moved to amerce the marshal for not bringing him in.

THE COURT (nem. con.) said the marshal could not be amerced. The law had not provided the means of compelling an appearance.

WILLIAMS (CREDITORS v.). See Case No. 3,379.

WILLIAMS (DE LAVEAGA v.). See Case No. 3,759.

WILLIAMS (DWIGHT v.). See Case No. 4,218.

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

Case No. 17,720.

WILLIAMS et al. v. EMPIRE TRANSP. CO. et al.

[3 Ban. & A. 533; 6 Reporter, 673; 17 Am. Law Reg. (N. S.) 698; 14 O. G. 523; 1 N. J. Law J. 315; 18 Alb. Law J. 313; 24 Int. Rev. Rec. 330; 35 Leg. Int. 440; 1 Md. Law Rec. 115.] [1]

Circuit Court, D. New Jersey. Oct., 1878.

PRACTICE IN EQUITY — PLEA OF NO INTEREST — JURISDICTION OF FEDERAL COURTS—CORPORATIONS, WHERE "FOUND."

1. Where one of the defendants appeared, and pleaded certain facts, which, if true, would show that he had no interest in the subject matter of the suit, and a motion was made to strike out such plea, which motion was, by consent, treated as a demurrer: *Held*, that the plea should not be overruled, nor ordered to stand as an answer, but that the benefit of the plea should be saved to the defendant until the hearing, when it would be treated as the testimony in the case might warrant.

2. A foreign corporation transacting business in a state, and amenable to the process of the courts of such state, is "found" within the state, in the sense of the judiciary acts, and may be sued in the federal courts therein.

[Cited in Wilson Packing Co. v. Hunter, Case No. 17,852; Hayden v. Androscoggin Mills, 1 Fed. 95; Ehrman v. Teutonia Ins. Co., Id. 478; Eaton v. St. Louis Shakspear Mining & Smelting Co., 7 Fed. 141; Boston Electric Co. v. Electric Gaslighting Co., 23 Fed. 839; Maxwell v. Atchison, T. & S. F. R. Co., 34 Fed. 288.]

[This was a bill in equity by John T. Williams and others against the Empire Transportation Company and others.]

A. Q. Keasbey and Joseph C. Clayton, for complainants.

George Harding, for defendant Hopper.

NIXON, District Judge. This is a motion to strike out a plea. The bill of complaint was filed for the infringement of certain letters patent, against the Empire Transportation Company, a corporation organized under the laws of the state of Pennsylvania, and doing business as such, among other places, at Jersey City and elsewhere within the state of New Jersey, and B. W. Hopper, the agent of the said company in this state.

The service of subpœna was made upon the defendant Hopper. No appearance has been entered for the defendant corporation; but Hopper has appeared and pleaded that at the time of the commencement of this suit he was acting merely as station agent, at Newark, New Jersey, for the Empire Transportation Company, a corporation organized and operating under the laws of Pennsylvania; that, as such agent, he had nothing whatever to do with the construction and operation of cars for transporting petroleum, nor with the running of the same within the district of New Jersey, nor in any other place; his duty as agent being merely to keep the books of the

[1] [Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. 6 Reporter, 673, contains only a partial report.]

company, to collect the amounts due for freights received and shipped, and to make returns for the same to the office of the company at Philadelphia, etc.

By the consent of the parties the motion to strike out the plea has been treated as a demurrer, under the rules. The facts stated are admitted to be true, and the question is whether they constitute a sufficient reason why the said Hopper should not have been included as a defendant in the suit. The plea, although not common, is one well known in equity practice. It is sometimes called a plea in abatement, and sometimes a plea in bar. A defendant is permitted to plead that he does not sustain the character which he is alleged to bear in the bill, or that he has no interest in the subject of the suit. Story, Eq. Pl. §§ 732–734.

I am quite sure that the plea ought not to be overruled. The facts stated may be a defence. The only doubt I have is whether I should save to the defendant the benefit of the plea to the hearing, or order it to stand for an answer. But, upon the whole, I think the former course is the true one, because so far as it appears to the court it may prove to be a defence. Matters may be disclosed in the evidence which will establish or avoid it, and no course should be now taken that will preclude the consideration of the question hereafter. The plea is, therefore, saved to the hearing, and to be then treated as the testimony in the case shall warrant.

But I infer from the argument of the counsel, at the hearing, that this is not the question which, in fact, the parties are endeavoring to have decided. They are reaching after a different matter. They wish to ascertain whether, if the proceedings should be discontinued against the defendant Hopper, for the want of interest, the suit is still maintainable against the Empire Transportation Company, a foreign corporation, in view of the provisions of the eighty-eighth section of the "Act concerning corporations," approved by the legislature of the state of New Jersey, April 7th, 1875 (Rev. St. 193), and also of the first section of an act of the congress of the United States, entitled "An act to determine the jurisdiction of circuit courts," etc., approved March 3d, 1875 (18 Stat. 470).

The state law referred to enacts that in all personal suits or actions hereafter brought in any court of this state against any foreign corporation not holding its charter under the laws of this state, process may be served upon any officer, director, agent, clerk or engineer of such corporation, either personally, or by leaving a copy at his dwelling-house, or usual place of abode, or by leaving a copy at the office, depot or usual place of business of such corporation.

The act of congress provides that no civil suit shall be brought before either of said courts (circuit or district), against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, etc. The corporation was not an inhabitant of the state of New Jersey at the time of filing the bill and serving the subpœna.

It has long been settled that the body corporate only lives within the boundaries of the sovereignty by which it is created. Bank of Augusta v. Earle, 13 Pet. [38 U. S.] 519; Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 286. This results from the fact that it is an artificial being, deriving its life from its charter, and has no capacity to exist, and no power to exercise its functions, except as they are conferred by the local law.

It would seem to be a legitimate, if not a necessary inference from this, that a corporation could not be found outside of the place of its creation, to be served with legal process. Such was the opinion of the late learned justice of the Second district (Nelson), in the case of Day v. India Rubber Co. [Case No. 3,685], in which he quashed a writ of attachment and summons that had been issued in the circuit court of the Southern district of New York against a New Jersey corporation. And in the subsequent case of Pomeroy v. New York & N. H. R. Co. [Id. 11,261], he went a step further, and held that the defendant corporation, organized in Connecticut, could not be found in New York, in the sense of being amenable to federal process, although the legislature of the state of New York in authorizing the body corporate to purchase lands, to enter into contracts, and to extend its road into and over the state, had expressly provided that it should be liable to be sued by summons in the same manner as corporations created by the laws of the state, and that the process might be served on an officer or agent of the company. He says (page 122):

"The difficulty here is in giving effect to this law of New York, providing for service of process on the defendants. That is regulated, as to this court, by the act of congress of 1789, already referred to, and cannot be altered or modified by any state law. According to that act, the defendant must be an inhabitant of the district, or be served with process within it, in order to give the court jurisdiction.

"Now, service of process, by the assent of this company, upon an agent, within the state, . . . cannot be said to be service upon an inhabitant of the district, or upon a person within it. The corporation is still a Connecticut company, resident within the state of Connecticut, but consenting to be sued in New York by service of process on its agent; and, however effectual this service may be in conferring jurisdiction over the company, upon tribunals governed by the laws of New York, it cannot have that effect in respect to federal tribunals, which are not only not governed by the state laws, but are governed by the act of congress, which has prescribed a different rule."

But the supreme court have given a different construction to the act, and, of course, have come to a different conclusion. Since the recent case of Ex parte Schollenberger [96 U. S. 369], it would seem that the court should look to the legislation of the state, and exercise jurisdiction over a foreign corporation, when provision has been made for the service of process. That action was one of a large number instituted in the circuit court of the United States for the Eastern district of Pennsylvania, by a citizen of that state against a foreign fire insurance company, which corporation had been allowed to transact its business in Pennsylvania by a law of the state, upon certain terms, one of which was that a person should be designated upon whom a service of summons could be made, in case of suit against them. The circuit court dismissed the case for want of jurisdiction, and because the law of the state could not confer it. But the supreme court, after long argument and careful consideration, issued a mandamus directing the circuit court to reinstate the suits and proceed to trial, holding that a foreign corporation, transacting business in Pennsylvania, in view of the legislation of the state, was found there for the purpose of service of the writ.

As the last utterance of the highest tribunal, this must now be accepted as the law, and it is instructive to review the steps by which the court reached the result.

In Bank of Augusta v. Earle, supra, it was held that a corporation might be deemed to have an existence beyond the place of its creation, to the extent of making contracts which the courts would enforce.

In Lafayette Ins. Co. v. French, 18 How. [59 U. S.] 404, the question was whether the federal tribunals would acknowledge the validity of judgment obtained in the courts of a state against a foreign corporation, when the state law authorized the corporation to transact business within the state only on the condition that service of process upon the agent of the corporation should be considered as service upon the corporation itself.

The court held that the state had the right to impose such a condition in regard to suits before its own tribunals, and that when the corporation sent its agent into the state to effect insurances, it must be presumed to have assented to the rule.

In Railroad Co. v. Harris, 12 Wall. [79 U. S.] 65, a suit was brought in the supreme court of the District of Columbia against the Baltimore & Ohio Railroad Company for injuries received from a collision on the road in the state of Virginia. The company received its charter from the state of Maryland. Authority was given by the legislature of Virginia to extend the road into that commonwealth, clothing the company with all the rights and privileges granted, and subjecting it to all the obligations and penalties imposed by the original Maryland charter. Congress subsequently passed an act authorizing the extension of a lateral road into the District of Columbia, and conferring upon the company the right to exercise the same powers and privileges, and imposing upon them the same restrictions in the construction of the said lateral road within the District as they might exercise or be subject to under and by virtue of the act of incorporation of the state of Maryland.

After argument and reargument the court held that no new corporations were created by this legislation in the state of Virginia or in the District; that the old corporation remained unchanged in its unity, but with the sphere of its operations greatly enlarged; and that although foreign, and incapable of migration from Maryland, it might, nevertheless, be found in the District of Columbia, exercising its authority upon such conditions as were prescribed by the act of congress. "One of these conditions may be," says Mr. Justice Swayne, speaking for the whole court, "that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly." This decision was referred to with approbation by the court in the subsequent case of Railroad Co. v. Whitton, 13 Wall. [80 U. S.] 284.

It will be observed from an inspection of these cases that it is nowhere asserted that jurisdiction can be conferred upon the federal courts by the legislation of the state. Indeed, such an inference is expressly repudiated in the Pennsylvania insurance cases (Ex parte Schollenberger, supra), where the court says:

"States cannot by their legislation confer jurisdiction on the courts of the United States, neither can consent of parties give jurisdiction when the facts do not; but both state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case. Ex parte McNiel, 13 Wall. [80 U. S.] 236."

It would, perhaps, more nearly accord with the principle announced in these insurance cases, to say that, by the legislation of a state, foreign corporations doing business in the state may be estopped from setting up in bar of a suit in the federal courts that they are not amenable to the jurisdiction.

But, whether this may be the meaning of the decision or not, I am constrained by the authority of these cases in the supreme court to hold that the jurisdiction of the court over the present suit is not to be defeated because the defendant corporation was organized under the laws of a sister state. It was transacting business here, and by the provisions of the local law (Rev. St. 1877, p. 193) it is subject to process by serving the same upon one of its agents, and has waived its right to question the legality of such a mode of service.

WILLIAMS (FERRIS v.). See Cases Nos. 4,749 and 4,750.

WILLIAMS (GIBSON v.). See Case No. 5,403.

WILLIAMS (GROVER & BAKER SEWING MACH. CO. v.). See Case No. 5,847.

WILLIAMS (HOFFMAN v.). See Case No. 6,579.

Case No. 17,721.

WILLIAMS v. The HOPE.

[1 Pet. Adm. 138.] [1]

District Court, D. Pennsylvania. 1798.

SEAMAN'S WAGES—ILLNESS IN FOREIGN PORT.

A seaman was left sick at a foreign port, and recovered. He might have rejoined the ship, but would not; and claimed wages for the voyage, which were refused, and only allowed until the time when he might have rejoined.

John Williams, a seaman, was left sick in a foreign port and recovered. The ship, on a circuitous voyage touched at a port, where the seaman also came on his way home; being one of the crew of another vessel. He could there have rejoined his ship, but refused, because, as he alleged, the ship had her complement of men. Wages were claimed for the voyage, which the court would not grant; but decreed payment to the time the sailor had it in his power to re-enter under his original contract, deducting what he had earned after his recovery from sickness; and until that period.

See the case of Bordman v. The Elizabeth [Case No. 1,657], in which the principles adopted by the court in cases nearly resembling the present, are fully explained. Thompson v. The Catharina [Id. 13,949].

Case No. 17,722.

WILLIAMS v. HOPKINS.

[2 Cranch, C. C. 98.] [2]

Circuit Court, District of Columbia. April Term, 1814.

ASSUMPSIT FOR COSTS OF APPEAL.

Assumpsit will not lie for the costs of appeal, against the person for whose use the appeal was prosecuted, and for whose use it was entered upon the record of the court of appeals; and a transcript of the record is not admissible evidence to support the action.

The suit in equity of Hodgson, for the use of Hopkins, v. Williams and Clark, was carried up by the plaintiff to the court of appeals of Maryland, where the plaintiff failed to prosecute his appeal with effect. Williams and Clark brought the present action of assumpsit against Hopkins, for whose use the appeal was prosecuted, to recover 94 dollars and 1⅓ cent costs on the appeal.

E. J. Lee, for plaintiff, offered in evidence a transcript of the record of the court of appeals in the suit of Hodgson, for the use of Hopkins, v. Williams and Clark.

C. Lee, for defendant, objected, that the record contained no evidence of any obligation or promise of the defendant to pay. There must be a promise in writing, for it is the debt of another. The act of Maryland of 1796, c. 43, § 13, applies only to actions at law, not to suits in equity; and if it did, the remedy must be by attachment, as provided by the statute; or, if it has become a debt of record, the remedy is by an action of debt. The assumpsit is merged in the higher remedy.

E. J. Lee, in reply. The record is admissible to prove that the suit was prosecuted for the benefit of Hopkins. The remedy by attachment prescribed by the Maryland statute, is only cumulative. That statute did not create a new obligation, and if it did, it is applicable only to actions at common law, originally "instituted" for the use of a third person.

THE COURT (THRUSTON, Circuit Judge, absent) rejected the transcript of the record as evidence.

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

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

WILLIAMS (HOWE v.). See Case No. 6,778.

WILLIAMS (HURD v.). See Case No. 6,918.

Case No. 17,723.

WILLIAMS et al. v. The JENNY LIND.

[Newb. 443.] [1]

District Court, E. D. Louisiana. Nov., 1853.

ADMIRALTY JURISDICTION — INTERIOR RIVERS — SALVAGE CONTRACTS—COMPENSATION.

1. Since the decision of the supreme court of the United States, in the case of The Genesee Chief v. Fitzhugh, 12 How. [53 U. S. 443], the admiralty jurisdiction has been considered as fully established on the Mississippi river, and all other rivers as far as they are navigable from the ocean, for vessels of ten or more tons burden.

2. The establishment of such a jurisdiction, necessarily carries with it all its incidents. Salvage services are as much the subject of admiralty jurisdiction, as damages arising from collisions or other maritime torts.

[Cited in Seven Coal Barges, Case No. 12,677.]

3. The stipulations of a written contract will be recognized no further in a court of admiralty charged with a case of salvage, than they accord with the opinion of the court in the exercise of a sound discretion.

[Cited in Chapman v. The Engines of The Greenpoint, 38 Fed. 672.]

4. This court as a court of admiralty, cannot be called upon to enforce a specific performance of such a contract, though such a contract may and often does form a fair and equitable criterion in fixing the quantum of salvage compensation.

[Cited in The Silver Spray, Case No. 12,857.]

[This was a libel for salvage by Joseph Williams and others against the barge Jenny Lind.]

J. W. Price, for libelants.

Duncan & McConnell, for respondent.

McCALEB, District Judge. This is a claim for salvage compensation for services ren-

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

dered on the Mississippi river. It appears that on the 25th of January last, the steamboat Hungarian left the port of Cincinnati bound for the port of New Orleans, having in tow the barge Jenny Lind, laden with a cargo of flour, pork and tallow. On the night of the 6th of February, both the steamboat and barge ran hard aground on Princeton bar, in the Mississippi river. The steamboat remained in that position until the 9th of February, when she got off through the assistance of the steamboat Moses Greenwood, and on the day after, proceeded on her voyage to this port. It does not appear that before leaving, any active exertions were made by her captain to get the barge afloat. The witness Robertson, who was examined under a commission, states that Captain Collier (commanding the Hungarian) took a yawl and went down and examined the condition of the barge and reported that he could do nothing with her. The witness Mass, who was supercargo on the barge, testifies that Captain Collier endeavored to make some arrangements with the Moses Greenwood to relieve the barge. The captain of the Greenwood consented to endeavor to do so, but asked for a delay of two days, to enable him to go up to the mouth of the Arkansas river, and put out his cargo and return. It was the opinion of those persons with whom the witness conversed upon the subject, that the barge would break in two in less than twelve hours. He conversed with the pilots of the Greenwood, and with the captains of both the Hungarian and Greenwood. The Greenwood felt her way out on the bar towards the barge, and the captain concluded that by means of a flat boat between her and the barge, they might pass the cargo out of the latter on to the Greenwood. He would, however, agree to do nothing until he had been up to the mouth of the Arkansas. He thought he might return on the Saturday following, but would make no agreement to be back until Sunday. He refused to leave any of his hands on the barge during his absence. He said he would charge a dollar per barrel for the flour, and fifty cents a hundred for the tallow and pork, on all he might take off and bring to New Orleans. Finding that the Greenwood would do nothing in time, and that some immediate action was necessary to relieve the barge, the captain of the Hungarian proposed to leave the witness in charge of the barge and to proceed with the steamboat on her voyage. To this the witness objected, as he was unwilling to have the whole responsibility on his hands. After a variety of propositions were discussed by the captain and the witness, the latter suggested that Mr. Williams, who is the libelant in this suit, and who was employed as mate on the Hungarian, should take charge of the barge and her cargo, and endeavor to get her off, as he had great confidence in his skill and ability. The captain declared he did not know what to do, and thought if he left Mr. Williams behind, he would be blamed if there was any loss. The witness then went to the libelant and proposed to him that he should remain behind and take charge of the barge. This the libelant refused to do, saying that he did not want anything to do with it; for if he remained behind, he would only be cursed for his pains. The witness insisted, and after a good deal of conversation, the libelant said it was a very bad job, but that he did not see what else could be done. He remained and took charge of the barge upon the terms and conditions expressed in the following agreement, which was signed at the time:

"To all whom it may concern. Know ye that I, Daniel Collier, captain of the steamer Hungarian, having had the barge Jenny Lind loaded with flour, pork and tallow, and bound for New Orleans, in tow, and grounded said barge on Princeton bar in the Mississippi river, where she now lies in a perilous situation, do hereby abandon said barge Jenny Lind and cargo, to Joseph Williams, and agree that he shall have fifty per cent. upon all property saved. As witness my hand, dated at Princeton, Mississippi, this 10th day of February, 1853. (Signed) D. Collier, Captain of the Steamer Hungarian, for all concerned.

"We, the undersigned, hands employed on the above-named barge Jenny Lind, do also, so far as we are concerned or have any authority, abandon said barge to Joseph Williams, as above stated, believing it to be the best thing that Capt. D. Collier could do for all parties concerned. As witness our hands the day and date above written. (Signed) W. H. Mass. Hugh M. George."

The testimony of Mass is substantially corroborated by that of Robertson, who had been the second clerk of the Hungarian, but who also left her with the libelant, to aid in getting the barge afloat. The other persons who participated in the salvage service, were Thomas Sheehy, Daniel Burns, William and John Murphy, George Light and Joseph McKiver. They have already received a compensation for their services in the nature of wages, but are now claiming a further allowance in the nature of salvage, and allege in their intervening libels, that when they executed their receipts in full for wages, they did so in ignorance of their rights.

Before the libelant Williams and those who aided in the salvage service left the Hungarian, they received their wages then due, and were regularly discharged from the obligations of their contract by the captain. They left with his full consent, and were perfectly at liberty to embark in the enterprise. The salvors have been examined, to prove the character of the services they rendered, and the length of time they were engaged in getting the barge afloat. I have, however, attached very little importance to their testimony, not because there is any reason to believe that they have been guilty of exaggera-

tion in their statements of the value of their services, but because I find the disinterested testimony of Mass and of Robertson, to be sufficiently clear and satisfactory to enable me to arrive at a satisfactory conclusion. Both of these witnesses participated in the efforts which were finally successful in delivering the barge, but neither of them appears before the court as a salvor. The former, as we have already seen, was the supercargo of the barge, and seems to have exhibited throughout a becoming solicitude for the interests of the owners of the cargo. The latter was employed by the libelant at five dollars per day, and although not perhaps entirely disinterested, seems to have made his statement with great candor and with every appearance of truth. He is, moreover, in all material facts, sustained by the testimony of Mass.

This evidence fully establishes the meritorious character of the services rendered. Tne barge was regarded by Captain Collier of the Hungarian, to be in a perilous condition. Apprehensions were entertained that she would break in two. There was about ten feet of water at her bows as she lay on the bar, about three and a half or four feet at her stern, and about two feet a little abaft midships. She had already leaked a little and she was very much strained. The river was falling when the salvors commenced operations, though it rose about the time they got the barge afloat. The weather was very disagreeable as it was raining nearly all the time, and the men were greatly exposed. The libelant Williams was compelled to employ an additional force of twelve negroes from the neighboring plantation of Major Smith, and for each of these he agreed to give the sum of $5 per day. He lost two flat-boats while they were laden with a portion of the cargo of the barge. He paid $75 for one, and $153 for the other. He also paid $25 for the use of another. The salvors were laboriously engaged for three days in getting the barge afloat, and a great portion of this time they worked in the night, as the river was falling. When they finally succeeded in getting her off, a contract was made with the steamboat New Orleans to tow her to this port, and for this service $800 was agreed to be paid.

It is unnecessary to notice more particularly the evidence upon which the claim for salvage compensation is founded. The proctor for the claimants denies that any such claim can be legally asserted. But I cannot concur in the position he has assumed. Since the decision of the supreme court of the United States, in the case of The Genesee Chief v. Fitzhugh [12 How. (53 U. S.) 443], the admiralty jurisdiction has been clearly established upon the whole length and breadth of the Mississippi, and all other public rivers, as far as they are navigable from the ocean, for vessels of ten or more tons burden. The establishment of such a jurisdiction necessarily carries with it all its incidents. Salvage services are as much the subject of admiralty jurisdiction, as damages arising from a collision or other maritime tort.

But while I am clear in the opinion, that I have no power to refuse to exercise a jurisdiction, which has been so fully and unequivocally conferred, and while I am satisfied from the evidence that the services performed by the salvors in this case, are of a highly meritorious character, I am yet constrained to differ very materially from the view taken by the captain of the Hungarian, in his estimate of the value of those services. Such contracts as the one which he thought proper to execute, in favor of the libelant (Williams), will be recognized no further in a court of admiralty charged with a case of salvage, than they accord with its own equitable discretion in filing the quantum of compensation. It would be absurd to call upon this court to enforce the specific performance of such contracts. They may, and often do, form a fair and equitable criterion in awarding compensation for salvage services, if those services have been rendered under circumstances which show that the parties have voluntarily, and without any controlling necessity, on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services quantum meruerunt; in either case it does not alter the nature of the service, but only fixes the rule by which the court is to be governed in awarding the compensation. It is still a salvage contract, and a salvage compensation. But contracts made for salvage services, are not held obligatory by a court of admiralty, upon the persons whose property is saved, unless the court can clearly see, that no advantage is taken of the situation of the parties, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. And it has been remarked with equal justice and elegance, that no system of jurisprudence, purporting to be founded upon moral or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others, to force upon them a contract, unjust, oppressive and exorbitant: that he might turn the price of safety to the price of ruin: that he might turn an act, demanded by Christian and public duty, into a traffic of profit which would outrage human feelings, and disgrace human justice. The Emulous [Case No. 4,480].

The terms of the contract in this case are entirely too exorbitant and do great injustice to the innocent owners of the barge and her cargo. If the services of the salvors had been rendered upon the ocean or on a dangerous coast, amid the perils arising from exposure to storms, I would not feel myself called upon to fix the quantum of compensation at a

higher rate than was allowed by this contract. The actual labor performed was doubtless great, but it was entirely unattended with any danger to life, that most important ingredient in a salvage service. I have no disposition certainly to pass censure upon the conduct of the captain of the Hungarian; but as cases of this nature may frequently arise from the growing commerce of the Mississippi, I deem it my duty to lay down such rules for the future guidance of the court, as will teach the masters of steamboats that they cannot with impunity trifle with the rights of owners who confide property to their charge. In no sense of the maritime law was this a case of derelict, however the term "abandon" may have been used by Capt. Collier in his contract with the libelant. Parties cannot, by the terms they choose to employ, change the well established principles of law. This question of what constitutes a derelict in the sense of the maritime law, has already been examined by this court in various cases, and very recently in the case of The T. P. Leathers. [Case No. 9,736]. The proceeds of the cargo in this case amount to $21,593.55, and the agreed value of the bark $3,600, making in the aggregate the sum of $25,193.55. Instead of the moiety allowed by the contract I am of opinion that one-sixth will be both a fair and liberal allowance. Of this amount I shall order the sum of $12 to be paid to each of the intervening libelants in addition to the sum they have already received as wages. The entire balance I shall order to be paid to the libelant Williams, in view not only of the services he has rendered, and the responsibility he assumed, but also of the expenses he incurred in saving the property.

The question of costs is reserved for future consideration, and in the meantime all parties having claims for costs under the provisions of the late act of congress, are ordered to present those claims to be filed with the clerk.

WILLIAMS (JORDAN v.). See Case No. 7,528.

Case No. 17,724.

WILLIAMS v. The JUNO.

[1 U. S. Law J. 154.]

District Court, D. Massachusetts. March, 1810.

SEAMEN'S WAGES — CAPTURE AND DETENTION — NEUTRAL SEAMEN.

1. Where an American (neutral) seaman was taken from on board an American vessel by a French cruiser, and the vessel ordered into a French port for adjudication, but subsequently recaptured by a Sicilian cruiser, and restored to the master on payment of salvage: *Held*, that such seaman, not having been able to return to his ship, was entitled to wages during the time of his detention on board the French cruiser, and for the whole voyage, at the stipulated rate; deducting his proportion of salvage.

2. The case of a neutral seaman thus detained, distinguished from the cases of detention of enemy seamen.

[This was a libel for wages by John Williams against the brigantine Juno, Samuel Page, master, and John Saunders and Samuel Upton, owners and claimants.]

Story & Saltonstall, for libellant.
Mr. Prescott, for respondent.

DAVIS, District Judge. The libellant, on the 10th of April last, shipped on board said brigantine as a mariner, on a voyage for Sicily and back to Salem, at the monthly wages of sixteen dollars. The vessel sailed on the 16th of April, and on the 29th of May following, when off Palermo, was stopped by a French privateer. The libellant with three other men was taken out, and the brigantine, under the command of a prize-master from the privateer, was diverted from her port of destination, and ordered to some port where she could be under the control of the government of the French. About twelve hours afterwards, said brigantine was recaptured by a Sicilian armed vessel, carried safely to Palermo, and there surrendered to the master on payment of salvage. She returned to Salem on the 10th of January last past, the master having hired other men in the room of those taken out by the French privateer. The libellant was carried to Naples, and it not being in his power to rejoin the brigantine, he embraced the first opportunity of returning to the United States, and arrived at Salem on the 10th of December last, without receiving or earning of wages on board of the vessel by which he returned. He had received, previously to his separation from the brigantine, thirty-nine dollars, and now demands the balance of wages at the stipulated rate, as if he had performed the voyage.

The respondents contend, that the claim for wages is extinguished under the circumstances, or, at most, he is entitled only to a pro rata allowance to the time when the brigantine was captured as above mentioned, and his separation from said vessel; and if any allowance should be made for the subsequent portion of the voyage, a proportional deduction on account of the salvage paid, is insisted on. The cases principally relied on to maintain the ground of defence assumed by the respondents, relate to a hostile capture by an enemy in open war. But this is to be considered, not as a hostile capture, but as the arrest and detention of a neutral ship by a belligerent, for examination and adjudication. Cases of this description can scarcely be expected to be found in the English books; for that nation is seldom neutral.

Sir Wm. Scott seems to have determined, that where a vessel is captured, and a seaman is taken out, the claim for wages is extinguished, though the vessel be afterwards re-captured and carried to her port of destination. The Friends, 4 C. Rob. Adm. (Am. Ed.) 143. In this, however, he differs from Lord Eldon, in the case of Bergstrom v. Mills, tried at nisi prius the year preceding. 3 Esp. 36. But it is observable, that the ground of Sir. Wm. Scott's

decision, in the case mentioned, is not applicable to the present case. The mariner, on whose claim he decided, was "taken," as he observes, "as a British subject, liable, with all the rest of his countrymen, to the hazards and hardships of war." But the distinction suggested by Judge Peters, in the case of Howland v. The Lavinia [Case No. 6,797], appears to me altogether pertinent; and with him, "I conceive the situation of a neutral seaman, one of the crew of a neutral ship, carrying in for adjudication, and taken away from his ship, by the vis major, is not similar to the case of the sailor, as determined by Sir Wm. Scott." "He is not captured and carried off as a subject liable to the hazards of war, but as a citizen of a friendly nation, whose vessel must submit to search and adjudication." The policy of the law, extinguishing wages by capture, rests also, as I conceive, on another principle. One of the objects in view, as in the case of shipwreck, is to stimulate the mariner to the utmost exertion to prevent the impending peril. This principle has its full operation in the case of a hostile attack by an enemy. With the neutral detained for search, examination, or adjudication, it is altogether different. On a deliberate consideration of the case, therefore, and the principles applicable to it, I am altogether satisfied with the view of cases of this sort, as to the legal effect on wages, which has been taken by different judicatories in our country; and to consider the circumstances of this case, not as constituting a capture which defeats all rights and interests, but as a temporary interruption only, which does not extinguish a claim for wages; the seamen being at no fault, and the intended voyage, with a slight and transient interruption only, successfully accomplished. In this decision, I agree with the repeated determinations of Judge Peters, and with the supreme court of Massachusetts in the case of Brooks v. Dorr, 2 Mass. 39. And the principles of the case of Beale v. Thompson, 4 East, 546, appear to me also to support the present claim. I therefore decree to the libellant wages at the stipulated rate to the time of his return to Salem, deducting the $39 previously advanced, and his proportion of salvage.

Case No. 17,725.

WILLIAMS v. KING.

[13 Blatchf. 282; 43 Conn. 569.] [1]

Circuit Court, D. Connecticut. March 27, 1876.

CONTRACTS OF MARRIED WOMEN—STATUTORY SEPARATE ESTATE.

1. A woman married in Connecticut, in 1864, executed there, in 1868, a promissory note, which was made and signed by her alone. The consideration for the note was the sale to her, by the payee, of some shares of stock in a corporation. At the time of her marriage she had real and personal property, part of the latter consisting in stocks of corporations, some of which were sold after her marriage, and the proceeds were reinvested in other stocks, both before and after the note was executed, so that the value of the property was not diminished. The shares of stock purchased or subscribed for were issued to her in her own name, and the subscriptions therefor, when made, were made by her husband acting as her attorney. There was no settlement to her separate use of the property she owned at her marriage, nor had any of her after-acquired property been conveyed to her in consideration of her personal services during coverture. In a suit at law brought against her to recover the amount of the note: *Held*, that, at the time of the execution of the note, she had separate property, under the statutory system of Connecticut in regard to the property of married women, which was intended to be, and was, bound by her contract, and that the plaintiff was entitled to recover.

2. Under an act passed in Connecticut, in 1872, a married woman may be sued at law for a cause of action on which she would previously have been liable in equity.

3. Where a married woman who has a separate estate enters into a contract for its benefit, or for her exclusive benefit, it will be presumed that such contract was made upon the credit of her estate.

4. A debt contracted for the purchase of property which goes into the actual or constructive possession of the purchaser, is a debt contracted for the benefit of his estate.

5. The statute of Connecticut in regard to the personal property of married women, construed.

6. Whether real estate in Connecticut, conveyed to a married woman without words indicating that it was conveyed to her sole use, is to be considered as her separate estate, quere.

[Action by Charles B. Williams against Belinda M. King on a promissory note.]

Alvan P. Hyde, for plaintiff.

Edward W. Seymour and John S. Beach, for defendant.

SHIPMAN, District Judge. This is an action of assumpsit against a married woman, to recover the amount of a negotiable promissory note for the sum of $2,500, made and signed by her alone, dated December 17th, 1868, and payable eighteen months after its date, to the order of William C. Hurd, and by him endorsed to the plaintiff. The defendant executed this note in consideration of the sale to her, by the payee, of certain shares of the corporation known as the Silix Lead Company. The case was tried by the court upon the following agreed statement of facts: "The defendant was married November 2d, 1864, to O. B. King, of Watertown, Connecticut, with whom she has ever since lived as his wife. She executed the note in question at said Watertown, upon the day of its date, to wit, December 17th, 1868, for the consideration stated in the declaration. At the time of her marriage, she was possessed of property, real and personal, exceeding in the aggregate twenty thousand dollars. A portion of the personal property consisted of stocks in sundry incorporated companies, some of which stocks have been sold since her marriage, and reinvestments made of the avails thereof in other stocks, both before and since the execution of said note, which reinvestments have

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

not diminished the value of the property owned by her at the time of her marriage. In making the reinvestments, the shares of stock purchased or subscribed for have been issued to the wife in her own name, and the subscriptions therefor, when made, were made by her husband acting as her attorney. None of the property owned by her at the time of her marriage had been settled to her sole or separate use, nor has any of her property, since acquired, been conveyed to her in consideration of her personal services during such coverture."

The general assembly of the state of Connecticut passed, in the year 1872, the following act: "Actions at law may be sustained against any married woman upon any contract made by her, upon her personal credit, for the benefit of herself, her family, or her estate, * * * in the same manner as if she were sole, single and unmarried." It is admitted that this act simply changed the form of the remedy for liabilities which had been, or should be, incurred by married women, and did not create any new liability, and, therefore, applied to pre-existing contracts. Buckingham v. Moss, 40 Conn. 461. The statute authorized an action at law against a married woman for the same cause of action upon which she would previously have been liable in equity. Another act had been passed in 1869, in regard to suits against married women, but, as that act was clearly prospective, its effect need not here be considered.

The general question which is now to be determined is, whether, under the statutory system of Connecticut in regard to the property of married women, as that system existed in 1868, a bill in equity could have been maintained against the defendant, to enforce payment of this note from her real or personal property? "The separate estate of a married woman will, in equity, be held liable for all the debts, charges, incumbhances, and other engagements which she does expressly, or by implication, charge thereon." 2 Story, Eq. Jur. § 1399. Her separate estate is, by implication, charged with the payment of debts contracted for the benefit of the estate, or for her own benefit, and upon her personal credit. Whether the contract was made upon her personal credit depends upon the circumstances of the case; but it is not necessary that the contract should make any reference to the separate estate, and it is presumed that a contract entered into by a married woman having a separate estate, for its benefit, or for her exclusive benefit, has been contracted upon the credit of her estate. Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613, 638; North American Coal Co. v. Dyett, 7 Paige, 9; Ballin v. Dillaye, 37 N. Y. 35; Mrs. Matthewman's Case, L. R. 3 Eq. 781. The Connecticut statute, which was intended to be in affirmance of the equity principles of the common law, declares the liability of a married woman to be "upon any contract made by her upon her personal credit, for the benefit of herself, her family, or her estate." The contract which is now in suit is a note entered into by a married woman, for the purchase price of stock which she had herself bought. A debt contracted for the purchase of property which goes into the actual or constructive possession of the purchaser, is a debt contracted for the benefit of his estate. Ballin v. Dillaye, 37 N. Y. 35. These principles being admitted, the question upon which the parties are at issue is, whether the defendant had or had not any separate estate which could be bound or held liable for the payment of her note. If she had none, her contract was invalid in law and inoperative in equity. If she had separate estate, it is admitted that the contract was, in equity, valid and inoperative.

The statute of Connecticut which was in force in 1868, in regard to the personal property of married women, provided, in substance, that "all the personal property of any woman married since the 22d day of June, 1849, and all the personal property thereafter acquired by a married woman, and the avails of any such property, if sold, shall vest in the husband, in trust for the following uses—to receive and enjoy the income thereof during his life, subject to the duty of expending from such income so much as may be necessary for the support of his wife, during her life, and of her children during their minority, and to apply any part of the principal thereof which may be necessary for the support of the wife, or otherwise, with her written assent, and, upon his decease, the remainder of such trust property shall be transferred to the wife if living, otherwise, as the wife may, by will, have directed, or, in default of such will, to those entitled by law to succeed to her intestate estate." The rights in the personal property of the wife, which are conferred upon the husband by this statute, are a modification of the rights which were vested in him by the common law. He formerly had an absolute estate; he now has a trust estate, with the right to receive and enjoy the income during his life, which income must, however, be appropriated, if necessary, to the support of his wife and minor children. This peculiar statutory estate is very far from being a sole and separate estate of the wife, which is defined to be that estate, either real or personal, which is settled upon the wife for her separate use, without any control over it on the part of her husband. Butler v. Buckingham, 5 Day, 492. The husband is vested with the trust estate, and the legal title to her personal property, by virtue of his position as husband. He is not trustee to her sole and separate use, but receives and enjoys the income during his life. By virtue of the marital relation, he has the custody and control of the property, and of the rents and income thereof, until he is removed from the trusteeship for cause, or until he abandons his wife, and, in the latter event only, does the property vest in her as her sole estate. If the wife could, during the

trusteeship of the husband, bind the trust property by her own obligations, the checks which the statute has attempted to place upon her right to the enjoyment of the property during her life, would be of very little avail. The intent of the statute was to modify the severity of the common law, and preserve her personal estate for her heirs, but not to place it within her control as her separate estate, unless by the agreement of the parties. Chief Justice Seymour, in Cooke v. Newell, 40 Conn. 596, defines the nature of the estate which is created by the statute, as follows: "The statute limits the rights of the husband in his wife's property, but does not deprive him of all rights. It leaves him the income and profits of it, and, except so far as specially restrained, he has the care, management, and control of it during his life. The trust is, therefore, not to the sole and separate use of the wife, free from the control of her husband. She has not that control of it which she has in equity of her separate estate." It follows, that the personal property which is vested in the husband, as trustee, and the title of which has never become divested, is not bound by the wife's contracts.

But, by ante-nuptial or post-nuptial agreement, the wife's property may be settled upon her to her separate use, freed from the trust. The husband may, after marriage, give his own property to the wife, when the rights of creditors do not interfere, in which case she will take a sole and separate estate. The husband will have thereafter, by virtue of the statute, no such use or life estate in the property so given, as would be vested in him in respect to personal property given to the wife by a third person, without words indicating that it was to her sole use. If an absolute gift is made to her by the husband, it is to her exclusive use, although words of exclusiveness are not used, and he cannot resume the use or control of the property by force of the statute. He will be her trustee under the general rules of equity, if necessary to preserve the title to the property, but not under the statute. Riley v. Riley, 25 Conn. 154; Deming v. Williams, 26 Conn. 226; Baldwin v. Carter, 17 Conn. 201. The husband may, also, by clear and unequivocal acts, free the property of the wife from the trust which the statute has created, divest himself of the estate which he has in consequence of the marriage, and give to the wife the entire estate and right to the income, so that, as to the personal property which he has thus transferred, while the legal title may remain in him, she will have a sole and separate estate. Merely permitting the title of stocks or bonds to remain in her name, or permitting her to collect interest or dividends, without any other circumstances to indicate his intention, would not show that the trust was waived. But if, in addition, he permits the wife to manage the property as her own, to change its character, to sell it and invest the proceeds in her name, or, if he transfers the stock to her, giving her a certificate in her own name, by these and like acts he furnishes the clear and satisfactory evidence which the law requires, of his intention to relinquish all his claims to her property and to give to her its complete control. Smith v. Chapell, 31 Conn. 589; Jennings v. Davis, 31 Conn. 134; Mason v. Fuller, 36 Conn. 160; Hayt v. Parks, 39 Conn. 357.

The summary of facts in this case states, that a portion of the personal property which the defendant owned at the time of her marriage consisted of stocks in incorporated companies, some of which have been sold since her marriage, and reinvestments made of the avails thereof, both before and since the execution of the note in suit. "In making the reinvestments, the shares of stock purchased or subscribed for have been issued to the wife in her own name, and the subscriptions therefor, when made, were made by her husband acting as her attorney." It thus appears, that, before the execution of this note, the purchased stocks were issued to the wife in her own name, although the statute provides that all reinvestments shall be made in the name of the husband, as trustee. But, a more significant and unequivocal act, indicating an intent upon the part of the husband to abandon the trust estate, as to a portion, at least, of the property, and give to the wife the interest which he had in that portion, is the fact that the subscriptions for new stock were made by the husband acting not as trustee, but as her attorney. These subscriptions, being made by her attorney, must have been made in her name, and the certificates must also have been issued to her in her name, by the direct agency of her husband acting in her behalf. These positive acts of the husband leave no doubt, under the Connecticut decisions in regard to the statutory status of the wife's property, that he had given to her the entire control of so much, at least, of the personal property as he had then deliberately subscribed for in the name of the wife, and, therefore, that, at the time of the execution of the note, she had separate property, which was intended to be, and was, bound by her contract made for the benefit of her estate.

It is not necessary to decide whether the real estate was the separate property of the wife. The brief statement of facts does not show whether the real estate was situated in Connecticut or not, but it is inferred that it was situated in this state. As it is a question of importance, whether, under the statutes of Connecticut, real estate which has been conveyed to a married woman without words indicating that it was conveyed to her sole use, is to be considered as her separate estate, and as it is a question not necessary to be now decided, I express no opinion upon this branch of the case.

Let judgment be entered in favor of the plaintiff.

Case No. 17,726.

WILLIAMS v. LEONARD et al.

[9 Blatchf. 476; 5 Fish. Pat. Cas. 381.] [1]

Circuit Court, N. D. New York. March 19, 1872.

INFRINGEMENT OF PATENTS — SUITS IN EQUITY — PROFITS AND DAMAGES—SALARY OF DEFENDANT.

1. In a suit in equity, for the infringement of letters patent, brought before the passage of the act of July 8th, 1870 (16 Stat. 206, 216, §§ 55, 111), both profits and damages cannot be recovered.

[Cited in Chapman v. Ferry, 12 Fed. 695. Distinguished in Untermeyer v. Freund, 58 Fed. 212.]

2. An interlocutory decree in such a suit, entered after the passage of such act, inadvertently provided for the recovery of both profits and damages. The report of the commissioner reported both profits and damages, and was excepted to by the defendant, on the ground that the damages could not be recovered in the suit: *Held*, that the point could not be raised by an exception to such report, but that, nevertheless, the court would not award any damages, and would resettle the interlocutory decree, so as to exclude them.

3. In an accounting for profits, the defendant cannot be credited with a sum of money as a salary earned by and paid to himself, while engaged in the business which earned the profits.

[This was a bill in equity by William Williams against Calvin A. Leonard and others for alleged infringement of a patent. Heard on exceptions to commissioner's report.]

F. A. Macomber, for plaintiff.

H. H. Woodward, for defendants.

WOODRUFF, Circuit Judge. The form of the interlocutory decree in this case warranted the commissioner in reporting both the profits made by the defendants, by infringing the patent of the complainant, and also the damages (over and above, or beyond the amount of, those profits) sustained by the complainant, as allowed in actions brought after the passage of the act of July 8, 1870 (16 Stat. 206, 216, §§ 55, 111). Whether any language can be found in the opinion of the court, delivered after the hearing of the cause on pleadings and proofs, that seemed to warrant such an interlocutory decree, I am not able, from recollection, to say; but it is quite certain, that the court did not intend to decide, that, in a suit brought in equity before the passage of that act, both profits and damages can be recovered. Section 111 declares, that actions and causes of action then existing may be commenced and prosecuted, and that suits then pending may be prosecuted to final judgment and execution, in the same manner as though the act had not been passed, and that the remedial provisions of the act shall be applicable to all suits and proceedings thereafter commenced, although the cause of action may have arisen before. The provisions of the statute regulating the form of action, and prescribing the measure of recovery, at law or in equity, are provisions applicable especially to the remedy; they are among the "remedial provisions." When they were declared applicable to all suits thereafter brought, as an exception to language importing that prior causes of action, not yet prosecuted, should be commenced and prosecuted, and suits commenced should be prosecuted to judgment, in the same manner as if the act had not been passed, the negative implication is plain, that those remedial provisions which were new have no application to suits then pending. In construing an exception, the expressio unius is eminently the exclusio alterius.

The interlocutory decree is wrong. Had such a decree been entered by consent, the defendants might be bound by it; but I presume it was entered without the attention of counsel being called to the construction of the statute. How it was settled does not appear.

But, in so far as the exceptions to the report of the commissioner are addressed to this point, the defendants have mistaken the mode of correcting the error. The report conforms to the decree, and, therefore, is not, in this particular, the proper subject of exception. The court should have been applied to, to resettle the decree.

Nevertheless, it is not too late to make the correction. Entertaining the opinion above expressed, the court will not proceed to a final decree against the defendants, which it deems not warranted by law; and the facts reported in detail by the commissioner will enable the court to decree the recovery of the gains and profits made by the defendants, by the infringement, excluding damages beyond that amount. The complainant had his election, to proceed for such gains and profits, or to sue for damages, and he chose the former. As to the result of such election, the law has not been changed since he brought his suit, and it is no hardship that he is held to his election.

As to the "salaries" of the defendants, during the period in which they have been engaged in infringing, they have no title, as against the complainant. It would be very great injustice, if the quantum of gains and profits recoverable by a complainant depended on the question, how much of such gains and profits the defendants used for their own support, or the support of their families, or, as even more broadly claimed here by the defendants, how much they saw fit to appropriate to their own use. Infringers would rarely be required to pay over anything, if they could divide the gains and profits among themselves, under the name of salary, wages, or any other designation. Men work for gains and profits, but they are gains and profits still. Men support themselves and their families out of their gains and profits,

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

but that does not change their nature. If it were not so, inventors might, by reason of infringements, fail to obtain anything, and the infringers obtain what they see fit to term adequate salaries, out of their piracy. What, in good faith, the defendants pay to others, as expenses, may be taken as the cost, to them, of their manufacture. What they take to themselves are gains. They might, perhaps, have earned and gained as much, or perhaps more, by laboring in some other business, in no violation of the rights of their neighbor; but they cannot be permitted to gain either wages or salary by a violation of such rights.

The exceptions, as exceptions, must be overruled, with costs; but the interlocutory decree should be resettled and entered, and the amount of gains and profits, which, as I understand the report, are $1,668.19, should be awarded by the final decree, with interest thereon, and the costs of suit.

Case No. 17,726a.

WILLIAMS v. The LIZZIE HENDERSON.[1]

District Court, S. D. Florida. May, 1880.

STATE PILOTAGE LAWS—DISCRIMINATION—CONSTITUTIONALITY.

[A state statute exempting vessels owned wholly in the state from the payment of any pilotage under the existing state laws unless a pilot is actually employed (Act Fla. March 7, 1879) is not a contravention of Rev. St. § 4237, prohibiting the states from discriminating in the rates of pilotage or half pilotage between vessels sailing between ports of the same state and vessels sailing between ports of different states; but such an act is void under the provision of the constitution of the United States that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another state." Article 1, § 9, cl. 6. This latter provision is an inhibition upon the states as well as upon United States.]

[This was a libel for pilotage by C. P. Williams against the steamboat Lizzie Henderson.]

G. Bowne Patterson, for libellant.

L. W. Bethel, for respondent.

LOCKE, District Judge. This is a case wherein a pilot libels for pilotage, under a regulation that gives the first pilot speaking a vessel either entering or leaving port half pilotage. The answer admits the facts alleged in the libel, namely, that the libellant did tender his services as pilot as the vessel was leaving the harbor, bound on a voyage to Havana, but alleges that the vessel is owned wholly within the state of Florida, and therefore exempt from paying any pilotage dues unless a pilot is actually employed, in accordance with an act of the legislature approved March 7, 1879, which provides: "That vessels owned wholly in this state shall not be required to pay any pilotage upon entering or leaving any port in this state, unless they avail themselves of the services of a pilot." It is admitted that previous to the passage of this act all vessels were liable to pay pilotage, whether accepting the services of the pilot or not, and the case turns upon the validity of this act. This is claimed by the libellants to be—First, in violation of the provisions of section 4237 of the Revised Statutes, which declares that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage or half-pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states"; second, repugnant to the sixth clause of the ninth section of the first article of the constitution of the United States, which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another"; and, third, that it is a regulation of commerce established by a state, and hence void.

Taking these objections in the order stated, the first relates to the restrictions contained in section 4237 of the Revised Statutes. This plainly divides vessels into two classes,—vessels sailing between the ports of one state, and vessels sailing between the ports of different states; or, in other words, vessels bound from any port to another port in the same state; or those bound to some port in a state other than the one from which they sail,—and declares that between these two classes of vessels there shall be no discrimination. It does not intend to prevent discrimination between individual vessels of either of these classes based upon size, draft of water, or other proper grounds, but evidently is to prohibit any state from so far giving preference to commerce carried on between its own ports as to establish a discrimination between two vessels based upon the fact that one vessel is engaged in a voyage to a port beyond its limits, and the other is not. That this was the intent of the law becomes more apparent when upon examining the pilotage laws in force at the time of the passage of this act, July, 1866, we find that certain states—Massachusetts, Georgia, and perhaps some others—had laws in force embodying this very discrimination in favor of vessels sailing between ports within their own states, and against vessels sailing between such ports and those of other states, The discrimination in the case under consideration is not based upon such state of facts, and I do not therefore consider it in conflict with its provisions.

The two remaining objections may be considered together, because, if the first is valid, the other becomes immaterial. The question as to whether or not pilot laws are regulations of commerce has been so clearly determined by the supreme court that it does not need further consideration, and we take that for granted. Ex parte McNiel, 13 Wall. [80 U. S.] 236; Cooley v. Board of Wardens of Philadelphia, 12 How. [53 U. S.] 299. In

[1] [Not previously reported.]

the matter of state legislation as connected with questions of regulations of commerce where congress has not legislated, a long line of decisions has determined, perhaps not directly, but to me satisfactorily, that, from necessity, there have been certain matters upon which the states have properly legislated that have more or less directly affected commerce, and in reality became regulations of commerce, although not originally intended as such. Among these are questions of pilotage, harbor police, quarantine, health, and other like matters, upon which the action of the states has either been directly adopted by congress, as in matters of pilotage and quarantine, or perhaps from an intimate relation to internal regulation. But in all such cases the appropriate limit of state legislation has been its necessity for the benefits of commerce generally, protection against importation of disease, or control of domestic matters; and, whenever such limits have been disregarded, the regulations established in regard to foreign or inter-state commerce have been held to be void as invading the exclusive province of national legislation. Steamship Co. v. Port Wardens, 6 Wall. [73 U. S.] 31; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1; Foster v. Master and Wardens of Port of New Orleans, 94 U. S. 246; Passenger Cases, 7 How. [48 U. S.] 414; Guy v. City of Baltimore [100 U. S. 434].

The rights of the states to establish pilotage regulations sufficient to insure at their several ports competent pilots, and determine such reasonable fees as will guarantee them compensation, has been recognized both by congress in adopting the regulations in force in 1789, and in adjudications subsequently; but the ground of such recognition and approval has been "the necessity of conforming regulations of pilotage to the local peculiarities of each port," and, when that necessity is satisfied, any further interference with commerce is as liable to objection as any other commercial regulation. The history of the restrictions placed upon states by the provisions of the constitution relating to commercial regulations shows too plainly to be misunderstood their object and intent. As early as 1778, the state of New Jersey pressed upon the attention of congress a memorial upon the subject; and in 1781 Dr. Witherspoon presented a resolution declaring it indispensably necessary that the United States, in congress assembled, should be vested with a right of superintending the commercial regulations of every state, that none might take place which should be partial or contrary to the common interest.

This question, namely, that of the national government having exclusive control of commercial regulations, had an important influence in replacing the articles of confederation by the present constitution. In Rhode Island it caused a delay of two and a half years in its adoption, and was thoroughly discussed and considered in all its bearings, and has been frequently adjudicated since. The supreme court, in the case Veazi v. Moor, 14 How. [55 U. S.] 568, says: "The design and object of that power as evinced in the history of the constitution was to establish a perfect equality among the several states as to commercial rights, and to prevent unjust and invidious distinctions which local and partial interests might be disposed to introduce and maintain." Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1; Brown v. Maryland, 12 Wheat. [25 U. S.] 419; New York v. Miln, 11 Pet. [36 U. S.] 102; License Cases, 5 How. [46 U. S.] 504. These decisions show conclusively how the supreme court has considered the intention and design of the framers of the constitution in this matter, namely, that there should be perfect equality, and no partial laws founded upon local greed or favoritism in commercial matters; but has such intention and design been so declared as to be prohibitory upon the states?

The clause of the constitution cited, namely, the sixth clause of the ninth section of article 1, it is claimed, has this effect. It provides that "no preference shall be given to the ports of one state over those of another," and has been frequently commented upon in judicial decisions, and held to be not a limitation upon the power of congress alone in regulating commerce, for the purpose of producing entire commercial equality between states, but also a prohibition upon each state to destroy such equality. In Passenger Cases, 7 How. [48 U. S.] 414, Mr. Justice Wayne says: "The sixth clause of the ninth section of the first article of the constitution, which declares that no 'preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another state,' is a limitation upon the powers of congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the states to destroy such equality by any legislation prescribing a condition upon which vessels bound from one state shall enter the ports of another." Again he says: "But I return to those clauses with which I have said the act in question is in conflict. It will be conceded by all that the fifth clause of the ninth section of the first article of the constitution was intended to establish among them a perfect equality in navigation. That all should be alike in respect to commerce and navigation is an enjoined constitutional equality which can neither be interrupted by congress nor by the state." The court, in Inman S. S. Co. v. Tinker, 94 U. S. 245, says: "The commerce clauses of the constitution had their origin in a wise and salutary policy. They give to congress the entire control of the foreign and interstate commerce of the country. They were intended to secure harmony and uniformity in the regulations by which they should be governed. Wherever such harmony goes, the power of the nation accompanies it, ready and competent, as far as pos-

sible, to promote its prosperity, and redress the wrongs and evils to which it may be subjected." In Ward v. Maryland, 12 Wall. [79 U. S.] 431, the court says: "Inequality of burden, as well as want of uniformity in commercial regulations, was one of the grievances of the citizens under the confederation; and the new constitution was adopted, among other things, to remedy those defects in the prior system. Evidence to show that the framers of the constitution intended to remove those great evils in the government is found in every one of the sections referred to, and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, showing that congress, as well as the states, is forbidden to make any discrimination in enacting commercial or revenue regulations."

Wherever the idea has been expressed that this clause is not a prohibition upon the states, it has been in connection with the idea of internal commerce or domestic affairs. Cooley v. Port Wardens, 12 How. [53 U. S.] 299; Munn v. Illinois, 94 U. S. 113. In Cooley v. Port Wardens [supra] it was cited, and, instead of dismissing it as not applying to any action of the state, the court considered it at length, and decided that the special act in question did not make the discrimination prohibited. Had that act exempted all vessels owned in Pennsylvania from paying pilotage, and compelled those owned elsewhere to pay it, the language of that decision satisfies me that the conclusion would have been different. Indeed, it seems but reasonable that if, "when congress sleeps upon its post, the state may seize its armor and exercise its authority," as is expressed in Cribb v. State, 9 Fla. 409, the same prohibitions which would affect congress on account of the subject-matter of legislation should cling to it, and restrain the states in their action. Were this a local regulation relating alone to the government of pilots, the objection to the application of this principle might be entitled to greater weight; but it is a regulation, in this case relating directly to foreign commerce, and is in no way intended to promote the efficiency or welfare of the pilots, control or regulate them, or provide for their support, neither to protect commerce at large nor provide for its necessities; but its whole object and aim is to make a discrimination in favor of vessels owned by citizens of this state, against all others. That is the entire gist and substance of the enactment.

Preference can only be given the ports of a state by giving advantages to those engaged in doing business through such ports. It is not the port, but the commercial transactions carried on by or through its medium, that are to be given the benefit of such relations. Neither is it the individual port that is not to be preferred, but the state or its citizens through its ports. Nor do I understand that such preference must be confined to vessels entering or leaving such ports, clearing from or being bound to them, any more than being owned and being registered at them, to justify an application of this prohibition. All are protected from being placed in any less favorable position in any commercial transaction on account of the ports of any state through which their business is done than those whose relations are with a port of a different state. Vessels are recognized and known as belonging to certain ports according to the residence of the principal owner, and any preference shown them, or any unequal burden imposed upon them on account of the state in which they are owned, is certainly showing a preference for the ports of the more favored state, whether expressed in so many words or not,—the effect is the same. Had the statute exempted all vessels arriving from or bound to Texas, and compelled payment from those arriving from or bound to Louisiana, can there be any question but what preference has been given to the ports of one state over those of another, although ports may not have been mentioned? And does not this hold equally as good if the difference is on account of the state where the vessel is owned? I consider it does. I am satisfied that if congress should declare all vessels owned within the state of New York might enter and leave any port without the payment of fees, pilotage or of any other character, while others owned elsewhere should be compelled to such payment, then this clause could be justly interposed as prohibitory; and I consider that the same restriction rests upon the legislation of a state relating to foreign commerce as in the present question. A state cannot do indirectly what it is prohibited from doing directly.

The constitution of the United States, and the powers confided by it to the general government, to be exercised for the benefit of all the states, ought not to be nullified or evaded by astute verbal criticisms, without regard to the grand aim and object of the instrument, and the principles on which it is based. Passenger Cases, 7 How. [48 U. S.] 414. The amount involved in the case at bar is small, but the principle of discrimination, if justified, would not be of slight importance to those interested. To a line of vessels carrying the mail between Cedar Keys and Havana, as contemplated by the post-office department, twice a week, it would in the course of a year amount in half pilotages at this port alone to $4,368, in favor of owners resident within this state; and, if the same regulation should be enforced at Cedar Keys and other places where the vessels might touch, it would be indefinitely increased. If such discrimination might be legally made in matters of pilotage, it might with equal propriety be established in quarantine, port wardens, harbor masters, wharfage and dockage dues, until the people of any state having no pecuniary interest in keeping such burdens, which must to a certain extent rest upon

commerce, within reasonable bounds, might drive all vessels owned elsewhere from its ports and monopolize the entire commerce. If one state might make such discrimination, all might with equal propriety, and the citizens of inland states be, not theoretically, but practically, prohibited from engaging in foreign commerce; and we should soon see local greed and avarice destroy all that has been accomplished by the long line of commercial regulations, based upon the principle of equality of the states in such matters.

But it has been asked, if the discrimination is against vessels owned in other states, why not relieve them of such burden and place them upon an equal footing with the more favored state, relieving all vessels of compulsory pilotage? It is not for courts to decide what the law should be, but what it is; and the only question under consideration is whether the act of 1879 is valid or not. If not, it has not been claimed but what the pilot laws in force prior to the passage of that act were valid and binding, and, if it is invalid, they are still in force. And this I consider to be the case. The amendment of 1879 in no way changed the pilotage laws, as it, in effect, only attempted to establish a discrimination which I consider to be contrary to the spirit and letter of the constitution, hence invalid; and the pilotage is due under pre-existing regulations, and decree will follow accordingly.

Vide [U. S. v. Dickson] 15 Pet. [40 U. S.] 165.

WILLIAMS (MARSHALL v.). See Case No. 9,136.

Case No. 17,727.

WILLIAMS v. MECHANICS' BANK OF NEW HAVEN.

[5 Blatchf. 59; [1] 10 Pittsb. Leg. J. 89.]

Circuit Court, S. D. New York. Sept. 22, 1862.

CORPORATIONS—TRANSFERS OF BANK STOCK—ATTACHMENT AND SALE—LIABILITY OF CORPORATION.

1. Where a banking corporation issued a certificate to C., certifying that he had standing to his credit on the books of the bank, ten shares of the capital stock thereof, "which are transferable at the bank, in person or by attorney:" *Held*, that the words, "transferable at the bank," meant "transferable only at the bank," and also implied that an act of transfer was to be done at the bank, under the cognizance of the officers of the bank.

[Cited in Lippitt v. American Wood Paper Co., 15 R. I. 145, 23 Atl. 112.]

2. The transfer of the certificate by C. did not operate as a transfer of the stock, except as against C., although the charter of the bank provided that the stock should be transferable according to such rules as might be established by the directors, and they had established no such rules.

3. The stock having been attached in the hands of the bank as the stock of C. and sold on execution, and transferred by the bank to the purchaser on such sales: *Held*, that the bank was not liable for the value of the stock to a party to whom C. had, prior to the attachment, transferred the certificate issued to him, the bank not having been, prior to the attachment, applied to by such party to transfer the stock to him, or notified of his claim.

[Cited in brief in Baltimore R. Co. v. Sewell, 35 Md. 246; Cheever v. Meyer, 52 Vt. 70.]

This was an action brought to recover the value of ten shares of the capital stock of the defendants, a banking corporation. On the trial, a verdict was rendered for the plaintiff [Richard S. Williams], subject to the opinion of the court, and the plaintiff now moved for judgment on the verdict. The facts were as follows: On the 18th of May, 1855, George W. Corlies, a resident of the city of New York, was the owner of ten shares of the stock of the defendants, and received a certificate therefor from them, in the following words: "Mechanics' Bank, No. 547. Shares 10. This is to certify, that George W. Corlies, of New York, has, at this date, standing to his credit, on the books of this bank, ten shares of the capital stock thereof, which are transferable at the bank, in person or by attorney. John W. Fitch, Cashier. New Haven, May 18, 1855." This certificate continued in Corlies' possession until on or about the 13th of March, 1856, when he effected a loan of money from the Market Bank, in the city of New York, and delivered the certificate in question to the president thereof, as collateral security for the loan, with the following power of attorney attached: "Know all men by these presents, that I, George W. Corlies, for value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer, unto Richard S. Williams, president of the Market Bank of the city of New York, ten shares Mechanics' Bank New Haven stock, standing in my name on the books of the said bank, and do hereby constitute and appoint Chester W. Arthur my true and lawful attorney, irrevocable, for me, and in my name and behalf, but to (blank) use, to sell, assign, transfer and set over all or any part of said stock, and, for that purpose, to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that my said attorney, or my (his) substitute or substitutes shall lawfully do by virtue hereof. In witness whereof, I have hereunto set my hand and seal, the 13th of March, 1856. George W. Corlies. Signed, sealed, &c., R. H. Haydock." Corlies gave his note for the loan, which was for $3,000, payable in thirty days. This note was not paid at maturity, but was renewed from time to time, until August, 1859, when the last renewal fell due, and was protested for non-payment. At the time the loan was obtained, the Market Bank received from Corlies other collaterals, but no question arose out of that circumstance. On the 8th of

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

September, 1859, the plaintiff presented the certificate in question to the defendants, and demanded a transfer of the ten shares of stock therein named, and the issue of a certificate for the same to him, and, on being refused, demanded from the defendants the value of the stock, which was also refused. The grounds upon which the defendants refused to comply with the demands of the plaintiff, to transfer the stock in question to him, or pay the value thereof, rested upon the following facts: In September, 1857, two years before the demand for a transfer was made by the plaintiff, Ebenezer D. Brockway, a resident of Connecticut, and a creditor of George W. Corlies, attached the stock, in a suit brought in Connecticut, and, in January, 1858, judgment was rendered in his favor against Corlies. On an execution duly issued upon this judgment, and levied upon the stock, it was sold by the sheriff, Brockway becoming the purchaser. The sale on the execution was in February, 1858. The sheriff gave Brockway a certificate of sale, as required by the laws of Connecticut. He presented that certificate to the defendants and demanded a transfer, which was made, and a certificate was issued to him. The defendants had no notice that the plaintiff had any claim to the stock, either as collateral security or otherwise, until long after the sale on execution and the transfer to Brockway, and not until the time, or about the time, when the demands before referred to were made by the plaintiff.

William Fullerton, for plaintiff.
George C. Goddard, for defendants.

Before NELSON, Circuit Justice, and SHIPMAN, District Judge.

SHIPMAN, District Judge. No question arises, in this case, touching the validity of the proceedings on the attachment, and sale on execution, of this stock. They were all regular, and in conformity to the laws of the state of Connecticut, and the transfer of the shares to Brockway, on his presentation of the certificate, was required by law, in the absence of any other consideration. It is, however, insisted by the plaintiff, that, inasmuch as the charter of the defendants provides that the stock "shall be transferable according to such rules as may be established by the directors," and it does not appear that the directors have established any such rules, except what may be implied from the certificate, therefore the transfer of the certificate operates as a transfer of the stock. The application of the argument is, that when Corlies delivered this certificate, with the power of attorney attached, to the plaintiff, the latter became vested with the legal title to the stock, and that the defendants are bound by such transfer, whether they had any notice or not. We think this view of the matter entirely overlooks the true construction of the certificate and the importance to be given to the words "transferable at the bank." The counsel for the plaintiff, in his criticism of the language of the instrument, suggests, that if the expression had been "transferable only on the books of the bank," the legal purport and significance of the paper would have been very different. But, while we concede that the form of expression suggested would be more full and exact, its legal import would, in our judgment, have been substantially the same. By the words "transferable at the bank," the defendants have indicated the place where the transfer must be made, as they had the right and power to do. To have inserted the word "only," would have added no force to the meaning. When a note or sum of money is made payable in terms at a specified place, or bank, it is payable there and nowhere else, and no words of exclusion are necessary to limit the construction of the instrument to the place named; and, in the eye of the law, this certificate reads the same as if the expression was, "transferable only at the bank."

As to the omission in the certificate to state that the transfer was to be made on the "books" of the bank, we do not regard this as material. The words "transferable at the bank" do not refer merely to the place—within the walls of the bank building—but to an act to be there done, and to assume a formal and authentic shape, under the official cognizance of the officers of the institution. All meaning in these words dissolves and evaporates under any other construction.

It follows, from these views, that we must hold that the plaintiff, in order to have obtained a valid title to this stock, (except as between him and Corlies,) should have applied to the defendants to have it transferred, or, at least, have given them notice of a claim upon it, before it was attached and sold on execution; and, that, having failed to do so, he has no claim against them.

Case No. 17,728.

WILLIAMS v. MISSOURI, K. & T. RY. CO.

[3 Dill. 267.] [1]

Circuit Court, W. D. Missouri. 1875.

JURISDICTION OF FEDERAL COURTS — CITIZENSHIP OF CORPORATIONS.

1. For the purposes of federal jurisdiction a corporation is conclusively considered as if it were a citizen of the state which created it.

2. This principle applied, and the defendant company held to be a citizen of the state of Kansas, under whose laws it was organized, and not of Missouri under whose laws it had gone into that state and purchased and was operating therein a line of railway in connection with its line in Kansas.

[Cited in Copeland v. Memphis & C. R. Co., Case No. 3,209; Blackburn v. Selma, M. &

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

M. R. Co., Id. 1,467; Uphoff v. Chicago, St. L. & N. O. R. Co., 5 Fed. 547; Wilkinson v. Delaware, L. & W. R. Co., 22 Fed. 354.]

3. The case in judgment considered to be analogous to that of Baltimore & O. R. Co. v. Harris, 12 Wall. [79 U. S.] 65, and distinguishable from Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 236.

This was an action brought originally in one of the courts of the state, to recover damages for the alleged wrongful ejection of the plaintiff [Samuel K. Williams] and his family from the cars of the defendant while traveling as passengers upon that part of its road lying in the state of Missouri. The defendant company applied in due form under the act of March 2nd, 1867 [14 Stat. 558], for the removal of the cause to the circuit court of the United States for the Western district of Missouri, stating on oath that the plaintiff was, and is, a citizen of Missouri; that the defendant was and is a citizen of Kansas; that the amount in controversy exceeds $500, and that by reason of prejudice and local influence, the defendant can not obtain justice in the state court wherein the suit is pending. Bond with sureties was given and accepted, and the state court ordered the removal of the suit to this court.

The plaintiff now, to-wit, at the November term, 1874, moves to remand the cause to the state court on the ground that the defendant company is a domestic corporation, that is, a Missouri corporation, and hence is a citizen of the same state with the plaintiff. It is upon this motion that the cause is now before the court.

It was admitted that the defendant company was incorporated under the incorporation laws of the state of Kansas, and that it owns and operates a portion of its line in that state, as well as in the state of Missouri. And it is admitted that the cause was properly removed to this court on the ground that the plaintiff is a citizen of Missouri, and the company, for jurisdictional purposes, a citizen of Kansas, unless the company is also to be regarded in respect to this suit as a corporation of the state of Missouri and a citizen of the last named state.

The claim of the plaintiff that it is to be thus regarded, rests upon certain provisions of the statute of the state of Missouri, and the action of the defendant had under its authority.

The statute relied on by the plaintiff is as follows: "Any railroad company heretofore incorporated, or hereafter organized, in pursuance of law, may at any time by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad, within or without the state, for the purpose of forming a connection of the last mentioned road, with the road owned by the company furnishing such aid; or any such railroad company which may have built its road to the boundary line of the state, may extend into the adjoining state, and for that purpose may build, buy, or lease a railroad in such adjoining state, and operate the same, and may own such real estate and other property, in such adjoining state, as may be convenient in operating such road; or any railroad company, organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad with all its privileges, rights, franchises, real estate, and other property, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of said companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed upon between said companies respectively, or any railroad company duly incorporated and existing under the laws of an adjoining state, or of the United States, may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state upon railroad corporations, organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state, concerning railroad corporations, as fully as if incorporated in this state, provided that no such aid shall be furnished, nor any purchase, lease, sub-letting or arrangements perfected until a meeting of the stockholders of the said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided, purchased, leased, sublet or affected by such arrangement, shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the holders of a majority of the stock of such company, in person or by proxy, shall have assented thereto, or shall assent thereto, in writing, and a certificate thereof signed by the president and secretary of the said company, or companies, shall have been filed in the office of the secretary of state; and provided further, that if a railroad company of another state shall lease a railroad the whole or a part of which is in this state, or make arrangement for operating the same as provided in this act, or shall extend its railroad into this state, or through this state, such part of said railroad as is within this state shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this state; and a corporation in this state, leasing its road to a corporation of another state, shall remain liable, as if it operated the road itself, and a corporation of another state being the lessee of a railroad in this state shall likewise be held liable for the violation of any of the laws of this state, and may sue and be sued in all cases, and for the same causes and in the same manner as a corporation of this state might sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations, shall discharge the other, and a corporation of another state being the lessee as aforesaid or extending its road as aforesaid into or through this state, shall establish and maintain an office on the line of the road so leased or constructed, at

which legal process and notice may be served as upon railroad corporations of this state." Act March 24, 1870; 1 Wag. St. (3d Ed.) 315.

Previous to the enactment of the foregoing statute, the legislature of the state of Missouri had chartered the Tebo & Neosho Company with authority to build a railroad, therein provided. Under the authority of the first mentioned statute, a majority of the stockholders of the Tebo & Neosho Railroad Company, of Missouri, at a meeting duly convened, on the 11th day of October, 1870, adopted and entered of record a resolution, "to sell, assign and convey to the Missouri, Kansas & Texas Railway Company, a corporation organized under the laws of Kansas, all of its privileges, rights, powers, franchises, real estate and other property, the whole or any part of which is in this state (Missouri) excepting only such as belong to the extension of the Tebo & Neosho line north from Sedalia." The resolution sets forth the terms of this sale to the Missouri, Kansas & Texas Company of the line of the Tebo & Neosho Company south of Sedalia, Missouri, and provides that the Missouri, Kansas & Texas Company "shall assume all indebtedness incurred by the construction or otherwise of the line between Sedalia and Fort Scott, the line purchased, and shall have, exercise, and enjoy all the rights, powers, privileges and immunities of the original charter of the Tebo & Neosho Railroad Company, and of the several amendments thereto, in the same manner and to the same extent as had been heretofore exercised and enjoyed by this company or its several stockholders."

A conveyance pursuant to these resolutions was made soon afterwards by the Tebo & Neosho Railroad Company to the Missouri, Kansas & Texas Company, of all of that part of the line of the former company south of Sedalia, containing, inter alia, a provision that the last named company should increase its stock 36,475 shares, being an amount equal to the capital stock of the Tebo & Neosho Company, which had been subscribed and paid for by individuals and towns and counties along the portion of the road thus sold and merged, and should issue and deliver to the holder of every share of stock of the Tebo & Neosho Company a like share of its own stock, subject to all calls and liabilities, if any, attaching to the stock so exchanged. A certificate of the aforesaid action, and the conveyance of the Tebo & Neosho Railroad Company to the defendant, was duly filed with the secretary of the state of Missouri, January 4th, 1871, and properly recorded. The defendant company afterwards constructed or finished the construction of the road on the portion of the line thus purchased, and has since operated the said road in Missouri, Kansas and Texas as a continuous line.

The injury for which this action is brought is alleged to have occurred in the state of Missouri, on part of the line of the road purchased and acquired by the defendant in the manner aforesaid. And the question is, whether the defendant company is, for jurisdictional purposes, as respects this action, to be considered in this court as a citizen of the state of Kansas. If so, this court, it was conceded, has jurisdiction of this suit. If not, it is admitted, that the cause should be remanded to the state court.

Johnson & Boon and J. La Due, for plaintiff.
Phillips & Vest, for defendant.

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

DILLON, Circuit Judge. The question here presented is important, since it involves the right of the defendant, which runs and operates a long line of railroad within the state of Missouri, to have access to the federal courts therein.

We have given to the statute of Missouri, which controls its decision, and to the judgments of the supreme court of the United States, having a bearing upon it, careful consideration, and our opinion is that the cause was properly removed into this court.

Upon the statute and facts brought to our attention it is plain that the defendant is a Kansas, and not a Missouri corporation. If so, then it is "for the purposes of federal jurisdiction to be regarded as if it were a citizen of the state where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted." Railroad Co. v. Harris, 12 Wall. [79 U. S.] 65, 81; Railway Co. v. Whitton, 13 Wall. [80 U. S.] 270, 285; Louisville, C. & C. R. Co. v. Leston, 2 How. [43 U. S.] 497. It is an admitted fact that the defendant company was originally organized under the incorporation laws of the state of Kansas, and hence is a Kansas corporation, and for jurisdictional purposes in the federal courts is considered to be a citizen of that state; but it is claimed by the plaintiff that the defendant, by virtue of its purchase of part of the line of the Tebo & Neosho Railroad Company, under the Missouri act of 1870, became, as to the line thus purchased, a corporation of the state of Missouri, and hence cannot litigate in the federal court therein with a citizen of the same state.

After an attentive examination of the statute of Missouri in question, under which the defendant purchased part of the line of the Tebo & Neosho Company, and constructed the road it operates in the state of Missouri, it is our opinion that the defendant did not thereby cease to be, even in the state of Missouri, a Kansas corporation, nor did it become, as to the road within the state of Missouri, a new and distinct corporation created by the laws thereof. There is no language in the Missouri act which re-incorporates it or which purports to create a new corporation; but the whole scope of that part of it conferring upon corporations of another state the power to purchase and operate roads in Missouri, is, that such corporations retain their identity, and remain foreign corporations, but subject to taxation, and to all the duties, liabilities

and provisions of the laws of Missouri, the same as corporations created under such laws. Among other things, they are to establish an office on the line of roads acquired, under the act, "at which legal process and notice may be served as upon railroad corporations of this state."

The case is strikingly analogous to that of Baltimore & O. R. Co. v. Harris, 12 Wall. [79 U. S.] 65, in which it was held that similar legislation on the part of the state of Virginia, and of congress in respect to the District of Columbia, did not create a new corporation of the Baltimore & Ohio Railroad Company, originally chartered by the state of Maryland, and which constructed extensions of the road through Virginia, and within the District of Columbia. The case before us is unlike that of the Ohio & M. R. Co. v. Wheeler, 1 Black. [66 U. S.] 286, in which a railroad company chartered by the laws of Indiana and licensed by Ohio, sued a citizen of Indiana in the federal court of the latter state, and where the judgment of the supreme court was against the jurisdiction.

The object of the legislation of Missouri under consideration is obvious. Without the sanction of the legislature a domestic corporation of that state would have no power to sell out to another company all or part of its road and franchises, and a foreign company without such sanction would have no authority to purchase and operate the road of a domestic corporation. The various provisions of the act show that the legislature designed to encourage the building of railroads and to facilitate the making of continuous or connected lines, by authorizing, as far as it could, its own companies to extend their roads into other states, and by conferring upon the companies of other states the right to lease or to buy, and to build and operate roads within its limits. But as above observed, it did not create such companies new corporations, but simply gave them on the conditions stated, the rights, powers and immunities specified in the act. It is, therefore, unnecessary to consider in this case what would have been the effect on the jurisdiction of this court, if the legislature of Missouri had undertaken to make new or domestic corporations of the companies of other states coming into it, under the act of 1870. Nor have we any occasion to determine how far such a case would be controlled by that of Wheeler (1 Black [66 U. S.] 287), nor how far the doctrines of that case have been modified by the subsequent decisions of the same tribunal.

The motion to remand is accordingly overruled. Motion denied.

NOTE. As to the effect on federal jurisdiction (where it is dependent upon the citizenship of the parties) of charters granted by different states to the same company or to companies constructing the same line of road, and as to the effect of consolidation on the jurisdiction of the federal courts, the following are the principal cases: Ohio & M. R. Co. v. Wheeler, 1 Black [66 U. S.] 286; Baltimore & O. R. Co. v. Harris, 12 Wall. [79 U. S.] 65; Chicago & N. W. R. Co. v. Whitton, 13 Wall. [80 U. S.] 270. See, also, Marshal v. Baltimore & O. R. Co., 16 How. [57 U. S.] 314; Baltimore & O. R. Co. v. Gallahue's Adm'rs, 12 Grat. 658; Baltimore & O. R. Co. v. Supervisors, 3 W. Va. 319; Goshorn v. Supervisors, 1 W. Va. 308. See Chicago & N. W. Ry. Co. v. Chicago & P. Ry. Co. [Case No. 2,665], decided by Circuit Judge Drummond, as to the effect of consolidation under charters of different states and the citizenship of the consolidated company.

Case No. 17,729.

WILLIAMS v. MOBILE SAV. BANK.

[2 Woods, 501.] [1]

Circuit Court, S. D. Alabama. June Term, 1875.

BILLS OF EXCHANGE—EFFECT OF WAR—DRAWEE IN CAPTURED CITY—RIGHTS OF PAYEE.

1. A bill of exchange, drawn by a bank in Mobile while that city was in possession of the Confederate forces, on a bank in New Orleans, after that city had surrendered to and was occupied by the Federal forces, is void.

2. Such a bill is void, even though the payee of the bill, at the time he received it, supposed the city of New Orleans was still occupied by the Confederate forces.

3. But where the payee of a bill of exchange paid therefor to the drawer the face value thereof, without knowledge of the fact that the territory where the drawee resided had fallen into possession of a government at war with the government of the drawer, and it turned out that by reason of that fact the bill was void: *Held*, that the payee was in no fault, and could recover from the drawer, on the common counts, the money paid for the bill.

On the 15th of May, 1862, the plaintiff's intestate took from the defendant, the Mobile Savings Bank, at Mobile, Alabama, a bill of exchange, of which the following is a copy: "State of Alabama, Mobile Savings Bank, Mobile, May 15, 1862. No. 4491. Pay to order of A. A. Williams, Ten Thousand Dollars. C. W. Gazzam, Cashier. To the Bank of New Orleans, New Orleans, La." This bill was afterwards indorsed by the payee to the order of Payne, Huntingdon & Co., and was by them transferred back to Williams, the payee. This suit was brought by the administrator of the payee, against the Mobile Savings Bank, to recover the money paid for the bill.

The first count of the complaint was for money had and received. On this the defendant took issue.

The second count alleged that Williams, the plaintiff's intestate, being a citizen of West Baton Rouge, in the state of Louisiana on the 15th of May, 1862, while passing through Mobile, Alabama, deposited $10,000 with the defendant, and took from it a bill, being the bill above described, and at that time said intestate did not know that the city of New Orleans had fallen into the possession of the army of the United States; that he proceeded to his home in West Baton Rouge, Louisiana, and inclosed said bill to

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

Messrs. Payne, Huntingdon & Co., of New Orleans; that before the draft reached them, Gen. Butler, then in command of the United States forces at New Orleans, issued a proclamation declaring martial law in said city, and declaring Confederate States currency valueless, and prohibiting its circulation as currency; and that in consequence it became valueless in New Orleans; and that about the 26th of May, 1862, Gen. Butler gave to the Bank of New Orleans, upon which the bill was drawn, permission to return to the said defendant all Confederate currency or bonds held by said Bank of New Orleans which belonged to the defendant, and the defendant did then and there withdraw and take full possession of all its funds in said Bank of New Orleans, and left nothing with which to pay said bill, but withdrew the identical funds upon which said bill was drawn, and has not since made any provision for the payment of said bill or any part of it, nor had the defendant any right to expect the same would be paid.

The third count was substantially the same as the second.

The fourth count claimed $10,000 as due from the defendant upon the said bill of exchange, and it averred that it was presented for payment to the proper officer of the Bank of New Orleans after the city of New Orleans fell into the possession of the forces of the United States, and payment was refused. The count then averred that before the late Civil War was terminated, to wit: in May, 1862, the defendant withdrew the identical funds on which the bill was drawn, and, at the same time, closed its accounts and dealings with the Bank of New Orleans, and has never since had any money in said bank with which to meet said draft; and the defendant has not since made any provision for the payment of the draft, nor had it any right to expect that the Bank of New Orleans would pay it.

The fifth count is based on the bill of exchange, of which a copy is given, and it is averred that it was presented for payment and payment was refused, and the bill was protested and due notice given to defendant.

The sixth count was predicated on the bill of exchange, and avers that the identical money in the Bank of New Orleans upon which the bill was drawn was withdrawn by defendant, and that defendant withdrew at the same time all its money from the Bank of New Orleans, and left no money to pay the bill. The common money counts were added.

Demurrers were filed to the second, third, fourth, fifth and sixth counts. The ground of demurrer was that the claims mentioned in these counts were shown to be founded on a consideration declared by the law of the land to be illegal and invalid, and that said bill of exchange was drawn in violation of the laws and policy of the United States.

Wm. Boyles and G. Y. Overall, for plaintiff.

R. H. Smith, R. I. Smith, and P. Hamilton, for defendant.

WOODS, Circuit Judge. There can be no doubt, it seems to me, that the bill of exchange, upon which some of the counts are based, is void, and no action can be maintained upon it. It is a part of the public history of the country, and it has been expressly held by the supreme court of the United States (The Venice, 2 Wall. [69 U. S.] 258; The Ouachita Cotton, 6 Wall. [73 U. S.] 521), that the city of New Orleans was subjugated and brought under the control of the Federal forces on the 6th of May, 1862. It continued in the possession of the Federal army until the close of the late war of Rebellion. At the time the bill sued on was drawn, Mobile, where the drawer—the Mobile Savings Bank—resided, was within the Confederate lines. The bill, therefore, was one drawn by a party within the Confederate lines, requesting the payment to the payee by a party within the Federal lines, of the sum of $10,000. The bill was therefore void. Griswold v. Waddington, 16 Johns. 438; Philips v. Hatch [Case No. 11,094]; Montgomery v. U. S., 15 Wall. [82 U. S.] 399; Wools. Comm. Int. Law, § 117; Britton v. Butler [Case No. 1,903]; Ouachita Cotton, 6 Wall. [73 U. S.] 521; Woods v. Wilder, 43 N. Y. 164. An attempt is made to take the case out of the rule by the averment in the second and third counts to the effect that at the time of taking the bill the plaintiff's intestate did not know that the city of New Orleans, which was the residence of the drawee, had fallen under the control of the Federal forces. I do not think this helps the plaintiff's bill. The rule which makes a bill given under these circumstances void is founded on the most imperative considerations of public policy. It is to prevent any intercourse across the lines of the contending armies, or any temptation to intercourse, and it is to prevent the enemy from drawing means to carry on his war from within the territory of the state with which he is at war. It was against public policy to allow a bank within the Confederate States to withdraw its assets from within the lines of the United States. It is therefore immaterial whether or not Williams, the intestate, at the time he received the bill, knew that it was drawn upon a bank which was then within the Federal lines. The public interest demanded that such bills should not be drawn, no matter what the parties knew or did not know. The counts of the declaration, therefore, which are based upon the bill of exchange, cannot be maintained, and the demurrer to them is well taken. These are the fourth, fifth and sixth.

The common money counts are of course not open to the objection that they are founded on a void paper. Nor do I think the sec-

ond and third counts are. These counts are not based upon the bill, but upon a deposit of money made by the plaintiff's intestate, for which he received a void bill of exchange. The second and third counts seem to me to be rather counts for money of plaintiff's testator, had and received by defendant, for which the plaintiff's intestate had taken a bill of exchange, the issuing of which was against public policy, and therefore void. The second and third counts, therefore, present the question, whether, under the circumstances of public history, and the facts detailed in these counts, the plaintiff can recover back the money which he paid for the void bill. It is a general and well settled rule of law, that where parties have been engaged in an illegal transaction, the courts will not aid either of them, but will leave them where they have placed themselves. "In pari delicto, melior conditio possidentis." Meyers v. Meinrath, 101 Mass. 366. See 2 Rob. Prac. 478, where the cases on this subject are collected. But it seems to me that the averment made in the second and third counts that plaintiff's testator, at the time he received the bill, had no knowledge that the city of New Orleans had fallen under Federal control, takes the case out of this rule. It is when parties are in fault that the law refuses to aid them. If the bill had been drawn before New Orleans fell, the transaction would have been a lawful one. The plaintiff avers that his intestate, when he took the bill, did not know the fact that the city of New Orleans had fallen. There was, therefore, no purpose on his part to violate any law or public policy. He ought not to be punished. He is in no fault. Why should he lose the money which he paid over to the bank when he supposed he was doing a perfectly lawful act? It seems to me that under the circumstances stated in the second and third counts, it would be against equity to allow the bank to hold on to the money, and that there is no rule of law which forbids the plaintiff from recovering it. The distinction here drawn is taken by the adjudged cases. Thus, it has been held in an action on a promise to indemnify, that if the act directed or agreed to be done is known at the time to be against law, an express promise to indemnify would be void. But if it was not known at the time to be unlawful, the promise to indemnify is a good and valid promise. See 2 Rob. Prac. 299, 300, and numerous cases there cited. If the Mobile Savings Bank had knowledge of the fall of New Orleans, while the plaintiff's intestate was ignorant of it, and the bank put off on him a bill which was rendered void by the fact of the fall of the city, it seems clear that the plaintiff could recover the money, for the parties would not be in pari delicto, and it would be a most unconscionable fraud to allow the bank to keep the money of the plaintiff's intestate in such a case. But suppose neither party to the transaction had knowledge of the facts which made it illegal; then neither party is in fault, and there is no rule of law or of public policy which forbids the courts from placing the parties in statu quo. It would, under such circumstances, seem to be the case of money paid under a mistake of fact, which might be recovered back.

In accordance with these views, the demurrers to the fourth, fifth and sixth counts are sustained, and the demurrers to the second and third are overruled.

Case No. 17,730.

WILLIAMS et al. v. MORA et al.

[2 Wkly. Law Gaz. 299; 40 Hunt, Mer. Mag. 198.]

Circuit Court, S. D. New York. Oct. 6, 1858.

SHIPPING—DAMAGE TO CARGO—STOWAGE—BILL OF LADING.

[1. Whether stowage of goods under a poop deck is a stowage under deck, within the meaning of a bill of lading, is not dependent upon whether or not the poop deck was built when the ship was originally constructed, but upon whether it afforded sufficient protection to the goods.]

[2. Stowage of hogsheads of sugar upon their heads is sanctioned by usage.]

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

[This was a libel for freight by Howell L. Williams and others against Jose A. Mora and others.]

NELSON, Circuit Justice. The libel was filed in this case to recover freight upon a cargo of sugar and molasses, shipped from Cardenas, Cuba, to the port of New York. The payment had been refused on the ground of damage to the cargo, claiming an abatement of the freight on account of the same. It was insisted that the damage was occasioned by shipping the goods on deck, when, according to the bill of lading, they should have been shipped under deck; also, that the cargo was badly stowed and damaged. Whether the goods were shipped on or under deck depended upon the question whether or not the poop deck upon the vessel, under which a portion of the cargo was stored, afforded a compliance with the bill of lading. The bark Abeona was originally a single-decked vessel. Subsequently a poop deck was built across her from near the after hatch back, a length of some forty feet; and as it respects the stowage, the principal objection was that some of the hogsheads of sugar and concentrated molasses were stowed upon their heads.

We have looked carefully into the evidence in the case, which is very contradictory and conflicting upon the questions as to the condition and sufficiency of the poop deck, and have arrived at the conclusion that the fair

weight of it supports the position of the libelants that the stowing of the goods under it satisfied the bill of lading requiring them to be shipped under deck. The question is not whether this deck was built when the ship was originally constructed, but whether it afforded security and protection to the goods within the meaning of the bill of lading, as under deck; and, upon the evidence, we are bound to say it did. The conflict of testimony in the case shows a very unsettled and unreliable state of opinion among the most intelligent persons engaged in the shipping business of this port, upon a question with which they ought to have been familiar. The endurance of this deck, in the several voyages the bark has performed since it was built, strengthens very much the testimony of the witnesses who have maintained its sufficiency to protect the cargo, the same as under deck. In respect to the stowage of the hogsheads on the head, the evidence is full in support of the usage.

We concur with the court below, that the damage to the cargo was occasioned by a peril of the sea, within the exceptions of the bill of lading, and the libelants are entitled to their whole freight. Decree affirmed.

Case No. 17,731.

WILLIAMS v. NEW ENGLAND INS. CO.

[3 Cliff. 244.] [1]

Circuit Court, D. Massachusetts. May Term, 1869.

MARINE INSURANCE—CHARTER BY GOVERNMENT—LOSS BY CHARTERER'S FAULT.

1. The defendant insured a vessel lost or not lost for the term of one year, taking the risk at sea, and in port, in dock, and on ways, with permission to sail with or without pilots, and to tow and assist vessels in all situations. Liability not to attach for any breakage of machinery or bursting of boiler unless caused by stranding or collision. The underwriters were to be liable if the vessel should take fire, and any part of the machinery or boilers was thereby damaged. When insured, the vessel was laid up. After insurance she was chartered to the United States government to be used as a government transport, but not to go to any place where there was not sufficient depth of water for her to go in safety. She was sent by a military officer of the United States to Hatteras Inlet. When starting for that place her destination was not known to her owner, but was to the charterers and their agents, as was also the fact that she was to cross the bar at the inlet. She proceeded to her destination, and remained outside the bar until ordered from a government tug to follow the tug over the bar. In following the order she struck on the bar, was driven among the breakers and became a complete wreck. The order to cross the bar was from the military commander of the expedition acting under the authority of the government of the United States. The draught of the vessel and the depth of water on the bar were known to the master of the tug. The water was so shoal that a vessel of the size, draught, and build of the insured one could not reasonably be expected to cross in safety, and such striking would naturally result in her loss. There was a strong wind and a high sea. The attempt to cross the bar was rash, hazardous, and unjustifiable. *Held*, the orders of the general commanding must be considered as if given by the president. But the United States were the charterers, and must be regarded as the agents of the owners, and the question was the same as if the owners themselves had given the order to cross the bar, instead of a military commander in the United States army, and the same consequences ensued, and that the plaintiff could not recover.

2. Insurance money may be recovered where losses were remotely occasioned by the negligence or misconduct of the master of the vessel, if proximately caused by the perils insured against.

3. But the insured cannot recover for a loss occasioned by his own wrongful act, or by that of any agent for whose conduct he is responsible.

Agreed statement. Assumpsit upon a marine policy of insurance. The principal question was, whether the circumstances attending the loss were such that the plaintiff [William P. Williams], within the true intent and meaning of the policy, was entitled to recover. Briefly stated, the material facts were: That the plaintiff was owner of the steamship New York, her furniture, engine, machinery, and boiler; and that the corporation defendants on May 4, 1861, insured the same, lost or not lost, in the sum of $6,500 for the term of one year from that date; taking the risk at sea and in port, in dock and on ways, with permission to sail with or without pilots, and to tow and assist vessels in all situations. . . . . Liability not to attach "for any derangement or breakage of machinery or bursting of boilers unless occasioned by stranding or collision with another vessel." The company was to be liable if the vessel should take fire, and any part of the machinery, or the boilers, should thereby be damaged. The value of the steamship and her furniture expressed in the policy was $18,000, and the sum insured on the same was $3,900. The policy value of the engine, machinery, and boilers was $12,000, and the sum insured on the same was $2,600, at a premium of twelve per cent. Two other policies of like date, tenor, and effect were also obtained by the plaintiff in two other companies upon the same steamship and her furniture, and also on her engines, machinery, and boilers, amounting in all to the sum of $9,500, in addition to the amount involved in this suit. The agreed statement showed that the same valuation was affixed to the objects insured in those policies as is expressed in the policy in this case. The amount insured in this policy was made payable in case of loss to a third party, but as the claim of that party was paid before the loss, no further reference to that circumstance is necessary. Prior to November 1, 1861, the steamship had always been employed in the merchant service, but at the date of the policy she was laid up in the harbor of Boston, without employment. On November 1, 1861, she was chartered by her owner for the period of fifteen days to the United States

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

government, by a charter-party of that date, "to be used as a government transport, and to leave New York under sealed instructions, to be opened when one hundred miles south of that port," and to be governed in her future course by such instructions, but not to be compelled to visit any port or place at which there was not sufficient depth of water for her to go in safety. Subsequent to the expiration of that charter-party, to wit, on December 27th, in the same year, the owner of the steamship, in consideration of $300 per day, during the term of the contract, and until she should be returned to her owner at that port, chartered her to the transport agent of the war department for the full term of ten days from the date of the charter, and as much longer as she should be required by the war department, subject to all the conditions specified in the antecedent charter to the United States government. Under the last-named charter-party the steamship was immediately taken into the possession and control of the United States, and was sent to a dock in that port for repairs. When repaired she was loaded by the charterers with ordnance stores, and on January 7th following, she sailed under orders communicated to her master to proceed to Fortress Monroe for further orders from the government. Pursuant to those orders she proceeded to the anchorage off that fortress, and there the master, on January 7th, received sealed orders from General A. E. Burnside, subsequently opened at sea, "to proceed directly to Hatteras Inlet, hoist your signal for a pilot, and after crossing the bar, anchor as far on one side of the channel as you can with safety." In obedience to that order the steamship at 12 m., on January 13th, came to anchor in safety off Hatteras Inlet, and set her signal for a pilot. Remark should be made that when she sailed for Fortress Monroe her ultimate destination was not known to her owner, but the charterers and their agents who had charge of her, and of her loading, knew that she was destined to proceed to Hatteras Inlet and across the bar there for the purpose of transporting ordnance stores for the troops of the United States as one of the fleet of the Burnside expedition. The agreed statement also showed that the steam-tug Ceres, then in the employment of the government as a pilot for that expedition, came out at three o'clock in the afternoon of that day and gave orders to the steamship to follow her over the bar, and it was agreed that in attempting to do so, and when she was directly in the wake of the pilot-boat, and within a ship's length of her, she struck upon the bar, where she remained fast, but before the following morning she was driven upon the breakers, and during the next day and night became, by force of the wind and waves, a complete wreck, and was totally lost and destroyed.

C. T. & T. H. Russell, for plaintiff.
W. G. Russell, for defendants.

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

CLIFFORD, Circuit Justice. Three principal defences are set up by the defendants to the claim of the plaintiff, but they will be considered in the reverse order from that in which they were presented at the argument. They contend that the plaintiff cannot recover, for the following reasons:

1. Because the ship was lost, not by perils insured against, but by the wrongful act of the insured, or his agents.

2. Because the employment of the steamship in the military service was such a change of risk contemplated by the parties, as to discharge the underwriters from their liability.

3. Because the steamship, when she sailed, was unseaworthy for the intended voyage and was lost by reason of such unseaworthiness.

Marine insurance is a contract whereby one party for a stipulated sum undertakes to indemnify the other for loss arising from certain perils or sea-risks to which ship-merchandise or other interest may be exposed, during a certain voyage or for a certain period of time. Seaworthiness of the ship for the voyage when she sails is a condition precedent to the liability of the underwriter for any loss incurred in the course of the voyage. Repairs may be made while the vessel is in port and during the lading of the cargo, as it would occasion much delay and unnecessary expense to require that she should be completely repaired before she can take on board any part of her cargo, and such a rule, if adopted, would be of no benefit to the insurers, provided the vessel is made seaworthy before she sails. Merchants' Ins. Co. v. Clapp, 11 Pick. 56. The meaning of that requirement is, that the vessel shall be staunch and strong, that she shall be suitably furnished, and that she be provided with a competent master and with a crew adequate in number and with sufficient experience for the voyage. The Niagara v. Cordes, 21 How. [62 U. S.] 23. Provided the ship is seaworthy and properly commanded, equipped, and manned when she sailed, as the contract requires, the insurers are liable for any loss proximately caused by the perils insured against, although they have been remotely occasioned by the negligence or misconduct, not amounting to barratry, of the master or crew, whether such negligence or misconduct consisted in omitting some act which ought to be done, or in doing some act which ought not to be done, in the course of the navigation. Redman v. Wilson, 14 Mees. & W. 476; Patapsco Co. v. Coulter, 3 Pet. [28 U. S.] 236; Columbia Ins. Co. v. Lawrence, 10 Pet. [35 U. S.] 517; Waters v. Merchants' Ins. Co., 11 Pet. [36 U. S.] 218; 2 Arn. Ins. 770; 1 Phil. Ins. § 1051.

Underwriters are held to be liable under such circumstances, by the very terms of the policy, as they take upon themselves all losses by the perils therein enumerated without any reference to the fact whether they are at-

tributable to the negligence or default of the master or crew, or to mere accident or irresistible force. Doubtless such an exception might be made, but the law will not make it, where there are no words in the policy to signify that such was the intention of the parties, as the owner is not in general in any better condition to guard against a loss by such means than the insurers. Hale v. Washington Ins. Co. [Case No. 5,916]; Copeland v. New England Marine Ins. Co., 2 Metc. [Mass.] 432. But the insurers are not liable for a loss even by the perils enumerated in the policy, if it was occasioned by the wrongful act of the insured or his agents, for whose conduct he was directly responsible. 1 Phil. Ins. 1046.

Authorities to prove that persons insured cannot recover for a loss occasioned by their own wrongful acts are hardly necessary, as the proposition involves an elementary principle of universal application. Losses may be recovered by the insured, though remotely occasioned by the negligence or misconduct of the master or crew, if proximately caused by the perils insured against, because such mistakes and negligence are incident to navigation and constitute a part of the perils which those who engage in such adventures are obliged to incur, but it was never supposed that the insured could recover indemnity for a loss occasioned by his own wrongful act or by that of any agent for whose conduct he was responsible. Thompson v. Hopper, 6 El. & Bl. 944; Marsh, Ins. 376; American Ins. Co. v. Ogden, 20 Wend. 305; Bell v. Carstairs, 14 East, 374; Cleveland v. Union Ins. Co., 8 Mass. 308.

Attention will next be called to certain other material facts of the case, as agreed by the parties. They agree that the order from the steam-tug to the steamship to cross the bar was given by direct authority from the commander of the expedition, and that the draught of the steamship was known to the master of the tug who gave the order, and that the draught of water upon that bar was a well-known and notorious fact; that the shoalness of the water there is such that a steamship of the draught of the steamship in question could not reasonably be expected at any stage of the tide to cross that bar in safety; that a vessel of the draught and build of the steamship was an unfit vessel for a voyage across that bar, because she would, under the most favorable circumstances, strike upon the bar, and, unless taken in tow by a steamer of lighter draught, such striking would naturally if not inevitably result in her loss; that there was a strong wind and a high sea at the time the attempt to cross the bar was made, increasing both the ordinary liability to strike and the danger resulting from it; and they also agree that taking into consideration the state of the tide, sea, and wind at the time, the attempt to cross the bar was an unjustifiable, rash, and hazardous act of navigation which no prudent or skilful navigator would have undertaken; that the master would not have made the attempt except from the compulsory order from the steam-tug, but would have remained at anchor in safety where he was when he received the order off Hatteras Inlet. Apart from the other defences, it is quite clear that the facts set forth in the agreed statement applicable to the proposition under consideration show that plaintiff cannot recover.

Obedience to the order from the steam-tug could not be refused, as it emanated from the general commanding the military expedition, who beyond question represented the United States. Orders given by a commanding general under those circumstances must be regarded as of the same effect as if given by the president, as they were not countermanded and have never been disavowed. The Venice, 2 Wall. [69 U. S.] 276. Beyond question the United States were the charterers of the steamship, and as between these parties they must be regarded as the agents of the owners of the steamship. Viewed in that light, the question is, whether the owners, if they had given the order to cross the bar when it was given by the steam-tug, and the steamship had been lost, would have been entitled to recover.

WILLIAMS (PICKERSGILL v.). See Case No. 11,123.

Case No. 17,732.

WILLIAMS v. POOR.

[3 Cranch, C. C. 251.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.

AUCTIONEERS—INSTRUCTIONS OF OWNER—LIMITATION OF PRICE.

1. The auctioneer is bound by the instructions of the owner.

2. If the price is limited, his duty is to set the goods up at that price; if they will not sell at the price limited, he must not sell; and if the goods perish, because they cannot be sold at that price, the loss must fall upon the owner.

This was an action [by James Williams' executors] against [Moses Poor], an auctioneer, for not accounting for goods deposited with him to be sold at a limited price; as per schedule amounting to $450.18.

Mr. Hall, for defendant, contended that the auctioneer was not bound by the limitation of price; that if he set them up, he was bound to sell them to the highest bona fide bidder, whatever might be the amount of the bid; and that the auctioneer was not liable if the goods perished because they would not sell for the price limited by the owner. Bexwell v. Christie, Cowp. 395.

Mr. Wallach, for plaintiff, contended, that the defendant should have accounted with the plaintiff's testator, for the goods, at the limited price, or returned them.

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

THE COURT instructed the jury, in effect, that the auctioneer was bound by his instructions; and if the price was limited by the owner, his duty was to set them up at that price, and if they would not bring it, he had no right to sell them; and if they perished because they could not be sold at that price, it was not his loss.

Verdict for the defendant.

Case No. 17,733.

WILLIAMS v. REED.

[3 Mason, 405.] [1]

Circuit Court, D. Maine. May Term, 1824.

ATTORNEY AND CLIENT—DISCLOSURE OF ADVERSE RETAINER—NEGLIGENCE—RATIFICATION OF PROCEEDINGS BY CLIENT — APPRAISEMENT OF REAL ESTATE.

1. An attorney is bound to disclose to his client, if he has any adverse retainer, which may affect his own judgment or his client's interest. But the concealment of the fact is not a necessary presumption of fraud.

2. If a creditor has several debts, some of which are secured by mortgage and some not, it is not gross negligence to unite them all in a single suit at law, and so take a single judgment therefor; and if in such case the execution issuing on the judgment is satisfied in part only, a court of equity will apply the monies received on the execution in the first instance to extinguish such parts of the debt and judgment as were not secured by mortgage.

3. A ratification of the proceedings of an attorney in a suit is not valid to bind the client, unless it is made with a full knowledge of all the material facts.

4. It seems, that an attorney at law is not bound to be personally present, or personally to coöperate with the appraisers, who, under the laws of Maine, are authorized to set off real estate by appraisement to satisfy an execution.

[5. Cited in Elmore v. Johnson, 143 Ill. 534, 32 N. E. 419, to the point that in suits to set aside contracts between parties standing in a confidential relation to each other, although the defense of laches is not usually regarded with favor, yet the application must be made within a reasonable time, to be judged by the court, under all the circumstances of the case.]

This was a bill in equity against the defendant [Isaac G. Reed], who was an attorney and counsellor at law, for fraudulent misconduct in respect to the plaintiff [John D. Williams], who was his client. The bill, as amended, was in substance as follows: "That on the 8th of March, 1820, one James W. Head of Warren, in the state of Maine, was indebted to the plaintiff in four several notes of hand, viz. one dated November 20th, 1812, for $7000; and three others dated December 16th, 1818, for $3000, $1000, and $3338.76 cents, all of them on demand with interest; that before this, viz. September 3d, 1813, Head mortgaged to the plaintiff, as collateral security for the note of $7000, his house and twenty-one acres of land in Warren; also a landing bounded on George's river; that afterwards on June 3d, 1819, Head mortgaged to plaintiff as security for the notes of $3000 and of $1000, a farm in Union of 160 acres, more or less, and also 114 rods of land in Warren, called the Limekiln and Landing; that March 8th, 1820, the plaintiff was at Waldoborough with his notes and mortgages, and then and there did for a certain fee retain the defendant, who was a counsellor and attorney at law, who thereupon engaged to assist plaintiff, and as far as practicable to obtain security for said debts; that the defendant obtained of Head on the 10th of March, 1820, another mortgage of other lands in Warren, (including, as the bill alleges, the lands described in the two former mortgages) as farther security for the aforesaid notes of $7000, $3000, and $1000; that at that time the aforesaid mortgages were good and ample security for the greater part, but not entirely sufficient for the whole amount of said several demands, and that Head was then able and willing to give the plaintiff, as farther security, certain good bonds and notes to the value of $8000, which the defendant ought to have taken, whereby the plaintiff would have been fully secured. Yet, that the defendant contriving to defeat and defraud the plaintiff, and to prefer other creditors of Head, did neglect to demand and receive of Head the said bonds and notes of hand, and to maintain and keep the collateral security aforesaid on said deeds of mortgage, but on the contrary he sued Head on the whole of said demands, and recovered judgment at April term, 1820, C. C. Pleas at Wiscasset, for $14,402.40 debt, and $29.04 costs, and sued out an execution on that judgment; that on the 31st of May, 1820, the defendant, with the same fraudulent design, caused the execution to be levied, and, as to the greater part, satisfied on sundry small and detached parcels of real estate, lying in various places, and distant from each other, and of no value to plaintiff; but which, by defendant's procurement, were estimated and appraised at the sum of $8785.27, discharging plaintiff's judgment for that sum, which is wholly lost to plaintiff; that there was also the further sum of $1145.58 received in part satisfaction of said judgment, which ought to have been, in equity, applied in part payment of the note of $3338.76, which was not secured by mortgage; and that by the defendant's fraudulent, false, and unfaithful conduct, while professing to act as plaintiff's attorney, there now remains unsatisfied of the plaintiff's judgment only $4500.84, which is all that the mortgages now stand for, although the estates mortgaged were sufficient security for $10,000; that the defendant with fraudulent design &c. to injure plaintiff and prefer other creditors, caused Head's right in equity in the mortgaged estates to be attached and sold to satisfy the claims of other creditors of Head; and conspiring with other persons the same was so sold for $3000, which was much less than its value; that the defend-

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

ant concealed his intentions of thus sacrificing the interests of plaintiff, and never notified him of the intended levy on the small parcels of land; that the defendant pretends, that this was done by the plaintiff's instructions, which is false; that the defendant pretends, that the mortgaged estate is worth only $4500.84, which is also false, they being worth $10,000. The bill therefore prays, that defendant may be held to answer, and also prays, that defendant may be compelled to take the real estate appraised at $8785.27 to himself, and pay plaintiff the amount of his judgment, and the bill concludes with a prayer for general relief," &c.

At October term, 1822, the plaintiff filed an amendment of his bill, as follows: "And now the said orator by leave of the court here first obtained, by way of amendment of the bill aforesaid, further charges and says, that the said Reed unskilfully, improperly, and against the duty, which he owed to your orator, joined in one suit all the notes of hand against the said James W. Head, which he had received of your orator for collection as aforesaid; and on all the demands thus improperly joined, said Reed afterwards recovered an entire judgment as aforesaid; thereby confounding those notes for which security by mortgage had been taken with those for which there was no security, and rendering it difficult or impracticable for your orator to apply any security or payment, which he might afterwards obtain, to those of your orator's said demands for which no security had been taken; and so exposing your orator's security by said mortgages to danger, by reason of any partial satisfaction of said judgment, which he might obtain by other means. And your orator further charges and says, that on the 6th day of March in the year of our Lord 1820, after your orator had had a confidential communication and conversation with the said Reed of and concerning his said debts, and the obtaining security thereof, but before said notes were deposited with the said Reed for collection as before stated, the said Reed, as attorney to one Joshua Head, caused an attachment to be made on divers parcels of real estate of the said James W. Head, situate in Union, Thomaston, and Warren, to wit, the same fifteen small detached parcels of real estate, on which said Reed caused the execution of your orator to be extended, in a suit in which said Joshua Head was plaintiff against the said James W. Head; of which proceeding the said Reed neither then nor afterwards gave your orator any notice. And the said Reed caused said action to be continued in court till the term thereof in the month of April, A. D. 1821, when judgment was entered therein for the plaintiff for the sum of two thousand and thirty-seven dollars, debt or damage, and costs of suit, taxed at twenty-two dollars and seventy-four cents. And the said Reed having fraudulently and improperly as aforesaid, on said thirty-first day of May, A. D. 1820, caused the execution of your orator against said James W. Head to be extended on said detached parcels of real estate, although said parcels were, as said Reed then knew, subject to the attachment made in said suit of Joshua Head against said James W. Head, caused the execution, which was issued on the judgment rendered in the last mentioned action to be levied on said James W. Head's equity of redemption of said lands before by him mortgaged to your orator for security of his demands aforesaid, and afterwards caused the same right in equity to be sold for the sum of two thousand and one dollars, being within five cents of the precise amount of said execution against said James W. Head. So that, in fact, said Reed fraudulently procured said last mentioned debt to be paid in cash out of the land mortgaged to your orator, and procured to your orator an illusory satisfaction of a part of his said judgment, by extent on sundry small parcels of land of little or no value, as aforesaid. So that your orator, who had the first right to the security of said mortgaged estate, has lost the same; and said Reed has obtained it for said Joshua Head; and said Joshua Head, who had only a security on said small detached parcels of real estate by his said attachment, has thrown the same on your orator, and has obtained his debt aforesaid in money out of the property and estate before mortgaged to your orator. And to the end that justice may be done in the premises, your orator humbly prays, that said Reed may be required further to answer upon his corporal oath, whether he had with your orator on said sixth day of March, A. D. 1820, or at any time previous thereto, and at what time, a confidential communication of and concerning his said demands, and the obtaining security for the same."

The defendant's answer, saving exceptions to the bill, admitted, that on the 8th of March, 1820, the plaintiff did retain him, professionally, to obtain better security and payment of Head's notes. That on the 11th of March, 1820, in pursuance of the plaintiff's orders, the defendant did obtain a mortgage of a store and land in Warren, as security for the notes of 7000, 3000, and 1000 dollars. That on the 8th of March, 1820, the plaintiff instructed the defendant in writing, that if Head would not give security, to attach all the property he could find, and secure the demands in the best way possible; to get the start of others, if any were about to attach, if he could; and to manage the whole business as if the property were his own. And on the same day the plaintiff verbally requested the defendant to attach all the real estate of Head, and keep it secret till he could ascertain whether Head would give good additional security to the amount of 8000 dollars. That the defendant, in the firm belief that Head would not and could not give other se-

curity, and that other creditors were about to attach, to secure the plaintiff, on the 9th of March, 1820, in pursuance of the plaintiff's instructions, attached, secretly, all Head's real estate. But Head would give no other additional security, except the aforesaid mortgage, given March 10th, except that afterwards, March 13th, 1820, the defendant obtained of Head a deed of mortgage, executed by James Crawford to Head, November 27th, 1816, of 96 acres of land in Warren, for $1653.29, payable in five years, with interest annually; and another mortgage by David Y. Kellock to Head, dated April 24th, 1819, of 80 acres, in Warren, for $171.85, payable in two years, with interest; and another mortgage by Samuel Weston to Head, dated January 11th, 1808, of 3 acres and some rods, for $228.31, and interest; and notes of hand for each of said sums. These mortgages were all assigned by Head to the plaintiff as farther security, as well of the fourth note of $3338.76, as of the other three; which being all the security Head would give, the defendant caused all his personal property to be attached for the plaintiff, and gave the plaintiff information thereof by letters of 13th and 16th of March, 1820, and in answer thereto received in writing the plaintiff's full and entire approbation. That the defendant was never instructed by the plaintiff not to insert the whole of his said notes of $7000, $3000, $1000, $3338.76 in the writ of attachment. That the defendant acted with good faith, and in pursuance of his instructions, as if the debts were his own. That on March 9th, 1820, the defendant commenced a suit against Head on the whole of the four notes, attached all his real and personal estate known to the defendant, and prosecuted the suit to final judgment for debt and costs as alleged in the bill. The answer admitted, that the defendant caused execution to be extended on several small and detached parcels of real estate in different places, distant from each other, and caused them to be set off on appraisement of men chosen regularly by the parties, at $8391.56. That the personal estate sold for $1220.28 and the costs of levy, $193.99 being deducted, it left the execution satisfied in part, for $9417.85, and unsatisfied for the residue, viz. $5013.77. It denied, that the land was set off at $8785.27, and that the judgment was reduced to $4500.84, as alleged in the complaint. It alleged, that the defendant obtained all the property he could, and duly notified the plaintiff of all his proceedings in the premises. That before the day of his retainer by the plaintiff, viz. March 6th, 1820, all Head's real estate mortgaged to the plaintiff, and all his other parcels of estate afterwards attached for the plaintiff, were attached on a writ of that date by one Joshua Head, for a debt of about $2000. That judgment was recovered April term, 1821, of the court of common pleas at Wiscasset, for the debt, $2037.33, and costs taxed at $22.74. That execution issued thereon. That the defendant, as Joshua Head's attorney, May 26th, 1821 (the attachments being then in force,) caused the right in equity to be seized and advertised, and, June 26th, 1821, sold at public vendue, to one James Head, of Warren, the highest bidder, for $2101, which was its full value. That before his retainer by the plaintiff, viz. March 6th, 1820, the defendant was retained as counsel by Joshua Head, to collect his debt of James W. Head; and for three years preceding, he had been retained as the general counsellor of Joshua Head, which the plaintiff well knew. That only upon this retainer of Joshua Head did he counsel or assist any other creditor of J. W. Head. It denied the defendant's knowledge of any other attachment except Joshua Head's, or that he assisted any other creditor. It denied, that the three mortgages given to the plaintiff were good and ample security for a great part of his demands, and that he could have obtained of J. W. Head any different, further, or greater security than the mortgages aforesaid. It denied, that the mortgages were worth, at the time of his retainer, more than the balance of the plaintiff's execution, viz. $5013.77. It alleged, that the plaintiff, by his letters of March 15th, 17th, and 21st, and of April 10th, 1820, estimated his demands, securities, and attachments against J. W. Head at $5000 less than their nominal value. And, lastly, it denied all unlawful combination, and traversed the knowledge as true, of any other matter, &c.

To this there was a general replication. That notwithstanding any thing in the defendant's answer, the matters and things in the plaintiff's bill of complaint were true, as therein alleged, et hoc paratus, &c.

Greenleaf & Mason, for plaintiff, contended:

1. That the defendant, when retained by the plaintiff, fraudulently, and contrary to his duty, concealed from the plaintiff the material facts, that he had been previously retained by Joshua Head, and had instituted a suit for him, and advised him to anticipate the plaintiff, in getting security; and that the defendant afterwards, although specially required to give all information in his power, concealed from the plaintiff the measures taken to secure Joshua Head's debt, whereby the plaintiff was deprived of the opportunity, which he ought to have had, of judging for himself, whether he would entrust the management of his business to the defendant under such conflicting engagements.

2. That the defendant unskilfully, and contrary to his duty, joined in one suit and judgment the plaintiff's debts secured by mortgages, with that which was not secured, and thereby rendered it difficult, if not impracticable, for the plaintiff to apply subsequent payments or securities exclusively to that not secured.

3. That the defendant, with intent of preferring Joshua Head to the plaintiff, caused the plaintiff's execution to be extended on

fifteen separate parcels of real estate, of no income and little value to the plaintiff, which were then subject to Joshua Head's previous attachment, and by improperly devolving the agency on Ludwig, the deputy sheriff, caused the same to be appraised at double their value, viz. $8391.56, thereby reducing the plaintiff's whole debt to $5013, when the value of the property held in mortgage amounted to nearly double that sum; whereby the plaintiff lost the benefit of nearly one half the value of the mortgages, and an equity of redemption was created at his expense, for the benefit of Joshua Head, for the full amount of his debt.

Fessenden & Orr, for defendant, contended:

1. That the plaintiff's instructions, touching all the subjects of complaint, where they were specific, were explicitly obeyed; and where indefinite or discretionary, were reasonably and faithfully fulfilled by the defendant, who gave due and seasonable notice to the plaintiff of all his proceedings, and of all facts within his knowledge, which were material to the plaintiff's interest.

2. That the attachment and sale of the equity of redemption in the mortgaged estates, did not diminish the plaintiff's security by mortgage; it was his own mature and settled plan and purpose, executed by the defendant, that reduced the sum covered by mortgage to its present amount.

3. That the fact of the purchase of the equity of redemption by the son of the debtor, more than a year after the levy of the plaintiff's execution, was no ground in equity to charge the defendant with having reduced the sum covered by mortgage to a value grossly inadequate; that purchase being the price of affection, and resulting from other motives than actuate ordinary purchasers.

4. That it was the plaintiff's duty, when expressly requested, to have given the defendant specific instructions respecting levying on the estates attached. And if any loss accrued, it was through his neglect to give such instructions.

5. That the defendant's instructions to the officer not to reduce, by levy on the lands, the mortgages below the sum of five or six thousand dollars, were just and reasonable, and the best that could have been given for the plaintiff's interest, with all the knowledge or means of knowledge of their value, possessed by the defendant.

6. That the fund secured by mortgage and attachment was rendered as productive by the defendant's agency, as it could have been by any course of proceeding, subject to Joshua Head's prior attachment, if his demand had been first satisfied out of the lands attached.

7. That had any part of the estates attached been omitted to be taken in execution, it would have diminished the plaintiff's fund, and rendered it less valuable than it was.

STORY, Circuit Justice, after referring to the bill, answer, and state of the controversy, proceeded as follows:

This is a case of a very unusual nature, at least in this circuit. The charge in the bill is of fraudulent misconduct on the part of an attorney and counsellor at law, in the management of a suit confided to his care by the plaintiff against one James W. Head, his debtor, and in the levy of the execution, which issued upon the judgment in that suit in his favour for a large amount, whereby the real estate of the debtor has been set off to the plaintiff at a gross overvaluation, and his interests unfairly sacrificed. The charge is of a very grave and important nature; and is doubtless to be listened to by the court with all that watchfulness and attention, which become those, who are called upon to secure an upright administration of public justice. Nor ought it for a moment to be doubted, that as it is the solemn duty of the court to supervise the conduct of its officers, and to discountenance every malpractice and abuse, that duty, however painful, will be performed with all due fidelity to the public. The conduct of attornies, when brought before the court for inquiry and consideration, ought to be scrutinized with the same exactness and rigid impartiality, as if the question were between mere strangers to the bar. And indeed there may naturally be supposed to exist some solicitude, that every act should be more scrupulously weighed, lest the slightest suspicion should arise, that any person might successfully shelter himself from responsibility for injuries behind the protections of his office. On the other hand, the same indulgence must be allowed here, as in all other cases, to inadvertence, mistake, and honest, though misguided, exercise of discretion.

The bill proceeds mainly upon the charge of fraud; and, if that is not made out in the evidence, it must fall; for it is that alone which comes within the cognizance of this court, sitting as a court of equity. There is, indeed, an allegation in the amended bill, of unskilfulness and negligence in the management of the suit by the defendant in certain particulars. But if this allegation is to be taken, as contradistinguished from fraud, it is not a fit subject of inquiry here. A suit at law will lie for such unskilfulness and negligence, and the remedy is plain, complete, and adequate; for there is no pretence to say, that any discovery is wanted to establish these facts. It is to establish the fraud, that a discovery is now sought; and the particulars alluded to are examinable here only so far as they contain indications of fraud. In that view they will require comment.

Taking, then, the case to be one of asserted fraud, I have diligently examined and compared the whole evidence, and the result of my judgment is, that the case is not made out. I acquit the defendant of any meditated or intentional misconduct. I do not say, that

there are not circumstances upon which one might pause; or, if they stood alone and unexplained, which might draw after them heavy suspicions; but they appear to me overcome by the general current of the evidence, taken in connection with the denials of the answer, in such a manner as to leave no sufficient ground for any imputation of ill faith.

I shall now proceed to state the reasons which have led me to this conclusion, commenting principally upon those points upon which most stress was laid at the argument.

The first point made at the bar is, that the defendant, at the time of his retainer by the plaintiff, fraudulently concealed from the plaintiff the fact, that he was the attorney of one Joshua Head, and that he had previously made an attachment in his favour upon the real estate of the debtor, then under mortgage to the plaintiff; whereby the plaintiff was led injuriously to place his confidence in the defendant, and to submit his interests, in the suit about to be commenced, to the management of the defendant.

The facts are, that on the 8th of March, 1820, James W. Head was indebted to the plaintiff in the several sums of $7000, $3000, $1000, and $3338.76, for which the plaintiff held four notes of the debtor. At this time the plaintiff held a mortgage given him in September, 1813, as security for the note of $7000, on the debtor's house and 21 acres of land in the town of Warren, and a landing on George's river; another mortgage given him in June, 1819, as security for the notes of $3000 and $1000, on a farm of 160 acres in the town of Union, and a tract of land in Warren, called the Limekiln and Landing. Feeling insecure, he applied to the defendant to procure additional security for him, and, in the meantime, to make a secret attachment upon the real estate of the debtor. On the 9th of March, the defendant, accordingly, made an attachment on the real estate of the debtor, and, within a few days afterwards, he obtained some additional security, by mortgages for the debts, but failing to obtain what was deemed adequate, he attached the personal property of the debtor, and the suit was prosecuted to judgment at April term, 1820, of the court of common pleas at Wiscasset, and a recovery had for $14,431.44, debt and costs. It is admitted, that previous to these transactions, to wit, on the 6th of March, 1820, the defendant, as attorney of Joshua Head, had made an attachment of the real estate of the debtor, and among others, of the equity of redemption of the real estates in Warren and Union, which were mortgaged to the plaintiff; that judgment was obtained in this suit at the April term, 1821, of the same court for $2060.07, debt and costs, upon which execution duly issued, and the same equity was sold to one James Head (the son of the debtor,) for $2101, to satisfy the execution. It is also admitted, that the existence of this suit was not made known to the plaintiff at the time of his retainer, nor does it appear to have been made known to the plaintiff throughout its whole progress, though it was pending during the whole year after the plaintiff recovered his judgment, however material it might have been to guide the plaintiff in his own levy on the real estate of the debtor. The plaintiff's execution was, in May, 1820, satisfied in part by a levy on sundry small parcels of land of the debtor, set off by appraisement at the sum of $8785.27, and by an additional levy on his personal estate to the amount of $1145.58, leaving an unsatisfied balance of about $4500 due to the plaintiff. The argument is that to the extent of the levy under James Head's execution on the equity of redemption, this concealment has operated injuriously, and that it was a breach of good faith.

I agree to the doctrine urged at the bar, as to the delicacy of the relation of client and attorney, and the duty of a full, frank, and free disclosure by the latter of every circumstance, which may be presumed to be material, not merely to the interests, but to the fair exercise of the judgment, of the client. An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity. In this very case, it is by no means clear, that if the prior retainer had been known to the plaintiff, he would have entrusted the defendant with the collection of so large a debt, under circumstances calling for the exercise of so much caution and zeal in the execution of his duty. And it is very certain, that the equity of redemption of the mortgaged estates in Warren and Union (which the plaintiff now esteems the most valuable), might have been placed beyond the reach of Joshua Head's execution by the simple arrangement of continuing the suit, and ultimately leaving the plaintiff's judgment unsatisfied for the sum of $7000, instead of $5000. The plaintiff might have elected this course, if all the facts had been laid before him; and, at all events, the right of election ought to have been submitted to his free and independent judgment. It is matter of regret, that no communication to this effect was made to the plaintiff, since it is obvious, that if it had been made, the whole of this heavy charge against the defendant's honour would have been avoided.

The pressure of this concealment has been made to bear with more severity upon the defendant, by the circumstance of the origin

of the debt, and of the defendant's peculiar relation to the parties. The debt of Joshua Head had its origin in a note payable to him, as guardian of the children of a Mr. Smouse, whose widow the defendant married, and who is, not unnaturally, supposed to take a lively concern in the welfare of these children. The argument is, that this connexion must have operated as a strong motive for the concealment, and that it casts a shade of mala fides over the whole transaction. It appears to me, however, that this circumstance has not as much weight as has been attributed to it at the bar. Joshua Head and his surety on his probate bond of guardianship were at the time, and still continue solvent; and as the attachment was already made out at the time of the plaintiff's retainer, the danger of loss to the children was past, and no stronger motive could operate upon the defendant, if he knew of the attachment, than might operate in case of an attachment by any other client. The most, that could be said, is, that the levy on the equity of redemption might have been prevented; but as the attachment covered many other parcels of estate, it might well have been satisfied out of the latter. Still, I cannot but agree, that the delicacy of the defendant's relation to the parties furnished a new motive for the disclosure; for, however well the plaintiff might have known, that the defendant was the general retained counsel of Joshua Head, his ignorance of this particular debt and attachment repels any notion, that he acted with the knowledge of every important fact.

It is said, however, that, in point of fact, the defendant did not, on the 8th of March know, what attachment had been made on Head's writ, the latter having personally conducted that business with the sheriff. But if the defendant did not know, he might well presume, that an attachment had been made; and it was clearly his duty to have put the plaintiff in possession of all the facts within his knowledge, and thus put him upon inquiry for more definite information. At all events, at the return term of the writ he did know the nature and extent of the attachment, and the knowledge at that time would have been quite as material and important to the plaintiff, as at any antecedent period. Yet an entire silence was preserved, a silence, which it must be admitted, if the other circumstances justified strong suspicions of ill faith, would not be without some significance.

Then, again, it has been said, that the plaintiff afterwards ratified all the proceedings of the defendant, and expressed his satisfaction in the most unequivocal manner. If this were with a full knowledge of all the transactions, the ratification would have a most important bearing. But a ratification, made in ignorance of material facts, cannot give validity to the acts of an attorney in the conduct of a suit, or repel the imputation of fraud. To give any effect, therefore, to any expressions of this nature, the previous foundation must be laid, that there has been a full disclosure of facts on the part of the attorney, and that the ratification is the result of a judgment acting upon knowledge, and not upon a blind personal confidence in the general integrity of the agent. The evidence on this point is not so direct and satisfactory, as might be wished. But taking the testimony of Ludwig, the deputy sheriff, in July, 1821, in connexion with that of Demuth, as to a conversation with the plaintiff in the June preceding, there is much reason to believe, that the plaintiff's declarations of satisfaction with the defendant's conduct in July, 1821, was with a knowledge of all the material facts.

But, independently of any such ratification, evidencing a consciousness on the part of the plaintiff, that the defendant acted with entire good faith, and for the substantial interest of his client, there are other circumstances in the case, which go very far to establish, that the concealment of Head's attachment, however imprudent or incorrect in a legal view, was not the result of meditated fraud, or an intentional abandonment of official duty. Indeed, such a concealment cannot, per se, be deemed evidence of fraud; but it must derive its force and bearing from the other accompaniments of the transaction. If no interest of the client has been betrayed or injured; if no real loss has been sustained; if there has been displayed throughout a proper zeal and devotion in all other respects to the client's suit, and no motive can be discerned in the concealment, but a misapprehension of duty, the act itself ought not to draw, and cannot draw after it, any imputation of fraud. Men do not perpetrate frauds without some important motive, or sacrifice their professional honour, not only without, but against an apparent interest. The defendant, too, has established some facts in excuse of his silence, which cannot but mitigate in some degree any severity of judgment. He has shown, that the debtor promised him from time to time to pay the debt to Head, and thus to relieve the attachment, and that he gave his own implicit confidence to these assurances. And it is proved beyond controversy, that Head originally required secrecy, as to the existence of his suit, and that the defendant's subsequent conduct was wholly without any concert with Head, or with the judgment debtor, or with any other party having an adverse interest. If, in addition to these considerations, it shall turn out upon a full examination of the case, that the levy of the plaintiff's execution was conducted with a strict regard to his interest, and that he has sustained no loss, and that Head has gained no advantage by the course adopted by the defendant (a topic, to which I shall hereafter advert), then the conclusion would seem to be irresistible, that the point of fraud cannot be maintained. At present, then, we may dismiss the question of concealment, as it bears on the bill

only in so far as it corroborates the main ingredients of fraud, arising aliunde.

Another circumstance relied on to establish fraud is the joinder in one writ of all the notes, so that a single judgment was taken upon all, and thereby the debts secured by mortgage were confounded with the other debt, and the plaintiff injured by impairing his mortgage security. The argument is, that it is now impossible to separate the different items composing the judgment; that the part satisfaction must be applied to the diminution of the mortgage debts, as well as the other; and that thus the mortgage debts will abate pro tanto, and leave much less than the balance due on the judgment covered by that security. And even if this were not the necessary result, still, that it is difficult, if not impracticable, to apply subsequent payments exclusively to the discharge of the unsecured debt. So far as this charge imports unskilfulness in the management of the suit, it has already been answered. Whatever may be the remedy at law, there is none for it in equity. Unskilfulness is not fraud, and may be, and often is, connected with the most scrupulous honesty.

That some inconvenience may arise from the consolidation of all the debts of the plaintiff in a single writ cannot be disguised. It has been suggested at the bar, that it was occasioned by a desire to save costs to the plaintiff, the statute of Maine (St. 1821, p. 260, c. 59) having provided, that "where a plaintiff shall at the same court bring divers actions upon demands, which might have been joined in one, he shall recover no more costs than in one action only." There is much probability in this suggestion; but that in a case, like the present, it ought to have overcome the other important considerations for keeping the secured and unsecured debts distinct from each other is in point of sound discretion more questionable. It however repels in a great measure the imputation of fraud; and, indeed, it is very difficult to perceive, how the joinder of the debts could have aided any contrivance of fraud to benefit Head's attachment, or to defeat the plaintiff's rights, unless the conduct of the levy of the plaintiff's execution was itself collusive. I cannot consider the mere joinder of the debts as gross negligence, presumptive of fraud, or as justly influencing any suspicion derivable from other sources.

Nor am I prepared to admit, that the consequences, assumed at the argument, would legally flow from the joinder of the debts. The mortgage debts were in no just sense extinguished by the judgment; and whenever the mortgages should be enforced in a suit for a foreclosure, upon the hearing in equity to ascertain the amount due every consideration, as to the application of payments and partial satisfaction, would arise, which could be entertained in the ordinary course of a bill in equity. The law is not disputed, that in voluntary payments the debtor may direct the application of them; if he omits it, the creditor may make the application; if neither makes it, the court will marshal the payments according to its own sense of the intention of the parties, and a just administration of equities between them.[2] But the present is not the case of a voluntary payment; but of a satisfaction pro tanto in invitum; and the plaintiff may well be presumed in such a case to make the application in the manner most beneficial to himself. I have no doubt, that it is the duty of a court of equity in such a case to apply the satisfaction primarily to such parts of the judgment, as were not secured by mortgage, leaving the whole balance to rest on the latter.

After all, the case must mainly rest upon the general fairness of the defendant in conducting the suit and the levy of the execution on the judgment in favour of the plaintiff. The charges are, that the execution was improperly levied on fifteen different parcels of real estate of no income or little value, which were then subject to Joshua Head's attachment; that the agency of the levy was improperly confided to Ludwig, the deputy sheriff, instead of the defendant's giving his own personal coöperation and presence; that the appraisement was a gross overvaluation, nearly one half beyond the real value of the property; that the plaintiff's debt was reduced to about $5000, when the value of the mortgaged property was nearly double; and that thus the plaintiff lost the benefit of nearly one half of his mortgages, and an equity of redemption was fraudulently created, at his expense, for the benefit of Joshua Head to the full amount of his debt.

These charges require a separate examination. In the first place, as to the charge of improper agency devolved on the deputy sheriff, who conducted the levy. I am not aware of any authority, which has established, that an attorney is bound to give his personal presence at the time of the levy of an execution of his client on real estate. Our laws authorise real estate to be set off in satisfaction of executions at an appraisement to be made by three disinterested freeholders, one chosen by the creditor, one by the debtor, and one by the officer, who executes the process. If the debtor fails to choose, the officer selects for him also. The appraisers are under oath for the faithful performance of their duty; and the property being once pointed out, or known, there would seem to remain nothing more than the discharge of a ministerial duty. The officer is bound to superintend the whole transaction; the appraisers are presumed to be intelligent and impartial; and it would, therefore, seem to be a case, where the law would not presume the presence of any attorney for

[2] See Heyward v. Lomax, 1 Vern. 24, and Raithby's note 1; Wilkinson v. Sterne, 9 Mod. 427; Perris v. Roberts, 1 Vern. 34; 2 Pow. Mortg. 1120, 1121; Clayton's Case, 1 Mer. 604; Manning v. Westerne, 2 Vern. 606; see Poth. Oblig. pt. 3, art. 7, c. 1; Id. arts. 528-530 et seq.

either party desirable, much less indispensable. I should be sorry to see a different doctrine established. At all events, I will not be the first judge to establish it. There is no pretence, that the officer was not intelligent and faithful, competent to his duty, and zealous for the interest of the plaintiff. Nor is it denied, and if it were, the proofs are clear, that the officer possesses the public confidence, and is worthy of it.

In the next place, as to the value of the parcels of real estate set off on the execution. No imputation has been cast upon the appraisers either in the proofs, or at the argument. On the contrary, it is admitted, that their conduct was pure; and their intelligence and capacity and respectability have not been brought into question. Under such circumstances, it is somewhat difficult to impeach the bona fides of their valuation, or to presume a very gross failure in judgment. How can a presumption of fraudulent overvaluation arise against the defendant, when three discreet and impartial men, under their oaths, sanction the appraisement? From the nature of the case, the actual value of real estate must be a matter of opinion, upon which men of equal skill and honesty may differ in their estimates. To establish such differences is not to impeach their judgment, much less to lay a positive foundation for intentional error. Taking the whole testimony together, I am by no means satisfied, that the weight of it does not substantially support the valuation of the appraisers. At all events, the differences are not more than may be fairly imputed to the ordinary operations of different minds on matters of this nature. Some allowance should also be made for the general habit of estimating real estate on levies by appraisements of its full value, and most favorably to the debtor. If, then, there has been any error, it is attributable, not to the misconduct of the defendant, but to the misguided judgment of the appraisers. It may be the misfortune of the client, but it results from the infirmity of the system of appraisement, and not from the fault of the attorney. My opinion, however, is, that the evidence does not furnish any sufficient ground for just imputation upon any party.

Then, as to the value of the mortgaged property, upon which mainly rests the charge of misconduct in the levy. If that property has not been greatly undervalued by the defendant, but the balance of $5,000 now due on the execution covers its fair value, then the most pressing allegation of fraud made by the bill is effectually removed. It is certain, that the defendant gave directions to the officer not to reduce the execution below $5,000, upon the avowed opinion, that this sum was the full worth of the mortgaged property. A strong circumstance, relied on to establish a higher value of this property, is the fact, that the equity of redemption was sold under Joshua Head's execution for $2,101 to the son of the debtor. This is certainly prima facie evidence of the purchaser's opinion; and, as the sale was at public auction, it is not unreasonable to presume, that it was a fair bidding. It has been said, that as Joshua Head's debt was deemed by the debtor himself a privileged debt, which he meant at all events to discharge, this purchase ought to be considered as the mere price of affection, and an offering of filial kindness, unaffected by any real consideration of value. The purchase may have turned upon such a consideration; but the court cannot assume the fact, and there is no sufficient evidence to support it. The fact, therefore, would have a strong bearing as proof of actual value, if it stood alone; but would not be decisive of fraud, for an honest opinion might be entertained, that the property was greatly overvalued. There is a great deal of testimony in the case on both sides, as to the value of the mortgaged property. The result of the testimony of the witnesses for the plaintiff gives the average value of about $7,500, conforming very nearly to the price for which the equity sold. That of the witnesses for the defendant (who are more than double in number, and equally respectable) gives a little over $4,000. After weighing the whole circumstances, the conclusion, to which my mind has arrived is, that there is a decided preponderance of opinion, that the value did not much, if at all, exceed $5,000. The property in Warren was open to very opposite calculations from the hopes or fears, which the parties might indulge, as to the future. The village had been flourishing; it was now on the decline. The chance of its revival would naturally give rise to opposite conjectures; and these again would materially influence every opinion as to the value of real estate. The factory in Union had an additional element of uncertainty, for manufacturing establishments had experienced, within a few years, great vicissitudes of alternate prosperity and depression. But what is most material is, that $5,000 is the very estimate (if the testimony is to be believed) which the plaintiff himself put upon the mortgaged property with a full knowledge of its situation. That testimony stands confirmed by his conduct upon various occasions; by the additional security of $8,000 required by him at the time of his attachment; and by his subsequent offer to sacrifice $5,000 of his debt, if the debtor or his friends would secure an absolute payment of the residue. This conduct could not but produce some impression upon the mind of his attorney; and it is surely no proof of fraud, that his estimate, however low, is supported by that of very numerous respectable witnesses, and has commended itself to the plaintiff's own judgment. Nor should it be forgotten, in this view of the case, that if Joshua Head's execution had not been satisfied by the sale of the equity of redemption, it might have been satisfied by a levy on the other real estate, of which the

plaintiff has now had the entire benefit. It is not true, therefore, that the equity of redemption has been created or sold at the plaintiff's expense. And yet the whole fabric of fraud, which the bill so studiously constructs, rests on this as its principal foundation.

There are other circumstances in the case, which have been relied upon by the parties, either to fix or to repel fraud; but I forbear to comment on them. The merits of the case stand on those which have been already discussed; and if those fail, there is an end of the controversy.

I feel entire confidence, that it is my duty to dismiss the bill, and I shall pronounce and decree accordingly. Bill dismissed.

WILLIAMS (REPUBLIC INS. CO. v.). See Case No. 11,707.

WILLIAMS (REYNOLDS v.). See Case No. 11,734.

Case No. 17,734.

WILLIAMS v. RITCHEY.

[3 Dill. 406.] [1]

Circuit Court, D. Kansas. 1874.

JURISDICTION—CHANCERY—INFANT COMPLAINANT—RESIDENCE OF PROCHEIN AMY.

The circuit court of the United States has jurisdiction of a suit in chancery commenced on behalf of an infant who is a citizen of another state against a citizen of the state where the suit is brought, although the next friend of the infant complainant be a citizen of the same state with the defendant.

[Cited in Woolridge v. McKenna, 8 Fed. 668.]

[Cited in Miller v. Sunde, 1 N. D. 1, 44 N. W. 302.]

The bill of complaint commences thus: "Victoria E. Williams, a citizen of the state of New York, and an infant under the age of eighteen years, by her next friend, Jacob V. Adneire, brings this her bill against John Ritchey, a citizen of the state of Kansas, and thereupon your oratrix complains," etc. Demurrer by the defendant on the ground that the prochein amy is not stated in the bill to be a citizen of a state other than the state of Kansas; and counsel admit that in point of fact he is a citizen of Kansas.

Clemens & Freiderich, for plaintiff.
John Martin, for defendant.

DILLON, Circuit Judge. The point here presented is stated by counsel to be novel, but it does not appear to the court to be difficult of solution. If the prochein amy is to be considered as the party, or even a party, to the suit, the objection to the jurisdiction of the court would be well taken. But he is not a party. The complainant is the infant in whose name and on whose behalf the bill is exhibited by her next friend. Infants are capable of maintaining suits to assert their rights, but the practice in chancery requires that the suit of an infant should be supported by another person technically known as the next friend of the infant. The object of this requirement is that the court may have the guaranty of a responsible person that the suit is one proper to be brought and that it is brought in good faith with the sanction of a friend of the infant who is willing to assure this by assuming a liability to the defendant for costs if the suit should prove unsuccessful. But this does not make the prochein amy in a legal sense the party or a party to the suit. The suit is, nevertheless, the suit of the infant. This is apparent from several considerations. Thus if the infant dies the suit abates, but not so on the death of the prochein amy. In this last event the court on application will appoint a new prochein amy and the cause proceeds. Nor does the suit abate on the infant's coming of age; he may then elect whether the cause shall go forward or not. If he goes on, no amendment or change in the bill is necessary. The prochein amy having served the temporary purpose for which he supported the bill, drops out of the cause and all future proceedings are conducted without the use of his name. If the infant on attaining his majority abandons the cause, as he may do, he must as between himself and his next friend pay the costs unless the bill was improperly filed. The next friend may be any person willing to act, even one it seems who has been outlawed, and he is subject to removal by the court for cause, and is at all times under its control. 1 Daniell, Ch. Prac. 92 et seq. A person sustaining such a relation to the cause is not a party in the sense of the 11th section of the judiciary act which requires the adverse parties to be citizens of different states in order to give this court jurisdiction. Indeed, as one of the objects of the practice in chancery requiring a suit by an infant to be brought by his next friend is to give the defendant a right to recover his costs, for which the infant is not liable, it is manifestly to the advantage of the defendant that the next friend should be a citizen of the same state as the defendant, thus rendering his property subject to the process of the court. Demurrer overruled.

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

Case No. 17,735.

WILLIAMS v. ROME, W. & O. R. CO.

[15 Blatchf. 200; [1] 3 Ban. & A. 413; 15 O. G. 653.]

Circuit Court, N. D. New York. Aug. 28, 1878.

PATENTS—REISSUES—LOCOMOTIVE LAMPS.

1. The reissued letters patent granted to Irvin A. Williams, December 19th, 1865, for an "improvement in locomotive lamps" (the origi-

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

nal patent having been granted to him April 29th, 1862), are valid.

[Cited in Strobridge v. Lindsay, 2 Fed. 695.]

2. The claims of said reissue are for patentable combinations and not for aggregations.

[Cited in Hoffman v. Young, 2 Fed. 77.]

3. The present case distinguished from Hailes v. Van Wormer, 20 Wall. [87 U. S.] 353, and Reckendorfer v. Faber, 92 U. S. 347.

4. The question of infringement considered.

[This was a bill in equity by Irvin A. Williams against the Rome, Watertown & Ogdensburgh Railroad Company for the infringement of letters patent No. 35,122, granted to I. A. Williams April 29, 1862; reissued December 19, 1865, No. 2,133.]

Edmund Wetmore, for plaintiff.

West & Bond, for defendant.

BLATCHFORD, Circuit Judge. This suit is founded on reissued letters patent granted to Irvin A. Williams, December 19th, 1865, for an "improvement in locomotive lamps." The original letters patent were granted to him April 29th, 1862. The specification of the reissue says:

"The object of my invention is to permit coal oil or kerosene to be used in lamps for locomotive head-lights with success and to obtain full advantage of its great light-producing capacity. In locomotive head-lights, it is important that the greatest amount of light should be concentrated in the smallest practicable space, in order that the light may be as nearly as possible in the focus of the reflector which throws it forward of the locomotive. It is also important, in lamps burning kerosene, that the flame should be protected from irregular currents of air, which tend to produce flickering. The first requirement has been attained to some extent by the use of a tubular wick from which the fluid burns, but the lamps in which such wicks were used did not contain instrumentalities which enable them to burn without smoke all the coal oil which such a wick is capable of supplying. The improvement which constitutes the invention or subject-matter of this patent consists of novel combinations of a circular hollow wick tube, by which I mean a wick tube suitable for holding a tubular wick and admitting air to its interior, with various other instrumentalities, which, when combined as hereinafter described, produce a lamp which is suitable for burning coal oil in a locomotive head-light, and is more efficient for that purpose than any lamp heretofore known, because it furnishes the greatest quantity of light from a wick of a given size, without material flickering. The first of these improvements consists of the combination of a circular hollow wick tube with a perforated air screen to regulate the passage of air to the exterior of the flame, and a cap deflector to form a combustion chamber above the wick, from the orifice of which chamber the flame issues in intimate contact with the exterior and interior currents of air, after it has formed above the wick within its combustion chamber and its carbonaceous constituents have obtained a glowing heat therein. The second improvement consists of the combination of the said circular hollow wick tube, perforated air screen for the exterior current of air, and cap deflector, with a lateral reservoir for the oil, by which I mean a reservoir so combined and arranged that the head from which the oil is supplied is at one side of the wick tube and above its lower end, whereby the reservoir can be placed outside of the reflector of the head-light, and the oil can nevertheless be supplied by gravitation at a level sufficiently near the burning part of the wick to keep it freely supplied with oil. The third improvement consists of the combination of the said circular hollow wick tube, perforated air screen for the exterior current of air, and cap deflector, with a button arranged above the orifice of the cap deflector, in such manner as to spread the flame after it issues from the orifice of the cap deflector, thereby lessening its height and confining it more nearly to the focus of the head-light. The fourth improvement consists of the combination of the said circular hollow wick tube, perforated air screen for the exterior current of air, and cap deflector, with a thimble wick holder for holding and moving the wick in the circular wick tube. The fifth improvement consists of the combination of the said circular hollow wick tube and lateral reservoir with a perforated air screen to regulate the passage of air to the interior of the flame or wick tube. The sixth improvement consists of the combination of the said circular hollow wick tube, perforated air screen for the interior current of air, and lateral oil reservoir, with the said cap deflector. The seventh improvement consists of the combination of the said circular hollow wick tube, cap deflector, and perforated air screen for the interior current of air, with a button to spread the flame, above the orifice of the cap deflector. The eighth improvement consists of the combination of the said circular hollow wick tube, cap deflector, lateral oil reservoir, and perforated air screen for the interior current of air, with a button to spread the flame, above the orifice of the cap deflector. The ninth improvement consists of the combination of the said circular hollow wick tube and cap deflector with perforated air screens for both the exterior and interior currents of air. The tenth improvement consists of the combination of the said circular hollow wick tube, cap deflector, and perforated air screen for the exterior current of air, with a close gallery to support the chimney, by which I mean a gallery combined with the other members in such manner that direct currents of air are not permitted to pass under the chimney and over the deflector, to cause the flame to flicker when the locomotive is in motion. The last of my improvements consists of the combination in a lamp of the following instrumentalities, viz.: The aforesaid circular hollow wick tube, thimble wick hold-

er, cap deflector, button, perforated air screen for the exterior and interior currents of air, and lateral oil reservoir.

"The lamp represented in the accompanying drawings embodies all my improvements, being an example of the best mode of embodying the invention known to me at the date of my application for the original patent. It has a circular hollow wick tube, C, composed of an interior cylinder m and an exterior cylinder l, which are separated by an annular space in which the tubular wick D is contained, but are connected together at their lower ends so as to retain the oil. This circular hollow wick tube is provided with a thimble wick holder, R, having the form of a short cylinder, to the exterior of which the lower end of the wick is secured, so that the wick may be moved up and down in the wick tube by moving the thimble wick holder, by means of a rack and pinion of the usual construction for such purpose, or by other suitable mechanism. The employment of such a wick holder permits the wick to be gradually exhausted by burning and trimming down to the fag end, which is secured to the thimble, without requiring the wick to be shifted upon the wick holder. The perforated air screen for the exterior current of air is, by preference, made of two cylinders E, F, of the material known as 'perforated metal,' although one cylinder only may be used, if deemed expedient. The perforations of this material ('perforated metal') are so small that the air is compelled to pass through them slowly in minute streams, which mingle in the space b, within the air screen, so that sudden variations in the pressure of the exterior air do not materially affect the flow within the air screen, and consequently do not cause the flame to flicker materially. This perforated air screen is so combined with the circular hollow wick tube C, and the cap deflector hereinafter described, that the current of air which passes to the exterior of the flame through the cap deflector, is compelled to pass through the perforations of the perforated air screen. The inner cylinder F is sustained by the circular hollow wick tube C. The outer cylinder E is separated from the inner by a space a, but it is sustained by the inner cylinder F. The cap deflector G is situated at the upper end of the wick tube C, being supported by the inner perforated cylinder F. It is composed of two parts—the lower, c, cylindrical, and the upper, d, conical, terminating at the orifice from which the flame issues. This cap deflector, as represented in the drawing, extends above the wick C, when the latter is at the highest position it occupies while the lamp is burning, and its interior forms a combustion chamber above the wick, in which the flame is permitted to form before it makes its exit from the orifice of the cap deflector. In these two respects the cap deflector differs from the old cones used to deflect the exterior current of air, in the old camphene or spirit lamps, in which the cone was placed so low that its upper orifice was on a level, or thereabouts, with the upper edge of the wick when in its highest position for burning, so that there was no combustion chamber above the wick, in which the flame could form after leaving the wick. It also differs from the said cones in the respect that it directs the strongest current of air upon the flame at a considerable distance above the wick, in such manner that the flame is contracted upon, and brought into intimate contact with, the current of air passing up its interior from the hollow wick tube, so that an intense combustion of the carbonaceous matter of the flame is effected after the particles have had time to attain a glowing heat, during their passage through the combustion chamber. The wick tube is connected by a tubular passage, B, with a lateral reservoir, A, for the oil, so that the latter is supplied to the wick by gravitation, without the necessity of employing mechanism to force it up the wick. The lateral reservoir is a matter of great importance in a lamp for a locomotive head-light, because such a reservoir may be placed behind the reflector of the head-light, and still supply the wick freely by gravitation, whereas it would be impracticable to surround the wick tube within the reflector with the reservoir, on account of the space occupied by it. The perforated air screen, L, for the interior current of air, is combined with the wick tube C in such manner that the air that enters the interior passage, S, of the hollow wick tube is compelled to pass through it. This air screen, like the exterior air screen, is formed, by preference, of 'perforated metal,' the holes of which are sufficiently fine to compel the air to enter with a low velocity, and thus prevent material variation in the pressure of the air in the head-light, from the flickering of the flame. In the present example, the air screen for the interior current is secured to the drip cup K, which catches the overflow from the wick tube. This drip cup has an opening at its bottom through which its contents can be withdrawn by removing the screw plug M, which closes the opening. The portion of the drip cup that is within the air screen L is perforated with a number of large openings, h, h, so as to permit the air which enters the air screen to pass freely to the wick tube. In order that the flame of the lamp may be prevented from rising from the orifice of the cap deflector in a cylindrical column of great height compared with its diameter, a button, g, is combined with the other members of the lamp, in such manner as to compel the flame to spread as it rises from the cap deflector. This button is supported upon a stem, f, which is sustained in the centre of the wick tube, C, by perforated diaphragms, H, I, which retain it securely in its position, but do not prevent the interior current of air from supplying the interior of the flame in the requisite quantity to secure perfect combustion. The perforated diaphragms, although not essential, are more useful than simple arms would be, because they not only

sustain the stem of the button, but also act supplementally to the perforated air screen L, for the interior current of air, and render the flow of that current still more equable. The equability of the flow of this interior current is increased by the use of a third perforated diaphragm, J, placed at the lower end of the wick tube. The lamp thus described is used in connection with a glass chimney which rests upon a gallery, t, and produces the requisite draught of air through the air screens. The gallery being close, or without openings, prevents currents of air from passing from the exterior of the lamp under the chimney, and over the deflector, to the flame. This feature of the lamp is of great importance in a locomotive head-light, because, when the locomotive is in motion, the head-light is filled with strong currents of air, and, if such currents are permitted to have direct access to the flame above the deflector, they cause it to streak and flicker, and to deposit soot upon the chimney, thereby obstructing the passage of light. When the lamp is in operation, the vapors rising from the wick inflame gradually; and, as the carbonaceous constituents at the lower part of the flame are not sufficiently heated to give out much light, the flame at the wick is mostly blue in color, as seen at figure 1. As, however, the flame extends upward within the combustion chamber formed by the cap deflector, the carbonaceous constituents attain a higher temperature, and, when they reach the orifice of the cap deflector, are at a glowing heat. At the orifice a rapid contraction takes place, the external current of air is driven against the column of flame above the wick at a sharp angle, and the flame itself is forced into the inner current, so that the products of the decomposition of the oil are brought into immediate contact with the air while at a glowing heat. The result is, that intense combustion is produced, the greatest quantity of light is generated from the quantity of oil which the wick is capable of supplying, and, consequently, a most intense light is produced from a wick occupying a comparatively small space within the head-light. The cap deflector thus used by me as a member of some of my combinations must not be confounded with the deflecting chimneys heretofore used with lamps. It constitutes no part of the chimney, but is a distinct instrument, and its construction, as such, permits it to be formed of metal, and to be used with a succession of chimneys, which, being of glass, are frequently broken and require to be replaced. It is an essential feature of my invention, that the perforated air screens of my lamp have free access to the air within the head-light, so that the air may be supplied to them in the requisite quantity to insure combustion of the oil which the wick is capable of supplying; because, the small perforations compel the air to pass through the screen at a low velocity, and, therefore, a large perforated surface must have access to the air, in order that the requisite quantity may pass through, and, if either air screen were so covered as to prevent the free access of air to it, the supply of air would be choked and the efficiency of the lamp would be destroyed.

"Having thus described a lamp embodying my improvements, I wish it to be understood that I do not claim to be the original inventor of any one of the individual instrumentalities or members of which my lamp is composed, as I am aware that such instrumentalities have been used before my invention, but, as such use was in combinations substantially different from those devised by me, I claim as my invention and desire to secure by letters patent: 1st. The combination, in a lamp, of the following members, viz.: The circular hollow wick tube, perforated air screen for the exterior current of air, and cap deflector, substantially as set forth. 2d. The combination, in a lamp, of the following members, viz.: The circular hollow wick tube, perforated air screen for the exterior current of air, cap deflector, and lateral oil reservoir, substantially as set forth. 3d. The combination, in a lamp, of the following members, viz.: The circular hollow wick tube, perforated air screen for the exterior current of air, cap deflector and button, substantially as set forth. 4th. The combination, in a lamp, of the following members, viz.: The circular hollow wick tube, perforated air screen for the exterior current of air, cap deflector, and thimble wick holder, substantially as described. 5th. The combination, in a lamp, of the following members, viz.: The circular hollow wick tube, lateral oil reservoir, and perforated air screen for the current of air in the interior of the wick tube, substantially as set forth. 6th. The combination, in a lamp, of the following members, viz.: The circular hollow wick tube, perforated air screen for the interior current of air, lateral oil reservoir, and cap deflector, substantially as described. 7th. The combination, in a lamp, of the following members, viz.: The circular hollow wick tube, cap deflector, perforated air screen for the interior current of air, and button, substantially as set forth. 8th. The combination, in a lamp, of the following members, viz.: The circular hollow wick tube, cap, deflector, lateral oil reservoir, perforated air screen for the interior current of air, and button, substantially as set forth. 9th. The combination, in a lamp, of the following members, viz.: The circular hollow wick tube, cap deflector, and perforated air screens for both the exterior and interior currents of air, substantially as set forth. 10th. The combination, in a lamp, of the following members, viz.: The circular hollow wick tube, cap deflector, perforated air screen for the exterior current of air, and close chimney gallery, substantially as set forth. 11th. The combination, in a lamp, of the following members, viz.: The circular hollow wick

tube, thimble wick holder, cap deflector, button, perforated air screens for the exterior and interior currents of air, and lateral oil reservoir, substantially as set forth."

The defendant attacks the plaintiff's patent for want of novelty, and has put in evidence various patents which are claimed to anticipate the plaintiff's inventions. Those patents were granted as follows: English patent to Jeremiah Bynner, December 9th, 1837; English patent to William Young, December 4th, 1843; patent to Stephen J. Gold, July 16th, 1841; patent to William M. Kimball, February 26th, 1856; patent to John Carton, assignee of John Stuber, May 20th, 1856; patent to Jacob Stuber and Frederick Frank, April 23d, 1861; and patent to John G. Webb, October 14th, 1851. The specification of the plaintiff's reissue states distinctly that he does not claim to be the original inventor of any one of the individual members which compose the several combinations claimed by him. He claims that such several combinations were not before united in a lamp. The inquiry, therefore, is, whether such several combinations existed before, each, in its entirety, in any of the earlier patents adduced. An examination of those patents shows that this inquiry cannot be answered in the affirmative.

The Young patent is relied on as containing the three members combined in the plaintiff's first claim. But the cone deflector of Young is not the cap deflector of the plaintiff. The latter extends above the wick when the wick is at the highest point it occupies while the lamp is burning; whereas, the former is, at most, only on about a level with the upper end of the wick when the lamp is burning, and, if the wick of Young should be raised, as it is practically in the lamps of locomotive head-lights, the upper orifice or end of the Young cone would be below the upper end of the wick. Moreover, the plaintiff's cap deflector forms a combustion chamber above the wick, in which the flame is permitted to form before it makes its exit from the orifice of the cap deflector; whereas, no combustion chamber is formed by Young's cone deflector. Again, the plaintiff's cap deflector has a peculiarity not possessed by Young's cone deflector, in that, as set forth in the plaintiff's specification, the former directs the strongest current of air upon the flame at a considerable distance above the wick, in such manner that the flame is contracted upon, and brought into intimate contact with, the current of air passing up its interior from the hollow wick tube, so that an intense combustion of the carbonaceous matter of the flame is effected after the particles have had time to attain a glowing heat during their passage through the combustion chamber. The evidence shows, that, by the use of the plaintiff's cap deflector, as compared with the use of Young's cone deflector, a wick of the same size will produce a flame materially greater in brilliancy and volume, all other conditions being the same. As the plaintiff's cap deflector is a member of all his claims but the fifth, the Young patent is no answer to such claims. As to the fifth claim, the lateral reservoir is a member of it, and there is no lateral reservoir in the Young patent. This disposes of the Young patent.

The Gold patent has no perforated air screen for the exterior current of air and no cap deflector. All of the plaintiff's claims but the fifth embrace one or both of those members. Nor has the Gold patent the combination found in the plaintiff's fifth claim.

The Carton patent has no perforated air screen for the exterior current of air. All of the plaintiff's claims except the fifth, sixth, seventh and eighth embrace this member. Nor is any one of the several combinations of the plaintiff in his fifth, sixth, seventh and eighth claims found in the Carton patent. The same remarks are true of the Bynner patent.

The other patents adduced by the defendant do not any of them contain any of the plaintiff's combinations.

It is contended for the defendant, that all of the claims of the plaintiff's patent except the eleventh are claims for aggregations and not for patentable combinations, and the doctrines of the cases of Hailes v. Van Wormer, 20 Wall. [87 U. S.] 353, and Reckendorfer v. Faber, 2 Otto [92 U. S.] 347, are adduced to show the invalidity of those claims. As all the individual members of each of the plaintiff's combinations are old, and each of such members is found in some pre-existing lamp, it is urged that each of such members had, in the prior lamp, the same office and the same operation which it has in the plaintiff's lamp, and that the plaintiff has only aggregated or assembled the detached parts or members, with change of position, and has not made any patentable combination. It is contended that no new, improved or useful result is produced by any aggregation claimed by the plaintiff. For instance, as to the first claim of the plaintiff's patent—the combination, in a lamp, of the circular hollow wick tube, perforated air screen for the exterior current of air, and cap deflector—it is contended that these parts do not co-operate to effect any definite result; that the aggregation of those three parts does not make a complete lamp; that the circular hollow wick tube does not co-operate with said perforated air screen, or modify in any manner the action of said air screen; that said air screen does not modify the action of said wick tube; that said air screen would operate in the same manner with a flat wick tube and without any wick tube; that the plaintiff's wick tube would operate in the same manner without said air screen; and that the action of neither of those two members is modified by the cap deflector. It is also urged, that there is no relation between the cap deflector and the lateral oil reservoir;

and none between the cap deflector and the perforated air screen for the exterior current of air; and none between said air screen and the button; and none between the said air screen and the thimble wick holder; and none between the lateral oil reservoir and the perforated air screen for the interior current of air; and none between those two parts unitedly and the circular hollow wick tube.

The doctrine of Hailes v. Van Wormer [supra] is, that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made; that the results, however, must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements; that, merely bringing old devices into juxtaposition and there allowing each to work out its own effect, without the production of something novel, is not invention; and that no one, by bringing together several old devices, without producing a new and useful result, the joint product of the elements of the combination, and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations. The same doctrine was affirmed and applied in Reckendorfer v. Faber [supra]. In Hailes v. Van Wormer the patent was for improvements in self-feeding stoves. It claimed combinations of devices all of which singly were old. It was held, that the use of revertible flues in the same stove with a flaring fire pot, and a supply reservoir with a contracted discharge end, and openings for illumination, was a mere aggregation of devices, and not invention; that no new operation was given to the revertible flues by their use in combination with the other devices, different from that which they had when not used in such combination; that the operation of such flues, in both cases, was to conduct the products of combustion into the exit flue; that such effect had no relation to the combination of such flues with the other devices, and could not be called the product of the combination; and that revertible flues had no more to do with a stove supplied by a feeder than with a stove supplied by hand. In Reckendorfer v. Faber, a lead pencil was old and the use of India rubber for erasure was old, and the patent claimed, as a combination, the application of a piece of India rubber to one end of the same piece of wood which made the lead pencil. The combination was held not to be patentable, because no new result was produced by the union of the two, and there was no joint operation of the two, each performing the same operation and in the same manner as if the other were not present, and there was no relation between the two in the performance of their several functions, and no reciprocal action.

These doctrines are not applicable to the present case. The flame of the lamp, and its illuminating character, as to brilliancy, steadiness, size and position, is the result to which all the devices used contribute. They all co-operate to effect and modify such illuminating character of the flame of the lamp. A locomotive head-light must be large, brilliant, steady, easy of adjustment as to the position of its wick, concentrated as nearly as possible in the focus of the reflector, and supplied freely with oil without interfering with the projection of the light forward, and without pumping mechanism. The circular hollow wick tube enables the light to be concentrated near the focus of the reflector. The perforated air screen for the exterior current of air promotes the steadiness of the flame. The cap deflector increases the volume and brilliancy of the flame. The lateral oil reservoir, supplying the oil by gravitation, enables the light to be projected forward without interference, and also enables a wick of a given size and a chimney of a given height to ensure the consumption of the maximum quantity of oil and the production of the maximum quantity of flame. The button gives such shape to the flame that it is concentrated more nearly in the focus of the reflector. The thimble wick holder enables the flame to be readily adjusted by raising or lowering the wick. The perforated air screen for the interior current of air contributes to the steadiness of the flame, and so does the close chimney gallery.

Three forms of head-lights are produced as having been used by the defendant on its locomotives, known in the case as No. 3, No. 4, and No. 5.

No. 3 infringes the first, second, third, fourth and tenth claims of the plaintiff's patent. It has substantially the plaintiff's circular hollow wick tube, exterior air screen, cap deflector, lateral reservoir, button, thimble wick holder and close chimney gallery. It makes no difference, that, in No. 3, the perforations for the exterior current of air are narrow horizontal slits. Their operation compels the air to pass through them slowly, in thin streams which mingle inside so that the flow of air inside is not materially affected by variations in the pressure of the air outside. The cap deflector in No. 3 extends above the wick when the latter is in the highest position it occupies while burning, and its interior forms a combustion chamber above the wick, in which the flame is permitted to form before it issues from the orifice of the deflector.

No. 4 infringes the fifth, sixth, seventh and eighth claims of the plaintiff's patent. It has substantially the plaintiff's circular hollow wick tube, lateral reservoir, cap deflector, button and interior air screen. The cap deflector in No. 4 has the peculiarity pointed out as the peculiarity in the cap deflector of No. 3. The perforated air screen for the interior current of air, in No. 4, is so arranged that the air which enters the interior

passage of the hollow wick tube must pass through such air screen, and its perforations operate substantially as in the plaintiff's lamp, to compel the air to enter with a low velocity.

No. 5 infringes all the eleven claims of the plaintiff's patent, and contains each one of the eight members which enter into those claims. The perforated air screen for the exterior current of air in No. 5 is so arranged that the air passes through its perforations in minute streams which mingle inside, and the current of air which passes to the exterior of the flame through the cap deflector must pass through the perforations in such air screen. The cap deflector in No. 5 has the peculiarity pointed out as the peculiarity in the cap deflector of No. 3. The perforated air screen for the interior current of air in No. 5 has the peculiarity pointed out as the peculiarity of the perforated air screen for the interior current of air in No. 4. The close chimney gallery in No. 5 is situated at the base of the cap deflector and at the head of the perforated air screen for the exterior current of air. This close gallery has no openings, and, therefore, prevents currents of air from passing from the exterior of the lamp under the chimney and over the deflector to the flame.

In No. 3 the screen for the exterior current of air is not composed of two parts, one surrounding the other, and each perforated, with a space between the two, the air passing in succession through the perforations of both. In respect to this, the plaintiff's specification says, that such screen is, by preference, made of two cylinders, of the material known as "perforated metal," but that "one cylinder only may be used, if deemed expedient." So, too, in No. 3 the perforations in the exterior screen are horizontal slits and not circular holes. But it is entirely clear that a single perforated cylinder may be a substantial mechanical equivalent for two perforated cylinders, to regulate the flow of the air to the exterior of the flame, and that the shape of the perforations is immaterial. The essential point is, that the screen should be perforated with openings relatively so small as to compel the air to pass slowly through them in small streams, which mingle in the space inside of the ultimate perforations, in such manner that sudden variations in the pressure of the external air do not materially affect the flow of the air inside of the ultimate perforations.

In No. 3 there is a ring of small orifices through the body of the cap deflector, which orifices permit currents of air to pass through the deflector from the interior of it to the space between the deflector and the glass chimney, and to operate to cool the chimney. But these orifices do not admit air from the outside to pass under the chimney and over the deflector to the flame. Notwithstanding such orifices the chimney gallery in No. 3 is the close chimney gallery of the plaintiff. Such orifices may be an addition or improvement, but the plaintiff's lamp burns successfully without them. These remarks apply to No. 4 and No. 5, also. In No. 4 the air current to the interior is only once obstructed by a perforated screen, which is at the bottom, and is not obstructed by perforated diaphragms in the interior of the wick tube. But this makes no material difference. The plaintiff states, in his specification, that the perforated diaphragms are "not essential."

There can be no doubt that the combinations made by the plaintiff were the results of invention and were patentable. The evidence shows that they were the results of careful and patient investigation and experiment. His lamp was the first one which successfully burned kerosene ail in a locomotive head-light. He was successful in becoming able to employ the great brilliancy of an oil rich in carbon, under the peculiar and disadvantageous circumstances of burning it in a lamp in rapid motion and subject to great vibrations. The merit of his lamp is generally acknowledged. It has superseded those previously in use and it is used on nearly all the railroads in the United States. No prior invention is adduced as anticipating him except such as are found in pre-existing patents. They were considered by the patent office on the granting of the reissue, and held to be of no effect, and the critical examination to which they have now been subjected confirms that conclusion.

The plaintiff is entitled to a decree for an injunction and an account of profits and an ascertainment of damages, in accordance with the prayer of the bill.

[For hearing on exceptions to master's report, see 2 Fed. 702. For another case involving this patent, see Williams v. Boston & Albany R. Co., Case No. 17,716.]

Case No. 17,736.

WILLIAMS et al. v. The SEA GULL.

[1 Cin. Law Bul. 37.]

District Court, N. D. Ohio. 1876.

DISTRICT COURTS — TERRITORIAL JURISDICTION — SALES IN ADMIRALTY—ORDERS OUT OF TERM.

[1. The act of May 23, 1872 (17 Stat. 157), which directs that two terms of the district court for the Northern district of Ohio shall be held in each year at Toledo, and the rules of court, entered pursuant thereto, fixing the time of said terms, and directing that actions, suits, and proceedings, commenced at Toledo, should there be prosecuted to final judgment, execution, etc., operate to make the court, when sitting at Toledo, a distinct court from that which sits at Cleveland.]

[2. The court sitting at Cleveland would have no jurisdiction to perform a judicial act in respect to a cause pending in the court at Toledo, and the same could only be done at the next stated term at Toledo.]

[3. The purchaser of a vessel under an order of sale in admiralty, in a cause pending at Toledo, having previously purchased the libelant's decree, tendered to the marshal the amount of the costs and his receipt for the

damages of the decree in payment of his bid. This was refused by the marshal, whereupon the purchaser applied to the court then sitting at Cleveland for an order directing the marshal to accept the receipt or acquittance tendered, and make a conveyance of the vessel. *Held*, that such an order, made between terms of the court at Toledo, would be erroneous, and subject to be set aside at the instance of any party holding a lien or claim against the vessel which he should seek to enforce against her proceeds.]

[This was a libel by E. R. Williams and others against the schooner Sea Gull.] Motion to order conveyances and distribute proceeds.

WELKER, District Judge. A suit in admiralty was some time since commenced by process sued out of the clerk's office at Toledo, which, at the December term, 1875, resulted in a decree against the vessel, and an order that she be sold, and a writ of vendi. exponas was issued, and, as is the ordinary practice, the marshal commanded to pay the proceeds into court, there to remain until disposed of by the court by its order of distribution. The sale was duly made by the marshal, and the purchaser, who had become the purchaser and assignee of the libelant's decree, tendered to the marshal the amount of the costs, and his receipt for the damages of the decree in payment of his bid. This was refused by the marshal, for the reason that it would not enable him to comply with the command of his writ, and because the proceeds in the registry remain until they are distributed by an order of the court, subject to be applied to the satisfaction of the claims or liens other than the decree of the libelants, if any such claims are interposed while the fund remains in court. Thereupon the purchaser tendered in the district court of Cleveland his motion that the marshal be ordered to accept his receipt or acquitance of the decree so assigned to him, and to make to him a conveyance of the vessel so by him purchased. Substantially, the purchaser asks the district court, sitting at Cleveland, to make an order of the distribution of the proceeds of the sale of the vessel, during the vacation between the legal terms of the court at Toledo.

Has this court, now sitting at Cleveland, jurisdiction or power to make such an order? The act of congress, approved February 10, 1863 [12 Stat. 657], dividing the state of Ohio into two judicial districts, provided that the circuit and district courts of the United States for the Northern district should be held in the city of Cleveland. On the 23d of May, 1872, congress enacted the following statute: "That there shall be two terms of the United States district court for the Northern district of Ohio, held in the city of Toledo, Ohio, in each year from and after the passage of this act, the time and the length of the terms to be fixed by the judge of said court." In the execution of the power and duty thus imposed, the district judge, on the 20th of June, A. D. 1872, by a standing rule or order then made and entered, prescribed or "fixed" the "time" of said terms to be on the second Tuesdays of June and December of each year, respectively; leaving the length of each term to be fixed at each term by adjournment. At the same time, by a like standing rule, the judge ordered "that the clerk of this court establish, and until the further order thereof maintain, an office in the city of Toledo, in which may be commenced actions, proceedings, and suits in such cases as are by law cognizable in this court in the Northern district of Ohio, and that actions, proceedings, and suits so commenced in said city of Toledo be there continued and prosecuted to final judgment, decree, or order, and execution, in the same manner as they would be if commenced in the city of Cleveland." These rules and orders still remain in full force, a clerk's office has been established and maintained, and terms of the district court have accordingly been held at Toledo until the present time.

Held: 1. That this statute and these standing rules make the district court, when sitting at Toledo, a distinct court from the same court when sitting at Cleveland.

2. That, as the making of the order asked for in this case would be a judicial act, the court here has no power or jurisdiction to make it, and that it can only be done at the next stated term of the court at Toledo.

3. That the making of such an order out of term would be erroneous, and subject to be set aside at the instance of any party holding a lien or claim against the vessel, which he should seek to enforce by petition against the proceeds, at any time before such proceeds are distributed by an order of the court regularly and legally made.

4. That the standing order of the court respecting the commencement and prosecution of suits in the district court of Toledo will be strictly enforced.

The motion is refused.

WILLIAMS (SEDAM v.). See Case No. 12,609.

WILLIAMS v. SHALLCROSS. See Case No. 9,944.

Case No. 17,737.

WILLIAMS v. SINCLAIR.

[3 McLean, 289.] [1]

Circuit Court, D. Michigan. Oct. Term, 1843.

PLEADING—BILL OF PARTICULARS—NONSUIT, SETTING ASIDE.

1. Where a plaintiff is called on to furnish a bill of particulars, he is limited in his proof to the items thus made out.

[Cited in brief in Carroll v. Paul, 16 Mo. 228. Cited in Nichols v. Poulson, 6 Ohio, 308.]

2. If the bill be found to be erroneous, after the jury to try the case are empannelled, the plaintiff will have to suffer a nonsuit.

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

3. A nonsuit will be set aside, in the discretion of the court, where justice requires it.

4. If there has been surprise, or the plaintiff has equity, the nonsuit will be set aside.

At law.

Mr. Bates, for plaintiff.
Goodwin & Collins, for defendant.

McLEAN, Circuit Justice. This action of assumpsit is brought on the following state of facts: The defendant was county treasurer in 1840, and as such made sales of lands at public auction, returned as non-resident land for non-payment of the taxes for the year 1837. At the sale, the plaintiff purchased a large number of tracts, on which he paid several thousand dollars, and received from the defendant, for each tract, the usual certificate of sale. The defendant, it is alleged, added several illegal items to the tax charges, and included them in the aggregate sum for which each tract was sold, thereby, as the plaintiff insists, rendering the sale illegal and void. Of the sums thus received the defendant paid over to the county the tax and interest, and retained the illegal charges; and this action is brought to recover the amount thus illegally exacted.

On the trial, the plaintiff having served the defendant with a bill of particulars, discovered that the items were erroneously put down, submitted to a nonsuit, with leave to move to set it aside. And now that motion is made.

This motion is addressed to the discretion of the court. Where a plaintiff has suffered a nonsuit, through gross carelessness, or where it is manifest from the trial that he is without merits, the court will not set aside the nonsuit. And in this respect, it comes under the rule applicable to a motion for a new trial. But where the plaintiff has been surprised, or where it is clear that he has merits, the nonsuit will be set aside. This will be done on both grounds, for the purposes of justice. As the court usually requires the plaintiff to pay, at least, the costs of the trial, if not all the costs that have accrued, no hardship is imposed on the defendant. If the defendant acted fraudulently, as alleged, in charging illegal items, as a part of the tax, which items he retained and did not pay over to the county or state, it is not clear that the plaintiff may not recover the amount. He cannot recover the illegal items from the owner of the land, as the owner can only be charged with the tax imposed by law. The county or state never having received the items, cannot be called on to refund them; and the defendant having received them without authority of law, may be compelled to account to the plaintiff. At least the facts show, that the plaintiff has a prima facie case.

The nonsuit is set aside, on the plaintiff's paying the costs of the term.

WILLIAMS (SMITH v.). See Case No. 13,127.

WILLIAMS (SOHIER v.). See Cases Nos. 13,159 and 13,160.

WILLIAMS (STEVENS v.). See Cases Nos. 13,413 and 13,414.

WILLIAMS (STOWELL v.). See Case No. 13,515.

Case No. 17,738.

WILLIAMS v. SUFFOLK INS. CO.

[3 Sumn. 270;[1] 1 Law Rep. 153; 1 Hunt, Mer. Mag. 159.]

Circuit Court, D. Massachusetts. May Term, 1838.

JURISDICTION OF COURTS — QUESTIONS IN DISPUTE WITH FOREIGN NATION — SOVEREIGNTY OF TERRITORY—REVOLUTIONARY GOVERNMENTS — SHIPPING — AUTHORITY OF MASTER — SEIZURE BY USURPED AUTHORITY — RECAPTURE — SALVAGE—INSURANCE—ABANDONMENT.

1. Where a dispute exists between two independent countries, as to the right of sovereignty over a particular territory, the courts of justice of each country are bound to consider the claim of their own government as rightful, and are not at liberty to discuss the question who is the rightful sovereign, it being a subject of political and diplomatic negotiation, and not of judicial cognizance.

[Cited in Luther v. Borden, 7 How. (48 U. S.) 57; In re Cooper, 143 U. S. 503, 12 Sup. Ct. 460.]

[Cited in Re Gunn, 50 Kan. 232, 32 Pac. 954.]

2. Therefore, where the question, whether the government of Buenos Ayres had sovereign jurisdiction over the Falklands or not, was in dispute between the United States and Buenos Ayres, and the United States maintained that it was not: it was held, that the American courts were bound by the acts of its own government; and that, consequently, a condemnation of an American ship by a Buenos Ayrean tribunal, for illicit trade with the Falkland Islands, was illegal, and void for want of jurisdiction.

3. The Falkland Islands were formerly a part of the vice-royalty of La Plata, or at least were so claimed by Spain; and the government of Buenos Ayres (a new revolutionary government) has no right to assert sovereignty over them, unless those islands have been acknowledged to be within its territorial jurisdiction.

4. Semble, that the master of a ship is not absolutely bound to break up his voyage upon a usurped authority, and an illegal threat of a foreign government to confiscate the ship and property, if he persists in carrying on the voyage. He may exercise his discretion on the subject; and is not guilty of barratry, or gross misconduct, in persisting in the voyage, even though the ship should be seized and condemned therefor.

[Cited in Orient Mut. Ins. Co. v. Adams, 123 U. S. 73, 8 Sup. Ct. 71.]

5. If a ship is seized under such usurped authority, and recaptured by the crew, they are entitled to salvage; and the decree of an American court in rem will be deemed conclusive on the right, unless fraud is shown.

[Cited in brief in Ellicott v. Alliance Ins. Co., 80 Mass. 319.]

6. Where, in consequence of such an illegal seizure, and recapture, the voyage is lost, the owners may abandon for a total loss.

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

7. If the immediate cause of a loss is a peril insured against, it is no defence, that it was remotely caused by the negligence of the master or crew.

8. On commercial questions, the courts of the United States are not bound by the decisions of the state courts.

[Cited in Gloucester Ins. Co. v. Younger, Case No. 5,487; Greely v. Smith, Id. 5,750.]

Assumpsit on a policy of insurance, dated the 19th of August, 1830, whereby the plaintiff caused to be insured by the defendant, for nine per cent. per annum, premium, warranting twelve per cent. "lost or not lost, forty-nine hundred and nineteen dollars, on fifteen sixteenths of schooner Harriet, and eighteen hundred and seventy-five dollars on board said vessel, at, and from Stonington, (Connecticut), commencing the risk on the 12th day of August instant, at noon, to the Southern Hemisphere, with liberty to stop for salt at the Cape de Verd Islands, and to go round Cape Horn, and to touch at all islands, ports, and places, for the purpose of taking seal, and for information and refreshments, with liberty to put his skins on board of any other vessel or vessels until she returns to her port of discharge in the United States. It being understood, that the value of the interest hereby insured, as it relates to this insurance, is not to be diminished thereby. It is understood and agreed, that if the Harriet shall not proceed south-easterly of Cape Horn on a voyage toward the South Shetland Islands, and there be no loss, then the premium is to be six per centum per annum, the assured warranting only nine per cent." Vessel valued at five thousand dollars, outfits valued at two thousand dollars. There was a similar policy underwritten by the defendants for the plaintiff, on the same day for the like voyage in all respects, of thirty-five hundred dollars, on the schooner Breakwater, and two thousand dollars on outfits on board, at the same premium; the vessel being valued at thirty-five hundred dollars, and the outfits at two thousand dollars; upon which also an action was brought. The declaration upon each policy averred a total loss, by the seizure and detention of one Lewis Vernet and other persons, pretending to act by the authority of the government of Buenos Ayres, with force and arms. The causes came on to be heard together by the court, upon certain facts and statements agreed by the parties. It appeared from these facts and statements, that both of the vessels insured were bound on a sealing voyage, and proceeded to the Falkland Islands in pursuance thereof, and were there both seized by one Lewis Vernet, acting as governor of those islands, under the appointment and authority of the government of Buenos Ayres. The Harriet was seized on the 30th of July, 1831, and was subsequently carried by the captors to Buenos Ayres, where certain proceedings were had against her in the tribunals and under the sanction of the government of Buenos Ayres. She has never been restored to the defendants; but has been condemned for being engaged in the seal trade at the Falkland Islands. The Breakwater was seized at the islands, on or about the 18th day of August, 1831, and was afterwards recaptured by the mate and crew, who remained on board, and was by them brought home to the United States; and after her arrival, was libelled for salvage in the district court of Connecticut district, and salvage was awarded of one third part of the proceeds of the vessel and property. Copies of the orders and decrees of the court of Buenos Ayres respecting the seal fisheries; of the appointment of Vernet as governor of the Falkland Islands; of the proceedings against the Harriet; of the correspondence of the American government with the Buenos Ayrean government respecting those seizures, and the claims of the Buenos Ayrean government to the jurisdiction of the Falkland Islands, were produced and read de bene esse in the case.

C. G. Loring, for plaintiff.
Theophilus Parsons, for defendant.

STORY, Circuit Justice. I do not think it necessary, in the present cases, to examine many of the points made by the learned counsel on either side; because, in my judgment, the whole controversy turns upon a point, which, if decided in favor of the plaintiff, will render the examination of all others wholly unimportant. The government of Buenos Ayres insists, that the Falkland Islands constitute a part of the dominions within its sovereignty, and, consequently, that it has the sole jurisdiction to regulate and prohibit the seal fishery at those islands, and to punish any violation of its laws by a confiscation of the vessels and property engaged therein. On the other hand, the American government insists, that the Falkland Islands do not constitute any part of the dominions within the sovereignty of Buenos Ayres; and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayrean government to regulate, prohibit, or punish. The controversy is still undisposed of by the two governments, each maintaining its own claims and pretensions, and neither admitting the claims or pretensions of the other. In this state of the diplomacy between the two countries, while the whole matter is in contestation between them, or, as we may say, flagrante lite, the question is, whether it is competent for this court to reëxamine and decide, in its judicial capacity, upon the claims and pretensions of the two governments, and thus to interpose its positive umpirage to settle the matters in dispute, at least to the extent required for the proper adjudication of the cases now before it.

My judgment is, that this court possesses no such authority; and that it is bound up by

the doctrines and claims insisted on by its own government, and that it must take them to be rightful, until the contrary is established by some formal and authorized action of that government. It is very clear, that it belongs exclusively to the executive department of our government to recognise, from time to time, any new governments, which may arise in the political revolutions of the world; and until such new governments are so recognised, they cannot be admitted by our courts of justice to have, or to exercise the common rights and prerogatives of sovereignty. This doctrine was fully recognised by the supreme court of the United States, in Gelston v. Hoyt, 3 Wheat. [16 U. S.] 246, 324, as indeed it had been before, in City of Berne v. Bank of England, 9 Ves. 347; Dolder v. Bank of England, 10 Ves. 353, 11 Ves. 583; and The Manilla, Edw. Adm. 1. Now, before the revolution in South America, it seems to be historically true, that the Falkland Islands were, if they were under the positive dominion of any power, a dependency of Spain, under the vice-royalty of La Plata. When Buenos Ayres separated itself from the government of Spain, it might have claimed the sovereignty also of the Falkand Isands as an appendage to its own dominions. But that claim, unless enforced by an actual possession, and a full recognition by other nations, could, in no just sense, be deemed to give a fixed title. Buenos Ayres has undoubtedly been recognized by the government of the United States as an independent government; but that recognition can by no means be extended to an admission of its title to the sovereignty of the Falkland Islands, unless some act of the government can be shown, which carries it to that extent. None such is shown; none such is pretended. On the contrary, our government has expressly denied the sovereignty of Buenos Ayres over those islands, while it has admitted its territorial sovereignty on the continent of South America. And, upon the principle already adverted to, a principle well founded in the acknowledged doctrine of the law of nations, the Falkland Islands must be deemed to belong to their old sovereignty (whatever it might be), until the title of Buenos Ayres has been admitted by our government. This short view of the matter seems to me to dispose of the main subject in controversy; for if Buenos Ayres had no legitimate sovereignty over those islands, the act of seizure of the Harriet and the Breakwater was a gross usurpation; and the decree of its tribunals upon the subject of the seizure of the Harriet was a mere nullity, utterly unfounded in point of jurisdiction.

But I wish to add a word or two more on this subject, upon a principle somewhat broader in its extent, and equally applicable to, and decisive of, the merits of this case. It is, that this court, in its judicial character, cannot entertain political questions of this nature; or settle the rights and claims, as to territory and sovereignty, in controversy between us and foreign nations. On the contrary, this court is bound, so far as its own functions are concerned, to act upon the ground, that the claims of our government, and its assertions of its rights in this respect are correct. "Omnia rite acta." It might otherwise happen, that the extraordinary spectacle might be presented, of the courts of a country, disavowing, and annulling the acts of its own government in matters of state, and political diplomacy. The true doctrine on this subject was laid down by the supreme court of the United States in Foster v. Neilson, 2 Pet. [27 U. S.] 253, 307, and it was fully acted upon at the last term of that court, in the case of Garcia v. Lee, 12 Pet. [37 U. S.] 511.

Upon these grounds, this court must hold both of these seizures unlawful, and therefore the plaintiff is entitled to recover, as for a total loss, in the case of the Harriet.

In regard to the Breakwater, there is no pretence to say, that there has been a total loss, for which the underwriters are responsible. Upon the recapture the voyage was capable of having been performed; at least, the contrary is not established. The only question, which remains is, whether the underwriters are responsible for the salvage decreed by the district court of Connecticut. I am of opinion, that they are.—In the first place, the decree, upon the principles established in Gelston v. Hoyt, 3 Wheat. [16 U. S.] 324, 311 to 322, is conclusive, that the salvage was due and properly awarded; and that decree, there being no pretence of any fraud, is not re-examinable in this collateral proceeding. In the next place, if that decree were re-examinable, here is no question, that it was rightfully a case for salvage; for the recapture saved the vessel and outfits from an imminent peril of condemnation. The conduct of the Buenos Ayrean government clearly shows that there was imminent danger of confiscation of the property; and not the less so, because, in the view of our government, the seizure was unlawful; since Buenos Ayres insisted upon it, under a claim of rightful sovereignty, to enforce a supposed violation of that right. The principles decided by the supreme court in Talbot v. Seeman, 1 Cranch [5 U. S.] 1, fully sustain this claim for salvage.

I have not thought it necessary to discuss at large the points suggested by the learned counsel for the defendants, that the loss was occasioned by the barratry or gross negligence of the master of the Harriet, in carrying on the seal fisheries at the Falkland Islands, after the alleged warning given to him by Governor Vernet. Assuming that such a warning was given, I do not think that it could in the present case change the rights of the defendants. There is no ground for deeming the master's conduct to be barratry; for it was not any fraudulent violation, or wilful abandonment of his duty to the owner. As to the point of gross negligence, not amounting to fraudulent conduct, if such a case were made out, it would not help the defence. It has

been repeatedly settled by the supreme court of the United States, that if the immediate cause of a loss is a peril insured against, it is no ground of defence, that it was remotely caused by the negligence of the master or crew; the rule being, "Causa proxima, non remota spectatur." See Patapsco Ins. Co. v. Coulter, 3 Pet. [28 U. S.] 222; Columbian Ins. Co. of Alexandria v. Lawrence, 10 Pet. [35 U. S.] 507; Waters v. Merchants' Louisville Ins. Co., 11 Pet. [36 U. S.] 213. This doctrine being founded, not upon local law, but upon the general principles of commercial law, would be obligatory upon this court, even if the decisions of the state court of Massachusetts were to the contrary; for upon commercial questions of a general nature, the courts of the United States possess the same general authority, which belongs to the state tribunals, and are not bound by the local decisions. They are at liberty to consult their own opinions, guided, indeed, by the greatest deference for the acknowledged learning and ability of the state tribunals, but still exercising their own judgment, as to the reasons, on which those decisions are founded. But I do not understand, that the supreme court of Massachusetts has adopted any positive doctrine inconsistent with the principles of the maxim above stated. On the contrary, in Delano v. Bedford Ins. Co., 10 Mass. 347, 354, that learned court fully recognised the rule, that the immediate, and not the remote, cause of a loss was to be regarded in policies of insurance. I am aware of the decision of the same court, in Cleveland v. Union Ins. Co., 8 Mass. 308; but considering, that the ultimate decision was made by a minority of the court, (Mr. Chief Justice Parsons and Mr. Justice Thacher not sitting, and Mr. Justice Sewall dissenting) it can hardly be considered as a satisfactory authority. See, also, Ellery v. New England Ins. Co., 8 Pick. 14, 22.

But if the law were otherwise, nothing but very gross and criminal negligence of the master would bring the case within the category of the argument. Now, here is the case of a trade lawful, as I am bound to maintain, to American citizens, and rightfully carried on by them. Under such circumstances, and especially taking into consideration the past uninterrupted state of that trade, it seems too much to say, that a mere fear of molestation in the trade would have justified the master in breaking up the voyage. The underwriters were bound to know the ordinary perils of the trade, as much as the owner of the ship; and they took upon themselves the ordinary risks, arising from the known claims and decrees of the Buenos Ayrean government, known, I am to presume, as much to one party to the insurance, as to the other. I cannot say, that the master did not exercise a fair and reasonable discretion; or that his conduct was marked with such rashness, precipitation, and gross negligence, as to amount to a desertion of his proper duty, or to exonerate the underwriters from their liability. He appears to have acted with good faith, under a sense of duty, and in a lawful manner, in the maintenance of the rights of his country. Assuming that he had knowledge of the threats of Governor Vernet to make a seizure, if he persisted in pursuing the seal fishery at the Islands, he might have deemed it, and undoubtedly did deem it, a mere brutum fulmen, a threat, intended for intimidation, and not for execution; and the more so, because it was a gross usurpation of jurisdiction and sovereignty. Indeed, it is a very grave question, whether a master is bound to abandon his legal rights, and to submit to an unjustifiable exercise of illegal authority; and whether, if, in consequence of his refusal, a seizure, manifestly unlawful, should take place, whereby the vessel is lost, the underwriters would be discharged, even though the master might by a more prudent course, and by abandoning the voyage, have avoided the seizure. At present I incline strongly to the opinion, that he is not, in such a case, bound to abandon his legal rights, unless, indeed, his conduct would amount to a criminal departure from duty. The case of Sewell v. Royal Exchange Assur. Co., 4 Taunt. 856, appears to me fully to support this doctrine. In that case, the master refused to submit to what was deemed an illegal order of the governor of St. Michaels, and his vessel was seized and condemned therefor; and that was the cause of loss averred in the declaration. On that occasion Lord Chief Justice Gibbs, speaking for the court, said: "We think each party stands on his strict rights; and we are now to consider the strict point of law, not the question, whether it would have been more prudent in him, the master, to go to Tercera (according to the order), but whether he acted bona fide. We do not, however, quite agree with the defendants on the question of imprudence. But it is for the underwriters to shew, that the owners did something, which made it legal for the Portuguese to seize and condemn the vessel. And unless the seizure is legalized by any illegal act done on the part of the owners by the captain, the seizure is illegal, as we think, that here it is, and the assured is entitled to recover." There is great good sense in this doctrine; and I do not well see, how, upon any other rule, a master could safely act either for himself, or for his owners, in emergencies of this sort. If, upon every threat of illegal violence or seizure, he were bound to abandon his voyage, or the legal rights of the owner, there would be an end of all security to trade and commerce. It seems to me, therefore, that upon principle there is great reason to hold, if the loss is occasioned by the illegal act of a foreign government, it is a loss within the perils of the policy, even though it might have been avoided by the master by a different course of conduct, if his actual conduct was bona fide, in furtherance of the objects of the voyage, and in pursuance of his duty to his owners.

Upon these considerations my judgment is,

that the plaintiff is entitled to recover for a total loss in the case of the Harriet, and for a partial loss (i. e. the salvage,) in the case of the Breakwater.

[NOTE. As the judges were opposed in opinion, the cause was certified to the supreme court, where it was held that, inasmuch as the American government insisted that the Falkland Islands do not constitute any part of the dominions of Buenos Ayres, the action of the American government on this subject is binding on the circuit court, and that the plaintiff is entitled to recover for the loss of the Harriet. 13 Pet. (38 U. S.) 415.

[For hearing upon the report of the assessor who was appointed to report whether there was a necessity for the loss of the Breakwater, see Case No. 17,739.]

Note [from 1 Law Rep. 153]. The case of Cleveland v. Union Ins. Co., 8 Mass. 308, was never retried; but the loss was paid by the underwriters, it having been understood that Mr. Chief Justice Parsons expressed a decided opinion against the underwriters, and recommended a settlement.

Case No. 17,739.

WILLIAMS et al. v. SUFFOLK INS. CO.

[3 Sumn. 510;[1] 2 Law Rep. 76.]

Circuit Court, D. Massachusetts. May Term, 1839.

MARINE INSURANCE — BREAKING UP OF VOYAGE — CAPTURE AND RECAPTURE—SALE FOR SALVAGE —TOTAL LOSS—GENERAL AVERAGE.

1. A ship on a sealing voyage visited the Falkland Islands, where the master, with the second mate and four of the best men, were captured by Lewis Vernet, acting governor of those islands. The ship itself was also seized, and, after being in the hands of the captors two or three days, was recaptured by the mate and part of the crew remaining on board, who brought her home, and libelled her for salvage. *Held*, that from these events there was a loss of the voyage from necessity, so that the underwriters were liable as for a constructive total loss.

[Cited in Gates v. Madison Co. Mut. Ins. Co., 5 N. Y. 479.]

2. The necessary sale of a vessel in the course of a voyage to defray salvage creates of itself a total loss of the vessel for the voyage.

3. Where the object of the voyage is entirely defeated, and the vessel is obliged to return home, it cannot be treated as a case of a voyage to a port of necessity for repairs, but there is a total loss.

4. No loss or expense is to be considered as general average, and so applied in making up a loss, unless, in the first place, it was intended to save and preserve the remaining property, and unless, in the second place, it succeeded in doing so.

[Cited in The Joseph Farwell, 31 Fed. 845; The L'Amerique, 35 Fed. 838.]

5. The expenses and charges of going to a port of necessity to refit can properly be a general average, only when the voyage has been, or might be resumed. But the doctrine does not apply, if the voyage has been abandoned from necessity.

This was a case upon a policy of insurance, which had been heard before [Case No. 17,738], and now came on upon the report of Willard Phillips, Esq., an assessor appointed to report the facts, whether there was a loss of the vessel insured, the Breakwater, from necessity. The assessor made his report in substance as follows: By the policy, the plaintiff was insured $3,500 on the Breakwater, and $2,000 on outfits at and from Stonington, commencing the risk on the 12th of August, 1830, to the Southern hemisphere for a sealing voyage, with liberty to put skins on board of any other vessel "until she returns to her port of discharge in the United States. It being understood, that the value of the interest hereby insured, as it relates to his insurance, is not to be diminished thereby." At the end of the first season—about March, 1831, the Breakwater visited the Falkland Islands, within the liberty given in policy, and for purposes connected with the voyage. The captain, with the second mate and four of the best men, and a seal boat, were captured by Lewis Vernet, acting governor of those islands. The schooner was also captured or seized, and after being in the hands of the captors two or three days, was recaptured by the mate and part of the crew remaining on board, who brought her home. After her arrival she was libelled for salvage in the district court of Connecticut, and salvage was awarded of one-third part of the proceeds of the vessel and property.

In regard to a total loss by the breaking up of the voyage, the mate testified explicitly, that the capture deprived the Breakwater of the following requisities for prosecuting the voyage: (1) A navigator, he being the only one after the detention of the captain, and it being necessary that there should be two at least on board, one to go out with the boats, the other to remain with the vessel, and he had no certain means of finding another navigator short of returning to the United States, if he had proposed still to prosecute the voyage. (2) The best men had been taken out and detained, and he could not procure other suitable hands to supply their places without returning to the United States, it being requisite that a vessel should have a certain number of men skilled in this kind of voyages. (3) The loss of the muskets, the method of killing the fur seals of late years being by shooting, for the most part, or, at least, in a great part, and that a vessel is not equipped for such a voyage without a supply of muskets and ammunition. These he supposed he might have obtained short of the United States, had he been otherwise prepared and disposed to pursue the voyage. (4) Loss of seal boat with the captain, which he could not have replaced short of the United States, and a vessel with one seal boat only would not be fit to prosecute this species of sealing, and could not prosecute it to any advantage, or with any safety, since two boats always go in company to render each other assistance in case of accident. (5) Another reason for not prosecuting the voyage was the danger of being captured by Vernet, who then had

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

at his command three vessels,—a part, or all, of which he had captured,—and seventy or eighty men. (6) The loss of the ship's papers by the capture was one objection to prosecuting the voyage, though the mate was of opinion, that, as it was a time of peace, this objection would not of itself have been conclusive. (7) He could not prosecute the voyage without coming home to refit, and he could not come home to refit without losing the sealing season.

Upon these facts the assessor reported that, by reason of the capture, there was a loss of the Breakwater by necessity.

Charles G. Loring, for plaintiffs.
Theophilus Parsons, for defendants.

STORY, Circuit Justice. It appears to me, that the assessor is right in the conclusion, which he has drawn, that there was a loss of the voyage by necessity, from the capture and other events stated in his report. I cannot treat this as the case of a voyage to a port of necessity for the mere purpose of new equipments and repairs to resume the voyage; but there was a total loss of the voyage itself. The sealing season was lost. The vessel was compelled to return home. A new master and crew were to be hired, and to be hired upon new terms, exactly as if a new voyage was commenced. New outfits were required, and to be useful they must be co-extensive with the whole period of the new voyage. Besides, the vessel was liable to, and was libelled, and sold for, salvage. That sale put an end at once to the original ownership and voyage; for after the sale it was utterly impossible to resume the voyage insured. New interests, new rights, and new parties had intervened. The necessary sale of a vessel in the course of a voyage to defray salvage creates of itself a total loss of the vessel for the voyage; and in a case like the present, there was thereby a total loss of the voyage also as to the outfits insured.

The question, therefore, of general average, which might arise, if the voyage to Stonington were a mere voyage to a port of necessity to refit and resume the original voyage, does not in my judgment become material to be considered. General average can only arise, where the sacrifice has been made for the common benefit, and has accomplished the object. The expenses and charges of going to a port of necessity to refit can properly be a general average only when the voyage has been, or might be, resumed. If it has been abandoned from necessity, then it is not a case for the application of the doctrine. The present case must be treated upon the basis of a constructive total loss by the perils insured against, where there has been a due abandonment to the underwriters.

As I understand the policy, the value insured upon the outfits is to continue undiminished during the whole voyage; that is to say, it is to be treated as a case where the outfits are valued at the sum insured for the whole voyage, without any regard to their diminution by waste, or by consumption, or by the transshipment of any of the seal skins, the product of the enterprise, in any other vessel during the voyage. I do accordingly confirm the report of the assessor, and recommit the report to him, with directions to ascertain and report the amount due to the plaintiffs, upon the basis of a constructive total loss of the Breakwater, and her outfits during the voyage.

Case No. 17,740.

WILLIAMS et al. v. The SYLPH.

[2 Betts, D. C. MS. 49.]

District Court, S. D. New York. Sept. 21, 1841.

BARRATRY—SEAMEN'S WAGES—SHARE IN PROFITS OF WRECKING—BARRATRY OF MASTER.

[1. The carrying off of a vessel, by her master, after her owner's death, to a port of a state other than that of the owner' residence, is an act of barratry, even if it be for the purpose of delivering her to persons supposed to be the owner's heirs, for it is to be presumed that the laws of the owner's domicile make provision for the proper disposal of the property.]

[2. In such case the right of one claiming a lien for wages is to be determined on the same principles as if the libel were filed in a court of the owner's domicile.]

[3. A mariner who shipped on a licensed wrecking vessel, under contract to receive compensation only by a share of the profits, acquires no right to wages by the fact that, on the owner's death, the vessel is carried off to a foreign port by the master, even if contrary to the mariner's will; and, if no profits were made, he can recover nothing from the ship.]

[4. Nor could a promise of the master to make reasonable compensation give the mariners any claim, as against the owner, it being notorious that he was committing a gross fraud and wrong against the owners in going off with the vessel.]

[This was a libel by Charles Williams and others against the schooner Sylph to recover wages.]

PER CURIAM. The vessel was employed under a license as a wrecker on the coast of Florida, and the libellants shipped on board at Indian Key, or Key West, under engagements to be compensated by shares of the earnings of that business. While the vessel was off the reefs, pursuing her business, the master, as it is alleged by the libellants, without their consent, and in violation of their rights, abruptly and tortiously left the cruising station, and brought the vessel to this port. It is also averred, in aggravation of damages, that the libellants were put upon an insufficient allowance of provisions on the passage, and were discharged on the arrival of the vessel here, without payment of their wages, or any means of support being provided them. The libellants claim wages for the full period of their contract, etc.

The vessel was the property of Jacob Houseman, a resident at Indian Key, where he died some time the last spring. He left a wife (but no children) residing at that place, and a father and brothers residing at Staten Island, in this state. The exemplification of a record of a testamentary paper from the county court of Monroe county, in the territory of Florida, was produced on the hearing to prove the bequest of this vessel to the widow of Jacob Houseman, and also letters testamentary, granted her by the same court, to administer as executrix upon the estate of her husband. These papers were objected to as not authenticated by competent evidence. It is not necessary to discuss or decide this question of evidence, because, by the principles of universal law, the disposal of the vessel as part of the personal estate of the deceased must be in correspondence with the law of his domicile. Story, Confl. Laws, pp. 312, 313, c. 9. Whether the will of Jacob Houseman made a valid bequest of this vessel to his widow, or, if not, who is entitled to it by inheritance, are questions, therefore, which are governed by the laws of Florida, and not those of New York; and those questions are to be disposed of as if brought to adjudication before a court of that territory. 1 Story, Confl. Laws, p. 403, c. 12.

The evidence offered, and the reasoning upon that evidence, tending to show that the vessel was brought off by the master for the purpose of delivering her up to the father and brother of Jacob Houseman, in this state, as entitled to her by inheritance, could be of no avail, even if it was proved that the act was done at the instance of those persons. The act would be tortious in respect to the change of property, and no right to wages would accrue thereby that did not exist or arise upon considerations independent of it, because there is no proof that the father would be heir to the deceased son by the laws of Florida, and none that the inheritance would descend to brothers, and accordingly the court cannot presume any interest, in the Housemans residing here, in this vessel, or regard any implication tending to show that the master acted under their authorization in bringing her out of her home jurisdiction. The claim to wages cannot, accordingly, be supported upon any supposed employment of the Housemans here in derogation of the authority and interests of the owner in Florida. As, therefore, the property in this vessel is determinable solely by the law of the late owner's domicile, and as it is to be presumed that suitable provision is there made for its possession and disposal, the demand of the libellants now in suit against it is to be examined, in respect to the act of bringing her away, as if prosecuted in that jurisdiction, or the same as if defended here by a claimant having a right to the property clear of all exception.

If the vessel was carried off by concert with the crew, or their consent, the act would be equally barratrous with respect to the mariners as the master, being a fraudulent act committed jointly by all, in prejudice of the owners of the vessel. Abb. Shipp. 138, § 2; [Patapsco Ins. Co. v. Coulter] 3 Pet. [28 U. S.] 222; [Columbia Ins. Co. of Alexandria v. Lawrence] 10 Pet. [35 U. S.] 517; [Waters v. Merchants Louisville Ins. Co.] 11 Pet. [36 U. S.] 221. Services rendered in a willful deviation or breaking up of the voyage can afford no foundation for a claim of wages by any one taking part in such act. Supposing the sailors free of all intentional agency in the transaction, and that the act of the master was a fraud upon them equally as upon the owner, is the vessel still liable to them for their services? There would be much greater difficulty in discharging the ship from such claim in cases of ordinary hiring; for, although the engagement may be for a specific voyage, and the vessel be by the master immediately run upon one totally variant from it, yet, as the seamen have no control in the navigation of the vessel, are usually in no way consulted, and are not supposed to know anything on the subject, their equities might well be regarded as continuing unaffected by such proceeding of the master, and the lien be preserved to them notwithstanding the barratrous conduct of the master. The present case is distinguishable from that of an ordinary hiring in this great particular: that the libellants, shipping for shares, have no specific lien on the vessel until the earnings of the vessel are ascertained and liquidated.

In the common case of a contract with sailors, a violation by the master, either in withholding from the men the employment engaged for, or in putting them upon a different service, the court may still regard it as continuing in force for the benefit of the seamen, and give them the same remedies as if it had been executed according to its terms. Wages would accordingly be decreed in such cases, upon the basis of the contract, and in conformity to its stipulations; the equity of the court only extending its application to the mere services imposed upon the crew. Here, however, it is admitted that no remedy can be afforded upon the contract itself. There never existed any lien upon the vessel, and the very nature of the undertaking imported that the men might work out the whole period of their engagement without ever acquiring any privilege against the vessel. To charge her with wages would be in direct subversion of the agreement and intention of the owner. He victualled and fitted her out, and allotted her to this enterprise; the men putting their labor in the common risk with his advances, to be recompensed or not according to the result of the adventure. Manifestly, therefore, the obligation of the owner to the mariners was this only: that he, and consequently the vessel, should be bound to give them their proportion of the earnings of this particular undertaking. The court cannot look out of this agreement, and frame a new one, that might be better calculated to protect or indemnify the men. Hoyt v. Wildfire, 3 Johns. 518, is a strong case to show how far this court will

go in securing to seamen the benefit of their contract. Although the services stipulated for are not performed, I think the doctrine of that case is sound, and that the liability of the vessel is commensurate with that of the owner; and it is clear, from the principles there declared, and the cases by which the decision is supported, that the contract will be upheld and enforced in behalf of the seamen, notwithstanding the failure of the voyage, when the failure is produced by the wrongful act of the master. The case, however, embodies no principle sanctioning an authority in the courts to substitute, in place of the contract, a new liability, distinct and variant in every feature from the stipulation between the parties, and attach the equities so raised in place of the contract upon the vessel.

The difference is wide between compelling an owner to fulfill his contract to a sailor who has not performed on his part, because prevented by the tort or laches of the master, and abrogating the contract, and raising a new one in behalf of the seamen for that cause. I should regard it a dangerous principle to admit into the Maritime Code that an interruption or violation of seamen's contract, committed by the master, or any of the men, or owner, would entitle the crew to receive from the courts, by implication, a new and better one, and have that enforced against the ship. Substituting, in this case, the highest rate of wages allowed at Indian Keys, or even reasonable money wages, in place of the shares stipulated for, might prove a most advantageous change of the agreement to the men, and a ruinous one to the owner; but, whether so, or the reverse, the court would by such proceeding assume to itself the power of granting privileges and imposing liabilities ex mero motu, and without the concurrence of the parties themselves,—an authority of doubtful utility in any court, but one which it is believed courts of admiralty never exercise. The libellants, then, having no right of action here upon their contract for earnings under it, if any were made, until the voyage shall be adjusted, and the proportions liquidated, and this court having no authority to decree for wages otherwise than in consonance with the contract, express or implied, whether upon a completion or abandonment of a voyage, the suit of the libellants, in so far as it rests upon this ground, must fail.

Nor does the allegation in the libel, if supported by proof, that the master promised the libellants, after the schooner arrived here, to make them a reasonable compensation in lieu of their stipulated wages, vary their case in respect to the owner or vessel. It was notorious to them all, then, that he had committed an act, if not of piracy, of gross fraud and wrong upon the owner in running off with the vessel, and that his engagements to them under such circumstances were not intended to be for the benefit of the owner, but, on the contrary, to his injury and ruin. If the engagement had been most formal and explicit, it could not be permitted the master and crew, under such circumstances, to abandon the subsisting contract, and create a different one. This would be no execution of his trust as agent in hiring a crew. Story, Ag. 109, 111. Independent of the want of authority in the master to bind the owner by a stipulation of that character, the libellants could not, however honestly made, enforce it, because the consideration was already executed and past; all their services, except nine days, having been rendered under a contract of a totally different nature.

Upon the facts charged in the libel, the prayer seeks recompense for the tortious abandonment of the voyage by the master, and bringing the libellants against their will to a port foreign from the place of their shipment. The answer asserts that the libellants concurred in the act, and that it was jointly done by all, with intent to defraud the owner. Putting the case, however, upon the allegations and proofs of the libellants alone, it does not appear to me that they make out a right of action against the vessel. The testimony of the libellants themselves makes the transaction piracy on the part of the master. He ran away with the vessel, and carried her to a port foreign from her home one, and delivered her up to those who had no authority in or over her. If such be the true complexion of the act, there certainly can arise out of it no right or equity on the part of the seamen to charge the injury they received to the owner, and make the vessel responsible for its satisfaction. It becomes, in respect to the seamen, merely a personal tort committed by the master,—the same, in effect, as a forcible imprisonment and kidnapping of the men. Owners are not liable for torts of that nature, nor for any that do not flow naturally from the relation of the master to the vessel, so as to fall within the scope of his agency. A close scrutiny of the proofs will, however, scarcely entitle the libellants to assume this to be the real posture of the case. There are manifold particulars conducing to show that they lent themselves willingly to the purpose of the master, and were ready participants in his malconduct. If such be the legitimate conclusion of the evidence, it disarms the occurrence of any appeal to sympathy in their behalf, and subjects them most justly to bear a part of the evil and loss inflicted by the act. Without adjudging that the testimony leads to such conclusion, the court upon the other features of the case, decrees that the libellants have established no right of recourse to the vessel for services rendered, for abandoning the voyage, or for tortiously bringing them to this port.

The case of Vidall, the cook, is supposed to be distinguishable from the others, inasmuch as his contract was for $8 per month money

wages, besides a half share of the profits of the adventure, and that he can now demand his money compensation at least. Admitting the contract with him to be of a separable quality, so as to give him an entire remedy for such provision, and that he can proceed for the amount of the money stipulated against the vessel for any wrongful violation of the agreement by the master, and also admitting that the evidence is insufficient to convict him as a willing participant in the wrongful act, it is yet insisted by the claimant that his demand is fully satisfied by payments made him; and it is proved, in support of that allegation, by a witness here, who paid him $8, that the cook then said that sum was all that was owing him. This is a sufficient bar to his action in this behalf. I am accordingly of opinion that, if there be any unsatisfied demand in favor of the libellants, it is not proved to be of a character which gives it a lien on the vessel. Ordered that the libel be dismissed.

[For subsequent proceedings by William D. Bradshaw, part owner, to recover possession of the vessel, see Case No. 1,791.]

Case No. 17,741.

WILLIAMS v. THRELKELD.

[2 Cranch, C. C. 307.] [1]

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

STATUTE OF FRAUDS — SUFFICIENCY OF AUCTIONEER'S MEMORANDUM.

1. An auctioneer's memorandum, or entry in his sales book, of a sale of lands, is not sufficient to take the case out of the statute of frauds, if it does not sufficiently describe the land, and the terms of sale.

2. Quære, whether an auctioneer's written memorandum of the sale of lands is in any case sufficient to take the case out of the statute?

This was an action brought to recover the purchase-money of about four and half acres of land, being lot No. 299, in Beatty & Hawkins's addition to Georgetown, amounting to $587.01. Upon a demurrer to the evidence the principal question was, whether the auctioneer's written memorandum of the sale was sufficient to take the case out of the statute of frauds.

The memorandum, a duplicate of which was delivered to the plaintiff, was as follows:

"April 12, 1819.

"4½ acre lot $144 per acre; Threlkeld,
" Lot 55 by 67; 8.12½, J. Cox, is $446 87½
" " 55 by 40; 5.62, J. Cox, is.. 309 10

$705 97½

"Sold for Mr. Williams. J. Peabody, Auct."

Mr. Key, for plaintiff, contended that the auctioneer is the agent of both parties in the sale of lands, exactly as he is in the sale of goods. Emmerson v. Heelis, 2 Taunt. 38; Coles v. Trecothick, 9 Ves. 234; White v. Proctor, 4 Taunt. 209; 2 Liverm. Ag. 355; Kemeys v. Proctor, 3 Ves. & B. 57.

Mr. Redin contra, cited Simon v. Motivos, 3 Burr. 1921; Stansfield v. Johnson, 1 Esp. 101; Walker v. Constable, 2 Esp. 659; s. c., 1 Bos. & P. 306; Buckmaster v. Harrop, 7 Ves. 341; Simonds v. Catlin, 2 Caines, 61; Jackson v. Catlin, 2 Johns. 248; Symonds v. Ball, 8 Term R. 151; Grant v. Naylor, 4 Cranch [8 U. S.] 234; Coles v. Trecothick, 9 Ves. 234; White v. Proctor, 4 Taunt. 209.

Mr. Redin further objected, that the auctioneer's memorandum did not contain the conditions and terms of the sale, nor a description of the land.

THE COURT, without deciding the question whether an auctioneer's memorandum of the sale is sufficient to take it out of the statute of frauds, was of opinion, that in this case it did not sufficiently in itself describe the property, nor the terms of the sale; nor refer to any other instrument that does describe them. Judgment, on the demurrer, for the defendant.

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

WILLIAMS (TURNER v.). See Case No. 14,265.

WILLIAMS (UNITED STATES v.). See Cases Nos. 16,704–16,724.

Case No. 17,742.

WILLIAMS v. The VANDERBILT and The COLLINS.

[N. Y. Times, Nov. 19, 1863.]

District Court, S. D. New York. 1863.

COLLISION—TOW WITH VESSEL AT DOCK.

[A floating derrick without motive power, moving in tow of a tug, *held* free from fault where she drifted against a vessel moored at a dock.]

[This was a libel by John E. Williams and others against the steam tug Vanderbilt and the floating derrick Collins. Exceptions to the libel filed by the claimants were heretofore overruled. Case No. 17,744.]

Owen, Gray & Owen, for plaintiffs.
Beebe, Dean & Donohue, for the steamtug.
Benedict, Burr & Benedict, for the derrick.

Before SHIPMAN, District Judge. This was a libel for collision. The libelants were the owners of the ship Chancellor, which, on Sept. 29, 1862, was lying alongside the dock just below the navy yard, in Brooklyn, and was struck by the floating derrick, which was being towed away from the navy yard by the steam tug, and injured to about $2,000. The testimony showed that the derrick had been employed by the government of the United States to do some lifting at the navy yard, and, having no motive power of her own, the government was to tow her there and away again. The same government offi-

cer who employed her also employed the steam tug to tow her, and was himself on board the steam tug, and gave some directions about her navigation. The tide was so strong that the derrick was swept down upon the Chancellor, and, having no motive power, could do nothing to prevent it.

THE JUDGE held that on the evidence the derrick must be exonerated, and allowed the steam tug to be heard as to whether being in government employ made any difference with her liability.

[NOTE. For hearing on the question as to whether the fact of the steamtug being at the time in the employment of the United States made any difference with respect to her liability, see Case No. 17,743.]

Case No. 17,743.

WILLIAMS v. The VANDERBILT and The COLLINS.

[N. Y. Times, Dec. 15, 1863.]

District Court, S. D. New York. 1863.

COLLISION—TOW WITH VESSEL AT DOCK—LIABILITY OF TUG.

[A steamtug, towing a floating derrick, which drifted against a vessel moored at a dock, *held* not liable, where the only fault was in starting out with her tow from the Brooklyn Navy Yard in the existing conditions of tide and weather; it appearing, however, that she was not at liberty to choose her own time, but was under the direction of a naval officer of the United States.]

[This was a libel by John E. Williams and others against the steam tug Vanderbilt and the derrick Collins. Certain exceptions to the libel were heretofore overruled by the court. Case No. 17,744. Thereafter the cause was heard, and the court held that the Collins was free from blame, but allowed time for the steam tug to be heard on the question as to whether the fact of her being at the time in the employment of the United States made any difference with respect to her liability. Case No. 17,742. The case has now been heard upon this latter question.]

Owen, Gray & Owen, for libelants.
Beebe, Dean & Donahue, for the tug.
Benedict, Burr & Benedict, for the derrick.

SHIPMAN, District Judge. This case is a very simple one, and the witnesses differ very little in their narrative of facts. The suit is brought by the owners of the ship Chancellor to recover damages to her inflicted by a blow from the derrick Collins, while the latter was in tow by the steam tug Vanderbilt, on the 29th of September, 1862. The Chancellor was lying at the dock of the Brooklyn Gas Company, in Brooklyn, below the navy yard, and the derrick was being towed out from the navy yard by the tug, on her way to the neighborhood of Sandy Hook. As the tug and derrick pushed out from the navy yard into the East river, and by where the Chancellor lay, the ebb tide caught the derrick, and swung her down against the stem of the ship, doing the damage complained of, which was considerable, inasmuch as she had to be taken on to dry dock for repairs. The derrick was owned by parties who had hired her to the United States government, and she was at the time of the accident in service and under the exclusive control and direction of the agents of the United States. She is a heavy mass of timber and plank, 76 feet square, with a large framework erected thereon, and used for raising heavy weights; she is unmanageable by any of the ordinary means used in the navigation of vessels. She has no sails, or other means of propulsion of her own, but, when moved, is towed like a log or mere hull. She was lying at the navy yard a short time before the collision, when the tug Vanderbilt, also in the service of the United States, was ordered to tow her out into the stream and down the bay, to or near Sandy Hook. It was necessary, or at least convenient, to start in the ebb tide, and the tug was ordered to hitch on and tow her out. This she did, and there is no evidence of fault of her officers and men. She went out in obedience to the orders of the officer of the navy in charge, and hauled up the river as far as she safely could, without coming in collision with vessels at anchor. The derrick, however, being an inert mass, did not follow in a line with the tug, but as she came within sweep of the tide she was carried down against the stem of the libelant's ship. Those navigating the tug could have done nothing more than they did do to prevent the collision. She was turned up stream as far as she could be safely, and exerted herself to keep the derrick as far up as possible, but the effect of the tide still carried the latter down and produced the collision.

The only fault shown by the evidence was in standing out under the circumstances and on the ebb tide. But the time of starting was not fixed or controlled by the tug, but was fixed and controlled by the naval officer in charge of the enterprise. He, and not the master or owners of the tug, had the right to fix the time of starting, and exercised this right. All the tug was bound to do was to exercise proper skill in performing the voyage; this the evidence showed she did. Had the tug been under a mere general contract to tow the derrick down to Sandy Hook, with the right to select her own time, then the responsibility would have been on the tug for any error in attempting the voyage at a dangerous time. She would have been liable for the consequences of an attempt to go out with a strong ebb tide, as well as liable for any other error during the voyage. But being under the control of the naval officers as to the time of starting, and there being no other fault, the movements of the tug being properly conducted, she is not liable. The

facts in this case take it out of the rule laid down in those cited by the libelant's counsel. Let a decree dismissing the libel be entered.

Case No. 17,744.

WILLIAMS v. The VANDERBILT and The COLLINS.

[N. Y. Times, April 1, 1863.]

District Court, S. D. New York. 1863.

PLEADING IN COLLISION CASES—VESSEL STRUCK AT DOCK—TUG AND TOW.

[1. A libel to recover damages to a vessel struck while moored at a dock by a moving vessel need not set out in detail the movements of the colliding vessel; nor, being incapable of movement herself, need she allege any matter in excuse of her own connection with the accident.]

[2. A libel may be maintained jointly against a tug and tow for an injury inflicted by a collision of the tow with another vessel. And the fact that one of these vessels may be found on the evidence to be free from blame does not vitiate the libel as against her co-defendant.]

[This was a libel by John E. Williams and others against the steam tug C. Vanderbilt and the floating derrick Collins to recover damages occasioned by a collision. On exceptions to the libel.]

This was an action to recover the damages occasioned to the ship Chancellor, belonging to the libelants, by her being run into while lying at a dock near the navy-yard, by the floating derrick in tow of the steamtug. The libel alleged that the derrick, at the time of the collision, was in possession and under the control of the employés of her owners, and also that the steamtug was under like direction and control of the same captain, and her movements were to be made to accommodate those of the derrick; nevertheless, to a certain extent, the steamtug was under the government and control of her own pilot and commander, so that it became the joint and several duty of the officers and men so employed to avoid the injuries inflicted upon said ship; yet that the aforesaid persons so carelessly, negligently, and improperly towed, moved and navigated the derrick and tugboat, as that, by their concurrent negligence and want of skill, the derrick was run into the ship.

The claimants filed exceptions to this libel as insufficient, because: First, it does not specify the acts of negligence charged upon the derrick; second, it does not allege it was possible for the derrick by any act or manoeuvre to have avoided the ship; third, it does not sufficiently set forth the maneuvres of the respective vessels, nor describe the method in which the ship was struck; and, fourth, it prays a joint decree against the derrick and tug, but does not set forth facts showing that the collision was caused by their joint negligence.

Owen, Gray & Owen, for libelants.
Benedict, Burr & Benedict, for derrick.

BY THE COURT (SHIPMAN, District Judge). Should the view of the counsel for the claimant be correct, that the rules of pleading in admiralty generally exact a specific detail of the movements made by a vessel collided against, for which she seeks compensation, and that she must show that all her own acts had been conformable to the laws of navigation, the doctrine would not apply to and govern the frame of the libel in this case, because the ship was passive in the transaction, and in no way contributed to the collision complained of, and is not called upon to excuse her connection with the event. She was moored at a wharf, and in no condition, by any active agency on her part, to induce or avoid the collision. Had she been in motion, it might be incumbent upon the complainants to justify or excuse, by pleadings in defence, the correctness of her course and proceedings. The libel is free of error in that respect.

It is plain upon the adjudged cases that an injury by collision may be inflicted upon a vessel afloat or stationary by the combined action of moving objects, a tug and a tow propelled together, in which a common fault may be committed by the motive power, and a common responsibility thereby be incurred, and accordingly the mutual wrong may be alleged against them, and a joint recovery be had for the concurrent misfeasance or negligence of each in recompense of it. In general, the ambiguity lies in the question of a community of culpability and responsibility, and the litigation results in exonerating one of the accused objects, and fastening the entire liability upon its associate. This is wholly matter of proof upon the trial, and the pleading against the blameable party is not vitiated by alleging against his codefendant more than is verified upon the evidence.

I think the recent decisions of the supreme court of the United States, and the cases cited and recognized therein, amply establish the doctrine ([McKinlay v. Morrish] 21 How. [62 U. S.] 346; [Sturgis v. Boyer] 24 How. [65 U. S.] 110; 1 Black [66 U. S.] 62); and sufficiently point out the restriction that the proofs must be kept within the scope of the allegations, and that the evidence must clearly establish whether the colliding vessels are mutually culpable, or the fault lies exclusively with one of them, and that point is determined by the proofs. The charge of fault may rightfully be made against the tug and barge conjointly or separately.

The exceptions in this case take the character of a demurrer, and in my opinion, do not point out any reform necessary in the structure of the libel, much less do they amount to a bar of the action. Exceptions overruled, with costs to be taxed.

The question came up on appeal from the clerk's taxation, whether the libelants were

entitled to the docket fee allowed by the statute "on a final hearing."

THE COURT held that they were entitled to it.

[For subsequent proceedings, see Cases Nos. 17,742 and 17,743.]

WILLIAMS (VAUGHAN v.). See Case No. 16,903.

WILLIAMS (VEAZIE v.). See Cases Nos. 16,906 and 16,907.

Case No. 17,744a.

WILLIAMS et al. v. The VIM.[1]

District Court, S. D. New York. March 19, 1879.

TOWAGE CONTRACT—EXEMPTION FROM INJURIES BY ICE—EVIDENCE.

[1. A statement made by the master of a tug in the course of a heated controversy with the master of one of his tows, as to the manner in which the tow should be made up, to the effect that "when we hook to a boat we are responsible for her, and you've got to be towed how and where we like," cannot be considered of any weight upon the question as to the existence or nonexistence of an alleged contract exempting the tug from responsibility for injury by ice.]

[2. A contract exempting a tug from responsibility for injury to her tow by ice does not relieve her from liability for damage resulting from her own negligence while towing in the ice.]

[This was a libel by Richard H. Williams and others against the steam tug Vim, to recover for the loss of a tow.]

Wm. W. Goodrich, for libelants.

R. D. Benedict, for claimants.

CHOATE, District Judge. This is a suit by the owner of the canal boat Oliver Breed and her cargo, consisting of 220 tons of coal, against the steam tug Vim to recover damages for the loss of said canal boat and cargo, while being towed by said tug from Brooklyn to Stamford, Connecticut, on the night of the 29th of January, 1877. The libel alleges a contract on the part of the tug to tow the boat and her cargo safely and carefully, in consideration of $50 to be paid therefor; that the tug took the Oliver Breed alongside on her starboard side, and also had another boat, the Daniel S. Reed, lashed to her port side, and left Brooklyn about 6 or 7 p. m.; that the tow proceeded up the Sound until about 12 or 1 o'clock, when near Execution Light it met large fields of ice; that the master of the tug was advised and requested by the masters of the two canal boats to tow them by a hawser astern, instead of alongside, and that that was the safest course, but the master of the tug refused to do so, and continued to tow the boats alongside; that, while proceeding, the master of the Vim carelessly, and without slackening her speed, towed the Breed into and upon the corner of a large piece of ice, which broke a hole in the starboard bow of the Breed, causing her to fill and sink in a few minutes in very deep water; that the damage was occasioned without any fault or negligence on the part of the libellants, and solely by the fault of those in charge of the tug, among other things, in towing the said boat when the navigation was dangerous, and in proceeding at a high, reckless, and dangerous rate of speed in a place filled with ice, which was both large and solid, and in not avoiding the ice, and in not slowing and stopping the tug, and in not towing by a hawser astern, instead of alongside, and in taking the course she did, instead of some other course.

The answer of the claimants, the owners of the Vim, admit the taking of the Breed in tow, as alleged in the libel, avers that, when they made the agreement to tow said boat to Stamford, it was agreed between them and the libellants that the claimants were not to be responsible for any dangers that might happen to her from coming in contact with ice while being so towed, and in all other respects it admits the claimants agreed to tow her safely and carefully; that when the tug with her tow had arrived about opposite College Point in the East river they met with floating ice; that the master of the tug then informed the master of the canal boat that he must take the risk of proceeding on through the ice; that the master of the canal boat preferred to go on and take the risk of injury by the ice, and the tug proceeded at a very slow rate of speed with her tow through the floating ice; that libellants' boat was properly and carefully towed in all respects; that when about three miles east of Sands Point the Breed was cut into by a cake of floating ice, and there sunk.

The answer denies that the tug towed the canal boat into and upon the corner of a large piece of ice carelessly, and without slacking her speed, and avers that she was making very little headway at the time, and was not going over a mile or a mile and a half an hour. It denied the alleged request of the master of the canal boat to tow her astern by a hawser, instead of alongside, or that that was the safest course, and it denies all the allegations of negligence mentioned in the libel.

As regards the agreement between the parties, Hanchet, the master of the Breed, who is the husband of her owner, one of the libellants, testifies that he went with the master of the other canal boat, on the day they were taken in tow, to the office of what is known as the "Game Cock Line," which is also the office of the steam tug Vim, and there saw Mr. McWilliams, who was the general superintendent of the Vim, and he referred him to Mr. Gladwich, the vice-president, and that he made the agreement with Mr. Gladwich for towing the two canal boats to Stamford for

[1] [Not previously reported.]

$100; that he saw McWilliams downstairs, and was sent upstairs to see Gladwich; that nothing whatever was said about ice, or who should take the risk of the ice. Root, the master of the Reed testified that he went with Hanchet to the office, and stood by him when he made the bargain; that they saw, first an old gentleman, and then another man; that nothing was said about ice; that he took no part in the conversation. This witness remembers very little of the conversation. He does not remember their going upstairs at all. The testimony of McWilliams and Gladwich and of Coffin, the secretary of the company, shows clearly, I think, that the interview of these two captains on that day was not with Gladwich, but with somebody else, and that they left the order for the towing of the boats with a boy named Duke, who kept a slate in the lower office, on which all orders for the Vim were entered by him; that the Game Cock Line took no orders for towing to Stamford, nor east of Norwalk, and that this order was entirely out of the line of the business of McWilliams and Gladwich. Upon this evidence, the witness Hanchet being so entirely wrong as to the circumstances of the interview, either from failure of memory or other cause, I cannot attach much weight to his statement as to the terms of the contract, if the contract was then made. It appears from the testimony of one of the witnesses from the office that the subject of the towing of these two boats had been talked of, and somebody had been there several times before to negotiate for the towage, though both the captains deny that they ever went there before, or authorized anybody to go there for them. The proof seems to be that no order for the towing of these boats was entered on the slate kept by Duke till that day, although the captain of the tug is positive in his recollection that he had received the order three or four days from Duke, and that he was waiting for the ice to clear away before starting. It is probable that he has confounded in his recollection the talk about the matter in the office and his consequent expectation of taking the boats to Stamford with the actual receipt of an order, and that he is mistaken on this point. Duke, with whom, upon the testimony, the contract was probably made, was not called; and although it appeared that he had removed to the state of Kansas some months before the trial, the fact that he was not examined is a circumstance to be considered on this question of what, if any, agreement was made as to ice. It appeared that at the very time the contract was made there was a notice written in chalk on a blackboard conspicuously placed in the office that boats towed by the company took the risk of ice. But, however probable the making of a contract exempting the tug from this risk would be under the circumstances, there is no evidence as to what took place at the time of the making of the agreement to prove that such a contract was made. Both parties, however, rely on conversations between the master of the tug and the masters of the canal boats after the making of the agreement, and before the loss of the Breed, establishing their respective positions that this contract as to ice was or was not made between them.

Captain Brainard, the master of the tug, was a part owner of her, and had full authority to make or alter any contract on her part for towage service. The first conversation was when the tug came to take the canal boats in tow. There was some trouble at first, growing out of the fact that when the master of the tug went to take the Reed in tow he was going to put her on his port side, and the captain of the Reed objected. The boats were lying at adjacent piers not far apart. The master of the tug undoubtedly insisted on his right to make up the tow as he pleased. There was loud talk between him and the captains of the canal boats before the difficulty was arranged, at the suggestion of Captain Hanchet that all that the captain of the Reed wanted was to be so placed that on arrival at Stamford the Reed should be first put up to the pier. Then Captain Brainard said he could arrange that by shifting the boats when he got to Stamford. But in the course of this altercation several witnesses testify that Brainard said something to this effect: "I want you to understand that when we hook on to a boat we are responsible for her, and you've got to be towed how and where we like." Although Captain Brainard denied having said this, or anything about being "responsible," it is of no consequence, in itself, as regards this alleged ice contract, whether he said it or not, for obviously the language, if used, did not relate to ice, or the risks of ice, but the words, if spoken at all, were spoken with reference to the question then before them; that is to say, the way in which the tow should be made up. It meant no more than this: that, as the tug undertook to do the towing, the tug should make up the tow and arrange the boats as he saw fit. Under the circumstances in which the words were used, they were not designed to define with precision the responsibility assumed by the tug, nor express the understanding of Captain Brainard in using them as to the nature and limits of the responsibility of the tug. They meant only, in a general sense, that it was the tug's business that he was doing, and that for which the tug, and not the canal boats, were responsible, and therefore that he must control it. A very true and proper statement of the case, but having no tendency to show whether the parties had or had not entered into an agreement exempting the tug in any degree from the risks of ice. I think the evidence sufficient to show that something of the kind was said. The fact that Captain Brainard denies the use of this expression is of no importance, except as bearing on the question of the credi-

bility of the two witnesses Brainard and Hanchet, on which, to a great extent, the case, in its more important points, must turn. It is, however, obvious that this denial may easily have been the result of failure of memory on his part, if the words were in fact spoken. In such a conversation, which was noisy and excited, and lasted some time, no witness can be expected to recollect all that was said. The other conversation is far more important, and has a direct bearing on the terms of the agreement with respect to ice. It will be remembered that Captain Brainard did not make the contract. It was made at the office. He received the order from Duke, and came for the boats. After they got under way, the three captains and the steward of the Vim went into the cabin of the Breed, and played a game of cards. The engineer of the Vim was there also, but not playing. After playing a while, there was a bell from the Vim to slow. Captain Brainard jumped up, and went and looked out. They had come to ice. This was about off White Stone Point. The captain of the Vim testified that he then said to the captains of the two canal boats: "Gentlemen we have come to ice. We take no risk of accident in ice. If you don't take the risk of ice on these boats, I am not going any further with them;" that the captain of the Breed spoke up, and said: "We all understand that; go ahead." With some unimportant variation in the language, this conversation is also testified to by the engineer and the steward of the Vim. Captain Hanchet admits the remark of Captain Brainard to have been made substantially as he states it, except as to not going further, but he says that he did not answer: "We understand that; go ahead"; but that he said: "If you wanted that, you should have told us before we left New York, and allowed us to make our choice." Captain Root of the Reed, the other witness, testifies that when Captain Brainard said "I suppose you know that you are towing at your own risk in the ice," he replied that he couldn't see it, and that Hanchet said the same as he did, "that he couldn't stand that going on his own risk"; that the words used by Hanchet, which he could not recall exactly, meant the same as what he had himself said. The three witnesses from the tug deny any such reply by Root and Hanchet, or any reply by Root, and Hanchet swears that he doesn't remember saying "that he couldn't see it." It is, of course, difficult, if not impossible, to reconcile this testimony on any theory of mere mistake or misrecollection, and, taking into consideration the other parts of the evidence, which is full of contradictory testimony between these two principal witnesses Brainard and Hanchet, and also considering the probabilities of the truth of the one statement and the other, so far as the circumstances under which the conversation took place throw light upon it, and the fact that they actually went on their voyage, I think the preponderance of the evidence is decidedly in favor of Captain Brainard's statement of what took place, and that Captain Hanchet admitted that he understood that the boats took the risks of accidents from ice, and that such was either the original agreement, or was then and there admitted by Hanchet to be his understanding of the agreement. This question is, however, mainly important as testing the relative credibility of the witnesses, because no such agreement as is here shown would relieve the tug from damage which was caused by her own carelessness or negligence while towing in the ice; and the more dangerous the position of the tow was in the ice, the greater the degree of vigilance and care which the law exacts of those in command of her, as that measure of ordinary care which a prudent owner would take in respect to his own property.

The question of negligence then remains unaffected, or but slightly affected, by this ice contract. That the Breed was cut into at the bow by the ice, and that this was the cause of her sinking, admits of no doubt. That the tow, in its further progress towards the eastward, fell in with dangerous ice floating in more or less large fields on the Sound is clearly proved; that this ice was much of it heavy, some of it eight to ten inches, at least, in thickness, is also proved. The tug had the flood tide with her till she reached Throg's Neck, and from there to Execution Light she had the flood against her, and from Execution Light to the eastward she had the ebb, which was there with her. They first met heavy ice that was troublesome after passing Execution Light. Another tug, the Uncle Abe, passed them about this point, with her tow alongside, and, coming up to this ice, signaled the boats astern, and went on. I think the evidence is that they passed Execution Light about midnight; that, after passing that point, their course was circuitous, and their progress very slow; that they deviated from their course to avoid and go round ice, and several times stopped. About 1 o'clock the Reed broke away, one or more of the lines between her and the tug gave way as they went through the ice, but she sustained no injury. They stopped, secured the Reed, and went on. It is evident that a considerable time elapsed between this breaking away of the Reed and the sinking of the Breed. Captain Brainard testifies that it was about four o'clock that the Breed sank. The evidence, as a whole, I think, tends to confirm him on this point. It is impossible to fix with any accuracy the place of the disaster, except that it was somewhere between Execution Light and Captain's Island, and not less than three miles from Execution. Captain Brainard's estimate of three miles east of Execution seems too short a distance, considering the length of time after passing that point. But the place is not material, except as the testi-

mony in respect to the place bears on the credibility and accuracy of the witnesses. The testimony of the engineer, which seems credible, and is certainly on this point not controlled by any contradictory evidence of any weight, is that, after getting into the ice, they went all the time under a slow bell, the engine just turning over enough to keep headway on, and he strongly corroborates the testimony of Captain Brainard that, after getting into the ice, they were not going more than a mile or a mile and a half through the water. The testimony of Captain Hanchet is to the effect that the immediate cause of the injury to the Breed was that, in trying to get into a channel through the ice made by another steamer, the Tilley, Captain Brainard made for a passing nearly at right angles with his course, leading into this channel, and to get into the pass he rang up the tug, and tried to break off the corner of a large field of ice, bringing the tow up to it in such a way that the starboard bow of the Breed struck directly against this field of ice, so as to break it off. The evidence does not sustain this charge. It is highly improbable in itself as a maneuver for the master of the tug to make, and it cannot be reconciled with the testimony of the master or the engineer, and there is no evidence of any jar or concussion, or, indeed, of any such sudden injury to the Breed as such a movement would have caused. Indeed the decided weight of evidence seems to be that the immediate blow by which the Breed suffered was not noticed by any one, but that either Captain Hanchet or Captain Root observed that she was lower in the water then she had been, and then it was discovered that she had received a serious injury on the starboard bow. How she received the injury certainly is not proved. Hanchet swears that she was in good condition, and about ten years old. Certainly there is nothing proved, either in the speed of the tug, or in the way that the tow was managed while in the ice, indicating any want of proper care in her management shortly before the discovery was made which will account for the injury received. If the tug was to proceed at all through the ice, it is difficult to see how she could have proceeded more cautiously. Nor is it a case where the mere happening of the injury by ice can be taken as itself sufficient evidence of want of care. The constant presence of ice ahead and about the boats carried with it a peril to them against which the greatest care and skill on the part of the master of the tug could not with absolute certainty guard. The ice was floating and drifting with the tide and the currents, and threatened any weak point, or, indeed, any strong point, in this canal boat, independently of any power of the tug to control it. Although it was a moonlight night, the evidence is that it was very difficult to distinguish the ice from the water in many places.

Upon the whole evidence, I think the negligence charged in the libel is not established by the proofs. The expert testimony as to which is the better and safer mode of towing canal boats in the ice, alongside or astern, is conflicting and indecisive. Much it appears depends on the particular circumstances of the case in hand, and some weight must be given to the judgment formed on the spot by an experienced master. In this case it is not proved that before the accident the master of the Breed requested Captain Brainard to tow him astern, nor that, under the particular circumstances of this voyage, such mode of towing would have been safer for the canal boat.

Libel dismissed, with costs to claimants.

Case No. 17,745.

WILLIAMS v. WATERMAN.

[1 Betts, D. C. MS. 6.]

District Court, S. D. New York. June Term, 1844.

SEAMEN'S WAGES — FORFEITURE — EMBEZZLEMENT OF CARGO.

[Embezzlement of pieces of the cargo by a seaman does not necessarily work a forfeiture of all his wages, and, if the amount of his wages exceed the value of the things embezzled, he will be decreed the excess.]

[This was a libel by George Williams against Edward A. Waterman to recover seaman's wages.]

B. L. Benedict, for libellant.

J. Coit, for respondent.

BY THE COURT. The question in this case turns upon the sufficiency of the defence as a bar to the action. The libellant's right to recover wages is resisted upon the allegation that he had embezzled two pieces of cotton goods, part of the outward cargo of the vessel, worth from $5 to $6 each at Valparaiso, where the embezzlement is charged to have taken place. The amount of the goods at this valuation is not equal to the sum due for wages.

First, then, as to the fact: The testimony if not direct and certain beyond all possible doubt, is yet so strong as to impose on the libellant the necessity of proving when and where he obtained the goods. They were sold by him to one of the crew on the arrival of the vessel in this port for about $4, he alleging that he had purchased them here and taken them out on the voyage. The mate proves that a sample piece was taken from each case of goods to send on shore at Valparaiso, and that he pinned on each a written ticket giving the number of the case from which it was taken, and that the clerk on shore reported two of the sample pieces missing. The pieces remained in the vessel accessible to the libellant and the rest of the crew, after being separated from their cases a considerable period, waiting an opportunity to send them ashore; and that he found

the same tickets on these pieces here on the return of the vessel to port. Although the testimony is open to some criticism with respect to the ability of the witnesses to identify these specific articles, yet together the evidence is sufficiently direct and cogent to call upon the libellant to explain his possession of these goods, and in fault of such evidence to stand chargeable with the embezzlement. It is true that all the others of the crew had an equal opportunity to abstract the goods, and some of them might have done it, and the libellant be merely a receiver afterwards, or possibly a casual finder of them as concealed or abandoned by the real taker. Such vague suppositions, however, are not to outweigh the presumption arising from the goods being in his possession, and being clandestinely disposed of below their value on his return, and his representations of the manner of acquiring them are not supported by proof, and not very consistent with probability. The evidence in this case would be sufficient, according to the old rule of law, to charge the value of the goods lost to the crew at large, if the embezzlement could not be fixed upon any individual, and finding the missing goods in his possession is auxiliary evidence to the fact of embezzlement, as well as exculpatory of the rest of the crew.

Secondly. The act of embezzlement does not necessarily work a forfeiture of all the wages. The doctrine stated by Abb. Shipp. 472, is well supported by the cases referred to, and also by the American cases cited in the note. Edwards v. Sherman [Case No. 4,298]. It rests upon the doctrine that the owners are only entitled to remuneration for their loss from the sailors. The punishment of a public prosecution for the offence may well be prosecuted against the seamen also, notwithstanding such satisfaction of damages. A different rule obtains in salvage, for there an embezzlement by a sailor, without regard to value, extinguishes his claim to salvage compensation. The Blaireau, 2 Cranch [6 U. S.] 240; The Boston [Case No. 1,673]; The Dove [Id. 4,035].

The libellant therefore must stand charged with the amount of this property (at the lowest valuation of the master, $10), and also with $13, agreed by the counsel to have been received in clothing on the voyage; and, if there then remains a balance, he will take a decree therefor, with costs. The usual reference to the clerk will be taken to ascertain the state of the account.

Decree: It is considered that the libellant recover his wages at the rate of $13 per month for the time he served as cook, and at the rate of $14 per month for the period he served as steward, and that he be charged with $10, the value of the goods embezzled by him on the voyage, and with $13 for clothing furnished him; and it is referred to the clerk to compute and ascertain the amount due him (making all other proper allowances and deductions), and report thereon with convenient speed to the court.

Case No. 17,746.

WILLIAMS v. WELLS et al.

[1 Hayw. & H. 116.] [1]

Circuit Court, District of Columbia. Dec. 3, 1842.

PROBATE OF WILLS—WITNESSES TO WILL.

Where a testator, by his will, appointed guardians to his infant children, and these so appointed were witnesses to the will, and the will was admitted to probate, it was *held*, on appeal, that the will was not proved according to law so as to create the parties appointed guardians.

Appeal from orphans' court.

Joseph H. Bradley, for petitioner.
Richard S. Coxe, for respondents.

By NATHANIEL P. CAUSIN, J. The petition stated that the last will and testament of John Williams has been admitted to probate; that Wells and Davis were designated as the guardians of the children or the testator. That said paper is wholly insufficient in law to create the said guardianship and that there are no testamentary guardians of said children, and prays the court to appoint some person or persons as guardians to take charge of the children and their estate, inasmuch as the said children are both under the age of fourteen years and incapable of making a selection for themselves. The answer of John Wells stated: That said testamentary paper is a valid instrument for the appointment of guardians. That it was executed in the presence of two or more credible witnesses. That he has assumed to act, and does act, as such guardian of said children.

The court, after hearing the arguments upon both sides, gave the following opinion:

James Williams, of Washington county, in the District of Columbia, having been advised that in and by a paper purporting to be the last will and testament of his brother, John Williams, late of said county, deceased, which has been admitted to probate, John Wells, Jr., and Charles A. Davis have been designated as the guardians of the children of the said John Williams, and that they now seek to be recognized by this court as such guardians. And having been further advised that the said paper is wholly insufficient in law to create the said guardianship, and that there are no testamentary guardians of the said children, prays that some person or persons may be appointed by this court as guardians, who will be fit and proper to take charge of the said children and of their estate, inasmuch as the said children are both under the age of fourteen, &c., &c. The petition has been duly considered, and in the opinion of this court the prayer of the said James Williams should not be granted for the reasons hereinafter given.

By the statute of 29 Car. II. c. 3, all devises

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

of lands and tenements shall be in writing, and signed by the testator, or some other person in his presence and by his express direction, and be subscribed in his presence by three or four credible witnesses. The statute regulations as to wills are substantially the same in the different states, and they have been taken from the English statute of 32 Hen. VIII. and the statute of 29 Car. II. above referred to. Three witnesses, as in the statute of frauds, are required in Maryland.

The paper purporting to be the last will and testament of the said John Williams, and which has been admitted to probate, is attested by three witnesses, two of whom are the individuals designated therein as the persons whom the said John Williams desired, after his decease, to take charge of his children and their estate (guardians by statute, or testamentary guardians, being appointed by virtue of the statute 12 Car. II. c. 24, which has been adopted in this country; see 2 Kent, Comm. 224), for which reason, it is contended, that the said paper, purporting to be the will of the said John Williams, is insufficient in law to create the said guardianship, &c. That the individuals named as such must renounce the guardianship in order that the will may stand; that the requisition of the statute (viz., that it should be subscribed in the presence of three credible witnesses) may be complied with, the attesting witnesses should be credible witnesses, entirely disinterested persons, and such as can receive no benefit or advantage by the will. Witnesses to a will are rendered incapable of taking any beneficial interest under it (4 Kent, Comm. 509) except it be creditors whose debts by the will are made a charge on the real estate. This was by the statute of 25 Geo. II., and it has been generally adopted in the United States as a salutary provision.

It seems to have been held in general that an incompetent witness was not a credible witness, and that a devisee or legatee under a will was incompetent, although a mere executor or trustee who took no beneficial interest under a will was held to be competent. 3 Starkie, 1689. In Bac. Abr. "Evidence," B, it is said by Chief-Justice Hale, that he knew it to have been adjudged that an executor in a cause concerning the testator's estate, if he hath not the surplusage given to him by the will, may be a witness for the will. 1 Mod. 107. An executor not taking any beneficial interest under the will is a good witness to attest it. Loveless, Wills. See Bettison v. Bromley, 12 East, 250; Phipps v. Pitcher, 6 Taunt. 220; Lowe v. Jolliffe, 1 W. Black. 365. Lord Chief-Justice Mansfield: "In a modern case of Holt v. Tyrrel, it was held in a trial at bar that a trustee might be a witness without releasing, and where is the difference between an executor in trust and another trustee? His being liable to actions makes no difference, for so are all agents, and yet they are allowed to be witnesses." In Massachusetts an executor who has accepted the trust cannot be used as a witness to support a will, although he be a mere trustee having no devise nor legacy given him therein. Durant v. Starr, 11 Mass. 527; Sears v. Dillingham, 12 Mass. 358. In New Jersey and Connecticut the English rule is adopted, that an executor is a competent witness to a will unless he take an interest under it. Den ex dem. Snedekers v. Allen, 1 Penning. [2 N. J. Law] 35. Justice Pennington: The modern and most approved cases in the English books on this subject, and one so far back as the time of Lord Chief-Justice Hale, prove, "that an executor may be a witness to establish a will unless he takes an interest under it; nor does the practice in this state of allowing a reasonable compensation for services performed by an executor, in my view of the subject, alter the case. Is an agent or factor disqualified as a witness to prove the authority under which he acts, because he is to have a reasonable compensation for his services? I think not." See Hawley v. Brown, 1 Root, 494. The statute of 25 Geo. II. having been generally adopted in the United States, as before stated, by which creditors whose debts by the will are made a charge on the real estate are deemed to be competent witnesses, and such decisions having been obtained with regard to executors, surely guardians (a trust of obligation and duty, and not of speculation and profit) cannot be regarded as disqualified on account of interest. Therefore, in the absence of any statute or rule of evidence, so far as my research and knowledge extend, forbidding it, I feel bound to carry out the wishes of the testator, and to regard and declare the said John Wells, Jr., and Charles A. Davis, testamentary guardians of the children of the said John Williams, deceased.

From this decision, the petitioner, by his counsel, prayed an appeal, which was granted. This appeal coming on to be heard on the above record and the argument of counsel, it is ordered, that the judgment of the orphans' court be, and the same is hereby, reversed; and it is adjudged that the said will has not been proved according to law so as to appoint guardians, and the cause is remanded to the orphans' court.

WILLIAMS (WISDOM v.). See Case No. 17,904.

WILLIAMS (WOOD v.). See Case No. 17,968.

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